



# WORKPLACE GUIDE AND MODEL DISCRIMINATION AND HARASSMENT POLICIES

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THE LAW SOCIETY  
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Disclaimer: This publication provides general information of an introductory nature for legal practices and solicitors in New South Wales regarding the identification and elimination of discriminatory recruitment and employment practices in their workplaces. It is a general guide only and is not exhaustive of issues which may be encountered. This publication is not intended and should not be relied upon as a substitute for legal or other professional advice. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by The Law Society of New South Wales, the authors or any person associated with the production of this publication, and any liability is hereby expressly disclaimed.



## PRESIDENT'S MESSAGE

The Law Society of NSW is pleased to announce the release of our Workplace Guide and Model Discrimination and Harassment Policies. The guide is part of the Law Society's work in promoting diversity and inclusion in the workplace, 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 has 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 applaud legal organisations that are already active in this area and 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.

Juliana Warner  
**President**



## INTRODUCTION

A fair workplace means that all participants are treated with respect and are not subjected to discrimination, harassment 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 and 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).

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 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.

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, 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.<sup>1</sup>

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 which 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.<sup>2</sup> Additionally, under the *Workplace Gender Equality Act 2012* (Cth) 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, including the existence of strategies or policies to support gender equality.<sup>3</sup>

### The business case for equal opportunity and workplace diversity

In addition to complying with legal obligations, there are a number of reasons why engaging with equal opportunity practices and implementing changes makes business sense for legal 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** – improvements in productivity and performance across a firm or practice, whatever its size, can accrue from a number of different aspects directly affected by measures of diversity and inclusion within a workplace. These include higher staff morale and reduced absenteeism at the employee level, and greater flexibility and innovation organisationally. Evidence shows that diverse groups are in fact better at decision-making and better equipped for solving difficult problems, which leads to improved business outcomes. For example, increased diversity was linked to improved financial performance in a 2015 McKinsey study.<sup>4</sup>
- **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 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)* and the *Legal Profession Uniform Law (NSW)* that prohibit discrimination and harassment.

### Discrimination

#### What is discrimination?

Discrimination means treating someone unfairly because they happen to belong to a particular group of people or have particular characteristics. Discrimination may be intentional 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 grounds on which it is unlawful to discriminate against another person or a group of people under NSW and Federal Law:

- age (including forcing someone to retire at a certain age);<sup>5</sup>
- 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);<sup>6</sup>

- 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);<sup>7</sup>
- homosexuality (male or female, actual or presumed);<sup>8</sup>
- marital or domestic status;<sup>9</sup>
- race (including colour, ethnic background, ethno-religious background, descent or nationality);<sup>10</sup>
- sex (including pregnancy and breastfeeding);<sup>11</sup> and
- transgender status (actual or presumed).<sup>12</sup>

It is also unlawful to victimise a person for raising a discrimination complaint.<sup>13</sup> 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);<sup>14</sup>
- state education;<sup>15</sup>
- private educational institutions if on the basis of race only;<sup>16</sup>
- provision of goods, services and facilities;<sup>17</sup>
- accommodation;<sup>18</sup> and
- registered clubs.<sup>19</sup>

In addition under NSW law, discrimination on the basis of a person's responsibilities as a carer is prohibited in the area of work (including employment and partnership contexts).<sup>20</sup>

Under Commonwealth legislation, the relevant Acts relate to discrimination based on a specific characteristic. 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 characteristic protected under legislation is treated less favourably than a person without such a characteristic, in the same or similar circumstances.<sup>21</sup>

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 although she meets all relevant criteria for promotion. This would be direct discrimination on the ground of pregnancy.
- A firm refuses to hire a suitably qualified person because they are of a particular race or ethnic descent. This would be direct discrimination on the ground of race.

Indirect discrimination focuses on the adverse effects of certain conduct. Indirect discrimination occurs where a person with a protected characteristic is required to comply with a condition or requirement that they cannot comply with and which a substantially higher proportion of persons without the characteristic are able to comply with. The imposition of the condition or requirement will be unlawful unless the condition or requirement is a reasonable one in all the circumstances.<sup>22</sup>

### » 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 a particular event occurred. It is sufficient if it is a reason for the event occurring<sup>23</sup> Commonwealth legislation contains similar provisions.<sup>24</sup>

### » 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 obtain work elsewhere. *Prima facie*, the decision to retrench the older solicitors is 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. It creates an uncomfortable 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, intimidates or seriously embarrasses a person. The test is whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.<sup>25</sup>

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.<sup>26</sup> 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.

