



WORKPLACE GUIDE AND MODEL DISCRIMINATION AND HARASSMENT POLICIES

November 2025



THE LAW SOCIETY
OF NEW SOUTH WALES

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VERSIONS

Version	Description	Publication
1.1	Launch of Workplace Guide and Model Discrimination and Harassment Policies	May 2021
1.2	Updates made including to reflect legislative changes relating to Respect@Work and psychosocial hazards	November 2025



PRESIDENT'S MESSAGE

The Law Society of NSW is pleased to announce the release of our updated Workplace Guide and Model Discrimination and Harassment Policies. The guide is part of the Law Society's work in promoting safe workplaces and contains practical tools that can assist legal practices in NSW to identify and eliminate discriminatory recruitment and employment practices. It includes helpful insights to enable law firms and other organisations to engage in best practice to promote a truly diverse and fair workplace.

Since it first developed an Equal Opportunity Policy in 1996, the Law Society has demonstrated a firm and ongoing commitment to the principles and practice of fairness of opportunity and diversity in the legal profession. Since then, the Diversity and Inclusion Committee and the Employment Law Committee have developed a number of initiatives such as the Charter for the Advancement of Women, and Diversity and Inclusion in the Legal Profession: The Business Case, recognising that a diverse and inclusive workplace is not only socially, politically and legally appropriate; it also makes sound economic sense.

Understanding and implementing discrimination and harassment policies should see organisations reap a range of benefits, resulting in better business outcomes for the profession and the community. I encourage all legal organisations to introduce and implement workplace policies that support fairness and inclusivity.

Thank you to the Law Society's Diversity and Inclusion and Employment Law Committees for their work in preparing the Workplace Guide and Model Discrimination and Harassment Policies. I commend this publication to legal practices and solicitors in NSW.

Jennifer Ball

President



INTRODUCTION

A fair workplace means that all participants are treated with respect and are not subjected to discrimination, harassment, bullying or victimisation. This Guide and accompanying Model Policies are intended to identify practitioners' current legal obligations under anti-discrimination law, and to provide practical tools for implementing any necessary changes in the workplace.

Since the first edition was published in 2001, there have been a number of legal developments making it necessary to continually revise and update this guidance to the profession. These include amendments to NSW and Commonwealth anti-discrimination law, increasing recognition of non-gender related barriers to equality of opportunity in the legal profession, the commencement of new legislation (including the *Age Discrimination Act 2004* (Cth), the *Fair Work Act 2009* (Cth) and the *Legal Profession Uniform Law* (NSW) (**Uniform Law**) in 2015), and the introduction of a positive duty under the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate measures to eliminate various forms of unlawful conduct from workplaces.

This Guide is designed to help solicitors in small, medium and large firms, as well as in other organisations including corporations, government and community legal centres. However, we are aware that many organisations have already developed their own equal opportunity and related policies, and we expect that it will predominantly be private firms who will use

this Guide and these policies. With this in mind, we have used the term “firm” throughout the document to broadly refer to legal service providers.

To assist in the implementation of the principles set out in this Guide, Appendix Four provides a series of checklists to guide legal practices through good decision-making and implementing good procedures. We encourage you to make copies of these checklists and have them on hand when making decisions or undertaking business processes.

The Guide is accompanied by the:

- Model Equal Opportunity Policy;
- Model Anti-Harassment Policy; and
- Model Grievance Handling Procedure; and
- Checklists for Employers.

These Model Policies reflect obligations imposed on practitioners by NSW and Commonwealth legislation. They are guides to help practitioners and can be modified to suit individual firms.

SECTION ONE: WHAT IS A FAIR WORKPLACE AND WHY IS IT IMPORTANT?

A fair workplace means that all participants have equal opportunities, are treated with respect, and are not subjected to discrimination, bullying, harassment or victimisation. All Australian states and territories have anti-discrimination legislation that prohibits discrimination in various aspects of life on the basis of specific characteristics. The Commonwealth also has anti-discrimination legislation. In practice this means that Commonwealth, state and territory legislation operate as parallel schemes. Generally, these laws overlap and prohibit the same conduct, although there are some differences in the application of NSW and Commonwealth law.

As employers and service providers, it is important that legal practices understand their rights and responsibilities under anti-discrimination law and comply with the obligations that they impose. Legal practices that do not implement comprehensive, up-to-date equal opportunity policies may be held liable for unlawful discrimination or harassment by their employees. Non-compliance with anti-discrimination law can be costly for firms.¹

Understanding these laws and implementing an equal opportunity and anti-discrimination policy reduces the risk of a legal practice being exposed to claims of unlawful discrimination or harassment. When effectively implemented and communicated, an equal opportunity policy creates awareness of conduct that is inappropriate in the workplace and enhances the work environment for employees.

Other legislation also imposes obligations on legal practitioners and legal practices in relation to equal opportunity and anti-discrimination. The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**Uniform Rules**) commenced in NSW and Victoria on 1 July 2015. Those Rules prohibit a legal practitioner from engaging in unlawful discrimination, including all forms of harassment, in connection with the practice of law.² Additionally, under the *Workplace Gender Equality Act 2012* (Cth), private sector employers and Commonwealth public sector organisations with 100 or more employees are required to report annually to the Workplace Gender Equality Agency on a number of gender equality indicators, including the existence of strategies or policies to support gender equality.³ Employers with 500 or more employees have additional reporting and compliance obligations under the *Workplace Gender Equality Act 2012* (Cth) to select and meet gender equality targets.⁴

The business case for equal opportunity and workplace diversity

There are several benefits for a legal practice, aside from compliance with their legal obligations, to meaningfully engage with and implement equal opportunity practices. Doing so can help firms improve their business in a number of ways, including the following:

- **Recruitment and retention of highly skilled staff** – firms will attract and retain the best people if they have a reputation as a positive, supportive and fair employer. Recruitment will draw from a bigger pool of talent by attracting and retaining staff from across all groups of the community.
- **Improved productivity and performance** – implementation of diversity and inclusion measures can improve a firm's productivity and performance in multiple ways. Benefits include higher staff morale and reduced absenteeism at the employee level, and greater flexibility and innovation organisationally. Evidence shows that diverse groups are better at decision-making and better equipped to solve difficult problems, which leads to improved business outcomes. For example, increased diversity was linked to improved financial performance in a 2015 McKinsey study.⁵
- **Increased competitiveness and growth** – firms and practitioners with diverse and inclusive workplaces and practices can expect to benefit from an enhanced reputation in the broader community and improved access to an increasingly diverse client base. This potentially provides a competitive edge and enables individuals and firms to succeed and grow. Clients often want to know about a firm's policies on issues such as equal opportunity and sexual harassment and many government and semi-government organisations consider these policies in tenders and when making decisions on allocation of work. Conversely, complaints or findings of discrimination or harassment can cause serious reputational damage to an individual or organisation, reducing their ability to attract and retain clients and adversely impacting business outcomes.

SECTION TWO: AN OVERVIEW OF THE LAW

NSW and Commonwealth anti-discrimination laws make it unlawful to discriminate, harass, victimise or vilify anyone in certain areas of public life on the basis of specific characteristics. It is also unlawful to bully someone in the workplace. This section provides an overview of the relevant legislation and the areas of public life to which it applies. It also contains a brief overview of liability principles.

Anti-discrimination laws include:

- *Anti-Discrimination Act 1977* (NSW);
- *Race Discrimination Act 1975* (Cth);
- *Sex Discrimination Act 1984* (Cth);
- *Disability Discrimination Act 1992* (Cth); and
- *Age Discrimination Act 2004* (Cth).

In addition, there are provisions in other legislation, particularly the *Fair Work Act 2009* (Cth), the *Australian Human Rights Commission Act 1986* (Cth), and the Uniform Law that prohibit discrimination and harassment.

Discrimination

What is discrimination?

Discrimination means treating someone unfairly or less favourably because they happen to belong to a particular group of people or have certain characteristics. Discrimination may be intentional, accidental or it may be unconscious. It is often entrenched in practices and attitudes that have an unfair or unequal impact on certain groups.

The following list sets out the grounds on which it is unlawful to discriminate against another person or a group of people under both NSW and federal law:

- age (including forcing someone to retire at a certain age);⁶
- carer's responsibilities (including current responsibilities, presumed responsibilities, responsibilities that the person had, or is presumed to have had in the past, and responsibilities that the person will have, or it is presumed will have in the future);⁷
- disability (including past, present or future disability, actual or presumed disability, physical, intellectual or psychiatric disability, behavioural disorder, learning disabilities, changes or different body parts and any virus or bacteria in the body that could cause disease such as HIV);⁸
- homosexuality (male or female, actual or presumed) or sexual orientation;¹⁰

- marital or domestic status;¹¹
- race (including colour, ethnic background, ethno-religious background, descent or nationality);¹²
- sex (including pregnancy and breastfeeding);¹³ and
- transgender status (actual or presumed),¹⁴ gender identity or intersex status.¹⁵

These grounds are collectively described as Protected Attributes in this document, however there are differences in coverage under NSW and Federal Law.

It is also unlawful to victimise a person for raising a discrimination complaint.¹⁶ What constitutes victimisation is discussed in further detail below.

Areas of public life in which discrimination is unlawful

Under the *Anti-Discrimination Act 1977* (NSW), it is unlawful to discriminate against another person or a group of people in the following areas of public life:

- work (including employment and partnership contexts);¹⁷
- state education;¹⁸
- private educational institutions if on the basis of race only;¹⁹
- provision of goods, services and facilities;²⁰
- accommodation;²¹ and
- registered clubs.²²

NSW law also prohibits discrimination on the basis of a person's responsibilities as a carer in the area of work (including employment and partnership contexts).²³

Under Commonwealth legislation, the relevant Acts relate to discrimination based on a specific characteristic or Protected Attribute. The areas of life that they cover can vary depending on the individual piece of legislation, but all include work and the provision of services in some form. They can also include the administration of Commonwealth laws and programs, requests for information, sport, housing, accommodation and superannuation.

Direct and indirect discrimination

Direct discrimination occurs when a person with a Protected Attribute is treated less favourably than a person without such a characteristic, in the same or similar circumstances.²⁴

A law practice, practitioner or employee's intentions or motives are irrelevant to establishing whether or not their conduct is discriminatory.

» EXAMPLES OF DIRECT DISCRIMINATION

- A firm's human resources manager refuses to consider applications for graduate employment from any person over the age of 35. This may be direct discrimination on the ground of age.
- A firm refuses to promote a senior associate to partnership because she is pregnant even though she meets all relevant criteria for promotion. This could be direct discrimination on the ground of pregnancy.
- A firm refuses to hire a suitably qualified person because they are of a particular racial or ethnic descent. This could be direct discrimination on the ground of race.

Indirect discrimination focuses on the adverse effects of certain conduct. Indirect discrimination occurs where a condition, rule or requirement that applies to everyone unfairly disadvantages people with a Protected Attribute. The imposition of the condition, rule or requirement will be unlawful discrimination unless the condition or requirement is a reasonable one in all the circumstances.²⁵

» EXAMPLES OF INDIRECT DISCRIMINATION

- The head of the Litigation Division schedules weekly team meetings for 6pm on Wednesday evenings. This could be indirectly discriminatory against staff members with carer's responsibilities unless it can be shown that the requirement for meetings at this time is reasonable in all the circumstances.
- A firm imposes a requirement that to be promoted to partnership, senior associates must be prepared to work full-time. This could be indirectly discriminatory on the ground of sex, disability and/or carer's responsibilities unless it can be shown that the requirement to work full-time is reasonable in all the circumstances.

Discrimination does not have to be the "dominant or substantial" reason to be unlawful

Under the *Anti-Discrimination Act 1977* (NSW), discrimination does not have to be the dominant or substantial reason for a particular event, or certain action being taken, which forms the alleged discriminatory conduct or action. It is sufficient if it is *one* of the reasons for the event or action occurring.²⁶ Commonwealth legislation contains similar provisions.²⁷

» EXAMPLE

A law firm has to retrench five solicitors from its insurance area, due to a drastic downturn in the amount of work. Five solicitors in the area are over the age of 40. The remaining three solicitors are in their late twenties and thirties. The managing partner decides to retrench the five older solicitors on the basis that because of their experience, they are more likely to be able to obtain work elsewhere. The decision to retrench the older solicitors appears to be discriminatory on the ground of age. Although the decision is based on two reasons (financial necessity and the age of the employees), to act in a way that is contrary to the legislation it is sufficient that one of the reasons is discriminatory.

Harassment

Harassment can constitute a major obstacle to both a productive workplace and to a person's progression within the legal profession. Workplace harassment has profound impacts on the person experiencing the harassment including decreased self-esteem, exacerbated stress and anxiety, depression and low productivity. Workplace harassment also creates an unsafe work environment and can seriously undermine a firm's productivity and reputation. Firms with a culture that condones harassment are frequently characterised by low staff morale, increased absenteeism, resignations, lowered ability to attract the best applicants, poor work performance, safety incidents and ill health.

What is harassment?

Harassment is any form of behaviour that is unwelcome and offends, humiliates or intimidates a person. The test is whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.²⁸

Harassment can involve physical, visual, verbal or non-verbal conduct. It does not need to be repeated or continuous. A single incident can be harassment.²⁹ It is not necessary to prove that the alleged harasser intended to harass. Behaviour can still be classified as harassment even if the recipient has not told the harasser that their behaviour was unwelcome.

The Disability Discrimination Act 1992 (Cth) provides that it is unlawful for a person to harass another person on the basis of their disability in a range of work-related situations, including in employment and partnership contexts.³⁰

What is sexual harassment?

Current legislation explicitly addresses and prohibits sexual harassment.

Sexual harassment includes unwelcome sexual advances, unwelcome requests for sexual favours or other unwelcome sexual conduct which takes place in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.³¹

Many forms of sexual harassment can also constitute an act of sex discrimination.³²

Sexual harassment is prohibited in employment and other work-related situations, and in the provision of goods and services, as well as in a number of other areas.³³ In addition to the *Sex Discrimination Act 1984* (Cth), sexual harassment in employment is also dealt with by the *Fair Work Act 2009* (Cth), as set out below.

» EXAMPLES OF SEXUAL HARASSMENT

In *Coleman v Bentley*³⁴ the NSW Administrative Decisions Tribunal (as it was known at the time) provided a useful overview of the sort of conduct which had been found to constitute sexual harassment in earlier cases. These included:

- writing a letter containing a declaration of love and proposal for sexual intimacy including marriage and children;³⁵
- intimate pre-employment interview questions about the applicant's sex life;³⁶
- sexually explicit comments written on walls and equipment using the complainant's name, lewd magazines and posters and nude and partially clad women throughout the workplace, derogatory sexual comments being made to and about the complainant in her hearing;³⁷

- sexually explicit comments about a previous employee during a pre-employment interview, providing money to purchase underwear, requiring underwear to be bought, referring to the individual's breasts while making a comment "I would like to chew on those", physical touching, offers of massage;³⁸ and
- pinching an individual's bottom, offers of massage and massaging, comments of a sexual nature about himself and her sexual life.³⁹

Some examples of conduct which may constitute 'conduct of a sexual nature' include:

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;
- unwanted invitations to go on dates, or requests or pressure for sex;
- unwanted written declarations of love;
- sending sexually explicit or suggestive pictures of gifts to a worker, or displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the workplace;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, or following watching or loitering;
- inappropriate physical conduct, such as deliberately brushing up against a person, or unwelcome touching, hugging, or kissing;
- behaviours that are offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking; and
- sexually explicit or suggestive communication, including the use of emojis with sexual connotations, circulation of pornography or other graphic imagery, and sharing or threatening to share intimate images without consent.⁴⁰

An advance, request or other conduct may be sexual in nature even if the person has no sexual interest in the person towards whom that conduct is directed or is unaware their conduct is of a sexual nature. Some conduct, which may not amount to 'conduct of a sexual nature' on its own, may constitute sexual harassment if it forms a broader pattern of sexual conduct.

Sexual harassment is a widespread problem in the workplace: the Australian Human Rights Commission's national survey on sexual harassment in Australian workplaces in 2022 found that 33% of employees surveyed had experienced workplace sexual harassment in the previous five years (41% of women and 26% of men).⁴¹

What is sex-based harassment?

Harassment on the ground of sex, or sex-based harassment, is unwelcome conduct of a demeaning nature by reason of a person's sex or a characteristic that appertains or is imputed to a person of that sex, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Sex-based harassment may include:

- asking intrusive personal questions based on a person's sex;
- making inappropriate comments and jokes to a person based on their sex;
- displaying images or materials that are sexist, misogynistic or misandrist;
- making sexist, misogynistic or misandrist remarks about a specific person;
- requesting a person to engage in degrading conduct based on their sex; and
- deliberate exclusion from professional opportunities, meeting or decision-making processes based on their sex.

Harassment in the workplace

In the workplace, harassment is unlawful in the following circumstances:

- during recruitment;
- during the course of employment;
- at work-related functions including conferences, work functions, office Christmas parties and business or field trips;
- in relation to the termination of employment;
- when dealing with clients;
- where it occurs between workplace participants, such as where two people work at the same premises but have different employers; and
- where a person works at another workplace during the course of their employment, such as on secondment.⁴³

» EXAMPLE

Emily, an applicant for a summer clerkship, is asked during the interview whether she is married or has a boyfriend. The partner interviewing Emily says, "an attractive woman like you could go a long way in the legal profession." This question is not only inappropriate, but the interviewer's comment may also be considered sexual harassment if a reasonable person would have found it to be offensive, humiliating or intimidating. See *Hall v A and A Sheiban Pty Ltd* (1989) 85 ALR 503.

