

Fair, Safe and Inclusive Legal Workplaces

Guidelines for the Employment of Law Clerks, Graduates and Lawyers



Prepared for the Law Society of Western Australia
by the Young Lawyers Committee

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The Law Society of Western Australia

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Foreword

It is important that we strive to ensure that working conditions in the legal profession are such that law clerks, graduates and lawyers can thrive, and be empowered to best contribute to their workplaces, their clients and the profession, all the while maintaining their physical and mental wellbeing, and lives outside of the workplace.

The Law Society of Western Australia, through its Young Lawyers Committee, has drafted these Guidelines with the aim of promoting fair access to employment in the legal profession and to support the health and wellbeing of legal practitioners and other employees engaged in the legal profession.

All legal workplaces are encouraged to strive to meet the standards recommended in these Guidelines. Doing so is to the benefit of both legal employers and their employees, and the legal profession as a whole.

Disclaimer: This is a guideline only and does not constitute legal advice. You should obtain your own information and advice as to the applicable employment laws. People can contact the Fair Work Ombudsman, Department of Mines, Industry Regulation and Safety (WA) or the Law Society of Western Australia to be referred to a recognised employment lawyer.

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Introduction

- 1 Poor working conditions for lawyers at the beginning of their careers are well documented.¹
- 2 A 2018 survey conducted by the Law Society of Western Australia (the 2018 Survey) identified a number of issues particular to the junior profession in Western Australia.
- 3 Given these issues, the Law Society of Western Australia, through its Young Lawyers Committee, has drafted Guidelines with the aim of promoting fair access to employment in the legal profession and to support the health and wellbeing of legal practitioners and other employees engaged in the legal profession.
- 4 The Guidelines are an initiative of the Young Lawyers Committee, and have been reviewed by the Law Society Employee Relations Committee and Joint Law Society/Women Lawyers Committee.
- 5 The Guidelines incorporate some information within the existing *Information guide: law graduates' and junior legal practitioners' working and pay conditions* published by the Law Society of Western Australia in 2018. However, the intention of the Guidelines is to encourage legal workplaces to actively strive to be the best they can be, rather than to provide information as to legal standards applicable under industrial relations laws. The Law Society of Western Australia has also prepared a [Know Your Rights Guide](#) for law clerks, law graduates and practitioners commencing their legal careers.
- 6 The Guidelines are voluntary and proposed to serve as a resource to assist the legal profession to self-regulate on issues affecting law clerks, graduates and lawyers. The Law Society of Western Australia does not purport to undertake a regulatory or enforcement role in relation to the Guidelines. It is important to stress that these Guidelines are not rules of conduct and do not have the force of law.

¹ See, e.g., Natasha Gillezeau and Elouise Fowler, [‘What it's like working as a young corporate lawyer at a top tier firm’](#), *Australian Financial Review*, 25 January 2019.

Part 1: Pay

Background

- 7 There has been a recent spotlight on concerns as to low pay and long working hours for early career lawyers. The 2018 Survey found a large variation in pay across employers of early career lawyers in Western Australia. Some practising lawyers were being paid close to minimum wage and 38% of respondents reported being unsatisfied with their pay.²
- 8 It is important that legal professionals, from law clerks to more experienced lawyers, are paid a salary that is adequate and proportionate to the time, experience and responsibility expected of their role.
- 9 This is particularly important for law graduates entering the legal profession in an increasingly competitive market. Law graduates may not be in a position to negotiate a salary commensurate with their role, as their negotiating power may be limited.
- 10 The competitive market for law graduates has also led to graduates in some instances taking on unpaid work in order to complete the practical component of a Graduate Diploma in Legal Practice. Though some are able to secure employment with the firm they volunteer with or work part-time for as a restricted practitioner, this does not always occur.

Recommendations

1. Salary

- 1.1. Pay is proportionate to the time, experience and responsibility expected of the role.
- 1.2. All employees, including admitted legal practitioners, be paid a salary or wage that is at least equal to the amount the employee would have received under the applicable legislation, with respect to minimum wages and overtime payments.
- 1.3. Where the employer is not a Federal system employer, clerks, paralegals and law graduates nevertheless be paid consistently with the *Legal Services Award 2020*.
- 1.4. The pay offered to restricted practitioners and practising lawyers be informed by the minimum wage for law graduates under the *Legal Services Award 2020*. Practising lawyers be paid a salary greater than the minimum wage applicable to law graduates under the *Legal Services Award 2020*.
- 1.5. Where the employer is not a Federal system employer, overtime payments commensurate with those required by the *Legal Services Award 2020* be nevertheless provided.
- 1.6. Promote gender equality in the pay offered to employees.

² The results of the survey, which was conducted by the Law Society's Mental Health and Wellbeing Committee, are not publicly available. 84 people responded to the survey. A not insignificant proportion of participants were being paid below \$50,000, including two participants being paid a full-time salary around the national minimum wage (which is approximately \$38,500).

1.7. If an employer takes on a graduate as an articled clerk or graduate undertaking their Graduate Diploma in Legal Practice, this role be adequately remunerated, especially if the employer profits from the graduate's work. If the employer is a not-for-profit organisation, for example a community legal centre, which offers voluntary practical legal training placements, this be made explicit.

