



Review of Harassment in the South Australian Legal Profession

Report by the Equal Opportunity Commission to
the Attorney-General

April 2021



Government of South Australia
Equal Opportunity Commission

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OFFICIAL

To:

The Honourable Vickie Chapman MP
Deputy Premier
Attorney-General
Minister for Planning and Local Government

I present this report on harassment in the South Australian legal profession, as you requested on 24 November 2020.



Steph Halliday
Acting Commissioner for Equal Opportunity

9 April 2021

Contents

From the Acting Commissioner	1
Executive summary	4
1. Introduction	10
1.1 Terms of Reference	11
1.2 Scope, limitations and definitions	11
1.3 Methodology	17
2. Current context of the Report	22
2.1 Previous reviews and inquiries	22
2.2 Informal advice avenues	25
2.3 Current legislative framework	27
2.4 Existing preventative measures	45
2.5 Current regulatory framework	49
3. Prevalence of harassment in the South Australian legal profession	50
3.1 Survey overview	50
3.2 Overview of survey participants	51
3.3 Nature and prevalence of sexual harassment	55
3.4 Nature and prevalence of discriminatory harassment	65
3.5 Impacts of harassment	73
3.6 Experiences of reporting sexual and discriminatory harassment	74
3.7 Barriers	85
3.8 Power imbalance	86
3.9 Bullying	87

4. Preventative mechanisms	89
4.1 Factors driving harassment	89
4.2 <i>It's too late when a complaint has been made: Observations on culture</i>	94
4.3 Implementation of diversity and inclusion measures	98
4.4 Workplace culture and policy	100
4.5 Role of the Commission to educate employers	122
4.6 Education and training at university	123
4.7 Mandatory reporting as a means of prevention	127
5. Establishing an independent complaints body	131
5.1 Findings of the Review	131
5.2 Features to be improved or adopted in existing mechanisms	133
6. Improvements to existing external complaint mechanisms	136
6.1 Awareness of existing external complaints mechanisms	136
6.2 Adequacy of external complaints mechanisms	137
6.3 Necessary attributes of a complaints body	138
6.4 How often are the current complaints mechanisms used?	143
6.5 How can the existing frameworks and complaint mechanisms be improved?	144
7. Conclusion	181
8. Appendix	189
A Survey questions	189
B The Commission's complaint and investigation process	190
C The Law Society of South Australia's informal report process	193
D National Action Plan Items	195

From the Acting Commissioner

The terms of reference for the Review of Harassment in the South Australian Legal Profession (**Review**) did not assume or acknowledge the prevalence of harassment and its impact on individuals and culture in the legal profession. This Report confirms that harassment is indeed prevalent in this sector and that the problem and its solutions sit at both an organisational and cultural level. This is not an issue unique to the South Australian legal profession. Sexual harassment is recognised to be pervasive in workplaces around Australia and is evidenced in research including the 2020 *Respect@Work* Report produced by the Australian Human Rights Commission (**AHRC**) as a result of the National Inquiry into Sexual Harassment in Australian Workplaces (**Respect@Work**).¹ Interstate and international reports also suggest that harassing behaviours are common across the legal profession in jurisdictions such as Victoria and New Zealand and in 2020 the High Court of Australia acknowledged harassing behaviours engaged in by one of its own judicial officers. As the Honourable Susan Kiefel AC, Chief Justice of the High Court of Australia said last year, ‘There is no place for sexual harassment in any workplace.’²

The recent report by the former Acting Commissioner, produced as a result of the *Review of Harassment in the South Australian Parliament Workplace (Parliamentary Review)*, concluded that sexual harassment and discriminatory harassment are all too prevalent in the Parliament. The fact that legal and political institutions are far from immune from unacceptable, unlawful behaviours is deeply disturbing. These are, after all, the workplaces of those who make and administer the laws by which the rest of society functions. Although it is frustrating and disappointing that this scourge persists in our profession, these are the very workplaces that can – and should – lead change in this area and there are already definite signs of improvement.

The recent shift in the national conversation was driven, in no small part, by the High Court’s statement in June 2020 regarding its investigation into the conduct of former Justice Dyson Heydon AC QC. So began the groundswell of support for greater scrutiny of harassment across the legal profession. The South Australian Parliament is to be commended for taking the important step of asking a light be shone on this sector and asking how the legal profession’s culture and processes can be improved.

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, January 2020) (*‘Respect@Work’*).

² Susan Kiefel, ‘Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia’ (Media Release, High Court of Australia, 22 June 2020) 2.

The response to this Review from much of the legal profession suggests there are many champions for change. Participants were willing to share distressing experiences in the hope of improving the legal profession's approach to addressing and dealing with harassment. As with the Parliamentary Review, this recognition of the need for change must continue and be acted upon – the people who work in the South Australian legal profession, and the public at large, will be looking to the creation of a safe, respectful and inclusive sector to serve as an exemplar for workplaces across our community.

The Commission has made 16 recommendations that are aimed at continuing to drive education and cultural change within the legal profession, with a view to stamping out harassment, including sexual harassment, across the sector. The recommendations also suggest means by which existing complaint mechanisms may operate to ensure that complaints can be made in a confidential and supportive environment. The Commission has not recommended that a new complaint body be established.

The data the Commission received about the usage of existing complaints mechanisms evidences a lack of engagement with all of them. The information gathered from participants overwhelmingly suggests that this lack of engagement is due to a lack of confidence in every one of those mechanisms. The very clear message is that, of itself, no complaint mechanism will cure the problem and what is in fact required is ongoing cultural change. The recommendations, which the review team developed having regard to the wealth of efforts currently underway, aim to address fundamental gaps in education, training and complaint practices with a view to preventing harassment and improving responses to it. Key factors in successfully continuing the cultural shift are strong leadership from those in positions of authority and an emphasis on systems that shift responsibility away from victims.

For reasons explained at Part 1.2.5, this Report refers to the parties of impugned conduct as 'victims' and 'harassers'. The Commission acknowledges that these terms do not sit comfortably with legal practitioners. Their use reflects the fact, however, that many instances of harassment go unreported, for reasons explored in this Report. Accordingly, there is often no 'complainant', nor an 'alleged harasser' in any formal sense. In no sense is the use of these terms intended to convey any prejudgement about the veracity of any of the participants' accounts.

I thank the Attorney-General's Department for acceding to my request for additional resources to conduct this Review. This enabled additional staff from across that

Department to work within the Equal Opportunity Commission (**Commission**) between March and April 2021, to produce this Report in a timely fashion. I am grateful to Mr Martyn Campbell, Executive Director SafeWork SA, for providing a member of his staff to assist with the Review. I also acknowledge the extensive work undertaken upon the commencement of the Review, in particular by the former Acting Commissioner, Emily Strickland, and Emily Carr, Legal Officer, both of whom continued to offer advice and support as the Review progressed.

I thank everyone who contributed to the Review – survey participants, interviewees and those who provided written submissions. The New South Wales Legal Services Commissioner, Mr John McKenzie, and staff from the Victorian Legal Services Board + Commissioner also provided insight and guidance into developments within their respective jurisdictions.

The Review team (to whom I am hugely grateful) comprised Lauren Clarke, Nicholas Crouch, Kim Eldridge, Liam Waddill and Colin Marsh (seconded from SafeWork SA). Their expertise, enthusiasm and diligence are brought to bear in this Report. I also thank the core staff of the Commission, who are unfailingly committed to the Commission's valuable work and who have provided assistance to this Review. Finally, I thank the Office of Justice Policy and Analytics (Attorney-General's Department) for their assistance in finalising the survey and their comprehensive analysis of its data.

Executive summary

The Review was requested by the South Australian Legislative Council on 14 October 2020. The Attorney-General appointed the then-Acting Commissioner for Equal Opportunity, Ms Emily Strickland, to undertake the Review on 24 November 2020. The terms of reference set out in the Legislative Council's motion requested an inquiry into the prevalence of harassment, including sexual harassment, in the legal profession, and asked the Commission to consider the adequacy of the laws and processes for making complaints about harassment, including sexual harassment, in the profession. The Commission was also tasked with making recommendations about improvements to the existing regimes for dealing with complaints relating to harassment and with considering whether the establishment of an independent complaints body was warranted.

To an extent, the final substantive term of reference was predicated on the assumption that the Commission would recommend a new complaints body should be created. The fourth term of reference was more of a creed than a topic to be examined. It asked the Commission to ensure that any complaints body would have specified characteristics, including appropriate investigative powers and the ability to receive anonymous complaints.

For the purposes of the Review, harassment is defined as sexual harassment or discriminatory harassment (being harassment on the basis of one of the protected attributes in the *Equal Opportunity Act 1984 (SA)* (**Equal Opportunity Act**) – i.e., age, race, disability, sex, gender identity, sexual orientation, or caring responsibilities). Bullying does not fall within the Commission's remit under the Equal Opportunity Act and was therefore not within scope, however, the Commission heard that incivility is prevalent in the legal profession and in itself is a contributing factor to the prevalence of sexual and discriminatory harassment.

In recognition of the diverse range of people engaged across the legal profession, the Review sought responses from anyone whose work involved some participation in the administration of justice – from court staff and clerks to members of the judiciary. Without intending to homogenise them, the myriad work groups were collectively referred to as the 'legal profession workplace'.

The Review's methodology included a survey of those currently working, or who had previously worked, in a legal profession workplace. The Commission received over

600 responses to the survey, interviewed 16 participants and received 18 written submissions. Quotes used from these responses throughout the Review have, in some places, been edited, solely for the purpose of deidentification.

Given the breadth of the cohort invited to participate in the Review it was not possible to calculate the number of eligible participants, meaning it was also not possible to calculate a response rate to the survey. However, it is clear to the Commission, given the number of responses received, that there is a keen interest in the subject of harassment in the South Australian legal profession.

A literature review considered the Respect@Work Report, along with numerous interstate and national reports on harassment both generally and in relation to the legal profession in particular. This research revealed similar themes to those that emerged from the Commission's consultation with the South Australian legal profession.

The Review confirmed that sexual and discriminatory harassment is prevalent in the legal profession. 42% of survey respondents who answered the primary questions about prevalence reported that they had experienced sexual or discriminatory harassment in the legal profession, including one-third who had experienced it more than once. 13 interview participants and four participants who made written submissions described being victims of sexual harassment. Allegations of harassment ranged in seriousness from sexually suggestive and unwelcome comments to sexual assault.

43% of survey respondents reported having experienced offensive comments or jokes made about a personal attribute protected by the Equal Opportunity Act. Survey results also suggested that unfavourable treatment on the basis of a protected attribute, particularly caring responsibilities, was not uncommon. Countless interview participants reported work practices which reflected gender bias.

It is clear that a number of features of the legal profession workplace operate as drivers of harassment, in particular:

- a patriarchal and hierarchical culture characterised by intense competition
- a lack of cultural diversity, particularly in relation to people identifying as Aboriginal and / or Torres Strait Islander
- deeply entrenched gender bias that underpins discriminatory behaviour
- a 'culture of silence' whereby instances of harassment are minimised, normalised and kept quiet.

Despite a significant proportion of the profession now being female, and the number of women at the bar increasing, the legal profession is still a male-dominated hierarchy. The Commission heard from numerous participants whose view was that a number of women in positions of authority were perpetuating the culture of silence by failing to raise their voices against the drivers of harassment listed above. Worse still, a number of participants indicated that some of the perpetrators of sexual harassment and discrimination (particularly on the basis of an employee's caring responsibilities) were, in fact, women.

These cultural aspects also drive the barriers to reporting harassment. There are very low reporting rates (for example 69% of survey participants who identified as having experienced sexual harassment did not report the harassment). A number of reasons for this were identified, including: a lack of understanding and trust in complaint processes, fear of repercussions on career and work life, and a culture where victims thought it best not to 'rock the boat'.

The majority of survey respondents indicated they were aware of the various bodies to which complaints could be made. The most well-known avenues included the Commission, the Legal Profession Conduct Commissioner (**LPCC**) and the Law Society of South Australia (**Law Society**). Awareness is not the problem. Fear of speaking up is the dominant constraint.

The low rate of reporting reflects the fact that a formal complaint process is focussed on an identified complainant and is often adversarial. Historically this has been justified given what is at stake for an alleged harasser if the allegations are accepted as fact.

The Commission overwhelmingly heard, however, that reducing the prevalence of harassment in the legal profession, will not be achieved solely by increasing the number of formal complaints brought by victims. Instead, the South Australian legal profession must scrutinise its ethos and foster mutual respect and civility. There must be greater diversity and implementation of inclusive practices. Those in positions of authority must model professional and supportive conduct and call out gender bias. Victims of harassment must be provided with adequate support so that, as one participant put it, the process might ultimately 'equalise harassed and harasser.'

Accordingly, the Commission has made 16 recommendations aimed at continuing to improve the culture in the profession, including through education before admission and as part of internal continuing professional development (**CPD**) programs.

Implementation of many of the recommendations will benefit from work well underway in South Australia and federally. The Law Council of Australia (**Law Council**) is drafting national model guidelines and various training resources to be adapted and used across the sector. The Women Lawyers' Association of South Australia has developed a Charter for the Advancement of Women in the South Australian Legal Profession, which aims to eradicate the structural and cultural barriers to women progressing in the profession. The national safe work regulator, ComCare Australia, has recently released guidance and resources to assist workplaces to prevent and respond to workplace sexual harassment. In our own State, the Law Foundation of South Australia has recently approved a grant to the Law Society to develop a suite of training materials (and to deliver training) aimed at reducing the incidence of harassment in the profession. Further, recent changes to the CPD scheme will see all practitioners undertake a mandatory CPD unit this compliance year, covering bullying and harassment.

Most recently, on 8 April 2021, the Commonwealth Government released its response to the Respect@Work Report.³ The response sets out the Government's long-term commitment to building a culture of respectful relationships in Australian workplaces by agreeing to (in full, in part or in principle) or noting all 55 recommendations in the Respect@Work Report.

All people engaged in the legal profession have obligations, to varying degrees, to conduct themselves in a respectful way in the workplace and to ensure they provide a safe workplace for others: in particular the Commission refers to the application of the Equal Opportunity Act, *Work Health and Safety Act 2012* (SA) (**WHS Act**), the *Judicial Conduct Commissioner Act 2012* (SA) (**JCC Act**) and the *Independent Commissioner Against Corruption Act 2012* (SA) (**ICAC Act**). In relation to legal practitioners, there are also the Australian Solicitors' Conduct Rules (**ASCR**) and the Barristers' Conduct Rules (**BCR**).

A significant proportion of harassment in the legal profession occurs at the workplace or at a work-related function or event. Often, the victim and harasser will have a professional association and may need to continue working together after an incidence of harassment has occurred. The harasser may therefore continue to present a risk to

³ See generally Australian Government, 'Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces' (Report, April 2021) ('*Roadmap for Respect*').

that same victim, or others in the profession. Harassment is frequently a work health and safety issue.

Work types across the sector vary enormously. One of the State's biggest employers of practitioners, across multiple agencies, is the public sector. At the other end of the spectrum are sole practitioners or chambers shared by two or three practitioners. Regulation of workplaces such as these presents unique challenges. Notwithstanding these difficulties, the Commission has made a number of recommendations to shine a light on the risks to health and safety which are underpinned by a culture of silence. Workplaces (within the meaning of the WHS Act) are encouraged to review and renew their policies and procedures to ensure that, to the extent reasonably practicable, risks to health and safety presented by harassment are reduced.

It is also recommended that legal profession workplaces consider implementing a formal cultural change framework for gender equality, such as Our Watch's Workplace Equality and Respect Standards or by seeking White Ribbon Australia Workplace Accreditation. The strategies recommended by these standards are evidence-based and are able to be tailored to the particular workplace, regardless of resourcing constraints. The Commission considers the effective implementation of an adequate work health and safety framework, by shifting the obligation from victims reporting harassment to employers managing risk, is key to the prevention of workplace harassment.

The final suite of recommendations relates to improvements to existing complaint mechanisms. One recommendation calls on the Attorney-General to facilitate the creation of a Memorandum of Understanding between a number of statutory agencies, to ensure that appropriate information is shared between them regarding harassment and discrimination in the legal profession.

The Commission also recommends that the office of the LPCC recruit an additional investigative solicitor, trained in trauma-informed responses, to receive complaints and anonymous reports from individuals who have experienced harassment.

Similarly, it is recommended that the Commission's office be sufficiently resourced to fund an additional position, a Dedicated Enquiries Officer (**DEO**), to assist all people (regardless of whether or not the harassment occurred in the legal profession) to make informed decisions about whether, and if so, how, to progress their complaint. It is evident from the Respect@Work Report that sexual and discriminatory harassment is

too common in all manner of disciplines – not just the legal profession. It is also clear that people experiencing harassment in the legal profession are confused about their options and the processes and timeframes involved in the various complaint avenues. There are also concerns about approaching other lawyers (e.g. at the LPCC's office). The Commission's office would provide information, guidance and materials, along with referrals to appropriate support services and complaint avenues. The DEO could then also participate in any conciliation undertaken under the Equal Opportunity Act, to provide continuity in the process.

The Commission also suggests that one of the five lay members of the Legal Practitioners Disciplinary Tribunal (**Tribunal**) should be a person who identifies as being Aboriginal and or Torres Strait Islander, or from a culturally and linguistically diverse background. It is also recommended that one or more appointees to the Tribunal has expertise in dealing with harassment or other forms of trauma. Additionally, the Commission recommends that amendments be made to the *Evidence Act 1929 (SA)* (**Evidence Act**) to ensure that victims called before the Tribunal may apply for an order that special arrangements be made for the giving of their evidence.

A strong theme during the Review was the need for anonymous reporting of harassment. The Commission supports the LPCC's work in this regard. Further, the Commission recommends that this State adopt the Legal Profession Uniform Law⁴ (**Uniform Law**) provisions relating to compliance audits and management system directions.

In addition, the Commission suggests that consideration be given to creating a positive duty on employers to prevent sexual and discriminatory harassment within the Equal Opportunity Act and to provide the Equal Opportunity Commissioner with associated compliance powers.

The Commission does not recommend establishing requirements of mandatory reporting, which can reinforce patriarchal culture and remove victims' agency.

Prompt and comprehensive implementation of all of the Commission's recommendations will demonstrate that leadership across the legal profession is committed to a safe, respectful and inclusive environment for everyone.

⁴ *Legal Profession Uniform Law Application Act 2014 (Vic)* sch 1.

1. Introduction

The Review originated via a motion moved by the Honourable Connie Bonaros MLC in the Legislative Council on 22 July 2020.⁵ The motion called on the Attorney-General to instigate an independent inquiry into the prevalence of harassment, including sexual harassment, in the legal profession, and to report to the Parliament on a number of matters, including the sufficiency of the existing complaint mechanisms in dealing with claims of harassment. The Honourable Connie Bonaros opined that the legal profession involves a ‘culture that tolerates sexual predation amongst other forms of inappropriate behaviour’.⁶

The motion was motivated, at least in part, by the June 2020 revelations about the conduct of former High Court Justice Dyson Heydon AC QC.

Following discussions between the Honourable Connie Bonaros and the Attorney-General, amendments were made to the original motion in Parliament on 14 October 2020.⁷ The motion (as amended) was carried. The settled terms of reference are set out in the following section of this Report.

The Legislative Council’s debate recognised the work already underway across the legal profession to address harassment. The Commission also acknowledges and endorses this work.

As with the Parliamentary Review, the terms of the motion did not demand an investigation or analysis of particular instances of harassment. Rather, the terms request an inquiry into the prevalence of harassment in the profession generally and the adequacy of laws and mechanisms for dealing with complaints. The terms require consideration to be given to improvements that could be made to the existing processes, and to whether an independent complaints body should be established.

On 24 November 2020 the Attorney-General appointed the former Acting Commissioner for Equal Opportunity, Ms Emily Strickland, to lead the Review. The Attorney-General noted the Review would traverse matters relating directly to the Commissioner’s statutory powers and functions, and that the subject-matter would be similar to the Parliamentary Review which at that time was still underway.

⁵ South Australia, *Parliamentary Debates*, Legislative Council, 22 July 2020, 1393–6 (Connie Bonaros).

⁶ South Australia, *Parliamentary Debates*, Legislative Council, 22 July 2020, 1394 (Connie Bonaros).

⁷ South Australia, *Parliamentary Debates*, Legislative Council, 14 October 2020, 1942 (Jacqueline Lensink).

Consultation for this Review commenced in January 2021. The timeframe for the completion of the Report has meant that it has not been possible to pursue all avenues of inquiry, though the Commission considers that the participation of interested parties and the compilation of materials has provided sufficient information to address the terms of reference. The Commission is also confident that its findings and recommendations are supported by the material obtained during the Review.

1.1. Terms of Reference

The terms of reference, as set out in the motion passed by the Legislative Council on 14 October 2020, require the Attorney-General to appoint an independent person to independently inquire into the prevalence of harassment, including sexual harassment, in the legal profession in South Australia and to report to the Parliament on the following matters:

1. The adequacy of existing laws, policies, structures and complaint mechanisms relating to harassment, including sexual harassment, in the legal profession
2. Improvements that may be made to existing laws, policies, structures and complaint mechanisms relating to assault and harassment, particularly in light of recent developments in other jurisdictions to treat sexual harassment as a workplace health and safety issue
3. Consider the establishment of an independent complaints body as a mechanism for individuals to make complaints in a confidential and supportive environment with appropriate legal protections against recrimination
4. Ensuring that any such body:
 - has a diverse membership
 - is transparent in its processes
 - has appropriate investigative powers
 - has avenues for anonymous complaints
 - consults widely with a broad range of stakeholders
 - provides for appropriate avenues of redress in the event a complaint is made out
5. Any other matters.

1.2. Scope, limitations and definitions

It is important to note that, while bullying and harassment of a general nature fall outside the Commission's legislative mandate (and therefore the Review's scope),

research suggests that ‘patterns of unprofessional behaviour may often co-occur with sexual harassment in the workplace’.⁸ This is discussed in further detail in Part 4.1.1.

As explained above, the Review looked at systemic issues. Review participants were advised via the Participant Information Statement and the Commission’s website that, while instances of individual complaints would be used to inform the Review, they would not be acted on as part of the Review process. Review participants were also advised that, should they wish to make a report or complaint about any alleged incidences of harassment, the Review team could support this by identifying an appropriate complaint-handling body.

From the outset, the Commission sought to clarify the scope of the Review through defining some key phrases used in the terms of reference. These definitions, along with other terminology used in this Report, are set out below.

1.2.1. Harassment

The Review’s terms of reference refer to ‘harassment, including sexual harassment’. The scope of the Review has been limited to harassment which has as its basis a discriminatory element protected by the Equal Opportunity Act. This was to ensure the Review’s content matched the expertise and role of the Commissioner and to distinguish from issues of general bullying. That said, examples of alleged bullying were drawn upon to assist in understanding how complaint mechanisms work in practice.

For the purposes of the Review, harassment is taken to include:

- **sexual harassment:** as defined under s 87(9) of the Equal Opportunity Act; and
- **discriminatory harassment:** unfavourable, discriminatory or offensive behaviour on the basis of age, sex, disability, race, gender identity, sexual orientation, caring responsibilities or pregnancy.

Under the Equal Opportunity Act, and for the purposes of the Review, unlawful sexual harassment is any unwelcome conduct of a sexual nature, in circumstances where it is reasonable to expect that the other person would be offended, afraid or humiliated

⁸ Jodie L Hertzog, David Wright and Debra Beat, ‘There’s a Policy for That: A Comparison of the Organisational Culture of Workplaces Reporting Incidents of Sexual Harassment’ (2009) 17(2) *Behaviour and Social Issues* 169, 175.

by that conduct. This is to be determined from the point of view of the person feeling harassed – the intention of the harasser is irrelevant.

1.2.2. Review participants

The Commission undertook targeted consultation with a number of professional bodies, committees and educational entities, seeking statistical information and input relevant to the terms of reference.

The Commission's website included a dedicated page for the Review which provided general information and invited those eligible to communicate their experiences to the Commission. Contributions were sought by way of written submissions, survey participation and interviews. The Commission also issued a media release promoting the Review.

1.2.3. Legal profession

Structure of the legal profession

Members of the legal profession work across a variety of structures, institutions and organisations. The precise manner in which the profession is constituted and structured is unique to the administrative, constitutional and commercial laws and arrangements inherent to each jurisdiction.⁹

In South Australia, the legal profession is perhaps best summarised as comprising the following primary structures:

- Judiciary
- The Courts Administration Authority
- The Legal Services Commission
- Community legal centres
- Sole practitioners
- Law firms
- Incorporated legal practices
- Chambers
- Government agencies, departments and instrumentalities.

⁹ Roger Bowles, 'The Structure of the Legal Profession in England and Wales' (1994) 10(1) *Oxford Review of Economic Policy* 18, 18.

Within each of these different organisations or types of organisations, there is a taxonomy of legal practitioners and business management and support staff, of varying seniority, authority, skill and experience.

The legal profession broadly falls into three categories.

Judicial officers

While judicial officers are obviously independent and are not practitioners in the ordinary sense, they are senior members of the profession's hierarchy.¹⁰

Each court has its own Head of Jurisdiction, who reports on matters related to the operation of the court to the Chief Justice.

Consistent with the fundamental principles of judicial independence, judges of the Supreme and District Courts can only be removed by the Governor upon the address of both Houses of Parliament.¹¹ Magistrates can only be removed from office by the Governor, in accordance with the JCC Act.

Legal practitioners

In order to practise the law, a person must have been admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia and hold a practising certificate.¹² In the 2019/20 Financial Year, the Law Society of South Australia issued 4,258 practising certificates, which are required to be renewed once every 12 months.¹³ This figure should not be interpreted as indicating the exact number of legal practitioners in South Australia. Not only is it a point-in-time statistic, it does not take account of the number of interstate legal practitioners who may be practising in this jurisdiction on an ad hoc or temporary basis, or those who hold a practising certificate but do not actively practise the law.

Legal practitioners, like judicial officers, interact with one another as part of a hierarchy. In the public and not-for-profit sectors, the operation of an organisation is generally overseen by a chief executive or other executive-level staff.

¹⁰ It is noted that judicial officers are 'legal practitioners' for the purposes of the *Legal Practitioners Act 1981* (SA), however they are not entitled to practise and they are not liable to investigation, inquiries and disciplinary action under Part 6 of that Act.

¹¹ *Constitution Act 1934* (SA) s 75.

¹² *Legal Practitioners Act 1981* (SA) s 21.

¹³ *Ibid* s 18(1).

In firms, legal practitioners are overseen by partners or chief executive officers, who are ordinarily supported by the following staff members, in descending order of seniority:

- Barristers (including Special, Senior and Queen's counsel)
- Consultants
- Senior associates
- Associates
- Solicitors.

Of course, the title of these roles may differ depending on the employment context. For example, in the public sector, solicitors often bear the title of Legal Officer.

There are myriad ways in which entities such as incorporated legal practices, chambers and sole practitioners might operate. Incorporated legal practices, for instance, may practise in partnership.

Barristers may be sole practitioners in their own chambers, or they may share chambers with others which may be operated by a body corporate of which some or all of the barristers are directors. Some chambers might have a manager of chambers business, depending on how many staff are engaged and what their employment arrangements are.

Business and administration support staff

The vast majority of legal profession workplaces include legal administrative support staff who undertake an essential but broad range of duties, including accounting and finance, business improvement, human resources, client liaison and management. Students undertaking a course of legal study are also often employed or otherwise participating in legal profession workplaces, in the capacity of paralegals, clerks, interns and placement students.

The hierarchical nature of the legal profession, as a driver of harassment, is discussed at Part 4.1.3 of this report.

Profession for the purposes of the Review

Accordingly, those within the **legal profession** itself were taken to include solicitors, barristers and judicial officers (noting that judicial officers do not have an entitlement to practise for such time as they hold judicial office).

The Review invited participation from anyone who works or previously worked in a workplace that provides legal services. This included people who practise or practised the law, as well as those who provide legal administrative and support services. This report refers to all of those who made contributions as **participants**.

In order to capture all of those working in the legal sector, **workplace** was taken to mean a place of work where legal services are provided, including:

- a private or incorporated legal practice
- a government office, agency or department
- a Barristers' chambers
- a Court or Tribunal
- the Legal Services Commission
- an educational institution, such as a university or college
- a community legal centre or free legal clinic.

Work-related events and travel were also considered extensions of the workplace for the purposes of the Review.

1.2.4. Equal Opportunity Commission, South Australia

The Equal Opportunity Commission of South Australia is referred to as the **Commission** throughout this report.

1.2.5. Parties to conduct

For the purposes of describing parties to an alleged incident of harassment, the Commission adopted terminology used by the AHRC in the Respect@Work Report. As the current leading research publication on workplace sexual harassment in Australia and internationally, the Commission considers that the AHRC's rationale for adopting the terminology of '**victims**' and '**harassers**' is sound.¹⁴

It is acknowledged that adopting these terms is likely to be an anathema to legal practitioners, particularly to those who have practised in criminal law. The Commission considers, however, that the use of these terms is appropriate for this Review.

¹⁴ *Respect@Work* (n 1) 59–60.

1.2.6. Acronyms

The following acronyms are used in this report:

AHRC	Australian Human Rights Commission
ASCR	Australian Solicitor's Conduct Rules
AWL	Australian Women's Lawyers
BCR	Barristers' Conduct Rules
CPD	Continuing Professional Development
DEO	Dedicated Enquiries Officer
IBA	International Bar Association
ICAC	Independent Commissioner Against Corruption
LPCC	Legal Profession Conduct Commissioner
LPEAC	Legal Practitioners Education and Admission Council
PCBU	Persons Conducting a Business or Undertaking
PLT	Practical Legal Training
SABA	South Australian Bar Association
SAET	South Australian Employment Tribunal
SACAT	South Australian Civil and Administrative Tribunal
WBC	Women at the Bar Committee
WHS	Work, Health and Safety

1.3. Methodology

The Review comprised five key methods: a literature review; a review of existing legislative and regulatory frameworks applicable to the legal profession; an online survey; an invitation for written submissions, both targeted and through the Commission's website; and interviews. Given that the Commission had so recently undertaken an analysis of much of this material as part of the Parliamentary Review, a great deal of what follows is drawn from that work.

The total number of people engaged in the South Australian legal profession (as encompassed by this Review) was not able to be readily estimated, due to a number of factors, including:

- Almost without exception, legal workplaces will include administrative staff and support workers performing a range of duties

- Individual workplaces will vary markedly in terms of the proportion of practitioners and other workers, all of whom were within scope for this Review.

Without a definitive workforce number, a confidence level or margin of error was not able to be calculated. Such a calculation would have indicated how well the survey results could be said to reflect the views of the South Australian legal profession overall. However, the Commission considers that the volume of the responses and their representation of the breadth of the profession indicates a strong interest in the Review and that the findings of this report reflect a cross-section of the profession.¹⁵

1.3.1. Literature review

The literature review provided an important reference point for understanding harassment in the workplace including its prevalence and drivers and how it might be prevented. In particular, the Review has drawn from the comprehensive Respect@Work Report into sexual harassment in Australian workplaces.

A number of jurisdictions interstate and internationally have undertaken reviews of harassment in the legal profession specifically. Consideration of these other reviews has assisted the Commission in contextualising and analysing the data and other information gathered for this Review. It is clear that South Australia is not unique, and that the workplace risk factors are sustained by cultural and social drivers which exist in other legal professions and, indeed, across the community.

Other than the analysis of the Respect@Work Report, research from other jurisdictions considered by the Review include those listed below:

- Law Council of Australia, *National Attrition and Re-engagement Study Report 2014 (NARS Report)*
- International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession (Us Too? Report)*
- Victorian Equal Opportunity & Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria 2012 (Changing the Rules Report)*

¹⁵ Further, the survey results were compared to those found by the AHRC in its 2018 Sexual Harassment Survey, and the Victorian Legal Services Board + Commissioner's *Sexual Harassment in the Victorian Legal Sector* report. The prevalence found in this Review were generally on par with the incidence of sexual harassment across the working population more generally, suggesting that the data compiled in the Review was not substantially impacted by non-response bias. See generally Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces 2018* (Report, 12 September 2018); Victorian Legal Services Board + Commissioner, *Sexual Harassment in the Victorian Legal Sector* (Report, 2019) ('*Victorian Harassment Report*').

- New Zealand Law Society, *Report of the New Zealand Law Society Working Group 2018 (NZLS Report)*.

1.3.2. Review of the existing legislative and regulatory framework

The Commission undertook an examination and analysis of the existing laws relating to the regulation of discrimination and sexual harassment, such as the Equal Opportunity Act and the *Sex Discrimination Act 1984* (Cth) (**Sex Discrimination Act**). The Commission also reviewed the Acts governing the various complaint mechanisms (principally under the Equal Opportunity Act and the *Legal Practitioners Act 1981* (SA) (**Legal Practitioners Act**). A summary of the respective schemes appears at Part 2.3 of this Report. In addition, an overview of the Commission's processes for managing a complaint is provided in Appendix C.

1.3.3. Survey

The survey was a key element of the methodology to ensure that all people in the scope of the Review were given the opportunity to contribute, anonymously, their experiences.

The survey aimed to capture information about participants' personal experiences of sexual or discriminatory harassment, whether the experiences were reported, barriers to reporting and satisfaction with complaint processes. The survey did not attempt to investigate individual complaints or to explore systems and processes within individual workplaces. Participants were discouraged from naming anyone related to their experiences.

Participants were also asked for their views on establishing an independent complaints body and what attributes such a body must have to encourage reporting and appropriate responses.

The survey was conducted between Tuesday 9 and Sunday 21 March 2021, using Qualtrics online survey software. The survey was limited to respondents aged 18 years or over who were currently working or had previously worked in the legal profession in South Australia.

Access to the online survey was by an anonymous link. The link was made available via the Commission's website and promoted in a media release and by social media. The Commission also wrote to stakeholders to promote the survey and to ask that the link be distributed across each stakeholder's network.

The survey consisted of 47 questions, including 26 single-answer, 19 multiple-choice and 2 free-text. Some of the multiple-choice questions allowed participants to select more than one answer. Participants were also able to provide further detail in the single and multiple-choice questions if their response was 'Other'.

The survey received a total of 733 responses, of which 622 were considered in scope.¹⁶ The survey asked two free-text questions allowing respondents to provide more detailed accounts of their experiences. There were 127 responses to the question, *Are there any other improvements you think should be made to the existing complaint mechanisms or processes?* (Q53), and 143 responses to the question, *Please use the space below if you would like to share more about your experiences and/or reporting of discriminatory harassment of sexual harassment in the legal profession* (Q54).

The survey results are presented in relevant sections throughout this report. Appendix B provides a link to the survey questions and the information provided to participants who responded to the survey.

1.3.4. Interviews

The Commission called for participants to engage in confidential, face-to-face interviews to discuss their experiences of harassment and provide their views on workplace reform to prevent or respond to incidents of harassment. Participation was sought via a media release, social media posts, the Commission's website, and participant information distributed through stakeholders.

The Acting Commissioner conducted 14 interviews with members of the legal profession, with the assistance and support of various members of the Review team. Ms Eldridge conducted a further two interviews. Of the total of 16 interviewees, 14 were victims.

In addition, the Acting Commissioner spoke to several people who were identified as having relevant expertise and critical insights into aspects of the terms of reference, including Mr John McKenzie, the New South Wales Legal Services Commissioner and Ms Danielah Iacono, Manager, Discipline and Suitability, and Michelle Marfurt,

¹⁶ 111 survey responses were excluded from analysis. A survey response was excluded where the participant had never worked in the legal profession (or did not confirm whether or not they had ever worked in the legal profession); an insufficient number of questions were completed; or a low reCAPTCHA score and a response time of less than 60 seconds indicated that the participant was a bot.

Manager, Policy and Regulatory Strategy, both of the Victorian Legal Services Board + Commissioner.

1.3.5. Written submissions

Requests for written submissions were made via letter to stakeholders (including the Law Society, the LPCC and the Respectful Behaviours Working Group), seeking their views on the terms of reference and other relevant issues specific to their role within the legal profession.

An open call for written submissions was also made via the Commission's website, media release, social media posts, and participant information distributed through stakeholders on behalf of the Commission.

The Commission received 14 written submissions from stakeholders and five written submissions from victims and witnesses.

2. Current context of the Report

2.1. Previous reviews and inquiries

2.1.1. The Law Society of South Australia

In 2018 the Law Society conducted a survey of its admitted members regarding the nature and prevalence of bullying, sexual harassment and discrimination in the South Australian legal profession. A copy of the preliminary report of results was provided to the Commission.

In its media release about the results, the Law Society noted a concerning level of harassment in the legal workplace, stating that the results aligned with similar reviews undertaken by the AHRC and IBA¹⁷. An outline of the results as they relate to this review are provided below.

Sexual harassment: survey findings

The Law Society's preliminary report found that 33% of participants had been sexually harassed, with 83% of those harassed on multiple occasions. Perpetrators of sexual harassment were most likely to be line managers or supervisors (44%), someone more senior (43%), third parties (31%) and someone of equal seniority (25%). Of the participants who disclosed sexual harassment, 67% had never made a report.

The preliminary report found that sexual harassment was more likely to be experienced by females (42%) than males (12%), and by those aged 45-49 years (48%) and 40-44 years (40%). It is noted that only about 18% of respondents to the survey who specified their age indicated that they were below the age of 30, which is likely to be a vulnerable cohort for harassment of this type.

The most common forms of sexual harassment reported, based on 15 choices, were:

- Sexual or sexually suggestive comments, remarks or sounds
- Sexist comments, including inappropriate humour or jokes about sex or gender
- Inappropriate physical contact, for example patting, pinching, brushing up against the body and any inappropriate touching or feeling
- Being looked at in an inappropriate manner which made the respondent feel uncomfortable.

¹⁷ The Law Society of South Australia, 'Law society forms working group to address workplace bullying, discrimination and harassment in response to survey' (Media Release, 18 October 2018).

Sexual harassment was also reported to occur most commonly in the workplace, at work social events, or at non-work social events.

Discrimination: survey findings

The preliminary report found 45% of participants had been discriminated against, with 82% of those discriminated against on multiple occasions. Perpetrators of discrimination were most likely to be line managers or supervisors (64%), someone more senior (42%), someone of equal seniority (20%) and third parties (18%). Of the participants who disclosed discrimination, 72% had never made a report.

The report found that discrimination was more likely to be experienced by females (53%) than males (27%), and by those aged 45-49 years (58%), 50-54 years (53%) and 40-44 years (51%).

Age and gender-based discrimination were the most commonly reported type of discrimination, with pregnancy and family responsibilities also cited as a frequent reason a participant was discriminated against.

Discrimination was most likely to occur within the workplace.

2.1.2. Us Too? Bullying and Sexual Harassment in the Legal Profession

In May 2019, the IBA released its report *Us Too? Bullying and Sexual Harassment in the Legal Profession*, compiling 6,980 survey responses from members of the legal profession in 135 countries. The report highlighted the prevalence of both bullying and sexual harassment in the legal profession worldwide, and made ten recommendations to address the issue. Notably, Australia scored well above the global average in percentage of respondents who had experienced bullying and sexual harassment.

2.1.3. National Inquiry into Sexual Harassment in Australian Workplaces

In January 2020, the AHRC released its report *Respect@Work*, which examined the nature, prevalence and reporting of sexual harassment in Australian workplaces, the drivers of this harassment and measures to address and prevent sexual harassment. *Respect@Work* followed AHRC's fourth national survey on sexual harassment in the workplace, which found that 33% of people who had been in the workforce in the previous five years had experienced workplace sexual harassment.

Respect@Work included a review of the current legal framework as it pertains to workplace sexual harassment and advocated for an evidence-based and victim-focussed approach to addressing sexual harassment in Australian workplaces to be framed through a gender and intersectional lens. The AHRC also suggested that the review should be based upon existing legal frameworks to avoid duplication, ambiguity or undue burden on employers.

The Commission notes the Federal Government's announcement on 8 April 2021 that it intends to adopt (in full or in part) all of the recommendations made in the Respect@Work Report. Given the timing of that announcement it has not been possible for the Review team to analyse the response in detail. However, where possible those responses are addressed in this Report.

2.1.4. Statutory Authorities Review Committee Inquiry into the State Courts Administration Council

In February 2019, the Statutory Authorities Review Committee (**the Committee**) resolved to inquire into the State Courts Administration Council. The terms of reference for the inquiry focused on the employment practices in the Sheriff's Office and the processes in place to deal with allegations of workplace bullying and harassment. The Committee's report was tabled in Parliament on 17 November 2020.

The Committee found that bullying and harassment levels in the Sheriff's Office had not improved over the past ten years, despite attempts over the years to improve the structure of the Sheriff's Office and the introduction of online bullying and harassment training. The Committee's report made a number of recommendations in relation to operation of the CAA and the management of its staff.

The Commission's view is that the Committee's report highlights the need for a specialised response, which includes measures such as anonymous reporting, to assist in victims feeling empowered to notify about their experiences of harassment or bullying.

The Commission notes the statement of Chief Justice Kourakis issued on 23 November 2020 in response to the inquiry report and welcomes the proposed implementation of an independent grievance complaints body. The Commission also notes the Attorney-General's response to that report, tabled on 16 March 2021.