Current legislation explicitly addresses 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.<sup>27</sup> Many forms of sexual harassment can also be acts of sex discrimination.<sup>28</sup>

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.<sup>29</sup>

## » EXAMPLES OF SEXUAL HARASSMENT

In *Coleman v Bentley*<sup>30</sup> the NSW Administrative Decisions Tribunal 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;<sup>31</sup>
- intimate pre-employment interview questions about the applicant's sex life;<sup>32</sup>
- 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;<sup>33</sup>
- sexually explicit comments about a previous employee during a pre-employment interview, providing money to purchase underwear, requiring underwear to be brought, referring to the individual's breasts while making a comment "I would like to chew on those", physical touching, offers of massage;<sup>34</sup> and
- pinching an individual's bottom, offers of massage and massaging, comments of a sexual nature about himself and her sexual life.<sup>35</sup>

In 2012 the Australian Human Rights Commission conducted a national telephone survey and asked responders about their experience of sexual harassment.<sup>36</sup> The published results indicated that many people have experienced sexual harassment at some time. Subsequent inquiries have found that sexual harassment remains prevalent and occurs in every industry and at every level in Australian workplaces.<sup>37</sup>

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.<sup>38</sup>

## 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.<sup>39</sup>

## » EXAMPLES

Emily, an applicant for a summer clerkship, is asked during the interview whether she is married or has a boyfriend. The partner interviewing Emily also states "An attractive woman like you could go a long way in the legal profession." As well as the question being inappropriate, the interviewer's comment may be 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.



## Hostile work environment

In order to be unlawful, there is no requirement that the offensive behaviour must 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;
- sexual innuendo or talk about sexual matters; and
- sexist or inappropriate emails or text messages.

### » EXAMPLE

Sunny has been working in the mail room of a large government legal office for several months. He has an intellectual disability. Some of his workmates play practical jokes on him, deliberately hiding the mail so that he becomes confused and disturbed. They also tell jokes about intellectually disabled people in his presence. During a recent bomb scare, he was left alone in the building for 20 minutes while the rest of the office was evacuated. In each of these instances, Sunny has been subjected to harassment on the ground of his disability.

### » EXAMPLE

#### *Legal Services Commissioner v PLP [2014] VCAT 793*

A female graduate commenced her legal training placement at a law firm. The supervising lawyer repeatedly propositioned her for sex, made persistent sexual comments and engaged in inappropriate touching culminating in an incident in a car park where he tried to physically assault her.

The supervising lawyer terminated the graduate's employment and attempted to block her admission after she lodged a sexual harassment application against him.

The Victorian Civil and Administrative Tribunal awarded \$100,000 damages to the graduate. The lawyer was found guilty of professional misconduct.

## 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.<sup>40</sup> It is 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.<sup>41</sup>

## Workplace bullying

An eligible worker who reasonably believes that he or she has been bullied at work can apply to the Fair Work Commission for an order to stop the bullying.<sup>42</sup> This applies to workers<sup>43</sup> in "constitutionally-covered businesses", as defined in the *Fair Work Act 2009* (Cth).<sup>44</sup> 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 engage in more than one instance of unreasonable behaviour 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.<sup>45</sup>

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

- aggressive or intimidating conduct;<sup>46</sup>
- belittling or humiliating comments;<sup>47</sup>
- victimisation;<sup>48</sup>
- spreading malicious rumours;<sup>49</sup>
- practical jokes or 'initiation';<sup>50</sup>
- exclusion from work-related events;<sup>51</sup> and
- unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level.<sup>52</sup>

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.<sup>53</sup>

In addition, an employer may be found liable in circumstances where they respond inadequately or inappropriately to bullying complaints made to them.<sup>54</sup>

## Reasonable management action

Bullying does not include reasonable management action carried out in a reasonable manner.<sup>55</sup>

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.

## 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;
- 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.<sup>56</sup>

Victimisation can also occur when a person subjects, or threatens to subject, another person to a detriment it is known or suspected that the other person intends to do any of the above.<sup>57</sup>

Subjecting someone to a detriment could include:<sup>58</sup>

- 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.

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 the Anti-Discrimination Board 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
  - 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;<sup>59</sup>
- are (or are thought to be) homosexual;<sup>60</sup>
- have (or are thought to have) HIV and/or AIDS;<sup>61</sup> or
- are (or are thought to be) transgender.<sup>62</sup>

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 publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.<sup>63</sup>

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.<sup>64</sup>

### » EXAMPLE

#### *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC [92-701]

A Wagga Wagga councillor made a number of public comments critical of and offensive to Aboriginal people including references to “half-caste radicals [who] have made a claim upon the city”. The Tribunal found that these comments amounted to vilification on the basis of race and ordered the councillor to refrain from further conduct, publish an apology, and pay one of the complainants \$3000 in damages.

