

Law Council of Australia

# **National Model Framework Addressing Sexual Harassment for the Australian Legal Profession**

Policy Statement

December 2021



**Law Council**  
OF AUSTRALIA

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## Message from the Law Council

Sexual harassment is unacceptable, in any context. Sexual harassment impairs the dignity and respect to those who experience it. The harm can be long lasting. For organisations it may have adverse legal, financial and reputational outcomes. Eliminating sexual harassment in the legal profession has been part of a long-running commitment from the Law Council and its Constituent Bodies.

The National Model Framework Addressing Sexual Harassment for the Australian Legal Profession (**Model Framework**) was developed by the Law Council pursuant to its National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (**NAP**).

The Model Framework was developed in consultation with the Law Council's Constituent Bodies and key stakeholders as a guidance material to assist the profession to proactively prevent and respond to sexual harassment. Organisations can either:

- a. adopt the Model Framework in its entirety as that organisation's own sexual harassment policy; or
- b. use the Model Framework to augment and/or refine their existing policies.

An auditing tool/checklist is included at **Appendix C**, which enables organisations to identify any gaps in their existing policies. To the extent that any such gaps are identified, organisations can then use the paragraphs of the Model Framework, as desired, to address those gaps.

In addition, included in the appendices to the Framework are best practice recommendations for complaints procedures, directed toward:

- a. organisations taking external complaints about sexual harassment - for example, disciplinary bodies (**Appendix A** to the Model Framework);<sup>1</sup> and
- b. organisations dealing with internal complaints - such as workplaces (**Appendix B** to the Model Framework).

The best practice recommendations on complaints procedures, like the Model Framework, are designed to draw and build upon existing best practice and provide guidance to organisations about the issues that should be considered in the management of sexual harassment complaints. These appendices have accordingly been drafted to complement existing best practice as far as possible, to promote national consistency of approach.

The Model Framework is supported by additional guidelines that are available via the Law Council's [Time for Change: Addressing Sexual Harassment](#) portal addressing sexual harassment.

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<sup>1</sup> The Law Council notes that the document in Appendix A has been drafted as a general guide, primarily directed towards legal profession complaints taking bodies, to facilitate best practice and consistency where possible. However, it is noted that the statutory functions and powers of complaints-taking agencies in general vary considerably, and this should be taken into account when making a complaint.

## 1. Introduction

- 1.1. Sexual harassment is unacceptable, in any context. It can happen to anyone, but often reflects power imbalances<sup>2</sup> and gender-based discrimination.<sup>3</sup> Sexual harassment drives people away from participating in the workplace and society,<sup>4</sup> and limits their opportunities in the process.<sup>5</sup> Sexual harassment causes lasting harm to individuals and organisations. It erodes the public's trust in the legal profession when our members are the perpetrator and, even more so, when they are not held accountable.
- 1.2. Sexual harassment is also inconsistent with the inherent values of the Australian legal profession, the principles informing the administration of justice, and the pursuit of integrity, fairness and equality before the law.
- 1.3. This National Model Framework for the Australian Legal Profession was developed by the Law Council of Australia to assist legal organisations, workplaces, legal practices, chambers, regulators and/or any other disciplinary or other bodies who take external complaints, in developing and/or refining their sexual harassment policies, training and complaints procedures.
- 1.4. This document is drafted in such a way as to encompass the wide range of contexts in which the Australian legal profession operates and the particular considerations of each Australian jurisdiction. In doing so, this National Model Framework aims to promote national consistency and best practice across jurisdictions. However, in setting a standard befitting the legal profession, this National Model Framework may, in some circumstances, set a higher standard than is reflected in particular federal, state or territory legislation and legal professional regulations.
- 1.5. Adopters of this National Model Framework are accordingly encouraged to use this document as a foundation upon which to build their own policy, taking into account any relevant local discrimination laws; work, health and safety legislation; and any other regulatory regimes that are applicable in the relevant jurisdiction. In the alternative, the checklist tool at **Appendix C** assists organisations to audit and assess their existing policies and, where gaps in content are revealed, this National Model Framework can be used as a guide to address those gaps.

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<sup>2</sup> While this National Model Framework is directed toward sexual harassment, the factors that contribute to sexual harassment are complex and can reflect power imbalances and gender-based discrimination. Organisations should consider whether they have other key policies in place, that support and promote gender equality and equitable practices. This may include policies addressing inclusion and diversity, promotions, flexible work arrangements and pay equality. For more information, please see the Law Council's [Time for Change: Addressing Sexual Harassment](#) Portal.

<sup>3</sup> See: Equal Opportunity Commission South Australia, *Final Report of the Review of Harassment in the South Australian Legal Profession* (April 2021), 5, available online: <<https://eoc.sa.gov.au/sites/default/files/inline-files/Final%20Report%20of%20the%20Review%20of%20Harassment%20in%20the%20South%20Australian%20Legal%20Profession.pdf>>.

<sup>4</sup> Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014) available online: <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement>.

<sup>5</sup> See: Review of Sexual Harassment in Victorian Courts, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT Report and Recommendations* (March 2021) 34, available online: <<https://www.shreview.courts.vic.gov.au/wp-content/uploads/2021/04/Report-and-Recommendations-Preventing-and-Addressing-Sexual-Harassment-in-Vic-Courts.pdf>>.

- 1.6. The Law Council will periodically review and update this National Model Framework, the latest version of which will remain available on the Law Council's [Time for Change: Addressing Sexual Harassment](#) Portal.
- 1.7. The Law Council will support Adopters of this National Model Framework through the ongoing development of guidance materials to support the implementation of, and ongoing adherence to, this National Model Framework.
- 1.8. This National Model Framework for the Australian Legal Profession aims to:
- a) promote the creation and maintenance of a profession free from sexual harassment;
  - b) engender commitment to professional environments free from sexual harassment;
  - c) set appropriate standards of conduct consistent with Australian law on sexual harassment and the applicable professional conduct rules;
  - d) facilitate the reporting of conduct that may be sexual harassment;
  - e) guard against the victimisation of people who make complaints of sexual harassment;
  - f) explain the consequences for people who engage in sexual harassment;
  - g) provide for best practice complaints procedures for complaints of sexual harassment; and
  - h) provide for the best practice training recommendations regarding sexual harassment.<sup>6</sup>

## 2. Definitions

- 2.1. For the purposes of this National Model Sexual Harassment Framework for the Legal Profession:
- a) **Bystander** means a person who:
    - has directly witnessed sexual harassment, even if not the focus of the conduct; and/or
    - has direct knowledge of the sexual harassment, such as Human Resources personnel, managers or other persons who have been told about the conduct by the Complainant or Targeted Person.
  - b) **Complainant** means the person making a complaint in respect of sexual harassment. In respect of this Framework, this person may be the person who is the focus of the sexual harassment, or a Bystander.
  - c) **Complaints Handlers** collectively refer to persons, whether employed or contracted, who are responsible for receiving, assessing and/or investigating

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<sup>6</sup> The best practice training recommendations are presently in development.

complaints in accordance with this Framework and the Best Practice Complaints Procedures at **Appendix A** (for organisations taking external complaints) **and B** (for organisations addressing internal complaints).

- d) **Conduct of a sexual nature** includes, for the purposes of this Framework:
- making statements or communications of a sexual nature about a person, to a person, or in the presence of a person, whether the statement is made orally or in writing;
  - any gestures of a sexual nature; or
  - making or attempting physical interactions of a sexual nature.

For examples of this conduct, please see paragraph 3.2 below.

- e) **Model Framework Adopter (MFA)** means the organisation, workplace, law firm, chambers, regulator and/or any other disciplinary or other bodies who take external complaints, who have agreed to adopt the terms of this Framework. This may include, as relevant:
- staff, including permanent, part-time, independent contractors, temporary and volunteer staff, sub-contractors, apprentices, interns and job candidates;
  - barristers, members or licensees of the chambers, all employees, volunteers, students and independent contractors engaged by them;
  - board members, partners and directors; and
  - members, barristers and/or readers who are members of MFA committees.
- f) **MFA associates** means clients, visitors and other associates of the MFA, including as relevant:
- visitors, including clients and members, and associates of clients and members, to the premises of the MFA;
  - all barristers engaged by a MFA,
  - barristers and court/tribunal staff, and other people present at work-related functions (social or otherwise); and
  - participants in any courses, seminars, events, or functions, whether educational, networking and/or social in nature.
- g) **Organisations taking external complaints-** as addressed in **Appendix A**, includes regulators, disciplinary bodies and any other organisations who take, conciliate, or otherwise have a role in resolving complaints external to the organisation.
- h) **Organisations addressing internal complaints-** as addressed in **Appendix B** includes, for example, workplaces or chambers.

- i) **Framework** means this National Model Sexual Harassment Framework for the Legal Profession, developed by the Law Council of Australia.
- j) **Respondent** refers to the person alleged to have engaged in sexual harassment.
- k) **'Sexual harassment'** means:
- An unwelcome sexual advance, an unwelcome request for sexual favours, or any other unwelcome conduct of a sexual nature that occurs in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person to whom the unwelcome conduct was directed would be likely to be offended, humiliated or intimidated.
  - For the purpose of this policy, sexual harassment is intended to include 'sexual harassment' as otherwise defined and made unlawful under the applicable state, territory or federal anti-discrimination, workplace or human rights legislation.
  - It includes harassment on the ground of sex being unwelcome conduct of a seriously demeaning nature on the ground of sex that occurs in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person to whom the unwelcome conduct was directed would be offended, humiliated or intimidated.

For examples of this conduct, please see paragraph **3.2** below.

- l) **Targeted Person** refers to the person who is the target or focus of the conduct alleged to be sexual harassment, who may or may not also be a Complainant.

### 3. Practical guidance

3.1. The definition of 'sexual harassment' requires consideration of the following elements:

- a) The *subjective* test of whether:
- the sexual advance, request for sexual favours, and/or conduct of a sexual nature was unwelcome to the person to whom the advance, request or conduct was directed.<sup>7</sup>
- b) The *objective tests* of whether:

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<sup>7</sup> It is noted that some jurisdictions, such as Queensland, have different or additional thresholds in the definition of sexual harassment. For example, Queensland includes an additional alternative test element relevant to the person engaging in the conduct; namely whether the conduct is done with the *intention* to offend, humiliate or intimidate the person. As this Policy aims to set a nationally consistent standard befitting the legal profession, in some respects it will set a higher standard than is reflected in some individual state and territory jurisdictions.

