



Submissions on the Attorneys-General Review of Model Defamation Provisions – Stage 2 Discussion Paper

The NSW Legal Services Commissioner (OLSC) is the designated local regulatory authority for Chapter 5 of the *Legal Profession Uniform Law (NSW)* (LPUL), which contains provisions pertaining to complaints about lawyers and professional discipline.

OLSC makes the following submissions in relation to Issue 2: Complaints of unlawful conduct made to employers and professional disciplinary bodies, focussing in particular on complaints about sexual harassment.

Complaints about lawyers

Any person or body may make a complaint – LPUL section 266(1)

All complaints are made to OLSC – LPUL section 267(1)

A complaint must be made or recorded in writing and must—

- (a) identify the complainant; and
- (b) identify the lawyer or law practice about whom the complaint is made (or, if it is not possible to identify the lawyer, identify the law practice concerned); and
- (c) describe the alleged conduct that is the subject of the complaint. – LPUL section 267(2)

The making of a complaint to OLSC is an occasion of absolute privilege, and accordingly the defence of absolute privilege will be available to a person who makes a formal complaint - *Defamation Act 2005 (NSW)*, section 27 + Schedule 1, clause 18(a).

However, there is precedent for clients being sued in defamation in circumstances where they complained to a lawyer about his conduct, and **copied** their correspondence to OLSC.¹

¹ The Court of Appeal judgment declining leave to appeal sets out the relevant history - *ZARTH v WILLIAMSON & ORS* [2006] NSWCA 246

Complaints about lawyers that allege sexual harassment

It has become clear that, as in other Australian workplaces, sexual harassment is prevalent in the legal profession². However, OLSC receives very few formal complaints alleging sexual harassment, and the evidence suggests those who experience such conduct are reluctant to make a formal complaint.³

In response to Question 20(a) of the Discussion Paper, whilst OLSC has no statistical information as to whether fear of being sued for defamation acts as a deterrent, the Commissioner has no doubt this may be a significant factor when a person is contemplating making a complaint about a lawyer.

The Commissioner is keen to encourage those who do not want to make a formal complaint to provide information to OLSC informally, so he can gauge in which law practices, barristers' chambers or other legal profession workplaces sexual harassment is occurring and how it might be prevented. In appropriate cases, he may use the information to make a complaint himself, or to conduct a compliance audit of a law practice to ensure they have adequate systems and procedures in place to address sexual harassment.

Those providing information will be able to remain anonymous if that is their wish, and to provide as much (or as little) information as they are comfortable disclosing.

To that end, OLSC now has available on its website a selection of paper notification forms that those who have experienced sexual harassment can print out, complete and submit:

<https://www.olsc.nsw.gov.au/Pages/inappropriate-personal-conduct/inappropriate-personal-conduct.aspx>

An online reporting app is also being developed so information can be provided electronically.

The Commissioner is concerned, however, that providing information in this way, which stops short of making a "complaint" as defined in LPUL, may **not** fall within Schedule 1, clause 18(a) of the *Defamation Act 2005* (NSW) and may accordingly **not** be an occasion covered by the defence of absolute privilege, so exposing people who make reports to the risk of being successfully sued in defamation..

² Law Council of Australia, *National Action Plan for Addressing Sexual Harassment in the Legal Profession* 23 December 2020, p.9

https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf

³ Law Council of Australia *National Action Plan for Addressing Sexual Harassment in the Legal Profession* 23 December 2020, p.13

https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf

OLSC submits the wording of clause 18(a) (or its equivalent in the Model Defamation Provisions) should be expanded to cover the provision of information that stops short of a formal complaint.

18 May 2021