Sexual harassment under the Fair Work Act

The Australian Human Rights Commission's Respect@Work Report in 2020 ("the Respect@Work Report") made 55 recommendations seeking to address and prevent sexual harassment in Australian workplaces.⁴⁴

Key aspects of those recommendations were included in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (the *Respect@Work Amendment Act*), which amended the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth). The amendments included the insertion of Part 3-5A into the *Fair Work Act 2009* (Cth), which, among other things, prohibits sexual harassment in connection with work, and sets out the Fair Work Commission's jurisdiction to deal with sexual harassment disputes and make stop sexual harassment orders.⁴⁵

Prohibition on sexual harassment in the workplace

Part 3-5A of the *Fair Work Act 2009* (Cth) applies to sexual harassment that occurs in connection with a person's work. Specifically, it makes it unlawful for a person to sexually harass a second person who is:

- a worker⁴⁶ of a person conducting a business or undertaking (PCBU);
- seeking to become a worker of a PCBU; or
- conducting a PCBU,

where the harassment occurs in connection with the second person being:

- a worker of a PCBU;
- seeking to become a worker of a PCBU; or
- conducting a PCBU.⁴⁷

This prohibition applies to sexual harassment occurring on or after 6 March 2023 and is a civil remedy provision.⁴⁸

What is sexual harassment under the Fair Work Act?

The *Fair Work Act 2009* (Cth) adopts the definition of sexual harassment that is provided in the *Sex Discrimination Act 1984* (Cth).⁴⁹ As above, sexual harassment is conduct that amounts to:

- an unwelcome sexual advance;
- an unwelcome request for sexual favours; or
- other unwelcome conduct of a sexual nature⁵⁰

where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person who was harassed would be offended, humiliated or intimidated by the behaviour.⁵¹

Those circumstances include, but are not limited to, the following considerations:

- 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;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed; and
- any other relevant circumstance.⁵²

The person's reasons or motives are irrelevant in assessing whether they have engaged in sexual harassment.⁵³

Sexual harassment in the workplace amounts to serious misconduct and is an expressly valid ground for dismissal for serious misconduct.⁵⁴

When is sexual harassment 'in connection with' work?

Sexual harassment will be 'in connection with' work if the worker or PCBU is engaged in some form of conduct or activity, or is visiting a particular place, as a result of being a worker or PCBU.⁵⁵ This includes by way of example:

- attending a pub to continue a discussion that begun at the principal workplace;
- a vehicle used to travel to work, a conference or meeting, or to meet clients;
- visiting the workplace outside of hours because of a connection to work (e.g. to check the roster, collect payslips, or collect belongings from a locker);
- conduct that occurs outside of work hours, such as through text message, if the parties only have a professional relationship; or
- remaining in the workplace on a lunch break or after a shift has finished.

It is important that businesses take reasonable and proportionate measures to prevent sexual harassment from occurring in connection with work, in order to comply with the positive duty under the *Sex Discrimination Act 1984* (Cth). Businesses can also be held vicariously liable for the conduct of an employee or agent, as if they carried out the act themselves, if they do not take all reasonable steps to prevent the conduct from occurring.⁵⁶

Hostile work environments

It is unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex. The *Sex Discrimination Act 1984* (Cth) states that conduct in a workplace is hostile if a reasonable person would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the employee's sex.⁵⁷

In order to be unlawful, there is no requirement that the offensive behaviour be directed at the person making the complaint. Generally, the law recognises an employee's right to quiet enjoyment of their workplace. Conduct that unreasonably interferes with an employee's work performance or creates an intimidating, offensive or hostile work environment may constitute harassment even though the conduct is not specifically directed at the individual employee.

Conduct that may create a hostile work environment includes:

- nude or sexually suggestive pin-ups or posters;
- sexist, racist or ageist jokes or comments;
- practical jokes or sabotaging of work;
- swearing or crude language;
- sexual innuendo or talk about sexual matters; and
- sexist or inappropriate emails or text messages.

Harassment in areas other than employment

As set out above, legislation specifically makes harassment unlawful in a number of other areas, including in the provision of goods and services.⁵⁸ It is also unlawful for a legal practitioner to harass a client. Solicitors who engage in unlawful harassment in connection with the practice of law may face disciplinary action.⁵⁹

Workplace bullying

An eligible worker who reasonably believes that they have been bullied at work can apply to the Fair Work Commission for an order to stop the bullying.⁶⁰ This applies to workers⁶¹ in "constitutionally-covered businesses", as defined in the *Fair Work Act 2009* (Cth).⁶² The Fair Work Commission can only deal with applications for an order to stop bullying if the worker is bullied while they are at work in a "constitutionally-covered business".

What is bullying?

An eligible worker is being bullied if an individual or group of individuals repeatedly behaves unreasonably towards the worker (or towards a group of workers of which the worker is a member) and that behaviour creates a risk to health and safety.⁶³

Based on cases heard in various jurisdictions, the following behaviours may constitute bullying conduct:

- aggressive or intimidating conduct;⁶⁴
- belittling or humiliating comments;⁶⁵
- victimisation;⁶⁶
- spreading malicious rumours;⁶⁷
- practical jokes or 'initiation';⁶⁸
- exclusion from work-related events;⁶⁹ and
- unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level.⁷⁰

Additional conduct capable of being considered bullying behaviours under the legislation, depending on the content and the contact, may include:

- the making of vexatious allegations against a worker;
- spreading rude and/or inaccurate rumours about an individual; and
- conducting an investigation in a grossly unfair manner.⁷¹

In addition, an employer may be found liable in circumstances where they respond inadequately or inappropriately to bullying complaints made to them.⁷²

Reasonable management action

Bullying does not include reasonable management action carried out in a reasonable manner.⁷³

Reasonable management action may include:

- performance management processes;
- disciplinary action for misconduct;
- informing a worker about unsatisfactory work performance or inappropriate work behaviour;
- asking a worker to perform reasonable duties in keeping with their job; and
- maintaining reasonable workplace goals and standards.

The law accepts that managers need to be able to give feedback to help employees improve and address poor performance or behaviour. However, the way that the employer *takes* the action, or manages an employee's performance, must be carried out in a 'reasonable' way.

Victimisation

People experiencing discrimination and harassment are often afraid of retaliation or victimisation if they speak up. Victimisation occurs where a person takes, or threatens, detrimental action against another person because they have, or are believed to have:

- lodged, or are proposing to lodge, a complaint of discrimination or harassment;
- provided information or documents to an internal investigation or an external agency about discrimination or harassment;
- attended a conciliation conference or mediation;
- reasonably asserted their rights, or supported someone else's rights, under anti-discrimination laws; or
- made an allegation that a person has acted unlawfully under anti-discrimination laws. This applies even if the person does not explicitly refer to anti-discrimination law when raising the complaint.⁷⁴

Victimisation can also occur when a person subjects, or threatens to subject, another person to a detriment where it is known or suspected that the other person intends to do any of the above.⁷⁵

Subjecting someone to a detriment could also include:

- failing to adequately investigate allegations of harassment or discrimination;
- disciplining or dismissing a person who has complained of discrimination or harassment;
- ignoring a complaint; or
- ostracising or singling out a person who has complained of discrimination or harassment.

Under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth), victimisation can attract civil actions in addition to constituting a criminal offence. An initial complaint of discrimination or harassment does not have to be upheld for a victimisation complaint to succeed.

» EXAMPLE

James v Department of Justice, Corrective Services NSW [2017] NSWCATAD 238:

- Ms James, who worked for Corrective Services in Windsor, complained that her Director, Mr Calder, had bullied and harassed her and had touched her inappropriately. During the investigation of the complaint, Ms James was moved from Windsor to another position at Silverwater. Her doctor had recommended that she and Mr Calder not have contact until the investigation was complete.
- However, when the police finalised their investigation, she was still not allowed to return to Windsor, even though she had medical clearance to do so.
- Ms James complained to Anti-Discrimination NSW that she had been victimised because she had accused Mr Calder of sexual harassment. She claimed that she suffered the following detriments:
 - not being allowed to return to her job even though everything was finalised;
 - two hours extra travel time, higher fuel costs and wear and tear on her car to get to Silverwater;
 - the humiliation of having to do a job at a lower grade, even though she was paid at her usual rate;
 - damage to her career in missing out on opportunities for training and promotion; and
 - being interviewed by Mr Calder when she did apply for a promotion.

The Tribunal was satisfied that on the balance of probabilities, Ms James had suffered a detriment in not being returned to Windsor and awarded Ms James \$20,000 as compensation for the harm caused to her by the victimisation.

Vilification

Vilification means any public act that could incite or encourage hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground that they:

- are of a particular race;⁷⁶
- are (or are thought to be) homosexual;⁷⁷
- have (or are thought to have) HIV and/or AIDS;⁷⁸ or
- are (or are thought to be) transgender.⁷⁹

- Public acts include written or spoken communications with the public such as radio or TV broadcasts, actions or gestures that are observable by the public or the display of signs or insignia to the public.⁸⁰
- Previously, under the *Anti-Discrimination Act 1977* (NSW) there was an offence for serious vilification in each of these areas. In 2018, a provision was inserted into the *Crimes Act 1900* (NSW), creating an offence for intentionally or recklessly, publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity, intersex or HIV/AIDS status.⁸¹

» EXAMPLE

Case study (June 2024) from Anti-Discrimination New South Wales (ADNSW)⁸²

Carmen* is Jewish. She came across a vintage store which openly sells Nazi memorabilia including a copy of “Mein Kampf”, Nazi uniforms, Swastikas, “Nazi Youden” propaganda, and Nazi pamphlets. She said she felt the memorabilia vilified Jewish people on the ground of race and religion, and made her and other Jewish people feel unsafe.

Carmen lodged a complaint with ADNSW. She was not aware that the display of Nazi symbols was now an offence under section 93ZA of the *Crimes Act 1900* (NSW) and that penalties applied. The conciliation officer alerted Carmen to this.

When Carmen contacted NSW Police, she was advised that the store was already under investigation. Carmen was satisfied with the police advice that the matter was under investigation.

** Name has been changed to protect the privacy of the individual*

The Fair Work Commission's jurisdiction to deal with sexual harassment disputes

A person alleging to have been sexually harassed may apply to the Fair Work Commission to make a stop sexual harassment order or otherwise deal with the dispute.⁸³

In deciding whether to make a stop sexual harassment order, the Fair Work Commission will consider whether the person has been sexually harassed and whether they are at risk of continued sexual harassment.⁸⁴ In their assessment of the evidence, the Fair Work Commission must consider:

- any interim or final outcomes arising out of an investigation into the matter;
- the employer's grievance procedures;

- any outcomes (final or interim) of any internal grievance procedure utilised by a person subject to the harassment; and
- any other relevant matter.⁸⁵

A stop order will be made to prevent sexual harassment from reoccurring, for example by ordering:

- a harasser to not do certain acts, such as using language that is suggestive;
- a review of workplace policies;
- training for staff on appropriate workplace behaviour; or
- changes to working arrangements.

Dealing with the dispute in other ways may involve mediation or conciliation, or by making a recommendation.⁸⁶

» EXAMPLE 1

Emma is a solicitor at a family law practice. She is also a new mother who has just returned to the workplace. One morning, Emma attends a directions hearing in Court where she awaits to be called by the associate. While she waits in the gallery, another solicitor known to Emma professionally sits beside her and whispers “*wow, you’re looking physically well after just having a child*”. These comments made Emma feel uncomfortable. Emma and this other person are not employed by the same firm but because she was at court as a result of her job, it may constitute unlawful sexual harassment for the purpose of the *Fair Work Act 2009* (Cth). Emma may apply for stop sexual harassment order to be made by the Fair Work Commission.

» EXAMPLE 2

Later that day, Emma is reading the afternoon list pinned to the Court wall. A former client who is attending a separate hearing, approaches Emma and says “*Emma! You’re back. Unlike others, having a child has done wonders for your body. You look better than you did before you had a child*”. Again, the former client is not an employee of Emma’s firm, but the circumstances may still constitute unlawful sexual harassment.

Liability for unlawful discrimination, harassment, vilification and victimisation

At a Commonwealth level there is no statutory limit to the amount of damages which may be awarded to a successful complainant. In NSW, there is a statutory ceiling on a single respondent paying damages of \$100,000.⁸⁷

In addition to civil liability, under Commonwealth legislation, victimisation is an offence and attracts a penalty of imprisonment.⁸⁸

Personal liability

Legal practitioners may be personally liable for their own acts of unlawful discrimination, harassment, victimisation or vilification, both as an employee and an employer.

In addition, any legal practitioner who, in the course of practice, engages in conduct which constitutes discrimination, sexual harassment or workplace bullying may be subject to disciplinary proceedings.⁸⁹

Direct liability

Every partner in a firm other than an incorporated limited partnership is liable jointly with the other partners for all debts and obligations of the firm incurred while they are a partner. This means that partners may be liable for the unlawful acts of the firm, for example where the firm as a whole makes a decision that results in discrimination or harassment.⁹⁰

Each principal of a law practice must ensure that reasonable steps are taken to ensure that all legal practitioners of the law practice comply with their obligations under the Uniform Law and Uniform Rules and their other professional obligations. Principals of a law practice must also ensure that legal services are provided in accordance with the Uniform Law, Uniform Rules and other professional obligations.⁹¹

Further, if a law practice contravenes any provision of the Uniform Law or Uniform Rules, a principal of the law practice is taken to have contravened that provision if the principal knowingly authorised or permitted the contravention, or if the principal was in, or ought reasonably to have been in, a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the contravention.⁹²

Work, health and safety obligations

Each PCBU has a duty under the *Work Health and Safety Act 2011* (NSW) to ensure the health and safety of its workers and others as far as is reasonably practicable.⁹³ Health is defined as including both physical and psychological health.⁹⁴ Such a duty requires a PCBU to eliminate risks to health and safety, to the extent that is reasonably practicable. If it is not reasonably practicable to eliminate the risks, the employer must minimise the risks so far as is reasonably practicable.⁹⁵

In addition, officers must exercise due diligence to ensure that the PCBU meets its obligations and workers must take reasonable care that their acts or omissions do not adversely affect the health and safety of others.⁹⁶

In October 2022, the *Work Health and Safety Regulation 2017* (NSW) was amended to provide more explicit guidance for PCBUs managing psychosocial risks to health and safety in the workplace and New South Wales has also introduced a Code of Conduct to assist PCBU's manage these risks.⁹⁷ The amendments impose a positive duty on PCBUs to identify psychosocial hazards, manage psychosocial risks, and implement control measures to eliminate or reduce those risks, so far as reasonably practicable.⁹⁸

A psychosocial hazard is a type of hazard that arises from or is related to various aspects of work, including:

- the design or management of work;
- the work environment;
- plant (equipment) at the workplace; or
- workplace interactions or behaviours,

that has the potential to cause psychological harm to workers or other individuals, regardless of whether it also causes physical harm.⁹⁹

A psychosocial risk is a risk to health or safety faced by workers or other individuals because of exposure to a psychosocial hazard in the workplace.¹⁰⁰

A PCBU must implement control measures to eliminate psychosocial risks as far as reasonably practicable, and if that is not possible to minimise psychosocial risks so far as reasonably practicable.¹⁰¹ These control measures must be fit for purpose, suitable for the nature and duration of the work, and installed, set up and used correctly.¹⁰² In determining what control measures to implement, a PCBU must have regard to:

- the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards;
- how the psychosocial hazards may interact or combine;
- the design of work, including job demands and tasks;
- the systems of work, including how work is managed, organised and supported, and
- the design and layout, and environmental conditions, of the workplace, including the provision of:
- safe means of entering and exiting the workplace, and
- facilities for the welfare of workers;
- the design and layout, and environmental conditions, of workers' accommodation;
- the plant, substances and structures at the workplace;
- workplace interactions or behaviours;
- the information, training, instruction and supervision provided to workers; and
- all other relevant matters.¹⁰³

A PCBU must ensure that any control measures implemented remain effective and is required to review and revise those control measures where necessary.¹⁰⁴ For example, it would be necessary to review control measures where:

- the control measure did not control the risk (e.g. a notifiable incident occurred which the control measure was supposed to prevent);
- a new hazard or risk is identified;
- before a change at the workplace that is likely to give rise to a new or different risk to health or safety that the measure may not effectively control; or
- the results of consultation with workers indicate that a review is necessary.¹⁰⁵

Further than their work, health and safety obligations, PCBU and employers are subject to further legal requirements to prevent discrimination at work, including obligations under the *Sex Discrimination Act 1984* (Cth).

Duty to eliminate unlawful sex discrimination, sexual harassment, harassment on the ground of sex hostile workplace environments and acts of victimisation

Following the Respect@Work Report, the *Sex Discrimination Act 1984* (Cth) now imposes a positive duty on employers to eliminate sex discrimination, sexual harassment, harassment on the ground of sex, hostile workplace environments, and acts of victimisation as far as possible.¹⁰⁶ This duty requires employers to take reasonable and proportionate measures, taking into account relevant matters, to eliminate discriminatory conduct from occurring in the workplace or in connection with work.¹⁰⁷ Compliance with this duty will be monitored, assessed and enforced by the Australian Human Rights Commission.¹⁰⁸

A Model Policy for complying with the positive duty under the *Sex Discrimination Act 1984* (Cth) is being drafted in accordance with the Australian Human Rights Commission's guidelines.¹⁰⁹

» EXAMPLE

Xinying, a junior lawyer at Lloyd & Keppel law firm, is often subjected to sexist jokes by her managing partner, Nic, and co-worker, Rory. Xinying does not find these jokes funny. Because Xinying does not laugh along, Nic and Rory often exclude her from team meetings. This may amount to a claim of sexual harassment and discrimination on the grounds of sex. Lloyd & Keppel is obliged to manage this risk in accordance with the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2017* (NSW), including with the implementation of control measures. Lloyd & Keppel has similar but distinct positive duty obligations imposed by the *Sex Discrimination Act 1984* (Cth) to eliminate sex discrimination, sexual harassment, harassment on the ground of sex, hostile workplace environments, and acts of victimisation as far as possible. Further, Xinying may bring a claim against Lloyd & Keppel, who may be found vicariously liable for unlawful discrimination and harassment under state or federal discrimination law unless they have taken reasonable steps to prevent it.