- the conduct in issue was of a sexual nature; and
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person to whom the unwelcome conduct was directed would be likely to be offended, humiliated or intimidated.

3.2. Examples of conduct of a sexual nature may include, but need not be limited to:

- a) making (or attempting to make) unwanted physical contact;
- b) requests for sex or sexual favours;
- c) jokes, comments and communications of a sexually suggestive or offensive nature;
- d) distribution or display of printed, audio or audio-visual material of a sexual nature;
- e) lingering stares or leering;
- f) derisive comments or ridiculing of a sexual or gendered nature;
- g) unwanted invitations for individual social engagements, or invitations that are in the circumstances inappropriate – such as refusing to respect declined requests for a date;
- h) unwanted approaches via social media, email or other digital mediums that, in the circumstances, are inappropriate;
- i) stalking;
- j) invasive personal questions;
- k) invading personal space or maintaining unnecessarily close physical proximity; and
- l) acts, gestures and exhibitions of a sexual nature.

3.3. The conduct does not have to be sexually explicit. Conduct of a sexual nature may arise by innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod. These are all devices capable of being deployed to sexualise conduct in ways that may be unwelcome.<sup>8</sup>

3.4. Sexual harassment does not have to be repeated to be ‘harassment’ - a single incident or interaction can be sexual harassment in the circumstances.

3.5. Interactions of a sexual nature that are genuinely ‘welcome’ because they are consensual will not be sexual harassment. It is wrong to think that conduct of a

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<sup>8</sup> *Vitality Works Australia Pty Ltd v Yelda* (No 2) [2021] NSWCA 147 (19 July 2021) at [125].

sexual nature will be welcome in the absence of express objection or rejection. A lack of objection does not signal consent. The Respondent's intention or reason for engaging in sexual conduct is irrelevant to determining whether the conduct is unwelcome.

- 3.6. The context of the relationship between the Targeted Person and the Respondent is relevant to whether unwelcome conduct of a sexual nature would be likely to offend, humiliate or intimidate the Targeted Person in all the circumstances. Relevant matters for consideration include those addressed in paragraphs **3.7 to 3.9**.
- 3.7. Considerations relevant to whether a person is likely to be offended, humiliated or intimidated by the unwelcome sexual conduct include circumstances such as:
- a) the sex, age, sexual orientation, gender identity, variations in sex characteristics,<sup>9</sup> marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the persons;
  - b) the relationship between the persons;
  - c) the comparable power and/or seniority of the persons;
  - d) any disabilities or vulnerabilities of the person subject to the conduct or behaviour; and
  - e) any other relevant circumstance.
- 3.8. Factors that may facilitate a culture of sexual harassment include:
- a) *Hierarchical structures* where there are marked power imbalances in employment relationships. This may be further exacerbated by:
    - a material power differential - particularly the actual or perceived ability of the perpetrator to influence the career prospects or job security of the target; and
    - a material age and/or experience differential - particularly as age and experience often runs together with power differentials.
  - b) *Gender differentials* - sexual harassment is consistently associated with workplaces that have strongly embedded masculine norms,<sup>10</sup> including those that are male dominated, have an over-representation of men at senior management levels, have a masculine workplace culture,<sup>11</sup> and/or have rigid

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<sup>9</sup> The Law Council has adopted the terminology of the Darlington Statement, Intersex Human Rights Australia, available online: <https://ihra.org.au/darlington-statement/>.

<sup>10</sup> Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'The Economic and Career Effects of Sexual Harassment on Working Women' (2017) 31 *Gender and Society* 333, 336. Also see: Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 105.

<sup>11</sup> It is also noted in the Respect@Work Report that men are most often sexually harassed when they are considered to have violated traditional masculine social norms: Australian Human Rights Commission, Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (29 January 2020), 20, 147, available online: [https://www.humanrights.gov.au/ourwork/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report2020?mc\\_cid=1065707e3c&mc\\_eid=%5bUNIQID%5d#zrVGo](https://www.humanrights.gov.au/ourwork/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report2020?mc_cid=1065707e3c&mc_eid=%5bUNIQID%5d#zrVGo) ('Respect@Work Report').

adherence to gender roles or stereotyped understandings of masculinity and femininity.<sup>12</sup>

- c) *Competitive working environments* - competitive environments have been shown to increase the incidence of bad behaviour and motivate those to engage in unethical behaviours, such as bullying and harassment.<sup>13</sup>
- d) *Commercialism and managerialism* have been shown to drive organisations to prioritise commercial goals over individual wellbeing and promote an acceptance of problematic behaviours so long as the primary focus on profits, productivity, efficiency and client satisfaction are met.<sup>14</sup>
- e) *Social and informal settings*, particularly where alcohol may be involved.<sup>15</sup>

3.9. People who may be more likely to be targeted by/subject to sexual harassment include:

- a) women;
- b) persons who identify as LGBTIQ+;
- c) Aboriginal or Torres Strait Islander persons;
- d) persons with a disability;
- e) persons from culturally and linguistically diverse backgrounds;
- f) migrants and/or persons holding temporary visas;
- g) workers who have insecure working arrangements;
- h) young persons,<sup>16</sup> early career lawyers, and/or persons who occupy junior positions;<sup>17</sup> and
- i) people who experience multiple forms of social or political disadvantage (intersectional disadvantage).

3.10. It is noted that the matters addressed in paragraphs 3.7 to 3.9 above are not necessary conditions or precursors to sexual harassment.

3.11. Sexual harassment is unlawful in:

- a) the *Sex Discrimination Act 1984* (Cth);

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<sup>12</sup> Ibid 146-148.

<sup>13</sup> Baron, n10, 103.

<sup>14</sup> Ibid 87; Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281; Suzanne Le Mire and Rosemary Owens, 'A Propitious Moment: Workplace Bullying and Regulation of the Legal Profession' (2014) 37 *UNSW Law Journal* 1031.

<sup>15</sup> Respect@Work, n11, 139..

<sup>16</sup> As identified by Safe Work Australia: Safe Work Australia, 'Who is affected by sexual harassment?' (accessed 5 May 2021), available online: < <https://www.safeworkaustralia.gov.au/topic/workplace-sexual-harassment>>.

<sup>17</sup> Respect@Work, n11, 656.

- b) state and territory Crimes Acts,<sup>18</sup> discrimination<sup>19</sup> and workplace legislation;<sup>20</sup>
- c) the Australian Solicitors' Conduct Rules, as implemented in each participating state and territory; and
- d) Barristers' Rules, as implemented in each participating state and territory.

3.12. The prevalence and impact of sexual harassment has also been addressed within numerous studies and reports, which are detailed on the Law Council's [Time for Change: Addressing Sexual Harassment](#) Portal.

3.13. Australian workplaces and organisations have legal obligations at both the federal, state and territory levels to eliminate sexual harassment and victimisation within their workplaces and organisations as far as it is reasonably practicable. This also includes duties to:

- a) conduct risk assessments;
- b) identify hazards; and
- c) assess and control those risks and/or hazards within the workplace as far as reasonably practicable.<sup>21</sup>

3.14. Workplace risks and hazards include the incidence and impact of sexual harassment.<sup>22</sup>

## 4. Objectives

4.1. The MFA is committed to the elimination of sexual harassment within the Australian legal profession and promoting diversity, equality, respect and inclusion consistent with the principles of justice, integrity, equity and the pursuit of excellence upon which the profession is founded.

4.2. In making the commitments in paragraphs 4.1 above, the MFA aims to:

- a) prevent the continued development and/or maintenance of a culture that allows for the propagation of sexual harassment and other gender-based discrimination; and
- b) create, when sexual harassment does occur, an environment that supports Targeted Persons to utilise complaints mechanisms that will fairly, efficiently and appropriately investigate their complaint while minimising, as far as possible, re-traumatisation.

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<sup>18</sup> For example: *The Crimes Act 1958* (Vic).

<sup>19</sup> Noting that sexual harassment is unlawful in all State and Territory discrimination legislation.

<sup>20</sup> For example: *Equal Opportunity Act 2010* (Vic), *Occupational Health and Safety Act 2004* (Vic).

<sup>21</sup> For more information, see [Safe Work Australia](#). In Victoria, the legal obligations referred to in paragraph 3.11 include a positive duty to eliminate sexual harassment and victimisation. For more information, see: Victorian Equal Opportunity & Human Rights Commission, 'Preventing and responding to workplace sexual harassment - Complying with the Equal Opportunity Act 2010', (August 2020), available online: < [https://www.humanrights.vic.gov.au/static/8070e6b04cd51969490ccdecddff0c00/Resource-Guidelines-Workplace\\_sexual\\_harassment-Aug20.pdf](https://www.humanrights.vic.gov.au/static/8070e6b04cd51969490ccdecddff0c00/Resource-Guidelines-Workplace_sexual_harassment-Aug20.pdf) >.

<sup>22</sup> Ibid.

## 5. Scope

5.1. This Framework applies to the MFA, as defined in this Framework, in all circumstances connected with the activities of the MFA, including as relevant:

- a) at the primary or any associated premises of the MFA;
- b) at any venue, premises or location where any courses, seminars, events, or functions, or the like; are hosted or convened by, or in connection with, the MFA;
- c) in connection with the services provided by the MFA, members, staff, directors, barristers and/or readers, including any representations of those services to members of the public;
- d) in connection with employment and recruitment, including work performed both on and off-site, in courts and tribunals, in private mediation or arbitration, within and outside ordinary working hours, and including work-related functions, including social and networking functions and conferences;
- e) in connection with all facets of the provision, preparation and delivery of advice and advocacy, including interactions with clients, staff, and other legal professionals; and
- f) in both formal and informal interactions:
  - within the MFA;
  - between the MFA and MFA associates; and
  - between the MFA and the public.

