THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/DHas: 1616724

11 December 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: emma.hlubucek@lawcouncil.asn.au

Dear Mr Smithers,

National Inquiry into Sexual Harassment in Australian Workplaces – final submission

Thank you for the opportunity to contribute to the Law Council of Australia's submission to the Australian Human Rights Commission ("AHRC") inquiry into sexual harassment in Australian workplaces ("the Inquiry").

This letter represents the position of the Law Society with respect to the terms of reference for the Inquiry. In some instances, the provisional recommendations contained in our letter to the Law Council of 5 October 2018 have been refined. We therefore request you refer to the material in this letter rather than our preliminary response.

The material in this letter is informed by our Employment Law, Human Rights, and Diversity and Inclusion Committees.

Prevalence, nature and reporting of sexual harassment in the legal profession in Australia

In addition to state and federal legislation prohibiting sexual harassment, solicitors in Australia are bound by the Australian Solicitors' Conduct Rules, which at rule 42 requires that "a solicitor must not in the course of practice, engage in conduct which constitutes: discrimination; sexual harassment; or workplace bullying".

Notwithstanding this unambiguous rule, sexual harassment is a persistent issue within the legal profession in Australia. In 2018 the International Bar Association ("IBA") surveyed almost 7,000 legal professionals around the world on their experience of sexual harassment at work. In Australia, 934 legal professionals completed the survey, and the results revealed that around one third (37%) of lawyers in Australia disclosed they had been sexually harassed while at work or in work-related contexts. The results illustrated that women working in the law in Australia disclosed experiencing sexual harassment at a far greater rate than men: 47% of women disclosed being sexually harassed, compared with 13% of men. This compares with the global rate of 37% for women working in the law, and 7% for men.

The International Bar Association survey also found that sexual harassment goes unreported in 77% of cases. Of those who did report the harassment, 73% said their employer's

response was either insufficient or negligible. Of respondents who had disclosed harassment, 38% expressed an intention to leave their workplace as a result. On a global basis, 44% of people who had been harassed in legal workplaces reported that the perpetrator was "more senior" than them; in 19% of cases the perpetrator was someone of equal seniority, and in only 4% of cases was the person responsible for the harassment someone junior.

From October to November 2018 NSW Young Lawyers conducted a separate survey on young lawyers' experiences of sexual harassment in the workplace. The survey was distributed to the NSW Young Lawyers mailing list, and received 125 responses. Over half of respondents (51%) disclosed having been sexually harassed in the workplace, and 25% had witnessed another person being sexually harassed. Of those who disclosed an experience of sexual harassment, less than 30% made a complaint. The reasons for not pursuing a complaint were elaborated on by some of the respondents. One wrote that:

> "It 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."

Another respondent raised the power imbalance faced by young lawyers as a deterrent to formal reporting.

> "It 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".[1]

When asked how sexual harassment in the workplace could be eliminated or reduced, respondents to the NSW Young Lawyers survey provided four key suggestions: education of employers and employees on what sexual harassment is, how to report it, and consequences; cultural or attitudinal change, including systemic change led by management; strong disciplinary measures; and reducing alcohol consumption at work-related events. The Law Society understands that NSW Young Lawyers will be providing a supplementary submission outlining the results of its survey, and recommendations, in further detail.

Legislative reform to improve the legal framework to better address sexual harassment in Australian workplaces

Please find **attached** at Annexure A the Law Society's recommendations with regard to key aspects of the framework addressing sexual harassment – at a state, federal and international level.

Recommendations organisations can adopt to prevent and respond to sexual harassment in the workplace

The Law Society suggests that organisations develop and commit to organisation-wide frameworks to reduce the risk of sexual harassment occurring in the workplace and encourage a safe and respectful workplace that is free from harassment. Such a framework might include the following:

1) Recognition of the benefits of a safe and respectful workplace free from harassment and discrimination where the organisation does not tolerate sexual harassment.

---

[1] NSW Young Lawyers Human Rights Committee, 'Sexual Harassment in Australian Workplaces Survey Results' (November 2018).

2) Workplace policies addressing sexual harassment which include a set of values/principles for standards of conduct in the workplace, a clear definition of sexual harassment and details of whistleblowing or 'speak up' procedures.

3) Training programs for all staff which support workplace policies at least every two years, with tailored programs for management, given their heightened responsibilities.

4) Effective procedures which support organisational objectives and policies, including a robust and effective complaints mechanism and investigation procedures.

5) Reporting mechanisms to capture data in relation to complaints of sexual harassment in the workplace.

6) Procedures which finalise the complaint with the complainant once any investigation has concluded, and include the provision of appropriate support to the complainant through an employee assistance program or external providers. Any disciplinary outcomes should also be documented.

7) A feedback mechanism for staff to make comments and suggestions for improvements in relation to the organisation's approach to combatting sexual harassment.

