

SUBMISSION TO INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

Introduction

This submission is made pursuant to a resolution of the Alice Springs Town Council at its Ordinary meeting held 10 December 2018. It addresses the current legal framework with respect to sexual harassment, as applies to the Northern Territory.

Anti-Discrimination Act (NT)

The *Anti-Discrimination Act* (NT) (**ADA**) is the predominate law in the Territory dealing with sexual harassment, including in the workplace. Indeed, one of its three stated objects is '*to eliminate sexual harassment*'.¹ The Act prohibits sexual harassment occurring in a prescribed area of activity². The prescribed areas of activity include work³.

The issue

The issue is whether an Elected Member of a local government council in the Territory is protected from sexual harassment by the ADA. Local government is not a prescribed area of activity under the ADA⁴. To be protected from sexual harassment, it is necessary for the councillor to establish that, in carrying out their functions as such, they are working. In the ADA, '*work*' includes '*work in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment*'.⁵

Is, then, a councillor acting in that capacity, in a relationship of employment with the local government council?

Local Government Act (NT)

S37 of the *Local Government Act* (NT) (**LGA**) is clear: a councillor may not be a member of a council⁶. Additionally, the LGA deals entirely with Elected Members and Council staff entirely separately⁷; an Elected Member has no power to direct staff or interfere with the management of staff⁸ and only the CEO is responsible for the appointment of staff.⁹

¹ ADA, s3(c)

² ADA, s22(1)

³ ADA, s28(b)

⁴ The other prescribed areas of activity are: (a) education; (c) accommodation; (d) goods, services and facilities; (e) clubs and (f) insurance and superannuation

⁵ ADA, s4. The other included examples are work: (b) under a contract for services; (c) remunerated in whole or in part on a commission basis; (d) under a statutory appointment; (e) by a person with an impairment in a sheltered workshop; and (f) under a guidance program, vocational training program or other occupational training or retraining program.

⁶ **37 Disqualification**

(1) A person is disqualified from office as a member of the council if the person:

.....

(d) is an employee of the council

.....

⁷ LGA, Part 4.2 and Chapter 7

⁸ LGA, s35(2)

⁹ LGA, S103

Work Health and Safety (National Uniform Legislation) Act (NT)

So, too, s7(1) of the *Work Health and Safety (National Uniform Legislation) Act* does not include a councillor of a local council in its definition of *worker* whereas at s5(5) such member is specifically excluded from the definition of *a person controlling a business or undertaking*. Clearly, the legislature recognises the unique status held by an elected member of a local council.

Common law tests

A councillor is elected to the office of member in accordance with Chapter 8 of the LGA read with the *Local Government (Electoral) Regulations*. A councillor is not appointed by the CEO of the council. They enjoy tenure of office until the next general election unless in the meantime any of the contingencies set out in s39(1) arise. The CEO has no power whatsoever to terminate the tenure.

Similarly, the CEO has no power to discipline an Elected Member. This is only vested in a disciplinary committee established under Division 2 of Part 7.4 of the LGA, or the Minister (removal from office) under Part 7.5.

A councillor is certainly entitled to be paid an allowance under the LGA¹⁰. However, this is set by the Elected Members themselves in the budget approval process. Their only other entitlement is to payment or reimbursement of reasonable expenses¹¹. No PAYG tax is retained by Council from the allowance with the Elected Member being responsible for their tax obligations. The allowance is paid from a different budget line to that for employees. There is no entitlement to annual or personal leave or to superannuation.

Submission

If it is to be accepted that a councillor in the Territory is not in a relationship of employment with the council, or the worker or agent of the council¹², this Council submits that a councillor is nevertheless worthy of the protections against sexual harassment afforded by the ADA as their role is analogous to work. It advocates an amendment to the ADA to recognise the area of activity occupied by a councillor as protected from sexual harassment.

To be sure, it does not support an enlargement of the term '*worker*' in the ADA to include a councillor but rather a standalone addition to the areas of activity in which sexual harassment is prohibited, by amending s22(1). To do the former would lead to the intolerable situations where the CEO of the council would be required to participate in compulsory mediation¹³ and the council itself held vicariously liable for the misconduct of a councillor¹⁴.

This submission is limited to the situation where one councillor alleges sexual harassment against a fellow councillor. An allegation by a councillor against an employee of the council, or vice versa, is already covered by the ADA.

¹⁰ LGA, s71

¹¹ LGA, s72

¹² See ADA, s105(1)

¹³ See ADA, Part 6 Div 3

¹⁴ ADA, s105