

Memo

To: Arthur Moses SC, President, Law Council of Australia

From: Stuart Webb, President, Law Institute of Victoria

Subject: The Australian Human Rights Commission's Inquiry into Sexual Harassment in Australian Workplaces

Date: 21 January 2019

1. Introduction

1.1 The Law Institute of Victoria ('**LIV**') welcomes the opportunity to provide comments to the Law Council of Australia ('**LCA**') on the Australian Human Rights Commission's ('**AHRC**') inquiry into sexual harassment in Australian workplaces ('**the inquiry**'). These comments are informed by members of the LIV's Workplace Relations Section.

Nature and prevalence:

1.2 The term, 'sexual harassment', refers to unwanted or unwelcome advances and remarks which are of a sexual nature, and cause a person to feel offended, humiliated or intimidated.¹ As indicated in Australia's eighth report on the implementation of the *Convention on the Elimination of All Forms of Discrimination Against Women* ('**the Convention**'), sexual harassment and discrimination often coincide.² This is because sexual harassment, in all its forms, involves treating women unfavourably because of their gender.

1.3 The literature suggests two common forms of sexual harassment:

- when a job benefit, such as a pay rise, a promotion, or even continued employment, is made conditional on the victim acceding to demands to engage in some form of sexual behavior; or
- a hostile working environment, in which the conduct creates conditions that are intimidating or humiliating for the victim.³

- 1.4 Sexual harassment differs from sexual assault. Although the two terms are often used interchangeably, the latter concerns intentionally touching another person in a sexual way, which the other person does not consent to.⁴ Sexual assault is typically covered by the equivalent of the *Crimes Act 1958* (Vic) in other states and territories.⁵ Cases concerning sexual assault often involve sexual penetration and the infliction of serious bodily harm.⁶ Sexual harassment, in contrast, does not engage the criminal law, but rather intersects with discrimination, human rights, tort, contract and international laws.
- 1.5 Workplace sexual harassment may be verbal, physical or written. For example, in *Ewin v Vergara (No 3)* [2013],⁷ Bromberg J found that verbal propositions for sex in explicit terms constituted sexual harassment. Similarly, in *Poniatowska v Hickinbotham* [2009],⁸ Mansfield J found the following actions of an employer to their employee was sexual harassment: sending text messages with coarse images and invitations to start a sexual relationship, making inappropriate comments about the employee's body, asking the employee to have a sexual relationship with a representative from a separate company to secure a business deal, and kissing the employee on the mouth.⁹
- 1.6 In addition to these cases, examples of sexual harassment include staring or leering in a sexual manner, unwelcome 'wolf whistling', initiation

¹ International Labour Organisation, *Sexual Harassment at Work: Fact Sheet* at 1.

² Australian Government, Department of the Prime Minister and Cabinet, *Australia's Eighth Report on the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women August 2010-July 2014*, at 32.

³ Above n 1.

⁴ *Crimes Act 1958* (Vic) s 40.

⁵ *Crimes Act 1900* (NSW); *Criminal Code Act 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Compilation Act 1913* (WA); *Criminal Code Act 1924* (Tas).

⁶ See examples: *Director of Public Prosecutions v Lade (a pseudonym)* [2017] VSCA 264; *Re Guirguis* [2018] VSC 430; *Zhao v The Queen* [2018] VSCA 28; *Cao v The Queen* [2018] VSCA 98.

⁷ FCA 1311.

⁸ FCA 680.