## 6. Obligations

### Expectations

6.1. As part of its commitment to the elimination of sexual harassment within the Australian legal profession the MFA is committed to ensuring as far as it is reasonably practicable that interactions both within and in connection to the MFA will:<sup>23</sup>

- a) be free from sexual harassment and other forms of gender-based discrimination;
- b) treat all individuals with courtesy, dignity and respect, regardless of their relationship to the MFA; and

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<sup>23</sup> Emma Ryan and Naomi Neilson citing Maureen Kyne, 'Why stamping out sexual harassment starts at the recruitment process', *Lawyers Weekly*, (6 May 2021), available online: [https://www.lawyersweekly.com.au/biglaw/31306-why-stamping-out-sexual-harassment-starts-at-the-recruitment-process?utm\\_source=LawyersWeekly&utm\\_campaign=07\\_05\\_21&utm\\_medium=email&utm\\_content=1&utm\\_emailID=8ce338728fa15829441947c21201564a9100a2964905b80017ddfc3b208d2bf0](https://www.lawyersweekly.com.au/biglaw/31306-why-stamping-out-sexual-harassment-starts-at-the-recruitment-process?utm_source=LawyersWeekly&utm_campaign=07_05_21&utm_medium=email&utm_content=1&utm_emailID=8ce338728fa15829441947c21201564a9100a2964905b80017ddfc3b208d2bf0).

- c) address each and every complaint fairly and consistently, in a timely manner, without reprisal and, where appropriate to do so per **Appendices A or B** (as applicable), confidentially.
- 6.2. The MFA is committed to ensuring that as far as is reasonably practicable all persons within MFA and MFA associates are advised of and acknowledge:
- a) the existence of, and obligations under, this Framework; and
  - b) the expected standards for acceptable and appropriate behaviour set by this Framework, in all circumstances connected with the activities of the MFA.<sup>24</sup>
- 6.3. These standards referred to in paragraph 6.2 above should include that:
- a) sexual harassment is unacceptable, in any context;
  - b) sexual harassment is unlawful and unethical, and is a disciplinary matter that may raise questions about one's fitness to practise;
  - c) every complaint about sexual harassment will be treated seriously;
  - d) persons targeted by sexual harassment will be supported and have agency over the progression of the complaint as appropriate;
  - e) persons complaining of, and persons targeted by, sexual harassment will be supported and will be appropriately consulted in respect of how their private and/or confidential information is used;
  - f) any retaliatory actions, adverse actions and/or victimisation of the Targeted Person, the Complainant, Bystanders, or supporters of the Targeted Person will, in and of itself, be regarded as a disciplinary matter that raises queries about one's fitness to practice and/or suitability for continued employment;
  - g) investigations into complaints will be fair, clear, impartial, timely and, as far as is possible in the circumstances, confidential; and
  - h) all persons at the MFA, regardless of their role or seniority, are expected to abide by the terms of this Framework.

### **Recruitment and performance appraisals**

- 6.4. As part of its commitment to the elimination of sexual harassment within the Australian legal profession, to the extent that the MFA recruit staff or contractors, the MFA will ensure as far as it is reasonably practicable that:<sup>25</sup>
- a) all persons responsible for recruiting staff must receive training in respect of sexual harassment, as outlined from paragraph **6.7** below;
  - b) risk assessments are conducted in respect of all new employees and contractors, including for example:

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<sup>24</sup> For example, through terms in contracts of engagement or codes of conduct.

<sup>25</sup> Ryan & Neilson, n 23.

- In-depth interviews as appropriate;
  - thorough referee checking, as appropriate; and
  - social media screening.
- c) recruitment techniques should include practical assessments designed to test the values and personality of candidates in terms of their commitment to eliminating sexual harassment and discrimination and supporting equitable workplace practices;
- d) confidential feedback during probationary periods should be sought from multiple sources in addition to the direct supervisor, including from those of lower seniority to the new recruit where possible.

6.5. The MFA should encourage regular conversations between managers and staff on workplace matters, noting that more frequent 'check-ins' are more effective in reinforcing desired behaviours and assessing personalities within the workplace.<sup>26</sup>

### Risk assessments and analysis

6.6. As part of its commitment to promoting the elimination of sexual harassment within the Australian legal profession, the MFA will ensure as far as it is reasonably practicable that it will:

- a) Conduct audits of its sexual harassment policies on at least an annual basis, such as by utilising the **Checklist of Key Elements at Appendix C**.
- b) Conduct Sexual Harassment risk assessments on a regular basis, including:<sup>27</sup>
- a consideration of the risk factors and vulnerabilities identified at paragraphs **3.7 to 3.9** above;
  - an assessment of the relevant physical and online spaces;
  - conducting 'workplace culture checks' to review the effectiveness of training and policies, and identify opportunities to re-communicate the values of the MFA; and
  - direct anonymous feedback from MFA associates as appropriate, such as via surveys.
- c) Address and manage any risks identified in a Sexual Harassment risk assessment in a timely manner, including:<sup>28</sup>
- devising prevention plans that respond to the identified risk factors;
  - seeking feedback on the prevention plans from MFA associates;

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<sup>26</sup> Safe Work Australia, n16.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

- keeping up to date records of prevention plans; and
- making prevention plans available to MFA associates.<sup>29</sup>

### Awareness and training

6.7. As part of its commitment to the elimination of sexual harassment within the Australian legal profession, the MFA will ensure that all persons at the MFA have had or will receive sexual harassment awareness training that covers:

- a) awareness of this Framework, its terms and appendices;
- b) the behaviours that amount to sexual harassment;
- c) the relevant legislation, regulations and ethical obligations;
- d) the risk factors for sexual harassment;
- e) the impact of sexual harassment;
- f) the available complaints mechanisms both within and external to the MFA; and
- g) the support available for Targeted Persons and others impacted by sexual harassment (such as Bystanders).

6.8. The MFA is committed to delivering this training, including awareness of this Framework and its terms within a reasonable time:

- a) of orientation/induction and/or prior to commencement of membership or practice;
- b) of the assumption of management responsibilities for other staff;
- c) following a relevant change in legislation or regulation;
- d) at the request of a staff member or complaints handler or investigator;
- e) of being appointed as a board member, Director, Committee or related Chair;
- f) following any circumstances in which complaints handling procedures, as outlined in Appendices A or B, as applicable, have not been adequately implemented; and/or
- g) otherwise at least once every two calendar years.

6.9. The MFA is committed to ensuring that all managers or equivalent senior representatives of the MFA:

- a) are appropriately trained and aware of their obligations under this Framework, as well as the applicable federal, and state/territory legislation, and legal profession regulations as they pertain to sexual harassment;

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<sup>29</sup> For example, such prevention plans could be made available in the MFA's website.

- b) clearly communicate, promote and maintain the expected standards for acceptable and appropriate behaviour to which all MFA associates are expected to comply, in all circumstances connected with the activities of the MFA;
- c) monitor the MFA to ensure compliance with this Framework, in accordance with its terms;
- d) take any disciplinary action, as appropriate in the circumstances, in response to breaches of this Framework, in accordance with the terms of this Framework;
- e) treat all complaints seriously and take appropriate action in response to complaints in accordance with this Framework; and
- f) model the expected standards of behaviour to which the MFA has committed itself, as set out in this Framework.

### Bystander intervention

6.10. As part of its commitment under this Framework, the MFA acknowledges, and will ensure as far as reasonably practicable that its associates will acknowledge:

- a) that Bystanders are vital to driving cultural change and reinforcing the values and principles addressed in this Framework;
- b) however, the agency of the Targeted Person is vital and any complaints or action initiated by Bystanders must be conducted with appropriate consultation of the Targeted Person.

6.11. As part of its commitment under this Framework, the MFA agrees to take appropriate steps directed to ensuring that:

- a) staff are trained and aware of the importance of Bystander intervention;
- b) staff Bystander intervention will be supported by the MFA; and
- c) Bystander intervention will be managed in accordance with the **Best Practice Complaints Procedures** at **Appendix A** (for organisations taking external complaints)<sup>30</sup> and **B** (for organisations addressing internal complaints).<sup>31</sup>

## 7. Contraventions

7.1. As part of its commitment under this Framework, the MFA agrees that any complaint will be managed and investigated in accordance with the Best Practice Complaints Procedures at **Appendix A and/or B**.

## 8. Support

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<sup>30</sup> Such as regulators, disciplinary bodies and any other organisations who take, conciliate or otherwise have a role in resolving complaints external to the organisation.

<sup>31</sup> For example, workplaces or chambers.

- 8.1. As part of its commitment under this Framework, the MFA agrees that the contact, support and/or Complaints Handlers are properly trained in accordance with the Best Practice Complaints Procedures at **Appendix A and/or B**, and communicate how they can be contacted.
- 8.2. Counselling, legal and other support information for Targeted Person, Bystanders and other persons impacted by sexual harassment should be made available by MFAs. This information can be found on the Law Council's [Time for Change: Addressing Sexual Harassment](#) Portal.

## **9. Review**

- 9.1. MFA acknowledges that for their policies to remain up to date and effective, they must be periodically reviewed and updated.
- 9.2. As part of its commitment to the elimination of sexual harassment within the Australian legal profession, the MFA will ensure that it will review its iteration of this Policy and its terms on an annual basis.
- 9.3. To assist the MFA with this obligation the Law Council will periodically review this Model Framework, having regard to developments in legislation, legal profession regulation and professional conduct rules.
- 9.4. A copy of an up-to-date Model Framework, along with the a Framework Checklist (see **Appendix C**) will remain on the Law Council's [Time for Change: Addressing Sexual Harassment](#) Portal.

# APPENDIX A

## BEST PRACTICE COMPLAINTS PROCEDURES FOR ORGANISATIONS TAKING EXTERNAL COMPLAINTS<sup>32</sup>

### Recommendations and guidance

The terms used in this document are consistent with the definitions in the *Model Sexual Harassment Framework for the Legal Profession (Framework)*.