2.1.5. National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession

In December 2020, the Law Council released the National Action Plan which drew on the National Roundtable into Sexual Harassment in the Legal Profession (convened on 8 July 2020), literature and the findings of reviews undertaken before it, including the Respect@Work Report. The National Action Plan also relied upon the National Attrition and Re-engagement Survey, conducted by the Law Council in 2013, which found that approximately one in four women experienced sexual harassment in their legal workplace.¹⁸

The National Action Plan sets out the regulatory and cultural changes necessary to encourage reporting and to prevent sexual harassment in the legal profession.¹⁹ It is based on a four-tiered approach which aims to address sexual harassment:²⁰

- Through targeted advocacy for specific amendments to the Sex Discrimination Act
- By supporting the AHRC to, among other matters, establish a Workplace Sexual Harassment Council
- By advocating for cultural change in the legal profession
- By ensuring that the National Action Plan continues to reflect best practice approaches to addressing sexual harassment through annual review and reporting.

The Law Council and its Constituent Bodies (of which the Law Society is one) and Sections are currently undertaking work to implement the action items arising out of the National Action Plan. The Law Council has created a dedicated webpage on the Law Council Website, which contains information and links to relevant complaint mechanisms, policies and bodies. Proposed amendments to the ASCR have also been circulated for consultation. The Commission commends the Law Council (and its Constituent Bodies and Sections) for the work undertaken thus far.

2.2. Informal advice avenues

The Law Society and SABA, whilst not official complaints mechanisms, are nonetheless sounding boards for victims of harassment in the legal profession in light

¹⁸ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Report, 2014) 32, 76 ('*NARS Report*').

¹⁹ Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (Report, 23 December 2020) 7 ('*National Action Plan*').

²⁰ *Ibid* 7–8.

of their roles as supervisory bodies. Their role in triaging queries and reports in this area is therefore of considerable importance, and their procedures are outlined below.

2.2.1. The Law Society of South Australia

Pursuant to s 14AB(1)(c) of the Legal Practitioners Act, if a matter comes to the attention of the Law Society such that there are reasonable grounds to suspect that a practitioner has engaged in unsatisfactory professional conduct or professional misconduct, it is required to report that matter to the LPCC.²¹

On its face, this section could be interpreted as imposing a mandatory reporting obligation on the Law Society whereby a victim seeking informal guidance or support from the Law Society about a matter involving sexual harassment may be advised to go elsewhere for that advice or support unless the victim is prepared for the matter to be referred to the LPCC under the Law Society's s 14AB(1)(c) obligation. Thankfully, the Law Society has advised it does not take such a limited approach. In its second submission to the Review, the Law Society stated this obligation is only triggered if a matter is formally put before its Council or the Ethics and Practice Committee. Further, the Law Society advised that if an informal report were to be made to the Law Society for the purposes of seeking a referral to one of the Law Society's support services, it is unlikely the Law Society would be considered to have 'reasonable grounds' sufficient to enliven s 14AB. Similarly, the provision would not be triggered if an informal communication of this type did not identify the harasser.

The Law Society has provided a detailed summary of how such calls are processed. That summary appears as Appendix C to this report.

Support services for members

The Law Society has created several confidential support services for its members. LawCare is a counselling service provided by a medical practitioner ('**Dr Jill**'), who is experienced in treating legal practitioners and is familiar with the unique culture of the profession. Members may engage in a limited number of consultations per year with Dr Jill, with those costs being borne by the Law Society.

The Professional Advice Service and Young Lawyers Support Group are both constituted by volunteers who offer support and guidance on an ad hoc basis. In 2018

²¹ *Legal Practitioners Act 1981 (SA)* s 14AB(1)(c).

the Law Society surveyed the members of both the Professional Advice Service and Young Lawyers Support Group. Of the 16 respondents, two indicated that they had been contacted in relation to sexual harassment, with one respondent indicating they had dealt with one or two practitioners, and the other indicating two to five.²²

In 2020 members of both support services participated in training which included information to assist them in responding to queries regarding bullying, harassment or discrimination.

2.2.2. South Australian Bar Association

In October 2020, as a proactive step to address issues of harassment at the South Australian Bar, SABA developed a 'Policy against Discrimination, Bullying and Sexual Harassment' (**Policy**) and a 'Procedure to Deal with Grievances Concerning Discrimination, Sexual Harassment and Workplace Bullying' (**Grievance Procedure**). The Policy contains recognition from SABA that:

[T]he hierarchical structure of the Bar and legal practice create power imbalances which can contribute to discrimination, bullying and harassment.

The Policy and Grievance Procedure set out the steps a victim or a bystander may take to address discriminatory, sexually harassing or workplace bullying behaviour engaged in by a barrister. Of particular interest is the creation of the role of 'grievance stewards'. A person who wishes to report conduct engaged in by, or make a complaint about, a barrister is encouraged to contact a grievance steward who will then take steps to speak to the relevant barrister and potentially assist the victim to further the complaint if the victim so desires. A list of available grievance stewards is said to be available on the SABA website, however it appears that at this stage this list is accessible only to members of SABA. The effect of the Policy and Grievance Procedure is to establish a relatively informal mechanism by which members of SABA may seek peer support to address conduct engaged in by another barrister.

The Policy and Grievance Procedure also sets out a procedure whereby SABA intends to maintain deidentified data about reports of harassment so that SABA is able to better understand the prevalence of harassment at the Bar.

2.3. Current legislative framework

²² The Law Society of South Australia, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (12 February 2021) 3 [13].

2.3.1. Provisions under the Equal Opportunity Act

The Equal Opportunity Act establishes the Commission to foster and encourage informed and unprejudiced attitudes with a view to eliminating discrimination on the grounds to which the Equal Opportunity Act applies.

Equal Opportunity Act and sexual harassment

The Equal Opportunity Act makes it unlawful for a person to sexually harass another person in certain areas of public life, including in the course of a person's employment.²³ This prohibition applies to judicial officers to the extent that it is unlawful for a judicial officer to subject to sexual harassment a judicial or non-judicial officer, or a member of the staff, of a court of which the judicial officer is a member.²⁴

The definition of sexual harassment provided in the Equal Opportunity Act is broad, and has been previously outlined in Part 1.2.1. Whether conduct is of a 'sexual nature' is an objective test and consideration is given to the facts and context. The recounting of a sexual experience to another person, and a workplace hug, have both been found to be of a sexual nature within Australian case law.²⁵ A victim must prove on the balance of probabilities that they were subjected to conduct which constitutes sexual harassment and that the conduct would have offended, humiliated or intimidated the 'reasonable person'.²⁶

The Equal Opportunity Act regulates the conduct of employees while at their workplace or where the employee/s attend in connection with their work.²⁷ Employer organised functions (even those occurring on weekends) and after-hours parties/drinks have been found to be extensions of the workplace,²⁸ and technology-facilitated forms of workplace communication are also likely to be captured.²⁹

While employers do not have a positive duty in the ordinary sense, they have an obligation to set standards of behaviour and manage a complaint of an alleged breach of the Equal Opportunity Act.³⁰ An employer may be held vicariously liable for

²³ *Equal Opportunity Act 1984* (SA) s 87.

²⁴ *Ibid* s 87(6a).

²⁵ See *Sammut v Distinctive Options Limited* [2010] VCAT 1735.

²⁶ This is an objective standard assessed on the evidence, namely 'the perspective of a reasonable person in the role of a hypothetical observer'.

²⁷ *Equal Opportunity Act 1984* (SA) s 87(9)(e).

²⁸ See *Lee v Smith* [2007] FMCA 59.

²⁹ The use of work email, messaging systems and work phones may all be factors that come to bear on whether a person has been sexually harassed within their 'workplace'.

³⁰ *Equal Opportunity Act 1984* (SA) s 91(3).

the impropriety of an employee, unless the employer can demonstrate they had an appropriate policy in place for the prevention of such an act and they had taken all reasonable steps to implement and enforce the policy.³¹

Equal Opportunity Act and other unlawful discrimination in employment

The Equal Opportunity Act makes it unlawful to discriminate against a person in an employment contract because of their:

- Sex, sexual orientation, gender identity or intersex status (Part 3 of the Act)
- Race (Part 4)
- Disability (Part 5)
- Age (Part 5A)
- Marital or relationship status, spouse's or domestic partner's identity, religious appearance or dress, or because they are pregnant or might become pregnant or have caring responsibilities (including because they are breastfeeding) (Part 5B).

Discrimination under the Equal Opportunity Act can be understood as unfavourable treatment fully or substantially on the basis of the protected attribute. In the case of employment, unfavourable treatment may be in relation to:

- The terms and conditions of employment
- Denying or limiting access to opportunities to promotion, transfer or training, or to other benefits connected with employment
- Dismissing the employee
- Subjecting the employee to other detriment (defined as including humiliation or denigration).

Both direct and indirect unfavourable treatment are unlawful under the Equal Opportunity Act.³²

Victimisation is also unlawful under the Equal Opportunity Act. A person will have committed an act of victimisation if they treat a person unfavourably on the basis that the person has commenced, given information to or reasonably asserted someone's right to bring proceedings under the Equal Opportunity Act.³³ In the same way outlined

³¹ Ibid s 91.

³² Indirect discrimination occurs where a rule or policy applies to everyone but has the effect of disadvantaging some people who share a particular attribute.

³³ *Equal Opportunity Act 1984 (SA)* s 86.

above as to sexual harassment, an employer can be found vicariously liable for unlawful discrimination and/or victimisation in the workplace.

Equal Opportunity Act complaints process

A person aggrieved by an act in contravention of the Equal Opportunity Act may make a complaint to the Commissioner³⁴, who may then conduct an investigation into the alleged contravention.³⁵ The Commissioner has powers to require production of relevant documents for the purpose of an investigation, unless such documents would tend to incriminate a person or would lead to a breach of legal professional privilege or if the documents relate to the exercise, or purported exercise, of judicial powers or functions or the discharge, or purported discharge, of judicial duties by a judicial officer in court or in chambers.³⁶

The Commission has powers to resolve complaints by way of conciliation, and may require complainants and respondents to complaints under the Equal Opportunity Act to attend for the purpose of conciliation. A summary of the Commission's processes is set out in Appendix B.

If, following an investigation of a complaint, the Commissioner is of the opinion that it is appropriate to do so,³⁷ the Commissioner must refer the complaint to the South Australian Civil and Administrative Tribunal (**SACAT**) for hearing and determination. SACAT is granted powers to hear and determine matters under the Equal Opportunity Act, including powers to make orders for compensation, refraining orders in relation to future contraventions or orders requiring performance of specific acts with a view to redressing loss or damage arising from the contravention or remedying a discriminatory or unlawful act.³⁸

2.3.2. Provisions under the Australian Human Rights Commission Act

The AHRC was established under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). The AHRC receives, investigates and conciliates discrimination and human rights complaints made pursuant to the Australia's federal discrimination and human rights legislative framework which, most relevantly, includes the Sex Discrimination Act.

³⁴ Ibid s 93.

³⁵ Ibid s 94.

³⁶ Ibid s 94(2a)–(2b).

³⁷ Ibid s 95B(1).

³⁸ Ibid s 96(1).

The Sex Discrimination Act aims to eliminate discrimination in the workplace and in other areas of public activity on the basis of:

- sex
- gender identity
- intersex status
- sexual orientation
- marital or relationship status
- family responsibilities
- pregnancy (or potential pregnancy)
- breastfeeding.

The Sex Discrimination Act also makes it unlawful for a person to sexually harass another person, in certain circumstances.³⁹

Other Commonwealth enactments make it unlawful to discriminate against a person in an employment context on additional grounds (other than those set out above), which are also covered by the Equal Opportunity Act.⁴⁰ As a result, victims of sexual or discriminatory harassment in the legal profession can choose between two complaint pathways of this nature: the Commission or the AHRC.

There are inherent advantages (and disadvantages) to both avenues. One material drawback of the AHRC avenue is that sexual harassment is only prohibited in certain circumstances. On 15 March 2021, however, the Honourable Zali Stegall OAM MP introduced the Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill 2021 to the Parliament of Australia. Similar to the amendments proposed in the National Action Plan, the Bill seeks to address fundamental gaps in the Sex Discrimination Act by amending it to:

- Provide a general prohibition on sexual harassment
- Clarify that statutory appointees (such as judges and members of parliament) are protected from, as well as personally liable for, sexual harassment

³⁹ *Sex Discrimination Act 1984* (Cth) s 28A.

⁴⁰ For example, discrimination on the basis of age is prohibited (in certain circumstances) by the *Age Discrimination Act 2004* (Cth); discrimination on the basis of a person's disability is prohibited by the *Disability Discrimination Act 1992* (Cth); and discrimination on the basis of one's race is prohibited by the *Racial Discrimination Act 1975* (Cth). Discrimination on these bases is also prohibited by the *Equal Opportunity Act 1984* (SA).

- Provide protection against sexual harassment that may occur between witnesses and lawyers; lawyers and judicial officers or court staff; solicitors and barristers or between barristers
- Prohibit aiding and abetting sexual harassment.

Whilst the scope of this Review does not extend to considering the adequacy of the Sex Discrimination Act, the Commission nevertheless wishes to acknowledge the Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill 2021 and welcomes its introduction to Parliament.⁴¹

2.3.3. Provisions under the Work Health and Safety Act

South Australia's WHS Act is based upon model legislation, which is currently in operation in all States and Territories except Victoria and Western Australia.

While neither sexual harassment nor discriminatory harassment are explicitly referred to in the WHS Act, sexual harassment is recognised by SafeWork SA as a workplace hazard which may cause physical and psychological harm. The Commission strongly supports the view that psychological injury is just as relevant to health and safety as physical harm.

The WHS legislative framework comprises the WHS Act, the *Work Health and Safety Regulations 2012* (SA) and various codes of practice (the framework). The national WHS policy body (Safe Work Australia) and the state regulators (e.g. SafeWork SA) also produce guidelines to assist workplaces to comply with the WHS laws. The framework requires that employers and others in the workplace take reasonably practicable steps to prevent harm to workers. Failure to do so can result in enforcement action, including prosecution.

The WHS legislative framework establishes positive duties on various duty holders to eliminate or minimise risks in the workplace. The primary duty of care rests with 'Persons Conducting a Business or Undertaking' (**PCBUs**) to eliminate or minimise risks to the health and safety of workers as far as is reasonably practicable.⁴² The duties of PCBUs are limited by the extent to which they have control or influence over the conduct of the business or undertaking,⁴³ and what is 'reasonably practicable' will

⁴¹ The Commission notes that the Commonwealth Government's response to the Respect@Work Report on 8 April 2021 addresses some of the matters sought to be addressed under the Amendment Bill, including the Sex Discrimination Act's applicability to judges and parliamentarians.

⁴² *Work Health and Safety Act 2012* (SA) s 18.

⁴³ *Ibid* s 16.

depend on factors including the nature of the risk and the costs of eliminating it.⁴⁴ More than one PCBU may have a duty in relation to the same risk.⁴⁵

An officer of a PCBU⁴⁶ must exercise 'due diligence' to ensure that the PCBU undertakes or complies with that obligation.⁴⁷

A risk need not manifest for the duty to be impinged.

Workers must take reasonable care towards the health and safety of themselves and others, comply with reasonable instructions and cooperate with policies and procedures set out by the PCBU to meet its duties.⁴⁸

Failure of a duty under the WHS law can result in a range of compliance and enforcement actions by WHS regulators, including inspections, the issuing of enforcement notices and expiations, and prosecuting duty holders.

Complaints to SafeWork SA

Safe Work SA can commence an investigation into possible breaches of the WHS Act in a number of circumstances. One such trigger is when it is informed about a 'notifiable incident' under the Act, such as a death or serious injury to a worker. If such an incident occurs, the PCBU has a mandatory notification obligation.⁴⁹ An inspector appointed under the WHS Act may, when entering a workplace, exercise powers to determine whether the PCBU is complying with the Act.⁵⁰

The Commission considers that the duties of PCBUs to manage risks to health and safety in the workplace extend to managing the risk of sexual and discriminatory harassment, where that conduct creates risk of harm. This is because the definition of 'health' in the WHS Act includes psychological health,⁵¹ and sexual harassment and other forms of harassment are known to cause psychological harm. The concept of sexual and discriminatory harassment as WHS issues is explored further at Part 4.4.

⁴⁴ Ibid s 18.

⁴⁵ Ibid s 16.

⁴⁶ Ibid s 4. For the purposes of the entities that are most likely to fall within this Review, this will be an 'officer' within the meaning of section 9 of the *Corporations Act 2001* (Cth), other than a partner in a partnership.

⁴⁷ *Work Health and Safety Act 2012* (SA) s 27.

⁴⁸ Ibid Pt 2 Div 3.

⁴⁹ Ibid Pt 3.

⁵⁰ Ibid Pt 9 Div 3.

⁵¹ Ibid s 4.

2.3.4. Provisions under the Fair Work Act

The Fair Work system, established by *the Fair Work Act 2009* (Cth) (**Fair Work Act**) governs the relationship between employers and employees in most Australian workplaces. The operation of the Fair Work system is overseen by the Fair Work Commission and the Fair Work Ombudsman.

As the national workplace relations tribunal, the Fair Work Commission is responsible for a variety of workplace functions and regulation. Its powers and functions include dealing with unfair dismissal, anti-bullying, general protections and unlawful termination claims.

The Fair Work system does not expressly prohibit sexual harassment in the workplace. However, sexual and discriminatory harassment can be raised, albeit indirectly, through several provisions.

General protection provisions

Under the Fair Work Act, a person must not take adverse action against another person on the basis that the other person has, or has exercised, a workplace right.⁵² For example, under this provision, an employer must not, as a result of an employee making a complaint under an anti-discrimination law (such as the Sex Discrimination Act, which expressly prohibits sexual harassment in certain circumstances).⁵³

- Dismiss that employee
- Injure that employee
- Alter the position of that employee to the employee's prejudice, or
- Discriminate between that employee and other employees.⁵⁴

There is some overlap here with section 86 of the Equal Opportunity Act, which prohibits unfavourable treatment of a person on the grounds that, inter alia, they have brought proceedings under that Act.

A similar general protection from adverse action is contained in section 351 of the Fair Work Act. This provision prohibits employers (but not others) from taking adverse action against certain people on grounds that include their caring responsibilities,

⁵² *Fair Work Act 2009* (Cth) s 340.

⁵³ *Ibid* s 341(1)(c)(i); Australian Government Department of Jobs and Small Business, Submission No 453 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* 6.

⁵⁴ *Fair Work Act 2009* (Cth) s 342.

physical or mental disability, age, sex, sexual orientation, race, religion and marital status.⁵⁵

This general protection is, however, problematic, as it ‘does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace.’⁵⁶ *Respect@Work* sets out why this is the case.⁵⁷ The Commission endorses these observations.

Anti-bullying provisions

Anti-bullying provisions in the Fair Work Act enable workers who have been bullied at work to apply to the Fair Work Commission for an order to stop the bullying.

A worker is bullied at work if:⁵⁸

- a person or group of people repeatedly behave unreasonably towards the worker (or a group of workers of which the worker is a member)
- the behaviour creates a risk to health and safety.

While harassment will not necessarily constitute bullying in every instance, an order to stop bullying may assist in stopping harassment in the workplace where it is found to constitute part of a pattern of repeated unreasonable behaviour that creates a risk to health and safety and where it might be seen by a reasonable person as unreasonable behaviour.⁵⁹

An application for an order to stop bullying must be dealt with within 14 days of it being made to the Fair Work Commission.⁶⁰

2.3.5. Provisions under the Legal Practitioners Act

South Australian legal practitioners are regulated under the Legal Practitioners Act.

Complaints to the LPCC

Complaints about a legal practitioner are ultimately managed by the LPCC.

⁵⁵ *Ibid* s 351(1).

⁵⁶ *Respect@Work* (n 1) 517.

⁵⁷ *Ibid* 516–8.

⁵⁸ *Fair Work Act 2009* (Cth) s 789FD(1).

⁵⁹ Australian Government, Fair Work Ombudsman, ‘Bullying & Harassment’ (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/bullying-and-harassment>>.

⁶⁰ *Fair Work Act 2009* (Cth) s 789FE(1).

The LPCC is an agency of the Crown, appointed by the Governor, following consultation about the appointment by the Attorney-General with the Law Society and the South Australian Bar Association (**SABA**).⁶¹ Once appointed, the LPCC can appoint staff to assist in carrying out the LPCC's functions.

The functions are set out in s 72 of the Legal Practitioners Act and include investigating suspected unsatisfactory professional conduct or professional misconduct, following which,⁶² the LPCC can, if the complaint is not dismissed, take action against the practitioner⁶³ or lay charges before the Tribunal. The LPCC may also commence disciplinary proceedings against a legal practitioner (or former practitioner⁶⁴) in the Supreme Court, either in exercise of its powers under ss 88A or 89, or on the recommendation of the Tribunal.

To facilitate the exercise of these powers, the LPCC and the Law Society may enter into an arrangement, approved by the Attorney-General, providing for the exchange of information relating to legal practitioners.⁶⁵ This arrangement permits complaints made to the Law Society regarding a practitioner's conduct to be considered by the LPCC for potential investigation.

The LPCC also has power to instigate an own-initiative investigation into a practitioner's conduct.⁶⁶

Once the LPCC receives a complaint (by the process detailed above, by way of a written complaint, or from a direction by the Attorney-General), the LPCC must⁶⁷ undertake an investigation into a practitioner's conduct.

For complaints made by individuals,⁶⁸ the LPCC's power to investigate is only enlivened by the making of a written complaint,⁶⁹ which must identify the complainant,

⁶¹ *Legal Practitioners Act 1981* (SA) s 71(2).

⁶² Unless the complaint is closed under *ibid* s 77C.

⁶³ In accordance with the powers conferred by *ibid* s 77J.

⁶⁴ For the sake of simplicity, this report refers to 'practitioners' to cover both current and former practitioners for the purpose of this Act. It is noted, however, that the available orders arising as an outcome of investigations for former practitioners varies. See *ibid* ss 77J(3), 82(6).

⁶⁵ *Ibid* s 77A.

⁶⁶ *Ibid* s 77B(1).

⁶⁷ Subject to ss 67B and 77C. The former section indicates that Part 6 of the Act (Investigations, inquiries and disciplinary proceedings) does not apply to the conduct of a judicial officer, the Independent Commissioner Against Corruption (or her deputy), the Judicial Conduct Commissioner, the LPCC or his staff or delegates. Section 77C empowers the Commissioner to close a complaint at any stage after its receipt, for any of the reasons listed in s 77C(1). The power to investigate is also contingent upon the complaint being made in accordance with s 77B(3c) (as to time since the alleged conduct occurred).

⁶⁸ That is, not a direction by the Attorney-General.

⁶⁹ *Legal Practitioners Act 1981* (SA) s 77B(2)(b).

the practitioner and the alleged conduct.⁷⁰ A complaint to the LPCC must be made within three years of the alleged conduct, subject to the Commissioner allowing a longer period.⁷¹ The issue of limitations of time is discussed further at Part 6.5.9 of this report.

This Review's terms of reference charge the Commission with consideration of the possibility of the making of 'anonymous complaints'. Because, for the purposes of the Legal Practitioners Act, a complaint only exists when it identifies the complainant, it is easiest to instead refer to these informal notifications as 'anonymous reports'.

The Legal Practitioners Act does not make any provision for anonymous reports about a legal practitioner's conduct. In the LPCC's submission to the Review, the LPCC stated that there is little his office can do with an anonymous report in terms of its functions under the Legal Practitioners Act, given that findings of misconduct can only be made on the basis of 'substantial, admissible and reliable evidence'.⁷²

In November 2020, in acknowledgment of the very low numbers of reports the LPCC received regarding harassment, including sexual harassment, the LPCC announced the implementation of various measures aimed at encouraging victims to take steps towards making a formal complaint. These measures included assurances regarding the steps the LPCC would take to maintain the victim's confidentiality (other than to the accused practitioner) and the establishment of a dedicated staff member whose role was to provide information and support to victims without the victim first being required to make a formal complaint.

The LPCC has advised the Commission that there has been a steady uptake of this service since its inception. More is said about the potential to expand this service in Part 6.5.5 of this report.

Once a complaint is received under the Legal Practitioners Act, it is allocated to one of the LPCC's investigating solicitors, who may seek further information to clarify the terms of the complaint. Once all relevant material has been received and considered, a decision is made to investigate the complaint, which is then published to the

⁷⁰ Ibid s 77B(3a).

⁷¹ Ibid s 77B(3c).

⁷² Greg May, 'Sexual Harassment in the legal profession: the role of complaints processes' (November 2020) *The Bulletin* 19.

practitioner whose conduct is impugned.⁷³ The practitioner is provided with an opportunity to respond, which is then provided to the complainant for comment. The complainant is provided an opportunity to respond, which may lead to a further response from the practitioner, and so on. In this manner, the investigation process may be lengthy and protracted.

In the event that the subject matter of a complaint is also the subject of court proceedings, it may be suspended pending the outcome of that process. Similarly, the LPCC may close a complaint if the LPCC considers that the subject-matter of the complaint would be better investigated by police or another investigatory or law enforcement body.⁷⁴

Once the investigation is complete, the solicitor will report to the LPCC on the outcome. The LPCC will then decide how to proceed. In the event that a finding of misconduct is likely, the parties will be given an opportunity to address that provisional finding. Once any further submissions are received, the LPCC must prepare a determination and detailed reasons.

If the LPCC is satisfied there is evidence of professional misconduct by a practitioner, the LPCC must report on the matter to the Attorney-General and the Law Society.⁷⁵

In the event that the LPCC is satisfied there is evidence of unsatisfactory professional conduct which may be adequately dealt with under section 77J(1)(a) of the Legal Practitioners Act, the LPCC may determine not to lay a charge before the Tribunal and may instead exercise one or more of the powers listed in that provision.⁷⁶ For present purposes, that might involve:

- reprimanding the practitioner
- ordering the practitioner to pay a fine up to \$5 000
- ordering the practitioner to apologise to the complainant

⁷³ It is noted that the LPCC may, at any time, arrange for a conciliation of a complaint: *Legal Practitioners Act 1981* (SA) s 77O(1). It is not known whether this authority has ever been exercised in relation to complaints of harassment.

⁷⁴ *Ibid* s 77D(1)(d). Examples of other investigatory bodies might include the Independent Commissioner Against Corruption or the Office for Public Integrity (in the case of a practitioner employed within the public sector).

⁷⁵ *Ibid* s 77H(1).

⁷⁶ Note that similar outcomes are available under s 77J(2) of the *Legal Practitioners Act 1981* (SA) if the LPCC is satisfied that there is evidence of professional misconduct.

- ordering the practitioner to undertake training, education or counselling, or to be supervised⁷⁷ (this can also be a condition imposed on the practitioner's practising certificate)
- (only with the consent of the practitioner) making any other order considered appropriate in the circumstances.

If the practitioner consents to this approach, where it appears to the Commissioner that there is an illness, impairment, condition or impairment at play (that has affected the practitioner's capacity to practise), the LPCC may order the practitioner to submit to a medical examination, receive counselling or participate in a program of treatment or rehabilitation. A practitioner may also have their practising certificate suspended in this instance.

As soon as possible after determining to exercise a power under this section, the LPCC must provide the complainant with written notification of that fact.⁷⁸ The Commission heard that the timely provision of information such as this is important to complainants.

If the LPCC is satisfied that there has been unsatisfactory professional conduct or professional misconduct that cannot be adequately dealt with under s 77J, the Commissioner must (subject to a public interest test) lay a charge before the Tribunal.

Proceedings before the Tribunal

If the LPCC is unable to close a complaint in relation to a practitioner's conduct, it may progress to the second tier of regulation, in proceedings before the Tribunal.

There are 15 members of the Tribunal, 10 of whom are legal practitioners and five are persons who, although not practitioners, have an understanding of legal practice. Whereas the former Legal Professional Conduct Board had to include a legal practitioner of not more than seven years standing as one of its numbers (thereby mandating the inclusion of a 'new' legal practitioner on the Board), there is no such requirement for the composition of the Tribunal.⁷⁹

According to section 80(1) of the Legal Practitioners Act (which is subject to section 80(1a)), for proceedings alleging:

⁷⁷ This might be a particularly important outcome for complaints involving harassment.

⁷⁸ *Legal Practitioners Act 1981* (SA) s 77J(8).

⁷⁹ In fact, legal members of the Tribunal must have at least five years standing.

- professional misconduct:
 - where the charge is laid by the LPCC, and in which the Commissioner does not consider that the alleged conduct warrants an order that the practitioner be:
 - struck off,
 - suspended for more than three months or
 - fined more than \$10 000; or
- only unsatisfactory professional conduct by a practitioner,

the Tribunal consists of one of its members, chosen by the presiding member.

Complaints alleging harassment at the lower end of the range of seriousness (for which resolution under section 77J was not possible), might therefore be considered by one Tribunal member. That member must be a practitioner.⁸⁰

Where it is not considered possible to deal with proceedings alleging professional misconduct in this way, section 80(1) requires that the Tribunal will be constituted of three of its members, at least one of whom must be a practitioner and one a lay member.⁸¹ Further discussion about relevant considerations when making appointments to the Tribunal appears at Part 6.5.7 of this report.

A charge to be considered by the Tribunal may be laid by any one of a number of parties, including a person claiming to be aggrieved by reason of alleged unsatisfactory professional conduct or professional misconduct. Charges must be laid within five years of the day on which the person laying the charge became aware of the conduct in question.⁸²

Unless it considers the charge to be frivolous or vexatious, the Tribunal must inquire into the conduct of the practitioner to whom the charge relates.⁸³

In carrying out an inquiry, the Tribunal may exercise powers including summoning witnesses to attend and requiring them to answer questions on oath or affirmation.⁸⁴

An inquiry conducted by the Tribunal must be held in public unless it is 'in the interests of justice' for it to be conducted in private. There is no express provision in the Legal

⁸⁰ *Legal Practitioners Act 1981 (SA)* s 80(1c).

⁸¹ *Ibid.*

⁸² Unless the charge is laid by the Attorney-General or an extension of time is granted by the Tribunal. See *ibid* s 82(2).

⁸³ *Ibid* s 82(4)

⁸⁴ *Ibid* s 84.

Practitioners Act for proceedings to be held in private to preserve a complainant's anonymity.⁸⁵ It is noted that the vulnerable witness provisions in the Evidence Act do not apply to proceedings other than trials. Further commentary about improvements to complaint mechanisms in this respect appears at Part 6.5.6 of this report.

If, having conducted an inquiry, the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct,⁸⁶ any one or more of the following powers may be exercised. Relevantly for the purposes of this Review, the Tribunal may:

- reprimand the practitioner
- order that the practitioner pay a fine
- make an order imposing conditions on the practitioner's practising certificate, such as to require the practitioner to complete education or training or receive counselling
- suspend the practitioner's practising certificate
- recommend that disciplinary proceedings be commenced in the Supreme Court (providing the Tribunal is constituted of three members).⁸⁷

The Tribunal may make orders as to costs as it considers 'just and reasonable'.⁸⁸

After completing an inquiry under this section, the Tribunal must provide the evidence and a memorandum of its findings to the Attorney-General, the Law Society and the LPCC.

Disciplinary proceedings before the Supreme Court

Where the Tribunal, having conducted an enquiry into a practitioner, recommends that disciplinary proceedings be commenced in the Supreme Court, those proceedings may be commenced by the LPCC, the Attorney-General or the Law Society.⁸⁹ In proceedings against a practitioner in the Supreme Court, the Court may exercise any of the following powers, relevant to this Review. It may:⁹⁰

⁸⁵ Ibid s 84A(2). It is noted, however, that a suppression order may be applied for pursuant to section 69A of the *Evidence Act 1929* (SA).

⁸⁶ Note that an alternative finding of unsatisfactory professional conduct may be made for a charge alleging professional misconduct.

⁸⁷ *Legal Practitioners Act 1981* (SA) s 82(6)(a)(v).

⁸⁸ Ibid s 85.

⁸⁹ If the Commissioner considers that the practitioner be struck off the LPCC may, without laying a charge before the Tribunal, institute those proceedings at the outset.

⁹⁰ *Legal Practitioners Act 1981* (SA) s 89.

- reprimand the practitioner
- impose conditions on the practitioner's practising certificate, requiring the practitioner to undertake further education or training, or to receive counselling
- suspend the practising certificate (including until further order)
- order that the practitioner's name be struck off the role of legal practitioners.

It is important to note that in any disciplinary proceedings, the Supreme Court may exercise its discretion to accept and act on any findings of the Tribunal.⁹¹ This discretion is an important safeguard to ensure that complainants who have given evidence in an inquiry before the Tribunal will not routinely be required to be re-victimised.

2.3.6. Provisions under the Judicial Conduct Commissioner Act

The office of the Judicial Conduct Commissioner (**JCC**) is established under the JCC Act. The JCC is empowered to investigate specific conduct of judicial officers (which includes a person appointed to hold or act in judicial office). For the purposes of the JCC Act, that includes magistrates, judges and masters.⁹²

Complaints to the Judicial Conduct Commissioner

The powers of the JCC include receiving and dealing with complaints made under the JCC Act. The JCC is not, however, entitled to consider the legality or correctness of any determination made by a judicial officer in the course of legal proceedings.⁹³ What concerns the holder of this office, as its name suggests, is judicial conduct rather than judicial decisions. Clearly, conduct falling within the Review's terms of reference would fall within the JCC's remit, particularly given that '*conduct of a judicial officer*' has an inclusive definition which does not require the impugned conduct to have occurred in the course of carrying out functions as a judicial officer.⁹⁴

Section 12 of the JCC Act provides that a complaint about the conduct of a judicial officer may be made to the JCC. As with the LPCC, the JCC can only consider a complaint reduced to writing that identifies the complainant, the judicial officer and the

⁹¹ Ibid.

⁹² *Judicial Conduct Commissioner Act 2015 (SA)* s 4.

⁹³ Ibid s 6(3).

⁹⁴ Ibid s 4(2).

conduct in question.⁹⁵ Subject to the application of an exception to this rule, the JCC must provide the judicial officer and the head of jurisdiction with a copy of this complaint.

A complaint may be:

- dismissed (either before or after conducting a preliminary examination)⁹⁶
- referred to the Office of Public Integrity⁹⁷
- referred to the relevant jurisdictional head⁹⁸
- the subject of a report by the JCC to the Attorney-General⁹⁹
- the subject of a report to the Parliament¹⁰⁰
- the subject of a recommendation to the Attorney-General to appoint a judicial conduct panel to inquire into the impugned conduct.¹⁰¹

A judicial conduct panel must inquire into, and report on, the matters concerning the conduct,¹⁰² and provide a report to the Attorney-General as to its findings of fact and its determination as to whether removal is justified. If removal from judicial office is recommended, this may be effected by the Governor¹⁰³ or both Houses of Parliament,¹⁰⁴ as the case may be.

2.3.7. Provisions under the Independent Commissioner Against Corruption and Public Sector Acts

The Independent Commissioner Against Corruption (**ICAC**), as established by the ICAC Act, seeks to identify, investigate and, in turn, prevent corruption, misconduct and maladministration within the South Australian public sector. As such, a victim of sexual or discriminatory harassment in the legal profession within the public sector may make a complaint of 'misconduct' in public administration to the Office for Public Integrity under the ICAC Act. Misconduct is defined as:

⁹⁵ Note that the JCC can also receive a referral from the Attorney-General or a head of jurisdiction. The JCC can also, on her own initiative, consider as a complaint the conduct of a judicial officer. See *ibid* s 12.

⁹⁶ *Ibid* ss 16, 17.

⁹⁷ *Ibid* s 15.

⁹⁸ *Ibid* s 18.

⁹⁹ *Ibid* s 20.

¹⁰⁰ *Ibid* s 19.

¹⁰¹ *Ibid* s 21.

¹⁰² *Ibid* s 23.

¹⁰³ *Ibid* s 26(1).

¹⁰⁴ *Ibid* s 26(2).

(a) *contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or*

(b) *other misconduct of a public officer while acting in his or her capacity as a public officer.*

Complaints under the Code of Ethics for the Public Sector

Section 14 of the *Public Sector Act 2009 (SA)* (**Public Sector Act**) empowers the Commissioner for Public Sector Employment to issue the public sector code of conduct. According to section 15 of that Act, the code may include provisions governing the conduct of public sector employees that operate as disciplinary provisions.

The *Code of Ethics for the South Australian Public Sector* (**the Code**) applies to those within the legal profession in the public sector. The disciplinary provisions of the Code are set out in professional conduct standards, contravention of which will constitute misconduct for the purposes of the Public Sector Act.

A public sector agency may take disciplinary action against one of its employees on the ground of the employee's misconduct.¹⁰⁵ One of the professional standards requires that public sector employees treat other people with respect and courtesy. Another is that employees will not, at any time, act in a manner that would bring the public sector¹⁰⁶ into disrepute, or that would otherwise be improper or disgraceful.

The Commission notes that, as sexual harassment and discrimination are unlawful, it is likely that such conduct would meet the definition of misconduct.

Complaints to ICAC

Where allegations of a breach of the Code are made against public service employees, there are robust policies and procedures at a government and agency level which govern the subsequent process. There is also a range of disciplinary action that can be taken where misconduct is substantiated, including a reprimand, suspension from duties without remuneration and termination. The Commission notes this framework provides a means for complaints to be made and dealt with transparently, takes into account that behaviours can range in seriousness and provides for sanctions that can

¹⁰⁵ *Public Sector Act 2009 (SA)* s 55.

¹⁰⁶ Or themselves, the agency or the Government.

respond to that range of behaviours. It also places an obligation on the workplace to take action against staff who do not comply with the Code.

If the Office for Public Integrity assesses a complaint as raising a potential issue of misconduct in public administration, then the matter must be dealt with in one of the following ways:

- it may be referred to a ‘public authority’ and directions and guidance may be issued to the authority in respect of the matter.¹⁰⁷ Public authorities are listed in Schedule 1 of the ICAC Act
- it may be referred to an ‘inquiry agency’ (the Ombudsman) for investigation¹⁰⁸
- if the matter is assessed as raising a potential issue of serious or systemic misconduct, the ICAC may exercise the powers of the Ombudsman to investigate the matter if satisfied that the matter must be dealt with in connection with a corruption or maladministration investigation.

If, for example, a complaint alleged protracted sexual harassment in a public sector agency by a senior executive, this may well be deemed to be serious conduct invoking the ICAC’s powers to investigate.

Whilst the ICAC and the Ombudsman may not immediately come to mind as possible complaint handlers in relation to sexual and discriminatory conduct, the Commission notes that this particular avenue provides an entirely independent investigation process. As mentioned above, it also comes with strict statutory confidentiality provisions.

2.4. Existing preventative mechanisms

2.4.1. The Law Society of South Australia

Bullying, Discrimination and Harassment Working Group

The Bullying, Harassment and Discrimination Working Group was established by the Law Society in 2018. The Working Group comprised senior practitioners from across the profession and was tasked with making recommendations as to how best to deal with the systemic issues identified in the Law Society’s 2018 survey results. On 3 December 2018, the Law Society’s Council adopted ten recommendations made by the Working Group and on 4 November 2019 the Council adopted Guidelines for Bullying, Discrimination and Harassment which included a ‘no tolerance’ statement. The Guidelines were distributed to all legal practitioners in November 2019.

¹⁰⁷ *Public Sector Act 2009* (SA) s 24(2)(d).

¹⁰⁸ *Ibid* s 24(2)(a).

The Law Society continues to maintain a bullying, discrimination and harassment webpage on its website which provides information on Law Society initiatives as well as links to various relevant resources.

Continuing professional development and training

Following on from the work of the Law Society's Bullying, Harassment and Discrimination Working Group, the Legal Practitioners Education and Admission Council (**LPEAC**) amended its Rules to require that all practitioners undertake a mandatory unit relating to bullying, discrimination and harassment within the 10 units to be completed each compliance year.

The Law Society has already facilitated a number of CPD presentations addressing bullying, discrimination and harassment and has participated in a seminar at the Adelaide Law School covering integrity issues.

The Law Society has also successfully applied for a grant from the Law Foundation to engage the Commission to develop and deliver a tailored training program to members of the South Australian legal profession. The goal is that the program:

will assist in changing the culture of the profession by ensuring that those that perpetrate [harassment] face consequences for their actions and those who suffer it are aware of the available support, options and resources and can seek the assistance they need or make complaints without being fearful of implications for their career.¹⁰⁹

The full quantum of the grant was not approved by the Law Foundation. However, the Commission hopes that, with the national model guidelines being prepared by the Law Council pursuant to the National Action Plan, training materials targeted to our State will be prepared to achieve this goal. The Commission commends the Law Society for its efforts in this regard, and looks forward to working together to fulfil this goal.

2.4.2. Respectful Behaviours Working Group

The Respectful Behaviours Working Group was convened by the Chief Justice, at the suggestion of Ms Margaret Castles and Ms Alice Rolls.¹¹⁰ It is noted as being a 'forum

¹⁰⁹ The Law Society of South Australia, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (12 February 2021) 6 [18].