⁹ *Ibid* at 21.

ceremonies involving sexual behavior, or intrusive questions about one's sexual activities.¹⁰

- 1.7 In the report, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces (2016)*, the AHRC relayed that women were 29 percent more likely to experience sexual harassment in their life.¹¹ The prevalence of sexual harassment was also reported to be higher for members of the LGBTI+ community (84 percent) when compared to heterosexual people (70 percent).¹² Younger people, aged 18-29, were also more likely to experience sexual harassment.¹³
- 1.8 Academic studies have shown that sexual harassment, particularly in conjunction with a victim's past harassment or assault, can lead to harmful effects on their health.¹⁴ This includes post-traumatic stress disorder ('PTSD'). For example, in *Matthews v Winslow Constructions (Vic) Pty Ltd [2015]*,¹⁵ Forrest J found that the victim had 'sustained very considerable psychiatric injuries as a direct consequence of the . . . sexual harassment levelled at her' in the workplace.¹⁶ His Honour reasoned that these psychiatric injuries, being either bipolar disorder together with chronic PTSD or a major depressive illness together with PTSD,¹⁷ would 'continue to diminish the quality of her life'.¹⁸
- 1.9 There are also difficulties in coming forward about harassment. According to the AHRC, fewer than one in five people (17 percent) who experienced sexual harassment in the workplace in the last five years made a formal report or complaint.¹⁹ Further, there were no significant differences in reporting rates between men and women.²⁰ The LIV submits that the lack of reporting means the current approach is ineffective. Arguably, if the legal repercussions for sexual harassment were weightier, then people that experienced sexual harassment would be more likely to report it. This is due to the perception that reporting sexual harassment 'goes nowhere' as it is not a criminal offence, yet can jeopardise the victim's career.²¹

Conclusion:

- 1.10 The timing of this inquiry is significant, given that the worldwide #MeToo movement and 'Time's Up' campaign have placed the treatment of women in the workplace at the forefront of public discussion. This memo will focus on the current legal frameworks for, and risk identifiers of, sexual harassment, and make recommendations. In doing so, the LIV will submit that multiple forms of action will need to be undertaken to tackle this problem in Australian workplaces, for instance, more severe penalties, public campaigns, cultural changes in both public and private sector workplaces, and a more holistic portrayal of victims (inclusive of women, LGBTI+ and young people).

2. Laws and Processes in Australia

- 2.1. The current legal frameworks regulating sexual harassment differ from jurisdiction to jurisdiction. The same is true in respect of the definition of sexual harassment, as well as the obligations of employers to take steps to prevent sexual harassment. That said, the conduct which would constitute sexual harassment is largely the same. Sexual harassment is unlawful under the *Sex Discrimination Act 1984* (Cth) ('**SDA**'),²² as well as equal opportunity legislation in every state and territory.

Federal-level:

- 2.2. Section 28A of the SDA provides a definition of sexual harassment: A person sexually harasses another person if:
- a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours; or
 - b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

²² *Sex Discrimination Act 1984* (Cth) s 28B.

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

- 2.3. Section 28B of the SDA states that it is unlawful to sexually harass: an employee of the person,²³ a person who is seeking to become an employee of the person,²⁴ a fellow employee or person seeking employment with the same employer,²⁵ a commission agent or contract worker of the person,²⁶ a person seeking to become a commission agent or contract worker of the person,²⁷ a fellow commission agent or contract worker,²⁸ a partner in the same partnership or a person seeking to become a partner in the same partnership,²⁹ and a fellow workplace participant.³⁰
- 2.4. As per *Project Blue Sky Inc v Australian Broadcasting Authority* (1998),³¹ the general purpose and the policy of ss 28A and 28B are amongst the best guidelines to the meaning of these three elements.³²
- 2.5. Given the organisational structures of some workplaces in Australia may be highly complex or fragmented, the LIV supports the broad interpretation generally provided by courts to s 28B.³³ This allows for an interpretation which incorporates the object of the SDA, as expressed in s 3(c): 'to eliminate, as far as possible, discrimination involving sexual harassment in the workplace'. As has been reasoned in several cases, the human rights protection afforded by s 28B justifies this broad construction.³⁴

²³ Ibid s 28B(1)(a).

²⁴ Ibid s 28B(1)(b).

²⁵ Ibid s 28B(2).

²⁶ Ibid s 28B(3)(a).

²⁷ Ibid s 28B(3)(b).

²⁸ Ibid s 28B(4).

²⁹ Ibid s 28B(5).

³⁰ Ibid s 28B(6).

³¹ 194 CLR 466.