## 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 of \$100 000.<sup>65</sup>

In addition to civil liability, under Commonwealth legislation, victimisation is an offence and attracts a penalty of imprisonment.<sup>66</sup>

## 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.<sup>67</sup>

## 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 the partner is 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 resulting in discrimination or harassment.<sup>68</sup>

Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioners of the law practice comply with their obligations under the Uniform Law and Rules and their other professional obligations and that legal services are provided by the law practice in accordance with the Uniform Law, Rules and other professional obligations.<sup>69</sup>

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.<sup>70</sup>

Each person conducting a business or undertaking (PCBU) also has a duty under the *Work Health and Safety Act 2011* to ensure the health and safety of its workers and others as far as is reasonably practicable.<sup>71</sup> 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.<sup>72</sup>

## Accessory liability

Legal practitioners may also be liable as accessories if they aid, permit, cause or induce unlawful discrimination, harassment, victimisation or vilification.<sup>73</sup> 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.<sup>74</sup>

## 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.<sup>75</sup> A principal or employer will not be liable if they took all reasonable steps to prevent the agent or employee from contravening the law.<sup>76</sup>

Some Commonwealth legislation also makes specific provision for the vicarious liability of the unlawful conduct of employees.<sup>77</sup> These also provide a defence where the employer or principal can show that they took all reasonable steps to prevent the unlawful act.

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

- partners;
- professional staff;
- business services staff;
- consultants; 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.<sup>78</sup> 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”.<sup>79</sup> 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.<sup>80</sup>

### » EXAMPLE

A major client 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. The firm 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 under statute 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 which make it clear that conduct that amounts to unlawful discrimination and harassment and victimisation and vilification are unacceptable and will not be tolerated;
- have a clear, written and fair grievance handling procedure, and follow it;
- distribute these policies and procedures to all partners, managers and staff;
- train all partners, managers and staff about their rights and responsibilities under equal opportunity laws, including how to manage grievances effectively;
- 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 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 make it unlawful to discriminate on specific grounds in selecting applicants for employment. 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 when recruiting, including in recruiting new partners from outside to join the firm. The *Anti-Discrimination Act 1977* (NSW) makes it unlawful for partnerships with more than six partners to discriminate on any of the specified grounds in inviting any person to join a proposed or existing partnership.<sup>81</sup> There are similar provisions in some Commonwealth legislation.<sup>82</sup>

Legal practices should establish and follow objective recruitment criteria which are not directly or indirectly discriminatory and not allow personal biases, prejudices and stereotyping to intrude into 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 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.<sup>83</sup>

The exception in relation to disabilities 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 his or her disability, the person:

- would be unable to carry out the inherent requirements of the particular employment; or
- 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.<sup>84</sup>

In relation to carer's responsibility, the exception 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 his or her responsibilities as a carer, the person:

- would be unable to carry out the inherent requirements of the particular employment; or
- 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.<sup>85</sup>

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 what the job is and go beyond simply the physical capacity to perform the employment.<sup>86</sup>

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 of a person concerned; and
- the financial circumstances and estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.<sup>87</sup>

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 how access might be provided or adjustments made.<sup>88</sup> Some Commonwealth legislation explicitly states that the burden of proving that something would impose an unjustifiable hardship lies on the person claiming the exception.<sup>89</sup>

## 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.<sup>90</sup>

### » EXAMPLE

A legal service is established to provide legal advice and representation to the Korean community. 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.<sup>91</sup>

## Other exceptions can be granted

In NSW, the President of the Anti-Discrimination Board 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.<sup>92</sup> 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 Act 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 specified 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.<sup>93</sup>

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.<sup>94</sup> These include remuneration between women and men and availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees.<sup>95</sup>

### Remuneration and the gender pay gap

Research has highlighted significant barriers to pay equity for female practitioners, despite their growing numbers in the profession.<sup>96</sup> 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.

In *Bonella v Wollongong City Council*<sup>97</sup> it was held that an employer had discriminated against five of its female employees with regard to 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.<sup>98</sup>

### 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 ground of sex, carer's responsibilities, age and/or disability.<sup>99</sup> This may also be the case under the *Fair Work Act 2009* (Cth) when the employer does not have reasonable business grounds for refusing a request for flexible work arrangements.<sup>100</sup>

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.<sup>101</sup> 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 now less likely to accept the argument that flexible work practices are unworkable just because they have never been tried in a particular occupation before (e.g. finance officer: *FMSCFU (NSW) v Nambucca Shire Council*<sup>102</sup>); at a senior level (*Hickie v Hunt & Hunt Solicitors*<sup>103</sup>) or in a supervisory position (*Bogle v Metropolitan Health Service Board*<sup>104</sup>). 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.<sup>105</sup>

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.<sup>106</sup>

## » 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 on the days his partner works. 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.<sup>107</sup> In the Federal Circuit Court decision of *Heraud v Roy Morgan Research Ltd*<sup>108</sup> an employer was found to have engaged in adverse action when it made an employee redundant while on parental leave.



## 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 must be 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 on the basis of irrelevant characteristics such as age or gender.

In scheduling training sessions, firms should have regard to the needs of employees with carer's responsibilities or ethno-religious commitments. It may be discriminatory, for example, to conduct training sessions after hours or on days when part-time workers are not at work. It is also important to ensure that training venues and training materials are accessible to employees with disabilities.

### » 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.<sup>109</sup>

## 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.<sup>110</sup> Law firms that take into account protected considerations 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 who has no family responsibilities.

The staff partner has denied Layla a transfer because of her pregnancy. This would be unlawful sex discrimination.

