

Zero Tolerance Position Statement on Sexual Harassment, Workplace Bullying and Unlawful Discrimination

1. Position Statement

The Law Society of Tasmania recognises that sexual harassment, workplace bullying and unlawful discrimination within the legal profession are problems requiring considered and targeted responses.

As the peak body for the profession, the Society has an essential role to play in leading the profession towards healthy, safe, inclusive and respectful workplaces¹.

The Society will not tolerate sexual harassment, workplace bullying and unlawful discrimination within the legal profession.

The Society is determined to do all it can to address these behaviours to ensure that all legal practitioners, whether working in the public or private sectors or in-house are treated with respect, courtesy and fairness and that the standards expected of the profession are maintained at all times.

2. Guidelines regarding sexual harassment, workplace bullying and unlawful discrimination

The following is intended as a starting point for legal practitioners seeking general information about their professional obligations in relation to sexual harassment, workplace bullying and unlawful discrimination within the legal profession.

This information is not an exhaustive statement of the relevant professional obligations that might apply to specific circumstances.

These Guidelines are not intended to, and do not, replace or amend a legal practitioner's obligations under the *Legal Profession (Solicitors' Conduct) Rules 2020 (Tas)*.

2.1 Regulatory Framework

(a) Federal legislation

Australian Human Rights Commission Act 1986 (Cth)

Disability Discrimination Act 1992 (Cth)

¹*Legal Profession (Solicitors' Conduct) Rules 2020* rules 7, 8 and 47.

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Age Discrimination Act 2004 (Cth)

Workplace Gender Equality Act 2012 (Cth)

Fair Work Act 2009 (Cth)

Privacy Act 1998 (Cth)

(b) Tasmanian legislation

Anti-Discrimination Act 1998 (Tas)

Work Health and Safety Act 2012 (Tas)

(c) Tasmanian regulations

Legal Profession (Solicitors' Conduct) Rules 2020 (Tas)

2.2 Rule 47 of the *Legal Profession (Solicitors' Conduct) Rules 2020 (Tas)*

Rule 47 of the *Legal Profession (Solicitors' Conduct) Rules 2020 (Tas)* provides:

Anti-discrimination and harassment (ASCR 42)

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

(a) discrimination; or

(b) sexual harassment; or

(c) workplace bullying.

Bullying, discrimination and sexual harassment perpetrated by a legal practitioner may constitute a breach of the Conduct Rules and could accordingly result in a finding of unsatisfactory professional conduct or professional misconduct against the practitioner.

3. Definitions

What is sexual harassment?

Sexual Harassment is usually defined as unwelcome conduct of a sexual nature where a reasonable person would expect the person to feel offended, humiliated or intimidated.

Section 17(3) of the *Anti-Discrimination Act 1998 (Tas)* provides:

- (3) *Sexual harassment takes place if a person –*
- (a) *subjects another person to an unsolicited act of physical contact of a sexual nature; or*
 - (b) *makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person; or*
 - (c) *makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence; or*
 - (d) *makes any unwelcome gesture, action or comment of a sexual nature; or*
 - (e) *engages in conduct of a sexual nature in relation to another person that is offensive to that 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, intimidated, insulted or ridiculed.

Sexual harassment is prohibited by the *Sex Discrimination Act 1984 (Cth)* and the *Anti-Discrimination Act 1998 (Tas)*.

The following is drawn from an article published by the Law Society of New South Wales²:

Staring or leering at someone, making sexually suggestive comments or jokes, inappropriate advances of an employee on a social networking sites, and intrusive questions about a person's private life or physical appearance may constitute sexual harassment.

There has been a significant increase in the damages awarded for sexual harassment, reflecting the change in community standards and expectations. The landmark 2014 decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014]³, where the plaintiff was awarded \$130,000 in damages for sexual harassment, was significant for rejecting the notion of a "permissible range" of damages.

A sexual harassment complaint may be made against individuals and their employers. Employers are not automatically liable for their employees' sexual harassment conduct. However, an employer must show they have taken reasonable steps to minimise the risk of sexual harassment in the workplace to avoid being held vicariously liable for an employee's conduct.

What are "reasonable steps"

In the case of *Richardson v Oracle* it was held that it was not sufficient to have policies, procedures and training in place that prohibit sexual harassment. It found that an employer should have a "lively and real interest" in the discipline for sexual

² Petrine Costigan & Kate Green, 'Managing sexual harassment in the workplace', The Law Society of New South Wales, 1 May 2018.

³ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

harassment, and that it is important that employees are aware that it is against the law to sexually harass anyone in the workplace. Also, they need to identify the source of federal and state legislation that makes it unlawful to sexually harass anyone in the workplace.