³² Ibid at 69.

³³ For example, see: *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at 70 (Kiefel J).

³⁴ *AB v Western Australia* (2011) 244 CLR 390 at 24; *IW v City of Perth* (1997) 191 CLR 1 at 12 (Brennan CJ and McHugh J) and 39 (Gummow J); *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 371 (Brennan J).

2.6. In determining whether an act of sexual harassment has occurred in a workplace, the following elements to the definition provided in s 28A must be satisfied: 1) the behaviour must be unwelcome, 2) the behaviour must be of a sexual nature, and 3) the behaviour must be such that a reasonable person would anticipate in the circumstances that the person who was harassed would be offended, humiliated and/or intimidated.³⁵

Unwelcome:

2.7. As reasoned by Bromberg J in *Ewin*, the meaning of 'unwelcome' is conduct that is disagreeable to the person to whom it was directed.³⁶ Spender J interpreted 'unwelcome' as conduct that is not solicited or invited and regarded as undesirable or offensive by the person to whom it was directed,³⁷ and this understanding has been followed in several cases.³⁸

2.8. Per Mansfield J in *Kraus v Menzie* [2012],³⁹ whether the behaviour is unwelcome is a subjective test.⁴⁰ The court will consider how the conduct was perceived by the recipient, rather than the intention of the person who engaged in the behaviour. Section 28(1A) of the SDA provides a non-exhaustive list of circumstances to be considered, such as the relationship between the complainant and the accused. The circumstances are broad and can include 'any other relevant' circumstance.

Offended, humiliated and/or intimidated:

2.9. Whether the behaviour was offensive, humiliating or intimidating is an objective test.⁴¹ The court will consider whether a reasonable person

³⁵ *Ewin* at 26.

³⁶ *Ewin* at 27.

³⁷ *Aldridge v Booth* (1988) 80 ALR 1 at 5.

³⁸ *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 247; *Poniatowska v Hickinbotham* [2009] FCA 680 at 289.

³⁹ FCA 3.

⁴⁰ *Ibid* at 22.

⁴¹ *Johanson v Blackledge* (2001) 163 FLR 58 at 84-85; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81 at 83.

would have anticipated that the behaviour would have caused a person to be offended, humiliated or intimidated.⁴²

2.10. In addition, victimisation is prohibited under the SDA to protect complainants of sexual harassment.

The complaints process:

2.11. From April 2017, a complaint of sexual harassment should be made to the AHRC within 6 months of the harassment taking place (for harassment which occurred prior to this, the time limit is 12 months). If the complaint is made outside the timeframe, the AHRC can decline to consider the complaint (s 46PH of the *Australian Human Rights Commission Act 1986* (Cth)). The process is designed to conciliate complaints and resolve them confidentially. Complainants must first make a complaint to the AHRC in writing or by email. There is no cost involved in making a complaint to the AHRC. This limits barriers for complainants when first making a complaint.

2.12. Under s 46PH, the complaint will be terminated if the President is satisfied:

- (a) that the alleged unlawful discrimination is not unlawful discrimination;
- (b) the complaint was lodged more than 6 months after the unlawful discrimination took place;
- (c) the complaint is trivial, vexatious, misconceived or lacking substance;
- (d) the complainant has already been dealt with by the Commission or another statutory authority;
- (e) there are no real prospects of success.

⁴² *Collins v Smith (Human Rights)* [2015] VCAT 1029 at 34.

2.13. However, if the complaint is not resolved in the AHRC, the complainant has 60 days from when the AHRC finalises the complaint to make an application to the Federal Court of Australia or the Federal Circuit Court. LIV members report that, once the complainant has made an application in a court, the costs can quickly escalate, particularly if the complainant is legally represented.

State-level:

2.14. Each state and territory also has laws relating to sexual harassment.⁴³ In Victoria, for example, the *Equal Opportunity Act 2010* (Vic) ('**EOA**') defines sexual harassment as:

- (a) the making of unwelcome sexual advances, or an unwelcome request for sexual favours, to another person; or
- (b) engaging in any other unwelcome conduct of a sexual nature in relation to another person;

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

2.15. 'Conduct of a sexual nature' is broadly defined as subjecting a person to any act of physical intimacy, making remarks with sexual connotations or making gestures of a sexual nature in a person's presence.

