

OFFICIAL

Behavioural Standards Panel



GUIDANCE PAPER

SEXUAL HARASSMENT

November 2022



Government of
South Australia



Local Government Association
of South Australia

Behavioural Standards Panel



Contents

What is sexual harassment?	1
Sexual harassment under the council member conduct management framework under the <i>Local Government Act 1999</i>	2
1. As an alleged breach of the Behavioural Standards.....	2
2. As alleged repeated misbehaviour	3
3. As alleged serious misbehaviour	3
Sexual harassment under the <i>Equal Opportunity Act 1984</i>	4
The differences between complaints of sexual harassment dealt with under the Equal Opportunity Act and the Local Government Act	4
Who can lodge a complaint with the Equal Opportunity Commissioner or the Panel?	4
Equal Opportunity Commissioner	4
Panel.....	5
What are the differences in the processes of each body and the actions that may be taken? .	5
Equal Opportunity Commissioner	5
Panel.....	5
Can a complaint alleging sexual harassment be lodged with the Equal Opportunity Commissioner and the council/the Panel?	6
If a complaint is lodged with both the Equal Opportunity Commissioner and the council/ Panel, will the other body be informed?	7
Can complaints under both Acts proceed at the same time?	7
If I am a victim of sexual harassment, can I lodge a complaint with both the Equal Opportunity Commissioner and the Panel?	8
Equal Opportunity Commissioner	8
Panel.....	8



Behavioural Standards Panel

What is sexual harassment?

‘Sexual harassment’ means any unwelcome conduct of a sexual nature, where it is reasonable to expect that the other person would be offended, afraid or humiliated.

A person can be sexually harassed by another person of the same or a different sex.

Sexual harassment is determined from the point of view of the person feeling harassed.

It does not matter how the behaviour was intended - what matters is its effect on the other person.

Sexual harassment can be—

- unwelcome touching or kissing
- commenting on a person's appearance
- comments, jokes or name-calling
- leering or staring
- sexual pictures, objects, emails, text messages or literature
- direct or implied propositions, or requests for dates
- asking about a person's sexual history or sexual activities.

Mutual attraction or friendship with consent is not sexual harassment.

Source: www.eoc.sa.gov.au/discrimination/types-of-discrimination/sexual-harassment

Behavioural Standards Panel

Sexual harassment under the council member conduct management framework under the *Local Government Act 1999*

The council member conduct management framework, under the *Local Government Act 1999*, provides three avenues for addressing sexual harassment behaviour.

These are—

1. As an alleged breach of the Behavioural Standards

The *Behavioural Standards for Council Members* (Behavioural Standards) provides that a council member must not sexually harass a council member or employee.

The Behavioural Standards has a definition of ‘sexual harassment’—

An elected member will be considered to **sexually harass** other Council members or Council employees if:

the Council member either, as an individual Council member or as a member of a group:

- a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to another Council member, or employee (the person harassed); or
- b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated, or intimidated.

Conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Behavioural Standards Panel

This definition of 'sexual harassment' in the Behavioural Standards is taken from the definition within the *Equal Opportunity Act 1984*.

If it is alleged that a council member's behaviour falls within this definition, then it should be dealt with in accordance with a council's behavioural management policy.

2. As alleged repeated misbehaviour

If a council member repeatedly breaches the requirement not to sexually harass another council member or employee under the Behavioural Standards, a complaint alleging **repeated misbehaviour** may be referred to the Behavioural Standards Panel (the Panel).

For further information on **repeated misbehaviour**, please refer to the guidance paper on '*Types of behavioural matters that may be referred to the Behavioural Standards Panel*'.

3. As alleged serious misbehaviour

If the alleged 'sexual harassment' behaviour by a council member adversely affects the health and safety of another member or a council employee, this may be referred to the Panel as a complaint alleging **serious misbehaviour**.

For further information on **serious misbehaviour**, please refer to the guidance paper on '*Types of behavioural matters that may be referred to the Behavioural Standards Panel*'.

The Panel also has detailed practice directions on how the Panel will receive, assess, and inquire into complaints, and the actions the Panel may take. Please refer to these documents for further information.

Behavioural Standards Panel

Sexual harassment under the *Equal Opportunity Act 1984*

The *Equal Opportunity Act 1984* makes it unlawful for a council member to sexually harass another council member or an officer or employee of the council.

A council member or officer or employee of a council who considers that they may have been sexually harassed by a council member may choose to lodge a complaint with the Equal Opportunity Commissioner.

The Office of the Equal Opportunity Commissioner is an independent statutory body who supports the Equal Opportunity Commissioner. Enquiries may be made by emailing OCEO@sa.gov.au, by completing an online contact form via the Equal Opportunity Commissioner website at www.eoc.sa.gov.au, or by phone on (08) 7322 7070 or for Country Callers on 1800 188 163.

The differences between complaints of sexual harassment dealt with under the Equal Opportunity Act and the Local Government Act

The *Equal Opportunity Act 1984* enables a separate process for dealing with sexual harassment complaints to that of the Panel.

The key elements of each process are detailed below. Please contact the Panel or the Office of the Equal Opportunity Commissioner if you have any further questions about these two processes.

Who can lodge a complaint with the Equal Opportunity Commissioner or the Panel?

Equal Opportunity Commissioner

A complaint may be lodged with the Equal Opportunity Commissioner by the person who alleges that they have been sexually harassed by a council member, or by someone on their behalf, with their consent.

Behavioural Standards Panel

Panel

A complaint of alleged sexual harassment may only be referred to the Panel, by a council or persons from a council enabled under section 262Q of the *Local Government Act 1999* to do so, as a complaint alleging **repeated misbehaviour** or **serious misbehaviour**. For further information on the Panel's powers and functions, please refer to the separate paper entitled '*Guidance Paper – General information – Behavioural Standards Panel*'.