2. Reimbursements in addition to salary

2.1. Where a legal practitioner or any employee of a legal practice is required to incur an expense in the performance of their role for the employer, those expenses be reimbursed, including in respect of:

- (a) the cost of the legal practitioner's practising certificate;
- (b) all insurance premiums associated with insurances required to enable the legal practitioner to work for the employer;
- (c) Membership of the Law Society of Western Australia and other relevant professional associations; and
- (d) all reasonable expenses to enable the legal practitioner to meet continuing professional development requirements.

3. Annual salary guides

3.1. Annual salary guides published by various recruitment firms and other industry experts are an indication of the appropriate range of salaries for legal professionals at various levels (where there is no Award or Agreement applicable to the employee).

3.2. Well known salary guides include:

- (a) [Hays salary guide](#) covering more than 1,000 positions.
- (b) [Michael Page Salary Centre website](#).
- (c) [Taylor Root](#).
- (d) [Montgomery](#).
- (e) Australian Legal Practice Management Association (ALPMA).

3.3. Salaries be generally consistent with such published salary guides.

3.4. How post-admission/post-qualification experience is calculated for the purposes of reimbursement and salary reviews to be clearly communicated to employees.

Part 2: Written Agreement

- 11 In order to minimise the likelihood of disputes, the employee and the employer should agree the terms of employment in writing. The written contract of employment should set out the matters listed at page 2 - 3 of the Law Society of Western Australia's [Know Your Rights Guide](#) as well as the following:
 - (a) if there is a probationary period, the details of this period (which should be of a reasonable duration); and
 - (b) specify who pays the pro rata costs of the employee's practising certificate if the employee leaves mid-way through a financial year.
- 12 If any other conditions or options, either during the course of the contract or at its completion, are agreed during contract negotiations, they should be included in the written agreement.

Part 3: Working hours

Background

- 13 Australian law sets the maximum working hours for a full-time employee at 38 hours per week, plus reasonable additional hours.³ State-based awards and agreements for Government and Community Legal Centres set ordinary full-time working hours at 37.5 hours per week.⁴
- 14 According to a survey conducted by the Law Society of Western Australia in 2018, on average, early career lawyers reported that they ordinarily work approximately 50 hours per week, with about 15% of respondents usually working more than 60 hours per week, and around 4% usually working between 70 and 75 hours per week. One respondent reported usually working between 80 and 85 hours per week.
- 15 Long working hours have been associated with poorer mental and physical health,⁵ which can negatively impact the standard of work produced by the employee and their satisfaction with the job. Academic studies have linked employee satisfaction,⁶ and general psychological wellbeing,⁷ with improved job performance.

³ *Minimum Conditions of Employment Act 1993* (WA) s 9A; *Fair Work Act 2009* (Cth) s 62(1); *Legal Services Award 2020* (Cth) s 13.1(a).

⁴ *Government Officers Salaries, Allowances and Conditions Award 1989* (WA) cl 20(1); *Public Sector CSA Agreement 2019* (WA) cl 22; *Community Legal Centres Association (WA) Inc Employment Agreement 2016* (WA) cl 13.1.

⁵ See, e.g., Wong, K., Chan, A. H., & Ngan, S. C. (2019). [The effect of long working hours and overtime on occupational health: a meta-analysis of evidence from 1998 to 2018](#). *International journal of environmental research and public health*, 16(12), 2102.

⁶ See, e.g., Westover, J. H., Westover, A. R., & Westover, L. A. (2010). [Enhancing long-term worker productivity and performance](#). *International Journal of Productivity and Performance Management*, 372-387.

⁷ See, e.g., Robertson, I., Jansen Birch, A. and Cooper, C. (2012), '[Job and work attitudes, engagement and employee performance: Where does psychological well-being fit in?](#)', *Leadership & Organization Development Journal*, Vol. 33 No. 3, pp. 224-232.

- 16 Reasonable working hours promote employee health and wellbeing, productivity, and job satisfaction. Working hours should be sustainable for employees to prevent burnout and other issues caused by working lengthy hours, and allow employees sufficient time for exercise, sleep, spending time with family, and maintaining hobbies or interests outside work. Employees should also be supported to contribute their time to the broader legal profession through activities such as pro bono work and mentoring.

Recommendations

4. Usual working hours

- 4.1. Full-time employees are supported to complete their required work within full-time hours of 38 ordinary hours in an ordinary working week, or the applicable proportion for part-time employees.
- 4.2. Full-time employees not be required to work more than 38 ordinary hours per week on a permanent basis.
- 4.3. A working week does not regularly exceed 50 hours unless there are exceptional circumstances (e.g. during a large trial or urgent transaction).

5. Measures where long hours are required

- 5.1. Where employees are required to work substantially more than 38 ordinary hours per week, they are supported with days off in lieu or a less demanding workload after the relevant project requiring those hours is complete.
- 5.2. Where employees are required to work additional hours they receive overtime payments or days off in lieu.
- 5.3. Where lengthy hours are required, employee independence and flexibility are supported (e.g. employees can nominate times during the week during which they will be able to attend family commitments, or use for hobbies, personal time, etc).

6. Billable hours and targets

- 6.1. Employee performance and salaries are determined not only by reference to the number of billable hours worked by an employee, but by the quality and efficiency of their work.
- 6.2. Where a firm uses billable targets, the target can feasibly be met on the basis of a 38 ordinary hour working week, taking into account leave entitlements, attendance at professional development events, and other non-billable work requirements. Billable targets should not discourage the taking of leave.
- 6.3. If time billed is not actually charged (e.g. written off) this should not be deducted from a lawyer's progress towards their billable target, unless time to be written-off has already been incorporated into the setting of the billable target.