2.16. Harassment by employers and employees is expressly prohibited under s 93 of the EOA. A complainant in the Victorian system can make a complaint to the Victorian Equal Opportunity and Human Rights Commission ('**VEOHRC**') for conciliation. If the matter cannot settle, a complainant can make an application to the Victorian Civil and Administrative Tribunal ('**VCAT**'). A complainant does not need to make a

⁴³ *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (QLD); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (TAS); *Equal Opportunity Act 1984* (WA).

complaint to the VEOHRC first: they can make a complaint directly to VCAT.

- 2.17. There is no set timeframe for lodging an application with VCAT, but the application may be dismissed if it is not lodged within 12 months of the sexual harassment occurring. This can be a very difficult timeline for complainants to adhere to, particularly considering the complex issues that surround sexual harassment. For example, a complainant may not report sexual harassment for a myriad of reasons, including feelings of shame, denial, minimisation of the incident, fear of consequences, low self-esteem, lack of information, feelings of hopelessness or disbelief. It may take in excess of 12 months for a victim of sexual harassment to become a complainant. This may occur after sufficiently overcoming aforementioned reporting barriers, encouragement by others or as the #MeToo movement has illustrated, the naming of similar harassment by other women may embolden victims to speak out.

Employer liability for sexual harassment:

- 2.18. Vicarious liability refers to a secondary liability that arises under the common law. It means, in a workplace context, that an employer can be held liable for the acts or omissions of its employees. The SDA and the EOA both enshrine this principle into statute; employers can be held responsible for the sexual harassment of their employees. However, the standard the employer is required to meet under the SDA is significantly higher than that under the EOA.
- 2.19. Section 106 of the SDA provides that where an employee or agent, in connection with their employment or duties as agent, commits unlawful discrimination or sexual harassment, the Act applies as if the employer or principal had committed the act itself. However, this will not be the case if it is established that the employer or principal took 'all reasonable steps' to prevent the employee or agent from committing the unlawful act.

- 2.20. The meaning of ‘all reasonable steps’ was considered in *Richardson v Oracle Corporation Australia Pty Ltd* [2013].⁴⁴ In that case the court found that whilst the employer had taken ‘reasonable steps’ to prevent the harassment it had not taken ‘all reasonable steps’, as required by s 106.
- 2.21. Whilst Oracle had a policy which made clear that sexual harassment was against company policy, the court noted the policy did not state in clear terms that sexual harassment is against the law, and the source of that authority. The policy further failed to inform employees ‘legal action could be taken against them individually for sexual harassment and that they could also be exposing the company to liability’.
- 2.22. The requirements under the EOA are significantly less onerous. Under s 103 of the Act, an employer is not vicariously liable for the acts of its employees if it can show that it took reasonable precautions (as opposed to all reasonable precautions) to prevent the employees from contravening the Act. In *Walgama v Toyota Motor Corporation Australia Ltd (Anti-Discrimination)* [2007] VCAT 1318, the Tribunal considered s 103 and noted that the criterion of what was reasonable as it was ‘not very high or very exacting’, further stating the management could ‘not be expected to supervise every word that comes out of the mouth of a worker.’

Compensation:

- 2.23. Under s 46PO(4)(d) of the AHRC Act, a court, if satisfied that there has been unlawful discrimination by a respondent, may make an order requiring a respondent to pay to an applicant damages by way of compensation. The assessment of damages usually follows the principle of *restitutio in integrum* in tort law.⁴⁵ That is, the applicant is restored to their position prior to the damaging act.⁴⁶ Historically, these amounts have been low.⁴⁷

⁴⁴ FCA 102.

⁴⁵ *Richardson* at 208.

⁴⁶ *Ewin* at 602.