Accessory liability

Legal practitioners may also be liable as accessories if they aid, permit, cause or induce unlawful discrimination, harassment, victimisation or vilification.¹¹⁰ For example, if a solicitor is aware that a colleague in the firm is being sexually harassed by a client but ignores the conduct, they may be liable as an accessory as a result of having permitted that conduct.¹¹¹

Vicarious liability

Under NSW anti-discrimination legislation, a principal or employer may be vicariously liable for an act done by an agent or employee unless the principal or employer did not authorise the act either expressly or by implication.¹¹² A principal or employer will not be liable if they took all reasonable steps to prevent the agent or employee from contravening the law.¹¹³

Some Commonwealth legislation also makes specific provision for the vicarious liability of the unlawful conduct of employees.¹¹⁴ For the purpose of the *Fair Work Act 2009* (Cth) and *Sex Discrimination Act 1984* (Cth), for example, an employer may be held vicariously liable for sexual harassment by an employee or agent in connection with the employment unless it can demonstrate that it has taken all reasonable steps to prevent it.¹¹⁵

A firm may be vicariously liable for the unlawful conduct of all staff including:

- partners;
- professional staff;
- business services staff; and
- persons employed on commission.

A principal or an employer may be held vicariously liable for the actions of its agents or employees if the agent or employee contravenes the *Anti-Discrimination Act 1977* (NSW) in the course of their employment and the principal or employer, expressly or by implication, authorised the contravention.¹¹⁶ The term "authorise" has been held to mean "sanction, approve, countenance and permit" and "permission may be inferred from inactivity and indifference where the person sought to be made liable is aware that some particular behaviour may occur".¹¹⁷ In some circumstances, firms may also be liable for the conduct of anyone with whom their staff interacts in the course of their work, such as clients.¹¹⁸

» EXAMPLE

A major client of Lloyd & Keppel law firm insists that all weekly meetings be held at 7.30am on-site at a manufacturing facility on the outskirts of the city. This could amount to discrimination against a solicitor on the grounds of carer's responsibility. Lloyd & Keppel may be liable for the conduct of the client if the firm exercises some measure of control in these circumstances.

This has the effect that under both State and Federal law, employers are required to take active steps to minimise the risk of unlawful behaviour occurring in the workplace or in connection with an employee's employment.

In order to take all reasonable steps a legal practice should:

- have clear and written policies on equal opportunity, discrimination and harassment (including sexual harassment and harassment on the ground of sex) which make it clear that conduct that amounts to unlawful discrimination and harassment (including sexual harassment or harassment on the ground of sex) and victimisation and vilification are unacceptable and will not be tolerated;
- have a clear, written and fair grievance handling procedure, and follow it promptly, without victimisation;
- distribute these policies and procedures to all partners, managers and staff and have these generally accessible;
- regularly train all partners, managers and staff about their rights and responsibilities under equal opportunity laws, including how to manage grievances effectively;
- demonstrate a strong commitment from senior management to respectful and inclusive

workplace behaviour;

- monitor conduct in the workplace to ensure that appropriate standards of behaviour are being observed; and
- identify and address any barriers to the implementation of the firm's policies on equal opportunity, discrimination and harassment, and regularly review and update them.

Application of these principles

The following chapters of this Guide set out how the law can be applied by legal practices in their employment practices, exploring the application of the law in relation to:

- recruitment;
- conditions of employment;
- training;
- transfer;
- promotions;
- termination of employment; and
- client service.

SECTION THREE: RECRUITMENT

What is discrimination in recruitment?

All Australian anti-discrimination laws prohibit discrimination in recruitment processes. It is unlawful for an employer to discriminate against someone based on specific grounds when selecting applicants for prospective employment with the employer.

Under NSW and Commonwealth anti-discrimination legislation, “recruitment” covers not only how applicants are chosen but also all the steps leading to their appointment. Discriminatory practices in advertising, short-listing and interviewing may also be unlawful.

Law firms should take care not to discriminate against candidates and applicants including when recruiting new partners from outside of the firm. The *Anti-Discrimination Act 1977* (NSW) makes it unlawful for partnerships with more than six partners to discriminate on any of the Protected Attributes in inviting any person to join a proposed or existing partnership.¹¹⁹ There are similar provisions in some Commonwealth legislation.¹²⁰

Legal practices should establish and follow objective recruitment criteria which are not directly or indirectly discriminatory and not allow personal biases, prejudices or stereotyping to impact the selection process.

Exception: inherent requirements of the role

In certain limited circumstances, it will not be discriminatory to refuse to recruit a person from a particular group, or a person with a particular attribute, for a position with a legal practice. These circumstances include that the person cannot carry out the inherent requirements of the job because of their disability, or because of their responsibilities as a carer.¹²¹

The exception in relation to disabilities only applies where the employer or potential employer has also taken into account the person’s:

- past training;
- qualifications;
- experience relevant to the particular employment;
- if the person is already employed by the employer, the person’s performance as an employee; and
- all other relevant factors that it is reasonable to take into account,
- and determines that because of their disability, the person:

- would be unable to carry out the inherent requirements of the particular employment; and
- would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer.¹²²

In relation to carer’s responsibility, the exception only applies where the employer or potential employer takes into account the person’s:

- past training;
- qualifications;
- experience relevant to the particular employment;
- if the person is already employed by the employer, the person’s performance as an employee; and
- all other relevant factors that it is reasonable to take into account,
- and determines that because of their responsibilities as a carer, the person:
- would be unable to carry out the inherent requirements of the particular employment; and
- would, in order to carry out those requirements, require arrangements that are not required by persons without those responsibilities as a carer and the making of which would impose an unjustifiable hardship on the employer.¹²³

The inherent requirements of a job are what would be considered, on an objective basis, to be the essential requirements of the job. These will vary depending upon the nature of the work and extend beyond physical capacity to perform the job.¹²⁴

The exceptions make it clear that an employer has an obligation to take relevant factors into account about a person’s ability to perform the role and to make reasonable adjustments to accommodate a person with a disability or with carer’s responsibilities.

Firms should consider whether the services or facilities required for reasonable adjustment would constitute an ‘unjustifiable hardship’ on the firm. In determining what constitutes unjustifiable hardship, all relevant circumstances are to be taken into account, including:

- the nature of the benefit or detriment likely to accrue or be suffered by the persons concerned;
- the effect of the disability or responsibilities as a carer of a person concerned; and
- the financial circumstances and estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.¹²⁵

Unjustifiable hardship is based on an assessment of what is fair and reasonable in the circumstances. Before coming to this conclusion, a person or organisation should thoroughly consider their capacity and ability to provide access or make adjustments as necessary.¹²⁶ Commonwealth legislation explicitly states that the burden of proving that something would impose an unjustifiable hardship lies on a firm, as the organisation claiming the exception.¹²⁷

Exception: genuine occupational qualification

In NSW, there are separate limited exceptions that apply if it is a genuine occupational qualification of the job that a person of a particular race, sex or age be employed.¹²⁸

» EXAMPLE

A legal service is established to provide legal advice and representation to the Korean community, with a focus on assisting those persons who do not speak English. It would not be discriminatory for this service to refuse to hire a solicitor who does not speak Korean.

The *Sex Discrimination Act 1984* (Cth) provides an exception to unlawful discrimination under that Act in cases where it is a genuine occupational qualification to be a person of a specific sex.¹²⁹

Other exceptions can be granted

In NSW, the President of Anti-Discrimination NSW can grant exemptions from the *Anti-Discrimination Act 1977* (NSW) to permit discrimination in respect of a person of a certain class, an activity or class of activity, or any other matter or circumstance. Such an exception can be subject to conditions.¹³⁰ The exemptions generally relate to providing employment opportunities or access to services for people who have previously been disadvantaged or discriminated against on one of the grounds covered by the legislation such as affirmative action programs for women or Aboriginal and Torres Strait Islander people or people with disabilities, or programs to assist older workers.

Using recruitment agents

Law practices that use a recruitment agency as part of their recruitment of staff may also be jointly legally liable for any discriminatory conduct by the agency in the recruitment process. When using a recruitment agency, it is vital to take steps to make sure that the agent is aware that the firm expects the best candidates to be interviewed for the position, regardless of their race, gender, age, disability or other attributes not related to their skills and qualifications. The recruitment agent should be given a copy of the firm's equal opportunity, discrimination and harassment policies and be required to comply with its terms.

» EXAMPLE

An international law firm requires a solicitor for its expanding commercial law area. The firm's human resources manager enters into a contract with a legal recruitment agency to advertise the position, conduct initial interviews and provide a shortlist of the most suitable applicants.

Priya, a highly qualified commercial lawyer, applies for the position and is interviewed by Sara, a recruitment consultant with the agency who asks Priya how many children she has and what arrangements she has for the children to be looked after if they become ill while she is at work. Priya is confused and unsettled by the questions about her childcare arrangements and performs badly in the interview.

Arguably, Sara has discriminated against Priya on the grounds of her sex and carer's responsibilities by asking her questions that are not about her skills and qualifications but about her childcare arrangements. The firm may be jointly liable for the recruitment agent's discrimination.

In *Bridges v Ballarat University College* (1993) EOC [92-527] the Equal Opportunity Board of Victoria found that a non-parent would not have been asked these "inappropriate and irrelevant questions".

SECTION FOUR: CONDITIONS OF EMPLOYMENT

In accordance with State and Commonwealth anti-discrimination legislation, legal practices have an obligation not to discriminate against employees in providing work conditions or other substantive benefits. Conditions of employment include a wide range of matters.

Legal practices that offer conditions of employment in a way that is less advantageous to particular groups because of Protected Attributes may be discriminating against those groups. Firms that are constituted as partnerships should be mindful that it is unlawful for any of the partners (in a partnership of six or more partners) to discriminate against a partner by denying them access or limiting their access to any benefit arising from being a partner.¹³¹

» EXAMPLE

Bonella v Wollongong City Council [2001] NSWADT 194

It was held that an employer had discriminated against five of its female employees with regard to the use of company vehicles. Company vehicles had been allocated to 75 per cent of male assistant managers but only 50 per cent of female assistant managers. The allocation of vehicles was a condition of employment offered to some employees. As it was a benefit, the Council had discriminated against female employees on the basis of sex. This decision was upheld on appeal.¹³²

In the legal workplace, there are two areas where firms are especially at risk of engaging in discriminatory practices in relation to conditions of employment. These are:

- remuneration; and
- flexible work arrangements.

Firms should be aware that non-government employers with 100 or more employees are required to report annually to the Workplace Gender Equality Agency on a number of gender equality indicators.¹³³ These include remuneration between women and men and availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees.¹³⁴ Employers with 500 or more employees have additional reporting and compliance obligations under the *Workplace Gender Equality Act 2012* (Cth) to select and meet gender equality targets.¹³⁵

Remuneration and the gender pay gap

Research has highlighted significant barriers to pay equity for female practitioners, despite their growing numbers in the profession.¹³⁶ Generally female solicitors have earned, and continue to earn, less than male colleagues.

Legal practices that fail to remunerate female solicitors on the same basis as male solicitors for the same type of work may be discriminating against them on the ground of sex. This is unlawful under both State and Commonwealth anti-discrimination legislation. Employees should be rewarded on the basis of merit.

Flexible work arrangements

Under NSW and Commonwealth anti-discrimination legislation, legal practices that fail to provide and support flexible work practices may be discriminating against employees on the grounds of sex, carer's responsibilities, age and/or disability.¹³⁷ This may also be the case under the *Fair Work Act 2009* (Cth) where the employer does not have reasonable business grounds for refusing a request for flexible work arrangements.¹³⁸

A range of tribunals operating under NSW or similar legislation have held that the failure to provide and support part-time work or flexible work practices for women with children may amount to discrimination on the basis of sex or carer's responsibilities.¹³⁹ There is generally no difficulty establishing the first two requirements of indirect discrimination, namely that the employee was required to comply with a requirement or condition of full-time work (on-site) and that workers without, for example, carer's responsibilities are more able to comply with that condition. Most arguments usually centre on the third element, which is whether the attendance or full-time requirements are reasonable having regard to the circumstances.

When considering what is reasonable, legal practices should be aware that tribunals are unlikely to accept the argument that flexible work practices are unworkable just because they have never been tried in a particular occupation before (e.g. at a senior level (*Hickie v Hunt & Hunt Solicitors*¹⁴⁰) or in a supervisory position (*Bogle v Metropolitan Health Service Board*¹⁴¹)). Employment tribunals have shown sensitivity to the argument that the use of flexible work practices is more than reasonable, given its potential to enhance profitability through the retention of valued staff.¹⁴²

It has also been found to be unreasonable where an application for part-time work is refused but there is work available for the employee to do which they are able to do, even if that work is different to the work that the employee was previously doing when working full-time.¹⁴³

Similarly, if remote or hybrid work has been proven to be effective and become an established practice at a workplace, denying this opportunity inflexibly, without justification or considering an employee's personal circumstances could be perceived as unreasonable¹⁴⁴ and discriminatory.

» EXAMPLE

Jai is a partner in the insolvency group of a large law firm. He and his partner have recently had a child. Jai submits a proposal to the firm's management committee requesting that he be allowed to work part-time in order to care for his child. The management committee refuses the request on the basis that "in order to be able to manage their practices effectively, partners must work full-time".

This is potentially discriminatory on the grounds of carer's responsibilities. By imposing a requirement to work full-time on partners, the firm may be indirectly discriminating against partners with responsibilities to care for or support family members. The onus would be on Jai to demonstrate that the requirement is an unreasonable one in the circumstances. The firm has an obligation to consider the proposal and not reject it without considering all the options.

In addition to the *Anti-Discrimination Act 1977* (NSW) and the Commonwealth suite of anti-discrimination legislation, the *Fair Work Act 2009* (Cth) provides rights and remedies to employees who are subject to adverse action on a prohibited ground of discrimination such as family responsibilities.¹⁴⁵

SECTION FIVE: TRAINING FOR STAFF

Training is important in enhancing an employee's value to the firm, as well as developing the employee's potential and enjoyment of the job. Anti-discrimination laws require that the decision-making processes used to determine which employees are to be offered training are non-discriminatory.

Training and development opportunities within a legal practice should be allocated to staff objectively, such as on the basis of their duties, skill development needs and career interests. Access to training should not be denied because of irrelevant characteristics such as age or gender.

» EXAMPLE

A firm conducts leadership training sessions for senior associates during a long weekend. A senior associate who is Jewish is unable to attend the training because his religion requires strict observance of a Jewish feast day. The firm has denied the senior associate access to training by imposing a requirement (weekend attendance) with which he cannot comply and with which a substantial proportion of persons of his ethno-religious background cannot comply. Unless it can be shown that the requirement of weekend training is reasonable in the circumstances, it may be indirectly discriminatory on the ground of race or ethno-religious background.

An employer can place a reasonable requirement on an employee that they undertake internally provided training as part of their contract of employment. This will not be discriminatory unless the person chosen for the training is selected on one of the legislative grounds of discrimination.¹⁴⁶

SECTION SIX: TRANSFERS

In some firms, a transfer into another position or office with the same employer is a pre-requisite to future promotions. For this reason, it is important that firms utilise a non-discriminatory transfer system and that decisions about who will qualify for a transfer are based on merit.

Decisions to transfer staff intrastate, interstate or overseas within the same firm should always be made on the basis of merit. There should be reasonable grounds for any transfer.¹⁴⁷ Law firms that take into account Protected Attributes such as a person's age, gender or carer's responsibilities when deciding whether or not an employee should be transferred may be unlawfully discriminating against that person or other candidates.

» EXAMPLE

A firm wants to transfer a solicitor from Sydney to its Perth office for three years. The position in Perth requires an experienced taxation lawyer with excellent client skills, capable of setting up and developing a taxation practice. Layla, a tax lawyer with over 10 years' experience who has established a successful tax practice in the Sydney office, says she is interested in the transfer. The firm's staff partner decides not to transfer her because she is pregnant, and he is concerned that a move may be too stressful for her. He decides to transfer a young male solicitor with less experience and who has no family responsibilities.

The staff partner has denied Layla a transfer because of her pregnancy. The firm and the partner have unlawfully discriminated against Layla on the basis of her sex and pregnancy status.

An employer may generally require an employee to transfer to another position within the workplace, including where there are other arrangements being made such as a general restructure of the workplace or where a firm itself physically relocates.¹⁴⁸

SECTION SEVEN: PROMOTIONS

The method employed by legal practices to determine eligibility for promotion must be non-discriminatory. This means that legal practices should promote employees on the basis of merit and not take into account Protected Attributes. The crucial factor is whether the person applying or being considered for promotion is the best person for the position.

The more open and transparent the process for promotions, the more likely that employees will be satisfied that the process is not discriminatory.

To make a finding of discrimination it is not necessary to find that a person would have been promoted except for the relevant Protected Attribute. It is only necessary to show that the person was treated in a way that breached anti-discrimination law at some point in the selection process.¹⁴⁹

» EXAMPLE

Maryam (aged 49) and Nasir (aged 30) are senior associates with a 15-partner firm. Both apply to be promoted to partnership. Both have essentially the same level of experience and skill. The firm decides to promote Nasir but not Maryam on the basis that Nasir, being younger, is likely to have a longer future with the firm.

The firm has refused Maryam access to promotion on the basis of her age. This is unlawful age discrimination.