#### 1. Complaints Handlers, Assessors and Investigators

- 1.1. The persons who act as the points of contact for:
  - a) those making complaints (**Complainants**); and
  - b) the persons targeted by the sexual harassment (**Targeted Person**); are vital to the effectiveness of any complaints process.
- 1.2. Further to paragraph 1.1, above, this document provides for complaints by Bystanders, so the Complainant and the Targeted Person may not necessarily be the same person. The Complainant and the Targeted Person are accordingly addressed separately in this document.
- 1.3. Persons, whether employed or contracted, who are responsible for receiving, assessing and/or investigating complaints (**Complaints Handlers**) should be appropriately trained in responding to persons who report sexual harassment. A Complaints Handler's training should include:
  - a) the matters addressed in the Framework;
  - b) trauma informed techniques for interviewing and investigation;
  - c) an understanding about the impact of shame and fear of retribution;
  - d) an understanding about the practical application of procedural fairness in investigations;
  - e) obligations around privacy and reporting to other agencies such as Police; and
  - f) how to respond to complaints in a timely manner consistent with this document.
- 1.4. A Complaints Handler should refresh their training within a reasonable time:
  - a) following a relevant change in legislation or regulation;

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<sup>32</sup> The Law Council notes that this document has been drafted a general guide, primarily directed towards legal profession complaints-taking bodies, to facilitate best practice and consistency where possible. However, it is noted that the statutory functions and powers of complaints-taking agencies in general vary considerably, and this should be taken into account when making a complaint.

- b) at the request of a staff member or another complaints handler or investigator;
  - c) following any circumstances in which complaints handling procedures, as outlined in this Appendix, have not been adequately implemented; and/or
  - d) otherwise at least once every two calendar years.
- 1.5. Complaints Handlers should also be provided with appropriate guidance and support, to maintain a high quality of claims management for Complainants and Targeted Persons, and the well-being and resilience of the Complaints Handlers. This should include:
- a) the professional guidance of a senior colleague or manager;
  - b) the availability of counselling services such as the Employee Assistance Program;
  - c) clear procedures for dealing with complaints and the use of information that are reinforced and consistent with what is required in-practice;
  - d) clear mechanisms for the escalating of complex complaints as appropriate;
  - e) clear reporting and grievance mechanisms in the case of alleged mismanagement or conduct; and
  - f) ongoing training as outlined in paragraphs **1.3** and **1.4**.
- 1.6. Organisations who receive external complaints (for ease of reference, **Organisations**), should ensure there is no 'wrong door' for Complainants. They should endeavour to triage complaints so that complaints about sexual harassment are directed to the Complaints Handlers that are suitably trained. This could be achieved, for example, through a dedicated phone and/or email service, or training 'first contact' staff to triage complaints, including:
- a) explaining, in a trauma informed, sensitive and impartial manner, the 'triaging' step; and
  - b) only seeking as much information as necessary so as to redirect the Complainant to an appropriate complaints staff member.
- 1.7. Subject to the 'triaging' step addressed in paragraph **1.6** above, Organisations should also facilitate, as far as reasonably possible, for the initial complaints handler to remain the consistent 'contact person' for each Complainant and Targeted Person, to avoid unnecessary repetition of detail and re-traumatisation.
- 1.8. It is crucial that Complaints Handlers ensure that communications with Complainants and Targeted Persons be:
- a) calm;

- b) clear;
  - c) respectful;
  - d) fair;
  - e) impartial;
  - f) sensitive to the risks of re-traumatisation; and
  - g) sensitive to support, access and communication requirements and preferences.
- 1.9. Complaints Handlers should be mindful not to suggest to the Complainant or Targeted Person any judgment on the merits of the complaint prior to determination of the complaint.
- 1.10. Complainants and Targeted Persons should be supported and educated about the avenues for redress and support, in accordance with the wishes of that individual, rather than advised or guided towards particular outcomes. Central to the process should be a respect for the Targeted Person's desired outcomes, including if they change or waver.
- 1.11. Complaints Handlers should be appropriately trained and equipped to provide referrals and information to Complainants and Targeted Persons as appropriate, so there is no 'wrong door' to reporting sexual harassment.

## **2. Document management**

- 2.1. The Targeted Person should be consulted, and kept informed, in respect of how their personal information is proposed to be used and stored.
- 2.2. In the case of complaints initiated by Bystanders, but consented to by the Targeted Person, care must be taken to:
- a) quarantine any personal information in respect of the Targeted Person from the Complainant and any other parties; and
  - b) subject to any statutory reporting requirements, only use information provided by the Targeted Person with their express consent in respect of how a particular piece of information is to be used.
- 2.3. Complaints must be recorded in a document management system that ensures, as far as is reasonably possible:
- a) sensitive information is kept confidential to (as applicable):
    - o the complaints handling (and preferably the sexual harassment complaints handling) team; and/or
    - o claims investigators;
  - b) that all correspondence is on file and up to date; and

- c) that all documents are stored securely for at least six years from the date the complaint was raised, or for such longer time as is reasonable in the circumstances.
- 2.4. All persons who will be handling the sensitive information should be clearly informed of the parameters for accessing and using the information, including the consequences of misuse. This should include any obligations to report certain events or information to other agencies such as Police.
- 2.5. Clear disciplinary procedures should be developed in respect of the misuse of information.

### 3. Complaints processes

#### 3A Initial contact

- 3.1. At the time of the initial interaction with the Complainant, Complaints Handlers should:
- a) Ask if the Complainant would benefit from any assistance to aid the discussions with the Complaints Handler, such as a support person, an interpreter, hearing or visual aids.
  - b) Clearly convey that sexual harassment is unacceptable, in any context.
  - c) As far as it is possible, give consideration to whether a Complaints Handler of the same gender is preferable in the circumstances.
  - d) Advise that the taking of the complaint can be conducted over more than one session, and that the Complainant can pause (or discontinue) the complaint at any time.
  - e) Establish whether the complaint is being made by the Targeted Person or a Bystander.
  - f) Enquire whether other related proceedings/investigations/complaints are on foot. To the extent that this is confirmed:
    - o advise the Complainant of whether both can proceed concurrently; and
    - o to the extent that they cannot proceed concurrently, advise how this will impact the Complainant's query with the subject Organisation, including timeframes, noting that:
    - o regard must be had to protecting the privacy of any persons involved in other complaints and ensuring that the subject complaint or other complaints are not prejudiced.
  - g) Enquire as to whether the complaint is covered by a Non-Disclosure Agreement (**NDA**) and inform the Complainant that legal advice may be of assistance in that context and, to this end, the relevant law society or professional association will be able to refer the Complainant to appropriate legal advice.
  - h) Enquire whether the complainant is seeking a particular outcome.

- i) Advise the Complainant of the availability of both anonymous reporting or a complaint and the parameters of each including that complaints cannot remain anonymous.
- j) Explain that anonymous reporting can later be formalised into an investigable complaint, if desired.
- k) Ask Complainants how they wish their private information to be treated.
- l) Explain what information will be required to proceed - this will differ depending on whether the complainant desires to make an anonymous report or a complaint.
- m) Outline the frameworks for redress (as outlined in **Sections 3B, 3C and 3D** below), without providing legal advice.
- n) If applicable, note the timeframes and limitation periods for pursuing these avenues for redress, and that legal advice can be sought on this issue;
- o) Inform the Complainant of the next steps of the applicable avenues for redress, including an indication to timeframes.
- p) Refer Complainants to any applicable forms or guidance materials, as is appropriate.
- q) Offer any other information and referral services, as appropriate, including where legal advice can be sought.<sup>33</sup> It is recommended that Complaints Handlers have available, from the outset of receiving any complaints, all available referral points, including those to counselling and other support services such as Lifeline or 1800 RESPECT.

### **3B. Anonymous reporting**

3.2. The Law Council recommends that anonymous reporting be permitted for information gathering purposes, noting that:

- provision of, and support during, the anonymous reporting process has been shown to empower Complainants/Targeted Persons to later proceed with a complaint;<sup>34</sup> and
- even if complaints are ultimately not pursued, information provided in anonymous reports may provide valuable information about trends and areas of concern that may be addressed through other avenues.<sup>35</sup>

3.3. Anonymous reporting should also be accepted from Bystanders.

3.4. It is noted that there is no power under the state and territory Legal Profession Acts and Legal Profession Uniform Law (**Uniform Law**) for individuals to be investigated and/or disciplined on the basis of an anonymous report. This is on

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<sup>33</sup> Please see the Law Council's *Time for Change* Portal regarding Law Societies and Professional Associations who can refer persons to appropriate legal advice.

<sup>34</sup> See: Office of the Legal Services Commissioner (NSW), Inappropriate personal conduct- sexual harassment and workplace bullying, (accessed April 2021) available online: <<https://www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct/inappropriate-personal-conduct.aspx>>.

<sup>35</sup> See: Victorian Legal Services Board + Commissioner, Making a complaint to VLSB+C about sexual harassment, (accessed April 2021), available online: <https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/making-complaint-vlsbc-about-sexual-harassment> .

the basis that a respondent to an anonymous report will be deprived of sufficient particulars so as to respond to the case against them.<sup>36</sup>

### **3C. Investigations initiated by Regulatory Organisations**

- 3.5. It is noted that there is latitude within the Uniform Law for Designated Local Regulatory Authorities to initiate audits to ensure compliance with the Uniform Law (including Professional Conduct Rules) pursuant to [Section 256](#).
- 3.6. The Law Council considers that both anonymous reports and formal complaints of sexual harassment occurring within a legal practice meet the 'reasonable grounds' threshold in Section 256 and permits regulators to commence 'own motion' investigations.