Thank you for the opportunity to provide input on this issue. Should you have any questions or require further information please contact Andrew Small, Policy Lawyer on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

Enc.

Annexure A: Recommendations of the Law Society of NSW for improving the legal framework with respect to preventing and responding to sexual harassment

a) Federal framework

Issue Identified	Recommendation
Australian Human Rights Commission Act 1986 (Cth) ("AHRC Act") s 46PH(b). The ability of the President of the Australian Human Rights Commission ("AHRC") to terminate a complaint if it is not brought within six-months of an alleged act or practice taking place acts as a barrier for individuals who wish to seek redress for sexual harassment at work.	Amend s 46PH(b) of the AHRC Act to reinstate the 12-month time limit that was in place prior to passage of the *Human Rights Legislation Amendment Act 2017* (Cth).
Promoting employer accountability and addressing systemic discrimination. Currently, employers can only be held accountable for failing to take all reasonable steps to prevent sexual harassment through the vicarious liability provisions of the *Sex Discrimination Act 1984* (Cth) ("SDA"). Under the *Anti-Discrimination Act 1977* (NSW) ("ADA"), the vicarious liability provisions are even narrower, with employers only vicariously liable if they expressly or impliedly authorise the act of sexual harassment.	To address systemic discrimination, the AHRC should be given the power to conduct own-motion investigations of what appears to be unlawful sexual harassment under the SDA, and the power to commence court proceedings without receiving an individual complaint.
Fair Work Act 2009 (Cth) ("FWA") s 351. Sexual harassment is not directly covered by the general protections provisions of the *Fair Work Act 2009* (Cth) ("FWA"). The definition of "adverse action" does not explicitly include sexual harassment, and while the protections against discrimination in s 351 of the FWA prohibit adverse action due to sex, it is not clear whether sexual harassment is prohibited by this section.	Section 351 of the FWA should be amended to include sexual harassment in the definition of "adverse action".
Intersectional discrimination. The SDA and ADA do not recognise the ways in which individuals may experience compound or intersectional forms of discrimination. Where an individual seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation. This may act as a further barrier to minority groups who experience sexual harassment along with discrimination based	The Commonwealth Government should consider consolidating federal anti-discrimination law to address all the prohibited grounds of discrimination, including sexual harassment. The definition of discrimination under any consolidated act should include intersectional discrimination.

Issue Identified	Recommendation
on other protected attributes from pursuing a claim.	
Whistleblower protections. Whistleblower protections are lacking, particularly in the private sector.	The Parliament of Australia should pass the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017*, which is currently before the Senate. This would require public companies and large proprietary companies to have a whistleblower policy and to make this accessible to all employees, and imposes penalties for non-compliance.
Lack of public accountability. There is presently no formal requirement for companies to regularly report sexual harassment statistics and claims internally or externally.	The AHRC should consider introducing compulsory reporting requirements so a company's board and a relevant external body receive regular updates on sexual harassment incidents and claims.
Expand the application of the SDA. State-based public servants are not able to make a claim under the SDA for sexual harassment that occurs within their workplace. The discrimination and sexual harassment provisions of the SDA do not currently provide explicit coverage for volunteers and other types of unpaid workers.	Subject to any constitutional limitations, the Commonwealth Government should amend the SDA to: • Provide coverage to an employee of a state or a state instrumentality, as recommended by the Senate Standing Committee on Legal and Constitutional Affairs in their 2008 Inquiry into the effectiveness of the SDA; and • Provide coverage for volunteers, interns, and other categories of unpaid workers.

b) International framework

Issue	Recommendation
ILO Convention on the Elimination of Violence and Harassment in the World Of Work.	The Commonwealth Government should: a) vote to adopt the new ILO Convention and Recommendation on the elimination of violence and harassment in the world of work at the 108th session of the International Labour Conference in June 2019; and b) if the Convention is adopted, take action to ratify it and incorporate it into domestic law.

c) General recommendations

Issue	Recommendation
Resourcing of the AHRC. The AHRC remains significantly under-resourced, with complaints regularly taking five to six months to reach a conciliation hearing.	The Commonwealth Government should adequately resource the AHRC so it can effectively carry out its investigation, complaint and conciliation functions.
Promoting uniformity in state and territory anti-discrimination legislation. Each state and territory in Australia has enacted anti-discrimination legislation that outlaws sexual harassment. While the laws are largely similar, some significant differences exist. One notable area of divergence is the damages cap: in NSW, there is a cap on damages under the *Anti-Discrimination Act 1977 (NSW)*, while in other states there is no such cap. This creates difficulties for individuals as to where to commence their action. Similarly, respondent organisations face the complex task of ensuring their policies and operations comply with multiple pieces of legislation.	State and territory governments should amend their anti-discrimination legislation to ensure harmonisation between jurisdictions. This process should seek to harmonise best practice, rather than a lowest common denominator approach.