The consent of the person who alleges that they have been sexually harassed by a council member is not required for a complaint to be referred the Panel. However, the Panel will consider complaints of this nature sensitively.

What are the differences in the processes of each body and the actions that may be taken?

Equal Opportunity Commissioner

If a complaint is assessed as being covered under *Equal Opportunity Act 1984*, the Office of the Equal Opportunity Commissioner can help through a conciliation process.

The Equal Opportunity Commissioner is **unable** to impose sanctions on any individual or business, such as a prosecution, financial penalty or suspension. The Commissioner will remain independent in any dispute. The parties to a dispute must jointly decide the terms of any potential resolution. If conciliation is unsuccessful, the matter may be referred to the South Australian Civil and Administrative Tribunal (SACAT). SACAT has the power to make orders of compensation or other specific acts with a view to redressing loss or damage arising from the contravention, or remedying a discriminatory or unlawful act.

Panel

A complaint of alleged sexual harassment may be referred to the Panel, by a council or specific persons from a council enabled under section 262Q of the *Local Government Act 1999* to do so, as a complaint alleging **repeated misbehaviour** or **serious misbehaviour**.

After inquiring into a complaint, the Panel may, in accordance with section 262W of the *Local Government Act 1999*, order one or more of the following actions be taken—

- reprimand the member (including by means of a public statement);

Behavioural Standards Panel

- direct the council to pass a censure motion in respect of the member;
- require the member to issue a public apology (in a manner determined by the Panel);
- require the member to attend a specified course of training or instruction, or to take other steps;
- require the member to reimburse the council a specified amount (which may include the reimbursement of the council's costs relating to investigation of the complaint and giving effect to an order under this section);
- remove or suspend the member from one or more offices held in the member's capacity as a member of the council or by virtue of being a member of the council (other than the office of member of the council);
- suspend the member from the office of member of the council for a period not exceeding three months, with or without an allowance (as determined by the Panel);
- direct the council to lodge a complaint against the member with SACAT.

The Panel may also, at any time, arrange for mediation, conciliation, arbitration or other dispute or conflict resolution measure to be conducted in order to resolve a matter (section 262V of the Act).

For further information on the Panel's powers and functions, please refer to the separate guidance paper entitled '*Guidance Paper – General information – Behavioural Standards Panel*'.

As noted above, the Panel's practice directions detail how the Panel will receive, assess, inquire into complaints, and the actions it may take. Please refer to these documents for further information.

However, in the first instance, a complaint of sexual harassment, as an alleged breach of the provision in the Behavioural Standards not to sexually harass a council member or council employee, should be lodged with the relevant council. This complaint may be lodged by the person who alleges they have been sexually harassed by a council member or someone else who considers that the council member may have breached the Behavioural Standards. These complaints should be referred to the relevant council under their behavioural management policy.

Can a complaint alleging sexual harassment be lodged with the Equal Opportunity Commissioner and the council/the Panel?

Yes, complaints alleging sexual harassment by a council member may be lodged under both the *Equal Opportunity Act 1984* and the *Local Government Act 1999*.

Behavioural Standards Panel

The complaints considered under the processes of both these Acts may occur in parallel. The difference is in who may lodge a complaint and the outcomes of complaints dealt with under each of these Acts.

If a complaint is lodged with both the Equal Opportunity Commissioner and the council/ Panel, will the other body be informed?

No. The person lodging the complaint may, however, choose to inform the relevant bodies that they have lodged a complaint, or are aware that complaint has been lodged, under both Acts.

A complaint lodged with the Equal Opportunity Commissioner is confidential under the *Equal Opportunity Act 1984*. This means that the Equal Opportunity Commissioner cannot inform the Panel that a complaint is before them.

Likewise, the Panel has determined that all complaints referred to the Panel will be treated confidentially until such time as the Panel determines that a report of the Panel should be published in relation to an inquiry of a complaint referred to the Panel or a complaint that the Panel refused to deal with or determined to take no further action. The Panel may also require that a report provided to a council be considered at a public meeting of the council.

Can complaints under both Acts proceed at the same time?

Yes, the complaints process under both Acts are separate processes and can happen in parallel. One process is not reliant on the other, nor does it affect the other.

Behavioural Standards Panel

If I am a victim of sexual harassment, can I lodge a complaint with both the Equal Opportunity Commissioner and the Panel?

Equal Opportunity Commissioner

Yes, if you are a member, officer or employee of a council, who considers that you have been sexually harassed by a council member, you may lodge a complaint alleging sexual harassment with the Equal Opportunity Commissioner. Alternatively, another person may lodge a complaint on your behalf, if you have provided your consent, in writing, for them to make the complaint.

Panel

A complaint of **repeated misbehaviour** or **serious misbehaviour** may be referred, under section 262Q of the Act, to the Panel by—

- a resolution of the council; or
- the principal member (Mayor) of the council; or
- at least three members of the council; or
- a responsible person in relation to the health and safety duties of council members in accordance with section 75G(5) of the Act – this is a where a responsible person has given a member a reasonable direction not to attend a council meeting.

If you are a council member or employee who considers that you have been sexually harassed by a council member—

- In the first instance, please contact the person at the council responsible for managing complaints of council member behaviour. Please refer to your council's behavioural management policy.
- You cannot refer a complaint to the Panel unless you are one of the persons under section 262Q of the Act, and the complaint alleges **repeated misbehaviour** or **serious misbehaviour**.

Please note that your consent is not required for another person to make a complaint relating to a council member's behaviour to the council or to be referred to the Panel. Complaints of a sexual harassment nature, however, will be considered sensitively.