In promoting solicitors to existing or proposed partnerships, partners should take care not to discriminate on any of the Protected Attributes.¹⁵⁰

Any person who works for a law firm and is meeting the required performance standards has as much right to progress within the firm as anyone else with the same qualifications who is doing the same type of work. 'Opportunities for promotion' is not defined in the legislation but would include access to work on major projects or high-profile matters, opportunities to attend client functions and/or access to mentors within the firm. Where promotional opportunities are linked to performance reviews, a failure to provide a performance review based on a Protected Attribute, for example to a pregnant employee, may be unlawful discrimination.

SECTION EIGHT: TERMINATION OF EMPLOYMENT

A legal practice cannot make an employee redundant for a discriminatory reason, even if it is only one of the reasons for the action being taken.

» EXAMPLE

Jeanne is a senior associate with a medium sized firm specialising in insurance law. Her annual performance reviews have been very positive and two years ago she was awarded a bonus for excellent client service. She has been told that she will be put up for partnership next year.

Jeanne tells her supervising partner that she is 20 weeks pregnant. During her performance review a few days later he informs her that there are serious deficiencies with her performance and that it is likely that she will not be made a partner.

A few weeks later she is informed that the firm no longer has a position for her.

It would appear that Jeanne has been discriminated against because of her pregnancy. The fact that performance issues were raised only after Jeanne advised her employer of her pregnancy and that she was dismissed shortly after, suggests that the pregnancy may have been a reason for the dismissal.

Termination for misconduct, including discrimination or harassment

In some circumstances a firm may wish to terminate an employee's employment because of misconduct, such as sexual harassment. An employee who is dismissed for these reasons may attempt to seek reinstatement or other remedies on the basis that their dismissal was unfair.

Employers considering termination because the employee has engaged in conduct that is discriminatory or constitutes harassment should always consider (among other things) the application of unfair dismissal and general protection laws, including:

- Whether there is a valid reason to dismiss – for example, is it clear from the facts that the alleged discrimination or harassment occurred? Did the conduct amount to serious misconduct? Are there no fair and workable alternatives to dismissal? Can it be clearly and reasonably demonstrated in hindsight that the termination is warranted and fair in all the circumstances?

- The application of procedural fairness – for example, has the person against whom the complaint has been made had an opportunity to respond? Has the investigatory and decision-making process been thorough and transparent? Are all records clear about what occurred and why? Is it clear that the process of assessment has been fair, impartial and reasonable in all the circumstances?

Employers should also follow their own policies and procedures, particularly if these are incorporated as a term of the employee's employment.

Examples of reasons for which an employer may be able to summarily terminate an employee for harassment are:

- a failure to obey a lawful and reasonable direction, through a deliberate breach of policy or otherwise failing to obey an order to cease harassing persons connected with the workplace; or
- serious misconduct, either in connection with an incident of harassment or general patterns of harassment. Sexual harassment is expressly defined as being serious misconduct.¹⁵¹

An employer may direct an employee to refrain from harassing or discriminating against a fellow employee either in the workplace or in any other circumstances where the harassment in question is work related and can reasonably be said to detrimentally affect performance at work.

It is lawful for an employer to give an employee a direction to prevent the repetition of sexual harassment of a co-employee outside of the workplace where that harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (i.e. it is employment related); and the harassment has and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the "efficient, equitable and proper conduct" of the employer's business because of the proximity of the harasser and the harassed person in the workplace.¹⁵²

Harassment may be a form of misconduct. Whether or not it is serious enough to warrant summary dismissal will depend on the nature of the harassment and all the circumstances of the case.

Employers should always keep clear records showing that all pertinent facts and options have been carefully considered and that the official decision to terminate was balanced and impartial.

Resignations

An employee may appear to have left a workplace voluntarily. However, they may lodge a complaint of constructive unfair dismissal and could also bring a complaint under Commonwealth anti-discrimination law if they feel they had no option but to resign due to factors such as harassment or discrimination.¹⁵³ It is essential for legal practices to carefully monitor their workplaces to ensure appropriate standards of behaviour and to have in place accessible and fair grievance handling procedures.

Retirement

Compulsory retirement is when an employer forces an employee to resign because of their age. This is expressly unlawful under the *Anti-Discrimination Act 1977* (NSW).¹⁵⁴ The retirement of mature aged partners and other legal practitioners may result in significant losses of skill and experience to the firm. Firms should consider the development of part-time and flexible working arrangements that will encourage mature aged practitioners to remain with the firm. Firms should also consider practices such as contract work and consultancy that will continue to allow them to use the skills and experience of these practitioners after retirement.

Voluntary redundancy

Firms that choose to implement a voluntary redundancy scheme should ensure that an employee's age, sex, race or other Protected Attributes are not a determining factor in accessing the scheme or receiving a particular level of redundancy payment.

It is generally permissible to give different levels of benefits according to different lengths of service.

Compulsory redundancy

Firms should not make compulsory redundancy decisions based on discriminatory factors or Protected Attributes, such as sex, race, marital status, pregnancy or potential pregnancy, disability, age, homosexuality, transgender and/or responsibilities as a carer. Firms should take care to avoid both direct and indirect discrimination.

SECTION NINE: PROVIDING A SERVICE TO CLIENTS

Under NSW and Commonwealth anti-discrimination legislation, it is unlawful to discriminate against or harass a person in the course of providing goods or services. The provision of goods or services need not be for payment for these provisions to apply.¹⁵⁵

In addition, legal practitioners are prohibited from engaging in unlawful discrimination, including all forms of harassment, in connection with the practice of law.¹⁵⁶

What this means for legal practices

Legal practitioners who harass or discriminate against clients in the course of providing legal services may be liable under anti-discrimination laws.¹⁵⁷ They may also be subject to disciplinary action, including loss of their practising certificate.¹⁵⁸ In addition, discrimination and/or harassment by a practitioner in the course of providing legal services can jeopardise and possibly end a relationship with a client and may also attract adverse publicity for the firm and/or the practitioner involved.

As set out in Section Two, legal practices may be vicariously liable for the conduct of the staff that harass or discriminate against clients unless they have taken all reasonable steps to prevent this conduct.

What if the services are not actually carried out?

The legislation also covers circumstances where a firm may be merely *offering* to provide legal services, such as in advertising, tendering or meeting with a potential client.¹⁵⁹

» EXAMPLE 1

A lesbian couple asks Aziz, a solicitor, to act on their behalf against a doctor who has refused them access to IVF procedures. Aziz is keen to take the case. However, the firm's managing partner is strongly opposed to homosexual parenting and refuses to allow Aziz to take instructions from the couple.

In refusing to provide legal services to the lesbian couple, the managing partner has discriminated against them on the ground of their sexual orientation.

» EXAMPLE 2

Noor, a solicitor in a city-based practice, is telephoned by Andres, who wants the firm to act for him in defamation proceedings. After taking initial instructions, Noor asks Andres to attend a meeting with her and one of the firm's partners so that they can discuss the matter in more detail. Andres tells Noor that he has a vision impairment and will need to bring his guide dog to the meeting. Noor tells Andres that she is concerned that this may compromise the firm's hygiene standards and instead arranges for the meeting to take place at Andres's home. Andres is annoyed, as he has to pay the travel costs of Noor and the partner.

Noor's conduct may constitute discrimination on the ground of disability in the provision of services.

» EXAMPLE 3

Abdi, a junior solicitor in a suburban practice, takes his client Ebony, a young businesswoman, to lunch to celebrate the settling of the purchase of one of her properties. During the lunch he talks openly about his sex life and offers to give Ebony a massage to help her to relax. Ebony feels uncomfortable and leaves the restaurant.

During the next week Abdi telephones Ebony at work several times and asks her out. She refuses. One night Abdi arrives at Ebony's house unexpectedly with a bottle of champagne and some massage oil. He repeats his offer of a massage and asks her to pose nude for a photography course he is doing.

Ebony could complain that she has been sexually harassed in the provision of services. Abdi's firm could be vicariously liable for his conduct if it cannot demonstrate that it has taken all reasonable steps to prevent the harassment (See *Evans v Lee and Anor* [1996] HREOCA 8 (3 May 1996)).

SECTION TEN: PUTTING POLICIES INTO PLACE AND MANAGING COMPLAINTS

Putting policies into place

Policies prohibiting discrimination, workplace bullying or harassment in the workplace should be clear, accessible and appropriate for the size and nature of the workplace in question. They should:

- clearly state that such conduct is unlawful under equal opportunity and anti-discrimination legislation and will not be tolerated;
- clearly define inappropriate behaviour and give examples of behaviour that will not be tolerated;
- state clearly that termination is a possible outcome of any relevant breach; and
- give details of the complaint procedures in place and explanations of how to access them.

Model policies relating to equal opportunity and harassment are attached to this Guide. Law firms may choose to use or adapt these model procedures or to write their own. Law firms may also wish to consider whether these policies should be contractual or whether the policies should be clearly stated to not be contractual in nature.¹⁶⁰ Making employee policies part of employment contracts ensures they are legally enforceable and provides clarity about rights and obligations. Conversely, this can reduce an employer's flexibility to update or adapt policies without employee consent, potentially making compliance and administration more burdensome, and could result in any failure of an employer to follow its own policy constituting a breach of contract.

Employers should take all reasonable steps to promote policy awareness and to educate employees about what their policies mean and how they operate. For example, relevant policies should be included in staff handbooks or other standing orders. Employees should also receive training about the implications and operations of each policy. The policies should be regularly reviewed and amended as necessary.

Bystanders

A bystander is someone who witnesses discrimination, harassment, sexual harassment or bullying in the workplace, or has direct knowledge of the conduct.

Bystanders should be encouraged to:

- in the first instance, support the affected person to ask the other person who is discriminating against, harassing, sexually harassing or bullying them to stop and make it clear that the behaviour is offensive or unwelcome, and/or

- if this does not resolve the issue, or the affected person does not feel comfortable raising the matter directly, encourage that person to make a complaint.

In some circumstances a complaint may not be made by the affected person but by the bystander. Where a complaint is made by a bystander, the consent of the affected person should be obtained for the complaint to be progressed. Where an affected person does not want a complaint to be made by the bystander, then the complaint could be treated as an anonymous complaint and recorded as such.

Essentials of effective complaint management

Legal practices should proactively conduct risk assessments and regularly review and monitor systems to reduce the risk of discrimination and harassment occurring. This is especially true in light of recent legislative reforms imposing a positive duty on employers:

- to eliminate sex discrimination, sexual harassment, harassment on the ground of sex, hostile workplace environments and acts of victimisation;¹⁶¹ and
- to identify psychosocial hazards, manage psychosocial risks, and implement control measures to eliminate or reduce those risks.¹⁶²

However, although routine assessments will help in identifying psychosocial hazards, there will be instances where an employer is only made aware of such hazards when they are reported.

As such, legal practices should have in place procedures for effectively responding to and managing complaints of discrimination and harassment. Failing to manage complaints may have negative consequences for legal practices, including an increased risk of complaints being taken to an external tribunal, negative publicity and increased legal costs. Without a complaint management procedure there is also an increased risk of a firm being held liable for failing to ensure the health and safety of its workers, including by failing to effectively manage psychosocial risks. Businesses and organisations may also be held liable for failing to uphold their positive duties under the *Sex Discrimination Act 1984* (Cth), or vicariously liable for the unlawful actions of an employee or agent. Additionally, victims of discrimination or harassment may make a complaint of victimisation.

» KEY PRINCIPLES OF A COMPLAINTS MANAGEMENT SYSTEM

A complaint management system should incorporate number of key principles.

- **Accessibility** – The procedures must be written in easy-to-understand language. This may mean providing versions in languages other than English where appropriate.
- **Promptness** – Complaints should be dealt with promptly. The procedures should provide fast, but realistic, time limits for each stage of dealing with the complaint.
- **Confidentiality** – Where possible, only people directly involved in the grievance or in its attempted resolution should have access to information. There are circumstances where information may not be able to be kept confidential, such as if physical threats are involved or the law otherwise requires it.
- **Impartiality** – Procedures must be both fair and impartial and comply with the requirements of natural justice (see below). All parties affected should be given an adequate opportunity to respond before any decision is made including about whether any witnesses should be spoken to.

Wherever possible, there should be a range of entry points to make a complaint so that everyone feels comfortable in coming forward. There should be at least one trusted and carefully trained person outside each employee's hierarchy or work area who can investigate and resolve complaints. Some systems may use 'contact officers' whose function is to provide support and information to employees about how the complaint procedures work but who are generally not involved in the formal resolution of a dispute. Where contact officers are used, they should be provided with training and detailed guidelines on their role.

Central to effective complaint management is an appropriate complaints or grievance handling procedure. Grievance handling procedures must be fair and accessible. Firms should have a written procedure, which is regularly reviewed and updated as necessary.

Potential outcomes

Complaints and grievance procedures should set out clearly the range of resolutions to expect, depending on whether the complaint is substantiated (found to be proven on the balance of probabilities), unsubstantiated (there is insufficient evidence either way), or frivolous or vexatious (found to have been made without any proper basis).¹⁶³ Resolutions should be consistent with any written policy on behaviour standards and breaches of those standards. Action must be consistent across

the firm regardless of what level the alleged harasser or discriminator comes from or how important their work is perceived to be by the firm.

» EXAMPLE

A solicitor with a large city firm was dismissed for sexual harassment after another employee complained he had deliberately touched her breasts when she was dancing with him at a staff Christmas party. The firm did not have a policy on harassment, nor had there been any training carried out in relation to equal opportunity or harassment. There was evidence that similar conduct by partners at the firm appeared to be condoned.

The firm may be found vicariously liable for the conduct of the solicitor if the female employee brings an action for sexual harassment and is successful in proving that sexual harassment took place. It has failed to take all reasonable steps to prevent harassment by failing to put in place a policy or to provide training to its staff.

Investigating complaints: the importance of natural justice

An investigation of a complaint of discrimination or harassment should be as comprehensive as reasonably possible. It must consider all relevant facts. If the complaint is later taken to an external tribunal or court, it will be important to demonstrate that the investigation was thorough and afforded natural justice. If this is demonstrated, the external tribunal or court is more likely to uphold the internal investigator's findings of fact. For instance, an employee's request to have a union representative or support person present during an interview should be accommodated to ensure the worker feels supported and is better able to express themselves and have a proper opportunity to respond. Denial will damage perceptions of the employer's procedure.

It is essential that those responsible for investigating and managing complaints do so in a way that is procedurally fair to both the complainant and the alleged harasser or discriminator. An alleged harasser or discriminator who is dealt with harshly, unjustly or unreasonably in the circumstances may have an action against the employer for wrongful or unfair dismissal.

The principles of natural justice require that both the process used to investigate complaints and the decisions made at the end of any such investigation are fair.

Generally, compliance with natural justice requires that:

- a thorough, confidential investigation is carried out and all relevant evidence (from any witnesses and documents) obtained;
- both sides are given an adequate opportunity to relate their version of events;
- the person about whom the complaint is made is provided with sufficient details of the allegations to make an informed response and given an adequate opportunity and time to respond to them;
- the investigator must not be biased (or be seen to be biased), i.e. the investigator must not have prejudged the complaint;
- each party to the complaint must have access to additional support or advocacy as necessary such as interpreters, support people, union representation, legal representation and counselling if required;
- each party should be given an opportunity to respond to adverse material that may have been raised against them during the investigation;
- the person who is the subject of the complaint must be given the opportunity to raise any mitigating factors;
- all interviews should be conducted separately and confidentially, so there is no possibility of collaboration or undue support for a particular version of events;
- where an allegation is found to be substantiated, the person who is the subject of the complaint is given an opportunity to respond to any proposed course of action; and
- the parties are told where to go for external/independent advice or to pursue a complaint when dissatisfied with the internal resolution.

If a complaint involves allegations of a criminal nature, a legal practice should make a report to police. It is essential that those responsible for investigating and managing complaints be mindful of the appropriate interaction between a police investigation and an internal investigation.

Training of staff involved in complaint management

Staff identified in the grievance handling procedures as having responsibility to manage complaints should receive specialised training regarding their rights and responsibilities.

» EXAMPLE

Twelve employees attended a lunch. The complainant said that when she had stood behind the respondent's chair to take a photo of the group, his hand came into contact with her genitals, and she felt something 'rubbing' against her body. The respondent said he felt uncomfortable but did not move his hand because he was embarrassed. The firm employed an external investigator who confirmed the complainant's allegations. After considering the matter, the employer summarily dismissed the respondent.

The respondent brought an action for unfair dismissal, alleging a denial of procedural fairness during the course of investigations. The court accepted the employer's contention that the dismissal was reasonable in all the circumstances. While a number of potential penalties other than dismissal were mentioned in the firm's sexual harassment guidelines, the respondent and the complainant worked closely together and the court agreed with the employer's decision that it would have been inappropriate for the respondent to continue working in the section. Transfer was also inapplicable, as it would have entailed a considerable downgrade in the respondent's position.

The court was satisfied that the harassment had taken place as alleged and that the investigative and decision-making processes accorded with the basic standards of procedural fairness.

In general, the court was sympathetic to the difficulties involved in investigating claims of sexual harassment and held that once the allegation had been made out in accordance with a standard of fairness the employer quite reasonably had no choice other than dismissal (see *Thomas v Westpac Banking Corporation* (1995) EOC [92-742]).

Barriers to the implementation of policies

It is important for firms to be able to identify barriers to the implementation of their equal opportunity policies as well as efficacy of application. It may be useful for firms to undertake actions of the following kind:

- Collect information about applicants, new hires and resignations (for instance, whether the firm is attracting and retaining women, people with disabilities, and people of non-English speaking background);
- Conduct regular employee opinion surveys that are anonymised and confidential, ensuring data collected can be compared from year to year and benchmarked against industry best practice;
- Monitor staff turnover, ensure exit interviews are conducted with all departing employees and feedback is measured against best practice;
- Seek client and peer feedback, formally and informally;
- Monitor and analyse complaints and grievances, and look for patterns in incident reporting, such as repeated concerns about a particular team or staff member;
- Regularly review equal opportunity, harassment and discrimination policies against legislative changes; and
- Make harassment and discrimination complaints a standing agenda item for leadership teams.