### **3D. Complaints**

- 3.7. Complaints should be accepted from any person:
  - a) who experienced and/or was the subject or target of the conduct;
  - b) Bystanders who directly witnessed the conduct, even if not the target of the conduct; and
  - c) Bystanders who has direct knowledge of the conduct, such as Human Resources personnel or managers or other persons who have been told about the conduct by the Complainant or Targeted Person.
- 3.8. The form of a complaint may depend upon the particular circumstances of the case. A Complainant should be afforded the opportunity to provide details of the complaint in a range of ways to enable the Complaints Handler to record:
  - a) the name and contact details of the Complainant (if a third party or Bystander);
  - b) the name and contact details of the Targeted Person;
  - c) the name and contact details for the Respondent;
  - d) the names and contact details for any other person/s who may have relevant information; and
  - e) details of the conduct complained of, including when and where the conduct took place.
- 3.9. Regardless of the source, complaints should be progressed in consultation with, and with the consent of, the Targeted Person.
- 3.10. When complaints are received by a third party or Bystander:

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<sup>36</sup> As noted by the Law Society of New South Wales in their Workplace Guide: "If the complaint is later taken to an external tribunal or court, it will be important to demonstrate that the internal investigation was thorough and afforded natural justice. If this is demonstrated, the external tribunal or court is more likely to uphold the internal investigator's findings of fact." See: New Society of New South Wales, *Workplace Guide and Model Discrimination and Harassment Policies*, May 2021, 24, available online: [https://www.lawsociety.com.au/sites/default/files/2021-05/LS3498\\_PAP\\_Workplace-guide\\_2021-05-13.pdf](https://www.lawsociety.com.au/sites/default/files/2021-05/LS3498_PAP_Workplace-guide_2021-05-13.pdf) >

- a) The Complaints Handler should inform the Complainant that the Targeted Person will be contacted, and their consent sought, before the complaint can be progressed.
- b) Subject to ensuring a trauma informed approach, the Targeted Person should then be the next point of contact, and:
  - be advised that a complaint has been made on their behalf;
  - be offered support (such as legal advice or counselling services) via appropriate referrals;
  - be provided with the same information as outlined in paragraph **3.1** of this Appendix;
  - be offered a reasonable amount of time to process and consider whether or not they wish to pursue the formal complaint;
  - at all times the Complaints Handler should comply with **Section 1** of this Appendix in their interactions with the Targeted Person.
- c) If the Targeted Person does not want a complaint to be pursued, the complaint should be treated as if it was an anonymous report where appropriate to do so.<sup>37</sup> The third-party/Bystander Complainant should be informed on this outcome, but not of the details of the discussions with the Targeted Person.
- d) If the Targeted Person does want the complaint pursued:
  - offer for the complaint to be initiated in their own name;
  - if the person is content for the third-party to pursue the claim on their behalf, clarify the extent to which the person may need to remain involved to pursue a disciplinary response to the matter; and
  - inform the Complainant of this outcome, but not of the details of the discussions with the Targeted Person.

3.11. In the event that the complaint is pursued, please see **Section 4** below.

## **4. Investigating complaints**

### **4A. Preliminary assessment**

- 4.1. Both the Complainant and the Targeted Person should be advised of the preliminary assessment stage before its commencement, including the matters outlined in this **section 4A**.

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<sup>37</sup> It is noted that there may be occasions where the conduct reported is of such a serious nature that it triggers Work, Health and Safety or other obligations, regardless of the Target Person's wishes. MFAs may consider in these circumstances seeking legal advice. Further information and guidance is available on the Law Councils' *Time for Change* Portal.

- 4.2. Despite the best intentions of Complaints Handlers, Complainants<sup>38</sup> may experience distress and fear associated with the Respondent being notified of the complaint. It is therefore imperative for any complaint to have a preliminary assessment, to avoid Complainants experiencing additional trauma if a complaint cannot be pursued.
- 4.3. It is important to note that matters may not be able to be pursued for reasons not connected to the veracity of the complaint, such as jurisdictional issues.
- 4.4. This preliminary assessment should determine whether there are adequate facts to investigate, and not amount to an assessment as to the veracity of the facts or the creditability of the Complainant and/or the Targeted Person. This should be emphasised to the Complainant and/or Targeted Person.
- 4.5. Preliminary assessments should be conducted by Complaints Handlers to identify:
  - a) any conflicts of interest between the assessor and the parties and, if found, arrange for an alternative assessor to progress the assessment;
  - b) whether allegations have been adequately specified or particularised;
  - c) whether any further information is required so as to properly assess the complaint;
  - d) whether the conduct falls within the definition and thresholds outlined in the Framework;
  - e) in the case of third-party/Bystander complaints, confirm whether consent has been obtained from the Targeted Person.
- 4.6. Complaints Handlers should also assess whether there are any interim or precautionary measures that have (or should have been) identified within the organisation that is the subject of the complaint and whether those measures have been implemented. To the extent that they consider measures have not been identified and/implemented, Complaints Handlers may consider, with the consent of the Targeted Person (and third-party Complainants where appropriate) contacting the relevant workplace/organisation in respect of work, health and safety obligations.
- 4.7. In the event the complaint does not meet the thresholds in paragraph 4.5 above, the Complaints Handler assessing the complaint should:
  - a) advise the Complainant and the Targeted Person of the outcome and reasons, as appropriate, as soon as reasonably practicable;
  - b) advise the Complainant and the Targeted Person that other avenues are available for review, such as through the Organisation's particular conflict resolution policies and/or other external regulators, and that they can seek external advice about the avenues; and
  - c) in the event that the claim is not sufficiently particularised to pursue - explain to the Complainant what additional information would allow the

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<sup>38</sup> It is noted that Bystanders may also experience fear and distress in this situation, particularly if they are concerned about a Respondent reacting to the news of their involvement. This may be particularly relevant, for example, where the Respondent is senior to the Bystander in the organisation.

claim to proceed, without providing advice specific to the facts of the case, or otherwise be construed as providing legal advice.

- 4.8. In the event that the threshold in paragraph 4.5 are met, the Complaints Handler assessing the complaint should:
- a) advise the Complainant and the Targeted Person that the complaint is ready to proceed to formal investigation;
  - b) clearly outline what the formal investigation entails, including what information is provided to the Respondent, even if these details were relayed at an earlier stage of the process; and
  - c) confirm the willingness of the Complainant and the Targeted Person to continue the claim to formal investigation.

#### **4B. Informal resolution**

- 4.8. Complainants and Targeted Persons may find the notion of a formal investigation intimidating and distressing and/or off-putting. Subject to the applicable regulatory frameworks, some complaint handling bodies may be able to attempt to resolve complaints informally.<sup>39</sup>
- 4.9. Such informal resolution options should be conducted with ongoing consultation with the Targeted Person - noting that the person may, depending on the circumstances, only be seeking minimal intervention.
- 4.10. Such informal resolution options may include:
- a) If the Targeted Person feels comfortable - a discussion with the Respondent, with or on behalf of the Targeted Person, as appropriate. Should the Targeted Person wish to discuss the matter directly with the Respondent, the aid of the Complaints Handler and/or a support person should be offered.
  - b) If the person feels comfortable - correspondence to be provided by the Organisation to the workplace or other organisation where the conduct is alleged to be occurring, on terms agreed with the Targeted Person, such as:
    - notifying the other organisation of an anonymous complaint being made and informing the other organisation of their obligations in respect of addressing sexual harassment;<sup>40</sup> and/or
    - providing any further details as consented to by the Targeted Person, and inducing specific initial recommendations (for example regarding training and bolstering policies, or a change of reporting lines);
  - c) conciliation or mediation through an independent/external facilitator.

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<sup>39</sup> In circumstances where the applicable complaint handling body does not have regulatory arrangements supporting informal resolution, and where complainants do not wish to proceed to informal investigation, regulators have indicated that these complaints can be grounds for compliance audits.

<sup>40</sup> This option should only be exercised with caution and careful consideration of whether Complainant, Targeted person or Respondent can be inadvertently identified from context.

#### 4C. Formal investigation

- 4.11. Once the complaint has proceeded to the formal investigation, the Respondent must be notified, in writing, as soon as reasonably practicable.
- 4.12. However, before the Respondent is notified, investigators should inform the complainant that they are preparing the notification documents and that they will be advised before any formal correspondence is sent to the respondent.
- 4.13. The Complainant and Targeted Person should then be notified:
  - a) shortly before the Respondent has been notified; and
  - b) once the Respondent has been so notified.
- 4.14. Investigators may consider notifying, as appropriate, any other organisations that may be connected to the alleged conduct so that any workplace health and safety, or other reasonably anticipated risks may be appropriately managed while investigations are ongoing. Whether or not this is appropriate will depend on the circumstances of the case and the extent to which they intersect with other work, health and safety and any other statutory obligations.
- 4.15. The notice to the Respondent must include sufficient details so that the Respondent can properly respond to the complaint made against them.
- 4.16. The Respondent must have a sufficient period of time to respond to the complaint made against them. The Respondent should be invited to respond to the allegations and advised that they can seek external advice or assistance to do so.
- 4.17. Formal investigations:
  - a) should consider any conflicts of interest between the investigator(s) and the parties and, if found, arrange for an alternative investigator(s) to progress the investigation;
  - b) should have an investigator(s) that is appropriately qualified and/or experienced so as to reliably weigh the relevant facts and legal thresholds;
  - c) should have the investigator(s) appropriately trained to decide matters involving sexual harassment, as outlined in **section 1** of this Appendix; and
  - d) should, as far as possible, utilise investigators to reflect diverse cultural backgrounds, genders and orientations.
- 4.18. Formal investigations should:
  - a) consider the information and evidence provided by the parties to the complaint, including any:
    - statements;
    - documentary evidence; and
    - corroborating evidence.

- b) apply the principles of procedural fairness and natural justice;
- c) assess and make findings of the credibility of the parties and any witnesses – in doing so, investigators should be cognisant that complaints of sexual harassment often lack corroborating evidence and this alone should not prevent a determination;
- d) consider and apply the applicable thresholds, as addressed in the Framework; and
- e) apply a civil standard of proof, being on the balance of probabilities.<sup>41</sup>

4.19. If it is determined that the sexual harassment occurred on the balance of probabilities, appropriate remedies should be considered subject to the applicable rules, regulations and legislation.

4.20. Subject to the facts of the individual case, remedies might include (as relevant):

- a) a finding of unsatisfactory professional conduct or professional misconduct for legal practitioners;
- b) fines;
- c) restrictions or cancellation of a practising certificate or membership;
- d) removal from the Roll of practitioners;
- e) a finding that the Respondent breached workplace or discrimination legislation; and/or
- f) a referral to an external body as outlined in **section 4C** below.

4.21. Once a determination has been made in respect of the complaint, the outcome should be communicated to all parties as soon as practicable.

4.22. In the event that the investigator(s) determine that it would be appropriate for the matter to be referred to an external body, please refer to **section 4C** below.

#### **4C. Referral to external body**

4.23. Transparency is key to deterring sexual harassment. There will be occasions when Complaints Handlers investigating the complaint will consider it appropriate for the complaint to be determined by an external body, regulator, agency and/or tribunal including and not limited to Police and the applicable state or territory Workplace Health and Safety regulator.