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.<sup>111</sup>

## 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 characteristics. 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 characteristic. 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.<sup>112</sup>

### » 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 specified grounds.<sup>113</sup>

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 or to access 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 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 one particularly grave incident of harassment or general patterns of harassment and sexual behaviour inappropriate to the workplace.<sup>114</sup>

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.<sup>115</sup>

In some circumstances, 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.<sup>116</sup> 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).<sup>117</sup> 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 a voluntary redundancy scheme should ensure that an employee's age, sex, race or other protected characteristics 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, such as sex, race, marital status, pregnancy or potential pregnancy, disability, age, homosexuality, transgender and/or responsibilities as a carer. Care should be taken 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.<sup>118</sup>

In addition, legal practitioners are prohibited from engaging in unlawful discrimination, including all forms of harassment, in connection with the practice of law.<sup>119</sup>

### 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.<sup>120</sup> They may also be subject to disciplinary action, including loss of their practising certificate.<sup>121</sup> 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.<sup>122</sup>

#### » EXAMPLE

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 homosexuality.

#### » EXAMPLE

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

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 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.<sup>123</sup>

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.

### Essentials of effective complaint management

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 vicariously liable for failing to deal effectively with a complaint and for victims of discrimination or harassment to make a complaint of victimisation.

### » KEY PRINCIPLES OF A COMPLAINTS MANAGEMENT SYSTEM

A complaint management system should incorporate a 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 and also in Braille.
- **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 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 complainants 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 vexatious (found to have been made without any proper basis).<sup>124</sup> 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. Should the solicitor bring an action for unfair dismissal against the firm, he may succeed.

## Investigating complaints: the importance of natural justice

An investigation of a complaint of discrimination or harassment should be as comprehensive and conclusive 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 internal 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 always be accommodated if at all possible, as denial will greatly 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. s/he must not have prejudged the complaint,
- each party to the complaint must have access to additional support or advocacy as necessary such as interpreters, 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, 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 serious 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 applicant'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 applicant 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 applicant.

The applicant 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 applicant and the complainant worked closely together and the court agreed with the employer's decision that it would have been inappropriate for the applicant to continue working in the section. Transfer was also inapplicable, as it entailed a considerable downgrade in the applicant'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. It may be useful for firms to undertake actions of the following kind:

- Collect information about applicants, new hires and resignations (for instance, is the firm attracting and retaining women, people with disabilities, and people of non-English speaking background?),
- Conduct regular employee opinion surveys. Ensure 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
- Regularly review equal opportunity, harassment and discrimination policies against legislative changes.

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, and conducting problem solving focus groups. When this data has been collected and analysed, the firm can then implement effective solutions 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,
- provide regular training and education on equal opportunity to everyone employed by the firm,
- review all 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 value everyone working for our firm for how well they perform their duties.

We believe that applicants for employment and all employees should be treated with fairness and respect in the workplace.

This organisation 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. Discriminatory conduct may also result in legal proceedings under relevant anti-discrimination legislation and under criminal law. These proceedings can affect the individual and the employer, who may be vicariously liable. For legal practitioners, discriminatory conduct may also result in disciplinary action under the *Legal Profession Uniform Law* (NSW).

## Legislative provisions

### 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 those with whom we work, including clients, and those who undertake work for us, including contractors and their employees.

## 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 or domestic status, race, sex or transgender status. 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.

[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:

- 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 means treatment that is less favourable on any of the prohibited grounds, 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 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 attributes listed above,
- 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.

## Workplace bullying

If someone is being bullied because of a personal characteristic protected by equal opportunity law, it is a form of discrimination.

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).<sup>125</sup> 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.

## Victimisation

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

- said you should not discriminate against them,
- made a complaint about discrimination at work,
- sent a complaint about discrimination to an external body, such the Anti-Discrimination Board, or
- given advice or information about discrimination to someone else, or acted as a witness for someone who has been discriminated against.

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.

## Responsibilities of employees and contractors

Employees and contractors must:

- comply with the firm's equal opportunity policy,
- offer support to anyone who is being discriminated 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. If you are a manager, supervisor or partner you must:

- monitor the working environment to ensure acceptable standards of conduct are observed at all times,
- be a good role model – comply with the firm’s equal opportunity policy and do not engage in behaviour that could be interpreted as discrimination,
- ensure that the people you supervise understand this policy,
- promote the firm’s equal opportunity policy within your work area,
- 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 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.

## Disciplinary and grievance procedures

[Name of firm] will regard any act of unlawful discrimination 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 or victimisation may be communicated confidentially to your supervisor, the managing partner, the human resources manager [specify other names as appropriate].

All complainants may contact the Office of the Legal Services Commissioner, Anti-Discrimination Board of 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.

## 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 in the workplace and that differences should be respected. This means that everyone must be able to work in an environment free from harassment.

This organisation 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 the harassment policy, and
- promote appropriate standards of conduct at all times.