Part 4: Safe and Inclusive Working Environment

Background

- 17 Employers owe a fundamental duty to their employees to provide a safe working environment, both physically and psychologically. Employers should ensure that:
- (a) the workplace is free of safety and health hazards;
 - (b) the workplace is supportive, and free from bullying and harassment;
 - (c) working demands are sustainable for maintaining good mental health, and working hours are reasonable; and
 - (d) the workplace is inclusive of people from various backgrounds, including women, people with disabilities, people practising different religions, people of colour and people who are LGBTQIA+.
- 18 Making a workplace inclusive and supportive for diverse groups of people helps make the workplace physically and psychologically safe, helps remove barriers for those people, and ultimately benefits the organisation as a whole.⁸ The benefits of having a more diverse and inclusive workplace include higher employee satisfaction, greater employee innovation, effort and effectiveness, better staff retention, and better customer/client service.⁹
- 19 There are also other aspects of the working environment which bring benefits to both employees and organisations as a whole. These include promoting employee flexibility and independence. Employee flexibility is associated with better employee satisfaction and wellbeing,¹⁰ and should be promoted and supported in a non-discriminatory fashion.
- 20 Employers should also keep in mind that work includes travel to and from the workplace, and attendance at places outside of the physical workplace such as external meetings, seminars and work social events.
- 21 For example, venues which exclude women or a venue which has publicly expressed negative sentiments towards a particular group (e.g. persons of a particular race, religion, or people who are LGBTQIA+) may not be a venue which some employees feel safe and comfortable attending.
- 22 Apart from physical accessibility, some social events (e.g. late night drinks) may not be accessible or welcoming to all employees, such as employees with parental responsibilities and employees who do not drink alcohol.

⁸ Diversity Council Australia (O’Leary, J. and D’Almada-Remedios, R.) [DCA-Suncorp Inclusion@Work Index 2019–2020: Mapping the State of Inclusion in the Australian Workforce, Synopsis Report](#), Sydney, Diversity Council Australia, 2019.

⁹ Diversity Council Australia (D’Almada-Remedios, R., and O’Leary, J.), [Inclusion@Work Index 2021–2022: Mapping the State of Inclusion in the Australian Workforce](#), Sydney, Diversity Council Australia, 2021, 14.

¹⁰ See, e.g. Richman, A. L., Civian, J. T., Shannon, L. L., Jeffrey Hill, E., & Brennan, R. T. (2008). [The relationship of perceived flexibility, supportive work–life policies, and use of formal flexible arrangements and occasional flexibility to employee engagement and expected retention](#). *Community, work and family*, 11(2), 183-197.

- 23 If an employee is required to work late, travelling home may be unsafe, particularly for women, people with disabilities, or people who are LGBTQIA+. Further, a secondment to a country which criminalises homosexuality may be unsafe for an employee who is LGBTQIA+.

Recommendations

7. Safe workplaces

- 7.1. Actively strive not only to ensure that the workplace is physically safe, but also psychologically safe for employees.
- 7.2. Actively strive to eliminate workplace bullying and harassment, and appropriately support any employees experiencing bullying or harassment.
- 7.3. Consider ways to make work-related activities outside of the physical workplace safe, inclusive and accessible for employees.
- 7.4. Develop and implement an Occupational Health and Safety policy which complies with applicable laws and regulations.
- 7.5. Provide mental health support through access to an Employee Assistance Programme.
- 7.6. Implement the [Tristan Jepson Memorial Foundation \(TJMF\) Best Practice Workplace Wellbeing Guidelines](#).
- 7.7. Help reduce employee stress, burnout, and mental health concerns by ensuring working hours are reasonable, workloads are manageable, the workplace is supportive, and employees are offered an appropriate level of flexibility and responsibility.
- 7.8. Develop and implement a workplace bullying policy which ensures bullying is identified, addressed and prevented, including by disciplinary action against persons who engage in bullying.
- 7.9. Promote a culture where staff feel comfortable about reporting that they feel unsafe or have experienced bullying.
- 7.10. Address workplace diversity and inclusion in line with the recommendations below (Part 5).
- 7.11. Address workplace sexual harassment in line with the recommendations below (Part 6).
- 7.12. Provide ergonomic office equipment suitable to individual employees' needs both at the office, and in the working-from-home environment where there is a mandatory or permanent working from home arrangement.

8. 'Work' extends beyond the physical workplace

- 8.1. Consider ways to make work-related activities outside of the physical workplace safe, inclusive and accessible for employees. This includes considering physical accessibility when choosing venues for events and seminars, as well as whether the place or venue is inclusive and safe for all employees, or providing transport to travel home safely.

