

An initiative of the Law Council of Australia

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

23 December 2020



Law Council  
OF AUSTRALIA

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- Law Institute of Victoria;
- Law Society of New South Wales;
- Law Society of South Australia;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Law Society;
- Queensland Law Society;
- The Victorian Bar;
- Law Firms Australia;
- Family Law Section of the Law Council of Australia; and
- Legal Practice Section of the Law Council of Australia.

The Law Council would also like to thank and acknowledge the assistance of the Australian Human Rights Commission, the Victorian Legal Services Board + Commissioner, and the participants to the Law Council's National Roundtable Addressing Sexual Harassment.<sup>1</sup>

This National Action Plan was developed in consultation with the Law Council's Equal Opportunity Committee:

Kate Eastman SC (Chair)	New South Wales Bar Association
Pauline Wright	President of the Law Council of Australia and representative for the Law Society of New South Wales
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Prue Bindon	Australian Capital Territory Bar Association
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Jenny Firkin QC	The Victorian Bar
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Rachel Joseph	Western Australian Bar Association
Leah Marrone	Australian Women Lawyers
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<sup>1</sup> For privacy reasons the Law Council does not have permission to release the names of all participants and the organisations they represented. However, it is noted that there were 38 participants from around the country with expertise in the area, including inclusion and diversity representatives from the Law Council's Constituent Bodies, the Australian Bar Association, regulators of the legal profession, women lawyers' associations, law student and university representatives and the Sex Discrimination Commissioner.

In addition, the Chapter 3A on the Australian Solicitors' Conduct Rules was developed in consultation with the Law Council's Professional Ethics Committee:

Steven Stevens (Chair)	Law Institute of Victoria
Chris Boundy	Law Society of South Australia
Ian Dallen	Law Firms Australia
Philip Jackson SC	Law Society of Tasmania
Ashley Macknay	Law Society of Western Australia
Paul Monaghan	Law Society of New South Wales
Rob Reis	Australian Capital Territory Law Society
Stafford Shepherd	Queensland Law Society
Kelvin Strange	Law Society Northern Territory
Murray Hawkins	Secretariat, Law Council of Australia
Tarryn Gaffney	Secretariat, Law Council of Australia

## About the Law Council of Australia

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

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

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

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

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

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

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

## Executive Summary

1. Eliminating sexual harassment in the legal profession is part of the Law Council's long-running commitment to inclusion and diversity in the legal profession. Sexual harassment is unacceptable in the legal profession and the Law Council and its Constituent Bodies are committed to its elimination.
2. The National Action Plan to Reduce Sexual Harassment in the Australian legal profession (**NAP**) brings together the determination of the Law Council's state and territory Constituent Bodies to address sexual harassment in the legal profession across the nation.
3. This NAP is designed to map a path forward that addresses the regulatory and cultural change factors necessary to facilitate better experiences for legal professionals. It is important to note that this a living document, setting out a framework for change, the specifics of which will continue to evolve as each measure is developed. The NAP includes specific law reform proposals as policy positions of the Law Council. It also includes measures to be implemented within the legal profession to drive cultural change.
4. The Law Council's proposed solutions and recommendations include:
  - Advocating for federal law reform amendments to the *Sex Discrimination Act 1984* (Cth) (**SDA**).
  - Supporting the work of the Australian Human Rights Commission, particularly in relation to:
    - the establishment of a Workplace Sexual Harassment Council;
    - amending the SDA:
      - to introduce positive duties;
      - to expand aiding and abetting provisions to sexual harassment;
      - to clarify the position of civil actions for victimisation as unlawful discrimination;
    - the harmonisation of federal and state and territory discrimination laws; and
    - education and training programs for judicial officers and tribunal members.
  - Driving cultural change in the legal profession through:
    - legal profession regulation;
    - the development of national model sexual harassment policy and guidelines;
    - the development of a centralised source of information and suite of educational tools;
    - the facilitation of a consistent complaints process;

- supporting Constituent Bodies to develop professional development training;
  - the consideration of bystander provisions; and
  - supporting persons who have experienced sexual harassment.
- Advocating for the establishment of a Federal Judicial Commission.
5. The Law Council will review and report on this NAP on an annual basis to its Board of Directors addressing the implementation of the endorsed measures as they are further canvassed and developed in consultation with the Law Council's Constituent Bodies.

# Background

## Prevalence

6. The Law Council recognises that sexual harassment in Australian workplaces is pervasive and damaging. In 2018, the Australian Human Rights Commission (**AHRC**) found that 23 per cent of Australian women and 16 per cent of Australian men had experienced workplace sexual harassment in the past year.<sup>2</sup> Similar statistics were recorded in 2004,<sup>3</sup> 2008<sup>4</sup> and 2012.<sup>5</sup>
7. The legal profession is no different. All available statistics, as well as anecdotal evidence, suggest that sexual harassment within the Australian legal profession is a prevalent and persistent problem. In 2013, the Law Council conducted the National Attrition and Re-engagement Survey (**NARS**) to investigate the progression, attrition, and re-engagement rates of male and female lawyers, obtain qualitative and quantitative data, and identify gendered trends within the profession.<sup>6</sup> The NARS remains one of the most comprehensive studies of the Australian legal profession, and found that approximately one in four women experienced sexual harassment in their legal workplace.<sup>7</sup> More recent studies suggest that these rates may be even higher.
8. Numerous sources of statistics relating to the prevalence of sexual harassment within the Australian legal profession have been published, including:
  - In 2007, the [Law Society of Tasmania's Employment and Equal Opportunity Committee's survey](#) on sexual harassment and inappropriate workplace behaviour in the local legal profession, completed by 132 men and 89 women, where 47 respondents (that is, 21 per cent) stated they had been subjected to inappropriate workplace behaviour;<sup>8</sup>
  - In 2012, [Changing the Rules: The Experiences of Female Lawyers in Victoria](#) where 24 per cent of the female lawyers who responded to the survey reported having experienced sexual harassment;<sup>9</sup>
  - In 2014, the aforementioned [National Attrition and Re-engagement Study \(NARS\) Report](#) where 24 per cent of the female lawyers and eight per cent of the male lawyers who responded to the survey reported having experienced sexual harassment;<sup>10</sup>

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<sup>2</sup> Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018).

<sup>3</sup> Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue ... ; Sexual Harassment in the Australian Workplace* (2004).

<sup>4</sup> Australian Human Rights Commission, *Sexual Harassment: Serious Business; Results of the 2008 Sexual Harassment National Telephone Survey* (2008).

<sup>5</sup> Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment National Telephone Survey* (2012).

<sup>6</sup> Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (2014).

<sup>7</sup> *Ibid* 32, 76.

<sup>8</sup> See Law Society of Tasmania's Employment and Equal Opportunity Committee, Submission No 358 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019).

<sup>9</sup> Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria* (2012) 30.

<sup>10</sup> Law Council of Australia, (n 6) 32.

- In 2017, the International Bar Association’s [Women in Commercial Legal Practice](#) where 27 per cent of the female lawyers and seven per cent of the male lawyers who responded to the survey reported having experienced sexual harassment;<sup>11</sup>
  - In 2018, the Victorian Bar’s [Quality of Working Life Survey](#) where 16 per cent of the female barristers and two per cent of the male barristers who responded to the survey reported having experienced sexual harassment;<sup>12</sup>
  - In 2018, the [Women Lawyers Association New South Wales survey](#) of 242 respondents, 96 per cent of which were women, where 71 per cent of respondents reported having experienced sexual harassment;<sup>13</sup>
  - In 2018, the [NSW Young Lawyers Human Rights Committee’s survey](#) on the incidence of sexual harassment in the legal profession, distributed to the NSW Young Lawyers membership, where 51 per cent of the respondents reported having experienced sexual harassment;<sup>14</sup>
  - In 2018, the [Women Lawyers Association of the ACT survey](#) on sexual harassment in the local legal profession where 57 per cent of the respondents reported having experienced sexual harassment;<sup>15</sup> and
  - In 2019, the International Bar Association’s (IBA) final report on its global survey, entitled [Us Too? Bullying and Sexual Harassment in the Legal Profession](#) where 47 per cent of the female lawyers and 13 per cent of the male lawyers who responded to the survey from Australia reported having experienced sexual harassment.<sup>16</sup>
  - In 2019, the [Women Lawyers of Western Australia Sexual Harassment Survey](#) revealed that 72 per cent of the 500 participants had personally experienced sexual harassment in the workplace.
  - In 2019, the Victorian Legal Services Board + Commissioner’s report on [Sexual Harassment in the Legal Sector \(VLSBC report\)](#) found that approximately one in three (36 per cent) legal professionals said they had experienced sexual harassment while working in the legal sector, and that women were significantly more likely to experience sexual harassment (61 per cent) as opposed to men (12 per cent).<sup>17</sup>
9. The latter report further noted that the most prevalent forms of sexual harassment experienced were generally not physical, rather they involved conduct such as intrusive questions about their own or someone else’s private life or physical appearance (24 per cent), sexually aggressive sounds, comments or jokes (23 per cent) and inappropriate staring or leering (19 per cent). However, one in five (18 per cent) respondents have experienced unwelcome physical contact, including

<sup>11</sup> International Bar Association, *IBA LPRU: Women in Commercial Legal Practice* (December 2017) 34.

<sup>12</sup> Victorian Bar, *Victorian Bar: Quality of Working Life Survey* (University of Portsmouth, 2018) 16.

<sup>13</sup> Women Lawyers Association New South Wales, Submission No 340 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (February 2019) 9.

<sup>14</sup> Law Society of New South Wales Young Lawyers, Submission No 308 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) 7.

<sup>15</sup> Women Lawyers Association of the Australian Capital Territory, ‘WLA Submission to AHRC Workplace Sexual Harassment Inquiry’ (February 2019) <<http://www.wlaact.org.au/national-inquiry-into-sexual-harassment-in-australian-workplaces>>.

<sup>16</sup> International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (2019) 87.

<sup>17</sup> Victorian Legal Services Board + Commissioner, *Sexual Harassment in the Legal Sector* (2019), vii.

touching, hugging, cornering or kissing (18 per cent) or attempted or actual rape or assault (two per cent).<sup>18</sup>

10. The VLSBC report also found that there was a disconnect between employees' and managers' perceptions of sexual harassment in the workplace:
  - **Employees:** 23 per cent reported that sexual harassment was 'common or very common', 41 per cent reported that it occurred 'sometimes' and 9 per cent thought it was 'very rare'; and
  - **Managers:** one per cent reported that sexual harassment was commonplace, five per cent reported that it occurred sometimes and 73 per cent reported that it was 'very rare'.<sup>19</sup>

## Drivers of sexual harassment

11. The Law Council considers that certain features of the legal profession contribute to the risk of sexual harassment. These include:
  - **Hierarchical nature:** the legal profession is 'heavily'<sup>20</sup> and 'strictly'<sup>21</sup> hierarchical. There are marked power imbalances in the relationships between colleagues, which are further skewed by a transactional element. Clients and senior colleagues largely determine the work that a lawyer gets to do, and career advancement is 'often strongly dependent on having the right sort of senior allies'.<sup>22</sup>

The *Changing the Rules* study of women lawyers in Victoria found that, in 78 per cent of cases, the harasser held a more senior position within the workplace.<sup>23</sup> The *Changing the Rules* study also found that 'sexual harassment was most likely to occur in the early stages of employment', leading the authors to suggest this relate to the power imbalance that underpins sexual harassment: '*the less amount of time that a person is employed, the younger they are, and the less established their reputation is*'.<sup>24</sup>
  - **Male-Dominated:** Multiple studies report that participants experience the legal profession as a male-dominated culture.<sup>25</sup> Sexual harassment is consistently associated with workplaces that have strongly embedded masculine norms.<sup>26</sup> Statistics suggest that sexual harassment, bullying and intimidation is less likely to occur in workplaces where women hold '40 per cent or more of senior

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<sup>18</sup> Ibid, viii.