¹¹⁰ Margaret Castles is a Senior Lecturer at the University of Adelaide Law School. Alice Rolls is a Principal at Lipman Karas.

for exchanging views and a clearing house for proposals and initiatives by statutory agencies, the profession, the universities and the courts'.¹¹¹

2.4.3. Current educative measures within universities¹¹²

University of Adelaide

Within its compulsory course in the Bachelor of Laws, the University of Adelaide covers the topic of harassment in its final year 'Dispute Resolution and Ethics' course, noting that '[respectful behaviour] is considered as part of the ethical conduct of lawyers', such that 'professional and ethical conduct extend beyond the court rules'.¹¹³ In 2020 the University's elective 'Clinical Legal Education' course contained harassment in the profession as one of its themes, with students undertaking seminars addressing the issue.¹¹⁴

During the last 12 months, the University has hosted two seminars of note for its students, to be attended on a voluntary basis, namely:

- 'Maintaining Integrity at Work' – was facilitated by the Law School. The seminar comprised a panel discussion between the Honourable Chief Justice Chris Kourakis, Amy Nikolovski (Partner at Duncan Basheer Hannon), Will Snow (Partner at Finlaysons) and Dr Gabrielle Golding (Lecturer at Adelaide Law School), discussing sexual harassment, discrimination and bullying at work, and how these matters have impacted the legal profession, as well as proposing what can and should be done in order to promote positive change¹¹⁵
- 'Sexual Harassment and Assault Seminar' – conducted by the Adelaide University Law Students' Society in conjunction with the Women Lawyers Association of South Australia. The panel consisted of Claire O'Connor SC (Barrister), Michelle Barnes (Barrister) and Michelina Guarna (Sole Practitioner), discussing sexual harassment and assault as it pertains to women working within the legal profession.¹¹⁶

The University of Adelaide also offers a Graduate Diploma of Legal Practice (**GDLP**) jointly with the Law Society of South Australia. In this program, content regarding

¹¹¹ Chief Justice of the Supreme Court of South Australia, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (22 March 2021) 1.

¹¹² The College of Business, Government and Law at Flinders University of South Australia did not respond to the Commission's request for information with respect to its course content.

¹¹³ Email from Peter Burdon to Lauren Clarke, 30 March 2021.

¹¹⁴ Margaret Castles, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (20 February 2021) 2.

¹¹⁵ Ibid 1.

¹¹⁶ Adelaide University Law Students' Society, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (17 February 2021) 2.

harassment is taught in line with the Ethics and Professional Responsibility competency standard of the LPEAC Rules. This includes discussion of Rule 42 of the ASCR, as well as other professional obligations, disciplinary processes, and ramifications in the event of a breach of such obligations. Students are also provided with information about support avenues available to them, and are advised on safety within their placements, as it pertains to potential incidents of harassment.¹¹⁷

University of South Australia

Within its substantive law courses, both academic and clinical, the University does not address the issue of harassment upon entering the profession. The University does, however, note that within its clinical courses, it ensures students are aware via a briefing that if their safety is compromised in any way within the legal clinic setting, they should contact university staff.¹¹⁸ It should also be noted that the University has an online training module, 'Sexual assault and sexual harassment: what are the drivers and how do we respond?' prominently available on its website, which is 'designed to help [students] understand the behaviours that give rise to sexual assault and sexual harassment, and how we can address them and provide support'.¹¹⁹

College of Law

The College of Law is the other provider of the Graduate Diploma of Legal Practice in South Australia. The College recently developed bullying and sexual harassment training resources, specific to the context of the profession, in conjunction with the IBA, following the publication of their report in 2020. These materials are freely available for public use. Moreover, the College notes that it is in the process of developing sexual harassment and bullying awareness training with the view to integrate this into its GDLP course, along with its Law Practice Management course.¹²⁰

¹¹⁷ Email from Desiree Holland to Lauren Clarke, 6 April 2021.

¹¹⁸ Email from Jane Knowler to Lauren Clarke, 26 March 2021.

¹¹⁹ University of South Australia, *Online training* (Web Page) <<https://i.unisa.edu.au/students/student-support-services/wellbeing-at-unisa/domestic-and-family-violence-sexual-assault-and-sexual-harassment/sexual-assault-and-harassment/online-training/>>.

¹²⁰ Email from Graham Jobling to Lauren Clarke, 6 April 2021.

2.5. Current regulatory framework

2.5.1 Australian Solicitors' Conduct Rules

The ASCR were adopted by the Council of the Law Society of South Australia on 25 July 2011. The Rules are not a complete and comprehensive statement of all ethical obligations that must be observed by legal practitioners. There are many common law and statutory ethical duties and obligations that legal practitioners must comply with that are not covered by the Rules. The Rules are not laws. That is, a breach of the Rules alone does not result in any penalty or disciplinary action. It is only when a breach of the Rules forms the basis for a finding by the relevant body that the practitioner concerned has committed an act of unsatisfactory or unprofessional conduct that disciplinary action will result. Rule 42 provides that a solicitor must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying.

2.5.2. Barristers' Conduct Rules

Barristers in South Australia are bound by the BCR.

Rule 12 provides that a barrister must not engage in behaviour that is dishonest, discreditable, likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute. Rule 117 provides that a barrister must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. Rule 117 mirrors Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules* and Rule 42 of the ASCR, save and except for substituting 'solicitor' with 'barrister'.

3. Prevalence of harassment in the South Australian legal profession

3.1. Survey overview

As stated in Part 1.3.3, there were 622 survey responses considered in scope and included for analysis. Of the responses, 585 (94.1%) were from individuals currently working in the legal profession, and 37 (5.9%) from individuals who previously worked in the profession. The Commission undertook further analysis of data using all in-scope respondents as one whole group.¹²¹

The Commission was not able to reliably estimate the size of the legal profession workforce in South Australia. Accordingly, this report does not suggest an industry participation rate for the survey, however, the Commission considers the number of surveys completed, submissions received and interviews undertaken as a strong indication of the interest in harassment in the legal profession. The breadth of participants' experience is also indicative of a wide cross-section of the sector.

There were some survey participants who did not complete the full survey. The Commission notes that the content of the survey could be triggering for some respondents and difficult to complete. Other respondents may also have been reluctant to answer all questions due to concerns over the anonymity of the process. After the survey was closed, the Commission was advised by a number of participants that they had experienced technical difficulties and were unable to complete the survey.¹²² To avoid the silencing of victims, the Commission decided that partially complete surveys would be included within its analysis.¹²³

In addition, due to the survey logic, respondents were only asked questions relevant to their experience and opinions. There was therefore variance in the total number of respondents to each different question. For each question, analysis and reporting is based on the number of responses received, rather than the number of in-scope respondents. It is also noted that a number of questions permitted more than one answer to be selected.

¹²¹ A review of the profiles of participants who previously worked in the profession identified there were no significant differences to the profiles of participants who currently work in the profession.

¹²² Those would-be participants were invited to submit written responses, and one did so.

¹²³ Providing they answered at least one question about experiences of harassment (Question 7 being the first asked).

Key results from the survey are included below and in subsequent parts of this report. The Commission has not reproduced every result.

3.2. Overview of survey participants

The Commission reviewed the responses to demographic questions completed by survey respondents.

As an overview, the Commission found that the majority of respondents:

- were aged of 31-60 years at the survey date (68.5%), with 39.2% aged 31-45
- were women (68.4%)
- were not of Aboriginal or Torres Strait Islander descent (95.8%)
- spoke English as the main language at home (95.8%)
- did not have a disability or disabilities (93.9%)
- described themselves as straight or heterosexual (86.8%)

The Commission also found that the majority of respondents:

- had law firm (35.1%) or government office, agency or department (23.4%) as their most recent workplace.
- had associate or solicitor (27.5%), management (e.g. partner, director, principal, registrar, executive) (23.4%) or senior associate or senior solicitor (15.4%) as their most recent role.
- had worked for more than five years in the legal profession in SA (77.4%)

A detailed breakdown of responses to each question is provided below.

3.2.1. Personal attributes

As shown in Figure 1 below, of the respondents who provided their **gender**, 346 (68.4%) were female and 140 (27.7%) were male. One respondent identified as non-binary/third gender, one as other (please specify),¹²⁴ and 18 (3.6%) preferred not to say.

¹²⁴ The participant did not provide a meaningful response in the free text for *Other (please specify)*. Indeed, the response was indicative of some of the cultural change that is required.

Figure 1: Gender of survey respondents

Value	Respondents	% Total Respondents
Female	346	68.4%
Male	140	27.7%
Prefer not to say	18	3.6%
Non-binary / third gender	1	0.2%
Other (please specify)	1	0.2%
Total	506	100.0%

Note: Table excludes 116 respondents who did not provide an answer to Q58.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q58

Figure 2 (below) shows the **age** of the respondents at the time of completing the survey. 199 (39.2%) were 34-45 years, 149 (29.3%) were 46-60 years, 95 (18.7%) were 18-30 years, 54 (10.6%) were 60 years or older, and 11 (2.2%) preferred not to say.

Figure 2: Age of survey respondents

Value	Respondents	% Total Respondents
31-45 years	199	39.2%
46-60 years	149	29.3%
18-30 years	95	18.7%
60 years or older	54	10.6%
Prefer not to say	11	2.2%
Total	508	100.0%

Note: Table excludes 114 respondents who did not provide an answer to Q56.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q56

Of the respondents who provided their **sexual orientation**, 439 (86.8%) answered they were straight or heterosexual. In addition, 13 (2.6%) were bisexual, 10 (2.0%) were gay, 6 (1.2%) asexual or aromantic, 3 (0.6%) lesbian, 3 (0.6%) pansexual and 3 (0.6%) undecided, not sure or questioning. 29 (5.7%) preferred not to say.

Survey respondents were also asked if they were of **Aboriginal and/or Torres Strait Islander descent**. There were 6 who identified as Aboriginal (1.2%) and 15 (3.0%) who preferred not to say, whilst the remaining 483 (95.8%) answered 'no'. The Commission did not receive any responses to indicate a participant was of Torres Strait Islander descent.

Of the respondents who answered if they had a **disability**, 17 (3.4%) identified having a disability, with 14 (2.8%) preferring not to say, and 475 (93.9%) stating they did not.

Respondents were also asked to state the **main language they spoke at home**. For 485 (95.8%) respondents, English was the main language. 12 respondents (2.4%) identified a number of other languages, including Greek, Cantonese and Italian, and 9 (1.8%) preferred not to say.

The impacts of a lack of diversity on the nature and prevalence of sexual and discriminatory harassment is discussed in detail in Part 3.4.1 below.

3.2.2. Work attributes

Respondents were asked **how many years they had worked in the legal profession**. 393 (77.4%) respondents to this question indicated they had more than 5 years in the profession. Approximately 20% had between 1 and 5 years' experience, and only 10 (2.0%) had less than a year's experience.

When asked to identify their **most recent role** in the profession, 139 (27.5%) answered they were associates or solicitors, 78 (15.4%) senior associates or senior solicitors, 35 (6.9%) clerks, interns or paralegals and 41 (8.1%) barristers. A further 101 (20.0%) were in management roles, and 12 (2.4%) indicated that they were members of the judiciary.

There were 56 respondents (11.1%) in other roles, including business services and other support, students, trainees or graduates, and consultants. The results are shown in Figure 3 below.

Figure 3: Most recent role in the legal profession

Value	Respondents	% Total Respondents
Associate or solicitor	139	27.5%
Management (e.g. partner, director, principal, registrar, executive)	101	20.0%
Senior associate or senior solicitor	78	15.4%
Prefer not to say	43	8.5%
Barrister	41	8.1%
Clerk, intern or paralegal	35	6.9%
Business services or other support	31	6.1%
Other	16	3.2%
Member of the judiciary	12	2.4%
Consultant	6	1.2%
Law student	2	0.4%
Trainee or graduate	1	0.2%
Total	505	100.0%

Note: Table excludes 117 respondents who did not provide an answer to Q63.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q63

As shown in Figure 4 below, when asked to identify their **most recent workplace** in the legal profession, 177 (35.1%) stated it was a law firm, 118 (23.4%) a government office, agency or department, 55 (10.9%) the Courts Administration Authority or a tribunal, and 33 (6.5%) a barristers' chambers.

A further 32 (6.3%) indicated they worked in a corporation or organisation, 26 (5.2%) the Legal Services Commission, 10 (2.0%) a community legal centre or free legal clinic, and 10 (2.0%) provided examples of other workplaces.

There were 8 respondents (1.6%) that advised they were a member of the judiciary, and 35 (6.9%) preferred not to say.

Figure 4: Most recent workplace in the legal profession

Value	Respondents	% Total Respondents
Law firm	177	35.1%
Government office, agency or department	118	23.4%
Courts Administration Authority or Tribunal	55	10.9%
Prefer not to say	35	6.9%
Barrister's Chambers	33	6.5%
Corporation or organisation	32	6.3%
Legal Services Commission	26	5.2%
Community legal centre or free legal clinic	10	2.0%
Other	10	2.0%
I am a member of the Judiciary	8	1.6%
Total	504	100.0%

Note: Table excludes 118 respondents who did not provide an answer to Q64.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q64

Notwithstanding the inability to quantify the number of potential participants, it is clear from the analysis detailed above that a broad range of practitioners and others working in the profession (from clerks to judicial officers) undertook the survey. The Commission is therefore confident that key findings arising from the survey contribute useful information as to harassment across a diverse range of the legal workplace.

The Commission notes that participants in the Review, whether in the survey, written submissions, or interviews, made it plain that harassment occurs across the legal profession, from the courts to the public sector and everywhere in between. The incidence of sexual and discriminatory and harassment in different legal workplaces is discussed in Parts 3.3.1 and 3.4.2 below.

3.3. Nature and prevalence of sexual harassment

The survey sought to determine the nature and prevalence of sexual harassment across the South Australian legal profession. The Commission also heard about experiences of sexual harassment from other review participants through interviews and written submissions.

3.3.1. Prevalence of sexual harassment

The survey found that 42.1% of respondents had experienced **sexual harassment while working in the legal profession**, including one-third who had experienced it more than once (see Figure 5).

Figure 5: Have you experienced sexual harassment in the legal profession?

Value	Respondents	% Total Respondents
No	308	49.5%
Yes, more than once	207	33.3%
Yes, once	55	8.8%
Not sure	44	7.1%
Prefer not to say	8	1.3%
Total	622	100.0%

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q7

Moreover, women were much more likely to experience sexual harassment, with 56.6% of the 346 respondents who identified as female indicating they had experienced sexual harassment in the legal profession, compared with 13.6% of the 140 respondents who identified as male (see Figure 6).

Figure 6: Female vs male experiences of sexual harassment

Value	Female		Male	
	Respondents	% Respondents	Respondents	% Respondents
No	125	36.1%	112	80.0%
Yes, more than once	154	44.5%	14	10.0%
Yes, once	42	12.1%	5	3.6%
Not sure	23	6.6%	8	5.7%
Prefer not to say	2	0.6%	1	0.7%
Total	346	100.0%	140	100.0%

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q7

3.3.2. Nature of sexual harassment

Although the terms of reference did not specifically command an examination of the nature of sexual harassment in the profession, the Commission considered that the analysis of prevalence would be best-informed if the Review considered the types of harassment that occur. The survey therefore sought to understand the nature of sexual harassment in the legal profession by asking a range of questions around the

experiences of victims. Figure 7 below shows the types of sexual harassment respondents had experienced in a legal workplace:

Figure 7: Sexual harassment in the workplace

Value	Respondents	% Total Respondents
Sexually suggestive comments or jokes	192	67.4%
Inappropriate staring, leering or repeated physical proximity	136	47.7%
Intrusive questions about your private life or physical appearance	135	47.4%
Touching such as hugging, kissing or placing a hand on your knee	125	43.9%
Repeated or inappropriate invitations to go on a date	54	18.9%
Requests or pressure for sex or other sexual or intimate acts	41	14.4%
Sexually explicit pictures, posters or gifts	36	12.6%
Sexual gestures, indecent exposure or inappropriate display of the body	30	10.5%
Being inappropriately followed, watched or had someone loitering nearby	25	8.8%
Sexual violence or sexual assault	7	2.5%
Prefer not to say	4	1.4%
Total	285	100.0%

Note: Table excludes 337 respondents who did not provide an answer to Q08. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q8

The most common type of sexual harassment experienced was **sexually suggestive comments or jokes** (67.4% of respondents who answered this question). The Commission also identified a range of written survey responses and interview answers regarding experiences of this nature, including:

The men in the firm also had a running joke about who could have sex on the most couches/armchairs in the office.

he's one of the guys that, you know, would ask about my sex life and ... say that I should be a lesbian and just tell me stories I actually didn't want to hear, ... I had been overseas and went to the kitchen, he was there, and he asked me if I had dirty knees, and there's only one thing that that could have meant and other people [were there], and they didn't say anything.

Nearly half of respondents had experienced **inappropriate staring or leering** (47.7%), with one stating 'I still have lawyers on the other side of matters who look at my breasts and not my face'.

In addition, nearly half of respondents who answered the relevant question experienced **intrusive questions** (47.4%). The Commission heard further about the nature of intrusive questions, including the following:

I was asked and felt obliged to answer questions regarding the financial settlement of my marital property settlement by [a senior colleague]. I was embarrassed by the questions but felt obliged to answer.

... women have told me about such things as a) being told they have to wear heels as the worksite is not a flat shoe worksite and b) being asked about their sexual experiences over a weekend by their employer many years older

125 respondents (43.9%) also stated they had experienced **inappropriate touching such as hugging, kissing, or placing a hand on their knee**. The Commission also heard from participants who provided further detail on the nature of this type of sexual harassment, including:

[I have] been inappropriately touched at professional dinners more times than I can remember.

I was grabbed inappropriately twice by a senior colleague. He denied both accounts however [others present] witnessed both incidents and reported them ...

Predatory behaviour and unwanted advances were also reported, with 54 respondents (18.9%) experiencing **repeated or inappropriate invitations to go on a date**, and 41 (14.4%) receiving **requests or pressure for sex or other sexual or intimate acts**. The Commission heard about these experiences in further detail, including one participant, who recounted her experiences with a senior male in her workplace:

[H]e said to me "You do know I want to fuck you, don't you?" And I said "Yes, I do know that ... but, you know, I'm not going to". And he said "I'll wear you down." And I said "No, you won't." And ... he [also said he] was going to get me drunk and take advantage of me.

The Commission received multiple survey responses from individuals who rejected advances from others in the profession, only to be punished for rebuking the harasser.

Examples provided include the harasser assigning the victim subordinate duties, the harasser not talking to the victim for long periods of time, and the harasser attempting to prevent the victim from securing another job.

It is deeply disturbing that there were 7 (2.5%) respondents to the survey who indicated that they had experienced **sexual violence or sexual assault**:

I was sexually assaulted by a member of the profession, who was also a friend.

[A] junior solicitor who 'jumped' me one evening when I was a salaried partner at a major firm and we were the last to leave Friday night drinks at the office.

Three participants detailed behaviour including gross indecency and indecent assault at the upper end of the range of seriousness of offences of this nature.

One complainant was a clerk, who endured relentless bullying for years at a former workplace, before then experiencing sexual harassment. The alleged perpetrator of the sexual harassment was a barrister. According to the participant, these instances of harassment persisted for some months and occurred in chambers while the complainant was performing her work. The most egregious conduct involved pinning the clerk against his desk, grabbing her by the hips and rubbing his groin against her buttocks, while making comments to the effect that men could be excused for being 'creeps' sometimes.

Another participant (a very junior practitioner) recounted a harrowing incident involving allegations of unwelcome and inappropriate sexual touching, kissing, repeated requests for sex and attempts to remove clothing.

The Commission was also told of an incident at an after-work event where the victim, at the time a university student completing work experience, was cornered in a bathroom by the male harasser who was senior in the profession. The harasser exposed his genitals to the victim, pushed them towards her face, and told her to 'suck it'.

The survey also found that 36 respondents (12.6%) had been exposed to **sexually explicit pictures, posters or gifts**, 30 (10.5%) **sexual gestures, indecent exposure or inappropriate displays of the body**, and 25 (8.8%) were **inappropriately followed, watched or had someone loitering nearby**.

Although only a small number of male respondents detailed the nature of the sexual harassment they had experienced in the workplace (24), the profile of sexual harassment types was similar for males and females, with two exceptions. Female respondents reported a higher percentage of inappropriate staring, leering etc. than males (51.9% compared with 37.5%) and male respondents were more likely than female respondents to indicate they had received sexually explicit pictures, posters or gifts (20.8% compared with 11.8% of female respondents).

The survey also asked about experiences of sexual harassment by other means, such as different forms of electronic communication. Of the respondents, 27.2% had experienced **sexually explicit comments made in emails, SMS messages or on social media**. The Commission also heard from multiple respondents about pornography in the workplace.

Approximately one-third (37.9%) of the 103 respondents to this question indicated they had experienced **other unwelcome conduct** not listed. Of those, 21 respondents provided further detail, including nine that identified other inappropriate sexual comments or advances, and two who had been offered employment contingent on sex.

There were 15 respondents (14.6%) who had experienced **repeated or inappropriate advances on email, social networking websites or internet chat rooms**, nine (8.7%) of whom had received **indecent phone calls or voicemail messages**.

Sharing or threatening to share intimate images or film without consent had happened to two respondents (1.9%), and almost one-third (32.0%) **preferred not to say** how they have been sexually harassed.

3.3.3. Location of the harassment

The survey asked those who had experienced sexual harassment to indicate where it had occurred. As some respondents had experienced sexual harassment on more than one occasion, the total number of locations reported exceed the number of respondents to the question. The locations in which harassment occurs may be relevant to whether the conduct can be said to be connected to legal practice. This is explored in Part 6.5.3 of the report.

280 respondents identified the locations where their sexual harassment occurred, three-quarters (74.3%) of whom had experienced **sexual harassment at the office**

or workplace and just over half (55.0%) **at a work event**. The vast majority of written submissions and interviews also described sexual harassment having occurred at a legal workplace or at a work-related event.

Worryingly, 10.0% of respondents had experienced sexual harassment **during a proceeding**.

Further examples provided by respondents included harassment occurring whilst travelling to or from work or a work event or whilst on a lunch break. One participant recounted an experience during a field trip of some days' duration, in which she was a passenger in a car driven by the perpetrator. During the course of the trip, 'he got more and more suggestive and then finally asked me to sit on his lap'.

3.3.4. Relationship to the harasser

Of those who had experienced sexual harassment, the majority (80.2%) identified that behaviours involved a **person more senior in the workplace**, including a **line manager or supervisor** (27.2%). This compares with only 25.8% of behaviours involving a **person at the same or junior level**. About a third of respondents reported the behaviour involved a **third party external to the workplace** (30.5%) and 12.9% reported that the behaviour was engaged in by a **judicial officer**. Further discussion as to the seniority of perpetrators appears in the following section of this report.

These findings reflect two of the significant drivers of sexual harassment within the legal profession – its hierarchical nature and that positions of authority are still largely male-dominated. These features also underpin the reticence to report instances of harassment. Factors contributing to the risk of sexual harassment are outlined at Part 4.1. of this report. Barriers to reporting are discussed at Part 3.7.

The survey also showed that perpetrators can be persons outside of the profession. Of those who specified the category into which the harasser fell, 18.3% had been sexually harassed by a **client or witness** (see Figure 8 below). This was also evidenced within free text responses, where four participants detailed that their clients had engaged in inappropriate behaviour. One of them stated that:

[m]y experiences of witnessing inappropriate conduct all arose in the context of behaviour by [government] clients towards my female colleagues.

I had a touchy-feely client in the last few years.

Figure 8: Relationship to sexual harasser

Value	Respondents	% Total Respondents
Someone else more senior than me in my workplace	148	53.0%
A third party in the legal profession (e.g. consultant, barrister or solicitor from another firm)	85	30.5%
My line manager or supervisor	76	27.2%
Someone at my level in my workplace	57	20.4%
A client or witness	51	18.3%
A judicial officer	36	12.9%
Someone junior to me in my workplace	15	5.4%
Other (please specify)	10	3.6%
Prefer not to say	7	2.5%
Total	279	100.0%

Note: Table excludes 343 respondents who did not provide an answer to Q12. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q12

In its fourth national survey on sexual harassment in Australian workplaces, the AHRC found that sexual harassment involving a single perpetrator was most likely to come from co-workers at the same level (27%), and that only 15% of respondents had experienced sexual harassment by a co-worker who was more senior, and 11% by a direct manager or supervisor.¹²⁵ In comparison, the Commission found that the majority of respondents - more than 50% - had experienced sexual harassment by someone more senior in their workplace, and more than a quarter by a line manager or supervisor. This suggests there is a specific challenge in addressing sexual harassment within the South Australian legal profession being that there is a power imbalance is a significant driver of sexual harassment.

3.3.5. Sexual harassment by a senior figure

In addition to the statistical results, sexual harassment from people in a position of power emerged strongly through the free-text responses to the survey. Many of the experiences recounted by respondents occurred when they were in a junior role and perpetrators were in a more senior position, including members of the judiciary.

¹²⁵ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces 2018* (Report, 12 September 2018) 38.

The Commission heard from 12 survey participants about sexual harassment whilst they were in junior positions, such as:

I was physically sexually assaulted (leg touching) as a law clerk by a partner at a Xmas function. This was very upsetting at the time as I was only 19.

I have seen a senior male barrister suggest a kick-on venue to a group of very junior women after professional dinners that when questioned turned out to be a strip joint.

The Commission also heard 12 accounts of harassment by persons in senior roles. Four respondents suggested the harassers were serial offenders. Experiences shared by participants included:

One involves repeated lewd, inappropriate, and harassing remarks made by a Magistrate ... and the other involves a sexual assault (groping and attempted forced kiss) by a former Judge.

[Several years ago] I was locked in a car on the way to a client function and verbally assaulted by a special counsel at the firm ... He told me all the ways he would have sex with me in the car. He never touched me, but did not stop explaining what he would do to me despite my protests.

The judicial officer agreed with me when I said he would not have done that to a male barrister. He then said to me, in front of colleagues at the bar and overheard by waiting staff, "I would like to throw you on the floor and fuck you now, I love strong women."

I have seen, and also experienced, many uncomfortable situations from men in the office ... I was absolutely shocked, however, to be continually harassed by a Magistrate. I remember being in his courtroom one morning whilst he was presiding over a matter and he was texting me inappropriately during the case. He said he was imagining me kneeling between his legs at the bench.

I attended a firm wide function. A senior partner told me he had been interested in me for years and requested I go back to the office with him to have sex. I declined and he continued to pressure me. I eventually managed to leave but it was extremely difficult. This senior partner is a serial offender.

3.3.6. Witnesses and bystanders

In total, 223 respondents (37.1%) indicated they had **witnessed someone else experience sexual harassment in the workplace**. This figure was higher for female respondents (41.0%) compared with males (27.9%).

3.3.7. Sexual harassment against men

The Commission recognises that there are many men in the profession who strive to effect cultural change across the sector. By no means is it suggested that all men contribute to the problem.

Many men made constructive and valuable contributions to the Review. One participant (who had experienced sexual harassment) detailed the support she had received from the male partner of her former firm, a practitioner to whom she now refers other women experiencing harassment.

Further, the Review heard of specific instances of sexual harassment against men from five respondents to the survey. Some experiences included:

[H]arassment can be perpetrated by a woman against a man, but ... mostly the framing of these scenarios is that the perpetrator is a man and the victim a woman. This is unhelpful when trying to get an accurate account of ALL harassing behaviour. My experience was very minor and occurred many years ago but at the time left me feeling very awkward. Also the female lawyer was much senior to me and I think the feeling at the time would have been just to "suck it up".

Despite my repeated requests not to be included in any such topics, a female colleague repeatedly spoke to me about dating me outside her marriage, or leaving her husband for me (a male). A few weeks after I had made clear this was not going to happen, she became extremely aggressive and rude towards me and has remained so.

A female managing partner would only hire male summer and winter clerks for her team. She never referred to them by name, even to their face, and instead referred to them as "[inappropriate descriptor of male physical characteristic] 1" and "[inappropriate descriptor of male physical characteristic] 2".

I think discriminatory behaviour against men in the workplace is unrepresented due to cultural expectations and constraints. I think it is important for men to feel supported in making a complaint. (I am a woman).

One participant also detailed a course of conduct involving a senior male at his workplace, who asked to go to lunch with the victim (who was a junior solicitor on a contract):

At lunch they made lots of comments asking me if they were 20 years younger would I date them, asking me why I didn't have a relationship, asking me all very personal questions. I started feeling really uncomfortable ... and so I took my jacket off, and I rolled my sleeves up, and they ... said "[name], I'm finding your forearms very distracting" and I said "Why, because they are hairy?" ... you know, as an attempt to joke, and they said "No, because I find them very attractive."

Another participant noted that, in addition to contending with the harassment itself, male victims also have to endure derision from their colleagues when the perpetrator is a woman:

But it was, you know, "You idiot, you were given this offer and you should have taken it up, you know, what sort of man are you?" sort of thing.

3.4. Nature and prevalence of discriminatory harassment

The survey sought to determine the nature and prevalence of discriminatory harassment across the South Australian legal profession.¹²⁶

3.4.1. Lack of diversity in the legal profession

As the Parliamentary Review observed, diverse workplace profiles, coupled with policies and practices that promote inclusivity, can operate as a protective factor against a workplace culture that accepts and condones sexual and discriminatory harassment. The Diversity Council of Australia has found that workers in inclusive teams are seven times less likely to experience harassment and discrimination than workers in non-inclusive teams.¹²⁷

¹²⁶ As with sexual harassment, the terms of reference did not call for an examination of the nature of discriminatory harassment. However, it was canvassed during the Review to give the prevalence of this conduct context.

¹²⁷ Jane O'Leary and Andrew Legg, Diversity Council of Australia, *DCA Suncorp Inclusion@Work Index 2017-2018: Mapping the State of Inclusion in the Australian Workforce* (2017) 2.

3.4.2. Prevalence of discriminatory harassment

The survey found that 42.1% of respondents had **experienced discriminatory harassment** at least once, including 34.6% on more than one occasion (see Figure 9).

Figure 9: Have you experienced discriminatory harassment in the legal profession?

Value	Respondents	% Total Respondents
No	245	42.8%
Yes, more than once	198	34.6%
Not sure	82	14.3%
Yes, once	43	7.5%
Prefer not to say	5	0.9%
Total	573	100.0%

Note: Table excludes 49 respondents who did not provide an answer to Q27.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q27

The prevalence of discriminatory harassment was higher for females (49.2%) compared with males (25.7%).

3.4.3. Nature of discriminatory harassment

The survey sought to understand the nature of discriminatory harassment in the legal profession by asking respondents to confirm if they have been the subject of discriminatory harassment in the form of **inappropriate jokes and comments**, or **unfavourable treatment, based on a personal attribute** (see Figures 10 and 11, below).

Figure 10: Experiences of inappropriate jokes and comments

Value	Respondents	% Total Respondents
Your sex (incl. pregnancy, if relevant)	134	50.6%
Your age	74	27.9%
Your caring responsibilities	71	26.8%
Your marital status	47	17.7%
Your race	42	15.8%
Your gender identity	37	14.0%
Prefer not to say	19	7.2%
Your spouse or partner's identity	18	6.8%
Your sexual orientation	16	6.0%
A disability (or disabilities) you live with	7	2.6%
Total	265	100.0%

Note: Table excludes 357 respondents who did not provide an answer to Q28. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q28

Figure 11: Experiences of unfavourable treatment

Value	Respondents	% Total Respondents
Your sex (incl. pregnancy, if relevant)	122	49.2%
Your age	72	29.0%
Your caring responsibilities	69	27.8%
Your gender identity	36	14.5%
Prefer not to say	25	10.1%
Your marital status	25	10.1%
Your race	24	9.7%
Your spouse or partner's identity	11	4.4%
A disability (or disabilities) you live with	9	3.6%
Your sexual orientation	8	3.2%
Total	248	100.0%

Note: Table excludes 374 respondents who did not provide an answer to Q29. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q29

The most common type of discriminatory harassment experienced was offensive jokes or comments made on the basis of **sex (including pregnancy)** (50.6% of respondents who answered this question). Sex (including pregnancy) was also the most common attribute associated with unfavourable treatment, with 122 respondents (49.2%) who answered this question indicating they had experienced it.

Survey participants provided further details on their experience of discriminatory harassment on the basis of their sex, including:

I have been actively omitted from meetings with clients as senior colleagues have thought the client had negative views of women, and later found that wasn't the case but was actually senior colleagues projecting their views.

The men in my team also get given the better files and taken out for lunch by one of the partners on a regular basis. Me and a female junior solicitor are never invited.

... there is a constant undermining of young women in law at a culture level, [including] expecting female lawyers to collect coffees and refill glasses

Many managers prefer to hire men (junior or senior), and tend to perceive male candidates as being more deserving of opportunities. This preference appears to be ingrained and unconscious. Even in government environments where wages are standardised and there may not be a "gender pay gap" between solicitors at the same level, opportunities are often awarded to men, resulting in their careers progressing ahead of their female contemporaries.

[There is a] prevalent culture of maintaining secrecy for pay rates (which disadvantages women who are not encouraged to argue for higher pay like male counterparts).

In addition to discriminatory harassment with sex as its basis, around one-quarter of respondents had experienced offensive jokes or comments about their **age** (27.9%). Age was also a common reason for unfavourable treatment, with 72 respondents (29.0%) indicating they had experienced it.

Further, around one-quarter of respondents had experienced offensive jokes or comments about their **caring responsibilities** (26.8%), along with 69 respondents (27.8%) who had been treated unfavourably because of that same characteristic. A strong theme emerged through 19 free text responses of discrimination on the basis of taking maternity leave or undertaking part-time work, including the loss of promotional opportunities, demotion or termination. The Commission heard:

My managers, barristers and senior colleagues have made discriminatory remarks about me being part-time and about my pregnancies on too many occasions to count. There is also a general attitude that I do not deserve the same opportunities as full-time male staff, because I have children and therefore must be "less committed" to the role. This

attitude openly persists despite me usually working more hours per workday and often achieving better outcomes than them.

I have had my employment terminated on two separate occasions, one was the day I was due to go on maternity leave with my first child and the second was the day I got out of hospital having delivered my second child ... Needless to say, correspondence received from each employer made outrageous allegations of misconduct, clearly designed as a deterrent from taking any action against the employers in relation to either unlawful termination or discrimination.

The Commission also heard of the inbuilt bias affecting workers with caring responsibilities. One participant advised:

The applications for moving up pay levels I consider has always discriminated against part-time employees by for example at [workplace], introducing that you had to complete a certain number of trials to be eligible. This precluded part-time workers with child-caring responsibilities from ever progressing as they may only work a part of a week and therefore not be able to commit to a trial, potentially designed to deter them from undertaking certain roles ...

A similar barrier to progression and opportunities was experienced by another participant:

They made it compulsory, even though they had a number of single mothers on the committal team, made it compulsory to go on circuit, which is absolutely impossible for single mothers.

An alternative view was presented by a male survey participant:

As a male, I find that sexual harassment is rife against males but is rarely acknowledged or understood. Only women may access flexible working arrangements for caring responsibilities and only women are supported if they wish to move to part-time work for whatever reason. Cultural stereotypes of gender roles are perpetuated in these ways. Women are advantaged in promotions, training for leadership roles, and talent identification based on their sex, rather than talent or experience. This is justified on the basis of a pursuit of mandated partnership equality goals (40/40/20 being the goal, not merit based).

Race was the subject of 15.8% of offensive jokes or comment experiences, and to a lesser extent unfavourable treatment (9.7%). **Marital status** was slightly more likely to be associated with offensive jokes or comments than unfavourable treatment (17.7%, 10.1%). The number of respondents indicating offensive jokes or comments or unfavourable treatment were closely aligned for the factors of **gender identity** (14.0%, 14.5%), **a spouse or partner's identity** (6.8%, 4.4%), **sexual orientation** (6.0%, 3.2%), and **a disability (or disabilities)** (2.6%, 3.6%).

The profile of responses about discriminatory harassment was very different according to gender. Female respondents were more likely to have experienced jokes or comments on the basis of their sex (58.4% compared to 17.1% for males) and caring responsibilities (29.9% compared to 11.4%). A higher percentage of female respondents reported unfavourable treatment on the basis of sex (60.2%) compared with males (8.6%), and a higher percentage of female respondents reported unfavourable treatment on the basis of caring responsibilities (31.5%) compared with males (11.4%).

Male respondents were more likely to have experienced jokes or comments on the basis of their age (34.3% compared to 26.4% for females) or race (28.6% compared to 13.7%). There were little to no differences in the percentages of males and females experiencing unfavourable treatment on the basis of age.

One participant, who identified as being culturally and linguistically diverse, described the subtlety of unfavourable treatment in this way:

[T]his is my experience with discrimination. People are very clever about how they have their prejudice, you know. [They] can just act it by not doing things ... or by intimidation. But they're not going to come out and say "You know what, I really hate that you are in that programme and I hate that [you] have that" they're not going to say that. They're not stupid.

3.4.4. Location of discriminatory harassment

There were 291 respondents who identified the locations where discriminatory harassment occurred. Discriminatory harassment was most likely to occur **in the workplace**, with 81.1% of respondents indicating this. Discriminatory harassment had been experienced **at a work event, such as a dinner, conference or social event**,

by almost a quarter of respondents (24.1%) and, troublingly, almost 20% of respondents had experienced it **during a proceeding**.

Respondents also indicated that discriminatory harassment occurred **at the office of a third party legal professional** (13.4%), **at the office of another third party** (such as a client or witness) (7.6%), **via telephone, email, SMS or social media** (6.5%) and **whilst travelling for work** (3.4%). In total, 9 respondents indicated they had experienced discriminatory harassment during a recruitment process, such as in a **job application or interview**.

3.4.5. Relationship to the harasser

The survey asked those who had experienced harassment on the basis of a personal attribute to indicate their relationship to the harasser (see Figure 12).

Figure 12: Relationship to discriminatory harasser

Value	Respondents	% Total Respondents
Someone more senior than me (other than a line manager or supervisor)	148	52.1%
My line manager or supervisor	120	42.3%
A third party (e.g. consultant, barrister or solicitor from another firm)	63	22.2%
Someone at my level	57	20.1%
A judicial officer	49	17.3%
A client or witness	36	12.7%
Someone in a support function	16	5.6%
Someone junior to me	14	4.9%
Other (please specify)	12	4.2%
Prefer not to say	9	3.2%
Total	284	100.0%

Note: Table excludes 338 respondents who did not provide an answer to Q31. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q31

Of those who had experienced discriminatory harassment, the vast majority (94.4%) identified that the behaviours involved a **person more senior in the workplace**, including a **line manager or supervisor** (42.3%). This compares with only 25.0% of behaviours involving a **person at the same or junior level**. About a fifth of respondents reported the behaviour involved a **third party external to the workplace**

(22.2%) and 17.3% reported the behaviour was by a **judicial officer**.

The survey also showed that harassment can come from persons outside of the profession. Of those who nominated the category into which the perpetrator fell, 12.7% said a client or witness. This was also identified within free-text responses:

As a legal practitioner appearing in Court I was subject to offensive and discriminatory language intermittently over the course of several days based on my presumed (accurately) sexuality from members of the public gallery. This included “poofter”, “faggot”, “fairy”. These were my opponents’ clients.

Female respondents were more likely to report that the harasser was someone senior to them (other than a line manager or supervisor) (53.7%), compared to male respondents (40.0%). Male respondents were more likely than females to indicate the person was a judicial officer (25.0% compared with 15.7%).

3.4.6. Witnesses and bystanders

In total, 254 respondents (45.6%) indicated they had witnessed someone else experience discriminatory harassment in the legal profession. This figure was higher for female respondents (54.9%) compared with males (28.6%).

3.4.7. Discriminatory harassment by a senior figure

Consistent with the Commission’s findings in relation to sexual harassment, and in addition to the statistical results, a strong theme of discriminatory harassment from people in a position of power emerged through the free-text responses to the survey.

Respondents noted there is a significant power imbalance in the legal profession in favour of white men, and this an important factor in the prevalence of and responses to harassment and discriminatory behaviour.

It was noted repeatedly that senior positions are predominantly held by men, who are often the perpetrators of the discriminatory behaviour, contributing to a strong perception that the legal profession is fundamentally a ‘boys’ club’ that tolerates bad behaviour. Seven participants referred to the legal profession as a ‘boys’ club’ or as involving ‘jobs for the boys’. The Commission also heard:

Attention needs to be paid to prevention of the issue occurring in the first place (with particular attention to the role of power in sexual harassment and also the impact of the fact that the legal profession is still very male dominated in the senior ranks) ...

A number of survey participants noted that more women in positions of power has not changed the treatment of women, with some women enabling the continuation of abuse. One participant observed:

... as more women join the profession and move to positions of power, I had hoped to see a change in the way women were treated in the profession. This has not been my experience. Those women who do take positions of power generally engage in the work of the patriarchy and continue to support and protect men.

3.5. Impacts of harassment

Although the terms of reference did not task the Commission with an analysis of the impacts of harassment, it is critical to understand those outcomes in order to assess the efficacy of the complaint mechanisms under consideration. As one free-text response noted:

These effects are often trivialised or disregarded.