[Name of firm] considers unlawful harassment to be unacceptable and such conduct 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. Harassment may also result in legal proceedings under relevant anti-discrimination legislation and under criminal law. These proceedings can affect the individual and the employer, who may be vicariously liable. For legal practitioners, harassment may also result in disciplinary action under the *Legal Profession Uniform Law* (NSW).

## Legislative provisions

### 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 those with whom we work, including clients, and those who undertake work for us, including contractors and their employees.

## What is harassment?

Harassment can be sexual or non-sexual and is any type of behaviour that:

- the other person does not want and does not return,
- offends, embarrasses, intimidates, humiliates or insults them
- causes a hostile workplace by causing offence to, or humiliation or intimidation of another person.

The intention of the harasser is not relevant. It is instead based 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 is sexual harassment?

Sexual harassment refers to any unwanted, unwelcome or uninvited 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:

- threatening or taking adverse employment action if sexual favours are not granted;
- demands for sexual favours in exchange for favourable or preferential treatment;
- 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; and
- the display in the workplace of sexually suggestive objects or practices.

## What is not harassment

Reasonable management action, such as appropriate performance management or performance improvement processes, is not considered harassment.

Sexual harassment is generally not behaviour that is based on mutual attraction, friendship or respect. 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.

## Unlawful discrimination and harassment prohibited

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

Unlawful discrimination and harassment (including sexual 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 non-employees (for example, independent contractors, vendors, clients and customers).

## Harassment and the law

Harassment is a form of unlawful discrimination. Under the *Anti-Discrimination Act 1977* (NSW) 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),
- 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).

Harassment based on sex, race, disability or age 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 this 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.

## 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 material including on social media platforms such as Facebook, Twitter, WhatsApp or Instagram,
- racist, sexist, ageist, homophobic 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.

## Victimisation

This occurs when someone is treated less favourably because he or she has made a complaint about harassment or has taken action against the firm under the relevant legislation, or proposes to do so. This firm will not permit victimisation of complainants.

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, do not ignore the harassment thinking it will go away. Make it clear that the behaviour is offensive and unacceptable. If you can, tell the person 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

Employees and contractors must:

- respect the rights of others and never get involved in or encourage harassment, and

- carefully consider anything that could be interpreted as sexual or stereotyping (putting down) people because of the group they happen to belong to.

If an employee or contractor becomes aware that someone that he or she works with is being harassed, he or she should consider helping prevent it by offering to support them. For example:

- tell them that you are willing to act as a witness if they decide to lodge a complaint,
- refuse to join in the harassment,
- tell them they have the legal right to a harassment-free workplace,
- tell them they can say 'no' to the person or people who are harassing them, and
- tell them that they should report the harassment using our grievance handling procedure if it doesn't stop.

## Responsibilities of partners, managers and supervisors

All partners, managers and supervisors must do their best to prevent harassment happening within their teams. 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,
- make it clear to all being supervised that the firm won't tolerate any harassing behaviour from any of them,
- ensure that their team's working environment is free of sexist, racist, or any other type of stereotyping material, posters, and screen savers,
- wherever possible, make sure that neither the work environment, nor work processes, make it easy for harassment to happen,
- follow up any staff/team behaviour changes that could mean 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 that they can't sort out themselves, and
- act immediately if they are witness to or are told about any harassment by following the instructions in our grievance handling procedure and accompanying guidelines.



## 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 [specify other names as appropriate].

All complainants may contact the Office of the Legal Services Commissioner, the Anti-Discrimination Board of 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.

## 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 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 those with whom we work, including clients, and those who undertake work for us, including contractors and their employees.

### 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.

### Policy principles

The grievance handling procedures uphold 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.
- b) **Impartiality** – All sides 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 make 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 under equal opportunity legislation.
- 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) 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, and will treat all complaints seriously. Accordingly, once a complaint is made, we will deal with the matter appropriately in accordance with this procedure.

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 are]. 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 volunteered for the job. 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. In the informal complaint procedure there is no decision made about what did or did not occur, but rather the grievance contact/support officer attempts 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 – see below for information and time limits.

Where practical, within two working days the person who is to investigate your grievance will:

- get full information from you about your grievance and what will resolve it as far as you are concerned,
- 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've received from you to the person/people you're 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 be disciplinary

- work out whether they have enough information to know whether the matter(s) alleged in the grievance did or didn't happen,
- if they don't have enough information to know whether the matters alleged in your grievance did or didn't happen and the allegation is serious enough to be disciplinary, they may need to speak to witnesses and/or review any relevant documents,
- 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 let everyone involved know the outcome. 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
  - 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
    - tell you and the other person/people involved about your right to appeal
- consider the need for staff training in particular policies or standards.

Where a complaint is substantiated, possible outcomes include:

- an apology and commitment that the behaviour will not happen again,
- access to counselling,
- a first or final warning,
- demotion,
- termination of employment,
- joint agreement: many grievances will be settled by agreement between the people involved in the grievance. If this happens, no notes or records will go on anyone's personnel file. The person who handled the grievance will write a confidential report which will be filed in a confidential grievance filing system within Human Resources. Only senior managers and human resource staff will have access to this, and only when necessary, or
- referral to police if a criminal offence has or may have been committed.

