

Russell Kennedy Government CPD

Session 9. Responding to complaints of workplace bullying and discrimination

18 March 2022

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Lawyers

Melbourne > Sydney

Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Introduction



One size does not fit all

While there are general principles which will apply to most complaints processes, each complaint should be addressed based on its individual circumstances.

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Overview

- Receiving and responding to complaints
- Investigation process
- Choosing the right outcomes
- The questions you should be asking as in-house counsel



Common definition of sexual harassment

There are three elements to sexual harassment:

unwelcome conduct

of a *sexual nature*

that a *reasonable person* (aware of the circumstances) would anticipate would make the person subjected to the conduct feel offended, humiliated or intimidated

Common definition of workplace bullying

Workplace bullying occurs when an individual or group of individuals **repeatedly** behaves **unreasonably** towards a worker or a group of workers at work, causing a **risk to health and safety**

Fair Work Act 2009 (Cth)

Focus on respect and courtesy

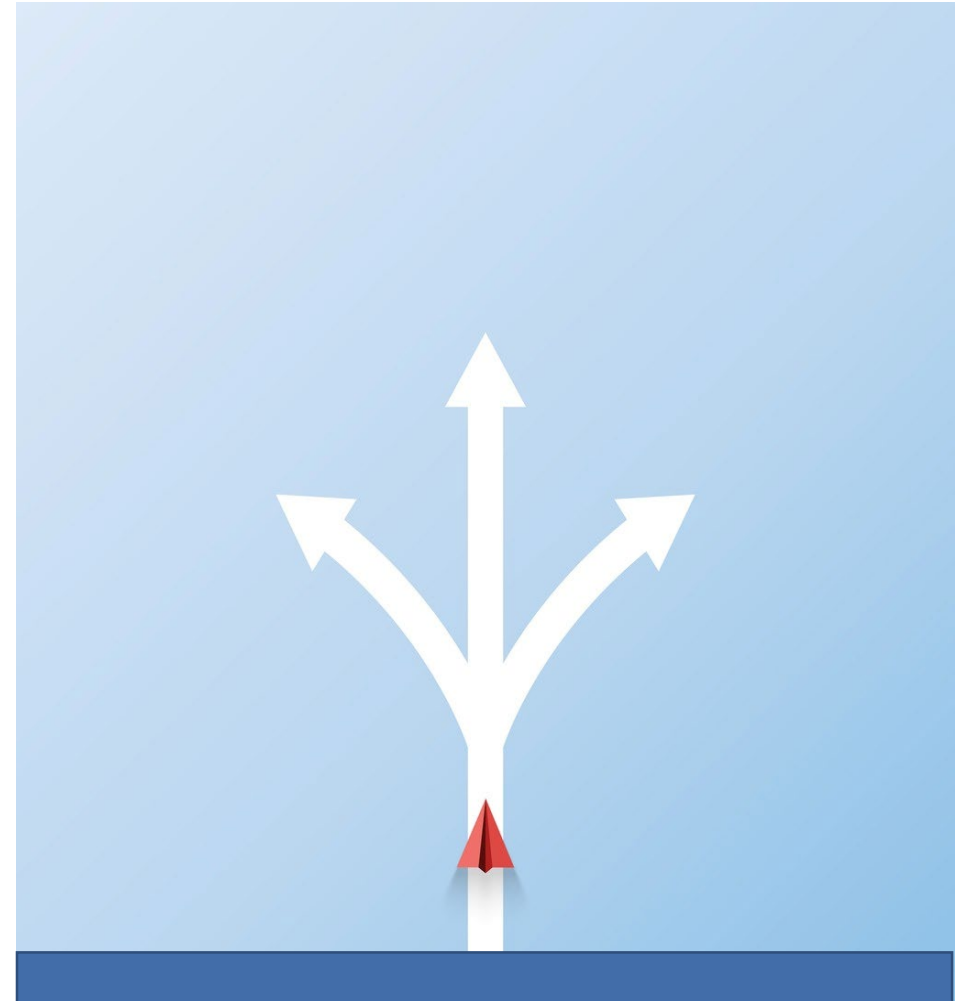
- Put policies in place which require staff to:
 - Treat each other with respect
 - Give consideration to the views and responsibilities of others
- Establishing a breach of such a requirement is a simpler, and more relevant exercise, than establishing workplace bullying