Throughout free-text survey responses, respondents detailed the impact that sexual and discriminatory harassment had on them. Those effects were palpable during the interviews. There were also consequences as a result of reporting, which are discussed in Part 3.6 further below.

The Commission heard of harassment causing stress and mental health issues, and impacts on home life:

The discrimination suffered was quite varied ... From seemingly quite mild to [the] point when I would go home and vomit due the stress and anxiety it caused.

[of working part-time] Ultimately you feel inadequate at work and return to working more hours than you are comfortable with and your home life suffers.

There was also reportedly an expectation that, having endured harassment, victims would brush it aside and 'get on with it'. One participant indicated that they had complained to their employer about bullying and discriminatory harassment in a workplace, which had resulted in them being ostracised and ignored. This had occurred in the practitioner's first workplace in the legal profession, and had therefore shaped and tarnished her initial experiences as a solicitor. The victim raised the experience in discussing professional development and was asked why it was being raised because it was 'a long time ago.'

Several survey participants reported that their experiences of harassment and discrimination had caused them, or colleagues, to miss development opportunities, to leave the business, or the legal profession all together. Responses included:

I resigned from a private firm due to the way I was treated when disclosing my pregnancy. It was obvious that pregnancy/motherhood were incompatible with my senior position.

I left private practice to work for Government as an in-house legal counsel and while I have had opportunities to go back to private practice, I don't feel safe to.

Because really the lingering issue I have with the whole event is that I lost five years of experience in a practice area that I really like doing.

Fortunately, not all experiences in the legal profession are negative. The survey heard from many respondents about their positive experiences, including one participant who, having endured sexual assault and bullying at one workplace, has since secured employment in a supportive environment. Some participants detailed their positive views:

In each environment I have worked in, my colleagues and bosses have been respectful and professional.

Working under the [named workplace] in SA, I am proud to say as a female I have never experienced feelings of being uncomfortable in my workplace. The culture here at [workplace] is remarkable.

I am thankful that [current senior] is an extremely respectful gentleman who has never been inappropriate, nor have I ever heard him speak inappropriately of anyone else.

3.6. Experiences of reporting sexual and discriminatory harassment

3.6.1. Reporting sexual harassment

Survey participants that had experienced or witnessed sexual harassment were asked if they have ever **reported sexual harassment**, and, if so, their experiences with that process. The survey found that the majority of respondents who answered this question had not reported the harassment (69.4%) (see Figure 13 below). There were 105 respondents that indicated they reported sexual harassment, however only about 25% did so on every occasion. Male respondents were slightly more likely than

females to indicate they had reported the behaviour *sometimes* (25.9% compared with 21.1%), but less likely to report on *all occasions* (1.9% compared with 6.9%).

Figure 13: Have you reported sexual harassment?

Value	Respondents	% Total Respondents
No	252	69.4%
Yes - sometimes	79	21.8%
Yes - on all occasions	26	7.2%
Prefer not to say	6	1.7%
Total	363	100.0%

Note: Table excludes 259 respondents who did not provide an answer to Q16.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q16

Participants were also asked to indicate **how many reports** they had made in the past five years. Almost 45% indicated they preferred not to say. Of the remaining 61 respondents who had reported sexual harassment, 48 (78.6%) had made one report. 13 respondents had made more than one report in the past five years.

Nearly half of the respondents (46.7%) who had reported sexual harassment did so on the same day or on the next working day, and 20.0% did so within a month (but not straight away). There were nine respondents (8.6%) who took more than six months before reporting the sexual harassment. The majority of respondents (68.6%) reported the incident to a manager or co-worker at a higher level, followed by an internal workplace channel, such as the Human Resources department (23.8%). A further 24 respondents (22.9%) reported the incident to a legal representative or external agency, including nine to a lawyer or legal service, four to the Commission, four to the LPCC and three to the Law Society (see Figure 14).

Figure 14: To whom was the sexual harassment reported

Value	Respondents	% Total Respondents
My manager or a co-worker at a higher level	72	68.6%
An internal workplace channel (e.g. HR)	25	23.8%
Someone else (please specify)	17	16.2%
A lawyer or legal service	9	8.6%
The Legal Profession Conduct Commissioner	4	3.8%
The SA Equal Opportunity Commission	4	3.8%
The Law Society of SA	3	2.9%
Prefer not to say	2	1.9%
A union or employee representative	1	1.0%
I lodged a worker's compensation claim	1	1.0%
South Australia Police	1	1.0%
The Women Lawyers Association of South Australia	1	1.0%
Total	105	100.0%

Note: Table excludes 517 respondents who did not provide an answer to Q20. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q20

Colleagues and friends were cited by 13 of the 17 respondents who indicated they had reported it to someone else.

In considering changes to reporting processes in this Review, it is important to note that many victims report their experiences within their workplace. This is consistent with the data provided by stakeholders such as the LPCC, which revealed very low numbers of reports to those bodies. It will therefore be critical to ensure that improvements are made to existing policies and structures within individual workplaces. These recommended improvements are discussed at Parts 4 and 6.5.1 of this report.

Survey participants who had reported sexual harassment were asked of the **impacts on them** of the reporting experience (see Figure 15 below). 41.7% of the respondents to this question did not experience any consequences as a result reporting the behaviour, whilst 16.5% received a positive outcome. About one-third (31.1%) had a negative outcome, including 17.5% who left the workplace and 11.7% who were treated adversely. Male respondents reported more favourable outcomes for

themselves, with 80% indicating no consequences or a positive outcome, compared with 56.0% for females.¹²⁸

Figure 15: Impacts on reporter of sexual harassment

Value	Respondents	% Total Respondents
There were no consequences for me	43	41.7%
I left that workplace	18	17.5%
I received some positive outcome (e.g. the harassment stopped, or an apology, compensation or positive feedback was received)	17	16.5%
I was treated adversely (e.g. transferred, demoted, disciplined, denied opportunities, ostracised, victimised or ignored)	12	11.7%
There were some other consequences for me (please specify)	12	11.7%
Don't know	9	8.7%
Prefer not to say	5	4.9%
I left the legal profession	2	1.9%
I signed a non-disclosure agreement	2	1.9%
Total	103	100.0%

Note: Table excludes 519 respondents who did not provide an answer to Q21. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q21

For those who had reported sexual harassment, about half (46.1%) of the respondents indicated there were no consequences to the **person they reported**. One-quarter (25.5%) were disciplined or ‘spoken to’. Including the *other consequences for the perpetrator*, nine of the persons left the workplace through resignation, reassignment, termination or changed work location (see Figure 16).

¹²⁸ 15 respondents were male, 72 respondents were female.

Figure 16: Impacts on sexual harasser who was reported

Value	Respondents	% Total Respondents
There were no consequences for that person	47	46.1%
They were disciplined internally, or were informally spoken to	26	25.5%
Don't know	10	9.8%
There were some other consequences for the perpetrator (please specify)	7	6.9%
They resigned	6	5.9%
Prefer not to say	4	3.9%
They apologised or compensated me	4	3.9%
The reporting process is still underway	2	2.0%
Total	102	100.0%

Note: Table excludes 520 respondents who did not provide an answer to Q22. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q22

3.6.2. Reporting discriminatory harassment

Survey participants were also asked if they had ever **reported discriminatory harassment**, and for their experiences with the reporting process (see Figure 17, below). The survey found that the majority of respondents who answered this question had not reported the discriminatory harassment they experienced or witnessed (73.1%). There were 88 respondents that indicated they had reported discriminatory harassment, however only about 15% did so on all occasions. There were no differences in reporting rates according to gender.

Figure 17: Have you reported discriminatory harassment?

Value	Respondents	% Total Respondents
No	263	73.1%
Yes - sometimes	75	20.8%
Yes - on all occasions	13	3.6%
Prefer not to say	9	2.5%
Total	360	100.0%

Note: Table excludes 262 respondents who did not provide an answer to Q35.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q35

Participants were also asked to indicate how many **reports** of discriminatory harassment they had made in the past five years. Almost 35% indicated they preferred not to say. Of the remaining 64 respondents who had reported discriminatory harassment, 35 (54.7%) had made one report. 29 respondents had made more than one report in the past five years.

More than a third of respondents (38.5%) who had reported discriminatory harassment did so on the same day or on the next working day, and 25.0% did so within a month (but not straight away). There were six respondents (6.3%) who took more than six months before reporting the discriminatory harassment.

The majority of reports of discriminatory harassment were made to a manager or a co-worker at a higher level (57.3%), followed by an internal workplace channel (27.1%). As with the reporting of sexual harassment, it is noted that the majority of reports were made within a workplace. The Commission recommends that workplaces focus on improving policies and processes to ensure that victims are supported when making reports.

28.1% of reports were made to a lawyer or legal service, or other agency (including the Law Society, the LPCC, ICAC, or a union) (see Figure 18, below).

Figure 18: To whom was the discriminatory harassment reported

Value	Respondents	% Total Respondents
My manager or a co-worker at a higher level	55	57.3%
An internal workplace channel (e.g. HR)	26	27.1%
Prefer not to say	11	11.5%
A lawyer or legal service	10	10.4%
Someone else (please specify)	10	10.4%
A union or employee representative	6	6.3%
The Law Society of SA	3	3.1%
The Judicial Conduct Commissioner	2	2.1%
The Legal Profession Conduct Commissioner	2	2.1%
South Australia Police	1	1.0%
The Independent Commissioner Against Corruption (ICAC)	1	1.0%
The SA Equal Opportunity Commission	1	1.0%
The Women Lawyers Association of South Australia	1	1.0%
Total	96	100.0%

Note: Table excludes 526 respondents who did not provide an answer to Q39. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q39

Both males and females were most likely to report to a manager or co-worker at a higher level (57.1% and 61.2% respectively). Males were more likely to make a report to a lawyer or legal services (19.0%) than females (7.5%).¹²⁹

Survey participants who had reported discriminatory harassment were asked about the **impacts on them** of reporting the conduct (see Figure 19 below). Approximately one third (30.2%) of the respondents to this question did not experience any consequences as a result of reporting the behaviour. Nearly half of respondents (45.3%) had a negative outcome, including 22.1% who were ostracised, victimised or ignored, 18.6% who were denied workplace opportunities, and 4.6% who were demoted or disciplined. In addition, 23.3% of respondents were transferred, left the firm or left the profession altogether.

¹²⁹ 21 respondents to this question were male.

Figure 19: Impacts on reporter of discriminatory harassment

Value	Respondents	% Total Respondents
There were no consequences for me	26	30.2%
I was ostracised, victimised or ignored by colleagues	19	22.1%
There were some other consequences for me (please specify)	19	22.1%
I was denied workplace opportunities, such as training or promotion	16	18.6%
I left that workplace	13	15.1%
Prefer not to say	8	9.3%
I received positive feedback for reporting the behaviour	7	8.1%
The harassment stopped	7	8.1%
I was transferred to a different department/section	4	4.7%
I left the legal profession	3	3.5%
My employer or manager apologised for failing to prevent the harassment	3	3.5%
I signed a non-disclosure agreement	2	2.3%
I was demoted	2	2.3%
I was disciplined	2	2.3%
My employer paid me compensation because of the harassment	1	1.2%
Total	86	100.0%

Note: Table excludes 536 respondents who did not provide an answer to Q40. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q40

Female respondents were more likely than males to indicate a negative outcome from reporting discriminatory harassment, including being ostracised, victimised or ignored (26.7% compared with 5.3% for males) and denied workplace opportunities (23.3% compared with 5.3% for males).

For those respondents who had reported discriminatory harassment, half (50.5%) indicated there were no consequences for the **person they reported**. Approximately one fifth (21.1%) were disciplined or 'spoken to' (see Figure 20).

Figure 20: Impacts on discriminatory harasser who was reported

Value	Respondents	% Total Respondents
There were no consequences for that person	48	50.5%
Don't know	15	15.8%
They were informally spoken to	13	13.7%
They apologised	8	8.4%
Prefer not to say	6	6.3%
They were disciplined internally within the workplace	4	4.2%
I was not told the outcome for that person	3	3.2%
They were formally warned	3	3.2%
They resigned	2	2.1%
The reporting process is still underway - other outcomes are unknown at present	1	1.1%
There were some other consequences for the perpetrator (please specify)	1	1.1%
Total	95	100.0%

Note: Table excludes 527 respondents who did not provide an answer to Q41. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q41

One respondent even indicated that the perpetrator of the harassment had received a promotion and shareholding following a report being made about their behaviour.

3.6.3. Satisfaction with the reporting process

For respondents who had reported sexual harassment, just over half (52.0%) were *somewhat* or *extremely dissatisfied* with the reporting process, including one-third of whom were *extremely dissatisfied*. In contrast, only 13.0% were *somewhat* or *extremely satisfied* (see Figure 21).

Figure 21: Satisfaction with reporting process- sexual harassment

Value	Respondents	% Total Respondents
Neither satisfied nor dissatisfied	35	35.0%
Extremely dissatisfied	33	33.0%
Somewhat dissatisfied	19	19.0%
Somewhat satisfied	11	11.0%
Extremely satisfied	2	2.0%
Total	100	100.0%

Note: Table excludes 522 respondents who did not provide an answer to Q23.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q23

Levels of satisfaction in the reporting process for discriminatory harassment were markedly lower than sexual harassment, with 70.2% of respondents *dissatisfied* with the reporting process, including 37.2% who were *extremely dissatisfied*. In contrast, only 8.5% were *somewhat* or *extremely satisfied* (see Figure 22).

Figure 22: Satisfaction with reporting process- discriminatory harassment

Value	Respondents	% Total Respondents
Extremely dissatisfied	35	37.2%
Somewhat dissatisfied	31	33.0%
Neither satisfied nor dissatisfied	20	21.3%
Somewhat satisfied	5	5.3%
Extremely satisfied	3	3.2%
Total	94	100.0%

Note: Table excludes 528 respondents who did not provide an answer to Q42.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q42

Overall, the levels of satisfaction with complaint processes was very low. In comparison, the 2018 AHRC survey on sexual harassment found 60% of respondents who made a formal report or complaint were satisfied with the outcome, with 35% extremely satisfied.¹³⁰ Although respondents to the Review were not limited to formal complaint mechanisms when reporting satisfaction levels, the Commission found that there are inherent barriers to reporting in the legal profession that lead to distrust in

¹³⁰ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces 2018* (Report, 12 September 2018) 78.

formal complaint pathways and a relative predominance of informal complaints, contributing to lower satisfaction levels.

3.7. Barriers to reporting

As previously stated in Part 3.6.1, when asked about reporting of harassment, 69.4% of respondents said they had never reported the sexual harassment they had experienced or witnessed, and 73.1% had not reported discriminatory harassment. The survey asked these respondents to provide the reasons for not reporting.

The most common **reason for not reporting sexual harassment** was concern over what might happen to them, including career prospects and retribution (47.5% of respondents). A similar percentage of respondents indicated they did not know it was sexual harassment or didn't think the sexual harassment was serious enough (44.3%). Respondents also did not report sexual harassment because they didn't think any action would be taken (36.5%) or because the harasser was too powerful within the profession (27.5%). Concern about damaging the reputation of the workplace, peers and/or profession (17.6%) and sexual harassment being accepted in the legal profession (16.4%) were also common reasons not to report such conduct.

The reasons for not reporting sexual harassment were different according to gender. In reporting sexual harassment, females were more likely to be concerned about the consequences to them (50.3% compared with 35.9% of males) or indicate they did not know it was harassment (50.9% compared with 35.9% for males). A higher percentage of females also felt that no action would be taken (38.9% compared with 25.6% of males).

The most common **reason for not reporting discriminatory harassment** was concern over what might happen to them, including career prospects and retribution (52.0% of respondents). A similar percentage of respondents indicated they did not think any action would be taken (50.7%), whilst 36.1% did not know it was harassment or think it was serious enough. Meanwhile, 73 (32.2%) respondents indicated that discriminatory harassment is accepted in the legal profession, and 59 (26.0%) indicated the harasser was too powerful within the profession. In addition, 15.9% did not report because they did not have anyone they could talk to or trust.

The reasons for not reporting discriminatory harassment were different according to gender. Females were more likely to be concerned about the consequences to them (55.2% compared with 34.3% of males) or indicate they did not know it was

harassment (38.5% compared with 28.6% for males). A higher percentage of females also felt that no action would be taken (51.1% compared with 45.7% of males).

The fear that making a complaint would have a significant detrimental impact upon their career progression emerged as a strong theme amongst free-text responses from survey participants:

We were told that if we report assaults we will be unemployable.

The main issue I have faced is the potential backlash and impact it would have on my career. I feel silenced by the profession and have been counselled by colleagues to not complain because of the impact it will have.

I didn't want us to be seen as a law firm that complains about other solicitors or give us any sort of reputation for being difficult.

In addition, responses indicate that there is a perception for some within the legal profession that they will be seen as causing problems if they make a complaint:

I would be viewed as "one of them".

Any woman who does complain is "problematic"

I thought sexist and rude comments about women in the workplace was just a part of acceptable culture and one I had to endure. Would have felt like a troublemaker if I complained at the time.

3.8. Power imbalance

The survey also identified the effects of power imbalance on the likelihood of reporting, with power differentials between victims and harassers making it less likely that incidences of sexual and discriminatory harassment would be reported. Responses included:

[I]f you're a junior lawyer and you make a complaint against a barrister or a partner, you're likely to face consequences for the rest of your career - whether intended or not. People will look at you differently, see you as not being "fun" or able to take a joke and you will be held back. This stops people from reporting in the first place. Even if you were to report anonymously, it's likely the perpetrator would figure out who it was and you'd face the same repercussions.

We know our rights but we are too scared to enforce them, we know we will be silenced with non-disclosure agreements in return for paltry sums while we will never be hired in the legal profession again. It is a small profession, and the power is still held by a few old white, conservative men.

The Commission found clear evidence of the need to improve complaint avenues to remove barriers to reporting. This is discussed further in Part 6. More significant, however, was the overwhelming response about a professional culture which permits this conduct to occur in the first place. There must be recognition that no changes to process will, of themselves, effect the required change. The Commission's findings about attitudes to complaint mechanisms must be considered in this context. Those findings are discussed at Part 6.1 of this report.

3.9. Bullying

Throughout the free-text survey responses the Commission heard of many examples of inappropriate workplace behaviour indicative of bullying and harassment of a general nature. Interview participants also discussed bullying they had experienced. The examples of bullying involved a broad range of workplaces in the profession, including firms, chambers and courts.

Although bullying did not fall within the scope of the survey, the Commission has been provided with enough examples to indicate that bullying is just as prevalent in the legal profession as sexual and discriminatory harassment. This was to be expected, with the Respect@Work Report making similar findings. It concluded that the coexistence of a range of inappropriate workplace behaviours, including sexual and discriminatory harassment, is the result of a culture that tolerates incivility. This is exemplified within responses detailing the perceived culture of the Courts Administration Authority:

Bullying, Harassment and Intimidation starts at the top. The numbers of Justices, Judges and Magistrates I have seen bullying and intimidating all variety of staff, and court visitors, is disgraceful. Bullying, Harassment and Intimidation is endemic in the CAA. Managers see what these Judges etc say and do and simply get away with their behaviour or conduct uninhibited, so they follow suit.

Misogyny and sexist/harassing behaviours, particularly against women, are rampant within the legal sector from both judicial officers and counsel. Within the CAA, it is often acknowledged as a 'joke' that certain judicial officers are 'just like that' confirming the belief that if a report were to be made, no action would be taken and the person making the report would be ostracised. For example, comments have been made to me

repeatedly by a single judicial officer (many of these overheard by management or other judicial officers) and nothing has been done. I have felt that I am expected to laugh it off rather than make waves for myself and the CAA ...

4. Preventative mechanisms

4.1. Factors driving harassment

Sexual harassment, while generally perpetrated on a one-on-one basis, is not simply an individual problem; it is a social problem that is part of a broader pattern of gendered violence underpinned by complex and interrelated drivers at the individual, organisational and societal levels.¹³¹ Understanding these drivers is key to understanding how to prevent and effectively respond to such behaviour. Many of these negative drivers will also serve to perpetuate discriminatory harassment.

4.1.1. General workplace conditions

In 2016, the United States Select Task Force on the Study of Harassment in the Workplace highlighted several conditions of a workplace generally, the presence of which increase the likelihood of harassment occurring. These conditions include:

- Homogenous workforces in which there is a lack of diversity
- Workplaces with 'high value' employees
- Isolated work environments
- Workplace cultures that tolerate or encourage alcohol consumption
- Decentralised workplaces
- Workplaces within which there exist significant power disparities.¹³²

These risk factors can certainly be present within various legal profession workplaces. In order to be effective, preventative measures must take account of the salient features unique to the legal profession that contribute to the particularly high rates of harassment experienced by its members.

4.1.2 Gender inequality

Traditionally, sexual harassment was considered to be 'an aberration perpetrated by deviant individuals' that resulted from 'feelings of sexual desire'.¹³³ A growing body of evidence, including our own survey results, now suggests that, as a form of violence overwhelmingly perpetrated by men against women, harassment has a root cause in gender inequality.¹³⁴ A recent United Nations General Assembly resolution stated, for

¹³¹ Our Watch, Submission No 281 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (27 February 2019) 11.

¹³² See generally Chai R Feldblum and Victoria A Lipnic, *Select Task Force on the Study of Harassment in the Workplace* (Report, June 2016).

¹³³ *Respect@Work* (n 1) 141.

¹³⁴ *Respect@Work* (n 1) 138, 141.

example, that ‘violence against women and girls, including sexual harassment, is rooted in historical and structural inequality in power relations between men and women’¹³⁵, as opposed to ‘the misbehaviour of a few misguided or malicious individuals’.¹³⁶

The results of the Review’s survey confirm that more than half of all participants who identified as female indicated that they had experienced sexual harassment in the legal profession, compared with 13.6% of the participants who identified as male. Similarly, nearly half of respondents who indicated that they had experienced discriminatory harassment identified as female, while a quarter of respondents identifying as male indicated that they had experienced discriminatory harassment. While not discounting the significant percentage of men who experience sexual and discriminatory harassment, these results confirm that incidents of sexual and discriminatory harassment in the legal profession are ‘largely gender based and influenced’.¹³⁷ That is, sexual harassment is a gendered phenomenon and must be addressed as such.

Participants recognised this, commenting that the profession needed to ‘work towards remedying the causes of gendered discrimination.’ Another participant similarly noted that:

The reality is that I have grown to accept a level of sexual harassment as part and parcel of my job. I have come to expect to be treated slightly differently because I am a woman who works in a predominantly male environment.

Drawing on the research conducted as part of the national framework for the prevention of violence against women, ‘Change the Story’, Respect@Work explained that ‘gender inequality in our society is reinforced and maintained through social norms, practices and structures that are highly gendered’.¹³⁸ These norms, practices and structures include:

¹³⁵ *Intensification of efforts to prevent and eliminate all forms of violence against women and girls: sexual harassment*, GA Res 73/148 UN Doc A/RES/73/148 (17 December 2018) 2.

¹³⁶ Purna Sen et al, *Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo* (Report, November 2018) 12.

¹³⁷ Paula Baron, ‘The Elephant in the Room? Lawyer Wellbeing and the Impact of Unethical Behaviours’ (2015) 41(1) *Australian Feminist Law Journal* 87, 99, citing Jacqui Hutchinson and Joan Eveline, ‘Workplace Bullying Policy in the Australian Public Sector: Why Has Gender Been Ignored?’ (2010) 69(1) *Australian Journal of Public Administration* 47. See also *Victorian Harassment Report* (n 15) 80; Australian Human Rights Commission, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (Report, 2012) 12; International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, May 2019) 32 (*‘Us Too? Report’*).

¹³⁸ *Respect@Work* (n 1) 142, citing Kim Webster and Michael Flood, ‘Framework Foundations 1: A Review of the Evidence on Correlates of Violence Against Women and What Works to Prevent It’

- Condoning violence against women
- Male control of decision making and limits to female independence
- Rigid gender roles and stereotyped constructions of masculinity and femininity
- Male peer relations that emphasise aggression and disrespect towards women.¹³⁹

The presence of a number of these drivers within the legal profession has been considered in several other studies having observed a correlation between gender inequality and rates of sexual harassment in the legal profession.¹⁴⁰

Respect@Work also found that other forms of disadvantage (for example, age, sexual orientation, Aboriginal or Torres Strait Islander status and disability) perpetuate harassment when they intersect with gender inequality. As the Inquiry explained:

[A]n intersectional understanding of sexual harassment acknowledges that while gender inequality underpins sexual harassment, it is not the only factor in every context. It may intersect with other relevant factors, such as race, age, disability, sexual orientation or class, for example.¹⁴¹

The Law Council notes that ‘men continue to dominate senior leadership positions’,¹⁴² despite entering the profession at approximately the same rate as women. This results in men being in positions of power, control, dominance and structural advantage vis-à-vis their female counterparts, and creates organisational contexts in which men are more likely to feel entitled to engage in sexual and discriminatory harassment. Women, however, have less power to challenge these behaviours.

4.1.3. Hierarchical structure

The legal profession is characterised by imbalances of authority and steep power gradients between and amongst judicial officers, practitioners, administrative and support staff, clients, witnesses and other members of the profession. In their National Action Plan, the Law Council observed that ‘senior colleagues largely determine the work that a lawyer gets to do, and career advancement is ‘often strongly dependent

(Research Paper, 2015) 13–4; Our Watch, Australia’s National Research Organisation for Women’s Safety and VicHealth, *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (Report, 2015) 8 (‘Change the Story’).

¹³⁹ *Change the Story* (n 138) 8.

¹⁴⁰ See, eg, *Us Too? Report* (n 137) 23; Employment and Equal Opportunity Committee, The Law Society of Tasmania, Submission No 358 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) 4; *National Action Plan* (n 19) 11.

¹⁴¹ *Respect@Work* (n 1) 153.

¹⁴² *National Action Plan* (n 19) 12.

on having the right sort of senior allies'.¹⁴³ This imbalance, which is not exclusive to relationships between practitioners but also pervades other relationships to which members of the legal profession are a party, was commented upon by participants, one of whom noted that:

I felt I had nowhere to go without risking my future career. I thought: why would anyone believe a young female over a powerful older male lawyer that everyone seems to respect and revere?

Perhaps the most notable power imbalance within the profession is that existing within the workplaces that make up the South Australian courts. Members of the judiciary are very powerful members of the legal profession. As one participant put it:

[Y]ou walk out on the street with a judge and it's like, you know, they are the Hollywood of the legal fraternity.

The staff working for judicial officers are, more often than not, very junior members of the profession or administrative staff. This could lead, and it appears in some instances has led, to a workplace culture where this power imbalance results in unreasonable demands by those in the more powerful positions and, in turn, the capacity for disrespectful behaviour to go unchecked. One participant who works within the Courts Administration Authority described the mantra of the workplace as:

What [the judicial officer] wants [the judicial officer] gets. So, regardless of what it is, regardless of how ridiculous, they get it.

Survey results indicate that in a majority of instances (80.2%), sexual harassment was perpetrated by a person in a position of seniority vis-à-vis the victim. In only 25.8% of instances, however, was sexual harassment perpetrated by a person at the same or more junior level.¹⁴⁴

In the case of discriminatory harassment, 94.4% of instances were perpetrated by a person in a position of seniority vis-à-vis the victim. In only 25.0% of instances was discriminatory harassment perpetrated by a person at the same or more junior level.

¹⁴³ *National Action Plan* (n 19) 11, quoting Prue Bindon, 'The Weinstein factor: Where does the legal profession stand?' (2018) 247 *Ethos* 26, 30.

¹⁴⁴ It is notable that a lower percentage of female participants indicated that the sexual harassment they were subjected to was perpetrated by a person at the same or more junior level, possibly due to the higher percentage of males in senior roles in the legal profession.

These results are broadly consistent with the *Changing the Rules* study, which found that in 78% of cases, the perpetrator of harassment held a more senior position within the workplace.¹⁴⁵

4.1.4. Consumption of alcohol

A number of contributions to the Review in which instances of sexual harassment were disclosed involved the consumption of alcohol. For example, one participant noted that:

I have been inappropriately touched by my immediate supervisor during work functions where alcohol was served.

Other participants commented that:

At the criminal law conferences and country law conferences, there are always incidents of sexual harassment. There have been incidents of lawyers drinking too much and attempting to remove female lawyers' clothing, principals of firms putting their hands on female lawyers' thighs and knees and rubbing them, barristers trying to kiss younger female solicitors, attempted rape, rape and groping.

In my personal experience and also as recounted to me by others, most inappropriate sexual conduct occurs at social and 'extra-curricular' functions (dinners, after work drinks, conferences, back of taxis etc), and usually involves excessive alcohol consumption.

The consumption of alcohol in the legal profession is significantly higher than in other professions.¹⁴⁶ Evidence suggests that although the consumption of alcohol is not a cause of violence (including sexual harassment) per se, it 'can increase the likelihood, frequency or severity of violence against women',¹⁴⁷ primarily due to its disinhibiting effect and interaction with the gendered drivers of harassment.

4.1.5. Competitive work environments

The Law Council has observed that environments which are 'commercial and managerial' and competitive in nature will encourage workplaces in which self-interest is paramount. Rather than focussing on staff wellbeing, cohesion and camaraderie,

¹⁴⁵ Victorian Equal Opportunity & Human Rights Commissioner, *Changing the rules: The experiences of female lawyers in Victoria* (Report, December 2012) 32 ('*Changing the rules*').

¹⁴⁶ Rebecca T Michalak, *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (Report, 2015) 19.

¹⁴⁷ *Change the Story* (n 138) 27.

individuals may be more motivated by productivity, profit and client satisfaction.¹⁴⁸ The link between such workplace cultures and unethical behaviours has been commented upon extensively within the literature.¹⁴⁹ The environment described by the Law Council is embodied by the highly adversarial nature of the legal profession. As a result of the profession's structure, barristers are likely to be those who are most often engaged in the 'adversarial aspects of legal practice'.¹⁵⁰ Justice Sam Doyle observed that the significant amount of time these individuals spend in such environments 'allow[s], if not encourage[s], certain personality traits to flourish in a way that might not be permitted to occur in the more controlled and accountable environments of a law firm or within government'.¹⁵¹

These observations were supported by a number of written submissions and interviews. One participant, for example, related an anecdote from her early days in practice:

At my first job at a law firm I was sexually harassed by a client. I received a phone call from him one day which I immediately relayed to my bosses which went a little like this: "I'm coming to pick you up in my car for a meeting. I hope you are wearing a short skirt because my car is quite high up and I want to see up your skirt." When I told my bosses they just stared at me. Crickets. At that moment – at the age of 24 – I realised that the client was more important than me.

4.2. 'It's too late when a complaint has been made': Observations on culture

Responses to the Review indicated that there is a degree of dissatisfaction with the existing complaint mechanisms and the laws that govern them. Survey responses and other information received on this topic are discussed at Part 6.1 of this report. However, many participants were more concerned with the underlying discrimination and gender-based bias which underpins harassment, including sexual harassment. One response in the survey noted that:

¹⁴⁸ *National Action Plan* (n 19) 12.

¹⁴⁹ See, eg, Maryam Omari, *Towards Dignity & Respect at Work: An Exploration of Work Behaviours in a Professional Environment* (Report, August 2010) 9; *Changing the rules* (n 145) 44; Al-Karim Samnani and Singh Parbudyal, 'Twenty Years of Workplace Bullying Research: A Review of the Antecedents and Consequences of Bullying in the Workplace' (2012) 17(6) *Aggression and Violent Behaviour* 581, 585; Denise Salin, 'Workplace Bullying Among Business Professionals: Prevalence, Gender Differences and the Role of Organizational Politics' (2005) 7(3) *PISTES* 7.

¹⁵⁰ Justice Samuel Doyle, 'The path to gender equality requires removing cultural and structural barriers in the profession' (March 2021) *Law Society of South Australia Bulletin* 6.

¹⁵¹ *Ibid.*

It's too late when a complaint has been made. The emphasis needs to be on education of the profession to ensure that the conduct doesn't happen in the first place.

Workplace culture is critical to the prevention of workplace harassment. The US Workplace Harassment report concluded that, '[w]orkplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment'.¹⁵² Similarly, Respect@Work documented, 'diverse and inclusive, gender-equal workplaces that had cultures of respect, integrity and trust were most effective at preventing and responding to sexual harassment'.¹⁵³

Consideration of preventative measures and avenues for complaint are cornerstones of the Review. A change in the broader culture of the legal profession itself was flagged, in survey responses and interviews alike, as being paramount to the success of any reform within the profession. A number of participants commented that the culture is already improving:

The main change that is needed is a culture shift which is already happening, and is irreversible, and which will probably continue relatively rapidly. Things that were accepted 20 years ago just don't happen today (except very rarely). No amount of complaints-handling improvements can deal with the issue better than cultural shift.

While that shift is underway, it is by no means complete. So much is evidenced by the low number of complaints made to bodies such as the LPCC. There are likely to be a number of aspects to this. One factor is that victims do not always recognise that the conduct is harassment, or they do not consider that the behaviour is serious enough to report. Another, more significant concern is that victims do not want to engage in a complaint process. Free-text responses offered these views:

A fundamental shift in the culture of the profession is needed so that people can identify behaviour that constitutes discrimination and harassment, and feel comfortable reporting it - without this cultural shift, process improvements alone won't fix the problems that exist.

The main impediment to reporting is not to whom to report, it is the unavoidable fact that you will not be truly supported having made the complaint and there will always be a

¹⁵² Chai R Feldblum and Victoria A Lipnic, *Select Task Force on the Study of Harassment in the Workplace* (Report, June 2016) 4.

¹⁵³ *Respect@Work* (n 1) 644.

taint of “what did you do to provoke that behaviour” or even outright disbelief that you are telling the truth.

As the Law Council has observed, ‘[m]any of the drivers behind sexual harassment ... are not easily remedied and arise from long-established structures within the profession.’¹⁵⁴ An upheaval of the profession’s culture may certainly appear unattainable and unrealistic. This is a sentiment acknowledged by Marissa Mackie and Leah Marrone of the Women Lawyers Committee, recognising that such change is ‘slow and sometimes that distracts us, thinking it is all too hard’.¹⁵⁵ Importantly, however, they note that it is a matter of the ‘small changes that we can take now that will have immediate benefit and [help to] chip away at that end goal’.¹⁵⁶ This is the crux of the Commission’s outlook.

In order to be effective, some measures effecting change will therefore need to be proactive, while others will be reactive.¹⁵⁷ That is, some will need to address preventative strategies (e.g. education and guidelines), and others should ensure that there are appropriate responses to such harassment that persists.¹⁵⁸ Having targeted preventative mechanisms in place for sexual harassment may also assist in preventing employers from being held vicariously liable for sexual harassment perpetrated by an employee.

Australian Women Lawyers point out that attitudinal shift across the profession needs to be complemented by broader systemic changes to address gender and intersectional discrimination.¹⁵⁹

The notion of a ‘call-out culture’ is crucial to curbing harassment in the profession, noting the way in which speaking up about misconduct has the ability to shape workplace norms and behaviours.¹⁶⁰ The Review notes a current absence of behavioural expectations about ‘calling out’ bad behaviour. Given the hierarchical

¹⁵⁴ *National Action Plan* (n 19) 31.

¹⁵⁵ Marissa Mackie and Leah Marrone, ‘Sexual harassment in the workplace – make it your business to make sure it’s not in your business’ (September 2020) *Law Society of South Australia Bulletin* 20.

¹⁵⁶ *Ibid.*

¹⁵⁷ The Commission notes that some preventative mechanisms will also involve a reactive element. See *National Action Plan* (n19) 32.

¹⁵⁸ This section is focussed on the proactive measures. Reactive mechanisms (such as complaint processes) are dealt with at Part 6.

¹⁵⁹ Australian Women Lawyers, ‘Seven Strategies for Addressing Sexual Harassment in the Legal Profession’ (Policy Paper, 9 July 2019) 2 (‘*Seven Strategies*’).

¹⁶⁰ See, eg, Our Watch, *Doing Nothing Does Harm* (Web Page)

<<https://www.doingnothingdoesharm.org.au/>>; Women’s Health Victoria, ‘Working With Workplaces: Challenges and Opportunities for Workplace Violence Prevention and Bystander Programs’ (Research Paper, May 2018).

nature of the sector, positive leadership of those in positions of power or authority is important. One survey respondent put it this way:

The people at the top need to model the right behaviours and call out unacceptable behaviours in the workplace.

Many other free-text responses indicated participants' willingness to provide a strong and positive voice for change. One participant offered this powerful contribution:

I hope that now that I am more senior I am approachable enough that anyone in my current organisation experiencing sexual harassment or assault would feel comfortable enough to speak to me. I feel I am now in a position to advocate strongly for those in less powerful positions and to make change where change is needed.

In 2020, the Australian Champions of Change Coalition released a resource for workplace leaders aimed at ending workplace sexual harassment. '*Disrupting the System: Preventing and Responding to Sexual Harassment in the Workplace*' advocates for male leaders to 'step up beside women in creating more effective approaches to preventing and responding to sexual harassment in the workplace'.¹⁶¹ The unique position of leadership in influencing culture is addressed in the report, as is the responsibility incumbent on leaders for developing safe, respectful and inclusive cultures. The US Workplace Harassment report contended that the role of leadership in creating effective preventative mechanisms for discriminatory harassment 'cannot be overstated'.¹⁶²

In the context of implementing gender equality or diversity measures, elements of resistance and backlash are inevitable, and leadership engagement in identifying opportunities to address concerns will be vital to the success of those measures. To this end, the Champions of Change Coalition and Victoria Health have produced guides for leadership on responding to these challenges.¹⁶³

¹⁶¹ Champions of Change Coalition, *Disrupting the System: Preventing and responding to sexual harassment in the workplace* (Report, 2021) 10. See also VicHealth, *(En)countering Resistance: Strategies to Respond to Resistance to Gender Equality Initiatives* (Report, 23 March 2018).

¹⁶² Chai R Feldblum and Victoria A Lipnic, *Select Task Force on the Study of Harassment in the Workplace* (Report, June 2016) 4.

¹⁶³ See Chief Executive Women and Male Champions of Change, *Backlash & Buy-in: Responding to the Challenges in Achieving Gender Equality* (Report, June 2018); VicHealth, *(En)countering Resistance: Strategies to Respond to Resistance to Gender Equality Initiatives* (Report, 23 March 2018).

It is important to note that an obligation to implement a culture of this nature is convoluted, and goes beyond communicating the mere expectation to call out unacceptable behaviour. Reliance on calling out keeps the onus on victims and witnesses, rather than on those behaving poorly, and in turn feeds into the notion of 'victim blaming'. Reliance on calling out also fails to recognise that the same power dynamics and hierarchical nature of the profession will be operative upon bystanders as they would upon victims.¹⁶⁴ As such, it is important that a greater duty to speak up is imposed on those in positions of seniority, rather than peers who, like the victim, are likely to be less powerful.

4.3. Implementation of diversity and inclusion measures

Part 4.1. demonstrates that improving gender equality in legal profession workplaces is a key harassment prevention measure. There is also a growing body of research to suggest that increasing the diversity and inclusiveness of a workplace has other advantages, including:

- Increased organisational performance (in terms of profitability, innovation and decision-making)
- Improved ability of companies to attract and retain talent
- Enhanced organisational reputation.¹⁶⁵

The Commission notes, however, that efforts to improve gender equality and diversity across the legal profession must be accompanied by efforts to improve inclusiveness. As the report of the Parliamentary Review discussed, 'diversity in and of its own, in the absence of inclusionary workplace practices, can in fact increase conflict'.¹⁶⁶ That is, the benefits of diversity are realised only in conditions that are genuinely inclusive.

Inclusive workplaces are those in which all employees:

- Feel safe
- Are involved in the workgroup
- Feel respected and valued

¹⁶⁴ Naomi Neilson, "'This is our profession": Noor Blumer on reporting sexual harassment' (31 August 2020) *Lawyers Weekly* <<https://www.lawyersweekly.com.au/biglaw/29322-this-is-our-profession-noor-blumer-on-reporting-sexual-harassment>>.

¹⁶⁵ Victorian Equal Opportunity & Human Rights Commission, 'Preventing and responding to workplace sexual harassment: Complying with the *Equal Opportunity Act 2010*' (Guidance Document, August 2020) 16; Terrance W Fitzsimmons, Miriam S Yates and Victor J Callan, *Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation* (Report, 2020) 148.

¹⁶⁶ Equal Opportunity Commission, *Review of Harassment in the South Australian Parliament Workplace* (Report, February 2021) 45 ('Parliamentary Review').

- Are able to influence decision-making
- Are able to be authentic
- Are recognised and honoured for their diversity.¹⁶⁷

The Commission was provided with information with respect to the efforts that are underway to increase diversity and inclusiveness in the legal profession.

The Women Lawyers' Association of South Australia, for example, has developed the *Charter for the Advancement of Women in the South Australian Legal Profession*. Legal practices and organisations can voluntarily become signatories to the Charter and, by doing so, commit to 'ensuring that female lawyers within their organisation are provided with equal opportunity and [are] subject to inclusive workplace cultures.'¹⁶⁸ The Charter, and the supporting guidelines, set out the practical ways in which signatories can fulfil their obligations. The Commission commends the Charter, on the basis that signatories are obliged to challenge the gendered norms, practices and structures that perpetuate sexual and discriminatory harassment in the legal profession.