8.2. Provide a range of social event options so that there are social events suitable for everyone.

Part 5: Diversity and Inclusion

Background

- 24 The Diversity Council of Australia defines 'diversity' as 'all the ways in which we differ', and 'inclusion' as occurring when 'a diversity of people are respected, connected, progressing and contributing to organisational success'.¹¹
- 25 An inclusive workplace is one where employees trust their organisation to treat them fairly, feel diversity is valued and respected, and report that top leaders demonstrate a visible genuine commitment to diversity and inclusion.¹²
- 26 People from diverse backgrounds continue to face barriers in the workplace. These include feeling that they need to hide or change who they are to fit in (in particular First Nations and LGBTQIA+ people), not feeling that they are part of the team, not having the same career opportunities, and experiencing bullying or harassment.¹³
- 27 First Nations workers, workers with a disability, workers from non-Christian religious backgrounds, workers aged under 30 and LGBTQIA+ workers experience the highest rates of harassment and discrimination.¹⁴ The experiences of discrimination and barriers at work are compounded for people with intersecting backgrounds (e.g. people who are both LGBTQIA+ and culturally diverse).
- 28 It is critical that the legal profession strives to be inclusive of people from a variety of backgrounds. This will not only help people who may face barriers or discrimination in their careers, but will also benefit the profession as a whole by attracting and retaining talent, and promoting innovation within the profession as people from varied backgrounds and experiences bring with them their unique perspectives.

Recommendations

9. Promoting diversity

- 9.1. Actively strive to be inclusive of people from various backgrounds, including women, people with disabilities, people practising different religions, First Nations people, people of colour and people who are LGBTQIA+.

¹¹ Diversity Council Australia (D'Almada-Remedios, R., and O'Leary, J.), [Inclusion@Work Index 2021–2022: Mapping the State of Inclusion in the Australian Workforce](#), Sydney, Diversity Council Australia, 2021, 7.

¹² Ibid, 9.

¹³ Diversity Council Australia (O'Leary, J. and D'Almada-Remedios, R.) [DCA-Suncorp Inclusion@Work Index 2019–2020: Mapping the State of Inclusion in the Australian Workforce, Synopsis Report](#), Sydney, Diversity Council Australia, 2019, 17-21.

¹⁴ Ibid, 21.

9.2. Actively strive to prevent sexism, racism, homophobia, transphobia and other forms of discrimination. Sexist, racist, homophobic, transphobic or otherwise discriminatory language and behaviour should not be tolerated.

9.3. Recognise that when it comes to promoting inclusion and making a workplace safe for people from diverse backgrounds, simple changes such as using inclusive language are also important.¹⁵

10. Scope of initiatives

10.1. Diversity and inclusion initiatives should extend to diversity and inclusion of people with disabilities, people practising different religions, First Nations people, people of colour, people who are LGBTQIA+, people from migrant backgrounds, people of younger or older ages, and other diverse groups, as well as people of different genders.

10.2. Employers should comply with relevant laws and regulations on discrimination and equal opportunity, as well as aim to actively promote diversity and inclusion.

11. Implement a formal policy

11.1. Develop and implement a formal diversity and inclusion policy, and measure the effectiveness of diversity and inclusion initiatives.¹⁶ This could involve, where appropriate, establishing a diversity and inclusion committee to guide initiatives. Any such body should, where possible, comprise a diverse range of staff.

12. Empower employees

12.1. Involve employees from a range of backgrounds in planning discussions relating to diversity and inclusion initiatives (e.g. in planning an initiative to assist employees with a disability, employers should ensure that those employees with a disability are included in the planning process).

12.2. Actively seek out these employees' views, rather than assuming that they will step forward to participate, to identify employee needs, ensure that initiatives will address those needs, and help empower employees from diverse backgrounds. If there are no such employees at the time, external advice from people of diverse backgrounds should be sought.

13. Diversity training

13.1. Implement training for both employees and the leadership team on:

- (a) diversity and inclusion;
- (b) LGBTQIA+ and gender diversity awareness; and

¹⁵ Research has found that non-inclusive comments in the workplace can have serious and harmful effects: Diversity Council Australia, [WordsAtWork - Building Inclusion Through the Power of Language](#), Sydney, Diversity Council Australia, 2016, 3.

¹⁶ The Diversity Council of Australia has published [resources](#) which may assist employers. Employers may also consider becoming a member of the Diversity Council for access to further resources.

- (c) cultural competency (including Aboriginal and Torres Strait Islander cultural competency training),

to address bias and stereotyping, and to provide both employees and leadership teams with skills to promote inclusion in the workplace.¹⁷

- 13.2. Ensure that training includes the intersectionality of diversity. Training is also recommended to include inclusive leadership training for leadership teams.¹⁸

14. Self-Assessment

- 14.1. Consider conducting an assessment of the current level of diversity and inclusion in the organisation to help guide future initiatives. Employers can utilise tools such as:

- (a) The [Australian Network on Disability's Access and Inclusion Index](#).
(b) The [Diversity Council of Australia's information on conducting a diversity survey](#).

- 14.2. Employers should also keep in mind that work includes travel to and from the workplace, and attendance at places outside of the physical workplace such as external meetings, seminars and work social events.

15. Additional specific recommended measures

- 15.1. Implement inclusive language in the workplace and consult the Diversity Council of Australia's 'Words at Work' Guide for more information on how to do so.¹⁹

- 15.2. Implement a Reconciliation Action Plan,²⁰ developed in collaboration with First Nations people.

- 15.3. Demonstrate commitment to inclusivity by visibly celebrating days, or participating in events, such as cultural events, International Women's Day, and LGBTQIA+ awareness days.

- 15.4. Consider how the celebration of some significant dates could be distressing for some employees and collaborate on appropriate ways of commemorating/recognising such dates with affected employees.