Receiving and responding to complaints



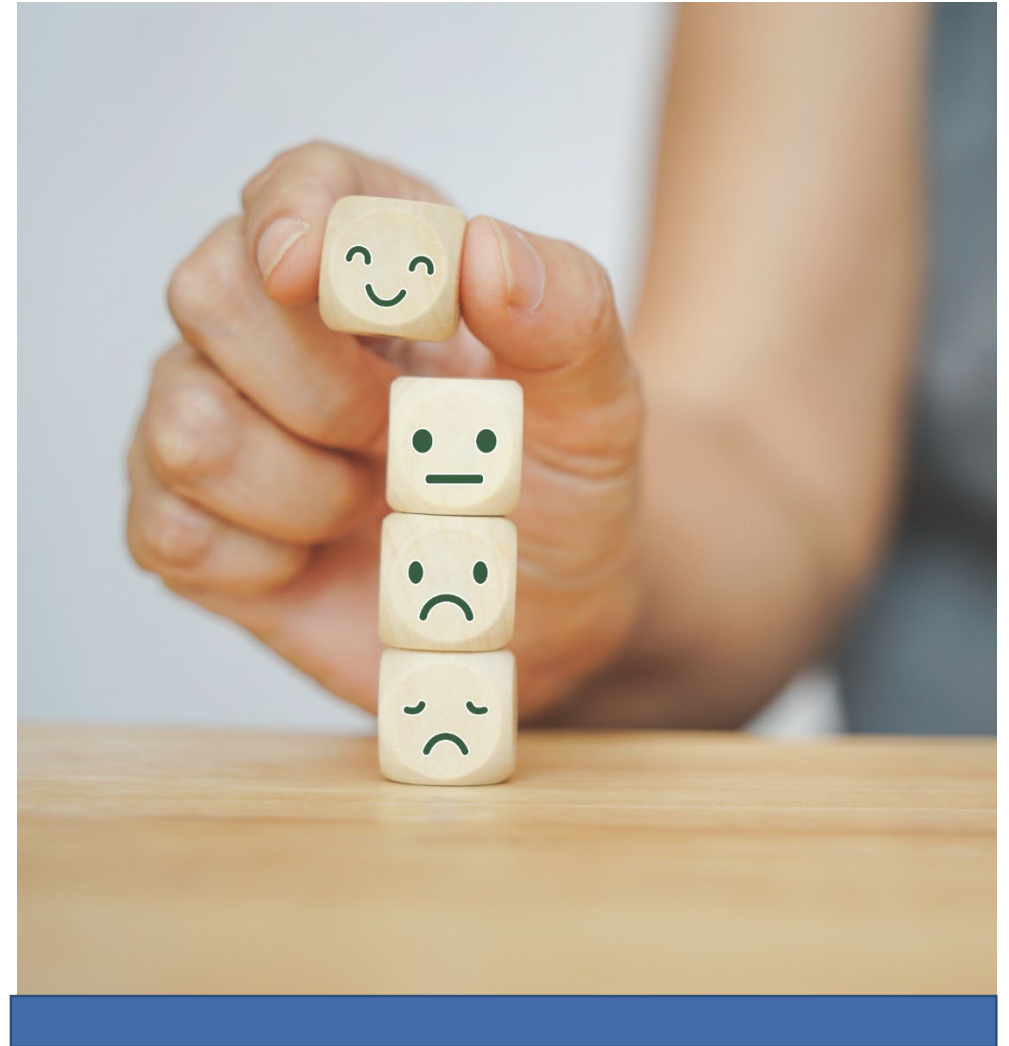
The process

- Receive the complaint
- Acknowledge the complaint
- Inform the respondent about the complaint
- Manage or investigate the complaint
- Determine appropriate outcomes
- Close the complaint
- Monitor conduct



The ideal complaint

- Made promptly
- In writing
- Identifies the complainant
- Identifies a respondent
- Clearly sets out the complaint
- Identifies any supporting documents and relevant witnesses
- Identifies outcomes the complainant is seeking



