

14 May 2021

Kingsford Legal Centre
Submission to the Public Consultation on Further Revisions to Rule 42 of the Australian Solicitors' Conduct Rules

We welcome the opportunity to make a submission to the Public Consultation on Further Revisions to Rule 42 of the Australian Solicitors' Conduct Rules (ASCR). We consent to this submission being published.

Summary of recommendations

We make the following recommendations:

1. Recommendation 1: Prioritise complete implementation of the Law Council's National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (NAP).
2. Recommendation 2: Rule 42 should apply regardless of whether the conduct has a connection to legal practice, reflecting the unlawful nature of sexual harassment.
3. Recommendation 3: Rule 42 should prohibit victimisation as defined under the applicable state, territory or federal anti-discrimination human rights legislation, in order to protect complainants and interveners.
4. Recommendation 4: Delete the word "unlawful" from Rule 42.1.3.
5. Recommendation 5: While the reference to "including sexual harassment" in the Glossary definition of "harassment" is not required, Rule 42.1.1 should maintain a specific reference to sexual harassment.
6. Recommendation 6: The Glossary should include a standalone definition of "sexual harassment" as "sexual harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation".
7. Recommendation 7: The Commentary to the proposed Rule 42 should include a plain English explanation of sexual harassment with examples.
8. Recommendation 8: If Rule 42 is to require a connection to legal practice, then:
 - The ASCR and Commentary should make clear that the phrase "in connection with, legal practice" has the broadest possible scope; and
 - The Commentary should include examples of the kinds of situations that would be considered to have a connection. This should include casual after-work drinks, legal industry networking functions, volunteering, interning, Continuing Professional Development (CPD) and legal education.

About Kingsford Legal Centre and our Sexual Harassment Legal Service

Kingsford Legal Centre (KLC) runs the specialist, NSW state-wide Sexual Harassment Legal Service. We have 40 years' experience and broad expertise across discrimination law, employment law and working for people who have experienced harassment.

The Sexual Harassment Legal Service works across a range of areas, including:

- Legal advice, assistance and representation to people who have experienced sexual harassment;
- Community legal education aimed at preventing sexual harassment and empowering people to speak up when it happens. This education is focused on a wide range of audiences, from high school and university students to community legal centres, pro bono lawyers and community workers;
- Law reform work to advocate for better legal protections for people who experience sexual harassment. This work aims to improve how the law and institutions deal with sexual harassment and draws on the direct experience of our clients;
- Leading cultural and institutional change. KLC is a leader in the conversation within legal institutions and with the next generation of lawyers about sexual harassment in the profession.

Sexual harassment in the legal profession

The landmark Respect@Work Report, released in March 2020, found that "sexual harassment is endemic in Australian society, across all areas of daily life".¹ As the Law Council's NAP acknowledges:

"The legal profession is no different. All available statistics, as well as anecdotal evidence, suggest that sexual harassment within the Australian legal profession is a prevalent and persistent problem."²

Recent findings by the International Bar Association (IBA) are particularly concerning. In its 2019 report on a global survey of the legal profession, the IBA found that 47% of female respondents and 13% of male respondents in Australia said they had experienced sexual harassment. This not only reflects the high prevalence of sexual harassment in the Australian legal profession – it is also significantly higher than the global averages in the IBA's report.³ The Women Lawyers Association of NSW found that 71% of its survey respondents had been sexually harassed at work in the legal profession, but only 18% of respondents had made a complaint to their employer.⁴ Preventing sexual harassment and

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 75 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

² Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (23 December 2020) 9 <https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf>.

³ International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019) 87 <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=B29F6FEA-889F-49CF-8217-F8F7D78C2479>>.

⁴ Women Lawyers Association of NSW, *Submission No 430 to the Australian Human Rights Commission, National Inquiry into Sexual Harassment in Australian Workplaces*

supporting people who have experienced sexual harassment must be urgent priorities for the Australian legal profession.

There are particular features of legal practice that can make the legal profession a risky environment for sexual harassment, including lack of female representation in senior leadership roles, strongly hierarchical structures, a work environment that can require people to work very long hours and the often-unregulated nature of relationships between judicial members and their staff. The finding that former High Court Justice Dyson Heydon harassed six former Judges' Associates highlighted that no part of the profession is immune.⁵ In our role as providers of clinical legal education at KLC, we hear regularly from law students who feel alienated from a profession where sexual harassment is so widespread and express concern about the impact that sexual harassment will have on their safety and their careers. The ASCR play an important role in ensuring the profession adheres to appropriate ethical standards and importantly make a public statement about acceptable and unacceptable conduct.

