



THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

Submission by the NSW Legal Services Commissioner to the AHRC National Inquiry into Workplace Sexual Harassment

The NSW Legal Services Commissioner (OLSC) is the designated local regulatory authority for the purposes of Chapter 5 of the *Legal Profession Uniform Law (NSW)* [LPUL], which contains provisions relating to discipline of the legal profession. OLSC has the power to investigate complaints about lawyers in NSW, including disciplinary matters, defined in section 270 of the LPUL as being so much of a complaint about a lawyer or law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct.

These terms are defined under the LPUL in sections 296 and 297 as follows:

- **Unsatisfactory professional conduct** includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- **Professional misconduct** includes unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence and conduct of a lawyer whether or not in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

Section 298 lists conduct capable of being unsatisfactory professional conduct or professional misconduct and includes:

(b) conduct consisting of a contravention of the Uniform Rules

Rule 42 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provides that a solicitor must not in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* similarly proscribes such conduct by barristers.

Lawyers engaging in conduct which constitutes sexual harassment in the workplace may be found to have engaged in conduct amounting to unsatisfactory professional conduct or professional misconduct, and face disciplinary action.

In addition, each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that principals, partners, consultants and employees comply with their obligations under LPUL and the Uniform

Rules – LPUL section 34. A failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of the principal.

OLSC is aware that resolution of a sexual harassment claim may often involve a non-disclosure agreement, and wishes to stress that the existence of a non-disclosure or settlement agreement in employment matters related to sexual harassment, within law practices, does not negate the rules and ethical duties that regulate and bind lawyers in NSW, nor preclude scrutiny of a lawyer's conduct. Any person or body may make a complaint about a lawyer or law practice. The NSW Commissioner may also initiate a complaint based on information provided to him.

The Commissioner is strongly of the view that everyone involved in the provision of legal services is entitled to work in an environment free from sexual harassment, workplace bullying and discrimination. Every complaint of an absence of such a supportive workplace will be assessed, investigated and acted upon. A high priority will be given in every instance to the best interests and wishes of any complainant, including their protection from public naming, if that is their request. The OLSC will act to the full extent of its legal powers to discipline any lawyer found to have committed sexual harassment.

Likewise, OLSC recognises the importance of the AHRC National Inquiry into Workplace Sexual Harassment having access to information about the prevalence and experience of sexual harassment in legal workplaces. It is the view of OLSC that non-disclosure or settlement agreements between law practices and their employees should not operate so as to prevent the participation of those bound by those agreements in the National Inquiry. OLSC accordingly supports the limited and/or partial waiver of confidentiality in non-disclosure or settlement agreements and urges law practices in NSW to provide that waiver to their employees.

28 February 2019