Informal or anonymous complaints

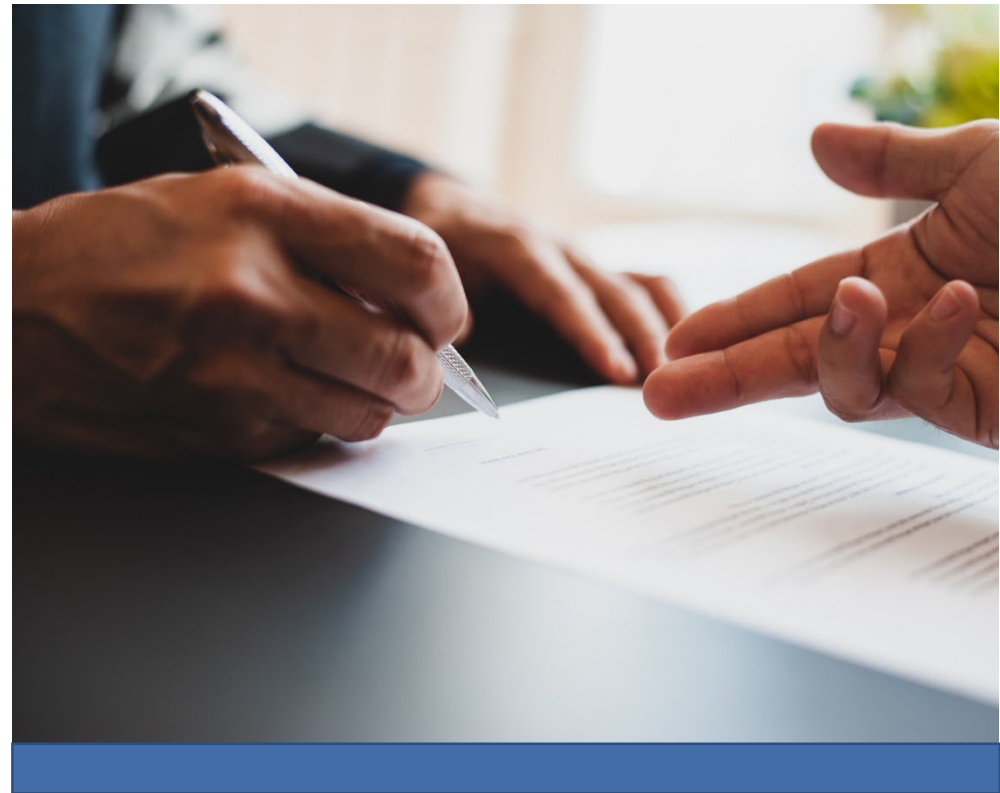
- Do not ignore informal complaints
 - Employers still have a duty of care
 - Offer to investigate, and confirm the complainant's position in writing
 - May still need to investigate – cannot let unlawful conduct, or conduct causing an OHS risk, go unchecked
- Do not ignore anonymous complaints
 - Ask for details from the complainant if you can
 - Otherwise, investigate the complaint with what you have

Acknowledging the complaint

- Ideally meet face-to-face
- Acknowledge receipt of the complaint
- Show empathy
- Seek as much initial detail as possible
 - How serious is it?
 - What happened?
 - What outcome is the complainant seeking?
- Outline the process that will be followed
- Outline available supports
- Confirm everything in writing

Inform the respondent

- Ideally meet face-to-face
- Outline the allegations
- Explain the process that will be followed
- Make it clear that a decision will be made only after the complaint is investigated
- Invite an initial response?
- Outline available supports
- Confirm everything in writing



Manage or investigate the complaint

- Every complaint should be investigated to some degree
- Formality of investigation depends upon:
 - the seriousness and complexity of the allegations
 - whether the allegations are disputed
 - who is involved
- Consider whether informal resolution is possible, before moving to a formal investigation

Decisions on standing down

- Standing down is not always necessary
 - Can make a return to work impossible
 - Consider alternatives where available
- Respondents should be stood down if:
 - The nature of the conduct is particularly serious
 - There is a serious health/safety concern
 - Not standing them down risks compromising the investigation
- Make standing down decision promptly

Investigation process



Investigation process

A good process should:

- Follow an established procedure, unless there is a good reason not to do so
- Resolve complaints as soon as practicable
- Ensure confidentiality for all involved
- Protect participants against victimisation
- Allow support persons where practicable
- Be thoroughly documented

Key elements of an investigation

- Clarify the complaint with the complainant
- Put allegations to the respondent
- Consider other evidence
 - Identify and speak with relevant witnesses
 - Review relevant documents
- Draw reasonable conclusions based on evidence
- Decide appropriate outcomes based on conclusions
- Ensure procedural fairness



Internal or external investigators?