<sup>19</sup> Ibid, vii.

<sup>20</sup> International Bar Association (n 16) 87.

<sup>21</sup> Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

<sup>22</sup> Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 30.

<sup>23</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 32.

<sup>24</sup> Ibid 31.

<sup>25</sup> Law Council of Australia (n 6); Victorian Equal Opportunity and Human Rights Commission (n 23); Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 106.

<sup>26</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. See also Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours (2015) 41 *Australian Feminist Law Journal* 87, 105.

positions'.<sup>27</sup> It is also recognised that 'women have a higher expectation of what the ethical climate of organisations should be'.<sup>28</sup>

Unfortunately, while men and women currently enter the legal profession at roughly equal rates, men continue to dominate senior leadership positions.<sup>29</sup> This means that:

*men are more likely to be in positions of structural advantage over women, controlling access to limited social goods like opportunity and advancement, and wielding structural power like seniority, reputation and authority.*<sup>30</sup>

On the other hand, resentment towards women's upward mobility can also factor. Some men react 'strongly and negatively' to the changing demographics of their workplace.<sup>31</sup> In these instances, unethical behaviour towards women becomes a 'means of maintaining control' over a profession traditionally considered male.<sup>32</sup>

- **Competitive working environments:** Competitive environments tend to increase incidents of bad behaviour.<sup>33</sup> When people are motivated to pursue their own self-interest, for example through internal competition, high pressure, reward systems, promotions, or limited workplace goods, they are also motivated to engage in unethical behaviours, such as bullying and harassment, in an effort to '*eliminate colleagues or subordinates who are considered as burdens or rivals.*'<sup>34</sup>
- **Commercial and Managerial:** Commercialism and managerialism are often highlighted as key issues impacting modern law firms.<sup>35</sup> Commercialism drives firms to focus on profits, productivity, efficiency, and client satisfaction, and 'rely heavily on practices that promote' these goals, including the 'promotion of effective profit earners'.<sup>36</sup> The worry is that these goals: '*can trump concerns about worker wellbeing and lead to a ready acceptance of problematic behaviours performed by particularly productive workers.*'<sup>37</sup> Similarly, managerialism focuses on the firm over the individual, and considers a person through their membership in the firm.<sup>38</sup>
- **Social Events and Alcohol:** When social events and professional interactions are organised around 'drinks', alcohol consumption becomes a feature of the cultures of certain societies, professions and workplaces. There is anecdotal evidence that incidents of sexual harassment within the legal profession are exacerbated by social events centred around the availability and high

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<sup>27</sup> Adrienne Morton (n 21) 35.

<sup>28</sup> Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 286.

<sup>29</sup> Paula Baron, 'The Elephant in the Room? Lawyer Well-Being and the Impact of Unethical Behaviours' (2015) 41 *Australian Feminist Law Journal* 87, 106.

<sup>30</sup> Adrienne Morton, 'Sexual Harassment in the Legal Profession' (2018) 144 *Precedent* 34, 35.

<sup>31</sup> Paula Baron (n 29) 105.

<sup>32</sup> *Ibid* 105.

<sup>33</sup> *Ibid* 103.

<sup>34</sup> *Ibid* quoting D Salin, 'Workplace Bullying among Business Professionals: Prevalence, Gender Differences and the Role of Organizational Politics' (2005) *Pistes* 7, 7.

<sup>35</sup> See, eg, *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>36</sup> Suzanne Le Mire and Rosemary Owens, *Ibid*, 1047.

<sup>37</sup> *Ibid* 1061 quoted by Paula Baron (n 29) 103-104.

<sup>38</sup> Suzanne Le Mire and Rosemary Owens (n 35) 1047.

consumption of alcohol. The Law Council is unaware of any formal research undertaken on the prevalence of sexual harassment when alcohol is a key factor or contributing cause for a person to engage in sexual harassment.

## Barriers to Progress

### Low Reporting

12. Lawyers who experience sexual harassment in the workplace are reluctant to make a formal report or complaint.<sup>39</sup> *Changing the Rules* found that 66 per cent of women lawyers who experienced workplace sexual harassment in Victoria did not make a complaint, and 29 per cent did not tell anyone at all.<sup>40</sup> A recent survey of young lawyers in New South Wales found that, of the 51 per cent who disclosed experiencing sexual harassment, less than 30 per cent made a complaint.<sup>41</sup> The IBA has reported that 77 per cent of sexual harassment cases in legal workplaces across Australia go unreported.<sup>42</sup>
13. Reasons for low rates of reporting of sexual harassment within the legal profession may include:
  - '[I] did not think that anything would happen so there was no point in complaining';<sup>43</sup>
  - 'lack of confidence in protocols';<sup>44</sup>
  - 'little perceived benefit in reporting sexual harassment';<sup>45</sup>
  - 'on the one occasion I did I found myself ostracised and then made redundant';<sup>46</sup>
  - fear of repercussions;<sup>47</sup>
  - 'they were concerned about negative repercussions for their career; and they were concerned their reputation would be negatively affected';<sup>48</sup>
  - 'they were concerned there would be negative repercussions for their career ... that their reputation in the legal profession would be jeopardised ... they would lose career opportunities ... they would be ostracised ... demoted ... transferred';<sup>49</sup>

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<sup>39</sup> Adrienne Morton (n 21) 36; Prue Bindon (n 22), 29; Paula Baron, (n 29) 87, 114.

<sup>40</sup> Victorian Equal Opportunity and Human Rights Commission, (n 9) 33.

<sup>41</sup> New South Wales Young Lawyers Human Rights Committee, 'Sexual Harassment in Australian Workplaces Survey results' (November 2018).

<sup>42</sup> International Bar Association, *Global Survey on Bullying and Harassment in the Legal Profession* (2018); See also Kate Allman, '#TimesUp for the Legal Profession' (2018) 51 *Law Society of NSW Journal* 30, 32-33.

<sup>43</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 30, 35.

<sup>44</sup> Grace Ormsby, 'IBA: 43% of Lawyers Bullied and 25% Sexually Harassed', *Lawyers Weekly* (online), 11 October 2018 <<https://www.lawyersweekly.com.au/biglaw/24234-iba-43-of-lawyers-bullied-and-25-sexually-harassed>> quoting IBA fact sheet. Information also supplied to the Law Council by the Victorian Bar.

<sup>45</sup> Adrienne Morton (n 21) 36.

<sup>46</sup> Women Lawyers Association of the Australian Capital Territory, *Survey of Sexual Harassment in the Legal Profession* (2018).

<sup>47</sup> Grace Ormsby (n 44).

<sup>48</sup> Paula Baron and Lillian Corbin, 'Ethics Begin at Home' (2016) 19 *Legal Ethics* 281, 289.

<sup>49</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 35.

- ‘[they] were too terrified of the repercussions ... Each had peers warn them not to report the situation in case whistleblowers were treated unfavourably ...’;<sup>50</sup>
- ‘fearful that our industry will continue to punish, in some subtle way, those who make public claims against their employers’;<sup>51</sup>
- ‘[a]bsolutely no way that I want to be labelled a trouble-maker. Making a complaint makes me the problem and could prejudice my career’;<sup>52</sup>
- ‘worry about how they will be received in the profession’;<sup>53</sup>
- ‘did not think they would be believed’;<sup>54</sup>
- ‘they may have feelings of embarrassment, guilt, shame, trauma, and stigma’;<sup>55</sup>
- ‘[i]t was embarrassing, and I did not want the stigma of being a complainer or too sensitive. I thought that complaining would be considered a ‘weak female’ response’;<sup>56</sup>
- the profile or status of the perpetrator;<sup>57</sup>
- ‘[i]t is impossible to make a complaint against a partner in a law firm for whom you work. HR has no power as the partners are the owners of the company. I feared retaliation’;<sup>58</sup>
- ‘[at] the firm I worked for it was ingrained in the culture and the male was a director and protected because his receipts were high’;<sup>59</sup>
- ‘[a] male client sexually harassed me and because of his high profile in the public service the firm would’ve been more protective of maintaining the relationship for future work’;<sup>60</sup>
- ‘[p]ast experience has shown that colleagues who have raised complaints of sexual harassment (following quite serious harassments [sic]) have not been listened to, and have in fact suffered detriment as a result of their complaint (seen as not being ‘team players’ or being ‘too sensitive’, while the harasser has been promoted and their conduct has been dismissed as ‘just what boys do’);<sup>61</sup>

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<sup>50</sup> Kate Allman (n 42) 35.

<sup>51</sup> Bridget Burton, ‘Sexual Harassment in the Law: What are “All reasonable Steps for Prevention”?’ (2018) *Proctor* 20, 20.

<sup>52</sup> Women Lawyers Association of the Australian Capital Territory (n 46).

<sup>53</sup> Bridget Burton, ‘Sexual Harassment in the Law: What are “All reasonable Steps for Prevention”?’ (2018) *Proctor* 20, 20.

<sup>54</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 35.

<sup>55</sup> *Ibid.*

<sup>56</sup> New South Wales Young Lawyers Human Rights Committee, ‘Sexual Harassment in Australian Workplaces Survey results’ (November 2018).

<sup>57</sup> Grace Ormsby (n 44).

<sup>58</sup> New South Wales Young Lawyers Human Rights Committee, ‘Sexual Harassment in Australian Workplaces Survey results’ (November 2018).

<sup>59</sup> Women Lawyers Association of the Australian Capital Territory (n 46).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

- ‘incidents being endemic to the workplace’;<sup>62</sup>
- ‘did not think that the matter was serious enough to warrant a complaint’;<sup>63</sup>
- ‘I was an articled clerk and he was pretty senior. I didn’t mention it as, at the time, it was the sort of thing that people joked about and you were supposed to take in your stride’;<sup>64</sup>
- ‘because in my experience the harasser has been a senior associate or partner, making comments or jokes they think are fine, and making a complaint would just label you as sensitive or weak or not having a sense of humour ...’;<sup>65</sup>
- ‘[t]he behaviour was pretty openly displayed and accepted by all. I felt uncomfortable about it but as a graduate there was not much I could do and the behaviour seemed tolerated at the top’;<sup>66</sup>
- ‘felt that the complaint process was too daunting’;<sup>67</sup> and
- ‘[i]t could escalate beyond what I would feel comfortable with. Also hard to establish evidence.’<sup>68</sup>

14. The Law Council notes that the AHRC has found ‘the majority of people who were sexually harassed in the workplace in the last five years did not make a formal report or complaint.’<sup>69</sup> Less than one in five people report workplace sexual harassment.<sup>70</sup>

15. However, this likely reflects the fact that when an incident of sexual harassment is reported, it may often not be handled adequately by employers or professional bodies.

### **Lack of action when reporting does occur**

16. The IBA reported that, of those lawyers who did report workplace sexual harassment in a recent survey, 73 per cent said their employer’s response was either insufficient or negligible and 80 per cent said the perpetrator was not sanctioned.<sup>71</sup>

17. In Victoria in 2012, ‘three out of 10 [women lawyers] reported that nothing happened to the alleged harasser’.<sup>72</sup>

18. Lack of action from employers can perpetuate, in the minds of both perpetrators and victims, a workplace culture that implicitly condones sexual harassment. Failure to sanction a harasser can impact on perceptions of acceptable workplace conduct,

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<sup>62</sup> Grace Ormsby (n 44) quoting IBA fact sheet.