Additionally, the Law Council is developing, in consultation with the relevant stakeholders, the National Model Policy and Guidelines. This policy will be informed by the Council's Diversity and Equality Charter, the New Zealand Law Society's Gender Equality Charter and the Australian Women Lawyers' Seven Strategies for Addressing Sexual Harassment, which contains recommendations to 'address the underlying biases and discrimination based on sex and gender'.¹⁶⁹ As the Model Policy and Guidelines are currently under development, it is not known to what extent they will incorporate diversity and inclusiveness principles.

The Commission considers that the South Australian legal profession would benefit from an evidence-based diversity and inclusivity policy that is comprehensive in its application to legal profession workplaces. Such a policy should seek to improve diversity in all respects as well as to foster a culture that values inclusivity.

¹⁶⁷ Lynn M Shore, Jeanette N Cleveland and Diana Sanchez, 'Inclusive workplaces: A review and model' (2018) 28(2) *Human Resource Management Review* 176, 185.

¹⁶⁸ Women Lawyers' Association of South Australia Inc, 'Charter for the Advancement of Women in the South Australian Legal Profession' <<https://www.womenlawyerssa.org.au/wp-content/uploads/2019/05/Charter-for-the-Advancement-of-Women-in-the-South-Australian-Legal-Profession.pdf>>.

¹⁶⁹ *Seven Strategies* (n 159) 2; *National Action Plan* (n 19) 40.

To that end, the Commission encourages legal profession workplaces to adopt the Workplace Equality and Respect Standards developed by Our Watch, Australia's 'national leader in the primary prevention of violence against women'.¹⁷⁰ There are five standards, pursuant to which actions are implemented to embed gender equality and inclusivity in the workplace:

- Commitment to the prevention of harassment
- Conditions that promote gender equality
- Culture that challenges the norms, practices and structures that drive gender inequality
- Support for those who experience harassment
- Core business practices that align with an organisation's commitment to the prevention of harassment.¹⁷¹

The Commission is of the view that implementation of the Workplace Equality and Respect Standards (or an equivalent strategy, such as committing to the Charter for the Advancement of Women in the South Australian Legal Profession) is an appropriate, if not essential, step in promoting gender equality and inclusivity in the legal profession.

Accordingly, the Commission recommends:¹⁷²

RECOMMENDATION 1

That all legal profession workplaces consider implementing the Workplace Equality and Respect Standards developed by Our Watch (or equivalent).

4.4. Workplace culture and policy

4.4.1. The work health and safety framework as a preventative mechanism

Harassment in the workplace, or related to the workplace, is a work health and safety (**WHS**) issue. The Commission's view is that the existing WHS framework ought to be better utilised by those in the South Australian legal profession as part of the suite of mechanisms to address the issue of harassment.

¹⁷⁰ Our Watch, *About us* (Web Page) <<https://www.ourwatch.org.au/about-us/>>.

¹⁷¹ Our Watch, *Workplace Equality and Respect Standards* (2018) <https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2019/10/29045029/OurWatch_WER_Standards_2019-April_final.pdf> 25.

¹⁷² See also Recommendation 2, which recommends that legal profession workplaces review their recruitment policies with respect to diversity and inclusion.

In South Australia and elsewhere, attention is being given to utilising the existing WHS framework to address harassment and bullying in the workplace. This is so not only for the legal profession, but also the broader community.

The reasons for this are clear and persuasive. The WHS framework already provides for the promotion of safe workplaces by the elimination or minimisation of risks to health and safety. The WHS Act imposes positive duties upon PCBUs, who may be held liable and prosecuted for contraventions of the WHS Act. The primary duty is to ensure the health and safety of workers engaged by them while they are at work for the business or undertaking.¹⁷³ 'Health' is defined as physical and psychological health.¹⁷⁴ The WHS framework places the onus on employers and away from victims.¹⁷⁵ The WHS Act gives SafeWork SA a range of powers to ensure compliance and to investigate and prosecute alleged contraventions of the various duties under that regime.

A significant barrier to using the WHS framework to address harassment is that there is a cultural and institutional emphasis on WHS laws addressing physical risks and harm. However, the Commission notes that there are ongoing efforts being made, at state, territory and federal levels, to reform WHS laws to appreciate the existence and significance of psychological risk and harm, and so to adapt the current model to address this.

The recent example from global law firm Allens demonstrates that in some instances, psychological risks are not appreciated and captured by appropriate WHS policy in the same way that physical risks are. That example reportedly involved a male senior associate sexually harassing a junior lawyer in his team by sending a series of text messages aggressively demanding she have sex with him before attending her apartment and ringing her buzzer for 15 minutes. The victim formally complained to the firm with the support of her father, who witnessed the male solicitor attend at the apartment.¹⁷⁶

The firm found that the male solicitor had sexually harassed the junior lawyer and formally disciplined the solicitor. Despite acknowledging the sexual harassment, and

¹⁷³ *Work Health and Safety Act 2012* (SA) s 19(1).

¹⁷⁴ *Ibid* s 5.

¹⁷⁵ Subject to the worker's obligation to take reasonable care for their own health and safety: *Ibid* s 28.

¹⁷⁶ Hannah Wootton, 'Allens promoted associate who sexually harassed junior lawyer' *Australian Financial Review* (online, 1 April 2021) <<https://www.afr.com/companies/professional-services/allens-promoted-associate-who-sexually-harassed-junior-lawyer-20210330-p57fer>>.

by extension the risk that the solicitor posed to the victim and to others, the solicitor continued to manage a team of junior female staff members, including the victim. The solicitor was not required to undertake any form of specialised training.¹⁷⁷

On one view, this example could constitute a contravention of the WHS Act and the requirement to eliminate risks to psychological health, at least on the part of the junior solicitor. The Commission's view is that this example is demonstrative of experiences in the South Australian legal profession of ongoing exposure to harassers in circumstances where their inappropriate behaviour is known.

I did make a complaint to the firm principal and, whilst assured they had "had a word" with the person (who was a senior partner), there was really no consequence for them and instead, I ended up being on the receiving end of further, more subtle poor treatment.

This example supports the need for harassment to be viewed as a WHS issue and for PCBUs within the legal profession to appreciate their duties and take steps to ensure they comply with WHS laws.

Harassment as a psychological risk

Research highlights the negative impacts of harassment on outcomes for individuals. The Respect@Work Report noted that workplace sexual harassment can result in a range of negative consequences including reduced performance and efficiency, absenteeism, increased staff turnover and a poor workplace culture.¹⁷⁸ The Law Council, in its NARS Report, identified culture, including sexual harassment and discrimination, as a key driver of the attrition from private legal practice, as well as a key barrier to re-engagement.¹⁷⁹ The way in which harassment is dealt with impacts upon perceptions of acceptable workplace conduct and can amplify the negative mental, physical and career impacts on the victim.

The Commission also notes that the deleterious effect of this conduct is often long-lasting. As the Law Council observed recently, 'the impact of sexual harassment may continue for many years, even decades after the event.'¹⁸⁰ While that commentary pertained to emotional impact, it is clear that there is often also a

¹⁷⁷ Ibid.

¹⁷⁸ *Respect@Work* (n 1) 281–4.

¹⁷⁹ *NARS Report* (n 18) 7, 36, 76.

¹⁸⁰ *National Action Plan* (n 19) 46.

significant impact on career paths. The Commission heard from a number of solicitors and staff in administrative roles whose professional development has been stymied by their experiences of harassment. One practitioner noted: 'it's massively financially affected me over my career. I'm only just [in a particular role] now and I wanted to [be in that role] 10 years ago'. Another has been unable to progress in their chosen field of expertise because of the perpetrator's prominence in that field.

Managing psychological risk under the WHS framework

A recent review of the model WHS laws has focussed upon psychological risks and reinforced that PCBUs are required to manage risks to psychological health and safety, just as they are required to manage risks to physical health and safety.

Every five years, Safe Work Australia conducts a review of the model work health and safety laws. The most recent review was conducted in 2018. Notably, this was prior to the completion of the Respect@Work Inquiry. The review recommended that the WHS framework be amended 'to deal with how to identify the psychological risks associated with psychological injury and the appropriate control measures to manage those risks.'¹⁸¹ The report further recommended that the incident notification provisions be reviewed to ensure that 'they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.'¹⁸²

The report noted:¹⁸³

[w]hile Safe Work Australia has recently developed guidance material on systematically managing work-related psychological health and safety, there are currently no model WHS Regulations or model Codes focused primarily on psychological health or how to manage psychosocial risks or hazards.

The Respect@Work Inquiry heard submissions in support of the 2018 WHS Act Review recommendation and other measures to increase awareness as to how to prevent sexual harassment in the workplace and to strengthen the ability for WHS regulators to respond to sexual harassment.¹⁸⁴ Recommendation 35 of the Respect@Work Inquiry was that:

¹⁸¹ Marie Boland, *Review of the model Work Health and Safety laws* (Final Report, December 2018) 12.

¹⁸² *Ibid* 15.

¹⁸³ *Ibid* 30.

¹⁸⁴ *Respect@Work* (n 1) 599-601.

*WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the [2018 WHS Act Review], and develop guidelines on sexual harassment with a view to informing the development of a Code of Practice on sexual harassment. Sexual harassment should be defined in accordance with the Sex Discrimination Act.*¹⁸⁵

The Commission notes the work that has been done by Safe Work Australia to develop guidance material in relation to psychological health and, more recently, sexual harassment in the workplace. The Commission also notes work currently underway by the Law Council to develop a national model sexual harassment policy and guidelines.¹⁸⁶

National guidance material on work-related psychological health

The national guidance material was released in January 2019 and describes a systematic practical approach to managing work-related psychological health and safety.¹⁸⁷ The guide provides references to the legal requirements under the model WHS Act and WHS Regulations. The guide recognises that ‘poor workplace relationships’ – which includes workplace bullying, aggression, harassment including sexual harassment, discrimination or other unreasonable behaviour by co-workers, supervisors or clients – as a cause of psychosocial hazard which, if prolonged and/or severe, can cause both psychological and physical injury.¹⁸⁸ The guide provides a four-step risk management process which involves identifying psychosocial hazards, assessing risks if necessary, controlling risks and reviewing hazards and control measures.¹⁸⁹

National guidance material on preventing workplace sexual harassment

In January 2021 Safe Work Australia released guidance material on preventing workplace sexual harassment, which provides information on what sexual harassment is or may include, as well as steps on preventing and responding to sexual harassment in the workplace.¹⁹⁰ The guidance material provides that more subtle forms of sexual

¹⁸⁵ Ibid 47.

¹⁸⁶ *National Action Plan* (n 19) 38.

¹⁸⁷ Safe Work Australia, ‘Work-related psychological health and safety: A systematic approach to meeting your duties’ (Guidance Document, 21 January 2019) 4.

¹⁸⁸ Ibid 9–10.

¹⁸⁹ Ibid 12–3.

¹⁹⁰ See generally Safe Work Australia, ‘Preventing workplace sexual harassment’ (Guidance Document, January 2021).

harassment can be just as harmful as overt forms of sexual harassment.¹⁹¹ This was evidenced by some of the reports from participants in the Review. The guidance material states that PCBUs ‘must do all that you reasonably can to manage the risk of sexual harassment occurring in the workplace.’¹⁹²

The Commission considers that these materials, along with the impending national guidelines to be prepared by the Law Council, will be useful materials for legal profession PCBUs looking to ensure that they are meeting their duties under the WHS scheme.

Model Code of Practice managing the risks to psychological health: SafeWork New South Wales

Since the implementation of the national guidance material on work-related psychological health, there has been ongoing work towards implementing a model code of practice in relation to managing risks to psychological health. SafeWork NSW is currently seeking comments on the NSW draft Code of Practice managing the risks to psychological health (the **draft code**). The draft code aims to:¹⁹³

- support compliance with the existing WHS primary duty of care as it applies to psychological risk management
- provide guidance around the existing duties and obligations
- include known information about particular psychosocial hazards, risks to psychological health and control measures, and
- help in determining what is reasonably practicable by providing a reasonable and practical approach to managing these risks.

The draft code recognises that exposure to infrequent but highly stressful events, such as bullying, harassment, or threats or acts of violence can damage psychological health. In the short term, this may lead to anxiety, and if exposure continues, to post-traumatic stress disorders, anxiety, or depression.¹⁹⁴

The draft code is intentionally broad to be generally applicable to most workplaces, recognising that every business faces different health and safety risks and has varying capabilities and commitment to comply with their WHS obligations.¹⁹⁵

¹⁹¹ Ibid 5.

¹⁹² Ibid 8.

¹⁹³ SafeWork NSW, ‘Explanatory paper for public consultation on the draft code of practice managing the risks to psychological health’ (Consultation Paper) 4.

¹⁹⁴ Ibid 6.

¹⁹⁵ Ibid 10.

The Commission endorses the AHRC's recommendation that the model WHS regulations be amended and a model Code of Practice be developed. The Commission notes that guidance material has already been released as recommended and supports the work being done by SafeWork NSW to develop a draft code on managing the risks to psychological health.

Psychological risks should be managed in the same way that physical risks are under the WHS Act. This approach focusses on mitigation of risk and prevention of harm and requires that PCBUs protect those who fall within their remit.

Comcare

In addition to efforts mentioned above, the federal WHS regulator, Comcare, has recently published a number of resources to help employers and employees prevent and respond to workplace sexual harassment. The publications – which are intended to complement those provided by Safe Work Australia and AHRC – include practical guidance for employers, managers and supervisors and workers, as well as regulatory guidance for employers. Comcare's *Never Part of the Job: Regulatory guidance for employers on their work health and safety responsibilities* is to be read in conjunction with Safe Work Australia's guide on preventing sexual harassment.¹⁹⁶ The guidance makes clear that sexual harassment can happen during working hours and at work-related activities such as training courses, conferences, trips and work-related social activities.¹⁹⁷

In the Commission's view, the availability of extensive material such as this means that legal profession workplaces are now well-equipped to review their policies and procedures to ensure that, to the extent possible, they are reducing the risk presented by sexual harassment and discrimination in connection with legal practice.

WHS examples from South Australia

The Commission recognises and supports the work being done by SafeWork SA at the state level.

¹⁹⁶ Comcare, 'Never part of the job: Regulatory guidance for employers on their work health and safety responsibilities' (Guidance Document) 2.

¹⁹⁷ Ibid.

SafeWork SA recognises that bullying, harassment and other inappropriate workplace behaviours are workplace hazards which create psychological health risks.¹⁹⁸ SafeWork SA notes that in some instances, incidents of sexual harassment may be notifiable incidents for the purposes of the WHS Act.¹⁹⁹ PCBUs are required to take steps to prevent inappropriate behaviour, and provide advice to employees and employers to explain how to identify and manage risks. As part of their duties, employers must provide a clear and fair process for workers to raise and settle grievances or complaints that arise against another worker or group of workers.²⁰⁰

SafeWork SA provides materials to assist PCBUs to prevent and manage harassment and appropriately respond to and resolve complaints. The Commission respectfully suggests that these materials are likely to assist legal profession workplaces in determining whether their existing policies and procedures need renewal.

SafeWork SA recently prosecuted a workplace after an employee was sexually assaulted by a client. The South Australian Employment Tribunal (**SAET**) found that Minda Inc failed to:²⁰¹

- provide adequate supervision of the client
- provide adequate information about the risk to the employee
- inform the employee of the requirements visitors were to adhere to when attending the client's premises.

WHS obligations in the South Australian Legal Profession

The Commission heard throughout the Review that not enough is being done by some PCBUs within the legal profession to prevent, manage and respond to psychological risks in the form of harassment. The following case study demonstrates that even well-intentioned and supportive employers will be left scrambling to manage an allegation of harassment if they do not have adequate policies and procedures in place prior to the incident.

¹⁹⁸ SafeWork SA, *Bullying & Inappropriate Behaviours* (Web Page) <<https://www.safework.sa.gov.au/workers/health-and-wellbeing/bullying-and-inappropriate-behaviours>>.

¹⁹⁹ SafeWork SA, *Sexual harassment* (Web Page) <<https://www.safework.sa.gov.au/workers/health-and-wellbeing/sexual-harassment>>.

²⁰⁰ SafeWork SA, *Grievance and complain resolution* (Web Page) <<https://www.safework.sa.gov.au/workers/health-and-wellbeing/grievance-and-complaint-resolution>>.

²⁰¹ SafeWork SA, 'Prosecutions', *Recent convictions* (Web Page, 16 December 2020) <<https://www.safework.sa.gov.au/enforcement/prosecutions>>.

CASE STUDY

I was subject to sexual harassment following an after-work function with my supervisor, clients and a barrister.

I reported the incident to my supervisor the following week. Although my supervisor acknowledged my report, they did not make anything more of it as it was apparent how uncomfortable it was for me to speak to them about it. My supervisor also had a close personal and business relationship with the harasser.

Neither my supervisor, nor my firm more broadly, was equipped to deal with my complaint. The firm had no human resources department and did not have any policies or mechanisms in place addressing harassment. While I was grateful that colleagues listened to my story, they did not have the capabilities to manage a complaint or know what to do with it.

My supervisor told me that he needed to report the incident to a partner. I felt like I did not have the opportunity to say no. I was invited into the partner's office. They were empathetic, but lacked knowledge regarding the potential complaint avenues, leaving me feeling disparaged.

As a result, the process to report my complaint internally was messy, distressing and overall disparaging. At the time, all I wanted to do was talk to somebody who could tell me all of my options, and potentially report the incident without lodging a formal complaint, as I was unsure about the consequences of speaking up and how this would affect me personally and professionally.

I left the office that day feeling incredibly overwhelmed, vulnerable and almost just as confused and more distressed than I was at the start of the day.

Using the case study above as an example, if the solicitor was required to continue working with the barrister after reporting to their employer that the barrister had harassed them, the employer would be breaching their WHS obligation to eliminate the risk to the solicitor's health and safety so far as reasonably practical. The answer is not to remove the solicitor from the file, as this only serves to punish the victim. Rather, the duties imposed under the WHS framework require the elimination of the risk, so far as reasonably practicable.

The topic of briefing polices was raised by one participant as a mechanism by which cultural change at the South Australian Bar could be achieved. It was noted that solicitors (both private and those working within government) are in a uniquely powerful position to drive change at the Bar by requiring certain conditions to be met by barristers (or entire chambers of barristers) before a brief will be given. Similarly, solicitors could put in place internal policies within their workplace which would require the withdrawal of all briefs from any barristers who are found to have engaged in conduct that amounts to harassment, including sexual harassment.

Without responsive WHS laws, victims of gender-based violence such as sexual harassment are left with the burden of pursuing harassers for remedies under anti-discrimination legislation, which does little to change the organisational structures that underpin gender-based violence.²⁰²

The Commission is of the view that PCBUs within the legal profession may be failing to identify the psychological risks arising from sexual and discriminatory harassment and therefore failing to manage them appropriately. The Commission believes that by acknowledging harassment as a WHS issue PCBUs will be able to more effectively identify psychological hazards and respond to eliminate or minimise them. It is also hoped that shifting the focus of these incidents away from the harassment itself will reduce the ramifications and stigma so often attached to victims.

PCBUs must implement safe systems of work to manage psychological risks arising from work by developing and adopting adequate work, health and safety policies and procedures. This will also require training to ensure that all duty holders, including management and workers, are aware that harassment is a psychological hazard and a WHS issue.

The Commission therefore recommends:

RECOMMENDATION 2

That all Persons Conducting a Business or Undertaking of a legal nature in South Australia review and, where necessary, update, their policies, procedures and processes (including staff induction materials) to ensure that they eliminate or

²⁰² Paula McDonald and Sara Charlesworth, Submission No 170 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (January 2019) 24.

ameliorate, as far as is practicable, risks of harm arising from sexual and discriminatory harassment, by:

- Developing, implementing and monitoring work health and safety systems with respect to risk of psychological harm
- Encouraging diversity and inclusion, including in recruitment processes
- Declaring that sexual and discriminatory harassment will not be tolerated
- Clarifying acceptable and unacceptable conduct
- Detailing internal and external complaint-handling procedures
- Underlining the need to maintain confidentiality about complaints
- Outlining internal and external support and services in the event of harassment, including links to relevant websites
- Specifying the need to keep and secure store records regarding complaints of harassment, for six years after they are made.

4.4.2. Shifting the onus from victims: amending the Sex Discrimination Act and the Equal Opportunity Act

A system which places the onus upon victims to make complaints about harassment is inadequate.²⁰³ This was recognised in the Respect@Work Report as well as by the Commission in the Parliamentary Review.²⁰⁴

The Sex Discrimination Act does not currently impose an obligation upon employers to take steps to prevent harassment. However, an employer may be vicariously liable for harassment perpetrated by an employee or agent where the harassment was ‘in connection with’ the employment or duties and where the employer cannot demonstrate that they ‘took all reasonable steps to prevent’ the alleged sexual harassment.²⁰⁵

The current framework is ineffective in addressing the prevalence and effect of harassment. As the AHRC noted:²⁰⁶

[T]he current legislative framework remains largely remedial in nature because the unlawful discrimination provisions only arise once a complaint has been made. This places significant responsibility on individual complainants and means that employer

²⁰³ *Respect@Work* (n 1) 518–29.

²⁰⁴ *Parliamentary Review* (n 166) 144.

²⁰⁵ *Sex Discrimination Act 1984* (Cth) s 106.

²⁰⁶ *Respect@Work* (n 1) 470; *National Action Plan* (n 19) 28.

practices are often only externally scrutinised after an allegation of sexual harassment has been made.

The Law Council notes that placing the onus upon victims, who are often not adequately supported, impairs their ability to self-help and prevents society addressing the issue of sexual harassment in a structural or systemic way.²⁰⁷

The AHRC recommended amending the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment and victimisation.²⁰⁸ The Law Council supports this recommendation.²⁰⁹ In determining whether a measure is reasonable and proportionate, the AHRC says the Sex Discrimination Act should prescribe the factors that must be considered including, but not limited to:

- the size of the person's business or operations
- the nature and circumstances of the person's business or operations
- the person's resources
- the person's business and operational priorities
- the practicability and the cost of the measures
- all other relevant facts and circumstances.

The AHRC and the Law Council identified the Victorian *Equal Opportunity Act 2010* (**Victorian EO Act**) as a possible model for reforming the relevant provisions of the Sex Discrimination Act.

That Victorian Act sets out six minimum standards that all organisations must follow in order to comply with the positive duty. The standards require employers to take action to prevent and respond to discrimination, sexual harassment and victimisation. This is done by requiring employers to:²¹⁰

1. understand their obligations under the Victorian EO Act and have up-to-date knowledge about discrimination, sexual harassment and victimisation
2. implement a prevention plan, which should outline the legal requirements for equal opportunity in any service delivery by the organisation, in addition to a policy that covers the workplace and conduct of the employer and employees

²⁰⁷ *National Action Plan* (n 19) 16.

²⁰⁸ *Respect@Work* (n 1) 44.

²⁰⁹ *National Action Plan* (n 19) 28.

²¹⁰ Victorian Equal Opportunity & Human Rights Commission, *Positive duty* (Web Page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>.

3. take steps to drive a culture of respect by building organisational capability, which may involve formal and informal training initiative and requiring leaders, managers and supervisors to role model respectful behaviour
4. build a culture of safety and address risk regularly
5. consistently and confidentially address discrimination, sexual harassment and victimisation to hold perpetrators to account and put the victim at the centre of responses
6. monitoring, reviewing and evaluating outcomes and strategies to facilitate continuous improvement.

In 2019 the VEOHRC used its powers to investigate discrimination in the travel insurance industry. It was found that three main travel insurance companies failed to meet their positive duty to eliminate discrimination, and as a result the issues are being addressed by those companies, with ripple effects across the broader industry.

The AHRC noted that the proposed positive duties under the Sex Discrimination Act are similar to those which are already required under state WHS laws. The AHRC said:²¹¹

Australian employers already have responsibilities to prevent workplace sexual harassment to ensure they are not held vicariously liable under the Sex Discrimination Act, as well as positive duties under WHS laws, the Commission's view is that this would not create a substantially new or increased burden for employers.

Rather, it would encourage better practice on the part of employers to meet their obligations, while reducing the costs to workplaces of sexual harassment. It would also allow sexual harassment to be addressed more holistically by recognising sexual harassment as a form of sex discrimination, which is driven and perpetuated by broader social, cultural and workplace factors.

In essence, the WHS positive duty, as it relates to sexual harassment, is focused on psychological health broadly and frames sexual harassment as a safety risk and hazard. The Sex Discrimination Act positive duty would have a more specific and targeted focus on sexual harassment, sex discrimination and victimisation, and would importantly operate within a human rights framework that takes into account the systemic and structural drivers and impacts of sexual harassment.

Further, while the positive duty under the WHS framework applies equally to physical and psychological harms, WHS schemes have historically focused on physical harms

²¹¹ *Respect@Work* (n 1) 471–81.

... [T]his has been reflected in the approach of employers and WHS regulators, where psychological risks and hazards have been given less focus than physical risks and hazards.

The Commission agrees that there is utility in amending the Sex Discrimination Act to include positive duties, by way of trying to address the systemic causes of discrimination, sexual harassment and victimisation.

The Commission is of the view that setting minimum standards is important to ensuring that those responsible for setting company policy turn their mind to the continuous development of policy and practice to facilitate the prevention of harassment in the workplace.

The Commission respectfully endorses recommendation 17 of the AHRC and commends the work that has already occurred in this regard.

Equal Opportunity Act

In addition to work at the national level, the Commission is of the view that consideration should be given to also amending the Equal Opportunity Act to impose a positive duty upon employers to ensure their workplace adheres to the standards prescribed by the Equal Opportunity Act.

There is no positive obligation to set standards of behaviour in a workplace or to manage a complaint of an alleged breach of the Equal Opportunity Act. South Australia has a similar scheme to the Sex Discrimination Act with respect to employers being liable for employees and agents in certain circumstances.²¹² As has been observed in relation to the Sex Discrimination Act, the Equal Opportunity Act places the onus upon the victim. Information received during the Review supports the AHRC's observation that this model is neither helpful nor conducive to addressing harassment in the workplace due to issues with chronic underreporting.

While there is a positive duty at the State level under the WHS Act (discussed at Part 4.4.1), as can be seen from the Respect@Work Report, there are barriers to consistently, robustly and systemically dealing with issues pertaining to harassment through a WHS lens.²¹³ The Commission notes the work that is being done to utilise the WHS framework to mitigate psychological risks in the workplace, which will assist

²¹² *Equal Opportunity Act 1984 (SA)* s 91.

²¹³ *Respect@Work* (n 1) 538–552.

in broadening the scope of the WHS laws to address harassment in the workplace. However, the Commission is of the view that concurrent work in addressing the Equal Opportunity Act is necessary.

A two-system approach?

The Commission notes that amending the Equal Opportunity Act to impose positive duties will duplicate some of the work done by the AHRC and others in reforming the Sex Discrimination Act. The Commission is nevertheless of the view that it is necessary to consider doing so, for several reasons.

The first is that imposing a positive duty, as adopted under the Victorian system, is good policy in that it moves the onus away from victims and towards prevention.

The second is that the Sex Discrimination Act and the Equal Opportunity Act operate concurrently.²¹⁴ Where a victim has experienced an unlawful act of sexual harassment, they may choose to pursue action in either jurisdiction, but not both.²¹⁵ It follows in the Commission's view that improvements, where identified, should be made to both levels of legislation.

The third is that reform at the State level may be more efficient due to the comparatively limited number of constituents. It is clear, and has been noted by the Law Council, that, in addition to broader, longer-term reform, urgent steps must be taken to address sexual harassment.²¹⁶ The Commission's view is that this applies to all forms of harassment. Amending the provisions at the State level will have positive implications irrespective of whether and when the federal legislature passes legislation to amend the Sex Discrimination Act.

While the Commission recommends amending the Equal Opportunity Act to impose positive duties, the Commission notes the submission of the Victorian EOHRC to the Respect@Work Inquiry that, while imposing a positive duty is beneficial, it is also important to have sufficient enforcement mechanisms in place to enhance its effectiveness and achieve significant systemic change.²¹⁷

The Commission recommends:

²¹⁴ *Sex Discrimination Act 1984* (Cth) s 10(3).

²¹⁵ *Ibid* s 10(4).

²¹⁶ *National Action Plan* (n 19) 20.

²¹⁷ *Respect@Work* (n 1) 476.

RECOMMENDATION 3

That, consistent with recommendation 15 of the Parliamentary Review, the Attorney-General consider amending the *Equal Opportunity Act 1984 (SA)* to impose a positive duty upon employers to eliminate discrimination, sexual harassment and victimisation.

The ongoing operation of the provision, if adopted, can be informed by the work that is being done by the Law Council at the national level, noting that consultation between the Law Council and its Constituent Bodies is ongoing.²¹⁸

4.4.3. Internal workplace policies

As discussed above at Part 1.2.3, there are myriad types of legal practices, from sole practitioners to large-scale firms. It is impossible to prescribe one standard workplace policy that will apply across all of these entities. However, to whatever extent is required, reasonable and proportionate (given the size of the practice and the nature of its business), there needs to be an internal policy to minimise instances of harassment, and to deal with them if they occur.

Whilst workplace policies are widely considered a ‘minimum benchmark’ in the prevention of workplace harassment, they nevertheless remain central to establishing workplace standards and, in turn, laying the foundations for a respectful workplace culture.²¹⁹ *Respect@Work* outlined the content it considered ‘core’ to effective workplace sexual harassment policies:²²⁰

- Recognition that sexual harassment is unlawful and unacceptable
- A clear definition of sexual harassment (that includes digital technology-facilitated sexual harassment) with practical examples that include diverse groups of workers
- Recognition that sexual harassment is driven by gender inequality
- Application to workers at all levels, including leaders and managers, as well as others in the workplace such as customers, clients and contractors
- Identification of the responsibilities of management and workers

²¹⁸ *National Action Plan* (n 19) 28.

²¹⁹ *Respect@Work* (n 1) 656.

²²⁰ *Ibid* 656–7.

- Clear assurance that people who report sexual harassment will be protected against retaliation
- A clearly described and robust complaint process, investigation process, and range of sanctions that may be taken against harassers
- External reporting and support channels available to victims.

The Victorian Harassment Report considered a number of workplace policies on sexual harassment. That review identified a lack of clear illustrations of what may constitute sexual harassment as a deficiency in a number of the policies, with only 57% of the workplace policies containing examples of behaviour that would be classified as sexual harassment.²²¹ A similar appeal for such information to be contained within workplace policies was captured in responses in this Review:

The parameters of what is allowed and what is disallowed must be defined ... A perpetrator may not appreciate what they are doing is wrong. They need to know the boundaries of their actions.

Participants were also confused about complaint mechanisms and avenues, both informal and formal:

I think better education of the existence of the mechanisms, more transparency as to processes as well as guidance as to which is the most appropriate course depending on circumstances, would all be helpful.

There needs to be more awareness about what processes exist and what the options are. When overt sexual harassment within my workplace happened to me both at work and at work social functions ... [and I was not made aware of which route to take at the time] It seems from this questionnaire that maybe there are lots of options that I had no idea about ... I wish I had known.

Respect@Work recognised that the implementation of a formal policy is not appropriate for all workplaces, particularly small businesses.²²² This is pertinent to the composition of the legal profession, in that, according to the most recent National Profile of Solicitors survey, 96% of law firms in South Australia are composed of either a sole practitioner, or between two and four partners.²²³ The development of policies to suit these small workplace environments is imperative to a change in culture. Here,

²²¹ Victorian Harassment Report (n 15) 68.

²²² Respect@Work (n 1) 659.

²²³ The Law Society of New South Wales, 2018 National Profile of Solicitors (Report, 17 July 2019), <<https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>> 27.

the AHRC suggests that the ‘practical reality’ is such that it remains possible for small employers to communicate the information that would ordinarily be contained within sexual harassment policies to staff, provided that they remain committed to ‘having clear, regular and open discussions with their workers about these matters, and supplementing this with simple written materials in the workplace’.²²⁴ Further discussion about the availability of best practice guidelines appears at Part 4.4.1 of this report.

4.4.4. Internal workplace training

Training to combat harassment is likely to have greatest effect when it is part of a suite of preventative measures aimed at influencing workplace culture, rather than one-off training. Employer initiative to educate employees about harassment provides benefits to the workplace twofold: by embodying the employer’s commitment to addressing harassment, and by initiating change through ‘developing a collective understanding of expected workplace behaviours and processes’.²²⁵

AWL’s ‘*Seven Strategies for Addressing Sexual Harassment in the Legal Profession*’ framework highlights compulsory training as one such key strategy, citing the Us Too? Report, whereby ‘[IBA] survey respondents at workplaces with training were significantly less likely to have been bullied or sexually harassed within the past year’.²²⁶ AWL notes that, so as to maximise effectiveness, implemented training must:

- Be mandatory or free of charge, or both
- Be implemented for at least 5 years and reviewed at that point (noting that AWL is most supportive of a 10-year implementation)
- Include training for bystanders in terms of actions that can/should be taken
- Not merely restate the law, and reinforce the context in which harassment exists, with regard to gender discrimination and other bias.²²⁷

In terms of Point 1 above, AWL contends that, in addition to being mandatory for existing practitioners at all levels, such training should also be a component of the Practical Legal Training (PLT) that all legal practitioners must complete in order to

²²⁴ The Law Society of New South Wales, *2018 National Profile of Solicitors* (Report, 17 July 2019), <<https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>> 27.

²²⁵ *Respect@Work* (n 1) 662.

²²⁶ *Us Too? Report* (n 137) 101.

²²⁷ *Seven Strategies* (n 159) 3.

attain their Graduate Diploma of Legal Practice, and in turn be admitted.²²⁸ Training within PLT will be discussed in further detail at Part 4.2.6.

Notably, LPEAC has, as at 1 April 2021, added bullying, discrimination and harassment as a compulsory CPD unit requirement,²²⁹ alongside its existing compulsory units on practice management, legal ethics and professional skills.²³⁰ The unit intends to educate participants in appropriate workplace conduct, as well as responding to and reporting incidents of harassment, and supporting victims.²³¹ The Commission endorses the rollout of widespread initiatives such as these, and welcomes the way in which this unit will ensure respectful behaviour is emphasised as a priority within the profession. The Commission notes that there are several specialised training providers who conduct sessions relevant to the prevention of, and response to, harassment and its drivers in the workplace.²³²

The Commission's view is that legal profession workplaces which provide in-house CPD sessions should be proactive in providing sessions on bullying, discrimination and harassment to demonstrate their commitment to addressing these issues and promote a positive culture in their organisations.

Accordingly, the Commission recommends:

RECOMMENDATION 4

That all legal profession workplaces which currently deliver in-house Continuing Professional Development courses, deliver one Continuing Professional Development course per year for the next five years with respect to bullying,

²²⁸ Ibid.

²²⁹ CPD units are used as an ongoing educative tool for legal practitioners, whereby they must complete a set number of units each year in order to fulfil the requirements of their practising certificates. In South Australia, the Law Society, as the administrator of practising certificates, regulates the register of CPD completion. The Law Society notes that a CPD activity must have significant intellectual or practical content primarily related to the practice of law; be conducted by persons qualified by practical or academic experience in the subject; and be relevant to the immediate or long-term professional development needs of the legal practitioner undertaking it.

²³⁰ The Law Society of South Australia, *Mandatory Continuing Professional Development* (Web Page) <https://www.lawsocietysa.asn.au/Public/Lawyers/Professional_Development/Mandatory_CPD.aspx>

²³¹ Ibid.

²³² For example, the Working Women's Centre (WWC) conducts a 'Preventing and Addressing Sexual Harassment' session, among others, with the aim of increasing knowledge of what constitutes harassment, practical prevention strategies and fostering a positive workplace culture. The WWC has expressed a willingness to conduct these sessions broadly across workplaces in South Australia. See Working Women's Centre, *Tailored training programs for your organisation* (Web Page) <<https://wwcsa.org.au/workplace-training/>>.

discrimination and harassment, including sexual harassment, in addition to the fourth required unit mandated by the 2018 *Legal Practitioners Education and Admission Council Rules*.

In a similar vein, the AHRC underlined the importance of the role that judicial officers play as leaders of the profession and models for behavioural standards, noting that the judiciary has ‘influence over the extent to which victims feel safe to come forward’. In light of this, the AHRC made the below recommendation in its Respect@Work Report:

All Australian governments should:

- a. Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with principles of Change the Story*
- b. Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training*

The Commission endorses the AHRC’s recommendation but considers it ought to go further. The engagement in training regarding the nature, drivers and impacts of harassment, including sexual harassment, must be mandatory for all judicial officers. The point is not only that judicial officers need this training because they may come into contact with victims of harassment in the course of their work, but also because it is imperative for judicial officers to model exemplary behaviour both to the profession as a whole and within their workplaces given the powerful position they hold (see Part 4.1.3 above). This Review has established that the judiciary may not be immune from concerns regarding the behaviour of its members and that this behaviour has a significant impact on the culture of the workplaces making up the South Australian courts.

RECOMMENDATION 5

That the State Courts Administration Council, in consultation with the relevant bodies responsible for developing training, programs and resources for judicial officers, develop a training program on the nature, drivers and impacts of

harassment, including sexual harassment for delivery to South Australian judicial officers on an annual basis.

The 2019 review into Victorian Sexual Harassment Report found that just 13% of organisations surveyed confirmed that they provided preventative training and education about sexual harassment to their employees, whilst 20% said no training was currently in place but that implementation was being considered. 54% stated that training was not currently provided, nor was it being considered.²³³

The Victorian Legal Services Board and Commissioner went on to note that, in line with the proposal from AWL, a crucial component of workplace training is ‘educating people about the types of behaviour that can constitute sexual harassment’, as a means of ‘reducing the underreporting of this conduct’.²³⁴

As above, the AWL also suggests that bystander education is an important component of effective workplace harassment training.²³⁵ Whilst considering the notion discussed above at Part 4.2 regarding the complex nature of compelling witnesses to call out poor behaviour in an exceedingly hierarchical workplace, it remains important to equip staff with the necessary training to recognise and, where possible, prevent such behaviour. As highlighted by the AHRC, such training should be designed so that it:

- Uses modelling in training to demonstrate how bystanders can assist
- Makes social responsibility norms evident in the workplace, such that it acknowledges bystander action can be taken by individuals or collectively
- Includes content which addresses different forms of bystander involvement and challenges myths of sexual harassment.²³⁶

Bystander training may increase the prevalence of inappropriate behaviour being called out as it happens. This would enable bystanders to call out behaviour without blame being placed on the victim. Some information received by the Commission indicated that not enough was being done at the time harassment occurs, despite others being present. For example, one participant said:

²³³ *Victorian Harassment Report* (n 15) 75.

²³⁴ *Ibid* 80.

²³⁵ *Seven Strategies* (n 159) 3.

²³⁶ See generally Australian Human Rights Commission, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (Report, 2012).

A senior partner brought some clients (managers of large businesses, significant clients for the firm) to the firm's social drinks. One of those managers physically assaulted me (putting his hands on my legs and up my skirt) in front of my entire firm. A colleague helped walk me to my car but no one intervened, and there was no follow up or fall-out for anyone. I asked to never have anything to do with that client again and was completely dismissed.

Although bystander training is valuable and contributes to the overall culture of rejecting harassment as a norm in the workplace, it must be implemented with caution. As discussed at Part 4.2, and consistent with the Commission's broad theme of recommendations, there should be some reservation in emphasising measures such as these which see the onus for action remaining with the victim or other innocent parties.

The Commission furthermore notes that although education in all settings is a foundation for prevention, it is not a silver bullet. Individuals must take responsibility for their own conduct, and even those who undergo training and are aware of appropriate conduct may not change.

This was supported by one participant, who stated:

I don't even think it's a matter of training. The senior partner I had issues with was very well versed in what he considered "political correctness" but that didn't stop him making extraordinarily racist comments nor expressing that women have taken sexual abuse allegations too far because "a bit of a grope isn't so bad".

Moreover, there is the inherent risk that internal workplace training may not be conducted to a best-practice standard; this is a possibility accompanying any measure which goes unregulated. Whilst this is certainly an important consideration, and the risk of subpar training should be mitigated where possible, mandatory training is a measure which is nonetheless worth pursuing. The Commission is of the view that, even if training were to only cover content considered the bare minimum, it may provide even one individual with the resources or support needed to pursue an avenue of complaint for an incident of harassment, or, conversely, the prompt needed for an individual to adjust their own poor behaviour.

There is also, as stated earlier within this section, a benefit for the employer in the mere staging of such training, in that it recognises harassment as an area of concern,

and one the organisation considers worth dedicating time and resources to.²³⁷ Marissa Mackie and Leah Marrone of the Women Lawyers Committee noted that ‘appropriately addressing’ sexual harassment in the workplace has the effect of firms being ‘more likely to be seen as employers of choice, attracting quality employees and, in turn, new clients’.²³⁸

Keeping training of this kind at the forefront of the profession, and in turn as a topic of discussion, will go some way in contributing to the necessary change in culture that is central to the findings of the Review.