Internal

- The ideal starting point
 - Employees may be less guarded
 - Greater likelihood of preserving working relationships
- Investigation should be conducted by someone:
 - Relatively senior
 - Objective
 - Experienced
- Investigator need not be the ultimate decision-maker

External

- More appropriate if complaints are:
 - Complicated or sensitive
 - About management or HR
- Can make findings of fact (what happened) and/or conclusions (was it bullying?)
 - Employer should still decide outcome
- Investigator should be experienced and impartial
- Investigation licences
- Legal professional privilege

Procedural fairness and natural justice

A good process should ensure:

- Complainant given reasonable opportunity to articulate complaint
- Respondent given reasonable opportunity to respond to the allegations
 - And any proposed outcomes
- Conclusions based on evidence
- Outcomes reflect the findings
- Outcomes are properly communicated

Opportunity to respond

- Allegations need to be put to the respondent
 - Allegations need to be sufficiently clear that they are capable of a meaningful response
 - Legal and factual concepts should be separated out, so that for each allegation the respondent is only responding to one thing
 - Eg:
 - On 15 March you bullied Byron in a team meeting.
- vs
- During the team meeting on 15 March you said to Byron: “Your idea is idiotic, I would not expect this from a person with your experience.”

Opportunity to respond

- Key inferences relied upon should be put to an respondent
- Disclose evidence that objectively demonstrates or disproves misconduct
- Not required to share all evidence (subject to policies and enterprise agreements)

Videos, emails, photos	Yes, where relevant
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Original complaint	No
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Witness statements	No
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Names of witnesses or other parties	Yes, if allegations make no sense without them
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Making findings of fact



What actually happened?

- Making a finding as to what has occurred
 - Not (yet) looking at the question of misconduct
- Considering and weighing up the contradictory evidence
- Determining the extent to which each allegation can be established
- Considering the evidence on the balance of probabilities
 - Not about proving guilt beyond reasonable doubt
- Persuasive evidence is required where the allegations or the consequences are serious, or the alleged conduct is inherently unlikely