<sup>63</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 30, 35.

<sup>64</sup> Ibid.

<sup>65</sup> Women Lawyers Association of the Australian Capital Territory (n 46).

<sup>66</sup> Victorian Equal Opportunity and Human Rights Commission (n 23) 35.

<sup>67</sup> Ibid.

<sup>68</sup> Women Lawyers Association of the Australian Capital Territory (n 46).

<sup>69</sup> Australian Human Rights Commission (n 5) 67. See also Paula Baron (n 25) 114; Adrienne Morton (n 21) 36.

<sup>70</sup> Ibid 67.

<sup>71</sup> International Bar Association (n 16).

<sup>72</sup> Victorian Equal Opportunity and Human Rights Commission (n 9) 36.

increasing the likelihood of future incidents and making future victims less likely to come forward. It can also amplify the negative mental, physical and career impacts on the victim as they try to negotiate a workplace lacking in support and a sense of justice.

### **Onus and responsibility on the victim of harassment to report and initiate action**

19. Many complaints processes, including the statutory complaints process under the *Australian Human Rights Commission Act 1986* (Cth) and informal complaints processes within organisations, require any complaint to be made and then progressed by the victim of sexual harassment.
20. This places a burden on the victim, who is often not adequately supported or is experiencing the impacts considered below, which impair their ability to 'self-help'. It also prevents society addressing the issue of sexual harassment in a structural or systemic way. As Adrienne Morton says, this impacts the take-up and efficacy of complaints processes:

*because targets of sexual harassment often respond passively to the conduct ... organisational approaches which rely exclusively on individual complaints made by targets of sexual harassment are unlikely to be successful.*<sup>73</sup>

### **Solutions**

21. Despite considerable efforts to address the situation, the above background demonstrates that sexual harassment remains a significant issue that continues to impact the legal profession.
22. The Law Council's proposed solutions and recommendations are set out in sections 1 to 5 below. These solutions approach sexual harassment from both general and specific perspectives: it addresses legislative gaps that work to reduce sexual harassment generally, and specific measures for implementation in the legal profession to drive cultural change.
23. In the development of this NAP, the Law Council has consulted extensively with its Constituent Bodies, key stakeholders and experts; including regulators and discrimination law experts.
24. As a result of this consultation, the Law Council recommends a four-tiered approach:
  - Addressing sexual harassment through targeted advocacy for specific amendments to the SDA;
  - Addressing sexual harassment by supporting and advocating for federal law reform as proposed in key recommendations in the AHRC's Respect@work report;

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<sup>73</sup> Adrienne Morton (n 21) 36 quoting Paula McDonald and Michael Flood, Australian Human Rights Commission, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (June 2012) 5.

- The implementation of measures to shift cultural trends in the legal profession; and
- Ensuring that this NAP continues to reflect best practice approaches to addressing sexual harassment through annual review and reporting.

## 1. Advocating for federal law reform: *Sex Discrimination Act 1984 (Cth)*

25. The expansion of coverage under the SDA has been on the agenda for many years.
26. In September 2008, the AHRC made a [submission](#) to the Senate Legal and Constitutional Affairs Committee's [Inquiry Into The Effectiveness Of The Sex Discrimination Act 1984 \(Cth\)](#). Pertinently, noting recent events, this submission raised the lack of coverage for judicial officers. The focus of the AHRC submission was personal workplace conduct, and it raised the concern that judges who engaged in discrimination or sexual harassment would not be legally liable for their personal conduct. It was not proposed that the judicial immunity for acts done in an official capacity should be displaced. The AHRC argued that in light of the senior and important role played by such persons in the community, it would be 'anomalous' if they could avoid personal liability under the law. The AHRC submitted that the Act should be clarified so statutory appointees, judges and members of parliament were adequately protected, as well as personally liable.<sup>74</sup>
27. During the same inquiry, the Law Council argued that the SDA did not provide comprehensive protection against sexual harassment for those in the legal profession as it may not apply to sexual harassment that occurs between witnesses and lawyers; lawyers and judicial officers or court staff; solicitors and barristers; or between barristers.<sup>75</sup>
28. In its final report, the Senate Committee did not make a specific recommendation to address personal liability for judicial officers, but it did recommend the SDA be amended to 'include a general prohibition against sex discrimination and sexual harassment in any area of public life.'<sup>76</sup> Such an amendment would have covered the conduct of judicial officers. The recommendation was not acted upon.
29. The Law Council again advocated for the expansion of coverage under the SDA in its submission to the National Inquiry into Sexual Harassment in Australian Workplaces (**NISHAW**), where it was submitted that the coverage of the SDA is not comprehensive and may not extend to sexual harassment by people who are self-employed workplace participants, nor partners, commission agents or contract workers;<sup>77</sup> who are not expressly covered by the legislation. It was again noted that

<sup>74</sup> Australian Human Rights Commission, 'Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality' (2008) <<https://humanrights.gov.au/our-work/legal/inquiry-effectiveness-sex-discrimination-act-1984-cth-eliminating-discrimination-0#fnB293>>.

<sup>75</sup> Law Council of Australia, Submission to Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (15 August 2008) <[https://www.apl.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2008-10/sex\\_discrim/submissions/sublist](https://www.apl.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/sex_discrim/submissions/sublist)>.

<sup>76</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Commonwealth of Australia, December 2008), xiv <[https://www.apl.gov.au/binaries/senate/committee/legcon\\_ctte/sex\\_discrim/report/report.pdf](https://www.apl.gov.au/binaries/senate/committee/legcon_ctte/sex_discrim/report/report.pdf)>.

<sup>77</sup> As submitted in the Law Council's response to NISHAW: Law Council of Australia, 'National Inquiry into Sexual Harassment in Australian Workplaces' (26 February 2019) (**LCA NISHAW Submission**)

barristers and certain statutory office holders or appointees, including judges, are similarly not covered.<sup>78</sup>

30. The Law Council further advocated for:

- Federal legislation to be amended to protect any person performing work; not just those who meet the proscribed employment relationships,<sup>79</sup> the proscribed meanings of workplace participant in a workplace,<sup>80</sup> or who are incidentally providing goods, services or facilities, educational institutions, or other specific functions.<sup>81</sup>
- The federal Government to make sexual harassment unlawful in all areas of public life.<sup>82</sup>

31. This would deal with the inconsistent coverage of current legislation in relation to workplace sexual harassment and would also provide an important normative statement on how sexual harassment is viewed.<sup>83</sup> The Law Council has also previously advocated for the Australian Government to consider these issues in any plan to consolidate federal, state and territory anti-discrimination legislation.<sup>84</sup>

32. In the alternative, the Law Council recommended expanding the definition of workplace participant to cover all participants.<sup>85</sup> This approach was reflected in the 'Respect@Work' report, where the AHRC recommended that the prohibition of sexual harassment be expanded to protect any person performing work, not just those who meet the current definition.<sup>86</sup>

33. However, it is noted that the aforementioned submissions were limited by the narrower remit of NISHAW which, unlike the Law Council's consultations, was restricted to Australian workplaces. As a result, the amendments considered by the Law Council are broader than those recommended in the Respect@Work report in some key areas.

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<<https://www.lawcouncil.asn.au/docs/5491c43c-d63e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf>>.

<sup>78</sup> Ibid, 23.

<sup>79</sup> *Sex Discrimination Act 1984* (Cth) subs 28B(1)-(5).

<sup>80</sup> Ibid subs 28B(6)-(7).

<sup>81</sup> Ibid ss 28C-28K.

<sup>82</sup> See, *LCA NISHAW Submission* (n 77) at 24, 49, 51. One constituent body noted that the latter point was also recommended in two separate Senate inquiries in 2008 and 2013 respectively. The former inquiry recommended that at the SDA be amended to include a general prohibition against sex discrimination and sexual harassment 'on the basis of all protected attributes' in any area of public life. See: Senate Standing Committee on Legal and Constitutional Affairs (n 76) xiv. The 2013 inquiry recommended that at the SDA be amended to include a general prohibition against sex discrimination and sexual harassment 'on the basis of all protected attributes' in any area of public life.

<sup>83</sup> Ibid at 24.

<sup>84</sup> LCA NISHAW Submission (n 78) 24.

<sup>85</sup> Ibid.

<sup>86</sup> See Recommendation 16: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (29 January 2020) <[https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020?mc\\_cid=1065707e3c&mc\\_eid=%5bUNIQID%5d#zrVGo](https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020?mc_cid=1065707e3c&mc_eid=%5bUNIQID%5d#zrVGo)> ('**Respect@Work Report**').

## 1A Advocate for the revision of section 28A of the SDA

34. The first proposal for federal reform consulted upon is in respect of section 28A of the SDA, as annotated below:

### 28A ~~Meaning of~~ **Prohibition of sexual harassment**

(1) A person must not sexually harass another person.

(~~4~~2) For the purposes of this Division, a person sexually harasses another person (the **person harassed**) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

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

(~~4A~~2A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

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

(~~2~~3) In this section:

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

35. The Law Council provided extensive [submissions](#) on the text of section 28A to NISHAW,<sup>87</sup> and acknowledges that the present wording of the SDA is not without criticism. The Law Council understands that the Government, in consultation with key stakeholders, will be considering the comprehensive Respect@Work report and the recommendations therein. However, the Law Council is also conscious of the impact of the COVID-19 pandemic and the fact that the report has recommended some substantial structural changes effecting a range of interacting pieces of legislation, including defamation laws and workplace laws. The Law Council further notes that it is also involved in a Consultation with the AHRC about the possible consolidation of Commonwealth anti-discrimination laws.<sup>88</sup>

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<sup>87</sup> LCA NISHAW Submission (n 77) 10-20.

<sup>88</sup> Law Council of Australia, 'Response to Discussion paper: priorities for federal discrimination law reform' (20 December 2019), 14 <<https://www.lawcouncil.asn.au/publicassets/ed1dce97-9048-ea11-9403-005056be13b5/3725%20-%20Priorities%20for%20federal%20discrimination%20law%20reform.pdf>>.

36. While the Law Council welcomes consideration of broader, longer-term reform, urgent steps must nonetheless be taken to address sexual harassment. The urgent steps proposed accordingly take into consideration the current framework of interacting legislation, even where there are proposals to later amend those related pieces of legislation.
37. The Law Council has committed to leading the legal profession and the community it services by addressing sexual harassment. Recognising the unique challenges this complex issue brings, the Law Council acknowledges that an appropriate balance must be struck between procedural fairness and barriers in complaints processes. The present wording of the SDA does not apply to barristers, judicial officers and other statutory appointees. The amendment advocated broadly reflects the recommendations of the AHRC's Respect@Work Report.<sup>89</sup>
38. As noted above, the Law Council recommendations go beyond the protections recommended in the Respect@Work report to cover not just workplaces, but all areas of life.
39. There was strong support among Constituent Bodies for the amendment of section 28A as proposed below.

#### LCA Action Item 1A

The Law Council will:

- advocate for the amendment of section 28A as excerpted **below**, including liaising with key stakeholders and government representatives:

#### **Recommended proposed revision:**

#### **28A Meaning of Prohibition of sexual harassment**

(1) A person must not sexually harass another person.

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

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

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

~~(1A)~~**(2A)** For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

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

<sup>89</sup> Recommendation 16, Respect@Work Report (n 86) 469.