4.24. It is imperative for the elimination of sexual harassment, that Organisations are open and supportive of external referrals:

- a) if it is appropriate in the circumstances; and

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<sup>41</sup> *Briginshaw v Briginshaw* [1938] HCA 34.

- b) as far as possible, is done with the consent of, and in consultation with, the Targeted Person.

4.25. In the event that the Complaints Handler investigating the complaint determines that it would be appropriate for the matter to be referred to another regulator, external body, disciplinary tribunal or authority for determination, the Complaints Handler should:

- a) advise the parties of this determination as soon as reasonably practicable, as appropriate; and
- b) provide the parties with an outline of the next steps, including an indication as to timeframes.

## **5. Review**

5.1. Following the determination of a complaint, regardless of outcome, Organisations should consider:

- a) whether the complaint reflects a systemic issue that requires further consideration and redress; and
- b) whether any element of the complaints handling, assessment or investigation process could be better managed in future complaints.

# **APPENDIX B**

## **BEST PRACTICE COMPLAINTS PROCEDURES FOR ORGANISATIONS ADDRESSING INTERNAL COMPLAINTS**

### **Recommendations and guidance**

The terms used in this document are consistent with the definitions in the *Model Sexual Harassment Framework for the Legal Profession (Framework)*.

#### **1. Complaints Handlers, assessors and investigators**

1.1. The persons who act as the points of contact for:

- a) those making complaints (**Complainants**); and
- b) the persons targeted by the sexual harassment (**Targeted Person**);

are vital to the effectiveness of any complaints process.

1.2. Further to paragraph 1.1, above, this document provides for complaints by Bystanders, so the Complainant and the Targeted Person may not necessarily be the same person. The Complainant and the Targeted Person are accordingly addressed separately in this document.

1.3. Persons, whether employed or contracted, who are responsible for receiving, assessing and/or investigating complaints (**Complaints Handlers**) should be appropriately trained in responding to persons who report sexual harassment. A Complaints Handler's training should include:

- a) the matters addressed in the Framework;
- b) trauma informed techniques for interviewing and investigation;
- c) an understanding about the impact of shame and fear of retribution;
- d) an understanding about the practical application of procedural fairness in investigations;
- e) obligations around privacy and reporting to other agencies such as Police;
- f) how to respond to complaints in a timely manner consistent with this document;
- g) how to recognise and manage any real or perceived power imbalance;
- h) how to consider whether an independent process (e.g. referral to a third party or engagement of an external investigator) is more appropriate; and
- i) how to respond to the specific needs of the complainant - such as any specific cultural or linguistic needs.

- 1.4. A Complaints Handler should refresh their training within a reasonable time of:
  - a) following a relevant change in legislation or regulation;
  - b) at the request of a staff member or another complaints handler or investigator ;
  - c) following any circumstances in which complaints handling procedures, as outlined in this Appendix, have not been adequately implemented; and/or
  - d) otherwise at least once every 2 calendar years.
- 1.5. Complaints Handlers should also be provided with appropriate guidance and support, to maintain a high quality of claims management for Complainants and Targeted Persons, and the well-being and resilience of the Complaints Handlers. This should include:
  - a) the professional guidance of a senior colleague or manager;
  - b) the availability of counselling services such as the Employee Assistance Program;
  - c) clear procedures for dealing with complaints and the use of information that are reinforced and consistent with what is required in-practice;
  - d) clear mechanisms for the escalating of complex complaints as appropriate;
  - e) clear reporting and grievance mechanisms in the case of alleged mismanagement or conduct; and
  - f) ongoing training as outlined in paragraph **1.3** of this Appendix.
- 1.6. Organisations receiving complaints arising within, or in connection with, their organisation (for ease of reference, **Organisations**), should ensure that managers and Human Resources staff are appropriately trained in the taking of complaints, in the manner outlined in paragraph **1.3**.
- 1.7. Organisations should also facilitate, where appropriate, for the initial Complaints Handler to remain the consistent 'contact person' for each Complainant and Targeted Person, to avoid unnecessary repetition of detail and re-traumatisation.
- 1.8. It is imperative that Complaints Handlers ensure that communications with Complainants and Targeted Persons be:
  - a) calm;
  - b) clear;
  - c) respectful;
  - d) fair;

- e) impartial; and
  - f) sensitive to the risks of re-traumatisation; and
  - g) sensitive to support, access and communication requirements and preferences.
- 1.9. Complaints Handlers should be mindful not to suggest to the Complainant or Targeted Person prior to any determination of the complaint:
- a) a judgment on the merits of the complaint; or
  - b) a likelihood of any particular outcome.
- 1.10. Complainants and Targeted Person should be supported and educated about the avenues for redress and support, in accordance with the wishes of that individual, rather than advised or guided towards particular outcomes. Central to the process should be a respect for the Targeted Person's desired outcomes, including if they change or waver.
- 1.11. Complaints Handlers should be appropriately trained and equipped to provide referrals and information to Complainants and Targeted Persons as appropriate, so there is no 'wrong door' to reporting sexual harassment.

## **2. Document management**

- 2.1. The Targeted Person should be consulted with, and kept informed, in respect of how their personal information is proposed to be used and stored.
- 2.2. In the case of complaints initiated by Bystanders, but consented to by the Targeted Person, care must be taken to:
- a) quarantine any personal information in respect of the Targeted Person from the Complainant and any other parties; and
  - b) only use information provided by the Targeted Person with their express consent in respect of how a particular piece of information is to be used.
- 2.3. Complaints must be recorded in a document management system that ensures, as far as is reasonably possible:
- a) sensitive information is kept confidential to Human Resources and/or the persons directly responsible for handling/investigating the complaint;
  - b) that all correspondence is secure, kept on file and up to date;
  - c) that all documents are stored securely for at least six years from the date the complaint was raised, or for such longer time as is reasonable in the circumstances.
- 2.4. All persons who will be handling the sensitive information should be clearly informed of the parameters for accessing and using the information, including the consequences of misuse. This should include any obligations to report certain events or information to other agencies such as Police.

- 2.5. Clear disciplinary procedures should be developed in respect of the misuse of information.

### **3. Complaints processes**

#### **3A Initial contact**

- 3.1. At the time of the initial interaction with the Complainant, Complaints Handlers should:
  - a) ask if the Complainant would benefit from any assistance to aid the discussions with the Complaints Handler, such as a support person, an interpreter, hearing or visual aids;
  - b) clearly convey that sexual harassment is unacceptable, in any context;
  - c) as far as it is possible, offer the availability of a Complaints Handler of the same gender, if desired;
  - d) advise that the taking of the complaint can be conducted over more than one session, and that the Complainant can pause (or discontinue) the complaint at any time;
  - e) establish whether the complaint is being made by the Targeted Person or a Bystander;
  - f) enquire whether the complainant is seeking a particular outcome;
  - g) ask Complainants how they wish their private information to be treated;
  - h) explain what information will be required to proceed - this will differ depending on whether the Complainant desires to make an anonymous report or a complaint;
  - i) inform the Complainant of the next steps of the applicable avenues for redress, including an indication as to timeframes;
  - j) refer Complainants to any applicable forms or guidance materials, as is appropriate; and
  - k) offer any other information and referral services, as appropriate, including where legal advice can be sought.<sup>42</sup> It is recommended that complaints handlers have available all available referral points, including those to counselling and other support services such as Lifeline or 1800 RESPECT.
- 3.2. Organisations should consider whether any interim or precautionary measures should be put in place while the complaint is being assessed or investigated, in a manner that does not disadvantage the Complainant. This might include, for example:
  - a) a change in reporting lines;
  - b) a change in workplace location;

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<sup>42</sup> Please see the Law Council's *Time for Change* Portal regarding Law Societies and Professional Associations who can refer persons to appropriate legal advice.

- c) the utilisation of remote working arrangements; and/or
  - d) implementation of policies or directions to address the relevant risk factors, for example in respect of conduct at social events or working after hours.
- 3.3. Any change in working arrangements as outlined in paragraph **3.2** above should be done in consultation with the Complainant and be mindful to avoid suggestions of adverse action or victimisation. To this end, Organisations considering interim or precautionary measures might consider legal advice with regard to the implementation of such measures.

### **3B. Anonymous reporting**

- 3.4. The Law Council recommends that anonymous reporting be permitted for information gathering purposes, noting that:
- provision of, and support during, the anonymous reporting process has been shown to empower Complainants/Targeted Persons to later proceed with a complaint;<sup>43</sup> and
  - even if complaints are ultimately not pursued, information provided in anonymous reports may provide valuable information about trends and areas of concern that may be addressed through other avenues.<sup>44</sup>
- 3.5. Anonymous reporting should also be accepted from Bystanders.

### **3C. Investigations initiated by the Organisation**

- 3.6. To avoid the onus of the complaint or disciplinary invention being placed on the Targeted Person or Complainant, the Law Council encourages Organisations to initiate investigations into reported sexual harassment as appropriate, on the basis that:
- a) the Targeted Person's informed consent is sought prior to the investigation being commenced; and
  - b) the Targeted Person is consulted throughout the process, as appropriate, noting that some Complainants will prefer minimal involvement.

### **3D. Complaints**

- 3.7. Complaints should be accepted from any persons:
- a) who experienced and/or was the subject or target of the conduct;

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<sup>43</sup> See: Office of the Legal Services Commissioner (NSW), Inappropriate personal conduct- sexual harassment and workplace bullying, (accessed April 2021) available online: <https://www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct/inappropriate-personal-conduct.aspx> >.

<sup>44</sup> See: Victorian Legal Services Board + Commissioner, Making a complaint to VLSB+C about sexual harassment, (accessed April 2021), available online: <https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment/making-complaint-vlsbc-about-sexual-harassment> .