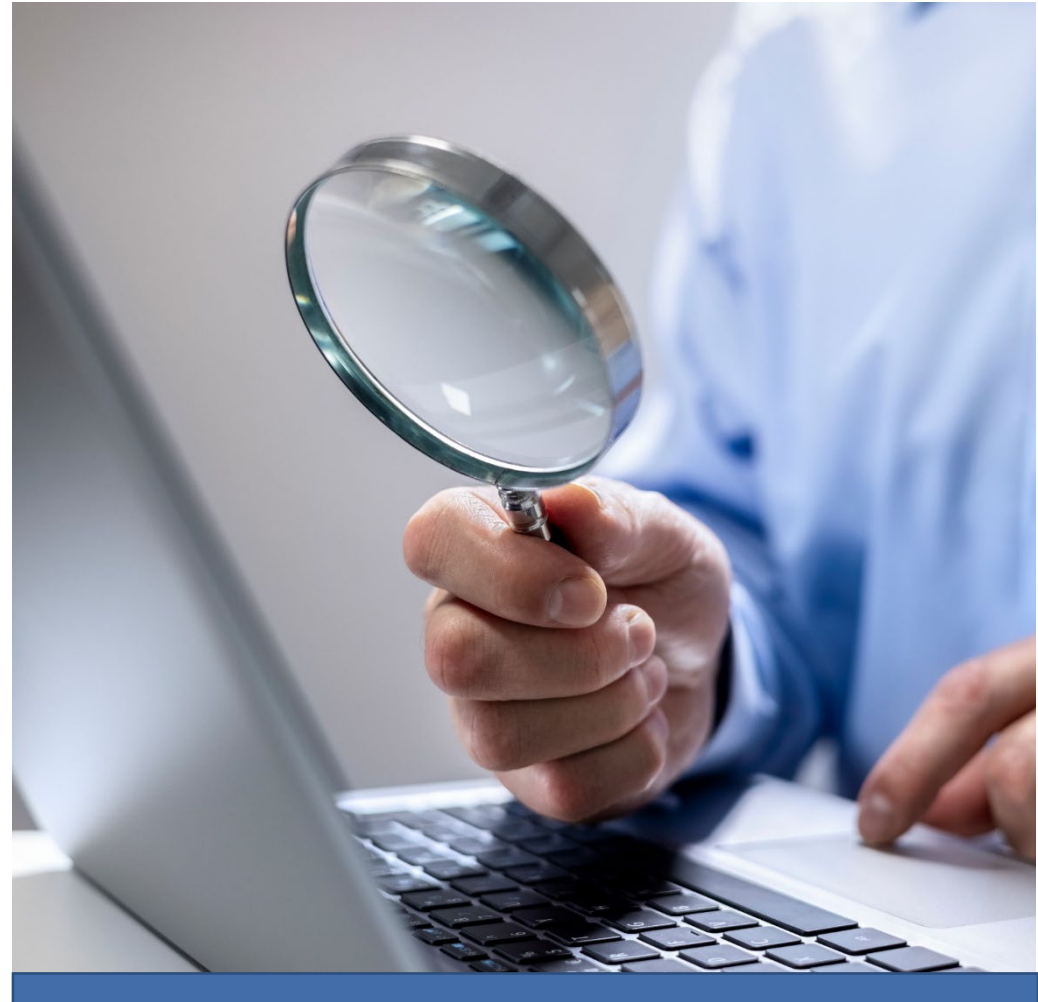
The *Briginshaw* principles

***Briginshaw v Briginshaw* (1938) 60 CLR 336**

- Need to consider the nature and consequence of the facts in question
- Consider:
 - Seriousness of allegation
 - Inherent unlikelihood of the occurrence
 - Gravity of consequences of a finding
- Cannot be satisfied by inexact proofs, indefinite testimony, indirect inferences

What does that mean?

- Test witness evidence against video/audio/documentary evidence
- Specific evidence, not general or vague
- Avoid overextending inferences
- Understand the limitations of:
 - Hearsay evidence
 - Tendency evidence
 - Credibility evidence



Hearsay

- Evidence from a person who did not witness the actual event
- Cannot be used directly to prove what happened
- Can be used to prove what witnesses said
- Quite unlikely to be determinative



Evidence of similar events

- Evidence of past misdeeds is not proof of a current allegation
- It can be indicative – but only if it is relevant
- Can't just reflect a vague tendency
- Context is critical
- Sometimes determinative

Credibility

- Clarity and consistency of recollection
- Direct and indirect answers to questions
- Consistency of their answers
 - With their own evidence
 - With other evidence
- Language and body language
- Often determinative

“He said, she said” cases

- You can make findings
 - If there is some supporting evidence to tip the balance
 - If there is a legitimate basis to consider one party more credible than the other
- Otherwise, allegations should not be substantiated

No response

Silence is not an admission of guilt

- Cannot draw a negative inference against a person for simply refusing to respond
- However, you can make findings based on all of the other available evidence
- If that evidence is strong enough to positively substantiate an allegation, you should find the allegation substantiated

New allegations

Don't make findings which are outside the scope of the allegations

- If new allegations arise, assess:
- Are they significant? Necessary?
- If so, put allegations to the respondent
- Seek evidence from relevant witnesses
- Subject the new allegations to the usual level of scrutiny

Findings

- Findings will typically be that an allegation is:
 - Substantiated
 - Partially substantiated
 - Not substantiated
 - Disproven
- False allegations can be a basis for disciplinary action

**Choosing the right
outcomes**



Outcomes and consequences based on findings

- Interpret your findings in the context of laws, contract, policies, etc:
 - Was the conduct a breach of policy?
 - Was it misconduct?
 - How serious?
- Consequences must be based on findings
 - Specifics of what was proven
 - Not the allegations
- Consequences must also reflect:
 - Previous warnings
 - Contrition and remorse
 - Admissions and accepting responsibility
 - Mitigating circumstances