(23) In this section:

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

## 1B Advocate for the revisions of sections 28B to 28L of the SDA

40. Sections 28B–28L make sexual harassment unlawful in certain areas of public life, including in the course of employment, partnerships, registered organisations, educational institutions, goods, services and facilities, provision of accommodation, and clubs. Following the proposed amendment to section 28A, discussed above, the Law Council consulted on whether the Law Council should advocate for the deletion of sections 28B-L.
41. Consultations revealed a lack of consensus on this issue. Matters raised for consideration included:
- Whether the deletion was necessary- it was proposed that, in addition to the general proposed prohibition in section 28A , sections 28B to 28L could be retained to provide a non-exhaustive list of areas in which the legislation would apply.
  - Whether, in the alternative to the proposed deletions, the following should be inserted as section 28A(4):
    - (4) Without limiting the generality of this section, examples of unlawful sexual harassment include those circumstances set out in sections 28B to 28L of this Act.
  - Whether the retention of sections 28B-L would align within the existing wording of the SDA, in the event the amendments to section 28A are implemented.
42. Accordingly, the Law Council will further consider the issues raised in further consultations with key stakeholders and experts.

### LCA Action Item 1B

The Law Council will:

- further consult with Constituent Bodies, key stakeholders and experts in respect of possible further revisions to sections 28B-L.

## 1C Advocate for the revision of section 105 of the SDA

43. The third specific SDA amendment consulted upon arose from Recommendation 20 of the Respect@Work Report:
- Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.
44. Presently, the ‘aiding and abetting’ provisions in section 105 of the SDA do not apply to Division 3 of the Act, addressing Sexual Harassment. Accordingly, the Law Council consulted on section 105 of the SDA ought to be amended as follows to ensure that it also applies to sexual harassment:

## Liability of persons involved in unlawful acts

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 of, 2 or 3 of Part II shall, for the purposes of this Act, be taken also to have done the act.

45. The Law Council notes that, in the employment context, accessory liability provisions apply to all civil contraventions in the *Fair Work Act*<sup>90</sup> and that this is consistent with the comparable provisions of section 122 in the *Disability Discrimination Act 1992* (Cth) and section 56 of the *Age Discrimination Act 2004* (Cth).<sup>91</sup>
46. However, the Law Council recognises that if the first and second amendments proposed above are endorsed and ultimately implemented, section 105 as proposed will extend the liability of persons involved in unlawful acts to a much broader range of conduct – namely, sexual harassment in any context. Nonetheless, it is noted that Queensland and Tasmania, both of which have a general prohibition of sexual harassment, have comparable prohibitions on ‘aiding contraventions’<sup>92</sup> and ‘requesting and encouraging’.<sup>93</sup>
47. The AHRC, in its ‘Respect@Work’ report, has provided some useful guidance on the extent to which passive or permissive involvement might attract liability.<sup>94</sup> This includes conduct:

Involving ‘a degree of knowledge or at least willful blindness or recklessness in the face of the known circumstances...’ but ‘does not have to go so far as to constitute knowledge of the unlawfulness of the proposed conduct but it must extend to an awareness of, or willful blindness to, the circumstances which could produce a result, namely discrimination, which the Act declares to be unlawful’.<sup>95</sup>
48. By way of example, the AHRC highlighted the case of *Elliott v Nanda*<sup>96</sup> where:

Moore J held that the Commonwealth Employment Service (CES) had permitted discrimination to take place in a doctor’s surgery as the number of complaints of sexual harassment from that workplace should have alerted the CES to the distinct possibility that any young female sent to work for the doctor was at risk of sexual harassment and discrimination of the basis of sex.<sup>97</sup>
49. The Law Council considers that these common law thresholds adequately address the required levels of recklessness, and suggest that this is precisely the type of conduct that ought to be captured in order to more effectively address sexual harassment. However, the Law Council acknowledges that further consideration of how the proposed revised section 105 would interact with proposed revised section 28A would be beneficial, and that the AHRC’s recommendation in respect of section 105 was on the basis that the SDA would only be amended to covers ‘all persons in

<sup>90</sup> *Fair Work Act 2009* (Cth) s 550, as noted Respect@Work Report (n 86) 488.

<sup>91</sup> Respect@Work Report (n 86) 488.

<sup>92</sup> Section 21 *Anti-Discrimination Act 1998* (Tas).

<sup>93</sup> Sections 122-123 *Anti-Discrimination Act 1991* (Qld).

<sup>94</sup> *Ibid* 487.

<sup>95</sup> *Howard v Northern Territory* [1995] EOC 92-672, as excerpted in the Respect@Work Report (n 86) 487.

<sup>96</sup> *Elliott v Nanda* [2001] FCA 418; (2001) 111 FCR 240.

<sup>97</sup> *Elliott v Nanda* [2001] FCA 418; (2001) 111 FCR 240 as excerpted in the Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (5 March 2020), 487.

the world of work, including paid and unpaid workers, and those who are self-employed'.<sup>98</sup>

50. Another relevant issue raised in consultation was that care should be taken to ensure that any amendment would not apply to junior practitioners who fail to act in response to witnessed sexual harassment, noting that more junior staff may not feel empowered to report or comment on the behaviour of more senior staff members.

### **LCA Action Item 1C**

The Law Council will:

- liaise with the AHRC and other key stakeholders about the interaction of the proposed revisions to sections 28A and 105 and how it would operate in practice, and determine whether further revisions need to be considered;
- to the extent that it is determined that further revisions to section 105 are required (for example limiting the application of section 105 to public areas of life only), consult with the Constituent Bodies, key stakeholders and experts to develop specific further proposed revisions to section 105.
- give further consideration, in consultation with Constituent Bodies, key stakeholders and experts, to accessorial liability and the impact of any amendments on junior staff.

## **2. Federal law reform: supporting the work of the Australian Human Rights Commission**

51. A further key outcome from the Law Council's was the participants' endorsement of key recommendations from the AHRC's Respect@Work Report.
52. The Law Council has consulted with its Constituent Bodies in respect of these key recommendations, being Recommendations 14, 16, 17, 20, 21, 26 and 40.

### **2A Workplace Sexual Harassment Council**

53. Recommendation 14 of the Respect@Work Report provides as follows:

The Workplace Sexual Harassment Council, supported by a permanent secretariat, be established immediately and funded by the Australian Government. Its objective is to improve coordination, consistency and clarity across the key legal and regulatory frameworks, to improve prevention and response to sexual harassment.

The Council is to be chaired by the Sex Discrimination Commissioner and its core membership include representatives from:

- the Fair Work Commission and Fair Work Ombudsman;
- Safe Work Australia and the Heads of Workplace Safety Authorities;
- the Heads of Workers' Compensation Authorities; and

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<sup>98</sup> See Recommendation 16, Respect@Work Report (n 86).

- the Australian Council of Human Rights Authorities.

The Council will also include associate members to provide expertise and advice on specific issues or areas of work relating to sexual harassment. Associate members include representatives across government, non-government, and independent organisations, including employer and union representatives.

54. A matter raised in consultation was that the Workplace Sexual Harassment Council (**WSHC**) should be clearly differentiated and independent from other agencies and should receive separate funding so that it 'does not come at the expense of other AHRC initiatives'. To this end, the Law Council welcomes the inclusion of \$700,000 a year for three years in the recent federal 2020 Budget to establish the WHSC.
55. The Law Council notes that the Respect@Work Report proposes that the WSHC would provide a coordinated mechanism facilitating the collaboration between existing policy and regulatory bodies to address sexual harassment and, in doing so, promote improved efficiency and effectiveness of government operations. It is also proposed that this collaborative approach will improve and better support both employers and workers, and promote prevention of sexual harassment.<sup>99</sup>
56. The AHRC has also proposed that the WSHC:<sup>100</sup>
  - be responsible for coordinating and improving consistency and clarity under the proposed new model;
  - provide high-level advice and insight to Government on sexual harassment in Australian workplaces; and
  - recommend guidance materials and programs to be developed by the AHRC in conjunction with other relevant bodies as appropriate.
57. The Law Council will liaise with the AHRC in respect of the WSHC, noting that further useful information would include:
  - the composition of associate members;
  - clarification of its terms of reference;
  - the proposed level of independence from government; and
  - whether its efficacy will be reviewed after a defined period of time.

#### **LCA Action Item 2A**

The Law Council will:

- support Recommendation 14;
- liaise with the AHRC in respect of further information about the WSHC and potential collaboration opportunities; and
- further consult with Constituent Bodies in respect of the details of the WSHC once those details have been further developed and provided.

<sup>99</sup> Respect@Work Report (n 86) 446.

<sup>100</sup> Ibid.

## 2B Amending the Sex Discrimination Act

58. Recommendation 16 of the Respect@Work Report provides as follows:

Amend the Sex Discrimination Act to ensure:

- a. the objects include ‘to achieve substantive equality between women and men’;
  - b. sex-based harassment is expressly prohibited;
  - c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited;
  - d. the definition of ‘workplace participant’ and ‘workplace’ covers all persons in the world; of work, including paid and unpaid workers, and those who are self-employed; and
  - e. the current exemption of state public servants is removed.
59. As noted above, the ambit of the Respect@Work report was limited to Australian workplaces. By comparison, the Law Council’s Roundtable participants were not so confined, such that they recommended the broader prohibition through the amendments to section 28A and the deletion of sections 28B-28L, which effectively address sub-paragraphs (b) and (d)<sup>101</sup> above. In addition, the Law Council’s proposed amendment to section 105, also addressed above, effectively addresses sub-paragraph (c) above.
60. In respect of the remaining sub-paragraphs, state-based public servants (addressed in (e) above) are presently unable to make a sexual harassment complaint under the SDA,<sup>102</sup> by virtue of section 13(2), which states:
- 13(2) Section 28B does not apply in relation to an act done by an employee of a State or of an instrumentality of a State.
61. The Law Council notes the Commission’s view that it:<sup>103</sup>
- ... is not aware of any current or continuing policy basis for the exclusion of state and territory public servants from coverage under the Sex Discrimination Act, and recommends that the current exclusion be removed.<sup>104</sup>

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<sup>101</sup> It was also opined in consultations that in circumstances where ‘workplace participant’ remains in the legislation, it should be expanded to include students and those at the work place in a non-paid capacity.

<sup>102</sup> Respect@Work Report (n 86) 268.

<sup>103</sup> Ibid.

<sup>104</sup> The AHRC also notes that this approach is inconsistent with the *Racial Discrimination Act*, the *Disability Discrimination Act* and the *Age Discrimination Act*, which all apply to state and territory governments and instrumentalities: see Respect@Work Report (n 86) 268.

### LCA Action Item 2B

The Law Council will:

- support Recommendation 16;
- advocate for the deletion of 13(2) of the SDA;
- advocate for the amendment of 'the definition of 'workplace participant' as proposed in Recommendation 16, to ensure that 'workplace' covers all persons in the world of work, including paid and unpaid workers, student workers and those who are self-employed;
- liaise with key stakeholders and government representatives to advocate for implementation of Recommendation 16;
- liaise with the AHRC in respect of potential collaboration opportunities with the Law Council; and
- consult with Constituent Bodies and key stakeholders in respect of any specific amendments to the SDA that are proposed.

## **2C Positive duties**

62. Recommendation 17 of the Respect Work Report provides as follows:

Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

- a. the size of the person's business or operations;
- b. the nature and circumstances of the person's business or operations;
- c. the person's resources;
- d. the person's business and operational priorities;
- e. the practicability and the cost of the measures; and
- f. all other relevant facts and circumstances.