⁴⁷ See: *Gilroy v Angelov* (2000) 181 ALR 57; *Elliot v Nanda* (2001) 111 FCR 240; *Shiels v James* [2000] FMCA 2; *Johanson v Blackledge* (2001) 163 FLR 58; *Horman v Distribution Group* [2001] FMCA 52; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81;

However, recently there has generally been a significant increase in the general damages awarded for sexual harassment.

- 2.24. Under s 125(a)(ii) of the EOA, VCAT may make an order that a person pay to an applicant an amount that VCAT thinks fit to compensate for loss, damage or injury suffered in consequence of sexual harassment. In *Collins v Smith (Human Rights)* [2015] VCAT 1029, it was held that a similar analysis to that in *Richardson* should be undertaken in respect of the EOA. When determining the general damages, the judge relayed the ‘importance of having regard to the general standards prevailing in the community for loss of enjoyment of life, and the experience of pain and suffering’ that results from sexual harassment.⁴⁸ The applicant was awarded \$180,000 in general damages and \$20,000 in aggravated damages.⁴⁹ Similarly, in *Matthews*, the court awarded the applicant \$380,000 in general damages, as a result of being subjected to abuse, bullying and daily sexual harassment.

Labour hire providers:

- 2.25. The recent Victorian inquiry into the labour hire sector found serious mistreatment of labour hire workers, including through sexual harassment.⁵⁰ The LIV re-affirms its support for a national labour hire licensing scheme, reflecting those schemes already introduced in Victoria⁵¹ and Queensland.⁵²

McAlister v SEQ Aboriginal Corporation [2002] FMCA 109; *Beamish v Zheng* [2004] FMCA 60.

⁴⁸ *Collins v Smith (Human Rights)* [2015] VCAT 1029.

⁴⁹ *Ibid.*

⁵⁰ Victorian Government, *Inquiry into the Labour Hire Industry and Insecure Work* (2018) at 129.

⁵¹ *Labour Hire Licensing Act 2018* (Vic).

⁵² *Labour Hire Licensing Act 2017* (Qld).

3. Risk identifiers

- 3.1. Section 28(1A) of the SDA covers the various circumstances that are considered in relation to sexual harassment which may include these drivers. Additionally, particular workplaces may be more susceptible to sexual harassment, such as male dominated industries.
- 3.2. 'Risky culture' or poor workplace cultures may also include accepting the status quo of an organisation. Recently, VCAT awarded a complainant \$10,000 in damages after she complained of sexual harassment and was told by her employer '*you are working in a man's working environment and you need to expect that kind of unwanted attention*'.⁵³ The Fourth National Survey on Sexual Harassment in Australian Workplaces conducted by the AHRC in 2018 (survey) revealed that the most common forms of sexual harassment experienced were offensive comments or jokes (59 per cent women and 26 per cent men), inappropriate contact (54 per cent women and 23 per cent men) or unwelcome touching (51 per cent women and 21 per cent men).⁵⁴
- 3.3. Additionally, the survey highlighted:
- people aged 18 to 29 were more likely than any other age group to experience workplace sexual harassment;
 - people who identify as gay, lesbian were more likely to have experienced sexual harassment than heterosexual people;
 - Aboriginal and Torres Strait Islander people were more likely to have experienced workplace sexual harassment than people who are not Aboriginal or Torres Strait Islander; and

⁵³ *XVC v Joanne Baronessa (Human Rights)* [2018] VCAT 1492.

⁵⁴ Above n 11, at 8.

- people with a disability were more likely than those without a disability to have been sexually harassed in the workplace.
- Vulnerable workers seem to be more likely to be targeted by sexual harassment. In the case of people aged 18 – 29 years, these employees are generally new to the workforce. Perhaps a combination of being uncertain as to how to act in a workplace coupled with low self-confidence are drivers of workplace sexual harassment.