Communicate outcome to the respondent

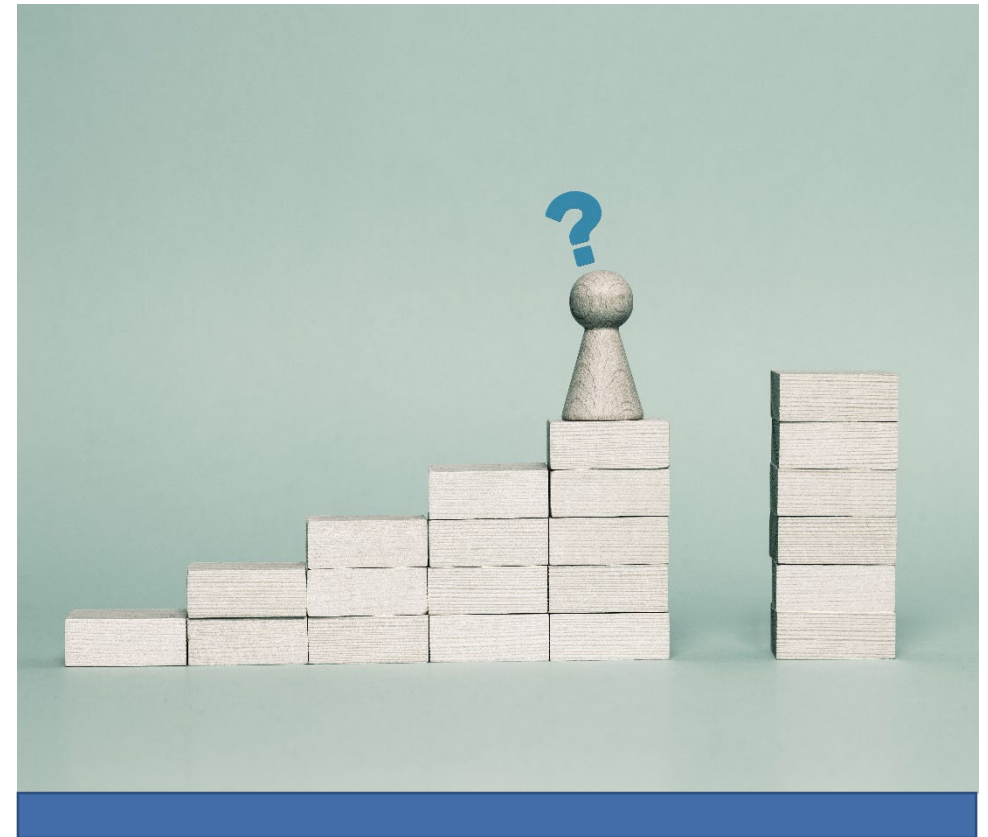
- Face-to-face and in writing
- Cover off on each allegation and finding
- Explain conclusions – misconduct, etc
- Set out proposed consequences
- Opportunity to respond
- Confidentiality and victimisation
- Outline next steps and support

More limited communication to the complainant

- Face-to-face and in writing
- Outline findings in general terms
 - Generally not a list of all findings
- Outline what action will be taken, if any
 - Generally do not provide specific information about any disciplinary action
- If no allegations substantiated, anticipate emotional response
- Outline next steps and support

Next steps

- Support
- Coaching or counselling
- Dispute resolution
- Address underlying issues
- Review policies and procedures
 - Do we adequately identify what is unacceptable in our workplace?
 - Are our processes appropriate?



**What questions should legal
counsel be asking?**



Key questions

- Are our policies and procedures good enough?
 - Complaints/investigations processes
 - Defining and deterring sexual harassment and discrimination
- Is our proposed process consistent with any procedure we might have in policies or an enterprise agreement?
- Do we want legal professional privilege?
- Does the investigator know what they are doing?
- Do the findings reflect the rules of evidence?

Conclusions



Conclusions

- Manage the process carefully
- Comply with your policies
- Ensure procedural fairness
- Test your evidence
- Get your communications right
- Get advice before the ship starts sinking

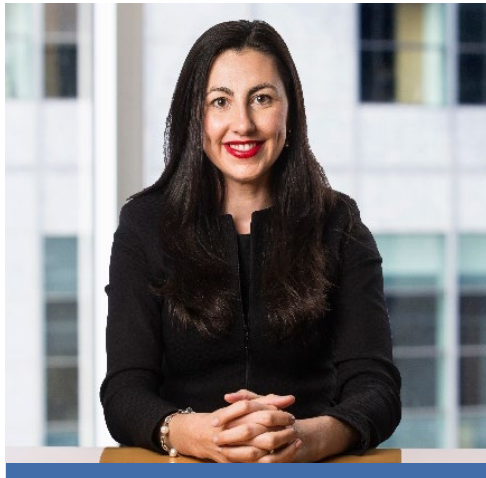


Q&A – Your Russell Kennedy Contacts



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