63. The SDA does not presently require employers to take steps to prevent sexual harassment. Rather, the SDA provides in section 106 that an employer will be vicariously liable for the sexual harassment by an employee or agent, where the harassment was 'in connection with' the employment or duties and where the employer cannot demonstrate that they took 'took all reasonable steps to prevent' the alleged sexual harassment.<sup>105</sup> However, the AHRC explains that this has proved ineffective, because:

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

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<sup>105</sup> Respect@Work Report (n 86) 470.

only externally scrutinised after an allegation of sexual harassment has been made.<sup>106</sup>

64. The Law Council has previously provided extensive submissions recommending that three positive duties – the duties to eliminate, respond and report- should be introduced into the SDA.<sup>107</sup> These submissions were relied upon in the AHRC's Respect@Work Report, where it was proposed that an additional, stand-alone duty be introduced into the SDA requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.<sup>108</sup> In recommending the introduction of a positive duty, the AHRC noted that:<sup>109</sup>

Australian employers already have responsibilities to prevent workplace sexual harassment to ensure they are not held vicariously liable under the Sex Discrimination Act, as well as positive duties under WHS laws, the Commission's view is that this would not create a substantially new or increased burden for employers.

65. Further, in determining what would amount to 'reasonable and proportionate' measures, the AHRC notes that the [Victorian Equal Opportunity Act 2010 \(Vic\)](#) could serve as a model.
66. However, the AHRC noted that, in developing a specific provision to recommend, further consultation would be required on matters including:
- whether all employers should be subject to a positive duty, or whether micro-businesses should be exempt; and
  - all Australian governments to consider the potential impacts of the introduction of a positive duty in combination with the implementation of Recommendation 16(e) addressing 'the exemption of state public servants is removed' (addressed **above**).
67. Matters raised in consultation included:
- the need for a more consistent national framework would send a clear message for Australian employers to take pro-active steps to eliminate sexual harassment, and to implement effective sexual harassment prevention plans;
  - the Law Council's previous recommendation<sup>110</sup> that three specific positive duties for employers – duties to eliminate, respond, and report – be introduced into the SDA with regard to sexual harassment, rather than a general requirement to take 'reasonable measures'. Positive duties should be required in proportion to the size, resources and capabilities of the duty holder.
  - the potential impacts of the introduction of a positive duty, for example, impacts on onus of proof and evidentiary burden in claims; and

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<sup>106</sup> Ibid.

<sup>107</sup> LCA NISHAW Submission (n 77) 37-45.

<sup>108</sup> Respect@Work Report (n 86) 471-481.

<sup>109</sup> Ibid.

<sup>110</sup> See: LCA NISHAW Submission (n 77) 37-45.

- what should amount to ‘reasonable and proportionate’ measures, and in doing so consider the operation of positive duties in the *Victorian Equal Opportunity Act*.<sup>111</sup>

### **LCA Action Item 2C**

The Law Council will:

- support Recommendation 17;
- liaise with the AHRC in respect of further information about the specific wording of the provision being developed, and regarding potential collaboration opportunities;
- in the meantime, consider and consult with Constituent Bodies, key stakeholders and experts on:
  - the potential impacts of the introduction of a positive duty, including the onus of proof and evidentiary burdens;
  - what should amount to ‘reasonable and proportionate’ measures, and in doing so consider the operation of positive duties in the *Victorian Equal Opportunity Act*.
- further consult with Constituent Bodies in respect of the details of the specific proposed provision once developed and provided by the AHRC.

## **2D Aiding and abetting**

68. Recommendation 20 of the Respect Work Report provides as follows:

Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.

69. The Law Council’s consultation and recommendations in respect of amending section 105 of the SDA has been addressed by way of legislative recommendations in **Section 1C** above. Accordingly, no further recommendations will be made in respect of section 105.

## **2E Civil actions for victimisation as unlawful discrimination**

70. Recommendation 21 of the Respect Work Report provides as follows:

Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

71. The AHRC stated in its Respect@Work Report that an effective system addressing sexual harassment must prohibit (and enforce laws prohibiting) victimisation, noting

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<sup>111</sup> It was noted in consultations that the Explanatory Memorandum for the introduction of s15 of *The Equal Opportunity Act 2020 (Vic)* stated: ‘*The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. It may involve organisations doing such things as identifying potential areas of non-compliance*’.

that victimisation was identified during NISHAW as a common barrier to making complaints.<sup>112</sup>

72. Victimisation is when retaliatory actions (or threats of) are taken against an employee because that employee either made, or supported someone making, a sexual harassment complaint.<sup>113</sup> SDA presently prohibits victimisation in [Section 94](#), and protects complaints made to the Commission and also workplace complaints processes.<sup>114</sup>
73. However, uncertainty has arisen in respect of the victimisation provisions in certain federal discrimination laws, including the SDA, as they are set out as criminal offences.<sup>115</sup> This means that when a complaint is terminated by the AHRC, such that the complainant can make an application to the Federal Court or Federal Circuit Court pursuant to [section 46PO](#) of the *Australian Human Rights Commission Act*,<sup>116</sup> there is uncertainty around whether those courts have jurisdiction to hear civil (as opposed to criminal) matters. This matter has not to date been resolved in case law.<sup>117</sup>
74. The AHRC has proposed in the Respect@Work Report that a legislative amendment should be made to address this uncertainty, and clarify that the Federal Court and the Federal Circuit Court have jurisdiction SDA civil victimisation claims.<sup>118</sup>
75. There was strong support among the Law Council's Constituent Bodies to support this Recommendation, although it was noted that, in respect of civil actions and accessorial liability, relevant provisions in the *Work Health and Safety Act 2011* (Cth) and the *Fair Work Act 2009* (Cth) should also be considered to avoid unintended consequences.

#### **LCA Action Item 2E**

The Law Council will:

- support Recommendation 21;
- liaise with the AHRC in respect of further information about the specific wording of the provision being developed, and regarding potential collaboration opportunities; and
- further consult with Constituent Bodies in respect of the details of the specific proposed provision once developed and provided by the AHRC.

<sup>112</sup> Respect@Work Report (n 86) 488.

<sup>113</sup> Ibid 489.

<sup>114</sup> See 94(2), as extracted in Respect@Work Report (n 86) 489.

<sup>115</sup> See: *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66; Respect@Work Report (n 86) 490.

<sup>116</sup> *Australian Human Right Commission Act 1986* (Cth).

<sup>117</sup> See: *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66; Respect@Work Report (n 86) 490.

<sup>118</sup> Respect@Work Report (n 86) 490.

## **2F Harmonisation of federal and state and territory discrimination laws**

76. Recommendation 26 of the Respect Work Report provides as follows:

The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.

77. The Law Council has previously submitted in favour of harmonising the federal and state and territory discrimination legislation,<sup>119</sup> and is presently engaged in a separate but related consultation process with the AHRC in respect of this issue.<sup>120</sup>

### **LCA Action Item 2F**

The Law Council will:

- support Recommendation 26;
- liaise with the AHRC in respect of further information about how Recommendation 21 is proposed to be implemented in practice, including via the ongoing engagement with related consultations;<sup>121</sup> and
- further consult with Constituent Bodies in respect of the details of the implementation of this Recommendation once developed and provided by the AHRC.

## **2G Education and training programs for judicial officers and tribunal members**

78. The AHRC notes in its Respect@Work report that judicial responses to sexual harassment in the cases before them have an integral role in the experiences of victims of sexual harassment.<sup>122</sup> The Judiciary accordingly has influence over the extent to which victims feel safe to come forward, as opposed to discouraging complainants. While various safeguards exist for vulnerable witnesses in legal proceedings, including sexual offence proceedings, these protections are one part of the equation.<sup>123</sup>

79. On this basis, the AHRC stressed that:<sup>124</sup>

It is vital that judges, magistrates and tribunal members have an understanding of the nature, drivers and impacts of sexual harassment, to manage these cases in a way that supports and does not re-traumatise victims.

80. The AHRC accordingly included Recommendation 40 in its Respect@Work Report, which provides as follows:

<sup>119</sup> Law Council of Australia (n 88) 14.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Respect@Work Report (n 86) 584.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

All Australian governments should:

- a. Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with the principles of Change the Story.
  - b. Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training.
81. While further consultation will be necessary with relevant stakeholders such as the AHRC and the National Judicial College about appropriate parameters of the Law Council's assistance in this regard, the Law Council considers that this matter can be dovetailed with the Law Council's work on the National Model Policy and Guidelines (**Section 3B** below), and supporting the profession to develop professional development training (**Section 3E** below). This is on the basis that the content developed in respect of those initiatives can form the foundation for any Judicial training programs.
82. The Law Council otherwise notes that it has been working to address aberrant Judicial behaviour through a number of avenues, including calls for a Federal Judicial Commission (see **Section 4** below).

#### **LCA Action Item 2G**

The Law Council will:

- support Recommendation 40;
- liaise with the AHRC, National Judicial College and other key stakeholders about the extent to which the Law Council can assist in this endeavour; and
- further consult with Constituent Bodies in respect of the details of the implementation of this Recommendation following further discussions with the AHRC and other key stakeholders.

### **3. Driving cultural change in the legal profession**

83. The Law Council recognises that responding to sexual harassment is multi-faceted and must be addressed at every level and not just through reform of federal discrimination legislation. It is accordingly equally, if not more important, to consider the mechanisms within the legal profession's regulatory and ethical framework that may be better leveraged to address sexual harassment and facilitate positive cultural change.
84. The Law Council has consulted on five measures to address cultural change in the legal profession, and two additional measures were raised during consultations. In proposing these measures, the Law Council recognises that cultural change can be difficult. Many of the drivers behind sexual harassment, addressed in the **Background** section above, are not easily remedied and arise from long-established structures within the profession. The need for meaningful institutional change nonetheless must be recognised as a national imperative.

85. The words of The Hon Chief Justice Susan Kiefel AC in her recent statement are a poignant reminder of the impact of sexual harassment on the integrity of the profession:

We're ashamed that this could have happened at the High Court of Australia.<sup>125</sup>

86. This impact was reflected in the Law Council's [NARS Report](#), which identified culture, including sexual harassment and discrimination, as a key drivers of the attrition of women from private legal practice, as well as a key barrier to re-engagement.<sup>126</sup> In failing to address issues such as sexual harassment, the legal profession effectively filters out large numbers of talented individuals from its ranks. This not only impacts women – sexual harassment has, and presently continues to, negatively impact all genders and orientations and their experiences of the profession.
87. The Law Council recognises that this NAP and the measures proposed will not solve every factor relevant to sexual harassment. Rather, it represents the beginning of a process that will need to be reviewed and refined as the endorsed measures are implemented.

### 3A Driving change through legal profession regulation

88. As one Constituent Body observed, measures addressing sexual harassment can either be reactive or proactive. Both categories are necessary: reactive measures have a deterrent effect and can include the reporting of incidents by the aggrieved person, or by other persons or entities entitled or obliged to do so, to the state and territory legal profession regulatory authority, to anti-discrimination authorities,<sup>127</sup> or to Police<sup>128</sup> where appropriate.<sup>129</sup> Proactive measures to guide and prevent certain behaviours include guidelines, continuing professional development, and organisations implementing ongoing initiatives such as the utilisation of inclusion and diversity committees.<sup>130</sup>
89. Of the mechanisms available to the legal profession to respond to sexual harassment, each state and territory has both proactive and reactive (i.e. legal profession regulation) measures in place, although the latter is more uniform across jurisdictions than the former.<sup>131</sup>
90. The existing legal professional regulatory framework sets out a number of core standards to be observed. Lawyers are subject to professional and statutory

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<sup>125</sup> Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, High Court of Australia (22 June 2020)

<<https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>>

<sup>126</sup> Law Council of Australia (n 6) at 7, 36, 76.