- 15.5. Consider implementing quotas or targets at junior and senior leadership levels, including for gender and cultural backgrounds.²¹

- 15.6. If appropriate and practicable to your workplace provide gender-neutral bathrooms, and access to sanitary disposal bins in men's bathrooms.

- 15.7. Ensure the workplace is physically accessible for employees with a disability and that those employees are provided with reasonable adjustments and equipment so that they can effectively perform their work.

- 15.8. Recognise that not all disabilities are visible.

- 15.9. Implement the following measures recommended by the Diversity Council of Australia and consult the resources published by the Diversity Council of Australia for making workplaces inclusive for people from different religious backgrounds.²²

- (a) Collecting data on faith diversity (the Diversity Council has resources for employers for this purpose).
- (b) Updating diversity and inclusion policies to include faith, and no faith, as part of a person's identity.
- (c) Considering how to ensure dress codes provide flexibility to accommodate employees' religious or cultural obligations.
- (d) Ensuring leave policies allow for employees to meet cultural and religious obligations.
- (e) Where feasible, providing multi-faith Quiet Rooms for prayer, meditation, and quiet reflection for employees of all faith and of no-faith.
- (f) Implementing education and training to prevent faith-based stereotyping and bias.

15.10. Become a signatory to the WA Law Society's [Charter for the Advancement of Women in the WA Legal Profession](#) and implement the Charter's recommendations.

Part 6: Sexual harassment

Background

- 29 Sexual harassment unfortunately remains an issue affecting people in the legal profession. A 2019 survey by Women Lawyers of Western Australia (the 2019 survey) found that 41.72% of survey participants (including both lawyers and support staff) had personally experienced sexual harassment in the workplace. However, less than 8% of affected participants made a formal complaint.²³
- 30 The 2019 survey found that the most common type of sexual harassment was 'lewd jokes or suggestive comments', but that survey participants also reported unwelcome physical touching, sexual advances and invasive questioning about their private life or body.²⁴
- 31 Sexual harassment is a gender-based phenomenon; the vast majority of cases involve female persons harassed and male harassers. However, sexual harassment can happen to others

¹⁷ The Diversity Council of Australia is one organisation which runs workshops on such topics.

¹⁸ See, Diversity Council Australia (O'Leary, J., Russell, G. and Tilly, J.) [Building Inclusion: An Evidence-Based Model of Inclusive Leadership](#), Sydney, Diversity Council Australia, 2015.

¹⁹ Diversity Council Australia, [Words At Work - Building Inclusion Through the Power of Language](#), Sydney, Diversity Council Australia, 2016.

²⁰ <https://www.reconciliation.org.au/reconciliation-action-plans/>.

²¹ See also, Law Society of Western Australia's [Charter for the Advancement of Women in the WA Legal Profession](#).

²² Diversity Council Australia, [Creating Inclusive Multi-Faith Workplaces](#), Sydney, Diversity Council Australia, 2019. Please consult this guide for further detailed information for creating a workplace inclusive of different faiths.

²³ Women Lawyers of Western Australia, [WLWA Sexual Harassment Survey and Submission to ALRC](#) (accessed on 19 July 2020).

²⁴ Ibid.

too, and people who are LGBTQIA+ are also overrepresented as persons subjected to sexual harassment.²⁵

- 32 Social perceptions of gender roles, and power imbalances between genders, are issues underlying sexual harassment. Because sexual harassment and power dynamics are linked,²⁶ sexual harassment often occurs where the harasser is in a position of power vis a vis the person harassed (e.g. senior employee or supervisor). Indeed, the 2019 survey found that the most commonly reported harassers were 'Legal Partner'.
- 33 Misconceptions around sexual assault and sexual harassment continue to be far too common. Thanks to the efforts of women's advocates and others striving for change, conduct which was once considered commonplace or even normal is now recognised as sexual harassment or sexual assault. Unfortunately it is still common for some people to fail to recognise such behaviour as unacceptable. Sometimes harassers might think they are 'complimenting' the person harassed.
- 34 Further, it is important to recognise that it is the harasser who is responsible for sexual harassment, not the person harassed. Sexual harassment and sexual assault are not caused by the person's behaviour, dress or appearance. Accordingly, employers should avoid placing the burden of preventing sexual assault and harassment on persons who have been, or may be, subjected to sexual harassment.
- 35 It is also important to note that fabrications of sexual assault are in fact rare.²⁷ Further, making a complaint of sexual assault or sexual harassment can result in severe consequences for complainants such as being ostracised and sometimes even threats of violence.²⁸
- 36 As noted above, sexual harassment remains a significant issue in the legal profession. Sexual harassment in the workplace not only impacts on the mental health of persons who have experienced it, but also negatively impacts workplaces and the profession as a whole, including contributing to women leaving their workplace or even the legal profession.²⁹ This means that sexual harassment contributes to loss of talent in the profession and hinders achieving gender equality.

²⁵ Trades Union Congress, [Sexual harassment of LGBT people in the workplace](#) (April 2019); Frances Perraudin, '[Survey finds 70% of LGBT people sexually harassed at work](#)' (The Guardian, 17 May 2019); Australian Human Rights Commission, [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#) (2020), 19.

²⁶ See, e.g., Victorian Equal Opportunity and Human Rights Commission, [Changing the rules - The experiences of female lawyers in Victoria](#) (2012), 52-53; Australian Human Rights Commission, [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#) (2020), 19.