4. Recommendations

- 4.1. Experience in other countries has shown that effective action against sexual harassment in the workplace requires a combination of legal frameworks, as well as greater enforcement, adequately funded and empowered institutions, and better public awareness of the issue.
- 4.2. These recommendations aim to support workplaces to establish best practice approaches when dealing with sexual harassment in Australian workplaces. There are two types of recommendations - based on best practice - and they are prevention and response. Both are essential to regulate and reduce sexual harassment in the workplace with the aim of providing 1) measures to prevent sexual harassment occurring in the workplace, and 2) steps to respond appropriately if it has occurred.
- 4.3. The LIV recognises that smaller businesses may need exemptions from some recommendation to reduce unreasonable regulatory burden, as they will have access to fewer resources than a larger business. However, small businesses must still be required to take appropriate steps towards a best practice model for dealing with sexual harassment in the workplace.
- 4.4. Other recommendations relate to regulatory responsibility and are the responsibility of government, and not workplaces.

- 4.5. It is also recommended that large private and large public sectors be treated equally with regards to expectations in preventing and responding to sexual harassment in the workplace. All reporting requirements imposed on larger public entities, must also be a legislated requirement of larger private entities.

Definitions:

First responder:	An individual who serves as the 'first point of call' to receive a report of a sexual harassment incident in a workplace. They may be an employee (of any rank), contractor, trade union representative, OH&S/HSW representative. They should undertake basic training and understand the businesses procedures and the external services available.
Large business:	Includes any type of entity (public, private, organisation, business, etc.) that has more than 15 employees
Offender:	Person who has sexual harassed another person or persons (reflecting terms used in <i>Sex Discrimination Act 1984</i>).
Person harassed:	Person that has been harassed (reflecting terms used in <i>Sex Discrimination Act 1984</i>)
Prevention:	Policies, procedures and other actions taken to avoid the incidence of sexual harassment in the workplace.
Response:	Prepared and agreed procedures, policies and other actions to enact in the incidence of a report of sexual harassment in the workplace.
Serious levels of sexual harassment:	

Serious levels of sexual harassment may include systemic levels in which the harassment is prevalent throughout all levels of the business (i.e. across all ranks and departments); is perpetrated by senior staff; has been repeated and unmanaged by workplace following a formal complaint. Any one of these factors alone should be considered as 'serious' levels, a combination would be 'extreme'.

4.6. The LIV makes the following recommendations on responding to sexual harassment:

Recommendation 1 – Timeframes:

Timeframes, under which sexual harassment claims can be made, should be extended, or eliminated entirely.

Recommendation 2 – Stop Sexual Harassment Orders:

The introduction of new provisions for expedited 'stop sexual harassment orders', similar to 'stop bullying order' in the *Fair Work Act 2009* (Cth) ('FWA'). Alternatively, broaden the definition of 'bullying' in the 'stop bullying order' provisions of the FWA to include sexual harassment.

Recommendation 3 – Whistle-blower Protections:

Introduce corporate whistle-blower legislation that specifically includes sexual harassment-related matters or complaints as protected disclosures.

Recommendation 4 – Technology and Online Harassment:

Amend the legal definition of 'sexual harassment' in the SDA to specifically include online harassment and the use of technology and social media to perpetrate sexual harassment.

Recommendation 5 – Employment-related Harassment:

Clarify the scope of 'employment-related sexual harassment' to specifically include conduct towards any person performing work, not just in an employment relationship or in a workplace.

4.7. The LIV makes the following recommendations on preventing sexual harassment:

Recommendation 6 – Reporting:

Introduce mandatory reporting of sexual harassment complaints, settlements and outcomes to corporate boards and separately to the Workplace Gender Equality Agency under the *Workplace Gender Equality Act 2012* (Cth).

Compulsory composition reporting should be introduced for all industries, not just public entities currently required to report on topics such as workplace gender equality. Reports must include the rate of incidents of sexual harassment in workplace and staff satisfaction with complaints process.

Note: This recommendation infers that businesses must collect information on these issues, which can be done through free, anonymous online surveys or using an approach that suits the size and nature of the business. A template should be included in proposed FWIS anti-sexual harassment guidelines (see recommendation 10).