<sup>127</sup> Such as the federal [Human Rights Commission](#), or its the state and territory counterparts.

<sup>128</sup> It was noted in submissions that some organisations, such as Bar Associations, will have compulsory obligations to report certain criminal conduct.

<sup>129</sup> It was emphasised in consultations that what steps a regulator takes will necessarily depend on the nature and gravity of the conduct report, the extent to which the aggrieved person wishes to make a complaint, and whether any compulsory obligations to report certain criminal conduct are triggered.

<sup>130</sup> However, it was noted in submissions that these 'proactive' measures also involve a reactive element.

<sup>131</sup> In addition to the example of the *Legal Profession Uniform Law* (NSW and Vic), it is noted that between 2004 and 2008 the States and territories (apart from South Australia) enacted a *Legal Profession Act* based on the template of the second edition *Legal Profession Model Bill* released in 2006. For more information see: Law Council of Australia, *The Model Legal Profession Bill* <<https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/the-model-legal-profession-bill>>.

obligations that are designed to promote the highest standards of professional conduct and ethical standards in the provision of legal services to clients and the administration of justice. In general terms, legal profession legislation such as the *Legal Profession Uniform Law (Uniform Law)*<sup>132</sup> and state and territory Legal Profession Acts<sup>133</sup> address matters of practice management, whereas the state and territory conduct rules<sup>134</sup> concern professional conduct and legal professional ethics.

91. While some variation still exists between the aforementioned Legal Profession Acts, some states participate in the Uniform Law scheme,<sup>135</sup> where the Uniform Law and the Uniform Rules are applied in both those participating jurisdictions by local application Acts.<sup>136</sup>
92. The regulation of the legal profession in participating jurisdictions is overseen by the relevant designated local regulatory authorities in each jurisdiction. In addition to avenues under federal or state workplace or discrimination law, complaints regarding sexual harassment can be made to the relevant designated local regulatory authority as a breach of the [Australian Solicitors' Conduct Rules \(ASCR\)](#).<sup>137</sup> It is notable that the AHRC cited the ASCR as a positive example of an industry regulating behaviour in relation to sexual harassment in its Respect@Work report.<sup>138</sup>

### Australian Solicitors' Conduct Rules

93. The ASCR are a statement of solicitors' professional and ethical obligations as derived from legislation, common law and equity. However, they also express the collective view of the profession about the standards of conduct that members of the profession are expected to maintain.<sup>139</sup>
94. The ASCR were endorsed by Law Council Directors in June 2011 and have been adopted as the professional conduct rules for solicitors in: South Australia,<sup>140</sup> Queensland,<sup>141</sup> New South Wales and Victoria (and shortly Western Australia),<sup>142</sup>

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<sup>132</sup> The *Legal Profession Uniform Law* (NSW and Vic), which commenced on 1 July 2015.

<sup>133</sup> The relevant Acts of the jurisdiction that do not participate in the Uniform Law are as follows:

- *Legal Profession Act 2006* (ACT);
- *Legal Profession Act 2006* (NT);
- *Legal Profession Act 2007* (Qld);
- *Legal Profession Act 2008* (WA);
- *Legal Profession Act 2007* (Tas); and
- *Legal Practitioners Act 1981* (SA).

<sup>134</sup> The Australian Solicitors' Conduct Rules (**ASCR**) have been adopted as the professional conduct rules for solicitors in South Australia, Queensland, New South Wales and Victoria, Tasmania and the Australian Capital Territory. Noting that the legal profession in Australia is regulated at the state and territory level, the ASCR were adopted in accordance with the processes of each jurisdiction (which vary considerably). Non-ASCR jurisdictions continue to maintain their own professional conduct rules.

With regard to Barristers, the Australian Bar Association (**ABA**) professional conduct rules have existed in various iterations since 1993, and have been implemented in New South Wales and Victoria, Queensland, South Australia, and Western Australia. The Northern Territory and Tasmania have maintained earlier conduct rules (Northern Territory has the *Barristers' Conduct Rules* (effective 20 March 2003), and Tasmania has the Tasmanian Bar Association's *Professional Conduct Guidelines*).

<sup>135</sup> Presently being Victoria and New South Wales, with Western Australia expected to join sometime in 2021.

<sup>136</sup> The Uniform Law replaced the Legal Profession Acts and Regulations in those states from 1 July 2015.

<sup>137</sup> See [Rule 42](#) of the ASCR.

<sup>138</sup> Respect@Work Report, (n 86) 723.

<sup>139</sup> Law Council of Australia, [Consultation Discussion Paper on the Review of the Australian Solicitors Conduct Rules](#) (1 February 2018): see paragraphs 14 (page 5) and 29 (page 8).

<sup>140</sup> Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules*.

<sup>141</sup> Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.

<sup>142</sup> Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

Tasmania,<sup>143</sup> and the Australian Capital Territory.<sup>144</sup> The ASCR were adopted in accordance with the processes of each jurisdiction, which vary considerably. The Northern Territory presently maintains its own professional conduct rules.<sup>145</sup>

95. The ASCR includes a Rule that specifically addresses sexual harassment: [Rule 42](#). The current wording of Rule 42 is as follows:

#### 42. ANTI-DISCRIMINATION AND HARRASSMENT

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

- 42.1.1 discrimination;
- 42.1.2 sexual harassment; or
- 42.1.3 workplace bullying.

96. Conduct relevant to Rule 42 must meet the thresholds imported through the relevant ASCR Glossary definitions. The Glossary definition draws from the federal, state and territory definitions of 'sexual harassment', which incorporate thresholds which are some variation of conduct that a *reasonable person* considers would *offend, humiliate or intimidate*.<sup>146</sup> The relevant conduct must meet the thresholds within the Glossary definitions in addition to the thresholds in the balance of the Rule.

97. The wording of and thresholds within the ASCR provide the designated local regulatory authorities with an avenue to investigate alleged breaches of the ASCR through [Rule 2.3 ASCR](#):

2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.

98. Regulators can consider whether the conduct answers the statutory description of 'unsatisfactory professional conduct'<sup>147</sup> (generally less severe conduct occurring in connection with the practice of law) 'professional misconduct' (reserved for conduct

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<sup>143</sup> Effective 1 October 2020, as the *Legal Profession (Solicitors' Conduct) Rules 2020*.

<sup>144</sup> Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.

<sup>145</sup> Northern Territory has the *Rules of Professional Conduct and Practice (effective from 10 April 2002)*.

<sup>146</sup> See also:

- [Equal Opportunity Act 2010 \(Vic\)](#) – Section 92;
- [Equal Opportunity Act 1984 \(WA\)](#) – Section 24 (repeated in Sections 25 and 26);
- [Equal Opportunity Act 1984 \(SA\)](#) – Section 87;
- [Anti-Discrimination Act 1991 \(QLD\)](#) – Section 119;
- [Anti-Discrimination Act 1998 \(Tas\)](#) – Section 17;
- [Anti-Discrimination Act 1977 \(NSW\)](#) – Part 2A;
- [Anti-Discrimination Act 1992 \(NT\)](#)- Section 22; and
- [Discrimination Act 1991 \(ACT\)](#)- Section 58.

<sup>147</sup> For example, see in the *Legal Profession Uniform Law* (emphasis added):

[Section 296 Unsatisfactory professional conduct](#)

For the purposes of this Law,

**"unsatisfactory professional conduct"** includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

at the more severe end of the scale, including conduct occurring outside the course of legal practice).<sup>148</sup>

99. In this way, the ASCR makes the conduct it captures a professional conduct issue—thereby availing regulators of the ‘unsatisfactory professional conduct avenue for those cases not otherwise meeting the thresholds for professional misconduct’?. To this end, while the ASCR largely reflects standards otherwise already existing in legislation, common law and equity, the profession can collectively decide to set a higher standard for itself through the ASCR.<sup>149</sup>
100. However, the present wording of the ASCR is restricted to conduct *in the course of practice*. It will respond in situations, for example, where a person is sexually harassed by a supervisor while at work at a law firm.
101. However, problems arise in practice when harassment occurs *outside* of a legal practice workplace setting. This is because the conduct, by virtue of the wording of Rule 42, will arguably not answer the statutory description of unsatisfactory professional conduct (in connection with the practice of law). Further, conduct occurring outside the course of legal practice will only meet the statutory description of professional misconduct if the conduct is of such gravity as to raise the question of whether or not the lawyer can be regarded as a fit and proper person to engage in legal practice. In case law such as *Ziems v Prothonotary of the Supreme Court of NSW* it was made clear that for conduct not occurring within legal practice to meet this threshold, it had to be of a particularly severe nature.<sup>150</sup>
102. [Rule 5 of the ASCR](#) (Dishonest and disreputable conduct) also can respond to sexual harassment:
  - 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
    - 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or
    - 5.1.2 bring the profession into disrepute.

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<sup>148</sup> For example, see in the Legal Profession Uniform Law (emphasis added):

[Section 297 Professional misconduct](#)

(1) For the purposes of this Law,

**"professional misconduct"** includes--

(a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

(2) For the purpose of deciding whether a lawyer is or is not a fit and proper person to engage in legal practice as referred to in subsection (1)(b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practicing certificate and any other relevant matters.

<sup>149</sup> Law Council of Australia, [Consultation Discussion Paper on the Review of the Australian Solicitors Conduct Rules](#) (1 February 2018): see paragraph 16 (page 5).

<sup>150</sup> *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46, [5], per Fullagar J.

103. However, as this Rule reflects (and imports) the ethical standards informing professional misconduct, it also responds to conduct otherwise the course of legal practice that is on the more severe or serious end of the scale.
104. The effect of the existing thresholds is that there is presently a regulatory gap that does not adequately cover conduct occurring outside the course of legal practice that does not also meet the very high thresholds in both Rule 5 and statutory definitions of 'professional misconduct'. In the Law Council's consultations on this issue, it was clear that while Rule 5 may respond to some cases of sexual harassment, it was not being consistently applied in practice across jurisdictions.<sup>151</sup> The Law Council was further informed that in practice, some regulators were having to consider problematic questions such as what degree of sexual assault was severe enough to meet the thresholds for 'professional misconduct', so that conduct occurring outside of a legal practice setting could be disciplined.
105. Accordingly, using the same example of the lawyer being sexually harassed by a supervisor referred to above- the same harassment could take place out of the office setting, such as at a casual after-work drinks setting, and not meet the required thresholds in some jurisdictions. Similarly, the same harassed person could be harassed at a legal industry networking function, and similarly have little recourse through the legal profession regulators within some jurisdictions.
106. The Law Council considers that this regulatory gap is unacceptable, and that further clarity is needed in Rule 42 to ensure that conduct occurring outside the course of legal practice, and that falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances, is captured.
107. The Law Council further considers that regulators should have the discretion to sanction problematic behaviour as is appropriate in the circumstances of a particular case. Further, regulators should have the appropriate range of disciplinary avenues available to them, so that they can properly and fairly address the various degrees of conduct that may arise.
108. The Law Council also considers that affording regulators an appropriate range of remedies may also have the effect of deterring problematic behaviour earlier, and send a clear message that all forms and degrees of sexual harassment are unacceptable.