Consultation Question 1: Does the proposed rule adequately address the issues identified in the Consultation Paper?

The proposed rule improves upon the present Rule 42, but we would make further recommendations to improve the rule.

Consultation Question 2: Does the proposed rule adequately address sexual harassment occurring in the context of the legal profession?

We welcome the Law Council's attention to improving Rule 42 of the ASCR. While improving Rule 42 is necessary, it is not sufficient to adequately address sexual harassment occurring in the context of the legal profession. The limits of a purely rule-based approach are illustrated by the fact that sexual harassment remains widespread in the legal profession, despite being prohibited by legislation⁶ and the present rule 42 of the ASCR. We need a comprehensive response to sexual harassment in the legal profession, including improvement of the ASCR, but also advocacy for law reform, education and cultural change.

We are pleased to see this understanding reflected in the Law Council's NAP.⁷ We recommend that the Law Council prioritise complete implementation of the NAP.

(28 February 2019) 9 <<https://australianwomenlawyers.com.au/wp-content/uploads/2019/04/WLANSW-Submission-Sexual-Harassment-Inquiry-28-Feb-2019-final.pdf>>.

⁵ Chief Justice Susan Kiefel, Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia (2020) <<https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>>.

⁶ Sex Discrimination Act 1984 (Cth) div 3; Anti-Discrimination Act pt 2A

⁷ Law Council of Australia, National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (23 December 2020) 7–8 <https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf>.

Recommendation 1: Prioritise complete implementation of the NAP.

Consultation Question 3: Does the inclusion of the phrase “in connection with, legal practice” adequately capture the regulatory gap discussed in the Consultation Paper?

The phrase “in connection with, legal practice” does not adequately capture the full regulatory gap identified in the Consultation Paper. It would not necessarily apply to all cases of “casual after-work drinks” or where the conduct has occurred in a social context unconnected to legal practice. This could present an unnecessary barrier to a complaint and does not appropriately reflect the high standards expected of practitioners. A requirement that the conduct occur in connection with legal practices creates a regulatory grey area that is ripe for exploitation by harassers. In our experience many harassers “groom” someone and the conduct can take place in a context without a clear or close connection to legal practice.

Sexual harassment is unlawful conduct. We consider that sexual harassment by a lawyer in any context is unacceptable conduct and this needs to be reflected in professional standards. This is true regardless of who is harassed, where the harassment occurs or whether it is connected with legal practice.

We also consider that rule 42 should prohibit victimisation as defined under the applicable state, territory or federal anti-discrimination or human rights legislation, in order to protect complainants and interveners.⁸ Without explicit recognition that it is professional misconduct to treat someone unfairly because they made a complaint or intervened to assist someone else, then the dominant culture will persist.

Recommendation 2: Rule 42 should apply regardless of whether the conduct has a connection to legal practice, reflecting the unlawful nature of sexual harassment.

Recommendation 3: Rule 42 should prohibit victimisation as defined under the applicable state, territory or federal anti-discrimination or human rights legislation, in order to protect complainants and interveners.

Consultation Question 4: Is the word “unlawful” in Rule 42.1.3 unnecessary given the wording of the Glossary definition?

The word “unlawful” in Rule 42.1.3 is unnecessary, given that the Glossary definition defines harassment as “harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation, including sexual harassment”. The inclusion of the word “unlawful” in Rule 42.1.3 risks creating confusion, as it is unclear whether the phrase “unlawful harassment” in Rule 42.1.3 has an identical meaning to the word “harassment” in the Glossary definition.

⁸ See, eg, Sex Discrimination Act 1984 (Cth) s 94.

Recommendation 4: Delete the word “unlawful” from Rule 42.1.3.

Consultation Question 5: Is the reference to “including sexual harassment” in the Glossary definition required, given the wording of Rule 42.1.2?