4.5. Role of the Commission to educate employers

The Victorian Equal Opportunity and Human Rights Commission has published a guideline, *Preventing and Responding to Workplace Sexual Harassment - Complying with the Equal Opportunity Act 2010*. The guideline sets out six minimum standards in relation to the prevention and management of sexual harassment. The Victorian Commission measures legislative compliance with reference to the six standards.²³⁹

The Commission notes that the Victorian guideline is based on compliance with the positive duty in the Victorian Equal Opportunity Act, discussed further in Part 4.4.2 of this report. Current South Australian laws do not place a positive duty on employers. However, employers can be vicariously liable for the actions of their workers, unless they can demonstrate they have taken reasonable steps to prevent discrimination and harassment.²⁴⁰

The Commissioner for Equal Opportunity may issue practice guidelines.²⁴¹ As the name suggests, practice guidelines provide practical guidance on how to comply with provisions of the Equal Opportunity laws. Although not legally binding, a Court or the SACAT may consider evidence of compliance with practice guidelines for a relevant matter.²⁴²

The Commission notes, however, that the Law Council proposes to develop national model sexual harassment policy and guidelines, in accordance with Recommendation

²³⁷ *Respect@Work* (n 1) 662.

²³⁸ Marissa Mackie and Leah Marrone (n 155) 21.

²³⁹ Victorian Equal Opportunity & Human Rights Commission, ‘Preventing and responding to workplace sexual harassment: Complying with the *Equal Opportunity Act 2010*’ (Guidance Document, August 2020) 43.

²⁴⁰ *Equal Opportunity Act 1984* (SA) s 91(3).

²⁴¹ *Ibid* s 91A.

²⁴² *Ibid* s 91B.

45 of the Respect@Work Report.²⁴³ This proposal is supported by other constituent bodies, including Australian Women Lawyers.²⁴⁴

The intention is that:²⁴⁵

codifying standards and expectations would ensure a consistent approach to the way the profession responds to and manages sexual harassment, improving transparency and accountability and putting the issue of sexual harassment at the forefront of the profession's agenda.

Consultation undertaken by the Law Council in 2020 indicated that there was a consensus that the model guidelines could provide a framework which could be tailored by individual jurisdictions as a basis for, or supplement to, their own guidelines. It is hoped that this will facilitate sufficient consistency in the best practice model, while still permitting some variation.

The Commission considers that, in light of the considerable work already underway in this regard, there is no merit in its office developing practice guidelines at this stage.

4.6. Education and training at university

4.6.1. Demand for profession-based education within the university setting

The appeal for an improvement in the culture of the profession, highlighted within the data, indicates that prevention and proactive measures are key to curbing harassment. Our Watch, in its *Change the Story* review, noted that implementing university-based education, specifically targeted to the profession, has the potential to provoke broader changes:

*Activity in this setting can directly influence people during the critical transition from school to work, or career change... Effective gender equality programs in education institutions can also help reduce the gender segregation of the future workforce.*²⁴⁶

Respect@Work similarly noted that 'universities and other tertiary and higher education institutions are key settings for addressing gender inequality and changing social norms'.²⁴⁷

²⁴³ *National Action Plan* (n 19) 38.

²⁴⁴ *Seven Strategies* (n 159) 4.

²⁴⁵ *National Action Plan* (n 19) 38.

²⁴⁶ *Change the Story* (n 138) 39.

²⁴⁷ *Respect@Work* (n 1) 407.

Similar sentiments have been noted amongst participants:

I think that women should be empowered through education as students/juniors on how to address this sort of conduct.

There needs to be more education to the graduates so that they know they have more power than they think.

The Law Foundation of New Zealand's report *Purea Nei: Changing the Culture of the Legal Profession* noted that one-fifth of its respondents indicated that they believed it to be important that mandatory training to combat harassment be included as a component of an undergraduate law degree. The report furthermore noted that 'participants were overwhelmingly in favour of frequent and appropriate training at all levels of a person's career – at university, at work and at professional development courses' in order to 'resolve culture issues'.²⁴⁸

It should be noted that the matter of harassment within a university across all disciplines has, in itself, been established as a matter of great concern. In turn, this issue is addressed prominently within universities nationwide, increasingly so since the publication of the *Change the Course* study. This has resulted in a number of mechanisms being rolled out nationwide, in a bid to curb concerning levels of sexual harassment amongst university students and staff.²⁴⁹

Further to this, however, the legal profession has noted that educative measures at a university level that are specific to the legal profession would be invaluable to those commencing their legal career. The Law Council highlighted that education on such matters should be a 'joint initiative' between 'government, the media, professional groups, health and social services organisations, workplace health and safety regulators, corporate bodies, schools and universities'.²⁵⁰

²⁴⁸ Ana Lenard, Allannah Colley and Bridget McLay, *Purea Nei: Changing the Culture of the Legal Profession* (Report, December 2019) 7.

²⁴⁹ See, for example, the University of Adelaide's 'Respect. Now. Always' campaign. Measures implemented, which are mirrored across other Australian universities, include the 'Consent Matters' online training module, as well as increased visibility of the university's reporting mechanisms and support services.

²⁵⁰ Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 48 [227].

4.6.2. Relevance of university-based education to the substance of the Review

The impact and prevalence of harassment within the junior lawyer cohort was a key theme amongst responses received, particularly with regard to harassment and discrimination in a job interview setting, as well as during the early years of their career:

At more than one job interview (as a 22-year-old clerk) I was asked directly about my intentions to have children and a family and how I would juggle that with law.

There is a culture in this industry that being abused or harassed is part [and] parcel. It's almost like a hazing experience. Juniors accept it and don't say anything for fear of being seen as weak or for losing their jobs in a harsh job market.

One respondent also addressed the vulnerability of recent graduates to harassment:

... two women ... who were graduates at a particular law firm ... independently came to me ... and said that the partner of the firm that they were doing their [PLT] with said that "if you sleep with me, you get a job here".

Correspondingly, Respect@Work found that workers aged between 18 and 29 years experienced a higher rate of sexual harassment than workers in other age groups,²⁵¹ thus underlining the importance of education at the outset of a practitioner's career. Moreover, in a submission to Respect@Work, several university academics 'expressed concern that young people are often in a precarious position in workplaces, as interns or in unpaid work experience, and may not be protected against workplace sexual harassment'.²⁵²

4.6.3. Recommendations for educative measures

Maurice Blackburn, in its written submission to the Commission, noted that its legal staff responsible for the submission did not report having been subject to any education or awareness training relevant to the prevention of harassment throughout the course of their university studies or practical legal training.²⁵³ The authors suggested that 'it would be invaluable for students to hear directly from practising lawyers (especially practising senior female lawyers) about their experiences in dealing with the power imbalance, the patriarchal nature of the environment, and the

²⁵¹ Respect@Work (n 1) 97.

²⁵² Ibid 410, citing Anne Hewitt et al, Submission No 263 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* 3.

²⁵³ Maurice Blackburn, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (19 March 2021) 21.

remedies available should they become the complainant of any form of harassment'.²⁵⁴

In light of this, the Commission considers that implementing educative measures, particularly during these years of formative career development, is of paramount importance. The Commission is also of the view that the Professional Obligations that are a compulsory competency standard as per the LPEAC Rules extend to having a comprehensive understanding of what constitutes respectful behaviour, and an awareness of the supports available in the event practitioners are a victim or witness to inappropriate behaviour.

The Commission has considered the preventative systems currently in place within law schools at South Australian universities at Part 2.4.3, and commends the clear trend towards acknowledging the relevance of the issue to the profession, particularly, and importantly, within the GDLP. Accordingly, the Commission recommends that the universities and PLT providers continue to review the content included within their respective Ethics modules, ensuring that a profession-specific view of the issue is incorporated, and that this content comprises part of the assessment for these units. The value of having professionals advise the cohort, with the University of Adelaide's abovementioned seminars as examples, should also be considered, with Maurice Blackburn noting that they believe a 'storytelling approach' would be most beneficial in 'equipping the next generation of lawyers with a clear understanding' of acceptable behaviour, and how to address inappropriate conduct.²⁵⁵

The Commission recommends:

RECOMMENDATION 6

That the South Australian universities and providers of Practical Legal Training review their ethics content, with a view to providing a profession-specific perspective of harassment and ensuring that students have a comprehensive understanding of the issue as a means of fulfilling the Legal Practitioners Education and Admission Council's Professional Obligations competency.

²⁵⁴ Ibid.

²⁵⁵ Ibid 21.

4.7. Mandatory reporting as a means of prevention

A number of participants noted that other jurisdictions, including New Zealand, had introduced a mandatory reporting obligation on practitioners who observe misconduct. The *Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008* require all practitioners to submit a confidential report to the New Zealand Law Society if they have reasonable grounds to suspect that another practitioner is guilty of misconduct.²⁵⁶ Sexual and discriminatory harassment can constitute misconduct for the purposes of those Rules. Practitioners who have reasonable grounds to suspect that another lawyer is guilty of unsatisfactory misconduct can also make a confidential report to the Law Society, but are not required to do so.²⁵⁷

Reports to their Law Society will be assessed and, if possible, referred to the Early Resolution Service.²⁵⁸ If the report is not suitable for resolution by that Service, it will be transferred to the Lawyers Standards Committee where it can either be: inquired into; referred to negotiation, conciliation or mediation; or dismissed.²⁵⁹ If the report is sufficiently serious to justify it being referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, then the Lawyers Standards Committee will make that report.²⁶⁰

In the United States of America, all universities and colleges that participate in federal financial assistance programs are subject to the requirements of Title IX of the *Education Amendments Act of 1972*, which prohibits discrimination at those institutions on the basis of sex, gender, sexual orientation, gender identity and gender expression. Sexual violence and discriminatory behaviours violate the provisions of that enactment by restricting or denying a student's ability to fully participate in their school's educational opportunities. Many universities and colleges have accordingly adopted mandatory reporting policies that require faculty staff and other employees to report sexual misconduct that occurs at or in connection with their institution so that it can be investigated and, where possible, resolved.

While the US Department for Education's Office for Civil Rights provides guidance and recommendations for such policies, educational institutions are afforded discretion to

²⁵⁶ *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) r 2.8.

²⁵⁷ *Ibid* r 2.9.

²⁵⁸ New Zealand Law Society, *How your complaint is processed* (Web Page, 17 December 2020) <<https://www.lawsociety.org.nz/for-the-public/complaining-about-a-lawyer/how-your-complaint-is-processed/>>.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid*.

define the types of conduct that should be reported and to determine which staff are required to make such reports.

In its submission to Respect@Work, the Law Council recommended the introduction of a positive duty ‘to report all allegations of sexual harassment to [each organisation’s] corporate board and to an independent statutory body.’²⁶¹ Several other peak organisations in the legal profession have also discussed, and are supportive of, the implementation of a mandatory reporting regime.²⁶² The Commission acknowledges that there is some merit in implementing a mandatory reporting system for sexual and discriminatory harassment in the legal profession as it would:

- reduce the likelihood of an organisation concealing sexual and discriminatory harassment
- maintain public confidence in the legal profession
- enable a regulator to monitor and take action, where it considers it appropriate to do so (provided legislative powers to that effect are so conferred)
- increase the accountability of organisations for preventing and responding appropriately to instances of sexual and discriminatory harassment, particularly where such data is made public in an anonymised form.

However, in their submission to the Review, Pender and Castles considered the matter of mandatory reporting of sexual and discriminatory harassment in the legal profession to be a ‘vexed, and often polarising, issue.’²⁶³ Another submission to the Review stated that ‘[t]hese policies are criticised by some factions for being overreaching, paternalistically [sic] and, ironically, discriminatory’²⁶⁴.

In 2018, the NZLS Report confirmed that the effectiveness of the current mandatory reporting regime was being undermined by a lack of encouragement to make a report and by a lack of support for those who do so.²⁶⁵ The Working Group subsequently

²⁶¹ Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 43 [199].

²⁶² See, eg, Australian Women Lawyers, Submission No 288 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (27 February 2019) 3; Victorian Women Lawyers Association Inc, Submission No 337 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* 18–9.

²⁶³ Kieran Pender and Madeleine Castles, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (19 March 2021) 4 [18].

²⁶⁴ Legal Profession Conduct Commissioner, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (1 March 2021) 20 [109]. See, eg, Karen Weiss and Nicole Lasky, ‘Mandatory Reporting of Sexual Misconduct at College: A Critical Perspective’ (2017) 16(3) *Journal of School Violence* 259.

²⁶⁵ New Zealand Law Society Working Group, *Report of The New Zealand Law Society Working Group* (Report, December 2018) 39, 40, 47.

recommended that a suite of amendments be made to the *Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008*, within which the mandatory reporting requirement is located, including:²⁶⁶

- Requiring a practice or lawyer responsible for a practice to report misconduct (including sexual and discriminatory harassment) and other matters
- Excepting legal practitioners from whom a fellow practitioner has sought guidance and support from having to make a report
- Excepting legal practitioners who are aware that a report has already been made from having to make a further report
- Prohibiting the victimisation of any person making a report in good faith, and
- Excepting lawyers who, by reporting, would risk significant harm to their mental or physical wellbeing or safety, from having to make a report.

The Commission understands that the New Zealand Law Society has considered these recommendations and is in the process of seeking Ministerial and stakeholder approval of amendments to the Conduct and Client Care Rules in terms substantially similar to those recommended.²⁶⁷

While the Commission commends the New Zealand Law Society for progressing amendments intended to address the scourge of sexual harassment within its jurisdiction, we are nevertheless not satisfied that such a system ought to be adopted in South Australia, for the reasons that follow.

Such a regime, irrespective of whether it compels employees or employers to make a report, ignores the barriers to reporting (for example, fear of retribution or victimisation, or adverse career impacts). Responses to this effect noted that the same hesitancy exists in witnesses as it does in victims:

Despite the things I have witnessed, I've never been comfortable making any formal reports or complaints, because it simply isn't the done thing in the profession.

I have been so scared and reluctant to report any harassment or discrimination as I was afraid of the repercussions with my Manager and job if I reported the behaviour.

²⁶⁶ Ibid 47.

²⁶⁷ New Zealand Law Society, *Update on changes to conduct rules* (Web Page, 3 September 2020) <<https://www.lawsociety.org.nz/news/legal-news/update-on-changes-to-conduct-rules/>>; New Zealand Law Society, *Key proposals for change to the Conduct and Client Care Rules* (Web Page, 7 July 2020) <<https://www.lawsociety.org.nz/news/lawtalk/lawtalk-issue-941/key-proposals-for-change-to-the-conduct-and-client-care-rules/>>.

Mandatory reporting regimes can also serve to disempower victims by removing the therapeutic element of choice and discourage the use of informal avenues of reporting.²⁶⁸ Further, mandatory reporting may increase the risk that victims will experience secondary victimisation and retraumatisation.²⁶⁹

By their very nature, mandatory reporting regimes often rely on penalties to promote compliance. The Commission rejects the use of penalties on the basis that they may serve to further entrench cultures of silence and increase enforcement costs.²⁷⁰ The absence of any penalty ultimately renders mandatory reporting requirements as merely symbolic.

The Commission is therefore of the view that mandatory reporting regimes should not be implemented in the South Australian legal profession until there is sufficient empirical evidence to support their efficacy and until appropriate support infrastructure is established to ensure those who make reports pursuant to such a scheme are adequately protected.²⁷¹

²⁶⁸ Karen Weiss and Nicole Lasky, 'Mandatory Reporting of Sexual Misconduct at College: A Critical Perspective' (2017) 16(3) *Journal of School Violence* 259, 266; New Zealand Law Society Working Group, *Report of The New Zealand Law Society Working Group* (Report, December 2018) 42.

²⁶⁹ See generally Debra Patterson, Megan Greeson and Rebecca Campbell, 'Understanding rape survivors' decisions not to seek help from formal social systems' (2009) 34(2) *Health & Social Work* 127; Courtney Ahrens, 'Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape' (2006) 38 *American Journal of Community Psychology* 263; Karen Weiss, 'Neutralizing sexual victimization: A typology of victims' non-reporting accounts' (2011) 15(4) *Theoretical Criminology* 445.

²⁷⁰ Cf Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 45 [205]. To prosecute an employee or employer for failing to make a report implies that the regulator had nevertheless been made aware of the conduct the subject of that prosecution.

²⁷¹ The Commission notes the mandatory reporting requirement in relation to unethical behaviour which applies to all public sector employees by virtue of the Code of Ethics for the South Australian Public Sector. While the Commission does not support the implementation of mandatory reporting regimes, it accepts and understands the rationale for a PCBU implementing such a requirement in furtherance of its WHS obligations to prevent and eliminate risks to health and safety in the workplace.

5. Establishing an independent complaints body

5.1. Findings of the Review

As detailed in Part 3, only 23.6% of participants who answered the relevant question expressed the view that the current mechanisms were not adequate. It cannot be said that there is a clear mandate to establish a new, independent complaints body.

One participant expressed the following concern about vesting decisions (at least at the initial stage) in only one person (eg the LPCC), particularly when that person is a legal practitioner. They offered this view:

The legal profession has long had responsibility for “looking after its own” and this can result in the appearance of downplaying or actual covering up of concerns. This still happens today.

On complaints alleging sexual harassment, one participant suggested that, rather than sitting as a single member, ‘on these sorts of matters [the LPCC] sits out to a board’.

Several participants sought to discourage the Commission from there being any increase in the role played by the Law Society in referring complaints of harassment. One participant expressed concern about the one entity being both the membership body and the initial receptacle of complaints. It was suggested that there is a tension between these two functions when a complaint of harassment is made. The argument is that the Society, being heavily reliant on its members, particularly those in the upper limits of the hierarchy, may be conflicted in supporting complainants.

However, the contrary view was also expressed. One senior member of the profession, who participated in the Review, indicated that: ‘I think they do a reasonable job of separating those [functions].’ Reference was made to the various referral services coordinated by the Society, including to Law Care or the Young Lawyers Support Group.

One response sought to dissuade the Commission from recommending that the Law Society assume regulation of complaints:

Conflicts of interest are everywhere. They receive a lot of their income from membership subscriptions, and these subscriptions are paid for by law firms, the employers. The Law Society is not going to risk subscriptions being cancelled by member firms, so they will be pressured to fall on the side of the employer member law firm, not the member

practitioner making the complaint.

The role of SABA as a complaint recipient was also questioned by participants. In a submission received from the Women at the Bar Committee, a subcommittee of SABA, it was said that SABA is not “the best” body to receive complaints because (amongst other things) there is a reticence to report a complaint about a barrister to a group of barristers because “everyone knows everyone else”. This, together with concerns about career progression, lack of education about reporting options and inadequate support mechanisms was said to contribute to underreporting about harassment perpetrated by or against barristers. The Women at the Bar Committee’s submission supported an anonymous complaint mechanism and the audit provisions existing under the Uniform Law.

Similarly, a small number of participants called into question the independence of the LPCC. One written submission indicated that the LPCC’s functions can create a juxtaposition. On the one hand, it is the body that receives and investigates complaints about harassment. On the other, it is the body with authority to initiate a charge before the Tribunal for unsatisfactory professional conduct or professional misconduct.

Another response expanded on this point. It was contended that practitioners must be permitted to call out harassment within the profession, without falling foul of a breach of the standards expected of them as practitioners (that is, in calling the profession into disrepute). Given that proceedings relating to circumstances within this ambit are currently on foot, the Commission makes no further comment on this point.

Depending on the desired outcome, there are already numerous reporting and complaint avenues available. If a complainant seeks a conciliated outcome, the Commission might be an option. If a complainant is willing to pursue a formal complaint, the LPCC could be an appropriate mechanism. Similarly, proceedings may be brought, in due course, in the Tribunal. All of these entities are independent in the sense that they may not be directed to act in a particular way by an individual or another similar body.

The critical question is how a new body could be justified when, regardless of the desired outcome, victims are simply not making formal complaints. The utility of yet another body in the present environment cannot be demonstrated.

The Commission was informed, countless times, of the need to change culture rather than complaint processes. Aside from the response to the Review not demonstrating a widely held view that there should be a new body, the proposition is simply not a sound business model. One participant observed that there was a risk that establishing a new body would be a waste of finite resources:

[I]t gets set up and lots of money is spent and then it gets like two complaints, and subsequent government goes “no, that’s it, pull the funding from that” and it would be all this big, catastrophic failure.

The Commission does not recommend establishing a new complaints body. However, the Review responses do indicate support for aspects of the body proposed by the terms of reference (e.g. avenues for anonymous complaints and legal protections against recrimination). Accordingly, the Commission has recommended that a number of these concerns are reflected in reforms to the existing complaint bodies. Discussion on these points appears in Part 6.5.

5.2. Features to be improved or adopted in existing mechanisms

The terms of reference suggested that an independent complaints body could facilitate the making of complaints in a confidential and supportive environment with appropriate legal protections against recrimination. It was also proposed that any independent complaints body would have the following attributes. Participants were asked to consider their relative significance:

- a diverse membership
- transparent processes
- appropriate investigative powers
- avenues for anonymous complaints
- wide consultation with a broad range of stakeholders
- appropriate avenues of redress in the event a complaint is made out.

Whilst completing the survey, those respondents who said there was a need to establish an independent complaints body indicated it should have **avenues for anonymous complaints** (84.1%), **appropriate investigative powers** (82.4%), **transparent processes** (81.7%), and **appropriate avenues of redress** in the event a complaint is made out (78.6%). **Diverse membership** of an independent complaints body was also considered important by 73.6% of respondents.

Less than half of the respondents (45.4%) considered it important for the independent complaints body to consult widely with stakeholders. The Commission did not identify how or why a complaints body might discharge an obligation to **consult widely with a broad range of stakeholders** in determining the outcome of a complaint. No written submissions or free-text responses addressed this attribute. In light of the lack of engagement on this proposed characteristic, there is an inference that participants in the Review could not see how it might work either.

The need for procedural fairness and support for all parties, as well as protections to prevent the victimisation of victims, emerged as common themes from respondents providing 'other' responses about the existing mechanisms or an independent complaints body. One participant suggested that, in addition to ensuring that there is adequate support for victims, there should also be a formal system for members of the profession to offer support for the alleged harasser. It was proposed that there could be a *quid pro quo* arrangement between firms, chambers or agencies to provide a senior person with appropriate integrity to provide a supporting role to a respondent (rather than giving legal advice) and to reinforce the principles of gender equality, diversity and inclusive practices and mutual respect. This Review was not able to explore the viability of this suggestion.

Only 17.8% of survey respondents indicated a need to establish an independent complaints body in isolation of other improvements. The greater degree of interest in improvements to existing mechanisms suggests that the industry would benefit most from changing them, rather than the creation of another body.

As identified in Part 6.3, there is a high level of distrust in existing complaint mechanisms within the legal profession. Victims have expressed concerns with the profession's 'loose lips'. Barriers to reporting, such as fear of repercussions (including the impacts on one's career and the inaction against harassers) and reluctance to engage in protracted and litigious complaint proceedings, contribute to low rates of reporting.

The Commission views the nature and prevalence of sexual and discriminatory harassment within the legal profession to be the product of its own culture of a hierarchical patriarchy, gender-based bias and discrimination, lack of diversity, tolerance of incivility, lack of awareness of appropriate behavioural boundaries, and a failure to identify inappropriate conduct as a WHS psychological hazard. Culture change, education and training, and a WHS approach are preventative mechanisms

that, if embraced, will reduce the need to seek out complaint bodies in the first place.

The Review heard of the confusion faced by victims in identifying their avenues for complaint, and in understanding how the respective processes operate. The Commission considers that the addition of an extra complaints body would only add a further layer to that complexity. The Commission believes that appropriate changes to the LPCC will address many of the concerns raised by review participants about existing complaint mechanisms and will increase willingness to utilise its services.

Moreover, to immediately address shortcomings in the legal profession (and across the community generally), the Commission believes that the provision of independent information and advice to victims of harassment is a function best performed by the Commission itself. Although not a complaint body (it is a reporting avenue that offers conciliation), it is the entity that can offer impartial expertise and objective advice about complaint avenues, and the referral to victim-centric support experts on sexual and discriminatory harassment. This service is available for all people who experience harassment and discrimination in South Australia and is not an entity that could be said to be affiliated with legal practitioners. It is therefore an ideal body to provide information to victims of harassment perpetrated by members of the profession who may lack confidence in accessing advice from a body staffed solely by other legal practitioners.

6. Improvements to existing external complaint mechanisms

6.1. Awareness of existing external complaint mechanisms

The survey sought to understand whether or not respondents were aware of a range of external complaint bodies that may be available to them, depending on the circumstances of the harassment. 542 respondents answered this question (see Figure 23).

The survey found that respondents were most aware of **the Commission** (82.6%) and **South Australia Police** (80.6%) as complaint bodies. The **LPCC** (76.5%), **Women Lawyers Association of South Australia** (67.6%), **Fair Work Commission** (65.2%) and **Law Society** (64.4%) were also relatively well-known.

Figure 23: Awareness of complaint bodies

External body	Female	Male	Total
Equal Opportunity Commission (EOC)	80.3	85.7	82.6
Fair Work Commission	63.0	69.3	65.2
Independent Commissioner Against Corruption (ICAC)	50.9	51.4	51.5
Judicial Conduct Commissioner	45.7	61.4	51.9
Law Society of South Australia	59.0	73.6	64.4
Legal Profession Conduct Commissioner	72.0	82.9	76.5
SA Bar Association	37.0	60.0	55.2
SafeWork SA	53.8	62.1	57.6
South Australia Police	81.8	75.7	80.6
Women Lawyers Association of SA	69.7	62.9	67.6

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q46

Although the data suggests that respondents are, for the most part, aware of a range of possible avenues to make a complaint, some participants indicated they found that the processes were unclear or that further guidance was needed:

We have recently had an incident where a junior lawyer was harassed by a [senior practitioner]. It was extremely difficult to ascertain what the procedure was for a complaint and who it should be made to. It also seems to differ from state to state. There needs to be an easy-to-use system which is easy to understand and accessible to everyone which applies to everyone in the profession.

Other, similar comments demonstrated that the existing complaint bodies need to better promote their functions and services, to maximise engagement with victims.

6.2. Adequacy of external complaint mechanisms

It is evident that, notwithstanding a general knowledge of the available processes, victims are not engaging with external complaint mechanisms. While the Commission was told that this was partly due to fears of repercussions and other barriers to reporting (see Part 3.7), there was also evidence of a degree of dissatisfaction with existing external complaint mechanisms, which may impact upon the rate of complaints.

The survey asked if respondents considered the existing complaint mechanisms, and the laws that govern them, to be **adequate** in addressing complaints of sexual or discriminatory harassment. Of the 539 respondents who provided an answer to this question:

- Only 18.6% said yes, no changes are required
- 29.7% considered that the existing bodies were adequate but that they could be improved
- 23.6% expressed the view that the current mechanisms were not adequate
- 28.2% were not sure.

It is evident that, although there is a call for change, there is no clear mandate to establish a new, independent complaints body.

Respondents who indicated that improvements were needed were asked to identify **which complaint bodies and laws needed change or improvement** (see Figure 24).

Figure 24: Complaint bodies and laws requiring change or improvement

Value	Respondents	% Total Respondents
All of the above	136	50.9%
Legal Profession Conduct Commissioner (Legal Practitioners Act 1981)	64	24.0%
Law Society of South Australia (Legal Practitioners Act 1981)	53	19.9%
Equal Opportunity Commission (Equal Opportunity Act 1984)	49	18.4%
Judicial Conduct Commissioner (Judicial Conduct Commissioner Act 2015)	47	17.6%
South Australia Police	32	12.0%
SA Bar Association	29	10.9%
Fair Work Commission (Fair Work Act 2009)	25	9.4%
SafeWork SA (Work Health and Safety Act 2012 (SA))	23	8.6%
Independent Commissioner Against Corruption (Independent Commissioner Against Corruption Act 2012)	13	4.9%
Women Lawyers Association of South Australia	13	4.9%
Total	267	100.0%

Note: Table excludes 355 respondents who did not provide an answer to Q48. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q48

Half (50.9%) of the respondents indicated that all complaint mechanisms need improvement. Respondents indicated that the bodies and laws that should be improved are the LPCC (24.0%), the Law Society (19.9%), the Commission (18.4%) and the JCC (17.6%). Combined, there were 43.9% of respondents who indicated that aspects of the Legal Practitioners Act were inadequate or need improvement. Suggested improvements to these bodies are discussed later in this Part.

6.3. Necessary attributes of a complaints body

Respondents were asked **what attributes a complaints body must have** to encourage reporting and to ensure that complaints are adequately investigated and responded to. See Figure 25 below.

Figure 25: Necessary attributes of a complaints body

Value	Respondents	% Total Respondents
Ensuring end-to-end confidentiality	281	80.3%
Enabling anonymous complaints to be made	258	73.7%
Ensuring complaint investigation and resolution processes are transparent	256	73.1%
Enabling those who make a complaint to request an independent review of any outcome or finding	220	62.9%
Making available additional remedies for those who make a complaint (for example, a 'Stop Harassing' order or access to counselling)	212	60.6%
Mandating timeframes for the investigation and resolution of complaints	205	58.6%
Providing those who receive and investigate complaints with additional powers to discipline those who are found to have harassed another	194	55.4%
Providing those who receive and investigate complaints with additional powers to investigate	192	54.9%
Other (please specify)	30	8.6%
Total	350	100.0%

Note: Table excludes 272 respondents who did not provide an answer to Q50. Because one or more answers were allowed, the sum of respondents from all rows is greater than the total respondents row.

Source: EOC Review of Harassment in the Legal Profession survey 2021 results, Q50

Confidentiality, anonymity and transparency were the three most significant attributes identified by survey respondents. They are expanded on below.

Confidentiality

The majority of respondents indicated a need for end-to-end confidentiality (80.3%).

The importance of confidentiality, and a perception that complaints would not be dealt with confidentially, were consistent themes. For example, one participant said:

It is in incredibly intimidating idea to have to complain about something like this and then to be brought into a meeting with others about it with the person you have accused. As much as we would like to think these things aren't shared around the office - people talk and gossip. It's better to keep your mouth shut.

Participants indicated that a lack of confidentiality significantly impacted upon their experience of reporting harassment.

One participant said there was an immediate breakdown of confidentiality once a supervisor was made aware of an incident of sexual harassment:

In less than an hour, everyone at my workplace suddenly knew about the incident.

It is indisputable that the identities of complainant and respondent must be kept confidential during any complaints process, whether it be within a workplace or to an external complaint body. While the Commission heard numerous accounts of failures to observe this fundamental tenet within internal reporting mechanisms, no submissions or responses were received to indicate that there had been a breach of any of the statutory obligations of a complaint body to protect confidential information.

The Commission notes that some participants called for a function which would enable victims to be told, when making an informal report, if the harasser had been the subject of other reports. While this would have the potential to empower victims to progress to making a formal complaint, the Commission's view is that this function would undermine the confidentiality of complaint proceedings (and infringe upon the rights of the alleged harasser) and is therefore not appropriate.

Part 6.5.1, below, details some suggested means to deal with confidentiality and integrity in the context of internal complaints.

Anonymity

The availability of anonymous reporting garnered significant support during the Review. Many participants indicated that an anonymous method of making a report would enhance the existing complaints mechanisms.

I think allowing for complainants to remain anonymous (if they want to) would assist. The difficulty is that the nature of any investigative process will likely mean the complainant can be identified, which will usually make people reluctant to come forward due to fear of punishment / retribution (including further poor treatment, career opportunities being limited, etc).

If I could just put it on the record just in case he does it to someone else.

I do feel strongly that there needs to be an anonymity about making complaints so that complaints can be made on behalf of other people and then the less senior or less powerful person does not suffer the consequences of being the one who reported the conduct.

There is a clear expectation that women will just cop it or they risk be [sic] further maligned. There is also the risk that if reports are made, the behaviour will worsen which provides a disincentive to make reports to the relevant organisations. If reporting could occur in a completely anonymous manner, I expect the true experience of women in the law would be better known.

Some participants acknowledged the limitations on anonymous reporting in some circumstances:

If it's a small firm who has lots of complaints, it's pretty easy to identify who the victims are, or who the person is that made complaints. So, there's a significant downside in relation to small firms.

Transparency

Transparency of processes is a key element of an effective complaint mechanism. This was supported by responses to the survey, with 73.1% of respondents stating that transparent complaint investigation and resolution processes were needed.

Several participants said they had experienced a lack of transparency in the complaints process which negatively impacted upon their experience.

One participant who reported being sexually harassed by a judicial officer was informed there was no policy for recording the complaint. They were told that 'there was not a clear path at this stage and that it was something that they were intending to work on'. The participant said:

I have still, to this day, not heard from management of the branch at all.

The participant had not been made aware of any external complaint bodies, including the JCC, despite the incident post-dating the introduction of this mechanism.

Another participant informed the Commission that, when making their complaint to their employer, they were advised that others (who were named during that conversation) had complained about the same harasser (breaching the integrity of those complaint processes). This same participant was reportedly not, however, kept updated about the progress or outcomes of their own complaint.

Rights of respondents

In addition to observations from a victim's perspective, the Commission acknowledges

the importance of the rights of the respondent of any complaint. Participants noted:

The rights of the accused must be protected as much as the rights of the alleged victim. Normal legal presumptions, and principles of due process, must be maintained. It is a primary duty of the legal profession to uphold the rule of law ... there must be an avenue of appeal for the accused.

Strict confidentiality for the victim and accused. Although the accused may have conducted themselves inappropriately this should not become "common knowledge" as it may cause ongoing damage for the perpetrator and not allow for the idea of behavioural change. While some people's views/behaviours may be difficult to change they should not become a victim themselves and those who have made the original complaint should be aware that attempts to make such things "common knowledge" in the workplace or wider community could also be considered bullying itself.

The Commission notes the impact that a false allegation of harassment may have. The Commission received one such example, in which the participant said:

My first experience was with a junior practitioner who made direct physical advances and then made a complaint to [a senior executive] when I said I was not interested. I did not complain of the conduct myself because it had been my first experience, I was in a relatively senior position and felt that I had handled the situation with dignity, respect and compassion when it arose. Sometimes someone makes a mistake and, particularly as the senior practitioner, it is my responsibility to allow that mistake to be something that is handled with decency and which doesn't seriously hurt someone just starting their career.

I was never told the substance of the complaint, just the fact that one had been made. Given the position that I occupied as a male in an otherwise all-female office, it did not feel safe to do anything but deny the suggestion in writing to the [senior executive] and leave it at that. There is almost as much stigma attached to denying an allegation or suggesting that a complainant should not be believed as there is to being on the receiving end of the complaint.

The Commission notes the deleterious impact that false accusations may have on respondents. The Commission does not however accept, as a general proposition, that an alleged perpetrator could be easily tarnished by the making of a formal (but false) complaint to any of the mechanisms under consideration.

The Review did hear from many participants about their deep fear of engaging in any kind of complaint process. A significant number of victims relayed their stories of harassment, many of which were raw many years after the events in question. Some of them had rarely, if ever, named their harasser.

Notwithstanding the plethora of experiences of harassment shared with the Review, the evidence obtained from complaint bodies themselves revealed that very few complaints had been made. Victims who had attempted to complain in less formal ways had also been ‘silenced’ and persuaded to ‘get on with it’ rather than take their complaints further. Many of those participants suffered personal and professional rebukes. This is supported by data collected elsewhere, which indicates that the rates of false accusations in relation to sexual violence and assault are low.

The confidentiality of any complaints process is important both for the benefit of the victim and the harasser. However, the Commission rejects the notion that the small (and, it would seem on the available data unlikely) risk of a false accusation should override any measure which seeks to increase the likelihood of victims feeling empowered to make a formal complaint.²⁷²

Notwithstanding the tension between balancing the rights of both victim and harasser, the Commission accepts the proposition that, in many instances, the prospects of effecting behavioural change will be enhanced by a non-adversarial process. Allegations that are broadly discussed may become focussed on parties’ reputations rather than their behaviour.

6.4. How often are the current complaint mechanisms used?

The Commission sought to identify how many complaints about harassment had been received by the LPCC, the SABA and the Law Society in the previous two years. The Commission was advised that:

- The LPCC has received²⁷³:
 - two formal complaints (in this case, in the past seven years) in relation to bullying, sexual harassment or discrimination

²⁷² See Claire E Ferguson and John M Malouff, ‘Assessing police classifications of sexual assault reports: A meta-analysis of false reporting rates’ (2016) 45(5) *Archives of Sexual Behaviour* 1185, 1189, at which the very low rate of false reporting of sexual offences (5%) is noted.

²⁷³ As at 1 March 2021. The Commission was advised by the LPCC during the course of the Review that this number had increased.

- approximately four or five anonymous reports of sexual harassment in the same period.
- The SABA has received:
 - no formal complaints of harassment or like behaviour
 - no informal reports of sexual harassment that have been the subject of any referral or communication with the Bar Council or the Professional Responsibility Committee, to whom such a complaint would be referred.
- The Law Society has received:
 - no formal complaints in the past two years
 - two informal verbal reports were received in the last two years.

The Commission also heard from several participants that they had received many anecdotal or informal reports from victims of harassment. It is clear from the information received by the Commission that the rate of anecdotal reporting between practitioners does not correlate with the rate of complaints made to external complaint mechanisms.

6.5. How can the existing frameworks and complaint mechanisms be improved?

Underreporting is a symptom of a lack of confidence in the existing mechanisms, as well as a reflection of the culture pervading the profession. Responses to the survey indicate that instances of sexual harassment are grossly underreported, with 69.4% of survey respondents who had experienced or witnessed sexual harassment saying they had not reported it (see Figure 13).

The South Australian legal profession is not unique in underreporting harassment. The Victorian Harassment Report found 81% of personal experiences of sexual harassment went unreported.²⁷⁴ The National Survey on Sexual Assault and Sexual Harassment at Australian Universities in 2017 found that 94% of students who were sexually harassed in a university setting did not make a formal report or complaint to anyone at the university.²⁷⁵

As previously noted, cultural change is a complex issue and will necessarily take some considerable time to resolve. The Commission's view is that, in the meantime, more

²⁷⁴ *Victorian Harassment Report* (n 15) viii.

²⁷⁵ Australian Human Rights Commission, *Change the course: National report on sexual assault and sexual harassment at Australian universities* (Report, July 2017) 11.

can be done to address the inadequacies identified in the current complaint mechanisms.

External complaint mechanisms must be developed and operated in a way which recognises the unique and personal nature of sexual and discriminatory harassment. The existing mechanisms need to be adapted with this in mind, and tailored to accommodate the additional rigours which are likely to be associated with complaints of this kind compared to, for example, complaints relating to overcharging.

Complaint mechanisms must focus on empowering and assisting victims to choose how they deal with harassment, which may include self-managing the situation without the immediate need or desire to make a formal report or complaint.

The Commission hopes that the recommendations dealing directly with the existing complaint mechanisms will not only provide pragmatic assistance and solutions for victims while more significant cultural changes occur, but will also themselves play a role in forcing that cultural shift.

Consequently, the Commission recommends that reform of the existing external complaint mechanisms includes, and indeed focusses upon, the following initiatives:

1. In relation to internal workplace channels of complaint:
 - a. Clarifying and reinforcing the importance of maintaining privacy and confidentiality while managing complaints of discrimination or harassment
 - b. Seeking assistance to ensure that policies and procedures satisfactorily address the risk of harm arising from harassment and discrimination
 - c. Where possible, providing for independent and external entities to assist in managing complaints to address concerns about impartiality
2. In relation to the SABA:
 - a. Ensuring that the list of Grievance Stewards is publicly available on the SABA website
3. In relation to the regulatory framework:
 - a. Amending the Legal Practitioners Act to include the BCR under the definition of *legal profession rules* in section 5
 - b. Supporting the reform of Rule 42 of the ACSR to capture conduct which arguably falls outside of the practice of law
4. In relation to the LPCC:

- a. Reducing delays in the determination of complaints relating to harassment
 - b. Increasing the current informal complaint initiative to two full-time equivalent investigative solicitors
 - c. Ensuring that those solicitors are appropriately trained in trauma-informed responses
 - d. Developing an online portal for receiving and managing reports in relation to harassment
 - e. Amending the Legal Practitioners Act to provide the LPCC with powers to conduct compliance audits and issue practice management directions
 - f. Ensuring that the LPCC is adequately funded to fulfil these improvements
5. In relation to the Tribunal, ensuring that one or more members:
- a. have expertise in dealing with harassment and/or trauma and ensuring that this member is included on any panel constituted to determine a charge arising from harassment, where appropriate
 - b. are of a culturally and linguistically diverse or Aboriginal and / or Torres Strait Islander background or, failing that, have experience in working with these groups
6. In relation to the Commission:
- a. Providing for a Dedicated Enquiries Officer within the Commission to take initial contact from victims seeking information and support, and to conciliate complaints made to the Commission
 - b. Extending the time in which complaints can be made to the Commission to three years
7. In relation to other matters:
- a. Providing for information sharing between relevant agencies who receive, consider and determine matters relating to reports and complaints
 - b. Providing protection from liability for those who make a report or complaint
 - c. Ensuring the appropriate and victim-centred use of non-disclosure agreements

6.5.1. Improvements to internal complaints processes

As detailed in Part 1.2.3, there is a diverse range of workplace types across the South Australian legal profession. There cannot be one type of policy and procedure document that could possibly suit all legal profession workplaces. The WHS framework does not require a PCBU to apply a 'one-size-fits-all' approach to preventing and managing discrimination and harassment. However, given that most respondents who reported an incident of sexual harassment did so internally²⁷⁶, it is critical that these reports are well-managed.