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<sup>151</sup> While one jurisdiction confidentially informed the Law Council that "in the course of practice" was interfered narrowly in practice, the AHRC's Respect@Work Report noted that "*the NSW OLSC has said that in its view, a NSW lawyer who has engaged in sexual harassment— whether in the course of their legal practice or otherwise may have engaged in unsatisfactory professional conduct or professional misconduct, which could impact on their right to practise as a lawyer*": Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (5 March 2020), 724 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

### LCA Action Item 3A(i)

In December 2020, Law Council Directors endorsed, and will propose for implementation, the following:

- A reformulation of Rule 42 that enables regulators to address complaints of sexual harassment as unsatisfactory professional conduct, where the subject conduct:
  - meets the statutory thresholds for sexual harassment, imported into the Rule through the applicable Glossary definitions;
  - does not meet the thresholds for professional misconduct; and
  - does not necessarily occur in the course of legal practice, however that conduct falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances.
- An updated Glossary definition that specifically addresses existing statutory thresholds for sexual harassment.

### Commentary

109. In addition to regulatory interventions, the legal profession has implemented a range of 'additional measures to guide professional conduct. Guidance materials such as the Law Council's [Commentary on the ASCR](#) and guidelines issued by state and territory law societies and bar associations contribute, along with other measures such as continuing legal education, to the maintenance of standards of professional conduct. 110 As noted above, the AHRC cited the ASCR as an example of an industry regulating behaviour in relation to sexual harassment in its discussions around Recommendation 47 in its *Respect@Work* report,<sup>152</sup> which provides:<sup>153</sup>

Key industry and professional groups (unions, employer associations, employers and other industry bodies) collaborate to establish industry and profession-wide initiatives to address sexual harassment, for Australian workplaces of all sizes. Initiatives may include industry-wide prevalence surveys, awareness-raising campaigns on industry-specific issues or the development of industry-specific policies or accreditation requirements.

110. The Law Council's *Commentary on the ASCR* is a guide to the application of the ASCR in practice. The Law Council has committed to expansion of the Law Council's current *Commentary* to provide more detailed guidance, and it is presently being developed while the current Review of the ASCR is being implemented in the participating states and territories. The expanded *Commentary* will address sexual harassment in the legal profession and Rules 42 and 5.

111. Submissions on the draft NAP also suggested that further guidance should be provided in the *Commentary* in respect of Rule 32 (Unfounded Allegations) due to concerns that the rule may have a 'chilling effect' on those who might be considering making a complaint.

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<sup>152</sup> *Respect@Work Report* (n 86) 723.

<sup>153</sup> *Ibid* 726.

### LCA Action Item 3A(ii)

The Law Council will:

- progress the development of *Commentary* on the ASCR that addresses the application of the revised Rule, in consultation with its Constituent Bodies.

### **3B Driving change through the development of national model sexual harassment policy and guidelines**

112. In addition to the *Commentary*, the Law Council has considered and consulted upon a number of additional measures relevant to the Respect@Work Recommendation 47, that can be utilised to facilitate cultural change.
113. Recommendation 47 specifies the utility of ‘industry-specific policies’. One of the key measures consulted upon for driving cultural change was that the Law Council should develop, in consultation with its constituent bodies and other relevant stakeholders, a national model sexual harassment policy and guidelines.<sup>154</sup>
114. This was on the basis that codifying standards and expectations would ensure a consistent approach to the way the profession responds to and manages sexual harassment, improving transparency and accountability and putting the issue of sexual harassment at the forefront of the profession’s agenda.
115. The benefit of model guidance and policies was also noted in Strategy 3 of the Australian Women Lawyers’ (AWL) [Seven Strategies for Addressing Sexual Harassment in the Legal Profession](#).<sup>155</sup>

#### **3. Model guidance of workplace policies**

We would like to work with the Law Council of Australia/ or other peak bodies to provide some guidance on minimum standards regarding the content of workplace policies. Where these are being worked on already AWL (and/or our relevant constituent body in each jurisdiction) seeks to be consulted in the development of such policies.

116. Key themes emerging from consultation included that the Law Council’s model policy and guidelines should:
- Set out minimum standards for a policy addressing sexual harassment, while also indicating further matters that should constitute ‘best practice’;
  - Include a definition of sexual harassment, as well as examples of unacceptable and acceptable conduct (physical, verbal and non-verbal);
  - Include examples that address different types of sexual harassment at all points along the spectrum of conduct;

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<sup>154</sup> It is noted that this is consistent with Recommendation 45 of the Respect@Work report. Which provides that: Industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals in roles that are responsible for advising employers on addressing workplace sexual harassment. The training should aim to: a) build skills and capacity on how to prevent and respond to workplace sexual harassment; b) be trauma-informed and c) include content on the nature, drivers and impacts of sexual harassment. Respect@Work Report (n 86)

<sup>155</sup> Australian Women Lawyers, ‘Seven Strategies for Addressing Sexual Harassment in the Legal Profession’, 4 <<https://australianwomenlawyers.com.au/wp-content/uploads/2019/07/Seven-Strategies-for-addressing-Sexual-Harassment-in-the-Legal-Profession-AWL-9-July-2019.pdf>>.

- Include information about both formal and informal avenues for redress, including addressing any differences that may arise from different workplaces;
  - Include avenues for practitioners who are concerned that they may have acted inappropriately to seek guidance;
  - Address the support available to those experiencing sexual harassment (such as counselling);
  - Address any obligations of bystanders witnessing sexual harassment;
  - Address the sexual harassment of LGBTQI individuals;
  - Address any other key roles and responsibilities of the relevant stakeholders, including the division of roles between Law Council and its Constituent Bodies.
117. Consultations also reflected a common desire for the national guidelines to constitute a general model framework, which individual jurisdictions and constituent bodies could use as general guides or adapt, add to, or incorporate into their own, more targeted policy and guideline documents.
118. However, consultation also revealed a desire for the model policy and guidelines to be sufficiently detailed so as to address all the necessary topics and issues, to minimise each jurisdiction reinventing content and promote consistency where possible.
119. Another common theme among submissions was the desire to identify, share and promote best practice in addressing sexual harassment. In consultations, one expert suggested that, in developing a national model policy and guidelines, the Law Council should collate and consider existing sexual harassment policies to identify key strengths to be incorporated into the national model. To this end, several Constituent Bodies have kindly provided the Law Council with copies of their policies and also directed the Law Council to other best practice examples for consideration. These included:
- The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) [Preventing and responding to workplace sexual harassment – A Quick Guide for Employers](#);
  - Australian Women Lawyers' [Seven Strategies for addressing Sexual Harassment](#);
  - The Law Council's [Diversity and Equality Charter](#); and
  - The New Zealand Law Society's [Gender Equality Charter](#).
120. The Law Council has commenced its consideration and analysis of these examples, and this will inform the development of the model policy and guidelines.

### LCA Action Item 3B

The Law Council will:

- develop national model policy and guidelines reflecting the best practice policies and materials; and
- consult with Constituent Bodies and key stakeholders in respect of the draft model policy, guidelines and other materials.

The model policy and guidelines are to include minimum standards and a best practice policy checklist.

### **3C Driving change through the development of a centralised source of information and suite of educational tools**

121. One of the themes arising from consultations was the benefit of information -sharing, in terms of both best practices and also providing the profession with information about how to prevent sexual harassment and what do if it happens.
122. Accordingly, one of the agreed measures consulted upon was for the Law Council to develop, in consultation with its Constituent Bodies and other relevant stakeholders, a centralised source of information and suite of educational tools about responding to and managing sexual harassment (the **Addressing Sexual Harassment Portal**).
123. It was proposed that this centralised source of information be modelled the Law Council's [Mental Health and Wellbeing Portal](#), which highlights the range of relevant resources and services currently available through the Law Council's constituent bodies and national initiatives.
124. The Law Council accordingly sought the views of its Constituent Bodies in respect of this proposal, and to nominate the resources, links and other information addressing sexual harassment in the legal profession that constituent bodies would like included on the Addressing Sexual Harassment Portal. The types of information recommended included information about:
  - Sexual harassment generally: including a summary of findings that have been made about sexual harassment in the legal profession- for example, links to the Respect@Work report, survey results and reports in various jurisdictions. This would assist by acknowledging the issues and help improve knowledge and understanding of the prevalence of sexual harassment in the profession.
  - How to try prevent sexual harassment:
    - information for employers about how to create a safe workplace;
    - links to training materials, further reading, and statistic reporting.
  - What to do if sexual harassment has occurred:
    - clear information on how to report sexual harassment, including links to make a complaint;
    - an explanation of legal mechanisms for making a complaint;
    - support that is available, including counsellors;

- links to relevant worker’s associations and legal assistance (such as Law Societies and relevant unions);
- resources for bystanders.

125. It was further recommended that the Law Council contextualise these tools for a diverse group of people including for example cultural background, disability and sexual orientation.
126. It was also suggested that, as far as possible, the portal information be attached by way of link to the Constituent Body website, to ensure that the material featured will be kept up to date. It was further proposed that the portal specify not only when the portal itself was last updated, but the currency of each link.
127. The Law Council considers that this content and focus of the Portal can be refined through the Law Council’s work in developing National Model Policy and Guidelines (**Section 3B** above), which will necessarily identify the key information that the Portal should address. The Portal would otherwise only showcase the information agreed by participating Constituent Bodies.

### **LCA Action Item 3C**

The Law Council will:

- develop the Addressing Sexual Harassment Portal, that Constituent Bodies can choose to participate in;
- showcase the materials on sexual harassment developed and submitted by participating Constituent Bodies;
- ensure that the materials, as far as possible, be attached by way of link to the Constituent Body website, to ensure that the material featured will be kept up to date; and
- periodically audit and update the Portal at least annually, in consultation with Constituent Bodies.

### **3D Driving change through the facilitation of a consistent complaints process**

128. Within the legal profession regulatory framework, complaints regarding sexual harassment can be made to the relevant designated local regulatory authority as a breach of the ASCR, which is implemented in each participating state and territory in accordance with the laws and processes of that jurisdiction. Arising from these jurisdictional variations is that the processes for making and investigating complaints also vary.
129. Some jurisdictions have implemented alternative reporting systems for certain types of complaints including sexual harassment, such as anonymous reporting mechanisms, however, there is no nationally consistent approach or knowledge-sharing between jurisdictions on this issue.
130. The Law Council considers that the sharing and promotion of best practice approaches to complaints handling across jurisdictions will improve access to redress in this complicated area and improve procedural fairness. While different regulatory processes in each jurisdiction will necessarily impact consistency across jurisdictions with different regulatory frameworks, there was strong support for the

Law Council supporting its Constituent Bodies through the facilitation of information sharing about best practice complaints processes.

131. A particular benefit noted in consultations was in the facilitation of a consistent complaints process across jurisdictions and the different branches of the profession, particularly when many in the profession will practice across different jurisdictions (and potentially branches of the profession) over the course of their career.
132. The Law Council notes that further consultation is required to establish a consensus on what constitutes 'best practice', although the following was suggested in consultation:
  - Having a particular team or staff members respond to sexual harassment complaints;
  - Those staff being appropriately trained by mental health and/or trauma experts;
  - The complainant having a dedicated staff member assisting with their complaint, so that they did not have to re-explain traumatic circumstances each time they made contact.
133. Further recommendations for complaints processes arising from consultations included:
  - Making available information for complainants on the complaint process, including:
    - such as how a complaint can be made;
    - what the options are in terms of dealing with the complaint; and
    - what the possible outcomes are.
  - The development of complaint/grievance procedures and training for small legal practices who lack a designated HR department (who would usually manage internal complaints processes);
  - A confidential (and possibly anonymous) advice line for complainants to discuss their matter with a qualified expert to assist them in considering next steps and whether they wish to make a formal complaint;
  - Subject to resources, the Constituent Bodies to provide access to employment law advice to:
    - practices to ensure they have appropriate complaint policies and procedures in place and are appropriately trained to be able to manage complaints and grievances; and
    - support individual practitioners seeking employment law advice regarding to sexual harassment, bullying and discrimination (whether experienced, observed or perpetrated).
  - The establishment of a national anonymous complaints mechanism, with any reporting collated at a national level, and mechanisms for independent investigations to be commenced without the need for a formal complaint; and

- Recognition that different complainants may be seeking different outcomes- for example, wanting their complaint recorded, seeking an apology, or seeking a more formal and/or serious response.