Identifying the barriers that exist in your firm will assist you to overcome them through the development of targeted strategies.

Monitoring the workplace

Partners and other senior staff must demonstrate a clear commitment to supervising the workplace and maintaining the standards set out in formal policy documents. This commitment can be demonstrated by the firm regularly reviewing workplace issues, e.g. by undertaking an annual audit of staff who have attended training, conducting a confidential survey to investigate staff concerns about harassment or discrimination, providing regular opportunities for feedback through one-on-one check-ins, and conducting problem solving focus groups. When this data has been collected and analysed, the firm should implement effective solutions promptly in an iterative process. Such actions will also reduce the likelihood of a complaint arising.

Additional steps for achieving organisational change

It is often a challenge to move good policy into good practice. Success in translating equal opportunity principles and policies into practice can be enhanced by engaging in a thorough organisational change process.

The ultimate aim of an organisational change process is to create and sustain a workplace in which equal opportunity policies are woven into the workplace culture and manifested in the way work is performed on a daily basis. In addition to rolling out and monitoring equal opportunity and complaints handling policies, firms can concurrently undertake other initiatives to support organisational change. These include the following:

- review the firm's other formal policies, procedures and educational materials to ensure they reflect the firm's equal opportunity and harassment policies;
- establish formal benchmarks for monitoring progress on equal opportunity-related goals;
- model inclusive leadership by management and visibly demonstrate commitment to equal opportunity principles and policies by challenging bias, calling out inappropriate behaviour and supporting fair decisions;
- provide regular training and education on equal opportunity to everyone employed by the firm;
- review all training opportunities and training provided to staff and ensure that it is inclusive and promotes diversity within the firm;
- review evaluation, work assignment and compensation procedures to ensure equal opportunity;
- re-examine leadership selection criteria and structures to ensure fair opportunities;
- develop adequate policies and practices concerning flexible and reduced schedules, family leave, telecommuting, carer's responsibilities and related work/life balance issues;
- monitor implementation to ensure that options that are available in principle are acceptable in practice and that standard billable hour expectations are not excessive;
- establish formal mentoring and coaching programs; and
- provide adequate opportunities, rewards and recognition for pro bono work.

APPENDIX ONE: MODEL EQUAL OPPORTUNITY POLICY

Policy Statement

[Name of firm] is committed to equal opportunity in employment for all staff and applicants for employment. We believe that applicants for employment and all employees should be treated with fairness and respect in the workplace.

[Name of firm] aims to:

- create a working environment where all members of staff are treated with dignity, courtesy and respect;
- implement training and awareness raising strategies to ensure that all employees know their rights and responsibilities in creating a workplace free from unlawful discrimination;
- provide an effective procedure for complaints, based on the principles of natural justice;
- treat all complaints in a sensitive, fair, timely and confidential manner;
- provide protection from any victimisation or reprisals;
- encourage the reporting of behaviour which breaches this policy; and
- promote appropriate standards of conduct at all times.

Anyone found to have breached this policy will be subject to appropriate disciplinary action, up to and including termination of employment or their engagement. Discriminatory conduct may also result in legal proceedings under relevant anti-discrimination legislation. These proceedings can affect the individual employee and the employer, who may be vicariously liable for an employee's actions. For legal practitioners, discriminatory conduct may also result in disciplinary action under the *Legal Profession Uniform Law* (NSW).

Relevant legislation

NSW

- *Anti-Discrimination Act 1977* (NSW)
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW)

Commonwealth

- *Sex Discrimination Act 1984* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Fair Work Act 2009* (Cth)

Related policies

- *Anti-harassment policy*
- *Grievance Handling Procedure*

[Insert name of any other relevant firm policies here]

Scope of this policy

This policy applies to everyone who works at [Name of firm] including partners, consultants, legal practitioners, administrative support staff, managers, temporary workers, and anyone applying for a position with us. It also applies to all persons performing work at the direction of, in connection with, or on behalf of the [Name of firm] (including for example contractors, subcontractors, agents, consultants, temporary staff and volunteers).

This policy extends to all places and functions that are work related, including:

- in the workplace, during and outside normal hours;
- during work activities regardless of location, including dealing with business partners, internal and external customers and the community;
- at work related events, including conferences, off site events, end of year parties, business development activities and social functions; and
- outside of the workplace but where there is a connection to the workplace.

Equal Opportunity and the Law

It is against NSW law to discriminate against employees, or anyone who applies for a job, on the grounds of age, carer's responsibilities, disability, homosexuality, marital status, race, sex or transgender status. Rule 42 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) also provides that a solicitor must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying.

[Name of firm] will not tolerate unlawful discrimination against staff or applicants for employment in any circumstances.

What is discrimination?

Discrimination occurs when a person is treated less favourably than another because they happen to belong to a particular group or have a particular characteristic.

Grounds of discrimination

In NSW, discrimination is unlawful on the following grounds, known as Protected Attributes:

- age (including forcing someone to retire at a certain age);
- carer's responsibilities (including current responsibilities, presumed responsibilities, responsibilities that the person had or is presumed to have had in the past and responsibilities that the person will have or is presumed will have in the future);
- disability (including past, present or future disability, actual or presumed disability, physical, intellectual or psychiatric disability, behavioural disorder, learning disabilities, changed or different body parts and any virus or bacteria in the body that could cause disease such as HIV);
- homosexuality (male or female, actual or presumed);
- marital or domestic status;
- race (including colour, ethnic background, ethno-religious background, descent or nationality);
- sex (including pregnancy and breastfeeding); and
- transgender status (actual or presumed).

Discrimination may be direct or indirect

Direct discrimination occurs when a person is treated less favourably because of a Protected Attribute, in any of the areas covered by equal opportunity legislation. For example, not hiring someone because they are considered to be too old or too young for the job would be direct age discrimination.

Indirect discrimination means a condition, requirement or rule that is the same for everyone but has an effect or result that is unequal and that is unreasonable in all the circumstances.

Unlawful discrimination

Discrimination will be unlawful if it is:

- based on one or more of the Protected Attributes;
- due to a person's association or connection with a person who possesses one of these attributes;
- based on a characteristic that a person with one of these attributes generally has;
- based on a characteristic that is imputed to a person or presumed; and/or
- based on an attribute someone has had in the past or may have in the future, in relation to disability and carer's responsibilities only.

Unlawful discrimination may involve, for example:

- only employing someone of a particular gender, based on a personal view that they are "better";
- lack of promotion or appointment due to a person's

racial or ethnic origin;

- not employing a person because they have family responsibilities or are assumed to have those responsibilities;
- offensive 'jokes' or comments about another person's racial or ethnic background, sex, sexual preference, age, disability, and the like;
- expressing negative stereotypes of particular groups (e.g. 'married women shouldn't be working');
- judging a person on characteristics such as religious or political beliefs, cultural practices, sex or age rather than work performance; or
- using stereotypes or assumptions when making decisions about a person's career.

Workplace bullying

Bullying can take many forms, including jokes, teasing, nicknames, emails, pictures, text message, social isolation, ignoring people or unfair work practices. Under Commonwealth anti-discrimination laws, this behaviour does not have to be repeated to be discrimination.

Bullying at work is also covered by s 789FD of the *Fair Work Act 2009* (Cth).¹⁶⁴ Under that Act, bullying at work occurs when a person or group of people repeatedly behave unreasonably towards a worker or group of workers and that behaviour creates a risk to health and safety.

Bullying in any form is unacceptable at [Name of firm] and will not be tolerated.

What is not workplace bullying?

Reasonable management action that is carried out in a reasonable way is not bullying. An employer or manager can:

- set reasonable performance goals, standards and deadlines considering a worker's skills and experience;
- allocate work fairly;
- roster and allocate working hours in a fair and reasonable manner;
- decide not to select a workplace participant for promotion or training, following a fair and documented process;
- make decisions about poor performance and carry out performance management processes;
- take disciplinary action;
- inform a workplace participant about unsatisfactory work performance in a constructive way;
- inform a workplace participant about inappropriate behaviour in an objective and confidential way; and
- implement organisational changes or restructuring.

It is the responsibility of managers to provide feedback on their employee's performance. Constructive feedback or disciplinary action that is reasonable and carried out in a reasonable way is not bullying because a worker disagrees with it.

Victimisation

It is against the law to victimise or threaten to victimise someone because they have:

- said you should not discriminate against them or allege that they have been bullied;
- made a complaint about discrimination or bullying at work;
- sent a complaint about discrimination to an external body, such as Anti-Discrimination NSW or the Australian Human Rights Commission; or
- given advice or information about those issues to someone else, or acted as a witness for someone who has been discriminated against or bullied.

Victimisation can include actual or threatened demotion, dismissal, transfer, suspension, loss of a benefit or loss of the right to quiet enjoyment of employment. [Name of firm] will not tolerate victimisation in any circumstances.

Anyone found to have engaged in victimisation will be subject to appropriate disciplinary action. Victimisation can also result in legal proceedings under relevant anti-discrimination legislation and under criminal law.

Vilification

Vilification is a public act which incites hatred towards, serious contempt for, or severe ridicule of, a person or group on any of the grounds listed below:

- race;
- religion;
- homosexuality or sexual orientation;
- HIV/AIDS status;
- Transgender or identity status; or
- disability.

Vilification can take many forms, including hate-speech, graffiti, websites and other types of written material. It is an act which happens publicly, as opposed to privately.

Examples of vilification include:

- a person inciting their colleagues to racially abuse an Aboriginal man in a cafeteria;
- posters and graffiti inciting hatred of Jewish people being put up in a workplace; or
- a person urging workmates to abuse a Muslim employee and remove her hijab.

Free speech is protected, so the following things are not vilification:

- a fair report by TV, radio or newspaper about someone else's act of hatred (unless extra material has been added which is vilifying);
- fair discussions or debates about issues, done 'reasonably and in good faith'; or
- material used in parliament, courts, tribunals or other government inquiries.

Vilification breaches this policy and may also breach federal and/or state legislation. Vilification may also amount to a criminal offence reportable to the police if physical harm is threatened towards a person or their property.

Responsibilities of employees and contractors

All employees, contractors and other persons covered by this policy must:

- comply with the firm's equal opportunity policy;
- offer support to anyone who is being discriminated or bullied against and let them know where they can get help and advice; and
- maintain complete confidentiality if they provide information during the investigation of a complaint.

Responsibilities of partners, managers and supervisors

All managers, supervisors and partners must do their best to prevent unlawful discrimination within their teams. Managers, supervisors or partners must:

- make sure all the people they supervise understand this policy;
- know the arguments supporting this policy so that they can deal effectively with any questions or concerns from the people they supervise;
- monitor the working environment to ensure acceptable standards of conduct are observed at all times;
- be a good role model – comply and visibly demonstrate commitment to the firm's equal opportunity policy;

- not engage in behaviour that could be interpreted as discrimination or bullying;
- ensure that the people you supervise understand this policy;
- promote the firm's equal opportunity policy within your work area and support fair decisions;
- make it clear that you will not tolerate any behaviour which could be in breach of this policy;
- offer support to anyone who is being discriminated against or bullied, and let them know where they can get help and advice; and
- act immediately if you witness or are told about any conduct that may be in breach of this policy.

Bystanders

A bystander is someone who witnesses discrimination, harassment, sexual harassment or bullying in the workplace, or has direct knowledge of the conduct.

If you are a bystander to this behaviour in the workplace, you should:

- in the first instance, support the affected person to ask the other person who is discriminating against, harassing, sexually harassing or bullying them to stop and make it clear that the behaviour is offensive or unwelcome; and/or
- if this does not resolve the issue, or the affected person does not feel comfortable raising the matter directly, encourage that person to make a complaint via the channels outlined in the firm's Grievance Handling Procedure.

This is a serious obligation: a person who aids or permits another person to unlawfully discriminate or harass another person may also be found liable for the discrimination.

Disciplinary and grievance procedures

[Name of firm] will regard any act of unlawful discrimination, bullying or victimisation as misconduct.

This firm will treat seriously and confidentially grievances and complaints made in relation to discrimination or victimisation and in accordance with the firm's Grievance Handling Procedure.

Grievances and complaints about discrimination, bullying or victimisation may be communicated confidentially to your supervisor, the managing partner, the human resources manager or [specify other names as appropriate].

All complainants may contact the Office of the Legal Services Commissioner, Anti-Discrimination NSW or the Australian Human Rights Commission for advice at any stage or if they are unhappy with the handling of a complaint.

Communicating the policy

This policy is endorsed and sponsored by the Managing Partner and all the partners of [Name of firm]. The policy is explained to all employees as part of their induction, and they are required to sign their copy of the policy to indicate their understanding and acceptance.

At least once a year the policy will be circulated, electronically or as a printed document, to all employees of the firm to reinforce [Name of firm's] commitment to upholding it.

Staff are required to comply with this policy as a condition of their employment.

More information

Comments and questions on the policy are welcome and should be directed to [name, position].

Review details

This policy was adopted by [Name of firm] on [insert date].

This policy was last updated on [insert date].

This policy may be updated or replaced by [name of firm] in the future, in which case you will be informed of any updates to this policy or replacement of this policy.

(Signature)

Name:

Position:

Date:

Signature and name of Chief Executive Officer/
Managing Partner

APPENDIX TWO: MODEL ANTI-HARASSMENT POLICY

Policy statement

[Name of firm] is an equal opportunity employer. We believe that everyone should feel comfortable and safe in the workplace. This means that everyone must be able to work in an environment free from harassment.

[Name of firm] aims to:

- create a working environment which is free from harassment and where all members of staff are treated with dignity, courtesy and respect;
- implement training and awareness raising strategies to ensure that all employees know their rights and responsibilities in creating a workplace free from harassment;
- provide an effective procedure for complaints, based on the principles of natural justice,
- treat all complaints in a sensitive, fair, timely and confidential manner;
- guarantee protection from any victimisation or reprisals;
- encourage the reporting of behaviour which breaches this policy, and
- promote appropriate standards of conduct at all times.

[Name of firm] considers unlawful harassment (including sexual harassment and sex-based harassment) to be unacceptable and such conduct will not be tolerated under any circumstances. These behaviours do not occur in isolation. Research shows that they are often driven by inequality, systemic bias and social norms that tolerate disrespect or exclusion on the basis of Protected Attributes. [Name of firm] is committed to identifying and addressing these root causes as part of our prevention strategy.

Unlawful discrimination and harassment (including sexual harassment and sex-based harassment) are prohibited by law and will not be tolerated under any circumstances.

Anyone found to have breached this policy will be subject to appropriate disciplinary action up to and including termination of employment or their engagement. Harassment may also result in legal proceedings under relevant anti-discrimination legislation and under criminal law.

These proceedings can affect the individual employee and the employer, who may be vicariously liable for an employee's actions. For legal practitioners, harassment may also result in disciplinary action under the *Legal Profession Uniform Law* (NSW).

Relevant legislation

NSW

- *Anti-Discrimination Act 1977* (NSW)
- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW)

Commonwealth

- *Sex Discrimination Act 1984* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Fair Work Act 2009* (Cth)

Related policies

- Equal Opportunity Policy
- Grievance Handling Procedure

[Insert name of any other firm policies here]

Scope of this policy

This policy applies to everyone who works at [Name of firm] including partners, consultants, legal practitioners, administrative support staff, managers, temporary workers, and anyone applying for a position with us. It also applies to all persons performing work at the direction of, in connection with, on behalf of, or for [Name of firm] (including contractors, subcontractors, agents, consultants, volunteers, clients and third parties).

This policy extends to all places and functions that are work related, including:

- in the workplace, during and outside normal hours;
- during work activities regardless of location, including dealing with business partners, internal and external customers and the community;
- at work related events, including conferences, off site events, end of year parties, business development activities and social functions; and
- outside of the workplace but where there is a connection to the workplace.

What is harassment?

Harassment can be sexual, sex-based or non-sexual and is any unwelcome or unwanted behaviour that offends, intimidates or humiliates another person on the basis of certain Protected Attributes such as race, sex, disability, or national or ethnic origin. The intention of the harasser is not relevant. Whether conduct amounts to

harassment depends on what a reasonable person would consider in the circumstances. Harassment may consist of isolated incidents, a series of incidents or an ongoing pattern of behaviour. Harassment can occur even if only one person amongst a group hears or overhears an offensive, intimidating or humiliating comment.

The person on the receiving end of the offensive conduct does not have to have said 'no' to the behaviour for it to count as harassment. The law recognises that sometimes power imbalances may make it impossible to say 'no'.

Harassment is not just unlawful during working hours or in the workplace itself and not only between co-workers. The behaviour is unlawful in any work-related context, including conferences, work functions, office Christmas parties and business or field trips and includes interactions with clients and customers.

What types of behaviour could amount to harassment?

There are many types of verbal, non-verbal and physical behaviour that could amount to harassment. The basic rule is that if someone else finds it harassing then it could be harassment. Harassment may include:

- racist, sexist, ageist, homophobic, or transphobic material including on social media platforms;
- racist, sexist, ageist, homophobic, or transphobic verbal abuse or comments;
- mimicking someone with a disability;
- stereotypic jokes;
- pushing, shoving or jostling;
- uninvited physical contact or gestures;
- leering or staring at a person's body;
- unwanted invitations;
- intrusive questions about a person's private life;
- sexual comments, jokes or innuendo; or
- displays of sexually graphic material such as posters, pictures, and screensavers.

What is sexual harassment?