²⁷ Commonwealth of Australia, Australian Institute of Family Studies, in collaboration with Victoria Police, [Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners](#) (2017), 9.

²⁸ See, e.g., David Choi, '[The woman accusing Brett Kavanaugh of sexual assault reportedly had to move out of her house and hire private security after receiving death threats](#)' (Business Insider Australia, 19 Sep 2018).

²⁹ See, e.g., Victorian Equal Opportunity and Human Rights Commission, [Changing the rules - The experiences of female lawyers in Victoria](#) (2012), 51-52; Australian Human Rights Commission, [Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces](#) (2020), 21-22.

What is sexual harassment?

- 37 As defined in the Law Society of Western Australia's Sexual Harassment Policy and Procedure, sexual harassment is any form of unwanted, unwelcome or uninvited behaviour of a sexual nature which a reasonable person would anticipate may be perceived as offensive, derogatory, intimidating or humiliating to another person. It is irrelevant whether the person engaging in the conduct intended to offend, denigrate, intimidate or humiliate the other person.
- 38 Sexual harassment can take many forms and includes:
- (a) subjecting another person to an unsolicited act of physical intimacy;
 - (b) making unsolicited demands or requests (whether directly or by implication) for sexual favours from the other person;
 - (c) making a remark with sexual connotations relating to the other person; and
 - (d) any other unwelcome conduct of a sexual nature in relation to the other person.
- 39 Some common examples of sexual harassment include:
- (a) patting, pinching, touching in a sexual way, standing too close to or deliberately brushing up against a person;
 - (b) making unwelcome comments about a person's body, or appearance;
 - (c) flirting;
 - (d) offensive telephone calls, emails, text messages, voicemails or comments on social media sites;
 - (e) repeatedly asking someone to go on a date or meet in a private or social capacity when the person has made it clear that the invitation is unwelcome;
 - (f) indecent exposure and sexual assault;
 - (g) leering or staring at a person or parts of their body;
 - (h) telling sexual jokes or playing pranks of a sexual nature;
 - (i) asking questions about a person's sexual activities or talking about your own sexual activities; and
 - (j) sending, viewing or displaying pornographic, rude or obscene magazines, pictures, emails, screensavers or internet sites in the workplace.
- 40 The conduct does not have to be repeated or ongoing in order to amount to sexual harassment.

Recommendations³⁰

16. General

- 16.1. Actively strive to eliminate sexual harassment, and appropriately support any employees who experience it.
- 16.2. Promote a culture where staff feel comfortable about reporting that they feel unsafe or have experienced sexual harassment. Employers can start by talking openly about these issues and checking in on employees.
- 16.3. Ensure that persons reporting sexual harassment are believed, are not blamed for the incident, are not ostracised and do not face any negative consequences in the workplace for reporting sexual harassment (such as social exclusion in the workplace).
- 16.4. Ensure that the harassed person is not required to work together with, or in proximity to, the harasser if they do not feel comfortable doing so. However, simply moving the harassed person to another section/practice group without addressing the harasser's behaviour should not be considered a sufficient response.
- 16.5. Provide mental health support through an Employee Assistance Programme.
- 16.6. Ensure staff are aware of ways they can report bullying and harassment externally (e.g. to the Legal Practice Board), especially at smaller law firms or those without a dedicated HR team who can receive confidential complaints.
- 16.7. Avoid the use of non-disclosure agreements as part of settling complaints, at least in relation to the details of the complaint (unless the harassed person requests this).

17. Formal sexual harassment policy

- 17.1. Develop a formal sexual harassment policy which includes the following elements:
 - (a) setting clear expectations as to what is unacceptable behaviour in the workplace;
 - (b) providing a clear and anonymous mechanism for the making of complaints within the workplace;
 - (c) implementing a no-tolerance approach to sexual harassment, such that harassers are disciplined — dismissal ought to be considered as an appropriate response to serious or ongoing cases of sexual harassment, including for harassers in senior management or leadership roles; and
 - (d) providing for a trauma-informed complaints and investigation process which protects the harassed person's identity if they wish to remain anonymous, ensures that the harassed person feels supported and believed, avoids re-traumatising the harassed person by requiring them to retell their story multiple times, and does not place an unreasonable burden on the harassed person to prove the allegations.

³⁰ See, Marissa Mackie and Leah Marrone, 'Sexual Harassment in the workplace: Make it your business to make sure it's not in your business', *The Bulletin*, September 2020.

17.2. The policy should be visible and clearly communicated to employees on a regular basis.

18. Training

18.1. Implement education and training on sexual harassment for all staff including partners and leadership teams.

18.2. Provide bystander education to teach people to interrupt incidents of sexual harassment, challenge harassers, provide support to persons potentially and actually subjected to sexual harassment, and speak out against the social norms and inequalities contributing to sexual harassment.³¹

Part 7: Employee entitlements

Leave Entitlements applicable under the law

- 41 Employers must ensure that all employees have access to their full leave entitlements under applicable legislation, Awards or Agreements.
- 42 Full-time employees are entitled to the following minimum conditions of employment (subject to limited exceptions):
 - (a) 20 days' paid annual leave accrued progressively during a year of service according to the employee's ordinary hours of work.
 - (b) 10 days of paid personal/carer's leave accrued progressively during a year of service according to the employee's ordinary hours of work with provision for an additional two days of unpaid carer's leave per occasion and an additional two days of paid compassionate/bereavement leave per occasion.
 - (c) Long service leave in accordance with the *Long Service Leave Act 1958 (WA)*.
 - (d) 5 days unpaid domestic and family violence leave (National System Employers only).³²
 - (e) 52 weeks of parental leave (including maternity, paternity and adoption leave) but only after one year of continuous service.