The reference to “including sexual harassment” in the Glossary definition of “harassment” is not required, given the reference to sexual harassment in Rule 42.1.2. We consider it vital that Rule 42.1.1 maintains a specific reference to “sexual harassment” in recognition that sexual harassment in the legal profession is a widespread and serious issue. Specific reference to “sexual harassment” provides a meaningful statement that sexual harassment by a solicitor is unacceptable conduct and a clear pathway for people who have been sexually harassed by a solicitor to seek accountability. For similar reasons, the Glossary should include a standalone definition of “sexual harassment” as “sexual harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation”.⁹

Recommendation 5: While the reference to “including sexual harassment” in the Glossary definition of “harassment” is not required, Rule 42.1.1 should maintain a specific reference to sexual harassment.

Recommendation 6: The Glossary should include a standalone definition of “sexual harassment” as “sexual harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation”.

Consultation Question 6: Are there any circumstances related to the application of the proposed Rule 42 that might usefully be addressed in the Commentary to the proposed rule?

In our experience, there are common misconceptions about what conduct constitutes sexual harassment and the serious harm sexual harassment causes to people who experience sexual harassment. Sexual harassment includes:

- Any unwelcome sexual advance;
- Request for sexual favours; or
- Unwelcome conduct of a sexual nature

that could cause offence, humiliation or intimidation to the person harassed, where that reaction is reasonable in the circumstances. It may include any unwelcome:

- Sexually suggestive comments or jokes;
- Sexual gestures or exposure of a person’s private parts;
- Touching, hugging, cornering or kissing;
- Staring or leering at a person;
- Comments or questions about a person’s private life or body;
- Requests for dates, sex or any sex acts;
- Display or circulation of images of a sexual nature; or

⁹ See, eg, Sex Discrimination Act 1984 (Cth) s 28A.

- Sexually charged or hostile work environment.¹⁰

It would help to correct misconceptions and strengthen implementation of the proposed Rule 42 if the Commentary included a plain English explanation of sexual harassment with examples to the effect of the above.

In response to Consultation Question 3, we have recommended that Rule 42 should apply regardless of whether the conduct has a connection to legal practice. If this recommendation is not adopted, then the ASCR and Commentary should make clear that the phrase “in connection with, legal practice” has the broadest possible scope. It must extend beyond traditional legal settings and extend to people who may not traditionally be classified as legal staff, such as students, interns, volunteers, cleaners and hospitality workers. We are concerned that the growing complexity of legal practice, and the growth of unpaid or insecure work, contribute to a heightened risk of harassment that must not be overlooked by an amended Rule 42.

If Rule 42 is to require a connection to legal practice, the Commentary should include examples of the kinds of situations that would be considered to have act connection. This should include casual after-work drinks and legal industry networking functions, as contemplated by the Consultation Paper.¹¹ It should also include volunteering, interning, CPD and legal education.

Recommendation 7: The Commentary to the proposed Rule 42 should include a plain English explanation of sexual harassment with examples.

Recommendation 8: If Rule 42 is to require a connection to legal practice, then:

- The ASCR and Commentary should make clear that the phrase “in connection with, legal practice” has the broadest possible scope; and
- The Commentary should include examples of the kinds of situations that would be considered to have a connection. This should include casual after-work drinks, legal industry networking functions, volunteering, interning, CPD and legal education.

Conclusion

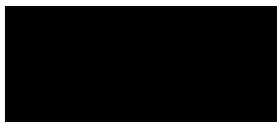
For too long, the Australian legal profession has failed to take seriously the issue of sexual harassment. This has contributed to an unsafe environment for people who experience sexual harassment (mostly women). There is presently a unique opportunity for the Australian legal profession to demonstrate leadership in responding to sexual harassment. We hope that appropriate revisions to the ASCR will play a role in this process.

If you have any questions about this submission, please contact Emma Golledge at legal@unsw.edu.au.

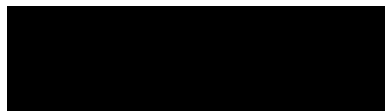
¹⁰ Kingsford Legal Centre, Fact Sheet: Sexual Harassment (21 August 2020) 1 <<https://www.klc.unsw.edu.au/sites/default/files/documents/Sexual%20Harassment%20Factsheet%201.pdf>>.

¹¹ Law Council of Australia, Australian Solicitors’ Conduct Rules – Further Revisions to Rule 42: Public Consultation (Consultation Paper, 6 April 2021) 5–6.

Yours faithfully
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