Sexual harassment refers to any unwanted or unwelcome behaviour of a sexual nature which makes someone feel humiliated, intimidated or offended, in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person would feel that way.

Sexual harassment can take different forms, including physical contact, verbal comments, the display of offensive material and uninvited intimacy. Examples of sexual harassment may include:

- making or threatening adverse employment actions, or offering preferential treatment, in exchange for sexual favours;

- unwelcome and repeated flirtations, propositions or advances;
- unwelcome physical contact, whistling, leering, improper gestures or offensive remarks, including unwelcome comments about appearance, sexual jokes or inappropriate use of sexually explicit or offensive language;
- intrusive questions about someone's personal life, sexual preferences or relationships; and
- the display in the workplace of sexually suggestive objects or practices.

Sexual harassment can happen in a group or one to one and can involve people of a different sex, or the same sex.

Ancillary liability provisions apply to unlawful sexual harassment, meaning that individuals can be held liable as an accessory to the sexual harassment if they caused, aided, or permitted its continuation.

What is sex-based harassment?

Sex-based harassment is unwelcome conduct of a demeaning nature by reason of a person's sex, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Sex-based harassment may include:

- asking intrusive personal questions based on a person's sex;
- making inappropriate comments and jokes to a person based on their sex;
- displaying images or materials that are sexist, misogynistic or misandrist;
- making sexist, misogynistic or misandrist remarks about a specific person; and
- requesting a person to engage in degrading conduct based on their sex.

Ancillary liability provisions apply to unlawful sex-based harassment, meaning that individuals can be held liable as an accessory to the sex-based harassment if they caused, aided, or permitted its continuation.

What is not harassment?

Reasonable management action, such as appropriate performance management or performance improvement processes, conducted in a reasonable way is not considered harassment.

If the interaction is consensual, welcome or reciprocated, it is not harassment. However, consensual, romantic and/or sexual relationships between a manager and a non-management employee, or between an employee with supervisory authority and his or her subordinate, can create an unprofessional atmosphere for other employees or result in potential or actual conflicts of interest.

Harassment and the law

Harassment is a form of unlawful discrimination. Generally, under NSW or Federal Law it is unlawful to discriminate in the area of work (including in employment and partnership contexts) or in providing a service on the grounds of:

- age (including forcing someone to retire at a certain age);
- carer's responsibilities (including current responsibilities, presumed responsibilities, responsibilities that the person had or is presumed to have had in the past and responsibilities that the person will have or is presumed to have in the future);
- disability (including past, present or future disability, actual or presumed disability, physical, intellectual or psychiatric disability, behavioural disorder, learning disabilities, changes or different body parts and any virus or bacteria in the body that could cause disease such as HIV);
- homosexuality (male or female, actual or presumed) or sexual orientation;
- marital or domestic status;
- race (including colour, ethnic background, ethno-religious background, descent or nationality);
- sex (including pregnancy and breastfeeding); and
- transgender status (actual or presumed), gender identity or intersex status.

Harassment based on sex, race, disability or age and sexual harassment is also unlawful under Commonwealth laws.

Some types of harassment, such as harassing phone calls, sexual assault and stalking, are also against the criminal law.

It is generally against anti-discrimination law for any employee to harass or be harassed by:

- a job applicant;
- another employee;
- a customer or client; or
- any other visitor to our workplace.

Harassment is unlawful and legal action could be taken against those who engage in harassment. Any acts of harassment may also expose the firm to legal risk.

Rule 42 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) provides that a solicitor must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. Solicitors must be mindful of this when interacting with clients.

Hostile work environments

A person must not subject another person to a work environment that is hostile on the ground of sex. This occurs when:

- a person creates a workplace environment that is offensive, intimidating or humiliating to another person by reason of two or more matters relating to:
 - the sex of the second person;
 - a characteristic that pertains generally to persons of the sex of the second person; or
 - a characteristic that is generally imputed to persons of the sex of the second person;
- the first person engages in conduct or makes a statement in a workplace where one or both people work;
- the second person is in the workplace when or after the conduct occurs; and
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of their sex or a related characteristic.

Only one of the two people involved need be a workplace participant to be prohibited from and liable for creating a hostile workplace environment.

Victimisation

It is against the law to victimise or threaten to victimise someone because they have:

- said you should not harass them;
- made a complaint about harassment at work;
- sent a complaint about harassment to an external body, such as Anti-Discrimination NSW or the Australian Human Rights Commission; or
- given advice or information about those issues to someone else, or acted as a witness for someone who has been harassed.

[Name of firm] will not permit victimisation in any circumstances.

Anyone found to have engaged in victimisation will be subject to appropriate disciplinary action. Victimisation can also result in legal proceedings under relevant anti-discrimination legislation and under criminal law.

What to do if you are harassed

If you are the victim of harassment, and you feel safe and comfortable to do so, you can tell the harasser that the behaviour is offensive and unacceptable and ask them to stop. If you don't feel comfortable doing this, or they don't stop, please refer to the procedures set out under the Grievance Handling Procedures.

Keep a note of any harassment which occurs with dates, times, witnesses (if any) and what happened and what you said, did or felt.

Seek advice from [name of appropriate person or position title].

Responsibilities of employees and contractors

All employees, contractors and others covered by this policy must:

- comply with the firm's anti-harassment policy;
- respect the rights of others and never get involved in, encourage or ignore harassment;
- offer support to anyone who is being harassed and let them know where they can get help and advice;
- maintain complete confidentiality if they provide information during the investigation of a complaint; and
- carefully consider anything that could be interpreted as sexual or stereotyping (putting down) people because of the group they happen to belong to.

Responsibilities of partners, managers and supervisors

All partners, managers and supervisors must do their best to prevent harassment happening within the workplace. Partners, managers and supervisors must:

- make sure all the people they supervise understand this policy;
- know the arguments supporting this policy so that they can deal effectively with any questions or concerns from the people they supervise;
- monitor the working environment to ensure acceptable standards of conduct are observed at all times;
- model appropriate behaviour – comply with the firm's anti-harassment policy and do not engage in any behaviour which could be interpreted as harassment;
- not engage in any behaviour that could be interpreted as harassment and make it clear to all that you will not tolerate any harassing behaviour;
- ensure that their team's working environment is free of sexist, racist, or any other type of stereotyping material, posters, and screensavers;

- wherever possible, make sure that neither the work environment, nor work processes, facilitate or enable harassment;
- follow up any staff/team behaviour changes that could indicate that harassment is going on, or that anyone has a harassment grievance;
- ensure team members know to report it immediately if they experience any harassment; and
- act immediately if you witness to or are told about any harassment by following the instructions in our grievance handling procedure.

Bystanders

A bystander is someone who witnesses discrimination, harassment, sexual harassment or bullying in the workplace, or has direct knowledge of the conduct.

If you are a bystander to this behaviour in the workplace, you should:

- in the first instance, support the affected person to ask the other person who is discriminating against, harassing, sexually harassing or bullying them to stop and make it clear that the behaviour is offensive or unwelcome, and/or
- if this does not resolve the issue, or the affected person does not feel comfortable raising the matter directly, encourage that person to make a complaint via the channels outlined in the firm's Grievance Handling Procedure.

This is a serious obligation: a person who aids or permits another person to unlawfully discriminate or harass another person may also be found liable for the discrimination.

Disciplinary and grievance procedures

[Name of firm] will regard any act of unlawful harassment or victimisation as misconduct.

This firm will treat seriously and confidentially grievances and complaints made in relation to harassment or victimisation and in accordance with the firm's Grievance Handling Procedure.

Grievances and complaints about harassment or victimisation may be communicated confidentially to your supervisor, the managing partner, the human resources manager or [specify other names as appropriate].

All complainants may contact the Office of the Legal Services Commissioner, Anti-Discrimination NSW or the Australian Human Rights Commission for advice at any stage or if they are unhappy with the handling of a complaint.

Communicating the policy

This policy is endorsed and sponsored by the Managing Partner and all the partners of [Name of firm]. The policy is explained to all employees as part of their induction, and they are required to sign their copy of the policy to indicate their understanding and acceptance.

At least once a year the policy will be circulated, electronically or as a printed document, to all employees of the firm to reinforce [Name of firm's] commitment to upholding it.

Staff are required to comply with this policy as a condition of their employment.

More information

Comments and questions on the policy are welcome and should be directed to [name, position].

Review details

This policy was adopted by [Name of firm] on [insert date].

This policy was last updated on [insert date].

This policy may be updated or replaced by [name of firm] in the future, in which case you will be informed of any updates to this policy or replacement of this policy.

(Signature)

Name:

Position:

Date:

Signature and name of Chief Executive Officer/
Managing Partner

APPENDIX THREE: MODEL GRIEVANCE HANDLING PROCEDURE

Purpose

The purpose of this Model Grievance Handling Procedure is to assist with the resolution of any grievance expeditiously and at the lowest possible organisational level.

Scope of this procedure

This procedure applies to everyone who works at [Name of firm] including partners, consultants, legal practitioners, administrative support staff, managers, temporary workers, and anyone applying for a position with us. It also applies to all persons performing work at the direction of, in connection with, on behalf of, or for [Name of firm] (including contractors, subcontractors, agents, consultants, volunteers, clients and third parties).

What is a grievance?

A grievance is a problem, concern or complaint related to work or the work environment. A grievance may be about an act, omission, situation or decision that you think is unfair, discriminatory or unjustified, including in breach of the [Name of firm]'s Equal Opportunity Policy and/or Anti-Harassment Policy.

Procedure principles

The grievance handling procedure upholds the following key principles:

- a) **Confidentiality** – Where possible, only people directly involved in the grievance or in its attempted resolution will have access to information. There are circumstances where information may not be able to be kept confidential, such as if physical threats are involved or the law otherwise requires it, and where confidential or anonymised information may need to be provided to the [Name of firm]'s governing body.
- b) **Impartiality** – All parties will have a chance to tell their story. No assumptions will be made and no action taken until all relevant information is collected and considered.
- c) **No repercussions** – No action will be taken against anyone for making or helping someone to raise a genuine grievance. The firm will take all reasonable steps to ensure that anyone involved in making a complaint or in attempting to resolve it is not victimised. Victimisation is unlawful.

- d) **Promptness** – All complaints will be dealt with as quickly as possible and resolved within two working days wherever possible. More complex investigations will take longer, but ideally no longer than four (4) calendar weeks.

What to do if you have a grievance

If you believe that you have been treated unfairly, you should not ignore it. It is important to raise your concerns as early as possible. We encourage all workplace participants to raise issues under this procedure. We treat all complaints seriously.

A complaint can be raised by the person directly affected or by a bystander. A bystander is someone who witnesses the conduct in the workplace, or has direct knowledge of the conduct. Where a complaint is made by a bystander, the consent of the affected person will be obtained in order for the complaint to be progressed. Where an affected person does not want a complaint to be made by the bystander, the complaint will be treated as an anonymous complaint and recorded as such.

It may also assist you to keep a note of events. You should include in your notes: the details of the incident(s), the names of people involved, the names of any witnesses, and the effect that the event(s) has had on you.

The following steps are intended as a guideline only, and the firm may skip or repeat the steps outlined below, or take other alternative action, as the firm considers appropriate in the circumstances.

Step 1: Raise the matter with the offending person

If you feel comfortable to do so, try to resolve your grievance with the person or people involved. You may find that they did not mean to do what they did and were not aware of the impact it was having. When raising the issue with them, you should identify the offensive behaviours, explain that it is unwelcome and offensive, and ask that the behaviour stops.

Step 2: Get more information from a grievance contact/support officer

If you aren't sure about how to handle the problem yourself, or you want to talk to someone confidentially about the problem and get more information about what you can do, you can talk to any of the grievance contact/support officers [insert reference to where information on support officers is]. The contact/support officer will speak with you as soon as they can and preferably on the same day you ask to see them.

The grievance contact/support officers are employees who volunteer in the position in addition to their normal role. They are trained to help anyone who has, or thinks they may have, a grievance. A contact/support officer can give confidential advice about the best way to tackle your problem and where you can get more help. A contact/support officer is not allowed to investigate or resolve your grievance, but they can go with you to see someone who can attempt to resolve it.

Step 3: Informal complaint

If you wish, you can raise your issue at an informal level. Under the informal complaint procedure there are a broad range of options for addressing your concern. The procedure used to address the issue will depend on the individual circumstances of the case.

The informal complaint procedure is more suited to less serious allegations that would not generally warrant disciplinary action being taken. Generally, no decision will be made about what did or did not occur, but rather the grievance contact/support officer will attempt to facilitate an outcome that is acceptable to all parties.

Possible options include:

- the contact person discussing the issue with the person against whom the complaint is made; and/or
- the contact person facilitating a meeting between the parties in an attempt to resolve the issue and move forward.

Step 4: Formal complaint

If the matter doesn't resolve as a result of informal steps, or the allegations are such that an informal process is not appropriate, you can make a formal complaint to your manager or Human Resources. You should provide a written account of events with as much detail as possible.

Whoever is to investigate the matter must get full information from you as soon as possible. Unless there is a very good reason, they will usually do this within two working days. They will then attempt to resolve the grievance as soon as possible.

Where practical, within two working days the person investigating your grievance will:

- get full information from you about your grievance and your views on how it could be resolved;
- explain how the rest of the grievance handling procedure works including what will be done to protect you from victimisation; and
- they will also refer you to people who can provide support or representation, if you need them.

The person investigating the grievance should take the following steps:

- put the information they have received to the person/people you are complaining about and get their side of the story;
- where practical, within one week of interviewing the person/people being complained about, and no later than four weeks from the date you first raised a formal complaint, they will:
 - work out whether the matter(s) alleged in your grievance are serious enough to require disciplinary action if established; and
 - work out whether they have enough information to know whether the matter(s) alleged in the grievance did or didn't happen;
- if they decide to speak to any witnesses, they will do this carefully to preserve confidentiality. They will not speak to any more witnesses than they need to decide how the grievance should be resolved;
- once the investigation has been completed, they will advise everyone involved about the outcome to the extent considered appropriate. They will do this in the following way:
 - when the grievance involves an allegation of a non-disciplinary or minor disciplinary nature and the main facts are not in dispute, they will mediate. This means they will help you and the other person or people involved agree about how the grievance should be resolved; and
 - when the grievance involves an allegation of a non-disciplinary or minor disciplinary nature and the main facts are in dispute, they will:
 - tell you and the other person/people involved about what might have happened had the grievance been proven one way or the other;
 - warn you and the other person/people involved about the disciplinary consequences of any victimisation; and
 - consider the need for staff training in particular policies or standards.

Where the complaint is not substantiated due to insufficient or conflicting evidence, possible outcomes may include:

- training on relevant policies;
- monitoring ongoing behaviours; or
- mediation.

Where a complaint is substantiated, it may be appropriate to implement one or more of the following outcomes:

- an apology and commitment that the behaviour will not happen again;
- access to counselling and the EAP;
- training on relevant policies;

- a first or final warning;
- demotion;
- termination of employment – for instance sexual harassment is defined as being serious misconduct under the *Fair Work Act 2009* (Cth), substantiating dismissal;
- joint agreement (see below); and/or
- referral to police if a criminal offence has or may have been committed.

Where a complaint is found to have been made in bad faith or vexatiously, you may face the following outcomes:

- counselling;
- an apology and commitment that the behaviour will not happen again;
- a first or final warning;
- demotion; or
- termination of employment.

Joint agreement resolving complaints

Where appropriate, and after careful assessment, some complaints may be resolved through agreement between the parties. Negotiations about the terms of a settlement should ensure so far as possible the wellbeing and safety of the complainant, and be trauma-informed, culturally sensitive and intersectional. Any resolution must:

- be voluntary and not place pressure or undue influence on the complainant to agree. The complainant may be given access to legal advice at the expense of the firm to ensure they fully understand the meaning and impact of the settlement agreement;
- consider the inclusion of confidentiality clauses carefully and only include provisions requested by and tailored to the needs of the complainant. The scope and duration of any confidentiality clauses should be as limited as possible;
- be consistent with the organisation's duty to provide a safe workplace;
- be reviewed and approved by senior management and Human Resources;
- include appropriate safeguards to prevent recurrence and protect all parties; and
- be clear, fair, in plain English and, where necessary, translated and/or interpreted.

When making the decision to include confidentiality obligations in any agreement to resolve a discrimination, or particularly a sexual harassment complaint, [Name of firm] will take its work, health and safety and positive duty obligations under the *Sex Discrimination Act 1984* (Cth) seriously.

The firm may determine that certain matters are not suitable for joint agreement, including where serious misconduct or systemic issues are involved and there is a real concern that the person who was found to have discriminated or harassed another party will harm another individual.

External complaint

At any point in the process, you are able to make a complaint to a relevant external agency, such as Anti-Discrimination NSW, the Australian Human Rights Commission, the Fair Work Commission and the NSW Industrial Relations Commission. Contact information is at the end of this document. Do this as soon as possible to best ensure you are able to take a course of action within any applicable time limits.

Confidentiality

These Grievance Handling Procedures are designed to protect the confidentiality of the people involved as far as possible. Information about complaints will be kept confidential and will only be shared with those who need to know in order to manage, investigate, or resolve the grievance, to comply with legal obligations, or to ensure the safety of the parties at the workplace. [Name of firm] may take disciplinary action against anyone in breach of this requirement.

This means that only those with a genuine role to play in helping to resolve a complaint are allowed to know its details or to discuss it. Relevant staff are permitted to disclose details of the complaint and investigation to maintain legal reporting obligations such as work, health and safety and mandatory reporting obligations. These confidentiality obligations should not prevent a complainant from seeking reasonable support: complainants are permitted to talk about the complaint to support people, treating doctor, mental health worker, union advisor or lawyer or other supports.

Who else can help?

If you are the person making the complaint, or the person being complained about, you can get legal advice from your union representative or legal representative. You may bring a support person, union or legal representative to any grievance meeting.