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

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

## External complaint

If you are unhappy with the outcome of your complaint, you can get advice from any relevant external agency, such as the Anti-Discrimination Board of NSW, the Australian Human Rights Commission, the NSW Industrial Relations Commission and the Fair Work Commission. Contact information is at the end of this document. Do this as soon as possible. Each agency will tell you what their time limits are.

## Confidentiality

These Grievance Handling Procedures are designed to ensure that details of complaints remain strictly confidential to the individuals involved and those with a formal role in the complaint process.

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. Anyone in breach of this requirement is risking disciplinary action and legal action under the laws of defamation.

## Malicious complaints

Anyone found to have made a false complaint in bad faith will face disciplinary action. This may include counselling, a written apology to the person complained about, an official warning, transfer, demotion or dismissal, depending on the seriousness of the allegations.

## 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 other legal representative. You may bring a 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](mailto:adbcontact@justice.nsw.gov.au)  
**Website:** [www.antidiscrimination.justice.nsw.gov.au/](http://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](mailto:communications@humanrights.gov.au)  
**Website:** [www.humanrights.gov.au](http://www.humanrights.gov.au)
- **NSW Industrial Relations Commission**  
Level 1, 47 Bridge Street  
Sydney NSW 2000  
**Telephone:** (02) 9258 0866  
**Website:** <http://www.irc.justice.nsw.gov.au/>
- **Fair Work Commission**  
Level 10, Terrace Tower  
80 William Street  
East Sydney NSW 2011  
**Telephone:** (02) 8374 6666  
**Email:** [sydney@fwc.gov.au](mailto:sydney@fwc.gov.au)  
**Website:** [www.fwc.gov.au](http://www.fwc.gov.au)

## 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.

## More information

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

## Review details

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

This policy was last updated on. 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 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 characteristics
- 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 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 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 "young gun" 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 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, ethno-religious obligations or carer's responsibilities and therefore need to vary these requirements
- Ask questions that are job-specific, 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?" Do not seek irrelevant personal information
- 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 ethno-religious background, descent or nationality, marital status, pregnancy and potential pregnancy, disability, age, homosexuality, transgender 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 him/her 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 cars
- ensure all employees receive fair access to the better-paid areas of the practice
- 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 such as job-sharing, work from home and part-time for all workers
- seriously consider requests for part-time 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 female 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 working from home, ensure reasonable steps are taken to provide appropriate equipment
- ensure that work health and safety requirements are fulfilled in relation to working from home
- 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
- Mentoring/coaching opportunities should be made available to all employees, irrespective of factors 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 fees and 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 irrelevant personal characteristics such as race, gender, age, disability or homosexuality
- 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
- 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 policies
- Decisions to terminate should be based on the following factors:
  - Genuine financial and operational reasons
  - Poor or inadequate work performance, or
  - Serious or wilful 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
- Conduct exit interviews with all employees leaving the firm to determine whether discrimination 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 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 cocktail 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
- 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



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

### Publications

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

- Australian Asian Lawyers Alliance, Cultural Diversity Report 2015
- American Bar Association, Diversity in the Legal Profession: The Next Steps (2010)
- Juliet Bourke, 'Law Society Report: Implementing Flexibility in the Legal Profession – Myths and Realities' (April 2005) *Law Society Journal*
- Helen Borger, 'Policy is one thing, action is another' (March 2014) *Law Society Journal*
- Kate Eastman 'Sex Discrimination in the Legal Profession' (2004) 27(3) *University of New South Wales Law Journal* 866
- Law Council of Australia, 'National Attrition and Re-engagement Study (NARS) Report' (2014)

- Law Society of NSW, 'Thought Leadership 2011 Advancement of Women in the Profession: Report and Recommendations' (2011)
- Law Society of NSW, 'Thought Leadership Advancement of Women in the Profession: Progress Report' (2013)
- Marilyn Krawitz, 'Time for Flexibility' (December 2014) *Law Society Journal*
- Victorian Women Lawyers "Do you manage? A guide to managing lawyers with flexible work arrangements" (2010)