A consistent theme in the free-text responses to the survey was that participants had no confidence in the integrity of the internal or in-house mechanisms to report harassment or discrimination. Part of the concern was about a lack of confidentiality. The importance of this trait of a complaint mechanism is explored at Part 5.1. It seems trite to say, but evidently the reminder is necessary: confidentiality *must* be observed in all forums in which reports and complaints are made, except to any extent necessary to investigate or resolve that complaint. In the context of an internal complaint, confidentiality will be particularly significant.

Some participants indicated that they were concerned about a complaint mechanism that provided for a determination to be made by another legal practitioner. Some participants were concerned about the risk of potential bias, given that the South Australian legal profession is so small. Others expressed a lack of confidence that their confidentiality would be maintained, given the profession's proclivity to gossip.

Lack of impartiality is also considered to be a concern. One participant stated:

Complaints about sexual harassment will never be handled properly within a law firm because the HR department reports to the partners, and often the partners are the perpetrators. Making a complaint to a HR department is a career-limiting move, with limited remedies offered.

One option to resolve this conundrum might be for firms to engage HR external consultants to manage complaints about harassment and discrimination occurring within the firm. Another possibility may be to have a reciprocal arrangement between smaller firms or practices to assist in resolving reports of inappropriate or unlawful

²⁷⁶ 68.6% reported to a manager or co-worker at a higher level, followed by an internal workplace channel, such as a human resources department (23.8%).

conduct. Any such arrangement would have to be subject to strict confidentiality requirements, of course.

For public sector agencies or other agencies or instrumentalities of the Crown, in which the complainant was concerned about undue influence of an alleged harasser (e.g. a senior executive), there could be similar reciprocal arrangements with other departments or agencies to assist with management of the complaint.

It is not a policy as such, but one important factor will be to ensure that individuals in leadership positions check their own attitudes and conduct, to ensure that they are setting the tone for a respectful environment. The way in which senior practitioners speak to or about others in the profession may influence the workplace culture more generally. One participant offered these observations:

I have also witnessed discrimination against female employees from my Manager and senior solicitor, by comments such as 'I cannot stand her'; [and] 'she cried when she doesn't get her own way' ... I have definitely witnessed some very inappropriate things said by my manager and senior solicitor that have been terrible towards their own staff, other in-house staff and the private practice.

What is also required is that all workplaces review their policies and procedures and make changes as necessary, to ensure that the risk of harm arising from harassment and discrimination is minimised. For a small practice it can be difficult, but it is not impossible. Members of the Law Society's Women Lawyers Committee and the Australian Women Lawyers have indicated²⁷⁷ that they are:

more than happy to field enquiries to support firms in developing their policies and training, to provide referrals to various bodies that can assist in navigating sexual harassment complaints, especially for those smaller firms where it may be difficult for people to report.

Other approaches by small and big businesses may involve a no-tolerance policy for bullying, discrimination and harassment, which is clear about the consequences for perpetrators. Workplaces should also take steps to ensure that all practitioners, staff and others engaged in the business (e.g. students undertaking placements) are aware of the available services and bodies from which information can be sought.

²⁷⁷ Marissa Mackie and Leah Marrone (n 155) 20.

6.5.2. Improvements to the South Australian Bar Association

The Commission notes and commends the recent work done by the SABA to implement a confidential and impartial grievance handling procedure.²⁷⁸

As part of this procedure, the SABA nominates ‘grievance stewards’ who are the point of contact for any person with a grievance. Grievance stewards then work with the person raising the grievance about how to progress it.

The list of grievance stewards is currently only available to SABA members. Noting that anyone can raise a grievance under the SABA procedure, the Commission’s view is that the list of grievance stewards should be accessible to the public on the SABA website.

The Commission has already engaged in discussion with the SABA and understands that this change will be implemented. As such, a recommendation is not necessary.

6.5.3. Amendments to the Australian Solicitors’ Conduct Rules and Barristers’ Conduct Rules

Conduct occurring outside of ‘the course of practice’

The ASCR are a statement of solicitors’ professional and ethical obligations as derived from legislation, common law and equity. They express the collective view of the profession about the standards of conduct that members of the profession are expected to maintain.²⁷⁹ The ASCR have been adopted by the Law Society of South Australia.

As mentioned earlier, Rule 42 states that a solicitor must not ‘*in the course of practice*’ engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. The relevant Glossary definitions provide the thresholds by which a breach of Rule 42 is determined. The definitions of discrimination and sexual harassment are imported from the Equal Opportunity Act.

The LPCC can consider whether the conduct answers the statutory description of ‘unsatisfactory professional conduct’ or ‘professional misconduct’. Unsatisfactory conduct includes conduct that falls short of the standard of competence and diligence

²⁷⁸ South Australian Bar Association, ‘Procedure to Deal with Grievances Concerning Discrimination, Sexual Harassment and Workplace Bullying’ (Guidance Document, October 2020) 3.

²⁷⁹ *National Action Plan* (n 19) 33.

that a member of the public is entitled to expect of a reasonably competent practitioner and must occur ‘in connection with the practice of law’.²⁸⁰ Professional misconduct is reserved for more serious misconduct but notably includes conduct whether it occurs in connection with the practice of law or occurring otherwise that would, if established, justify a finding that the solicitor is not a fit and proper person to engage in legal practice.

Rule 5 of the ASCR, which deals with dishonest and disreputable conduct, can also respond to sexual harassment, and applies more broadly to conduct engaged in ‘in the course of practice or otherwise’,²⁸¹ which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely, to a material degree, to be prejudicial to, or diminish the public confidence in the administration of justice or bring the profession into disrepute.²⁸² However, as with professional misconduct, this Rule ‘reflects (and imports) the ethical standards informing professional misconduct and it also responds to conduct otherwise [in] the course of legal practice that is on the more severe or serious end of the scale.’²⁸³

One can see from this regulatory scheme that practical issues may arise when harassment occurs outside of a legal workplace setting. Such conduct may have met the statutory description of unsatisfactory professional conduct, but for the fact that it did not occur in connection with the practice of law. This conduct may not be of such gravity to be held to be professional misconduct. The Law Council says there is a regulatory gap ‘that does not adequately cover conduct occurring outside the course of legal practice that does not also meet the very high thresholds in both Rule 5 and statutory definitions of “professional misconduct”’.²⁸⁴

Such an interpretation has recently been confirmed by the NSW Civil and Administrative Tribunal in *New South Wales Bar Association v EFA*.²⁸⁵ The conduct complained of in that case consisted of a male barrister pushing a female assistant clerk’s head whilst saying ‘suck my dick’. The Tribunal held that the conduct, which occurred at a barristers’ clerks’ dinner, could not be said to have had ‘some real and

²⁸⁰ *Legal Practitioners Act 1981 (SA)* s 68.

²⁸¹ The Law Society of South Australia, *Australian Solicitors’ Conduct Rules* (at 1 July 2015) r 5.

²⁸² *Ibid* r 5.

²⁸³ *National Action Plan* (n 19) 36.

²⁸⁴ *Ibid*.

²⁸⁵ [2021] NSWCATOD 21.

substantial connection with professional practice²⁸⁶ and therefore did not constitute professional misconduct at common law.²⁸⁷

The Tribunal found that the conduct breached the BCRs as it was conduct that was ‘discreditable to a barrister’ and also constituted ‘conduct likely to bring the legal profession into disrepute’.²⁸⁸ The requirements under the BCRs which were found to have been contravened do not require any connection to legal practice.²⁸⁹ Having found that the practitioner breached those Rules, the Tribunal held that the conduct was not so serious as to constitute professional misconduct, but rather constituted unsatisfactory professional conduct.²⁹⁰

The need for reform in South Australia

The imperative to address this issue arises from a consideration of the information received by the Commission during this Review, which supports the anecdotal evidence observed elsewhere, that incidents of sexual harassment within the legal profession are exacerbated by social events centred around the availability and high consumption of alcohol.²⁹¹

24.1% of respondents to this survey indicated that they experienced or witnessed sexual harassment at a work event, including dinners, conferences or social events.

Participants described the extent and severity of some instances of sexual harassment in social settings:

I have had to stand in professional social settings and listen to senior male members of the profession comment on my sex life and that of other women... [and] been inappropriately touched at professional dinners more times than I can remember.

I was at a professional social event when another member of the profession made sexually explicit comments about my body.

The Commission agrees with the Law Council's assessment that there is a regulatory gap which may produce undesirable outcomes in certain circumstances. The Commission agrees that it is unacceptable that this regulatory gap may apply to

²⁸⁶ Ibid [60], quoting *Council of the New South Wales Bar Association v Costigan* [2013] NSWCA 407 [79]–[80].

²⁸⁷ Ibid [68].

²⁸⁸ Ibid [81].

²⁸⁹ *New South Wales Barristers' Rules 2014* r 8.

²⁹⁰ *New South Wales Bar Association v EFA* [2021] NSWCATOD 21 [81].

²⁹¹ *National Action Plan* (n 19) 12–3.

conduct amounting to harassment, and supports reform of Rule 42 to ensure that it captures conduct occurring outside the course of legal practice, and that falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances.²⁹² The Commission also notes the efforts of the Law Council to reform Rule 42 to address issues which have been reported in relation to uniform application of Rule 5 across Australian jurisdictions.²⁹³ This is a clearly a desirable outcome.

The Commission notes that on 6 April 2021, the Law Council announced it would be accepting comments and submission on its proposal to amend Rule 42 of the ASCR to expand the Rule's application to not only conduct occurring directly in the course of legal practice, but also to conduct occurring in any situation or setting connected with legal practice.²⁹⁴

The Commission also acknowledges the submission from the LPCC in this regard. The LPCC says that the requirement that conduct must be 'in the course of practice' is problematic as it is often a grey area as to whether conduct in circumstances such as functions and conferences occurs in the course of practice.²⁹⁵ The LPCC's view is that the ASCR and BCR should continue to require some connection to practice. The LPCC says that 'it would be preferable for both the ASCR and the BCR to require that the relevant conduct be 'in connection with' the practice of law, rather than requiring it to be 'in the course of practice'.²⁹⁶ This is consistent with the Law Council's proposal.

The Commission agrees that this broader construction is preferable. As one participant said:

There needs to be more clarity within the Legal Profession Act to make it beyond argument that bullying, harassment and discrimination will not be tolerated regardless of whether it occurs at work ... It is fundamentally incompatible with the privileges and responsibility of our profession and yet it happens every day.

Accordingly, the Commission endorses Action Item 3A(i) of the National Action Plan, in relation to the implementation of:

²⁹² Ibid 36.

²⁹³ Ibid.

²⁹⁴ Law Council of Australia, 'Australian Solicitors' Conduct Rules – further revisions to Rule 42' (Consultation Paper, 6 April 2021) 8.

²⁹⁵ Legal Profession Conduct Commissioner (n 265) 7.

²⁹⁶ Ibid 9.

- A reformulation of Rule 42 of the ASCR that enables regulators to address complaints of sexual harassment as unsatisfactory professional conduct, where the subject conduct:
 - meets the statutory thresholds for sexual harassment, imported into the Rule through the applicable Glossary definitions
 - does not meet the thresholds for professional misconduct
 - does not necessarily occur in the course of legal practice, however that conduct falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances
- An updated Glossary definition that specifically addresses existing statutory thresholds for sexual harassment.

The Commission notes that any amendment to Rule 42 of the ASCR will need to be reflected by a corresponding amendment to s 68 of the Legal Practitioners Act.

6.5.4. Application of the Legal Practitioners Act to the Barristers' Conduct Rules

In his written submission to the Commission, the LPCC recommended that the Legal Practitioners Act or regulations be amended to make clear that the Bar Rules are included in the definition of *legal profession rules* under s 5 of the Legal Practitioners Act.

The Commission agrees with the LPCC that this would provide clarity and consistency between the ASCR and BCR.

Accordingly, the Commission recommends:

RECOMMENDATION 7A

That the Attorney-General amend section 5 of the *Legal Practitioners Act 1981 (SA)* to include the South Australian Bar Association Barristers' Conduct Rules under the definition of 'legal profession rules'.

6.5.5. Expanding the powers of the LPCC and the Tribunal

Following on from the work being done to expand the scope of behaviour that can amount to misconduct, the Commission's view is that the powers of the LPCC and the Tribunal should be expanded to enable them to make orders more appropriate in the

context of dealing with, and responding to harassment, once either unsatisfactory professional conduct or professional misconduct is established.

In particular, the Commission recommends that the LPCC and Tribunal each have a broad power to order that a practitioner do a specified act, or refrain from doing an unlawful act. The Commission notes that the LPCC already has a power to make an order that a practitioner do, or refrain from doing a specified act *in connection with legal practice* and only if the practitioner to whom the order applies consents to the making of the order or if the Commissioner.²⁹⁷ The Tribunal does not have such a power.

By way of comparison, the SACAT, upon determining that the respondent has acted in contravention of the Equal Opportunity Act, may make an order requiring the respondent to refrain from further contravention of the Equal Opportunity Act.²⁹⁸

In the Commission's view, in the context of responding to harassment, there is utility in both the LPCC and Tribunal having a broad power to order that a practitioner do, or refrain from doing a specified or unlawful act, irrespective of whether or not it is in connection with law practice. This is consistent with the view expressed by the Law Council above that regulators should be able to address complaints of sexual harassment as unsatisfactory professional conduct, even where the subject conduct does not occur in the course of legal practice, but still falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances.

The Commission notes that, in a similar vein, the AHRC recommended that the Fair Work Act be amended to introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' already in place.²⁹⁹ The Commission supports this recommendation as it relates to the Fair Work Act.

The Commission recommends:

RECOMMENDATION 7B

That the Attorney-General amend the *Legal Practitioners Act 1981* (SA) to grant the Legal Profession Conduct Commissioner and the Legal Practitioners Disciplinary

²⁹⁷ *Legal Practitioners Act 1981* (SA) ss 77J(1)(b)(vi), 77J(2)(i).

²⁹⁸ *Equal Opportunity Act 1984* (SA) s 96(1)(b).

²⁹⁹ *Respect@Work* (n 1) 525.

Tribunal the power to make an order that a respondent practitioner do, or refrain from doing, a specified or unlawful act.

6.5.6. Improvements to the Legal Profession Conduct Commissioner

At the outset, the Commission notes the submission of the LPCC that Parliament should await the outcome of the Law Council's National Action Plan before making amendments to the Legal Practitioners Act in the context of addressing inadequacies in the current complaint mechanisms. For this reason, the Commission recommends that the Attorney-General consults with the LPCC on these matters.

Addressing delays in determining complaints made to the Legal Profession Conduct Commissioner

As detailed above in Part 6.2, nearly a quarter of the respondents who indicated that existing mechanisms should be improved suggested that the mechanism of complaint to the LPCC needed to be reviewed. Two participants indicated that delay in the LPCC's processes could make the experience of making the complaint '*just as or more difficult than the event itself.*'

One participant noted in detail the effect that delay and transparency regarding timeframe with this process had on a victim. The participant said, while acknowledging that the LPCC's office no doubt operates with the best intentions, there is a '*clear lack of either timeliness or process.*' The participant opined that there had been insufficient explanations of the course of the investigation or the likely timeframes in which it would play out. The view was also expressed that the investigation stage seemed to be protracted.

The Commission considered a recommendation to impose time limits on the investigative processes undertaken by the LPCC. However, that is not recommended at this stage, for two reasons.

First, in 2020 the LPCC introduced a fee for the lodgement of complaints. Although the financial year is not yet complete (and allowances must be made for unexplained variations in data), the Commission has been advised that at this stage it appears likely that the introduction of this fee will see a reduction of the number of complaints received. It is hoped that this may have a flow-on effect of improving the timeliness of processing investigations.

Second, an arbitrary time limit (albeit one premised on the best intentions) may fail to recognise the nuanced nature and complexities of complaints presented to the LPCC. The critical principles of procedural fairness must be observed. The Commission would urge the LPCC, however, to continue to prioritise the determination of matters involving reports or complaints of harassment, particularly sexual harassment.

One participant noted that the role currently undertaken by Ms Billich is ‘*only one person, and one person can only do so much.*’ Some element of delay is inevitable when the investigator undertaking this role also performs other duties.

The Commission is optimistic that the shifting national (and global) conversation about sexual and discriminatory harassment will continue to effect much-needed cultural change within the profession. While the ultimate goal is for harassment to be eliminated, in the interim it is anticipated that more victims may engage with the various complaint and reporting mechanisms that are currently available. It is imperative that an increase in reports or complaints is met with adequately resourced complaint bodies.

It is surely beyond doubt that the LPCC’s role in investigating these matters must be an impartial one. It is not the Commissioner’s responsibility to support victims (any more than it is to support a practitioner the subject of a complaint). But it is clear that all parties to an investigation (and any proceedings that may follow) are entitled to a clear explanation of the procedural steps and the timeframes within which it is anticipated that those steps might be undertaken. Naturally, there may be instances in which there are unexpected delays, but these, too, should be explained to the parties. This will be particularly important in the case of complainants who are not legal practitioners and / or those who may be unfamiliar with the process and unable to afford representation.

The office of the LPCC must be sufficiently funded to ensure that investigations are, to the extent that procedural fairness will permit, conducted in a timely fashion and in a transparent manner.

Informal reporting to the Legal Profession Conduct Commissioner

The Commission’s view is that, for several reasons, an informal reporting mechanism is central to reform of the existing framework for addressing harassment.

First and foremost, the mechanism recognises that victims of harassment have suffered harm and may require someone with appropriate experience and training to explain what avenues are available to them and how they work. It is also imperative that victims can be referred to appropriate support agencies. This ensures both that victims receive appropriate support at the first instance and that they are empowered to make a fully informed decision based upon their unique situation. Information received by the Commission indicates that this is a feature, the absence of which has added to the difficulties experienced by victims. This would undoubtedly have impacted on confidence in the existing mechanisms. Improving the complaint-handling process and empowering victims may also lead to a reduction in attrition rates.³⁰⁰

This also recognises that many people do not wish to make a complaint, and that there are a wide range of alternative options available.

The Commission's recommendation is that the LPCC be adequately funded to employ, on an ongoing basis, two FTE investigative solicitors who could deal with reports in relation to harassment.³⁰¹ The Commission notes that many participants indicated a strong preference for individuals holding these positions to be female.

While this role would undertake tasks other than managing reports and complaints in relation to harassment, victims of harassment would exclusively deal with one or other of these investigative solicitors when making a report or complaint. Although an investigator cannot be a support person for a victim, it is critical that anyone undertaking this role has sufficient training to provide a trauma-informed response.

It is important to minimise the number of occasions on which and people to whom victims need to recount their experiences of harassment, so that those making reports are not re-traumatised every time that they need to detail their experiences afresh. Although the Commission did not receive any responses from practitioners against whom formal complaints had been made, it is anticipated that, similarly, those within that cohort would also appreciate having to deal with only one investigator.

³⁰⁰ *NARS Report* (n 18).

³⁰¹ As a possible framework which would consequently reduce time delays with the LPCC, see, for example, the Western Australian Legal Profession Complaints Committee, which contains a 'Rapid Resolution Team' who act upon complaints regarding the professional conduct of legal practitioners: Legal Profession Complaints Committee, *2017 Annual Report* (Report, December 2017) 11 <[https://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/4011080a3be283db2bcea26b48258233002b0f22/\\$file/1080.pdf](https://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/4011080a3be283db2bcea26b48258233002b0f22/$file/1080.pdf)>.

Consideration was given to whether the Commission should recommend that the LPCC's investigators include one or more who are not lawyers, given the Review participants' concerns about the reliability of lawyers handling complaints in a confidential and impartial manner. However, on balance, it was determined that, given that investigators will have to undertake many different types of investigations (most of which requiring legal skills), it was deemed best to continue to appoint legal practitioners to these roles.

The positions would be similar to that already implemented by the LPCC in which Ms Billich sits. The Commission commends the LPCC for his initiative in creating this role, and Ms Billich for undertaking it.

The benefit of having someone in Ms Billich's position has already become apparent in practice. As one participant said:

Following my initial correspondence with Ms Billich, I had a lengthy conversation with her, which outlined the complaints process, potential consequences for the perpetrator and what I would need to do if I were to make a formal complaint. The conversation with Ms Billich was very helpful and she was very supportive and understanding, for which I am grateful.

The second advantage of a robust informal reporting system, in the Commission's view, is that it will mitigate a victim's fear of experiencing negative professional and personal implications, thus leading to an increase in engagement with victims. An increase in reporting is beneficial to addressing harassment even where it does not lead to a formal complaint and sanctions.

Early figures which have been received from the LPCC in relation to Ms Billich's role support this. The responses to the survey also appear to support this view. 73.7% of survey respondents indicated that anonymous reporting is a desirable feature of a complaint-handling mechanism. Providing an anonymous and confidential avenue to make a report would assist in overcoming the most significant barrier to reporting in the South Australian legal profession, which is fear of negative implications professionally. 9.8% of respondents advised that they would have made an anonymous report, had they been able to.

If there were to be an increase in reporting, the LPCC, and by extension, other regulatory bodies (see Recommendation 12 regarding information sharing, below)

would have a better understanding of the nature and prevalence of harassment in the legal profession and could take steps to address systemic and cultural issues.

Thirdly, informal reporting would provide the LPCC with information which may assist in executing his functions under the Legal Practitioners Act (if it were to be amended as recommended below). This includes through the introduction of compliance audits and management system directions, which are discussed further below.

Reciprocal arrangements with other jurisdictions

An oft-cited reason for being reluctant to lodge a formal complaint with the LPCC (or, indeed, with any other body) is the notion that the Adelaide legal profession is small and 'everyone knows everyone'. There appears to be a fear that there is an inevitability that at some point in the complaints process (or, indeed, at every point) the persons involved in investigating or adjudicating the complaint will know the complainant or alleged harasser, or the solicitors engaged by either party, or any witnesses relevant to the investigation. One participant suggested the LPCC consider investigating the possibility of entering into an arrangement with the LPCC's equivalent in another smaller jurisdiction whereby complaints about harassment (or at the very least, sexual harassment complaints) are referred to the other jurisdiction's body for investigation and determination. The Commission suggests that the LPCC consider whether such an arrangement ought to be pursued.

Following interstate examples

The Commission's view is that the models established in Victoria and New South Wales to receive and manage informal reports should be adopted in South Australia, whether as a consequence of implementing the Uniform Law or otherwise.

The Commission heard from the regulators in New South Wales and Victoria, who have taken significant steps to implement informal reporting as part of addressing sexual harassment in the legal profession.

The NSW Office of the Legal Services Commissioner is that jurisdiction's designated local authority under the Uniform Law. The Office of the Legal Services Commissioner has recently implemented an informal reporting process which is available to anyone

who has been subject to, has witnessed or has knowledge of discrimination, sexual harassment or workplace bullying.³⁰² This process can be anonymous.

The Commission notes that the Office of the Legal Services Commissioner is currently in the process of developing an online portal and platform to receive and manage informal complaints anonymously. The system, once implemented, will provide the reporter with a unique identity in order to allow their report to be maintained by a single person within the Office of the Legal Services Commissioner as far as practicable.

Similarly, the Victorian Legal Services Board + Commissioner has introduced an informal and anonymous reporting mechanism to receive information about sexual harassment, through which a victim or witness can make a report either by phone or email.

Both the Office of the Legal Services Commissioner and Legal Services Board + Commissioner have dedicated teams to handle reports about sexual harassment. The team members are predominantly legally trained, and have been provided training to deal with and manage those who have experienced trauma.

The Commission's view is that a system of informal reporting, including in some circumstances anonymous reporting, is imperative to ensure that victims can have confidence in making a report, which may be the first contact they have with another person in relation to harassment. From this point, a victim remains in control of their process and can make a fully informed decision as to how they wish to proceed, which may be to take an alternative pathway to formally complaining. The Commission heard how beneficial such an initial communication can be:

I felt like having this initial discussion with the Equal Opportunity Commissioner was extremely helpful and informative in my decision making and I would really like to see this available for every other complaint mechanism.

Compliance Audits and Management System Directions

A further benefit of the systems being developed and implemented by both the Office of the Legal Services Commissioner and the Legal Services Board + Commissioner derives from features in the Uniform Law under which they operate.

³⁰² Office of the Legal Services Commissioner, 'Informally Reporting Inappropriate Personal Conduct' (Fact Sheet, March 2021) 2
<<https://www.olsc.nsw.gov.au/Documents/Informal%20Reporting%20Fact%20Sheet%20March%202021.pdf>>.

Under the Uniform Law, the designated local authority may conduct, or appoint a suitably qualified person to conduct, an audit of the compliance of a law practice with the Uniform Law, the Uniform Rules and other applicable professional obligations, providing the authority has reasonable grounds to do so based on either the conduct of, or complaint against, the law practice or one or more of its associates.³⁰³

The Office of the Legal Services Commissioner provides that most audits would take about two days and include a general discussion with the principals and brief, informal interviews with other key members of staff and a review of a selection of current and recently closed matter files. A law practice is given at least three weeks' notice of the Office of the Legal Services Commissioner's intention to conduct an audit.³⁰⁴

The Commission understands that both the Office of the Legal Services Commissioner and Legal Services Board + Commissioner intend to rely upon informal reports as part of forming reasonable grounds to conduct a compliance audit where, for example, multiple reports of sexual harassment are received about a particular practitioner or firm.

Under the Uniform Law, the regulator may also issue management system directions, if it considers it reasonable to do so after conducting an audit.³⁰⁵ A management system direction is a direction to a law practice to ensure that appropriate management systems are implemented and maintained.³⁰⁶ In the present context, the relevant management systems might be complaint processes and policies. A management system direction may also require a law practice to provide periodic reports on the systems and compliance with the systems.³⁰⁷ A law practice that fails to comply with a management system direction may be disqualified from providing legal services.³⁰⁸

The Commission's view is that the LPCC should be granted these functions.

The Commission notes the LPCC's submission that, if his Office is to be given additional auditing powers, it would need additional resources in order to exercise them. The Commission recommends providing additional funding to the LPCC to the extent required to effectively exercise the additional powers proposed under this Part.

³⁰³ *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 256.

³⁰⁴ Office of the Legal Services Commissioner, *Compliance Audits* (Web Page) <https://www.olsc.nsw.gov.au/Pages/lsc_practice_management/olsc_compliance_audits.aspx>.

³⁰⁵ *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 cl 257.

³⁰⁶ *Ibid* sch 1 cl 257(2)(a).

³⁰⁷ *Ibid* sch 1 cl 257(2)(b).

³⁰⁸ *Ibid* sch 1 cl 120(2)(b).

Adopting the Legal Profession Uniform Law

The Commission notes that the LPCC supports amendments to the Legal Practitioners Act to empower the LPCC to conduct compliance audits and issue management system directions. The LPCC notes this can either be done by implementing the Uniform Law or by amending the Legal Practitioners Act.³⁰⁹

The Uniform Law has been in force in NSW and Victoria since 1 July 2015, providing a single system to govern legal practice. The Uniform Law provides the designated regulator with the power to conduct compliance audits and management system directions.

The Commission notes that Western Australia currently intends on implementing the Uniform Law on or before 1 January 2022.³¹⁰

Some time ago, the Law Society advised the Attorney-General that it would not be in the best interests of the South Australian legal profession to participate in the Uniform Law in the short term. However, the Law Society recently advised the Commission that it is in the process of preparing submissions to the Attorney-General on the adoption of certain Uniform Law provisions via amendment to the Legal Practitioners Act, with consideration of the compliance auditing function being prioritised in that context.³¹¹

It is beyond the remit of this Review to analyse whether it is appropriate for South Australia to join the Uniform Law in its entirety. However, the Commission's view is that, with respect to the matters referred to above as they pertain to additional functions for the LPCC, the models in Victoria and New South Wales should be followed.

Therefore, the Commission recommends:

RECOMMENDATION 8

That the Legal Profession Conduct Commissioner be adequately funded to:

³⁰⁹ Legal Profession Conduct Commissioner (n 265) 16.

³¹⁰ The Law Society of Western Australia, *Legal Profession Uniform Law* (Web Page) <<https://www.lawsocietywa.asn.au/legal-profession-uniform-law/>>.

³¹¹ The Law Society of South Australia, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (29 March 2021) 3.

- increase the informal reporting initiative to two investigative solicitors, and that those officers be provided with adequate training to provide trauma-informed management of complaints of harassment
- establish an online portal for receiving and managing informal reports and formal complaints.

That the Attorney-General consult with the Legal Profession Conduct Commissioner regarding amendments to the *Legal Practitioners Act 1981* (SA) to empower the Commissioner to conduct compliance audits and issue management system directions, as available to regulators under the *Uniform Law Application Act 2014* (Vic), and that the Legal Profession Conduct Commissioner receive adequate funding to allow the proper exercise of those functions.

6.5.7. Improvements to the Legal Practitioners Disciplinary Tribunal

As detailed above at Part 2.3.5, not all reports to the LPCC may be resolved under s 77J of the Legal Practitioners Act. In that instance, the Commissioner must lay a charge before the Tribunal (unless to do so would be contrary to the public interest).

The five lay members of the Tribunal are appointed by the Governor on the nomination of the Chief Justice.³¹² While they must not be legal practitioners, they are required to be '*familiar with the nature of the legal system and legal practice.*' There are no other eligibility criteria specified.

While exploring the possibility of the creation of a new complaint body, the Review heard from a number of participants who were apparently not aware of the existence of the lay members of the Tribunal. Concern was expressed, particularly by those interviewed, to the effect that complaint avenues did not allow sexual harassment matters to be determined by someone other than by a practitioner. Participants offered insights such as:

The legal profession has notoriously loose lips

I just get concerned that if it was all lawyers in a matey-matey profession, they could just make a decision without any independent oversight.

On the other hand, there was a perception from some participants that decision-making bodies must include practitioners to be credible:

³¹² *Legal Practitioners Act 1981* (SA) s 78(2).

Lawyers only respect lawyers, rightly or wrongly. If other people try and weigh in on this stuff, and they are not lawyers - lawyers are very dismissive of non-lawyer's comments.

The nature of charges considered by the Tribunal are likely to vary considerably. In the main, those issues are likely to be closely related to the practitioner's practice (sometimes described as 'consumer' complaints). It is also recognised that (at least on present complaint numbers) there are likely to be few charges before the Tribunal relating to sexual or discriminatory harassment. However, in order to encourage victims of harassment to engage in the existing mechanisms to ventilate and resolve their complaints, measures should be taken to ensure that the process of appearing as a witness before the Tribunal is not, in itself, a barrier to reporting harassment.

It is respectfully recommended that the five lay members of the Tribunal include one or more members who have, in addition to familiarity with the legal system, expertise in dealing with trauma.³¹³ It is also recommended that, wherever possible, this member be included in the constitution of the panel of members to determine proceedings relating to a complaint of harassment. This may assist in presenting complainants with a less-confronting panel before which evidence may be given. One participant observed:

I think you would certainly have to have people who understand, sort of, the psychology of experiencing something like that in a workplace where you kind of feel enclosed and trapped and someone to, sort of, help you navigate that. For me it was really that sort of sense of feeling trapped, that uncertainty, and not having enough trust and confidence in the independence of the complaints process.

Insights offered by a panel member with expertise in dealing with trauma or harassment may also assist in fashioning outcomes³¹⁴ that might shed light on the harasser the impacts of their conduct and thereby – in an ideal world – contribute to cultural change.

As detailed above in Part 3, there is a lack of diversity in the legal profession, which is a driver for harassment and discrimination. It is therefore also important that the Tribunal pursues inclusion in its membership. Consequently, it is also recommended

³¹³ The Commission is not aware of the qualifications or expertise of the present lay members. The commentary and recommendations on this topic are not premised on any criticism of those members but rather is intended as a guide for future appointments.

³¹⁴ Imposed if the Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct.

that, where suitable, a person of a Culturally and Linguistically Diverse background, or a person who identifies as Aboriginal and / or Torres Strait Islander, be appointed as one of the Tribunal's lay members. Should this be deemed unfeasible, a person experienced in working with individuals from such groups should be appointed.

Accordingly, the Commission recommends:

RECOMMENDATION 9

That the members to be appointed to the Legal Practitioners Disciplinary Tribunal include one or more members:

- with expertise in dealing with sexual harassment and / or other trauma, and that this member be appointed to any panel constituted to consider a charge arising from alleged harassment, including sexual harassment
- be of a culturally and linguistically diverse or Aboriginal and / or Torres Strait Islander background, or, failing that, be experienced in working with individuals in these groups.

As an adjunct to this recommendation, the Commission considered the difficulties likely to be experienced by a complainant who is required to appear in the presence of their alleged harasser to give evidence before the Tribunal. In some such instances, there might be an argument that the victim could experience 'embarrassment or distress' of the sort addressed by section 13 of the Evidence Act. That provision allows a court³¹⁵ to make special arrangements for taking evidence from a witness 'in a trial' in order to protect the witness from, inter alia, embarrassment or distress. One participant recounted that, when told that they could be called as a witness if they made a complaint, had this to say about that prospect:

I didn't want to see him, let alone be stuck in a room talking about what he did ...

It is not beyond dispute that proceedings before the Tribunal would meet the description of a 'trial' for the purposes of section 13.³¹⁶ As with the suggestion about the expertise of the lay membership of the Tribunal, clarifying that an application could

³¹⁵ Which, for the purposes of that Act is defined to include a tribunal invested by law with authority to make any inquiry or to receive evidence. It is also noted that section 5 of the *Evidence Act 1929 (SA)* indicates that, subject to the expression of a contrary intention in the *Legal Practitioners Act 1981 (SA)*, the provisions of the *Evidence Act 1929 (SA)* apply to every proceeding before every court. (An inquiry by the Tribunal would be captured by the definition of 'proceeding' in that Act.)

³¹⁶ 'Trial' is not defined in the *Evidence Act 1929 (SA)*. It is noted, conversely, that the term 'proceeding' is defined, and that definition is a broad one. There is therefore an argument that an inquiry by the Tribunal would not be considered a 'trial' for the purposes of section 13.

be made under section 13 of the Evidence Act could serve to break down one barrier to reporting harassment.³¹⁷

Accordingly, the Commission recommends:

RECOMMENDATION 10

That the Attorney-General amend section 13 of the *Evidence Act 1929 (SA)* to ensure that it applies to witnesses appearing in an inquiry before the Legal Practitioners Disciplinary Tribunal.

6.5.8. Improvements to the Commission

Dedicated Enquiries Officer

The Commission recognises that some within the South Australian legal profession, including those who are practitioners and those who are not, view the current complaint mechanisms a part of the broader profession and therefore perceive these mechanisms as not sufficiently removed from the ‘problem’ to provide meaningful assistance. Participants advised the Commission:

The existing mechanisms are nested within the power structure of the legal profession, particularly, the organisations of that hierarchy. The Law Society, the LPCC, even Women Lawyers, are all representative of the traditional male dominated hierarchy, and are not always seen as trusted, because they carry the history and culture of the profession which has been poor at managing harassment ...

[An ex-President of the Law Society] is well-known for saying that if young women can't hack it (the culture) then they aren't cut out for the profession

Whilst a complaint at SABA is an avenue for victims to take, it is unlikely to be taken up. There is a good chance that the members of the Bar Council and/or the appropriate committee will be friends or chamber-mates with the perpetrator, making reporting uncomfortable, and raising questions of confidentiality. There are also feelings of the Bar being a “boys’ club”, with women already disadvantaged in many ways, making women reporting such incidents to men at the Bar unlikely.

For some, this perception is the result of previous experience making a complaint:

³¹⁷ It is acknowledged that this measure may be infrequently implemented, at least in the short-term, given the paucity of complaints of this type.

CASE STUDY

I was sexually assaulted by a member of the profession, who was also a friend. I reported the assault to the Law Society of South Australia. I was advised not to mention the name of the perpetrator because this would cause the Law Society to investigate the matter which included me being cross examined on my allegation. I was then referred to Dr Jill and was told to contact a senior member of the profession that was named on a list provided to me by the Law Society as a support person for young lawyers. I attended upon Dr Jill and contacted a senior member of the bar named on the list. The senior member of the bar did not want to assist me in fear that the perpetrator may be an instructing solicitor causing her conflict.

As a result of the above, I did not pursue the matter further because I was worried about not being adequately supported in making a formal complaint.

I spent a good year and a half being ostracised from my colleagues in fear of seeing and being in close proximity to my perpetrator. It was not until the same perpetrator did the exact same thing to a colleague's friend at a private function that my colleagues started to associate with me again and excluded him from work and non-work functions. My partner and I still at times find it hard coming to terms with the assault.

Another participant perceived there to be barriers to making a complaint by virtue of their position:

Employees of the Law Society have nowhere to complain that is truly independent and free from influence from senior members of the Law Society. The Law Society is so heavily involved in all areas of the legal profession, that if an employee complains, there can be recriminations from a variety of areas of the profession. Members are unable to do anything to assist (for fear themselves) and the President of the day refused to get involved.

While the Commission's view is that the establishment of dedicated officers within the LPCC will go some way to addressing these perceptions and providing an 'independent' mode of reporting harassment, the Commission's view is that it is important to provide multiple avenues of complaint, notwithstanding the complexities inherent in having multiple complaint pathways. Providing victims with flexibility will

hopefully engender better engagement with processes. This is supported by the findings in the Respect@Work Report:³¹⁸

For workers, flexibility fosters trust in a reporting system, by allowing victims to choose how to proceed according to their own needs and expectations. ... It also allows for flexibility in responses to be proportionate to the conduct and harm. Victims may also be more likely to 'find someone with whom they are comfortable speaking if multiple routes are open to them'.

With this in mind, the Commission recommends the establishment of a DEO within the Commission to receive and manage reports of sexual harassment and co-conciliate matters which progress to that stage. Bearing in mind the volume of work already undertaken by the Commission, it is proposed that this be an additional position.

The DEO would not be dedicated to the legal profession, and would be responsible for taking initial reports of sexual harassment across the community. Again, noting that sexual harassment, even as compared to discriminatory harassment, is an issue which requires a dedicated, specially trained response, the appointee would need to have this expertise.

The DEO would be tasked with taking the initial enquiry, providing a robust summary of the various possible avenues available and detailing what each of these processes would entail and how long they may take. For this reason, the Commission's view is that this officer should have legal training.

The role would provide a single point of contact from initial enquiry through to conciliation. The Commission's proposal would be that the DEO also have training as a conciliator, and that the DEO be involved in conciliations in relation to sexual harassment. This would prevent a complainant having to tell their story to multiple people and minimises the risk of revictimisation.

³¹⁸ *Respect@Work* (n 1) 697.

The Commission recommends:

RECOMMENDATION 11

That the Attorney-General creates and funds an additional ongoing position within the Equal Opportunity Commission for a Designated Enquiries Officer to take enquiries and conciliate matters relating to sexual harassment.

6.5.9. Reforming time limitations on making complaints to the Commission

As part of a reform of the current complaint mechanisms, the Commission recommends extending the time limit within which a victim can make a complaint to the relevant bodies. The Commission is of the view that there are persuasive reasons to do so in order to ensure that the complaint process is victim-focussed.

Under the Equal Opportunity Act, a complaint must be lodged within 12 months of the date on which the contravention (or the last of a series of acts forming the contravention) is alleged to have occurred.³¹⁹ Complaints to the LPCC must be made within three years of the conduct that is the subject of the complaint or such longer period as the Commissioner may allow.³²⁰ There are no time limits for victims to make complaints under the WHS Act or the JCC Act. While there is no time limit applicable to complaints to the AHRC under the AHRC Act, the President has a discretion to terminate a complaint if it was lodged more than six months after the alleged unlawful discrimination took place.³²¹

Under the Uniform Law, a complaint (other than a complaint involving a costs dispute) must be about conduct alleged to have occurred within three years, but the relevant regulatory authority may waive the time requirement if satisfied that it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or if the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.³²²

³¹⁹ *Equal Opportunity Act 1984* (SA) s 93(2).

³²⁰ *Legal Practitioners Act 1981* (SA) s 77B(3c).

³²¹ *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b). Note, however, that the Australian Government has agreed to amend the *Australian human Rights Commission Act 1986* (Cth) so that the President's discretion to terminate a complaint under the *Sex Discrimination Act 1984* (Cth) on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place: *Roadmap for Respect* (n 3) 15.

³²² *Uniform Law Application Act 2014* (Vic) sch 1 cl 272.

The Victorian Equal Opportunity and Human Rights Commission (**Victorian Commission**) does not have a time limit in which disputes must be brought, however the Victorian Commissioner, similar to the AHRC, has a power to decline to provide or to continue to provide dispute resolution if the alleged contravention occurred more than 12 months before the dispute was brought.³²³

Similarly, the President of the Anti-Discrimination Board may decline a complaint if the whole or part of the conduct complained of occurred more than 12 months before the making of the complaint.³²⁴

Various issues were raised in the Respect@Work Report in the context of the appropriateness of the six-month provision under the AHRC Act.