You can also get confidential advice and support from any of the contact or support officers at any time during the grievance.

In addition, at any time during your grievance you have the right to contact an external agency for advice or help. You can also do this if you are unhappy with the way the grievance has been resolved. Agencies that may be able to help you are:

- **Anti-Discrimination Board of New South Wales**
Level 7, 10 Valentine Avenue
Parramatta NSW 2150
Telephone: (02) 9268 5555
Email: adbcontact@justice.nsw.gov.au
Website: www.antidiscrimination.justice.nsw.gov.au/
- **Australian Human Rights Commission**
Level 3, 175 Pitt Street
Sydney NSW 2000
Telephone: (02) 9284 9600
National Information Service: 1300 656 419
General enquiries and publications: 1300 369 711
Email: communications@humanrights.gov.au
Website: www.humanrights.gov.au
- **NSW Industrial Relations Commission**
Level 10, 10 - 14 Smith Street
Paramatta NSW 2150
Telephone: (02) 8688 3516
Website: <http://www.irc.justice.nsw.gov.au/>
- **Fair Work Commission**
Level 10, Terrace Tower
80 William Street
East Sydney NSW 2011
Telephone: 1300 799 675
Email: sydney@fwc.gov.au
Website: www.fwc.gov.au

Communicating this procedure

This procedure is endorsed and sponsored by the Managing Partner and all the partners of [Name of firm]. The procedure is explained to all employees as part of their induction, and they are required to sign their copy of the procedure to indicate their understanding and acceptance.

At least once a year the procedure will be circulated, electronically or as a printed document, to all employees of the firm to reinforce [Name of firm's] commitment to upholding it.

Staff are required to comply with this procedure as a condition of their employment.

More information

Comments on the procedure are welcome and should be directed to [name, position].

Review details

This procedure was adopted by [firm name] on [insert date].

This procedure was last updated on [insert date].

This procedure may be updated or replaced by [name of firm] in the future, in which case you will be informed of any updates to this procedure or replacement of this procedure.

(Signature)

Name:

Position:

Date:

Signature and name of Chief Executive Officer/
Managing Partner

APPENDIX FOUR: CHECKLISTS FOR EMPLOYERS

General considerations for non-discriminatory recruitment

- Aim to find the best applicant for the job based on merit
- Do not make decisions based on Protected Attributes
- Target recruiting to attract a diverse group of applicants
- Ensure that those responsible for recruitment, including external recruitment agencies, are familiar with the firm's equal opportunity policies. Ideally, they should have received training in non-discriminatory recruitment
- Consider arranging unconscious bias training for all those involved in recruitment and those involved in promotion decisions
- Be consistent and fair in your recruitment processes

Creating a position description and advertising the role

- Carefully consider the specific requirements of the job so that all potential candidates can clearly understand the skills and duties. Ensure that these reflect the real requirements of the job
- Distinguish between essential qualifications (those that the person must satisfy in order to do the job) and desirable criteria (those that will help to do the job)
- Ensure that there are no restrictive qualifications on jobs that do not require them
- Be specific. For example, do "communication skills" refer to talking on the telephone to clients, writing detailed advices, advocacy skills and/or teamwork?
- Write job profiles in inclusive language that encourages a diverse group of applicants – men and women, different age groups, cultures and background
- Advertise positions as available to be worked full-time, part-time or as job-share, or casual where appropriate
- Advertise positions internally as well as externally. Ensure that staff on parental leave or sick leave are made aware of the advertisement
- Ensure that information in the advertisement matches the selection criteria. It is best practice to inform the candidates of the selection criteria
- Avoid the use of stereotyped or discriminatory language. For example, "person required aged 28-35" or age-suggestive language such as "junior" or "student"

- If using recruitment agents, ensure that they are fully briefed on the requirements of the position and that they have a good understanding of equal opportunity and anti-discrimination principles

Short listing applicants for a job

- Prioritise a short list on essential qualifications first, then on desirable criteria
- Avoid making assumptions about qualifications and experience, how candidates will fit in with the firm's culture, how they will fulfil their duties – for example, "she has children, so she won't be able to travel"
- If necessary, seek more information from applicants to help you ascertain whether or not they are suitable for the role
- Be fair and consistent in decision-making
- Clearly document reasons for decisions

Preparing for interviews

- All applicants, not just those who disclose a disability prior to the interview, should be asked if they require any adjustments/assistance to participate in the interview – for example, a person with vision impairment may need detailed instructions and extra time to find the building
- Make sure that any tasks or paperwork to be completed during the interview are accessible to all candidates

Conducting interviews

- Ensure interview panels consist of people with diverse backgrounds and a good understanding of the requirements of the job
- Questions should focus on the inherent requirements of the role
- It is suggested that all candidates largely be asked the same set of common questions in the interests of consistency and fairness
- Allow applicants the opportunity to demonstrate what they can offer the firm, not to simply confirm expectations, or to see how they perform under pressure
- The candidate should be asked about any adjustments they may require to complete the inherent requirements of the job
- Don't make assumptions about a person's ability to do the job based on physical characteristics

- It is appropriate to ask applicants whether they can fulfil the requirements of the job, such as travel and after-hours functions, but these questions must be asked of all applicants. However, the firm may also have to accommodate the needs of people with disabilities, cultural or religious obligations, or carer's responsibilities and therefore need to vary these requirements
- Ask questions that are job-specific and do not seek irrelevant personal information, for example, "Can you commit yourself to the firm for two years?", rather than invasive and irrelevant questions, such as, "Do you intend to start a family soon?"
- Be aware of biases held by the interviewers in conducting the interviews. Interviewers should make an effort to suspend all biases that are not job related. Be aware of attitudes regarding accents, communication styles, tone and volume of speech
- Consider running skills tests for all positions in addition to interviews, as a means of checking that candidates can do what they say they can do
- Ensure that the skills being tested are requirements for the position. For example, written tests could be indirectly discriminatory against some people, including those with dyslexia or vision impairment, if the ability to write in a certain style is not critical to the position

Reference checks

- Use reference checks to verify information provided by the candidate and to ask about performance and accomplishments
- Contact references provided by the candidate. Let the candidate know beforehand so they can alert the referee(s). If people who have not been listed as references are to be contacted, let the candidate know in advance
- Reference questions should relate to specific knowledge, skills and abilities that are required to perform in a specific position, and to a candidate's professional background or credentials which they raise in their application and/or in the interview
- Do not ask questions about a candidate's sex, race, colour, ethnic or cultural or religious background, descent or nationality, marital status, pregnancy and potential pregnancy, disability, age, sexuality, transgender status and/or responsibilities as a carer unless the particular quality inquired about is a bona fide occupational qualification
- Double-check the veracity of any reference which reveals information that seems completely contrary to other information

Sample questions to ask during a reference check

- How long and in what capacity have you known the candidate?
- Can you comment on your knowledge/experience of how well the candidate meets each of our selection criteria? You may wish to provide the referee with the selection criteria in advance of the conversation to give them sufficient time to consider them. Referees may be asked to what extent the candidate was able to do the specific tasks or functions in the referee's organisation and/or whether they believe the candidate has the ability and networks to do this
- Would you hire the candidate again?
- Who else should I talk to about the candidate?
- Is there anything we haven't covered that you would like us to know about?

Remuneration and the gender pay gap

In order to ensure pay equity between male and female solicitors law practices should:

- meet their reporting obligations to the Workplace General Equality Agency
- analyse remuneration data according to gender and seniority
- ensure that female and male employees receive comparable pay for equivalent performance in similar roles
- ensure that female and male employees have equal access to superannuation
- conduct salary/wage reviews fairly, impartially and on a regular basis
- include part-timers and those on sick leave and parental leave in all salary reviews
- ensure that any differences between the average salaries/wages of male and female staff are merit-related
- ensure that all employees receive fair opportunities to access employment benefits such as study leave, annual leave, shares/options and motor vehicles
- ensure all employees receive fair access to the better-paid areas of the practice, and
- remuneration and employment benefits should be linked to objective performance measures

Flexible working checklist

To help all employees achieve a better work/life balance law practices should:

- consider implementing flexible work practices which include opportunities such as job-sharing, remote work/work from home and part-time work for all workers
- seriously consider requests for part-time work, remote work/work from home and job-share on an individual basis across all positions, levels and departments/divisions

- identify the inherent requirements of the position and whether the requested accommodation is reasonable in all the circumstances
- leave without pay should be available to staff who need to care for family members or dependents, not just children, where other forms of paid leave have been exhausted
- consider allowing employees additional leave when they have been working long hours on particular projects
- allow, whenever possible, for an employee's need to deliver and collect children from childcare facilities at specified hours, or other regular carer's responsibilities, such as collecting dependents from medical appointments
- consider allowing employees and partners to take career breaks for family reasons, study or pursuit of other interests
- encourage work hours that enable all employees and partners to fully contribute
- support employees to return to work while continuing to breastfeed their newborns, for example by the use of flexible working hours or by the provision of private facilities (other than a toilet) for the expression of milk
- allow pregnant staff flexibility to attend doctor's appointments
- when making provision for remote work/working from home, ensure reasonable steps are taken to provide appropriate equipment
- ensure that work health and safety requirements are fulfilled in relation to remote work/working from home, and
- conduct exit interviews with all employees leaving the firm to determine whether difficulties in achieving work/life balance have been contributing factors

Training checklist

- All employees should receive fair opportunities to participate in training and development opportunities
- Mentoring/coaching opportunities should be made available to all employees, irrespective of Protected Attributes such as gender, age, carer's responsibilities and disability. They should be regularly monitored for effectiveness and provide confidential access to another staff member if there are difficulties
- Monitor access to opportunities to practise in areas of the law which command higher profile clients, higher fees and/or enhance the resulting fee earning capacity of individuals

- Avoid training after hours and on weekends
- Consider cross-cultural training for staff. This may assist customer relations as well as employee relations
- Avoid promotion criteria that require staff to bill over a specified amount to be a partner, such an amount being so high that only a full-time employee could attain it

Promotions checklist

- Ensure that the firm has clear and accessible promotion criteria
- Ensure that all staff are given fair opportunity for promotion, irrespective of Protected Attributes such as race, gender, age, disability or sexuality
- Advertise any vacancies widely throughout the firm, giving all staff the opportunity to consider them and to increase the pool of applicants
- Ensure that those who are responsible for promotion, for example partnership evaluation committees or panels, are familiar with and understand the firm's equal opportunity policies and promotion criteria
- Ensure that any committees or panels established to decide promotion applications consist of people from diverse backgrounds
- Do not ask irrelevant or invasive questions at promotion interviews such as "how will you manage/are you managing your childcare arrangements?" Focus on the essential requirements of the position
- Provide constructive counselling and feedback to unsuccessful applicants for promotion focusing on the selection criteria which they did not meet, compared with the successful candidate(s), and how they could improve
- Review policies to ensure that opportunities for promotion are not linked to requirements that may be indirectly discriminatory - for example, a policy that requires interstate transfer for promotion to partnership may be indirectly discriminatory against those with carer's responsibilities
- Regularly review the practice of solicitors to ensure that they all have access to career moves and development opportunities such as high-profile matters and clients
- Ensure that all employees receive fair opportunity to work overseas, interstate and in a range of areas within the firm

Termination of employment checklist

- A dismissal must not be based on any of the grounds prohibited by equal opportunity or anti-discrimination legislation
- Develop written performance management and disciplinary policies
- Decisions to terminate should be based on the following factors:
 - Genuine financial and operational reasons
 - Poor or inadequate work performance, or
 - Misconduct
- Ensure that employees with performance problems are given counselling and/or adequate warnings that they could be facing dismissal if their performance does not improve
- Do not allow irrelevant assumptions about pregnancy and disability to intrude into any assessment of performance, for example, “she’s pregnant, therefore she is not able to concentrate”
- The employee should be afforded procedural fairness before the dismissal takes place
- Document all steps leading to the dismissal
- Do not make entry to voluntary redundancy, retirement or severance schemes conditional on being a certain age
- Do not use age or years of service to determine who will be made compulsorily redundant unless you can show that this is reasonable in the circumstances
- Ensure that redundancy arrangements are offered to employees on sick leave in the same way they are offered to other employees
- Be mindful of the right to return to work provisions that apply to employees on parental leave under the *Fair Work Act 2009* (Cth)
- Do not assume that employees on parental leave or sick leave will want to be or can be made redundant
- Monitor the frequency and reasons for loss of staff and turnover
- Conduct exit interviews with all employees leaving the firm to determine whether discrimination, bullying or harassment has been a contributing factor
- Ensure that departing employees have equal access to outplacement services such as seminars and skills workshops
- Consider practices such as re-hiring, contract work and consultancy that will enable you to continue to use the skills and experience of employees after they retire

Client services checklist

- Equal opportunity and harassment policies should make it clear that discrimination, bullying and harassment in the course of providing legal services is unlawful and will not be tolerated by the firm in any circumstances
- Inform clients that the firm has an equal opportunity policy in relation to client service, which can be provided upon request, and provide the details of a contact person
- Conduct awareness and training sessions for staff on the non-discriminatory provision of legal services
- As far as possible, make your premises accessible to clients with disabilities
- Avoid holding client functions, such as conferences and parties, at venues that are not accessible

Harassment checklist

- Develop a clear and comprehensive policy on the prevention of all forms of harassment
- Ensure that the policy is accessible and appropriate to the size and nature of the firm
- The policy should state clearly what harassment is, what it is not, and that harassment is unlawful
- The policy should make it clear that the firm will not tolerate harassment of any kind and that consequences can include termination of employment or engagement
- Ensure that effective and easily accessible complaint handling procedures are in place to deal with complaints of harassment, including sexual harassment
- Complaint handling procedures should provide protection from any victimisation and reprisals
- Ensure that all employees are informed of the policy’s content and aware of how to make a complaint
- Ensure that employees know their rights and responsibilities
- Treat all complaints in a sensitive, fair, timely and confidential manner
- Conduct specialised training for contact and grievance handling officers so they can effectively respond to and manage complaints
- Conduct exit interviews to identify whether people are leaving because of harassment issues
- Model appropriate standards of conduct at all times
- Encourage reporting of behaviour that breaches the harassment policy
- Monitor the policy for effectiveness and update as required

RESOURCES

There are a number of resources available that will be of use to law practices in implementing equal opportunity practices.

Organisations

The websites of the following organisations have a number of resources for employers and employees

- Anti-Discrimination NSW
- Australian Human Rights Commission
- Australian Network on Disability
- Department of Employment and Workplace Relations
- Department of Industrial Relations (NSW)
- Diversity Council of Australia
- Fair Work Commission
- Fair Work Ombudsman
- NSW Equal Employment Opportunity Practitioners' Association (NEEOPA)
- Office for Women, Department of the Prime Minister and Cabinet
- Pride in Diversity
- SafeWork NSW
- Women Lawyers Association of NSW
- Women NSW
- Workplace Gender Equality Agency

Publications

Publications that may be of interest to firms include the following:

- Asian Australian Lawyers Association, Cultural Diversity Report 2015
- Asian Australian Lawyers Association, Cultural Diversity Focus Groups Project: Pilot Outcomes Report (2022)
- American Bar Association, Goal III Annual Reports
- Australian Human Rights Commission, Guidelines for Complying with the Positive Duty (2023)
- Australian Human Rights Commission, Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (2022)
- Marie Boland, 'Review of the model Work Health and Safety laws' (December 2018)
- Law Council of Australia, 'National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession' (2020)
- Law Council of Australia, 'National Model Framework Addressing Sexual Harassment for the Australian Legal Profession' (2025)

- Law Council of Australia, 'National Attrition and Re-engagement Study (NARS) Report' (2025)
- Law Society of NSW, Charter for the Advancement of Women (2021)
- Law Society of NSW, Equitable Remuneration in the Legal Profession (2023)
- SafeWork NSW, 'Code of Practice: managing psychosocial hazards at work' (May 2021)
- SafeWork NSW, 'Code of Practice: sexual and gender-based harassment' (June 2024)

Legislation

Commonwealth

- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Fair Work Act 2009* (Cth)
- *Human Rights (Sexual Conduct) Act 1994* (Cth)
- *Privacy Act 1988* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Workplace Gender Equality Act 2012* (Cth)

NSW

- *Anti-Discrimination Act 1977* (NSW)
- *Crimes Act 1900* (NSW)
- *Disability Inclusion Act 2014* (NSW)
- *Industrial Relations Act 1996* (NSW)
- *Privacy and Personal Information Protection Act 1998* (NSW)
- *Work Health and Safety Act 2011* (NSW)

Other

- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1992* (NT)
- *Anti-Discrimination Act 1991* (Qld)
- *Equal Opportunity Act 1984* (SA)
- *Anti-Discrimination Act 1998* (TAS)
- *Equal Opportunity Act 2010* (Vic)
- *Racial and Religious Tolerance Act 2001* (Vic)
- *Equal Opportunity Act 1984* (WA)

