

Memorandum

To: Directors
Presidents – Constituent Bodies
CEOs – Constituent Bodies
Chairs – Equal Opportunity Committee, Access to Justice Committee, National Human Rights Committee, National Criminal Law Committee, Indigenous Legal Issues Committee, National Elder Law and Succession Committee, Indigenous Incarceration Working Group, Industrial Law Committee

From: Margery Nicoll, Acting Chief Executive Officer

Date: 23 March 2020

Australian Human Rights Commission National Inquiry into Sexual Harassment in Australian Workplaces

Action Request

For noting and distribution to members.

Key Issues

On 20 June 2018, Kate Jenkins, Australia's Sex Discrimination Commissioner, announced that a National Inquiry into Sexual Harassment in Australian Workplaces (**NISHAW**) would be conducted by the Australian Human Rights Commission (**AHRC**). Amongst other things, the aim of the NISHAW was to consider: drivers of sexual harassment behaviour in Australian workplaces; its economic impact; the existing legal framework, measures and employer practices; and recommendations for addressing it.

On 26 February 2019, the Law Council provided the AHRC with a comprehensive submission on the NISHAW. The submission incorporated content from the Law Council's Constituent Bodies and Equal Opportunity Committee, as well as external organisations like the International Bar Association.

Further background can be found in the Law Council's memorandum to Constituent Bodies dated 10 August 2018.

The Report was released on 5 March 2020, covers over 900 pages and makes 55 recommendations. It also provides an implementation roadmap.

On preliminary review, the following key findings and recommendations set out in the Report are of primary interest to the Law Council:

- Simplifying the definition of sexual harassment to improve the law's accessibility
 - The Report recommends amending state and territory human rights and anti-discrimination legislation in order to achieve consistency between sexual harassment laws throughout the Council of Australian Governments. As noted in its submission, the Law Council believes this will make the

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messaging of what is and is not sexual harassment easier to understand and communicate.

- Making sexual harassment unlawful in all areas of public life
 - The Report proposes expanding the prohibition of sexual harassment to protect any person performing work, not just those who meet the current definition. This will expand protection to those who are unpaid or self-employed.
 - Whilst the Law Council welcomes this proposed expansion, it remains of the view that the prohibition on sexual harassment should be expanded to cover all areas of public life. As noted in our submission, this would deal with the inconsistent coverage of current legislation in relation to workplace sexual harassment and would also provide an important normative statement on how sexual harassment is viewed.
- Introducing positive duties to eliminate, respond and report
 - The Law Council supports the recommendation to introduce a positive duty to eliminate sex discrimination, sexual harassment and victimisation. However, the Law Council is of the view that separate duties to respond to allegations of sexual harassment and to report all such allegations to an independent statutory body should be considered.
 - The Law Council agrees that the substance of any positive duty should be proportionate to the size, resources and capabilities of the duty holder. It is satisfied, in this regard, with the AHRC's recommendation that various factors be prescribed for consideration in determining whether a measure taken by an employer is 'reasonable and proportionate' (for example, the size of its business).
- Strengthening formal complaints processes and raising public awareness of the law
 - The Law Council supports the recommendation made in the Report to extend the time period after which the President of the AHRC may exercise discretion to terminate a complaint of sexual harassment under the *Australian Human Rights Commission Act 1986* (Cth) to 24 months after the alleged unlawful discrimination took place. Victims of sexual harassment should be afforded time to consider the potential reputational and personal cost of reliving a traumatic experience before deciding whether to pursue a formal complaints process. It may also be preferable to allow time for internal workplace complaints processes to be conducted in the first instance.
- Strengthening powers of the AHRC
 - The Report echoes the Law Council's position that the AHRC should be given greater investigation and enforcement powers. The Report also satisfies the Law Council's view that such an increase in the functions conferred on the AHRC must be matched by a proportionate increase its funding.
- Non-disclosure agreements
 - Non-disclosure agreements (**NDA**s) may pose harm to current and future victims of sexual harassment, by enabling repeat offenders to operate with impunity, or by depriving a victim of the power of speaking out about their experience. However, the Law Council cautions against banning their use, recognising that a person who has been sexually harassed may derive legitimate benefits from an NDA. Accordingly, the Law Council supports legislative reform to make NDAs unenforceable in certain circumstances: for

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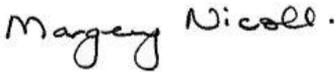
- example, where they do not explicitly state that the sexually harassed person's promise to not disclose the relevant conduct is contingent on the perpetrator not publicly misrepresenting it.
- The Report does not recommend making NDAs unenforceable under any such circumstances. However, the recommendation for the development of a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters, to inform the development of regulation on NDAs, is a step in the right direction.
 - Legal advice and assistance
 - The Report recommends that all Governments provide increased, recurrent funding to the services that assist victims to take action on sexual harassment, such as community legal centres and legal aid commissions. The Law Council strongly supports this recommendation.

Further information regarding the NISHAW Report may be found on the AHRC [website](#).

The Law Council is currently considering the findings and recommendations made in the Report in further detail and may provide a response to Government in due course. If it determines to do so, Constituent Bodies will be consulted for their input.

Contact

Should you require any further information or wish to provide comment, please contact Alex Wormald, Policy Lawyer (at alexandra.wormald@lawcouncil.asn.au or on 02 6246 3724) in the first instance.



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