- b) Bystanders who directly witnessed the conduct, even if not the target of the conduct; and
  - c) Bystanders who have direct knowledge of the conduct, such as Human Resources personnel or managers or other persons who have been told about the conduct by the Complainant or Targeted Person.
- 3.8. The form of a complaint may depend upon the particular circumstances of the case. A Complainant should be afforded the opportunity to provide details of the complaint in a range of ways to enable the Complaints Handler to record:
- a) the name and contact details of the Complainant (if a third party or Bystander);
  - b) the name and contact details of the Targeted Person;
  - c) the name and contact details for the Respondent;
  - d) the names and contact details for any other person/s who may have relevant information; and
  - e) details of the conduct complained of, including when and where the conduct took place.
- 3.9. Regardless of the source, complaints should be progressed in consultation with the Targeted Person as far as possible.
- 3.10. When complaints are received by a third party or Bystander:
- a) the Complaints Handler should inform the Complainant that the Targeted Person will be contacted, and their consent sought, before the complaint can be progressed.
  - b) the Targeted Person should then be the next point of contact, and:
    - be advised that a complaint has been made on their behalf;
    - be offered support (such as legal advice or counselling services) via appropriate referrals;
    - be provided with the same information as outlined in paragraph **3.1** of this Appendix;
    - be offered a reasonable amount of time to process and consider whether or not they wish to pursue the formal complaint; and
    - at all times the Complaints Handler should comply with **Section 1** of this Appendix in their interactions with the Targeted Person.
  - c) If the Targeted Person does not want a complaint to be pursued, the complaint should be treated as if it was an anonymous report where

appropriate to do so.<sup>45</sup> The third-party/Bystander Complainant should be informed on this outcome, but not of the details of the discussions with the Targeted Person.

- d) If the Targeted Person does want the complaint pursued:
- offer for the complaint to be initiated in their own name;
  - if the person is content for the third-party to pursue the claim on their behalf, clarify the extent to which the person may need to remain involved to pursue a disciplinary response to the matter; and
  - inform the Complainant of this outcome, but not of the details of the discussions with the Targeted Person.

3.11. In the event that the complaint is pursued, please see **Section 4** below.

## **4. Investigating complaints**

### **4A. Preliminary assessment**

- 4.1. Both the Complainant and the Targeted Person should be advised of the preliminary assessment stage before its commencement, including the matters outlined in this **section 4A**.
- 4.2. Despite the best intentions of Organisations, Complainants may experience distress and fear associated with the Respondent being notified of the complaint.<sup>46</sup> It is therefore imperative for any complaint to have a preliminary assessment, to avoid Complainants experiencing additional trauma if a complaint cannot be pursued.
- 4.3. It is important to note that matters may not be able to be pursued for reasons not connected to the veracity of the complaint, such as jurisdictional issues.
- 4.4. This preliminary assessment should determine whether there are adequate facts to investigate, and not amount to an assessment as to the veracity of the facts or the creditability of the Complainant and/or the Targeted Person. This should be emphasised to the Complainant and/or Targeted Person.
- 4.5. Preliminary assessments should be conducted to identify:
  - a) any conflicts of interest between the assessor and the parties and, if found, arrange for an alternative assessor to progress the assessment;
  - b) whether allegations have been adequately specified or particularised;

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<sup>45</sup> It is noted that there may be occasions where the conduct reported is of such a serious nature that it triggers Work, Health and Safety or other obligations, regardless of the Target Person's wishes. MFAs may consider in these circumstances seeking legal advice. Further information and guidance is available on the Law Councils' Time for Change Portal.

<sup>46</sup> It is noted that Bystanders may also experience fear and distress in this situation, particularly if they are concerned about a Respondent reacting to the news of their involvement. This may be particularly relevant, for example, where the Respondent is senior to the Bystander in the organisation.

- c) whether any further information is required so as to properly assess the complaint;
  - d) whether the conduct falls within the definition and thresholds outlined in the Framework;
  - e) whether there are any interim or precautionary measures, as outlined in paragraph **3.2** of this Appendix, that have, or should have, been identified and whether those measures have been implemented; and
  - f) in the case of third-party/Bystander complaints, confirm whether consent has been obtained from the Targeted Person.
- 4.6. In the event the complaint does not meet the thresholds in paragraph **4.5** above, the Complaints Handler assessing the complaint should:
- a) advise the Complainant and the Targeted Person of the outcome and reasons, as appropriate, as soon as reasonably practicable;
  - b) advise the Complainant and the Targeted Person that other avenues are available for review, such as through the Organisation's particular conflict resolution policies and/or external regulators, and that they can seek external advice about the avenues; and
  - c) in the event that the claim is not sufficiently particularised to pursue - explain to the Complainant what additional information would allow the claim to proceed, without providing advice specific to the facts of the case, or otherwise be construed as providing legal advice.
- 4.7. In the event that the threshold in paragraph **4.5** are met, the Complaints Handler assessing the complaint should:
- a) advise the Complainant and the Targeted Person that the complaint is ready to proceed to informal resolution and/or formal investigation;
  - b) clearly outline what the informal resolution and formal investigation entail, including what information is provided to the Respondent, even if these details were relayed at an earlier stage of the process; and
  - c) confirm the willingness of the Complainant and the Targeted Person to continue the claim to informal resolution and/or formal investigation.

#### **4B. Informal resolution**

- 4.8. Complainants and Targeted Persons may find the notion of a formal investigation intimidating and distressing and/or off-putting. In order to facilitate the reporting of sexual harassment, it is imperative that alternative and informal options for resolution be offered to the Complainant and/or Targeted Person.
- 4.9. Such informal resolution options should be conducted in consultation with the Targeted Person - noting that the person may, depending on the circumstances, only be seeking minimal intervention.
- 4.10. Such informal resolution options may include:

- a) If the Targeted Person feels comfortable - a discussion with the Respondent, with or on behalf of the Targeted Person, as appropriate. Should the Targeted Person wish to discuss the matter directly with the Respondent, the aid of the Complaints Handler and/or a support person should be offered.
- a) If the person feels comfortable - the Complaints Handler and/or Human Resources to have a conversation about the conduct directly with the Respondent, on terms agreed with the Targeted Person.
- b) Conciliation or mediation through an independent/external facilitator.

#### **4C. Formal investigation**

- 4.11. Once the complaint has proceeded to the formal investigation, the Respondent must be notified, in writing, as soon as reasonably practicable.
- 4.12. However, before the Respondent is notified, investigators should inform the complainant that they are preparing the notification documents and that they will be advised before any formal correspondence is sent to the respondent.
- 4.13. The Complainant and Targeted Person should then be notified:
  - a) shortly before the Respondent has been notified; and
  - b) once the Respondent has been so notified.
- 4.14. The notice to the Respondent must include sufficient details so that the Respondent can properly respond to the complaint made against them.<sup>47</sup>
- 4.15. The Respondent must have a sufficient period of time to respond to the complaint made against them. The Respondent should be invited to respond to the allegations and advised that they can seek external advice or assistance to do so.
- 4.16. Formal investigations:
  - a) subject to the consent of the Targeted Person should, if appropriate, be conducted by a person independent to/external to the Organisation;<sup>48</sup>
  - b) should consider any conflicts of interest between the investigator(s) and the parties and, if found, arrange for an alternative investigator(s) to progress the investigation;
  - c) should have an investigator(s) that is appropriately qualified and/or experienced so as to reliably weigh the relevant facts and thresholds;

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<sup>47</sup> Law Society of New South Wales, n36.

<sup>48</sup> Whether or not it is appropriate to engage an independent investigator will involve considerations such as: any independent person is available internally, whether to investigation internally would give the apprehension of bias or unfairness, and the resources of the organisation.

- d) should have the investigator(s) appropriately trained to decide matters involving sexual harassment, as outlined in **section 1** of this Appendix; and
- e) should, as far as possible, utilise investigators to reflect diverse cultural backgrounds, genders and orientations.

4.17. Formal investigations should:

- a) consider the information and evidence provided by the parties to the complaint, including any:
  - statements;
  - documentary evidence; and
  - corroborating evidence.
- b) apply the principles of procedural fairness and natural justice;
- c) assess and make findings of the credibility of the parties and any witnesses –in doing so, investigators should be cognisant that complaints of sexual harassment often lack corroborating evidence and this alone should not prevent a determination;
- d) consider and apply the applicable thresholds, as addressed in the Framework; and
- e) apply a civil standard of proof, being on the balance of probabilities.<sup>49</sup>

4.18. If it is determined that sexual harassment occurred on the balance of probabilities, the Organisation should consider appropriate remedies subject to the applicable policies, workplace health and safety laws or other applicable regulations.

4.19. Subject to the facts of the individual case, remedies might include:

- a) an apology;
- b) a requirement to undertake sexual harassment prevention training;
- c) counselling;
- d) an agreement on protocols regarding arrangements and interactions between the parties going forward;
- e) structural changes, including changes in reporting lines;
- f) demotion or termination of employment or engagement;
- g) clear expectations, codes of conduct and/or protocols established with contractors, clients, members and other applicable third-parties;

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<sup>49</sup> *Briginshaw v Briginshaw* [1938] HCA 34.

- h) for associations - cancellation, or limitations to, membership or licence;
  - i) reporting of conduct to the relevant regulator (e.g. law society, bar association, legal services commissioner); and/or
  - j) referral for civil or criminal legal action.
- 4.20. Once a determination has been made in respect of the complaint, the outcome should be communicated to all parties as soon as practicable.
- 4.21. In the event that the investigator(s) determine that it would be appropriate for the matter to be referred to an external body, please refer to **section 4C** below.

#### **4C. Referral to external disciplinary body**

- 4.22. Transparency is key to deterring sexual harassment. There will be occasions when complaints investigators will consider it appropriate for the complaint to be determined by an external body, regulator, agency and/or tribunal.
- 4.23. For the purposes of this document, an external body, regulator, agency and/or tribunal might include:
- a) the relevant regulator such as the applicable law society, bar association or legal services commissioner;
  - b) Police; and/or
  - c) the applicable state or territory Workplace Health and Safety regulator.
- 4.24. It is imperative for the elimination of sexual harassment, that Organisations are open and supportive of external referrals:
- a) if it is appropriate in the circumstances; and
  - b) as far as possible, is done with the consent of, and in consultation with, the Targeted Person.
- 4.25. In the event that the Complaints Handler investigating the complaint determines that it would be appropriate for the matter to be referred to a regulator, disciplinary tribunal or authority for determination, the complaint investigator(s) should:
- a) advise the parties of this determination as soon as reasonably practicable, as appropriate;
  - b) provide the parties with an outline of the next steps, including an indication as to timeframes.