ENDNOTES

1. A useful overview of damages awarded under Commonwealth legislation can be found in Australian Human Rights Commission, Federal Discrimination Law: Chapter 7 – Damages and Remedies (1 May 2009) <https://humanrights.gov.au/our-work/legal/federal-discrimination-law-chapter-7-damages-and-remedies#7_2>.
2. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) r 42.
3. Workplace Gender Equality Act 2012 (Cth) s 13; Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023 (Cth).
4. Workplace Gender Equality (Gender Equality Targets) Instrument 2025 (Cth).
5. Vivian Hunt, Dennis Layton and Sara Prince, 'Why Diversity Matters', McKinsey & Company (Web Page, 1 January 2015) <<https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/why-diversity-matters>>.
6. Anti-Discrimination Act 1977 (NSW) pts 4E, 4G; Age Discrimination Act 2004 (Cth).
7. Anti-Discrimination Act 1977 (NSW) pt 4B; Sex Discrimination Act 1984 (Cth); Fair Work Act 2009 (Cth).
8. Anti-Discrimination Act 1977 (NSW) pts 4A, 4F; also see the definition of disability under the Disability Discrimination Act 1992 (Cth).
9. Anti-Discrimination Act 1977 (NSW) pt 4C.
10. Sex Discrimination Act 1984 (Cth) s5A.
11. Anti-Discrimination Act 1977 (NSW) pt 4; Sex Discrimination Act 1984 (Cth).
12. Anti-Discrimination Act 1977 (NSW) pt 2 divs 2-3; Racial Discrimination Act 1975 (Cth).
13. Anti-Discrimination Act 1977 (NSW) pt 3; Sex Discrimination Act 1984 (Cth).
14. Anti-Discrimination Act 1977 (NSW) pt 3A.
15. Sex Discrimination Act 1984 (Cth) ss 5B and 5C.
16. Anti-Discrimination Act 1977 (NSW) s 50; Sex Discrimination Act 1984 (Cth) s 94; Race Discrimination Act 1975 (Cth) s 27(2); Disability Discrimination Act 1992 (Cth) s 42.
17. Anti-Discrimination Act 1977 (NSW) pt 2 div 2, pt 3 div 2, pt 3A div 2, pt 4 div 2, pt 4A div 2, pt 4B div 2, pt 4C div 2, pt 4G div 2.
18. Anti-Discrimination Act 1977 (NSW) ss 17, 31A, 38K, 46A, 49L, 49ZO, 49ZYL.
19. Anti-Discrimination Act 1977 (NSW) s 17.
20. Anti-Discrimination Act 1977 (NSW) ss 19, 33, 38M, 47, 49M, 49ZP, 49ZYN.
21. Anti-Discrimination Act 1977 (NSW) ss 20, 34, 38N, 48, 49N, 49ZQ, 49ZYO.
22. Anti-Discrimination Act 1977 (NSW) ss 20A, 34A, 38O, 48A, 49O, 49ZR, 49ZYP.
23. Anti-Discrimination Act 1977 (NSW) pt 4B.
24. Anti-Discrimination Act 1977 (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA.
In relation to race under the NSW Act it will also constitute discrimination if a person segregates the aggrieved person from persons of a different race or from persons who have such a relative or associate of a different race: Anti-Discrimination Act 1977 (NSW) s 7(1)(b).
In relation to a transgender person, it constitutes discrimination if a person treats the aggrieved person as being of the person's former sex or requires them to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable in regard to the circumstances: Anti-Discrimination Act 1977 (NSW) s 38B(1)(c).
25. Anti-Discrimination Act 1977 (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b)-(c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b).
26. Anti-Discrimination Act 1977 (NSW) s 4A.
27. Age Discrimination Act 2004 (Cth) s 16; Disability Discrimination Act 1992 (Cth) s 10; Racial Discrimination Act 1975 (Cth) s 18, Sex Discrimination Act 1984 (Cth) s 8.
28. Sex Discrimination Act 1984 (Cth) s 28A; Anti-Discrimination Act 1977 (NSW) s 22A. The test in the Sex Discrimination Act 1984 (Cth) is slightly different, in that it refers to circumstances in which a person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
29. Hall v A & A Sheiban Pty Ltd (1989) 85 ALR 503.
30. Disability Discrimination Act 1992 (Cth) s 35.
31. Anti-Discrimination Act 1977 (NSW) s 22A; Sex Discrimination Act 1984 (Cth) s 28A; Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126.
32. O'Callaghan v Loder [1983] 3 NSWLR 89.
33. Anti-Discrimination Act 1977 (NSW) pt 2A; Sex Discrimination Act 1984 (Cth) div 3.
34. Coleman v Bentley [2002] NSWADT 87.
35. Spencer v Dowling [1997] 2 VR 1277. More recently, see Hill v Hughes [2019] FCCA 1267.
36. Hall v A & A Sheiban Pty Ltd (1989) 85 ALR 503.
37. Hopper v Mount Isa Mines Ltd and others [1997] QADT 3.
38. B, C and D v Stratton [1997] HREOCA 8.
39. Tulk v Moore (1997) EOC [92-870].
40. See examples and caselaw: Fair Work Commission, Sexual Harassment Disputes Benchbook (1 October 2024) 32, 50-51.
41. For the full report see: Australian Human Rights Commission, Time for respect: Fifth national survey on sexual harassment in Australian workplace (Report, November 2022) <https://humanrights.gov.au/sites/default/files/document/publication/2022.11.25_time_for_respect_2022_final_digital.pdf>.
42. Sex Discrimination Act 1984 (Cth) s 28AA(1).
43. Anti-Discrimination Act 1977 (NSW) s 22B; Sex Discrimination Act 1984 (Cth) s 28B.
44. For the full report see: Australian Human Rights Commission, Respect@ Work: Sexual Harassment National Inquiry Report (Report, 5 March 2020) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
45. Fair Work Act 2009 (Cth) ss 527D, 527F, 527J.
46. 'Worker' has the same meaning as in the Work Health and Safety Act 2011 (NSW).
47. Fair Work Act 2009 (Cth) s 527D(1).
48. For orders to stop sexual harassment that occurred before 6 March 2023, see Schedule 1 to the Fair Work Act 2009 (Cth).
49. 'Sexually harass' definition: Fair Work Act 2009 (Cth) s 12.
50. '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: Sex Discrimination Act 1984 (Cth) s 28A(2).
51. Sex Discrimination Act 1984 (Cth) s 28A(1).
52. Sex Discrimination Act 1984 (Cth) s 28A(1A).
53. The test for whether an act amounts to sexual harassment is an objective test. The person's intentions are irrelevant for the purposes of that test: Prue Bindon, 'The Weinstein Factor: Where does the legal profession stand?' (2018) 247 Ethos: Law Society of the ACT Journal 26, 26.
54. Fair Work Regulations 2009 (Cth) reg 1.07(2)(c).
55. Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) 51.
56. Fair Work Act 2009 (Cth) s 527E(1)-(2).
57. Sex Discrimination Act 1984 (Cth) s 28M.
58. Anti-Discrimination Act 1977 (NSW) s 22F.
59. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) r 42.
60. Fair Work Act 2009 (Cth) s 789FC.
61. Defined as in the Work Health and Safety Act 2011 (Cth); Fair Work Act 2009 (Cth) s 789FC(2).
62. Fair Work Act 2009 (Cth) s 789FD(3).
63. Fair Work Act 2009 (Cth) s 789FD.
64. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
65. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618; Styles v Murray Meats Pty Ltd (tr/as Ben Howe Butchers) [2005] VCAT 914.
66. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
67. Willet v State of Victoria [2013] VSCA 76.
68. WorkCover Authority (NSW) (Inspector Maddaford) v Coleman (2004) 138 IR 21.
69. Willet v State of Victoria [2013] VSCA 76.
70. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
71. Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) [105].
72. Keegan v Sussan Corporation (Aust.) Pty Ltd [2014] QSC 64.
73. Fair Work Act 2009 (Cth) s 789FD(2).
74. Anti-Discrimination Act 1977 (NSW) s 50(1); Victimisation is also an offence under the: Disability Discrimination Act 1992 (Cth) s 42, Age

- Discrimination Act 2004 (Cth) s 51, Racial Discrimination Act 1975 (Cth) s 18AA, Sex Discrimination Act 1984 (Cth) s 94.
75. Anti-Discrimination Act 1977 (NSW) s 50(1).
 76. Anti-Discrimination Act 1977 (NSW) s 20C.
 77. Anti-Discrimination Act 1977 (NSW) s 49ZT.
 78. Anti-Discrimination Act 1977 (NSW) s 49ZXB.
 79. Anti-Discrimination Act 1977 (NSW) s 38S.
 80. Anti-Discrimination 1977 (NSW) ss 20B, 38R, 49ZS, 49ZXA.
 81. Crimes Act 1900 (NSW) s 93Z.
 82. Anti-Discrimination New South Wales, "Vilification case studies": <https://antidiscrimination.nsw.gov.au/complaints/complaint-case-studies/vilification/display-of-nazi-memorabilia-in-a-vintage-store.html>.
 83. Fair Work Act 2009 (Cth) s 527F(1).
 84. Fair Work Act 2009 (Cth) s 527J(2)(b).
 85. Fair Work Act 2009 (Cth) s 527J(3).
 86. Fair Work Act 2009 (Cth) s 527R(1).
 87. Anti-Discrimination Act 1977 (NSW) s 108(2)(a); NB: Multiple respondents can be found liable, meaning that a successful complainant can receive higher than the statutory cap of \$100,000 e.g. *Yelda v Sydney Water Corporation*; *Yelda v Vitality Works Australia Pty Ltd* [2021] NSWCATAD 107.
 88. Age Discrimination Act 2004 (Cth) s 51; Disability Discrimination Act 1992 (Cth) s 42; Sex Discrimination Act 1984 (Cth) s 94.
 89. Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015 (NSW) r 42.
 90. Partnership Act 1892 (NSW) s 9.
 91. Legal Profession Uniform Law (NSW) s 34.
 92. Legal Profession Uniform Law (NSW) s 35.
 93. Work Health and Safety Act 2011 (NSW), ss 5, 18-19.
 94. Work Health and Safety Act 2011 (NSW) s 4.
 95. Work Health and Safety Act 2011 (NSW) s 17.
 96. Work Health and Safety Act 2011 (NSW) ss 27-28.
 97. Work Health and Safety Regulation 2017 (NSW) regs 55A-55D; Work Health and Safety Amendment Regulation 2022 (NSW); Code of Practice: Managing psychosocial hazards at work.
 98. Work Health and Safety Regulation 2017 (NSW) regs 34-35, 37.
 99. Work Health and Safety Regulation 2017 (NSW) reg 55A.
 100. Work Health and Safety Regulation 2017 (NSW) reg 55B.
 101. Work Health and Safety Regulation 2017 (NSW) reg 55D(1)(a)-(b).
 102. Work Health and Safety Regulation 2017 (NSW) regs 37, 55C.
 103. Work Health and Safety Regulation 2017 (NSW) reg 55D(2).
 104. Work Health and Safety Regulation 2017 (NSW) regs 37-38.
 105. Work Health and Safety Regulation 2017 (NSW) reg 38(2).
 106. Sex Discrimination Act 1984 (Cth) s 47C.
 107. For guidance from the Australian Human Rights Commission about complying with the positive duty, see: Australian Human Rights Commission, Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth) (August 2023) 51, <<https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf>>.
 108. Australian Human Rights Commission Act 1986 (Cth) s 35A.
 109. Australian Human Rights Commission, Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth) (August 2023) 51, <<https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf>>.
 110. Anti-Discrimination Act 1977 (NSW) s 52; Racial Discrimination Act 1975 (Cth) s 17; Sex Discrimination Act 1984 (Cth) s 105; Disability Discrimination Act 1992 (Cth) s 43.
 111. Sex Discrimination Act 1984 (Cth) s 105.
 112. Anti-Discrimination Act 1977 (NSW) s 53(1).
 113. Anti-Discrimination Act 1977 (NSW) s 53(3).
 114. Sex Discrimination Act (Cth) s 106; Racial Discrimination Act 1975 (Cth) s 18A; Fair Work Act 2009 (Cth) s 527E.
 115. Fair Work Act 2009 (Cth) s 527E(2); Sex Discrimination Act (Cth) s 106(2).
 116. Anti-Discrimination Act 1977 (NSW) s 53.
 117. *Shellharbour Golf Club v Wheeler* [1999] NSWSC 224 [58] cited with approval in *State of New South Wales v Briggs* (2016) 95 NSWLR 467.
 118. See information made available by the Australian Human Rights Commission at: Australian Human Rights Commission, Vicarious Liability (Factsheet, November 2014) <<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/vicarious-liability>>.
 119. Anti-Discrimination Act 1977 (NSW) ss 10A, 27A, 38F, 42A, 49G, 49Y, 49ZK, 49ZYE.
 120. Sex Discrimination Act 1984 (Cth) s 17; Age Discrimination Act 2004 (Cth) s 21. Disability Discrimination Act 1992 (Cth) has a similar provision that operates in relation to three or more partners (s 18).
 121. Anti-Discrimination Act 1977 (NSW) ss 49D(4), 49V(4); Disability Discrimination Act (Cth) ss 21A-21B.
 122. Anti-Discrimination Act 1977 (NSW) s 49D(4); Disability Discrimination Act (Cth) ss 21A and -21B.
 123. Anti-Discrimination Act 1977 (NSW) s 49V(4).
 124. *Qantas Airways v Christie* (1998) 193 CLR 280. See additional information made available by the Australian Human Rights Commission at: Australian Human Rights Commission, 'Inherent Requirements (Web Page) <<https://www.humanrights.gov.au/quick-guide/12052>>.
 125. Anti-Discrimination Act 1977 (NSW) ss 49C, 49U.
 126. See additional information made available by the Australian Human Rights Commission at: Australian Human Rights Commission, 'Employers' (Web Page) <<https://humanrights.gov.au/education/employers>>.
 127. Disability Discrimination Act 1992 (Cth) s 11(2).
 128. Anti-Discrimination Act 1977 (NSW) ss 14, 31, 49ZYJ.
 129. Sex Discrimination Act 1984 (Cth) s 30.
 130. Anti-Discrimination Act 1977 (NSW) s 126.
 131. Anti-Discrimination Act 1977 (NSW) ss 10A, 27A, 38F, 42A, 49G, 49Y, 49ZK, 49ZYE; Sex Discrimination Act 1984 (Cth) s 17; Age Discrimination Act 2004 (Cth) s 21. The Disability Discrimination Act 1992 (Cth) has a similar provision that operates in relation to three or more partners (s 18).
 132. *Wollongong City Council v Bonella* [2002] NSWACTAP 26.
 133. Workplace Gender Equality Act 2012 (Cth) s 13; Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023 (Cth).
 134. Workplace Gender Equality Act 2012 (Cth) s 3; Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2023 (Cth).
 135. Workplace Gender Equality (Gender Equality Targets) Instrument 2025 (Cth).
 136. Law Society of NSW, Thought Leadership: Advancement of Women in the Profession Report and Recommendations (Report, December 2011) <<https://womenlawyersnsw.org.au/wp-content/uploads/579007.pdf>>; Law Society of NSW, Thought Leadership: Advancement of Women in the Profession Progress Report (Report, June 2013) <<https://womenlawyersnsw.org.au/wp-content/uploads/752919.pdf>>; Law Council of Australia, National Attrition and Re-engagement Study (NARS) Report (Final Report, February 2014) <<https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>>.
 137. Anti-Discrimination Act 1977 (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA; Fair Work Act 2009 (Cth) s 65.
 138. Fair Work Act 2009 (Cth) s 65A.
 139. *Hickie v Hunt & Hunt* [1998] HREOCA 8; *Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209; *Song v Ainsworth Game Technology* [2002] FMCA 31.
 140. *Hickie v Hunt & Hunt Solicitors* [1998] HREOCA 8.
 141. *Bogle v Metropolitan Health Service Board* (2000) EOC [93-069].
 142. *Bogle v Metropolitan Health Service Board* (2000) EOC [93-069].
 143. *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.
 144. *Ruth Cully v Commonwealth of Australia* (represented by the Australian National Audit Office) [2022] FWC 495.
 145. Fair Work Act 2009 (Cth) s 351.
 146. *Thompson v Courier Newspapers Pty Ltd* [2005] NSWADT 49.
 147. *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.
 148. *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184.
 149. Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (4th ed, 2012) 59.
 150. Anti-Discrimination Act 1977 (NSW) ss 10A, 27A, 38F, 42A, 49G, 49Y, 49ZK, 49ZYE; Sex Discrimination Act 1984 (Cth) s 17; Age Discrimination Act 2004 (Cth) s 21. The Disability Discrimination Act 1992 (Cth) has a similar provision that operates in relation to three or more partners (s 18).
 151. 'Serious misconduct' is defined in the Fair Work Regulations 2009 (Cth) reg 1.07.
 152. *McManus v Scott-Charlton* [1996] FCA 904.
 153. Fair Work Act 2009 (Cth) s 386(1)(b).
 154. Anti-Discrimination Act 1977 (NSW) s 49ZV. May also constitute discrimination under s 18 of the Age Discrimination Act 2004 (Cth).
 155. Anti-Discrimination Act 1977 (NSW) ss 19, 33, 38M, 47, 49M, 49ZP, 49ZYN. See also Age Discrimination Act 2004 (Cth) s 28; Disability Discrimination Act 1992 (Cth) s 26; Sex Discrimination Act 1984 (Cth) s 22.
 156. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

- (NSW) r 42.
157. Anti-Discrimination Act 1977 (NSW) s 108.
158. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) r 2.3.
159. Anti-Discrimination Act 1977 (NSW) s 22F(b).
160. For example: *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889; *Goldman Sachs JB Were Services Pty Limited v Nikolich* [2007] FCAFC 120; *Yousif v Commonwealth Bank of Australia* (2010) 193 IR 212; *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177; *McKeith v Royal Bank of Scotland Group PLC*; *Royal Bank of Scotland Group PLC v James* [2016] NSWCA 36.
161. Sex Discrimination Act 1984 (Cth) s 47C.
162. Work Health and Safety Regulation 2017 (NSW) regs 34-35, 37.
163. Australian Human Rights Commission, Good Practice Guidelines for Internal Complaint Processes (Guidelines, November 2014) <https://humanrights.gov.au/sites/default/files/GPGB_good_practice_guidelines_0.pdf>.
164. Section 789FD applies to all 'constitutionally covered businesses' as defined under the Fair Work Act 2009 (Cth). In *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50, s 51(xx) was construed to include any company which provides goods or services for payment.

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