What is workplace bullying?

“Bullying” is defined in section 7889FD of the *Fair Work Act 2009 (Cth)*.

The Australian Government Fair Work Ombudsman website states:

A worker is bullied at work if:

- (a) a person or group of people repeatedly act unreasonably towards them or a group of workers
- (b) the behaviour creates a risk to health and safety.

Unreasonable behaviour includes victimising, humiliating, intimidating or threatening. Whether a behaviour is unreasonable can depend on whether a reasonable person might see the behaviour as unreasonable in the circumstances.

Examples of bullying include:

- behaving aggressively;
- teasing or practical jokes;
- pressuring someone to behave inappropriately;
- excluding someone from work-related events; and
- unreasonable work demands.

The source of bullying behaviour may be a client, colleague, judicial member, supervisor or any other member of the profession.

What is not bullying?

Reasonable management action that is carried out in a reasonable way is not bullying.

An employer or manager can:

- make decisions about poor performance;
- take disciplinary action; and
- direct and control the way work is carried out.

Management action that is not carried out in a reasonable way may be considered bullying.

What is unlawful discrimination?

Discrimination on the basis of a protected attribute may be unlawful under Federal and Tasmanian anti-discrimination legislation as well as under the provisions of the *Fair Work Act 2009*

The Australian Government Fair Work Ombudsman website provides:

- Discrimination occurs in the workplace when an employer takes adverse action against an employee or prospective employee because of a protected attribute.

What are the protected attributes?

Protected attributes include:

- Race
- Colour
- Sex
- Sexual orientation
- Age
- Physical or mental disability
- Marital status
- Family or carer's responsibilities
- Pregnancy
- Religion
- Political opinion
- National extraction
- Social origin.

What is adverse action?

Adverse action includes doing, threatening or organising any of the following:

- firing an employee
- injuring the employee in their employment, eg. not giving an employee legal entitlement such as pay or leave
- changing an employee's job to their disadvantage
- treating an employee differently than others

- not hiring someone
- offering a potential employee different and unfair terms and conditions for the job compared to other employees.

When can discrimination occur?

Discrimination can happen:

- to someone applying for a job as an employee
- to a new employee who hasn't started work
- to an employee at any time during employment.

What is not discrimination?

Adverse action is not always discrimination, even though it might seem to be. There can be lawful reasons that have nothing to do with someone's personal characteristics.

It is not discrimination if the actions:

- are allowed under state or federal anti-discrimination law;
- are taken against an employee of a religious institution to avoid harming the organisation's religious beliefs;
- do not relate to one of the protected attributes; or
- relate to the necessary requirements of the job.

The following attributes are protected attributed under the Tasmanian *Anti-Discrimination Act (1998)*:

- race;
- age;
- sexual orientation;
- lawful sexual activity;
- gender;
- gender identity;
- intersex variations of sex characteristics;
- marital status;
- relationship status;
- pregnancy;

- breastfeeding;
- parental status;
- family responsibilities;
- disability;
- industrial activity;
- political belief or affiliation;
- political activity;
- religious belief or affiliation;
- religious activity;
- irrelevant criminal record;
- irrelevant medical record; and
- association with a person who has, or is believed to have, any of these attributes.

A complaint of unlawful discrimination may be made against an individual and, or alternatively, their employer. An employer is not automatically liable for their employee's conduct in breach of anti-discrimination legislation. However, an employer must show they have taken reasonable steps to ensure their employees do not engage in conduct in breach of anti-discrimination legislation to avoid vicarious liability for an employee's conduct.

4. Practical steps

Here are some steps to address the issues set out in this statement:

- **Educate** yourself and your employees about what constitutes sexual harassment, bullying and unlawful discrimination and the legislation that makes it unlawful to sexually harass, bully or unlawfully discriminate anyone in the workplace. Examples of resources include the websites of the Australian Human Rights Commission's and the Office of the Anti-Discrimination Commissioner of Tasmania (**Equal Opportunity Tasmania**) provide excellent tools and material to assist.
- **Implement** a system to induct new employees and continually re-educate existing employees about what constitutes sexual harassment, bullying and unlawful discrimination, and that it is unlawful.
- **Act** when a complaint of sexual harassment, bullying and unlawful discrimination is made. Investigate the complaint, support the employee who has made the complaint and the employee who the complaint is made about.

Ensure that any investigation is impartial, fair and provides procedural fairness to everyone involved.

Approved by Council of the Law Society of Tasmania – 15 May 2021

Acknowledgement This position statement and guidelines draw heavily on the work of the Law Societies of South Australia and Queensland.