134. It was also suggested in consultations that the facilitation of a consistent complaints process that reflects best practice could be achieved through the aforementioned national model policy, which Constituent Bodies can then adapt to their own existing processes.

### **LCA Action Item 3D**

The Law Council will:

- develop recommendations for best practice complaints processes in consultation with the Constituent Bodies and key stakeholders. The recommendations are to be included and/or addressed in the Law Councils' model policy and guidelines.

### **3E Driving change by supporting Constituent Bodies to develop professional development training**

135. Recommendation 45 of the Respect@Work report provides:<sup>156</sup>

Industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals in roles that are responsible for advising employers on addressing workplace sexual harassment. The training should aim to:

- a. build skills and capacity on how to prevent and respond to workplace sexual harassment;
- b. be trauma-informed;
- c. include content on the nature, drivers and impacts of sexual harassment.

136. This has necessarily initiated a conversation with the profession about the role of professional development training in addressing sexual harassment in the profession. Every State and Territory has a statutory condition of an Australian practising certificate that the holder must comply with the applicable requirements of the Continuing Professional Development (**CPD**) Rules.<sup>157</sup> Failure to comply with the conditions applicable to the practising certificate is a contravention which may carry a civil penalty<sup>158</sup> as well as being capable of constituting unsatisfactory professional conduct or professional misconduct.<sup>159</sup>

<sup>156</sup> Respect@Work Report (n 86) 677.

<sup>157</sup> Uniform Law, section 52.

*Legal Profession Act 2006* (ACT) sections 47(7) and 53.

*Legal Profession Act 2006* (NT) sections 70 and 78.

*Legal Profession Act 2007* (Qld) sections 53 and 58.

*Legal Profession Act 2007* (Tas) sections 56 and 62.

*Legal Profession Act 2008* (WA) sections 47(3) and 53.

*Legal Practitioners Act 1981* (SA) section 17A.

<sup>158</sup> Uniform Law, section 54.

<sup>159</sup> Uniform Law, section 298(a) and (b).

137. CPD is regulated on a state and territory basis. The designated regulatory authorities in those jurisdictions are responsible for developing the CPD Rules<sup>160</sup> and ensuring compliance with CPD obligations, although the Law Council has a role in developing CPD Rules in Uniform Law jurisdictions pursuant to section 427 of the Uniform Law. The current principles-based framework for CPD is broadly consistent across all Australian jurisdictions,<sup>161</sup> and there are four compulsory competency areas in most jurisdictions: Ethics and professional responsibility, practice management and business skills, Professional skills and substantive law<sup>162</sup>, although it is particularly relevant that South Australia has recently introduced a mandatory bullying and sexual CPD component.<sup>163</sup>
138. It was suggested in consultations that the Law Council, as part of its model policy and guidelines, develop recommendations regarding the appropriate CPD framework for education and training in relevant topics with regard to sexual harassment, workplace conduct, and workplace culture, and also the recommendation that this training be mandatory. It was then proposed that the Individual Constituent Bodies should be responsible, under the overarching framework provided by the Law Council, for developing and rolling out appropriate training and CPD to its members and the profession with regard to workplace sexual harassment, conduct and culture.
139. It was also suggested that the Law Council support Constituent Bodies by:
- providing model training and education of sexual harassment in the legal profession,
  - advocating for mandatory CPD training related to safe workplace culture, diversity and equality.
  - developing a best practice CPD program with Constituent Bodies, subject to consultation on the both the content and provider, with the view that it could be delivered by interested Constituent Bodies.
140. Issues proposed in consultations to be included in such training were:
- targeted training to the 'first responder' who is either formally or informally appointed to both receive complaints and manage complaints of sexual harassment within the workplace; and
  - best practice models on how to handle complaints internally, as well as information on external avenues including trade unions and the Australian Human Rights Commission.
141. The Law Council notes that this matter can be dovetailed with the work on the National Model Policy and Guidelines (**Section 3B** above), on the basis that the content developed can be used as the foundation for any model professional development training.

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<sup>160</sup> With the exception of South Australia and, pending its formal entry into the Uniform Law scheme, Western Australia.

<sup>161</sup> By virtue of the *Model Continuing Professional Development Scheme for Australian Lawyers* developed by the National CPD Taskforce and endorsed by Law Council Directors in June 2008.

<sup>162</sup> Not included in the South Australian Rules.

<sup>163</sup> Along with Ethics, Professional Skills and Practice Management.

### LCA Action Item 3E

The Law Council will:

- Develop recommendations for best practice professional development training in consultation with the Constituent Bodies and key stakeholders, for including with the Law Councils' model policy, guidelines and checklist.

### **3F Consideration of bystander provisions**

142. An additional matter raised in consultations was the role and possible impact of introducing 'bystander provisions' into the sexual harassment regulatory landscape.

143. Bystanders are persons who directly observe sexual harassment, or who have heard about it subsequently. This can include co-workers who are approached for support, managers, and human resources employees.<sup>164</sup> It was noted by the AHRC in its 2018 Survey that only 35 per cent of bystanders in the workplace in the last five years took any steps in response.<sup>165</sup>

144. The Law Council considers that this is a matter that could require careful consideration the contexts in which such provisions are envisaged to apply, as well as the applicable thresholds for reporting. The Law Council also notes that a related matter raised during consultations was further consideration of bystander protections, noting existing defamation legislation and possible gaps in workplace laws in respect of, for example, the victimisation of bystanders.<sup>166</sup>

145. Responses to the consultation noted:

- the need for further consideration and research (including whether or not such provisions should be pursued) in consultation with Constituent Bodies;
- the need to consider the purpose and impact of any bystander provisions, noting that victims of sexual harassment often do not want to take any action or may ask their confidant (i.e the bystander) to keep the information confidential;
- that such an approach should account for the autonomy and wishes of the harassed person;
- any such approach be careful not to inadvertently discourage discussions about acceptable/unacceptable conduct, colleagues 'checking in' with one another, or sexual harassment victims from talking about their experience (and therefore disincentivise reports of sexual harassment); and
- that any such provisions should ensure that victims are respected and protected, while also affording alleged perpetrators natural justice and procedural fairness.

<sup>164</sup> Respect@Work Report (n 86) 275

<sup>165</sup> Ibid 276; Australian Human Rights Commission (n 5) 95–6.

<sup>166</sup> Australian Human Rights Commission (n 5) Part 5.2, available online: <https://humanrights.gov.au/our-work/part-5-legal-and-organisational-implications-bystander-approaches-sexual-harassment#Heading904>

### **LCA Action Item 3F**

The Law Council will:

- further consider, research and develop recommendations with regard to the introduction of bystander obligations and protections; and
- consult with the Constituent Bodies and key stakeholders in respect of these recommendations.

### **3G Supporting persons who have experienced sexual harassment**

146. An additional matter raised in consultation was how the profession supports its members (both women and men) who have experienced sexual harassment and the adverse impact on their lives, careers and well-being. Often the support is focused on when the sexual harassment is occurring or its immediate aftermath. However, the impact of sexual harassment may continue for many years, even decades after the event. Consideration should be given to finding way to bear witness and support people who have experienced historical sexual harassment.

147. The Law Council notes Recommendation 27 of the Respect@Work report:<sup>167</sup>

A disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. The Australian Government should fund the Commission to facilitate this process.

148. The Law Council is conscious that any such initiative would require careful consideration and design, taking into consideration a responsible and trauma-informed approach that promotes healing, avoids triggers and is cognisant of not exposing participants to ramifications under defamation legislation. This is consistent with the recommendations of the AHRC, who opine in the report that:<sup>168</sup>

Such a process would create a safe space for individuals to be heard with respect and without judgment, with the principal purpose of listening to and documenting people's experiences. To support victims throughout this process, which raises risks of re-traumatisation, individuals will be connected with appropriate support services.

149. Further, an essential element of such a program would be the retention of appropriate person(s) with extensive experience and proper training for receiving complaints and dealing with this subject matter.

### **LCA Action Item 3G**

The Law Council will:

- further consider and develop options for supporting victims of sexual harassment, noting that matters raised in Section 3G, for consultation with Constituent Bodies.

<sup>167</sup> Respect@Work Report (n 86) 514.

<sup>168</sup> Ibid 513.

## 4. Federal Judicial Commission

150. The Law Council has, for a number of years, advocated for the Australian Government to establish a Federal Judicial Commission.<sup>169</sup> Sexual harassment in the legal profession highlights the importance of robust accountability mechanisms for the judiciary, and the Law Council believes that an independent oversight body forms an essential part of this framework.
151. If properly constituted, a Federal Judicial Commission will have a vital role to play in receiving and responding to the conduct of judicial officers, including allegations of sexual harassment. It is imperative that this matter be addressed at every level to ensure the ongoing sustainability of the profession and public confidence in the legal system as a whole.
152. The Law Council has commenced a process of consultation on the substance of its proposed future advocacy on the establishment of a Federal Judicial Commission, including the development of draft principles to underpin the development of the proposed body. This process is ongoing.

### LCA Action Item 4

The Law Council will:

- continue to advocate for the establishment of a Federal Judicial Commission.

## 5. Annual review of the NAP

153. The Law Council acknowledges that for the NAP to be effective, it must necessarily evolve as each measure endorsed is developed and its proposals be periodically reviewed and updated.
154. This might include the further canvassing of issues that were raised during submissions that require further consultation and consideration, including:
- Defamation laws and their impact on the reporting of sexual harassment;
  - The definitions of 'unsatisfactory professional conduct' and 'professional misconduct' within legal profession legislation; and
  - The remainder of the Respect@Work Recommendations.
155. It is accordingly proposed that this NAP be reviewed and reported on annually, addressing the implementation of the measures as they are further canvassed and developed in consultation with the Law Council's Constituent Bodies.

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<sup>169</sup> For example, as early as 2006, then President of the Law Council, John North, provided support for an independent body that could deal with complaints about the conduct of Federal judicial officers without endangering judicial independence. See, also, Law Council of Australia, 'Submission to the Senate Legal and Constitutional Affairs Committee on the Courts Legislation Amendment (Judicial Complaints Bill 2012 and Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012' (30 April 2012) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/judicial\\_complaints/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/judicial_complaints/submissions.htm)>; Morry Bailes, 'Opinion Piece: Federal Court deserves a fair hearing' (2 November 2018) *The Australian Financial Review* <[www.lawcouncil.asn.au/media/speeches/federal-court-deserves-a-fair-hearing](http://www.lawcouncil.asn.au/media/speeches/federal-court-deserves-a-fair-hearing)>; Arthur Moses, 'Opinion Piece: rule of law is key to integrity' (20 December 2018) <[www.lawcouncil.asn.au/media/speeches/opinion-piece-rule-of-law-is-key-to-integrity](http://www.lawcouncil.asn.au/media/speeches/opinion-piece-rule-of-law-is-key-to-integrity)>.

### **LCA Action Item 5**

The Law Council will:

- review and report on this NAP on an annual basis.

### **Further information**

156. For further information on this NAP and the Law Council's initiatives to address sexual harassment in the legal profession, please contact the Law Council of Australia at:

Email: [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)