³¹ Australian Human Rights Commission, [Encourage, support, act! Bystander approaches to sexual harassment in the workplace](#) (2012) 16, 35.

³² National System Employers are primarily governed by the *Fair Work Act 2009 (Cth)* and include incorporated legal practices.

- 43 Further, the *Legal Services Award 2020* obliges National System Employers to provide their law graduates with the following leave of absence with pay to attend to their pre-admission study requirements:
- (a) for study and attendance at examinations, not exceeding 4 days in respect of each subject for which they present themselves for examination which is necessary to enable the employee to qualify for admission; and
 - (b) to attend lectures and organised classes at a university or other course of instruction which is required to enable the employee to qualify for admission.
- 44 Employers should refer to the National Employment Standards contained in the *Fair Work Act 2009* (Cth) and the conditions in the *Minimum Conditions of Employment Act 1993* (WA) in relation to the above entitlements. Employers must also have regard to entitlements under any applicable Award or industrial instrument to ensure compliance with the minimum conditions contained in those documents.
- 45 In addition to ensuring compliance with legal obligations, it is recommended that employers implement the below recommendations.

Recommendations

19. Leave

- 19.1. For State System Employers,³³ provide leave entitlements which are at least equal to the minimum entitlements which National System Employers are required to provide, including study leave for graduates (unless an Award or Industrial Agreement provides for more favourable entitlements).
- 19.2. Encourage staff to use their leave entitlements throughout each calendar year, in order to improve their wellbeing, reduce stress and mitigate the risk of burnout. This may require facilitating flexible work arrangements or a temporary reduction in workload. On occasion, it may be appropriate for a manager or supervisor to recommend that a lawyer take leave.

20. Days off in lieu

- 20.1. Implement a clear policy on the provision of days off in lieu, which is consistent with applicable industrial laws, Awards and Agreements, in order to implement the recommendations relating to days in lieu in Part 3.

21. Paid parental leave

- 21.1. Provide paid parental leave.
- 21.2. Encourage male employees to take parental leave and create a culture in the workplace where this is considered acceptable and appropriate. Offering paid parental leave of equal duration to all employees regardless of whether they are a 'primary carer' can be an effective way to encourage more men to take parental leave.

³³ State System Employers are governed by the *Industrial Relations Act 1979* (WA).

21.3. Support employees returning to work after parental leave. Ensure that the workplace culture and individuals do not perpetuate attitudes that mothers should stay at home rather than working, or that men should not spend time at home caring for children (including being stay-at-home dads).

22. Working from home

22.1. Facilitate reasonable working from home arrangements.

Part 8: Flexible Working

Background

- 46 The *Fair Work Act 2009* (Cth) provides employees of National System Employers with a legal right to request flexible working arrangements. To be eligible, the employee must have worked for the employer for at least 12 months on a full-time or part-time basis. Further, the employee must be a parent or a carer, have a disability, be 55 years or older, or be experiencing domestic violence themselves or providing care for someone in their family who is experiencing domestic violence. Once a request has been made, an employer has 21 days to outline whether the request is approved or refused. A refusal must only be made on 'reasonable business grounds'.
- 47 However, the opportunity to work flexibly can be extremely beneficial for maintaining work-life balance, and for enabling employees to balance work with family and parental responsibilities. This opportunity should not be limited to employees falling within the categories listed above. Flexible working is also highly valued by early career lawyers.³⁴

Types of flexible work

- 48 Types of flexible working arrangements which employers could consider making available to employees include changes to hours of work, patterns of work, or locations of work. For example:³⁵
- (a) **Flexible start and finish times:** Allows employees to select their start and finish times while still working the required number of hours.
 - (b) **Remote Working:** Allows employees to work a specified number of hours or days external to the employer's workplace.
 - (c) **Time off in lieu, banked hours and making up time (flexi-time):** Time off in lieu (of payment) refers to taking time off to make up for extra hours worked. Banked hours allow employees to apply hours worked as overtime for use at another time. Making up time refers to working extra hours above the expected hours for time taken off previously.

³⁴ Young Lawyers Committee, The Law Society of Western Australia, ['Early Career Lawyers Overwhelmingly Want Our New 'Business as Usual' to Include Working From Home Options'](#), *Brief*, October 2020, pages 25-27; *Lawyers Weekly*, Grace Orsmy, ['Flexibility nearly on par with salary for grads'](#), 12 February 2019.

³⁵ These examples are outlined in the guidelines prepared by the Law Society of New South Wales, ['Flexible Working'](#), November 2012.

- (d) **Compressed work week:** This enables employees to work their weekly hours over fewer days.
- (e) **Part-time work:** Working part days, 5 or fewer days per week, or fewer than 5 full days per week.
- (f) **Part-year work:** Working reduced hours on an annual basis, rather than a daily or weekly basis, to allow the employee to take blocks of time off during the year (e.g. school holidays).
- (g) **Purchasing additional leave:** Allows employees to 'buy' additional leave, but average the reduced salary over the year.
- (h) **Taking additional unpaid leave:** Allows employees to take additional periods of unpaid leave which may be fixed to cover specific periods such as school holidays.