### 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 (2016) available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/working-without-fear-results-sexual-harassment-national>.
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 2013 (No 1) (2015) (Cth) cl 1.
4. Hunt V., Layton D. and Prince S., Why Diversity Matters (McKinsey & Company, 2015).
5. Anti-Discrimination Act 1977 (NSW) pts 4E, 4G; Age Discrimination Act 2001 (Cth).
6. Anti-Discrimination Act 1977 (NSW) pt 4B; Sex Discrimination Act 1984 (Cth); Fair Work Act 2009 (Cth).
7. Anti-Discrimination Act 1977 (NSW) pts 4A, 4F; also see the definition of disability under the Disability Discrimination Act 1992 (Cth).
8. Anti-Discrimination Act 1977 (NSW) pt 4C; Sex Discrimination Act 1984 (Cth).
9. Anti-Discrimination Act 1977 (NSW) pt 4; Sex Discrimination Act 1984 (Cth).
10. Anti-Discrimination Act 1977 (NSW) pt 2, divs 2 and 3; Racial Discrimination Act 1975 (Cth).
11. Anti-Discrimination Act 1977 (NSW) pt 3; Sex Discrimination Act 1984 (Cth).
12. Anti-Discrimination Act 1977 (NSW) pt 3A; Sex Discrimination Act 1984 (Cth) refers to gender identity.
13. 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
14. 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.
15. Anti-Discrimination Act 1977 (NSW) ss 17, 31A, 38K, 46A, 49L, 49ZO, 49ZYL.
16. Anti-Discrimination Act 1977 (NSW) s 17.
17. Anti-Discrimination Act 1977 (NSW) ss 19, 33, 38M, 47, 49M, 49ZP, 49ZYN.
18. Anti-Discrimination Act 1977 (NSW) ss 20, 34, 38N, 48, 49N, 49ZQ, 49ZYO.
19. Anti-Discrimination Act 1977 (NSW) ss 20A, 34A, 38O, 48A, 49O, 49ZR, 49ZYP.
20. Anti-Discrimination Act 1977 (NSW) pt 4B.
21. Anti-Discrimination Act 1977 (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA.
22. 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).
23. 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).
24. 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).
25. Anti-Discrimination Act 1977 (NSW) s 4A.
26. 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.
27. Sex Discrimination Act 1984 (Cth) s 28A; Anti-Discrimination Act 1977 (NSW) s 22A.
28. Hall v A & A Sheiban Pty Ltd (1989) 85 ALR 503.
29. 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.
30. O'Callaghan v Loder [1983] 3 NSWLR 89.
31. Anti-Discrimination Act 1977 (NSW) pt 2A; Sex Discrimination Act 1984 (Cth) div 3.
32. [2002] NSWADT 87.
33. Spencer v Dowling [1997] 2 VR 1277. More recently, see Hill v Hughes [2019] FCCA 1267.
34. Hall v A & A Sheiban Pty Ltd (1989) 85 ALR 503.
35. Hopper v Mount Isa Mines Ltd and others [1997] QADT 3.
36. B, C and D v Stratton [1997] HREOCA 8.
37. Tulk v Moore (1997) EOC [92-870].
38. For the full report see 'Working without fear: Results of the Sexual Harassment National Telephone Survey' available at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/working-without-fear-results-sexual-harassment-national>.
39. Australian Human Rights Commission: 'Respect@Work: Sexual Harassment National Inquiry Report (2020)' - see <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>
40. Disability Discrimination Act 1992 (Cth) s 35.
41. Anti-Discrimination Act 1977 (NSW) s 22B; Sex Discrimination Act 1984 (Cth) s 28B.
42. Anti-Discrimination Act 1977 (NSW) s 22F.
43. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 42.
44. Fair Work Act 2009 (Cth) s 789FC.
45. Defined as in the Work Health and Safety Act 2011 (Cth); Fair Work Act 2009 (Cth) s 789FC(2).
46. Fair Work Act 2009 (Cth) s 789FD(3).
47. Fair Work Act 2009 (Cth) s 789FD.
48. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
49. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618; Styles v Murray Meats Pty Ltd (t/as Ben Howe Butchers) [2005] VCAT 914.
50. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
51. Willet v State of Victoria [2013] VSCA 76.
52. WorkCover Authority (NSW) (Inspector Maddaford) v Coleman (2004) 138 IR 21.
53. Willet v State of Victoria [2013] VSCA 76.
54. Naidu v Group 4 Securitas Pty Ltd [2005] NSWSC 618.
55. Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) [105].
56. Keegan v Sussan Corporation (Aust.) Pty Ltd [2014] QSC 64.
57. Fair Work Act 2009 (Cth) s 789FD(2).
58. 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 27(2), Sex Discrimination Act 1984 (Cth) s 94.
59. Anti-Discrimination Act 1977 (NSW) s 50(1).
60. See information by the Anti-Discrimination Board of NSW, Conciliations – Victimisation, Employment at [http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1\\_resources/adb1\\_equalityconciliation/conciliations\\_victimisation\\_2.aspx](http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_resources/adb1_equalityconciliation/conciliations_victimisation_2.aspx).
61. Anti-Discrimination Act 1977 (NSW) s 20C.
62. Anti-Discrimination Act 1977 (NSW) s 49ZT.
63. Anti-Discrimination Act 1977 (NSW) s 49ZXB.
64. Anti-Discrimination Act 1977 (NSW) s 38S.
65. Crimes Act 1900 (NSW) s 93Z.
66. Anti-Discrimination 1977 (NSW) ss 20B, 38R, 49ZS, 49ZXA.
67. Anti-Discrimination Act 1977 (NSW) s 108(2)(a).
68. Age Discrimination Act 2004 (Cth) s 51; Disability Discrimination Act 1992 (Cth) s 42; Sex Discrimination Act 1984 (Cth) s 94.
69. Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015 (NSW) r 42.
70. Partnership Act 1892 (NSW) s 9.
71. Legal Profession Uniform Law (NSW) s 34.
72. Legal Profession Uniform Law (NSW) s 35.
73. Work Health and Safety Act 2011 (NSW), ss 5, 18, 19.
74. Work Health and Safety Act 2011, ss 27, 28.
75. 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.
76. Sex Discrimination Act 1984 (Cth) s 105.
77. Anti-Discrimination Act 1977 (NSW) s 53(1).
78. Anti-Discrimination Act 1977 (NSW) s 53(3).
79. Sex Discrimination Act (Cth) s 106; Racial Discrimination Act 1975 (Cth) s 18A.
80. Anti-Discrimination Act 1977 (NSW) s 53.
81. Shellharbour Golf Club v Wheeler [1999] NSWSC 224 [58] cited with approval in State of New South Wales v Briggs (2016) 95 NSWLR 467.