Recommendation 7 – Positive Duty on Employers:

Introduce a positive duty on employers in the SDA to eliminate sexual harassment as far as is reasonably practical, with a focus on bystander training as part of anti-discrimination training within organisations.

Recommendation 8 – Proactive Workplace Reviews:

Workplaces should actively review sexual harassment policies and provide training annually before complaints are raised.

Recommendation 9 – First Responder:

Response - Compulsory escalation, in consultation with the victim, of any reports of serious levels of sexual harassment to the appropriate authority, overriding privacy and confidentiality laws and/or workplace contracts and/or agreements

Prevention - All workplaces must have a designated 'first responder' to receive and manage reports of sexual harassment in the workplace. As part of this recommendation, compulsory online training should be developed to equip 'first responders' to receive and direct reports of sexual harassment to the appropriate person or authority. This person or persons must be internal but be aware of possible external alternate first responders (i.e. Australian Human Rights Commission or trade unions)

Recommendation 10 – Fair Work Information Statement ('**FWIS**').

The LIV submits that there should be an additional heading in the FWIS to include a statement on how sexual harassment in the workplace should be prevented and responded to. As with other topics in the FWIS, a best practice guide should also be made available for preventing and responding to sexual harassment in workplaces.

At present, there is no express mention of sexual harassment. Given that sexual harassment has been found to be prevalent in Australian workplaces, it should therefore be clearly highlighted.

The LIV suggests the following plain English wording for consideration:

'Dealing with sexual harassment:

You should be safe from sexual harassment in the workplace. All workplaces are now required to take steps to prevent sexual harassment from occurring in the workplace. Workplaces must also have clear procedures available to explain what steps to take in the event you have experienced or witnessed sexual harassment in the workplace.

If you have experienced or witnessed this type of harassment in the workplace and are unsure of what to do, you can seek assistance from the Australian Human Rights Commission. If you have been sexually assaulted, this is a criminal offence needs to be reported to the police.

See the Australian Human Rights Commission website or Sex Discrimination Act 1984 for more information.'

Recommendation 11 – Awareness Raising:

The LIV recommends that:

- a) All workplaces and relevant entities (e.g. public and private entities, associations, etc.) support education and awareness raising, including the use of notices, and other campaigns to emphasise peer enforcement that will help prevent sexual harassment in workplace.
- b) Counselling services (public or private) must be promoted in awareness raising activities to support persons harassed. In addition, the perpetrator of the harassment must attend compulsory counselling to learn about strategies to prevent re-offending.
- c) Internal and external options must be made available and communicated in workplaces for any person wishing to report sexual harassment.
- d) Schools & universities are to include workplace preparation education and awareness raising activities to help prepare students for the workforce. It is hoped this will help mitigate the risk of sexual harassment occurring. This should include age appropriate

communication and adhere to existing education guidelines. It should include explanations of what is deemed as inappropriate sexual behaviour and sexual misconduct, acceptable boundaries between, and negative consequences of, sexual harassment.

Recommendation 12 – Gender Targets:

Consider legislating targets or quotas for gender equality in large organisations on the basis that sexual harassment is more common in organisations dominated by one gender. Enforcing transparency on this issue is encouraged. Medium to large sized companies should be required to publish annual reports disclosing how they are meeting these targets or quotas.

Recommendation 13 – Workplace Leadership and Education:

Managers that are trained in responding to sexual harassment complaints will be able to mitigate any damage caused by sexual harassment, both to the victim and to the workplace. Complaints that go unanswered create an unhealthy workplace culture.

5. Conclusion

- 5.1. Should you have any queries about this memo, please contact Jacquie Goodwin, Policy Lawyer to the Workplace Relations Section (03 9607 9324 or JGoodwin@liv.asn.au), or Alexander Laurence, Paralegal to the Workplace Relations Section (03 9607 9565 or ALaurence@liv.asn.au).

Yours sincerely,

A handwritten signature in blue ink that reads "Stuart Webb". The signature is written in a cursive style with a large initial 'S'.

Stuart Webb
President
Law Institute of Victoria