Recommendations

23. Consistency between State and National System employers

- 23.1. State System Employers should ensure that the terms and conditions offered to employees in respect to flexible work are on par with those applicable to National System Employers.

24. Flexible working policy

- 24.1. Have a workplace policy in place which covers flexible working arrangements.
- 24.2. As part of the policy, address the firm's general stance on working flexibly, the options that are available to employees, including early career lawyers, and the process for applying for a flexible working arrangement.
- 24.3. The policy should be capable of implementation in practice, and should be sufficiently flexible for employees and employers to agree an arrangement that meets both business and personal needs.

25. Workplace culture

- 25.1. Employers should be proactive and open to discussions about working flexibly, and should invite early career lawyers to consider whether they would be interested in a flexible working arrangement. For example, the availability of flexible working arrangements could be raised during routine performance and productivity reviews. The opportunity to work flexibly should not be reserved only for senior employees.
- 25.2. Management should promote the value of flexibility, eliminate any negative behaviours or attitudes within the firm toward flexible working, and support those with flexible working arrangements.

26. Providing flexible work arrangements

- 26.1. When considering flexible working arrangements, employers should aspire to be fair and manage requests in a consistent, reasonable and objective manner.

- 26.2. Employers should provide employees with the necessary equipment and technology so that they can work effectively while working remotely.
- 26.3. If an employee works part-time, their workload should be adjusted to reflect this and should be proportionate to their working hours — a part-time employee should not be expected to perform the same amount of work as a full-time employee.

Part 9: Pathways to Promotion

Background

- 49 Part of ensuring that a process is truly based on the quality of employees' work is ensuring equality of opportunity for all employees.
- 50 Employers should be mindful that organisational structures and processes can unintentionally disadvantage certain groups, including by reason of unconscious bias. For example, gender quotas can be an effective way of levelling the playing field in the face of unconscious bias.
- 51 Resistance to measures such as quotas and voluntary targets often focuses on merit — there is a perception that such measures are inconsistent with a meritocracy. However, 'countless academic, social and business studies have proved that our conception of meritocracy is a myth, in a myriad of social settings'.³⁶ This is because merit is subjective (and therefore susceptible to being influenced by bias, whether conscious or unconscious) and because the playing field for men and women, for example, is not level.³⁷
- 52 There is also a significant evidence base demonstrating that diverse teams make better decisions and manage crises better than teams which lack diversity.³⁸
- 53 For these reasons, processes within legal practices which promote diversity and ensure equality of opportunity are vital.

Recommendations

27. Transparent promotion pathways

- 27.1. Implement a clear policy regarding promotion in order to ensure transparency. Employees should have clear information as to the applicable promotion and performance management process, the various levels within the organisation, and what is required in order to achieve a promotion.
- 27.2. Where an employer takes on a law graduate completing work experience or pre-admission requirements, the pathway to being offered a graduate position should be made clear from the outset.

³⁶ UN Women National Committee Australia, [Re-thinking Merit: Why the meritocracy is failing Australian businesses](#), 4.

³⁷ Ibid, 6.

³⁸ Ibid 11.

28. Supportive workplaces and constructive performance management

28.1. Provide a working environment where:

- (a) professional skills are able to be passed on by competent and more experienced practitioners to less experienced practitioners who need to acquire specified skills;
- (b) junior practitioners are encouraged to develop competencies more easily gained through experience as opposed to education; and
- (c) junior practitioners are assisted with the planning, development and management of their careers.

28.2. If an employee is not performing to the required standard, this should be discussed with the employee in a constructive manner to assist them to improve. Employees should receive genuine and constructive feedback on their work. Employees should not feel bullied or intimidated during discussions with supervisors and senior employees about their performance, and support ought to be provided to resolve any performance issues.

29. Promotion processes

29.1. Promotion and performance management processes should be fair and objective, meaning that they should be based on the quality of the employee's work.

29.2. The number of billable hours achieved by the employee should not be the primary basis for promotion and positive performance management. Doing so encourages quantity over quality, encourages unhealthy working hours, and disadvantages employees who work part-time or who cannot work lengthy hours due to family or health reasons, or other individual circumstances. It can also encourage a lack of efficiency, and over-billing.

29.3. Employers should ensure a genuine recognition of valuable non-billable contributions such as marketing, mentoring and pro bono work.

29.4. Utilisation of flexible working arrangements, including part-time work, or parental leave should not be a barrier to promotion.

30. Additional measures

30.1. Employers should:

- (a) implement the recommendations in Parts 4, 5 and 6, particularly in relation to diversity and inclusion, and sexual harassment;
- (b) provide unconscious bias training to management;
- (c) become a signatory to the WA Law Society's [Charter for the Advancement of Women in the WA Legal Profession](#) and implement the Charter's recommendations;
- (d) review performance/promotion criteria, and networking and marketing events, to ensure they are 'bias free' and do not unintentionally discriminate, including against lawyers working part-time or who access flexible working arrangements; and

- (e) offer training and mentoring to ensure that promotion is accessible to all — especially when a role is for a leadership or supervisory position, or a role in a different practice area.