82. See information made available by the Australian Human Rights Commission at <https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/vicarious-liability>.
83. Anti-Discrimination Act 1977 (NSW) ss 10A, 27A, 38F, 42A, 49G, 49Y, 49ZK, 49ZYE.
84. 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).
85. Anti-Discrimination Act 1977 (NSW) ss 49D(4) and 49V(4); Disability Discrimination Act (Cth) ss 21A and 21B.
86. Anti-Discrimination Act 1977 (NSW) s 49D(4); Disability Discrimination Act (Cth) ss 21A and 21B.
87. Anti-Discrimination Act 1977 (NSW) s 49V(4).
88. *Qantas Airways v Christie* (1998) 193 CLR 280. See additional information made available by the Australian Human Rights Council at <https://www.humanrights.gov.au/quick-guide/12052>.
89. Anti-Discrimination Act 1977 (NSW) s 49C.
90. See additional information made available by the Australian Human Rights Commission at <https://www.humanrights.gov.au/quick-guide/12105>.
91. Disability Discrimination Act 1992 (Cth) s 11(2).
92. Anti-Discrimination Act 1977 (NSW) ss 14, 31, 49ZYJ.
93. Sex Discrimination Act 1984 (Cth) s 30.
94. Anti-Discrimination Act 1977 (NSW) s 126.
95. 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).
96. Workplace Gender Equality Act 2012 (Cth) s 13; Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1) (2015) (Cth) sch 1, cl 1.
97. Workplace Gender Equality Act 2012 (Cth) s 3; Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument 2013 (No 1) (2015) (Cth).
98. Law Society of NSW, Thought Leadership: Advancement of Women in the Profession Report and Recommendations available at <https://womenlawyersnsw.org.au/wp-content/uploads/579007.pdf>; Law Society of NSW, Thought Leadership: Advancement of Women in the Profession Progress Report available at <https://womenlawyersnsw.org.au/wp-content/uploads/752919.pdf>; Law Council of Australia, National Attrition and Re-engagement Study (NARS) Report available at <https://www.lawcouncil.asn.au/docs/a8bae9a1-9830-e711-80d2-005056be66b1/NARS%20Report.pdf>.
99. [2001] NSWADT 194.
100. *Wollongong City Council v Bonella* [2002] NSWACTAP 26.
101. Anti-Discrimination Act 1977 (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA; Fair Work Act 2009 (Cth) s 65.
102. Fair Work Act 2009 (Cth) s 65.
103. *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.
104. NSW IRC 26 August 1998.
105. [1998] HREOCA 8.
106. (2000) EOC [93-069].
107. *Bogle v Metropolitan Health Service Board* (2000) EOC [93-069].
108. *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.
109. Fair Work Act 2009 (Cth) s 351.
110. [2016] FCCA 185.
111. *Thompson v Courier Newspapers Pty Ltd* [2005] NSWADT 49.
112. *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.
113. *Gardiner v New South Wales WorkCover Authority* [2003] NSWADT 184.
114. Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (4ed, 2012) 59.
115. 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).
116. 'Serious misconduct' is defined in the Fair Work Regulations 2009 (Cth) r 1.07
117. *McManus v Scott-Charlton* [1996] FCA 904.
118. Fair Work Act 2009 (Cth) s 386(1)(b).
119. Anti-Discrimination Act 1977 (NSW) s 49ZV. May also constitute discrimination under s 18 of the Age Discrimination Act 2004 (Cth).
120. 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.
121. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 42.
122. Anti-Discrimination Act 1977 (NSW) s 108.
123. Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 2.3.
124. Anti-Discrimination Act 1977 (NSW) s 22F(b).
125. 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.
126. See Australian Human Rights Commission, 'Sexual Harassment (A Code in Practice) – Complaint Procedures' available at: <https://www.humanrights.gov.au/publications/sexual-harassment-code-practice-complaint-procedures>.
127. 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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