## **5. Review**

- 5.1. Following the determination of a complaint, regardless of outcome, Organisations should consider:

- a) whether the complaint reflects a systemic issue that requires further consideration and redress; and
- b) whether any element of the complaints handling, assessment or investigation process could be better managed in future complaints.

# APPENDIX C

## Sexual Harassment Framework for the Legal Profession

### Checklist of Key Elements

*This checklist is designed to assist organisations with auditing their existing sexual harassment policies.*

	Key element	Explanation
1	<b>Objectives: Does your policy explain what its objectives are?</b>	<p>Some key objectives for a sexual harassment policy may include to:</p> <ul style="list-style-type: none"> <li>• facilitate the creation and maintenance of a profession free from sexual harassment;</li> <li>• engender commitment to professional environments free from sexual harassment;</li> <li>• set appropriate standards of conduct consistent with Australian law on sexual harassment and the applicable professional conduct rules;</li> <li>• facilitate the reporting of conduct that may be sexual harassment;</li> <li>• guard against the victimisation of people who make complaints of sexual harassment;</li> <li>• explain the consequences for people who engage in sexual harassment;</li> <li>• provide for best practice complaints procedures for complaints of sexual harassment;</li> <li>• provide for the best practice training recommendations regarding sexual harassment,<sup>50</sup> and</li> <li>• be written in clear and easily understood language.</li> </ul>
2	<b>Scope: Does your policy clearly describe who it covers and in what circumstances?</b>	<p>The policy should specify who is bound by the policy and who is 'protected' by it.</p> <p>Those bound by the policy should include for example:</p> <ul style="list-style-type: none"> <li>• for a law firm – all staff, volunteers, students and independent contractors engaged by the firm; and</li> <li>• for barristers – all barristers, members or licensees of the chambers, all employees, volunteers, students and independent contractors engaged by them.</li> </ul> <p>As far as it is possible, for example through codes of conduct, organisations should communicate the expected standards of conduct to persons associated or connected to the activities of the organisation.</p>

<sup>50</sup> The best practice training recommendations are presently in development, and will be circulated for consultation in the coming months.

	Key element	Explanation
		<p>Those protected by the policy should include for example:</p> <ul style="list-style-type: none"> <li>• for legal practices – all staff, volunteers, students and independent contractors engaged by the firm, barristers engaged by the firm, clients of the firm, other visitors to the firm, other solicitors, barristers and court/tribunal staff, and other people present at work-related functions (social or otherwise); and</li> <li>• for barristers – all barristers, members and licensees of the chambers, all other staff, volunteers, students and independent contractors engaged by them, all solicitors and clients working with them, other solicitors, barristers and court/tribunal staff, and other people present at work-related functions (social or otherwise).</li> </ul> <p>In some jurisdictions, those protected by the policy may be as broad as ‘any person’.</p>
3	<p><b>Definition: Does your policy define what sexual harassment is?</b></p>	<ul style="list-style-type: none"> <li>• The definition in the policy should reflect the definition in the Sex Discrimination Act 1984 (Cth), applicable state/territory law and applicable solicitor/barrister professional conduct rules.</li> <li>• The policy may highlight particular nuances of the definition, for example: <ul style="list-style-type: none"> <li>○ that conduct may constitute sexual harassment even if it is non-physical and non-verbal;</li> <li>○ that sexual harassment can arise from a single incident as well as repeated incidents or a course of conduct;</li> <li>○ what part of the definition is objective (i.e. whether the conduct is of a sexual nature, whether a reasonable person would have anticipated the possibility of the target being offended, humiliated or intimidated) and what part of the definition is subjective (i.e. whether the conduct is unwelcome).</li> </ul> </li> </ul>
4	<p><b>Practical guidance: Does your policy supplement the definition by elaborating on the forms of conduct that may constitute sexual harassment?</b></p>	<p>The policy should enlarge on the definition of sexual harassment by articulating the various different forms of conduct through which sexual harassment may occur. For example:</p> <ul style="list-style-type: none"> <li>• physical touching or gestures;</li> <li>• leering or staring;</li> <li>• invading personal space or maintaining unnecessarily close physical proximity;</li> <li>• verbal comments, questions, insults or jokes;</li> </ul>

	Key element	Explanation
		<ul style="list-style-type: none"> <li>• written comments, questions, insults or jokes; and/or</li> <li>• distribution or display of printed, audio or audio-visual material.</li> </ul> <p>The policy may also usefully give some guidance on certain ‘risk factors’ that commonly feature in sexual harassment scenarios (while emphasising that these are not requirements and that sexual harassment is by no means limited to scenarios that feature these risk factors). For example:</p> <ul style="list-style-type: none"> <li>• gender differential (most sexual harassment occurs by men against women);</li> <li>• material power differential (particularly the ability of the perpetrator to impact/influence the career prospects or job security of the target);</li> <li>• material age/experience differential (particularly as age/experience often runs together with power and the capacity to impact/influence the career prospects or job security of the target);</li> <li>• people experiencing disability;</li> <li>• social and informal settings (particularly where alcohol may be involved);</li> <li>• intersectional disadvantage (particularly the potential for those who face multiple forms of social or political disadvantage to be more likely to be subject to sexual harassment).</li> </ul>
5	<p><b>Obligations: Does your policy clearly express the obligations with respect to sexual harassment for people covered by the policy?</b></p>	<p>For legal practices, the policy should clearly set out the obligations on those covered by the policy, including:</p> <ul style="list-style-type: none"> <li>• the obligation not to engage in sexual harassment;</li> <li>• the obligation to not take adverse action against a person who makes a complaint or report of sexual harassment;</li> <li>• the obligation to help create and maintain a professional environment free from sexual harassment (this may be further broken down so as to impose more onerous obligations on line managers and those occupying senior roles);</li> <li>• the obligation to follow the complaint / reporting / grievance procedure with respect to any complaint of sexual harassment made by or against the person (the complaint / reporting / grievance procedure itself will also set out specific obligations).</li> </ul> <p>Consideration should also be given to including more extensive obligations as a matter of best practice including the obligation to report instances of sexual harassment that are witnessed or brought to the</p>

	Key element	Explanation
		<p>person’s knowledge (this may be further broken down so as to impose more onerous obligations on line managers and those occupying senior roles). It may be that the criminal law of the jurisdiction requires such reporting where the conduct amounts to an offence.</p> <p>For barristers, obligations may arise only in certain circumstances (e.g. policies that apply to chambers arrangements, or anti-discrimination law). It may be appropriate for the policy to identify both obligations and expectations.</p>
6	<b>Contraventions: Does your policy outline the consequences of non-compliance?</b>	<p>The policy should set out the potential consequences of non-compliance for those bound by the policy. For example:</p> <ul style="list-style-type: none"> <li>• disciplinary action up to and including dismissal for staff;</li> <li>• termination of engagement for volunteers students and independent contractors (depending on the terms of engagement);</li> <li>• termination of licence for licensees (depending on the terms of licence);</li> <li>• termination of membership for shareholders/members (depending on the terms of the shareholder’s agreement);</li> <li>• reporting of conduct to the relevant regulator (e.g. law society, bar association, legal services commissioner); and/or</li> <li>• referral to civil or criminal legal action.</li> </ul>
7	<b>Complaint or reporting procedure: Does your policy refer to the relevant grievance/complaint procedure?</b>	<p>The policy should clearly refer to the relevant complaint/reporting/grievance procedure for complaints or reports of sexual harassment engaged in by a person bound by the policy.</p> <p>The policy should also refer to external avenues for making a complaint of sexual harassment including:</p> <ul style="list-style-type: none"> <li>• relevant regulator (law society, bar association, legal services commissioner);</li> <li>• Police; and/or</li> <li>• the applicable state or territory Workplace Health and Safety regulator.</li> </ul>
8	<b>Bystander intervention: Does your policy address the importance and expectations of bystanders to incidents of sexual harassment?</b>	<p>The policy should define what constitutes a Bystander, explain the importance of their role in facilitating change, and outline steps they should take in response to sexual harassment.</p>

	Key element	Explanation
9	<b>Dissemination and training: Does your policy confirm that all those bound by it will have access to the policy and training on it?</b>	<p>All those bound by the policy should be provided with a copy of it (or instructed on how to access a copy of it). The policy should be accessible to those protected by it (for example, by being displayed on the organisation's website).</p> <p>Research suggests that policies are more effective when supported by training for those who are bound by it. Training should:</p> <ul style="list-style-type: none"> <li>• where possible (such as in the instance of legal practices), be mandatory and attended at least once, and ideally with regular refreshers;</li> <li>• extend to everyone bound by the policy, including the most senior levels;</li> <li>• cover not just the strict legal obligations but provide the context to sexual harassment (including the role of power/hierarchical dynamics and common scenarios) and the role of Bystanders;</li> <li>• cover the relevant complaint/reporting/grievance procedure for complaints or reports of sexual harassment engaged in by a person bound by the policy.</li> </ul>
10	<b>Support: Does your policy include reference to avenues of support available to those who have been subjected to or witnessed sexual harassment?</b>	<p>This may include:</p> <ul style="list-style-type: none"> <li>• internal personnel (for example, nominated grievance handlers or contact officers, Human Resources staff);</li> <li>• relevant professional body (law society/bar association);</li> <li>• external counselling services (for example, Employee Assistance Programs, BarCare, 1800RESPECT);</li> <li>• government bodies (for example, Australian Human Rights Commission, the applicable state or territory Workplace Health and Safety regulator).</li> <li>• community organisations (for example, Women's Legal Centres, Centres Against Sexual Assault).</li> </ul>
11	<b>Commitment: Does your policy require an acknowledgement of understanding and a commitment to abide by it?</b>	<p>Where possible (such as in the instance of legal practices), the policy should provide that all those bound by it will be required to acknowledge that they have been provided with access to the policy, they have read and understood it, and they agree to comply with it.</p>
12	<b>Review: Does your policy provide for periodic review?</b>	<p>The policy should anticipate the need for regular review of its terms to ensure that it remains consistent with legal and professional obligations and in step with current social norms. It should include identification of the relevant person to whom suggestions for</p>

	Key element	Explanation
		improvement can be directed.