Delays in making a complaint may be complex and may include the impact of the harassment on the complainant's mental state, fear of victimisation, lack of awareness of legal rights and proper processes or the complainant may be awaiting the outcome of an internal workplace investigation.³²⁵ The AHRC also heard that some were reluctant to report an incident of sexual harassment while still employed in the same workplace.³²⁶ This is consistent with information received by the Commission, that internal motivations (such as job security and career prospects) often lead to victims not making a complaint. The AHRC heard that for some complainants, the knowledge that their claim may be rejected because it is outside the time limit is enough to prevent them from making a claim at all.³²⁷

The Commission notes that the AHRC recommended that the six-month timeframe under the AHRC Act be extended to two years, to address the concerns regarding the complex reasons for the delay in bringing a sexual harassment claim.³²⁸ The Commission further notes the Commonwealth Government's announcement on 8 April 2021 that, as part of its response to the Respect@Work Report, it will seek to extend the six-month timeframe.³²⁹

³²³ *Equal Opportunity Act 2010* (Vic) s 116(a).

³²⁴ *Anti-Discrimination Act 1977* (NSW) s 89B.

³²⁵ *Respect@Work* (n 1) 494, citing Kingsford Legal Centre et al, Submission No 450 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (29 March 2019) 16.

³²⁶ *Respect@Work* (n 1) 494.

³²⁷ *Ibid.*

³²⁸ *Ibid* 495.

³²⁹ *Roadmap for Respect* (n 3) 15.

The Australian Women Lawyers, in its 'Seven Strategies for Addressing Sexual Harassment in the Legal Profession' identified the need for time limits on complaints to be extended to at least six years, with a discretion to allow historical complaints to be made.³³⁰

The Commission considers that the preferable model is that which provides a fixed and express time limit which may be subject to extension in certain circumstances. This model provides victims certainty with respect to whether their complaint will be considered, and makes clear that if a complaint is out of time, there is an option to apply for it to be heard. It also reflects a recognition that those accused of harassment or discrimination ought not to be prejudiced in terms of meeting any complaint against them. The Commission is of the view that a time limit of three years, as implemented in the Uniform Law, is appropriate. This will provide consistency both with the Uniform Law and the Legal Practitioners Act. The amended provision should provide the Commissioner with a discretion to allow for complaints to be made out-of-time in appropriate cases, including where it is appropriate in the circumstances of the delay or is otherwise in the public interest.

The Commission also heard from participants who considered it important for there to be a mechanism whereby historical complaints could be heard and documented as a means for enabling the victim's recovery. This was included as a recommendation in the Respect@Work Report (Recommendation 27). In its response to the Respect@Work Report on 8 April 2021, the Commonwealth Government announced it supports the intention of this recommendation and intends to work with state and territory governments to evaluate the effectiveness of existing counselling-based services for victims. The Commonwealth Government has also undertaken to ensure employers have access to guidance materials to assist in supporting victims of historical workplace sexual harassment.³³¹ It is notable that the Commonwealth Government's response makes no mention of providing resources in order to achieve either commitment. The Commission will watch developments in this area with interest.

The Commission recommends:

³³⁰ *Seven Strategies* (n 159) 4.

³³¹ *Roadmap for Respect* (n 3) 11.

RECOMMENDATION 12

That the Attorney-General amend section 93(2) of the *Equal Opportunity Act 1984* (SA) to increase the time limits in which a complaint may be made to three years, or such longer period as the Commissioner may allow, having regard to the nature of the failure to make a complaint within the timeframe and the public interest in receiving and progressing the complaint.

6.5.10. Information Sharing

The Commission's view is that information sharing between regulatory, investigatory and disciplinary bodies is an essential part of reform.

The Commission notes recommendation 3 of the AHRC in the *Respect@Work* Report. The effect of that proposal is that agencies handling workplace sexual harassment matters collaborate with the Workplace Sexual Harassment Council to aggregate data for annual reporting and share information on enquiries, complaints and claims relating to workplace sexual harassment.

In a similar vein, the Commission's view is that information-sharing mechanisms are necessary at the State level in order to coordinate efforts to eliminate harassment and ensure the efficient and effective use of resources and powers within the relevant bodies, being the LPCC, SafeWork SA and the Commission.

This is important for several reasons. One is that a coordinated approach, as recommended by the AHRC, will operate most effectively if there are well-developed mechanisms for information sharing involved.³³²

Secondly, each of SafeWork SA, LPCC and the Commission have unique but partially overlapping functions. The creation of a robust information-sharing system would hopefully enable each organisation to use specialised functions to address particular issues.

The Commission notes that certain types of information sharing between government agencies is facilitated by the *Public Sector (Data Sharing) Act 2016* (**Data Sharing Act**) and the *Public Sector (Data Sharing) Regulations 2017* (**Data Sharing Regulations**). The Data Sharing Act authorises the exchange of data, other than

³³² *Respect@Work* (n 1) 120.

public sector data, between public sector agencies for purposes prescribed under the Data Sharing Act and Regulations.³³³

The Commission's view is that consideration of reform to enable data sharing between SafeWork SA, the LPCC and the EOC should include a consideration of amending the Data Sharing Regulations³³⁴ to ensure that:

1. Data in relation to bullying, discrimination and harassment does not fall within the definition of exempt public sector data under Regulation 4
2. Regulation 7 is sufficiently broad to facilitate information sharing for the purpose of furthering the objects of the WHS Act, the Legal Practitioners Act and the Equal Opportunity Act as they relate to bullying, discrimination and harassment.

The LPCC supports information sharing between his Office and SafeWork. He provides that, in light of clause 19 of Schedule 4 of the Legal Practitioners Act, an instrument such as a Memorandum of Understanding would need to be created to enable him to share information with SafeWork SA. This could also be done by amending Schedule 4 to exclude SafeWork SA from the prohibition of disclosure of information.³³⁵

The Commission notes in this regard that on 8 March 2021 the Victorian Government announced the creation of a Ministerial Taskforce on Workplace Sexual Harassment, which aims 'to develop reforms that will prevent and better respond to sexual harassment in workplaces'.³³⁶ This includes the implementation of a Memorandum of Understanding between WorkSafe Victoria and the Victorian Equal Opportunity and Human Rights Commission.

The Commission notes that both the Legal Practitioners Act and the WHS Act already have similar provisions which deal with information sharing. Section 77A of the Legal Practitioners Act provides that the LPCC and Law Society Council may, with the approval of the Attorney-General, enter into an agreement or arrangement providing for the exchange of information relating to legal practitioners. Such an agreement is

³³³ *Public Sector (Data Sharing) Act 2016* (SA) s 8(1).

³³⁴ Consideration should also be given to Government of South Australia, *Administrative Instruction 1/89: Information Privacy Principles Instruction* ('Premier and Cabinet Circular 12').

³³⁵ Legal Profession Conduct Commissioner (n 265) 17 [92].

³³⁶ James Merlino, 'Preventing Sexual Harassment in Victorian Workplaces' (Media Release, 8 March 2021) 1.

currently in place.³³⁷ Section 152(g) of the WHS Act provides that SafeWork SA may engage in information sharing with a corresponding regulator to achieve the purpose of the Act. The LPCC is not a corresponding regulator under the WHS Act.

It is noted, however, that the confidentiality provision in the WHS Act prohibits disclosure of information obtained under that Act, subject to the application of any of the exemptions.³³⁸ The provision of information by those involved in administering the WHS Act to the Commission or the LPCC would not fall within any of those exceptions. Before an information-sharing arrangement could be entered into, consideration would need to be given to whether it was necessary to prescribe the Equal Opportunity Act and the Legal Practitioners Act in the WHS Regulations, pursuant to section 271(3)(c)(ii) of the WHS Act.

Accordingly, the Commission recommends:

RECOMMENDATION 13

That the Attorney-General facilitate the creation of an instrument pursuant to which Safe Work SA, the Legal Profession Conduct Commissioner and the Commissioner for Equal Opportunity can share information relating to reports, complaints or other information about harassment by a member of the legal profession.

6.5.11. The Fair Work Commission

It is clear that the general protection and anti-bullying provisions within the Fair Work Act (detailed at Part 2.3.4) can apply to sexual and discriminatory behaviours in the legal profession workplace.

In its submission to the Review, Maurice Blackburn referred to several benefits of utilising the complaint processes available under the Fair Work Act:

One of the benefits of this jurisdiction is that there are usually no adverse costs to individuals (even if they lose their case) and furthermore, matters can be conciliated more quickly.

³³⁷ Legal Profession Conduct Commissioner (n 265) 17 [92].

³³⁸ *Work Health and Safety Act 2012 (SA)* s 271.

Employees may also have other claims (such as an employer's failure to pay wages) which could be efficiently dealt with under one jurisdiction if sexual harassment was prohibited by the Fair Work Act.

The Fair Work Act also provides for reinstatement as a remedy if a person has been terminated because of a protected attribute (such as making a complaint or enquiry about sexual harassment).³³⁹

The Commission acknowledges the benefits of the Fair Work Commission as a complaints mechanism, however we consider it to be yet another underutilised means of reporting harassment in the workplace. While 65% of survey respondents were aware that, depending on the circumstances, a complaint could be made about harassment to the Fair Work Commission, no respondents indicated that they had used this mechanism to make such a report. The Commission also understands that an appreciable proportion of applications for orders to stop bullying are not followed through with.³⁴⁰

The Commission was guided as to why this may be the case by Maurice Blackburn, which submitted to the Review that the use of the Fair Work Commission as a complaints mechanism was inhibited, in part, because:

- There is no explicit prohibition of sexual harassment in the Fair Work Act, rendering it difficult for a complainant to successfully argue that the sexual harassment itself was adverse action on the basis of the person's sex³⁴¹
- A complainant has only 21 days to lodge a claim with the Fair Work Commission where that person has been dismissed³⁴²
- Sexual harassment is not specifically included in the definition of 'serious misconduct'.³⁴³

The AHRC thoroughly examined the Fair Work system as part of Respect@Work. It made several recommendations in relation to the system, including that:

³³⁹ Maurice Blackburn, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (19 March 2021) 17.

³⁴⁰ Allison Ballard and Patricia Easteal, 'Australia's National Anti-Bullying Jurisdiction: Paper Tiger or Velvet Glove' (2016) 5(1) *Laws* 4, 13.

³⁴¹ Maurice Blackburn, Submission to Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (19 March 2021) 16.

³⁴² *Ibid* 17.

³⁴³ *Ibid* 17.

- The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the *Sex Discrimination Act*, is expressly prohibited³⁴⁴
- The Fair Work Act be amended to allow a ‘stop sexual harassment order’ (equivalent to the ‘stop bullying order’) to be made.³⁴⁵

The Commission agrees that harassment should be explicitly and adequately covered by the Fair Work system. Expressly prohibiting harassment removes doubt from, and improves confidence in, the recourse process, and may serve to empower complainants to raise their concerns, not only with their employer but also with the Fair Work Commission. The Commission notes that, as part of the Commonwealth Government’s response to the Respect@Work Report announced on 8 April 2021, the Government will seek to amend the definition of ‘serious misconduct’ to explicitly include sexual harassment. The Commonwealth Government also announced that it intends to amend the Fair Work Act to include sexual harassment as a ground for dismissal.

The Commission also supports the insertion of provisions into the Fair Work Act to enable ‘stop sexual harassment orders’ to be made. To do so would provide complainants with an essential early intervention measure, and a timely one, provided the 14-day action requirement applies to applications made for such orders.³⁴⁶ The Commission notes that, as part of its response to the Respect@Work Report referred to above, the Commonwealth Government will seek to amend the Fair Work Act to include sexual harassment within the current ‘stop bullying order’.

The Commission agrees that ‘[w]hile sexual harassment may constitute bullying in some circumstances, the two types of behaviour can differ substantially in nature and experience.’³⁴⁷ The Commission routinely heard that victims of sexual harassment face unique barriers to making a report, given the sensitivity and, at times, subtlety, of such conduct. Accordingly, the Commission recommends that consideration be given to how barriers to making an application for such an order can be reduced. This could be done, for example, by:

- placing greater emphasis on maintaining the confidentiality of the parties and their association with the terms of the order (including the existence, nature and terms of the order itself) once it has been made

³⁴⁴ *Respect@Work* (n 1) 522.

³⁴⁵ *Ibid* 525.

³⁴⁶ *Fair Work Act 2009* (Cth) s 789FE(1) requires an application for an order to stop bullying to be dealt with within 14 days of it being made to the Fair Work Commission.

³⁴⁷ *Respect@Work* (n 1) 525.

- enabling the Fair Work Commission to prohibit the employer from disclosing the identity of the complainant (in connection with the order, or proceedings for the making of the order) and the existence, nature and terms of the order, except where reasonably necessary.

To that end, while the Commission agrees with the need for legislative reforms in the terms recommended by Maurice Blackburn and the AHRC, and proposed by the Commonwealth Government, the Commission believes that systemic cultural barriers are the primary factor undermining the use of the Fair Work Commission as a complaints mechanism (as it is with the majority of processes).

The Commission supports amendments to the Fair Work Act in the terms recommended by Respect@Work. However, in doing so, we stress the need to adopt the Commission's recommendations aimed at overcoming the barriers to making a report of harassment generally, as they appear throughout this report.

6.5.12. Ensuring protection from liability for victims

The Commission heard there is a need to consider whether Australia's defamation laws are operating as a barrier to reporting harassment. This is a complex issue and falls outside the scope of the Review. Work is already underway on this topic at a national level. A recently released discussion paper regarding possible amendments to Australia's Model Defamation Provisions asks for submissions about (amongst other matters) whether a fear of being sued for defamation is a significant factor deterring individuals from reporting unlawful conduct such as sexual harassment or discrimination to employers or professional disciplinary bodies. The discussion paper queries whether the defence of absolute privilege should be extended to these types of reports.³⁴⁸

The Commission suggests that the Attorney-General continues her support for this national work. Further, or perhaps in the alternative if the national work does not progress in a timely manner, the Commission recommends the Attorney-General give consideration to whether the Equal Opportunity Act and the Legal Practitioners Act ought to be amended to insert a provision similar to that set out in s 111(2) of the Sex Discrimination Act in order to provide some protection to persons who wish to access the complaint mechanisms under those Acts.

³⁴⁸ Department of Communities and Justice, 'Attorneys-General: Review of Model Defamation Provisions' (Discussion Paper, 31 March 2021) 83.

6.5.13. The use of non-disclosure agreements

Several participants raised with the Commission that they felt silenced when they pursued, or contemplated pursuing, avenues of redress for the harassment to which they were subjected. One participant related their experience:

Nobody is going to take you seriously and even if it does make it to anybody who can do anything about it, it will get squashed and you will get silenced.

Non-disclosure agreements are often used in the settlement of sexual harassment cases, including in the legal profession.³⁴⁹ They are contracts that create legally enforceable confidentiality obligations, often with respect to the terms of the settlement, the nature of the conduct itself and the identity of the victim and harasser.

The Commission recognises that, in the context of harassment in the legal profession, the use of non-disclosure agreements can, depending on the terms of the agreement:

- contribute to a culture of silence and impunity
- facilitate the evasion of accountability, both on an individual and organisational basis
- protect offenders 'from having to reveal the serial nature of their activity',³⁵⁰ thereby preventing those who are not privy to the agreement from being warned as to the offender's past behaviour
- embolden power imbalances at the expense of broader interests in addressing harassment³⁵¹
- exacerbate feelings of isolation and impede recovery (due to the restriction on one's ability to seek assistance and to speak of their experience generally).

The Commission is particularly concerned, however, with the suggestion that perpetrators of harassment are 'making less commitment to confidentiality than victims by falsely denying the occurrence of the sexual harassment or speaking out against victims in potentially damaging ways.'³⁵²

³⁴⁹ Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (25 February 2019) 33 [148].

³⁵⁰ Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 78, quoted in *ibid* 35 [154].

³⁵¹ Champions of Change Coalition, *Disrupting the System: Preventing and Responding to Sexual Harassment in the Workplace* (Report, 2020) 40.

³⁵² Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (25 February 2019) 36, citing Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 82–3.

Despite these consequences, victim-centred approaches dictate that survivors be provided with the upmost degree of control, choice and flexibility in their pursuit of justice.³⁵³ Universally prohibiting the use of non-disclosure agreements in harassment cases tends not only to disempower victims, but ignores the cogent reasons for, and legitimate benefits derived from, entering into such contracts in some instances.

For example, non-disclosure agreements provide an element of certainty, finality and closure to victims who do not wish to risk protracted and public litigation over which they lack control.³⁵⁴ Such agreements also provide victims with a level of privacy and confidentiality, which can be important for those who wish to avoid being exposed to the stigma and shame that can result from their victimisation.³⁵⁵

The Commission is nevertheless of the view that steps need to be taken to ensure that power imbalances, by which harassment in the legal profession is often characterised, are not exploited to induce victims to enter into a non-disclosure agreement, particularly where it is against their wishes to do so.

To this end, the Commission supports the recommendation of Respect@Work that a practice note or guideline be developed that identifies best practice principles for the use of non-disclosure agreements in workplace sexual harassment matters.³⁵⁶

The Commission is of the view that until such principles are developed, all legal professionals party to such arrangements should ensure that non-disclosure agreements are entered into only where the victim genuinely wishes to do so. Care should also be taken to draft such agreements fairly and ethically by:

- ensuring that victims retain the right to report the harassment to one of the complaint bodies outlined in Part 6. Given that the level of confidentiality afforded to a complaint will be determined by its outcome, disclosures to complaint bodies should be protected
- expressly prohibiting the harasser from misrepresenting any of the interactions the subject of the agreement.³⁵⁷

³⁵³ See, eg, United Nations High Commissioner for Refugees, 'Policy on a Victim-Centred Approach in UNHCR's Response to Sexual Misconduct' (Working Paper, December 2020) 6.

³⁵⁴ Vasundhara Prasad, 'If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements' (2018) 59(7) *Boston College Law Review* 2507, 2516.

³⁵⁵ *Ibid.*

³⁵⁶ *Respect@Work* (n 1) 564.

³⁵⁷ *Ibid.*; Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (25 February 2019) 36–7; Ian Ayres, 'Targeting Repeat Offender NDAs' (2018) 71 *Stanford Law Review Online* 76, 79.

Accordingly, the Commission recommends:

RECOMMENDATION 14

That all legal profession workplaces consider, adopt and apply, as part of their workplace policies, good-practice principles with respect to the appropriate, victim-centred use of non-disclosure agreements.

7. Conclusion and consolidated recommendations

7.1. Conclusion and Recommendations 15 and 16

The Commission is indebted to the participants of this Review. Their deeply personal accounts were evidently distressing to share and were certainly disturbing to hear. Participants informed the Commission about their experiences of discriminatory harassment on the basis of protected attributes including age, sex and caring responsibilities, along with a broad range of behaviour constituting sexual harassment, ranging from sexually suggestive comments to acts of gross indecency and indecent assault.

It is clear from the responses to this Review that harassment continues to be a prevalent feature in the legal profession and perpetrated against practitioners and support staff alike. The Review illuminated the fact that, because the profession operates in an adversarial environment where stress and distressing subject matter are common, civility can fall foul of expediency. This inevitably leads to harassment being normalised, minimised and often disregarded. Whilst it is important to ensure that effective structures are implemented to respond to harassment when it occurs, it is equally important to take steps to effect cultural change so that the legal profession does not continue to resign itself to unacceptable behaviour being the norm.

The Commission has made recommendations aimed at continuing to restore respectful behaviour across the board, in order to prevent and reduce instances of harassment, including sexual harassment. A number of these recommendations serve to reinforce educational initiatives already underway (both pre- and post-admission). For some, addressing the problem may be as simple as bringing someone else's point of view to their attention. For others, it will be a matter of thinking before they speak or act.

Some of the Commission's recommendations are geared towards shifting the focus away from a reliance on a victim bringing a formal complaint towards those in positions of authority and power (such as judicial officers, barristers, partners and executives) taking the steps necessary to generate positive cultural change. The legal profession's leadership figures must demonstrate decency and professionalism. The Commission encourages these senior members of the legal profession to adapt and adopt the words of Melbourne barrister, Rachel Doyle: 'To the members of the legal profession

who persist in perpetrating sexual [and discriminatory] harassment. Stop it. You ought to be ashamed.’³⁵⁸

The Commission also gained insight into the lack of understanding of or trust in complaint bodies and the regulatory gaps. It is trite to say that many lawyers are not adequately skilled to deal with personal issues in a workplace context. It is incumbent on employers to provide appropriate mechanisms for their employees to raise complaints or grievances, and for these to be handled in a respectful and confidential manner. The Review has highlighted the increased risk of harm to victims when there is an inadequate or inappropriate response to allegations of sexual or discriminatory harassment.

The Review produced ample evidence that harassment causes harm. It is time for the legal profession to accept that harm can arise from failure to comply with work health and safety obligations. The Commission has endorsed developments in the work health and safety framework and made recommendations which will hopefully assist legal profession workplaces to develop best practices for eliminating harassment, and, in the meantime, minimising and effectively responding to it.

The Commission recognises that some in the legal profession view the existing external complaint mechanisms as inadequate. Others are simply confused by the various bodies and their respective roles. Participants informed the Commission that this dissatisfaction will not be remedied by another body. Rather, the Commission’s recommendations focus upon developing mechanisms which are victim-centric and provide flexibility and adaptability. It is hoped that by improving accessibility and outcomes within these mechanisms, there will be increased confidence and therefore increased engagement.

The recommendations set out in this Report have broad application. Some are directed at the Government and statutory authorities, whereas others are directed to the legal profession as a whole. To ensure there is some level of accountability across the legal profession in relation to the dire need for urgent action, the Commission recommends that the Attorney-General, firstly, makes this Report publicly available and provides it to relevant organisations for dissemination (**Recommendation 15**, below). Secondly, the Commission recommends that the Attorney-General commits to commissioning a further review into the effectiveness of the laws and complaint

³⁵⁸ Rachel Doyle, ‘#Me Too and the law: Bridging the gap’ *The Age* 6 March 2021, 30

mechanisms relating to harassment, including sexual harassment, in the South Australian legal profession within three years of the publication of this Report (**Recommendation 16**, below).

The further review, to be conducted by an independent person appointed by the Attorney-General, will provide an opportunity for the reviewer to investigate the impact of the recommendations set out in this Report and will be conducted at a time when it is expected many other national initiatives will have come to fruition, for example the National Action Plan and the recommendations arising from the Respect@Work Report.

RECOMMENDATION 15

That the Attorney-General make this Report publicly available and provide it to the following organisations for further dissemination:

- Attorney-General's Department
- The Law Society of South Australia
- Legal Profession Conduct Commissioner
- Legal Services Commission
- South Australian Bar Association
- Courts Administration Authority
- Women Lawyers' Association of South Australia
- Respectful Behaviours Working Group
- Office of the Commissioner for Public Sector Employment
- South Australian Universities and Practical Legal Training providers.

RECOMMENDATION 16

That the Attorney-General commit to commissioning a further review into the effectiveness of the laws, policies, structures and complaint mechanisms relating to harassment, including sexual harassment, in the South Australian legal profession within three years of the publication of this Report.

By way of summary, the Commission's recommendations are set out below:

RECOMMENDATION 1

That all legal profession workplaces consider implementing the Workplace Equality and Respect Standards developed by Our Watch (or equivalent).

RECOMMENDATION 2

That all Persons Conducting a Business or Undertaking of a legal nature in South Australia review and, where necessary, update, their policies, procedures and processes (including staff induction materials) to ensure that they eliminate or ameliorate, as far as is practicable, risks of harm arising from sexual and discriminatory harassment, by:

- Developing, implementing and monitoring work health and safety systems with respect to psychological hazards
- Encouraging diversity and inclusion, including in recruitment processes
- Declaring that sexual and discriminatory harassment will not be tolerated
- Clarifying acceptable and unacceptable conduct
- Detailing internal and external complaint-handling procedures
- Underlining the need to maintain confidentiality about complaints
- Outlining internal and external support and services in the event of harassment, including links to relevant websites
- Specifying the need to keep and secure store records regarding complaints of harassment, for six years after they are made.

RECOMMENDATION 3

That, consistent with Recommendation 15 of the Parliamentary Review, the Attorney-General consider amending the *Equal Opportunity Act 1984* (SA) to impose a positive duty upon employers to eliminate discrimination, sexual harassment and victimisation.

RECOMMENDATION 4

That all legal profession workplaces which currently deliver in-house Continuing Professional Development courses, deliver one Continuing Professional Development course per year for the next five years with respect to bullying, discrimination and harassment, including sexual harassment, in addition to the fourth required unit mandated by the Legal Practitioners Education and Admission Council Rules 2018.

RECOMMENDATION 5

That the State Courts Administration Council, in consultation with the relevant bodies responsible for developing training, programs and resources for judicial officers, develop a training program on the nature, drivers and impacts of harassment, including sexual harassment for delivery to South Australian judicial officers on an annual basis.

RECOMMENDATION 6

That the South Australian universities and providers of Practical Legal Training review their ethics content, with a view to providing a profession-specific perspective of harassment and ensuring that students have a comprehensive understanding of the issue as a means of fulfilling the Legal Practitioners Education and Admission Council's Professional Obligations competency.

RECOMMENDATION 7

That the Attorney-General amend the *Legal Practitioners Act 1981 (SA)* to:

- amend section 5 to include the South Australian Bar Association Barristers' Conduct Rules under the definition of 'legal profession rules'.
- grant the Legal Profession Conduct Commissioner and the Legal Practitioners Disciplinary Tribunal the power to make an order that a respondent practitioner do, or refrain from doing, a specified or unlawful act

RECOMMENDATION 8

That the Legal Profession Conduct Commissioner be adequately funded to:

- increase the informal reporting initiative to two investigative solicitors, and that those officers be provided with adequate training to provide a trauma-informed management of complaints of harassment
- establish an online portal for receiving and managing informal reports and formal complaints.

That the Attorney-General consult with the Legal Profession Conduct Commissioner regarding amendments to the *Legal Practitioners Act 1981* (SA) to empower the Commissioner to conduct compliance audits and issue management system directions, as available to regulators under the *Uniform Law Application Act 2014* (Vic), and that the Legal Profession Conduct Commissioner receive adequate funding to allow the proper exercise of those functions.

RECOMMENDATION 9

That the members to be appointed to the Legal Practitioners Disciplinary Tribunal include one or more members:

- with expertise in dealing with sexual harassment and / or other trauma, and that this member be appointed to any panel constituted to consider a charge arising from alleged harassment, including sexual harassment
- from a culturally and linguistically diverse or Aboriginal and / or Torres Strait Islander background, or, failing that, be experienced in working with individuals in these groups.

RECOMMENDATION 10

That the Attorney-General amend section 13 of the *Evidence Act 1929* (SA) to ensure that it applies to witnesses appearing in an inquiry before the Legal Practitioners Disciplinary Tribunal.

RECOMMENDATION 11

That the Attorney-General creates and funds an additional ongoing position within the Equal Opportunity Commission for a Designated Enquiries Officer to take enquiries and conciliate matters relating to sexual harassment.

RECOMMENDATION 12

That the Attorney-General amend section 93(2) of the *Equal Opportunity Act 1984* (SA) be amended to increase the time limits in which a complaint may be made to three years, or such longer period as the Commissioner may allow, having regard to the nature of the failure to make a complaint within the timeframe and the public interest in receiving and progressing the complaint.

RECOMMENDATION 13

That the Attorney-General facilitate the creation of an instrument pursuant to which Safe Work SA, the Legal Profession Conduct Commissioner and the Commissioner for Equal Opportunity can share information relating to reports, complaints or other information about harassment by a member of the legal profession.

RECOMMENDATION 14

That all legal profession workplaces consider, adopt and apply, as part of their workplace policies, good-practice principles with respect to the appropriate, victim-centred use of non-disclosure agreements.

RECOMMENDATION 15

That the Attorney-General make this Report publicly available and provide it to the following organisations for further dissemination:

- Attorney-General's Department
- The Law Society of South Australia
- Legal Profession Conduct Commissioner
- Legal Services Commission
- South Australian Bar Association
- Courts Administration Authority
- Women Lawyers' Association of South Australia
- Respectful Behaviours Working Group
- Office of the Commissioner for Public Sector Employment
- South Australian Universities and Practical Legal Training providers.

RECOMMENDATION 16

That the Attorney-General commit to commissioning a further review into the effectiveness of the laws, policies, structures and complaint mechanisms relating to harassment, including sexual harassment, in the South Australian legal profession within three years of the publication of this Report.

8. Appendix

A Survey questions

The questions, answer options and display logic for the survey are available on the Commission's website (<https://eoc.sa.gov.au/>) or otherwise on request from the Commission.

B The Commission's complaint and investigation process

A 'person aggrieved', that is, a person who has been the subject of alleged discrimination, may make a complaint to the Equal Opportunity Commission. Complaints must be made in writing.³⁵⁹ Parties to this process are called 'complainants' and 'respondents'.

A person may be represented by an advocate or a lawyer if they choose, however if they choose to be represented by a lawyer they will need the Equal Opportunity Commissioner's (the Commissioner) permission to participate in the conciliation conference process.³⁶⁰ As a matter of practice, in the employment context respondents are often accompanied or represented by their employer during the conciliation process.

Once a complaint is lodged, the Commissioner will assess the complaint to ensure the Commission has jurisdiction to deal with it. The Commission will have jurisdiction where the complaint enlivens a ground protected by the Act³⁶¹ and where the alleged discrimination occurred in an 'area' of public life, including but not limited to in employment.³⁶²

If the Commissioner determines they have jurisdiction to consider the complaint,³⁶³ in the case where the subject matter of the complaint is under criminal investigation or the respondent has been or is to be charged with a criminal offence in relation to the matter, the Commissioner may not proceed with dealing with a complaint until the criminal investigation has been completed or the proceedings for the offence have been disposed of, withdrawn or permanently stayed.³⁶⁴

³⁵⁹ A person who cannot complain in writing is welcome to contact the Commission and accessible options can be offered.

³⁶⁰ *Equal Opportunity Act 1984* (SA) s 95(6).

³⁶¹ Equal Opportunity Commission, *Information on all grounds* (Web Page) <<https://eoc.sa.gov.au/index.php/what-discrimination/types-discrimination/information-all-grounds>>.

³⁶² Equal Opportunity Commission, *Places of Discrimination* (Web Page) <<https://eoc.sa.gov.au/index.php/what-discrimination/places-discrimination>>.

³⁶³ *Equal Opportunity Act 1984* (SA) s 93(2)(a)–(b). Complaints involving acts that occurred in another State or relate to a Commonwealth Department or Agency will not be within the Commission's jurisdiction, however the Australian Human Rights Commission may be able to consider the complaint. Generally, complaints that relate to incidents that occurred more than 12 months prior to the date of lodgement of the complaint may be out of time, and the Commission may not have jurisdiction to consider such a complain. Complainants would be encouraged to speak with the Commission about their particular complaint if it is older than 12 months, we may have jurisdiction to consider the complaint depending on the circumstances.

³⁶⁴ *Ibid* s 93(4).

If the Commissioner determines they have jurisdiction to consider the complaint and the complaint is not subject to criminal investigation, a copy of the complaint will be sent directly to the respondent and a written response will be requested. If the Commission deems that a conciliation conference may be suitable to assist in resolving the matter, a conference may also be scheduled at the same time the response is requested.

The conciliation conference is the alternative dispute resolution mechanism used by the Commission to assist parties to try and resolve their complaint. In essence, it involves the complainant speaking directly (or through the Conciliator) with the respondent, in an informal setting, which is mediated by a Conciliator at the Commission.

Conciliators control the procedural aspects of the conference, assist to uncover issues in dispute and help the parties explore potential resolutions. Conciliators at the Commission can provide the parties with an opinion about what they think the outcome of the matter might be should it proceed to the South Australian Civil and Administrative Tribunal or the South Australian Employment Tribunal³⁶⁵ (collectively, the Tribunal).

If a matter resolves at the conciliation conference, the Conciliator will assist the parties to draw up an agreement and will oversee any amendments to the agreement and ensure its execution. Notably, the terms of the agreement are dictated by mutual agreement by the parties. Therefore, a range of outcomes are possible from conciliation, and agreements have in the past included provisions that:

- The respondent/their employer change policies and procedures to prevent discrimination
- The respondent undertake equal opportunity training
- The respondent have adjustments made to their hours, pay or conditions
- The complainant be reinstated in their role, transferred or retrained
- The complainant receive compensation for economic loss, damages or injury for hurt or humiliation
- The respondent/respondent's employer issue a private or public apology

³⁶⁵ Ibid s 95B. Most matters proceed to the SACAT. Where the complainant has another matter on foot with the SAET, for example, a complaint made under the *Return to Work Act 2014 (SA)*, the Commissioner may determine to refer the Equal Opportunity matter to the SAET for case management efficiency.

- That the respondent/respondent's employer provide the complainant with a reference to assist with finding future work.

In cases where both parties agree, agreements may include a confidentiality clause, a breach of which the other party could seek to remedy by instituting proceedings for breach of contract. Further, the Equal Opportunity Act provides that anything said or done as part of proceedings with the Commission is inadmissible as evidence in proceedings under any other Act or law.³⁶⁶

If a matter is unable to be resolved at the conference, the Conciliator will prepare a recommendation for the Commissioner about whether the matter should be declined under the Equal Opportunity Act or referred to the Tribunal.

The Commission aims to have matters dealt within 3-6 months from lodgement. If a matter proceeds to the Tribunal, it may take anywhere from 3-12 months to resolve/determine, depending on the complexity of the case, the efficiency of the parties, and the Tribunal process.

³⁶⁶ Ibid s 95(9).

C The Law Society of South Australia's informal report process

The caller is not required to give their name or identify any other person that might be involved in the issue. The context of the call is informal, confidential and does not constitute the provision of legal advice.

The advice provided either directs the caller to the applicable statutory provision or rule or to another body or entity that can provide more targeted advice.

If the caller is seeking, or the staff member involved feels that they need, personal counselling or trauma support or more targeted legal advice, they are provided with contact details for one or more of the following Society services (depending on the nature of the problem):

- LawCare
- Professional Advice Service
- Young Lawyers' Support Group
- Women Lawyers' Mentoring Service
- Complaints Companion Service.

Callers seeking advice/support in relation to harassment or related issues will also be directed to the LPCC's Inappropriate Personal Conduct service (see paragraphs 23 to 28 of our letter dated 18 February 2021).

The staff member may ask for factual information, but that would be of a general nature and only for the purpose of identifying the nature of the ethical or professional obligation involved so that targeted advice can be provided. Staff members do not interrogate callers for detailed factual information and do not investigate or enquire into allegations made against another practitioner (unless the allegation concerns the misuse or failure to account for trust money in which context the Society has investigative powers and functions).

The information provided by the caller, and the advice given, is treated as confidential. If the staff member forms the view that the nature and content of the discussion is such that the 14AB(1)(c) requirement may be triggered, the caller is advised accordingly so they can make an informed decision about how to proceed. This applies to all calls for advice/support.

Any enquiry or request for advice/support that in the staff member's view triggers section 14AB(1)(c) of the Legal Practitioner Act is referred to the EPC. The caller is advised accordingly.

D National Action Plan Action Items

In the National Action Plan, the Law Council:

ACTION ITEM 1A

Undertook to advocate for the amendment of section 28A of the Sex Discrimination Act to include a blanket prohibition on sexual harassment, in consultation with relevant stakeholders.

ACTION ITEM 1B

Undertook to further consult with relevant stakeholders in respect of possible revisions to sections 28B to 28L of the Sex Discrimination Act, which make sexual harassment unlawful in certain areas of public life, including in the course of employment, partnerships and registered organisations, in light of the general prohibition the subject of Action Item 1A.

ACTION ITEM 1C

Undertook to:

- liaise with the AHRC and other relevant stakeholders about the interaction of the proposed revisions to sections 28A and 105 of the Sex Discrimination Act (the latter of which makes it an offence to cause, instruct, induce, aid or permit sexual harassment) and how they would operate in practice, and determine whether further revisions need to be considered
- to the extent that it is determined that further revisions to section 105 are required (for example, limiting the application of section 105 to public areas of life only), consult with relevant stakeholders to develop specific further proposed revisions to section 105,
- give further consideration, in consultation with relevant stakeholders, to accessorial liability and the impact any such amendments would have on junior staff.

ACTION ITEM 2A

Undertook to:

- support Recommendation 14 of the Respect@Work Report to immediately establish an interdisciplinary Workplace Sexual Harassment Council to improve coordination, consistency and clarity across the key legal and regulatory frameworks, and to improve the prevention of and responses to sexual harassment
- liaise with the AHRC in respect of further information about the Workplace Sexual Harassment Council and potential collaboration opportunities, and
- further consult with relevant stakeholders in respect of the details of the Workplace Sexual Harassment Council once those details have been further developed and provided.

ACTION ITEM 2B

Undertook to:

- support Recommendation 16 of the Respect@Work Report by advocating (in consultation with the relevant stakeholders) for amendments to the Sex Discrimination Act to ensure:
 - the objects include ‘to achieve substantive equality between women and men’
 - sex-based harassment is expressly prohibited
 - creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited
 - the definition of ‘workplace participant’ and ‘workplace’ covers all persons in the world of work
 - the current exemption of state public servants is removed, and
- liaise with the AHRC in respect of potential collaboration opportunities.

ACTION ITEM 2C

Undertook to:

- support Recommendation 17 of the Respect@Work Report to amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as is possible
- liaise with the AHRC in respect of further information about the specific wording of the provision being developed, and regarding potential collaboration opportunities
- in the meantime, consider and consult with relevant stakeholders on:

- the potential impacts of the introduction of a positive duty, including the onus of proof and evidentiary burdens
- what should amount to 'reasonable and proportionate' measures, and in doing so consider the operation of positive duties in the Victorian Equal Opportunity Act
- further consult with relevant stakeholders in respect of the details of the specific proposed provision once developed and provided by the AHRC.

ACTION ITEM 2E

Undertook to:

- support Recommendation 21 of the Respect@Work Report to amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination
- liaise with the AHRC in respect of further information about the specific wording of the provision being developed, and regarding potential collaboration opportunities
- further consult with relevant stakeholders in respect of the details of the specific proposed provision once developed and provided by the AHRC.

ACTION ITEM 2F

Undertook to:

- support Recommendation 26 of the Respect@Work Report that the Australian Government work with state and territory governments, through the Council of Australian Governments or other appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections
- liaise with the AHRC in respect of further information about how Recommendation 21 is proposed to be implemented in practice, including via the ongoing engagement with related consultations
- further consult with relevant stakeholders in respect of the details of the implementation of this Recommendation once developed and provided by the AHRC.

ACTION ITEM 2G

Undertook to:

- support Recommendation 40 of the Respect@Work Report, that Australian governments:
 - ensure that relevant bodies responsible for developing training programs and resources for judges, magistrates and tribunal members make available trauma-informed education on the nature, drivers and impacts of sexual harassment, consistent with the principles of Change the Story
 - support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training
- liaise with the AHRC, National Judicial College and other key stakeholders about the extent to which it can assist in this endeavour
- further consult with relevant stakeholders in respect of the details of the implementation of this Recommendation following further discussions with the AHRC and other key stakeholders.

ACTION ITEM 3A(i)

In December 2020, endorsed and will propose for implementation:

- a reformulation of Rule 42 of the ASCR, which enables regulators to address complaints of sexual harassment as unsatisfactory professional conduct, where the subject conduct:
 - meets the statutory thresholds for sexual harassment, imported into the Rule through the applicable Glossary definitions
 - does not meet the thresholds for professional misconduct, and
 - does not necessarily occur in the course of legal practice, however that conduct falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances
- an updated Glossary definition that specifically addresses existing statutory thresholds for sexual harassment.

ACTION ITEM 3A(ii)

Undertook to progress the development of commentary on the ASCR that addresses the application of the revised Rule, in consultation with relevant stakeholders.

ACTION ITEM 3B

Undertook to:

- develop national model policy and guidelines reflecting the best practice policies and materials
- consult with relevant stakeholders in respect of the draft model policy, guidelines and other materials.

ACTION ITEM 3C

Undertook to:

- develop the 'Addressing Sexual Harassment Portal' that Constituent Bodies can choose to participate in
- showcase the materials on sexual harassment developed and submitted by participating Constituent Bodies
- ensure that the materials, as far as possible, be attached by way of link to the Constituent Body website, to ensure that the material featured will be kept up to date
- periodically audit and update the Portal at least annually, in consultation with Constituent Bodies.

ACTION ITEM 3D

Undertook to develop recommendations for best practice complaints processes in consultation with relevant stakeholders. The recommendations are to be included and/or addressed in the Law Council's model policy and guidelines.

ACTION ITEM 3E

Undertook to develop recommendations for best practice development training in consultation with relevant stakeholders, for inclusion within the model policy, guidelines and checklist.

ACTION ITEM 3F

Undertook to:

- further consider, research and develop recommendations with respect to the introduction of bystander obligations and protections
- consult with relevant stakeholders in respect of these recommendations.

ACTION ITEM 3G

Undertook to further consider and develop options for supporting victims of sexual harassment, in consultation with the relevant stakeholders.

ACTION ITEM 4

Undertook to continue to advocate for the establishment of a Federal Judicial Commission.

ACTION ITEM 5

Undertook to review and report on the National Action Plan on an annual basis.



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