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Ministerial Review of the Human Rights Commission
in relation to the internal handling of sexual
harassment claims and its organisational culture

Judge Coral Shaw (retired)
May 2018

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Judge Coral Shaw (retired)

Executive Summary

The New Zealand Human Rights Commission (hereafter the HRC) is a national human rights institution recognised nationally and internationally for leading the promotion and protection of human rights for all people in Aotearoa New Zealand.

Acknowledging this strength, the HRC should be an exemplar employer in relation to matters of human rights violations in its own workplace.

Between December 2017 and February 2018, media in New Zealand widely publicised reports of a sexual harassment incident that had occurred within the HRC in October 2017. The incident had been formally investigated and resolved, but the reports raised concerns about the investigation and management of the incident.

On 21 February 2018, pursuant to section 132 of the Crown Entities Act 2004, the Minister of Justice, Andrew Little, appointed retired Judge Coral Shaw to review the HRC in relation to internal sexual harassment claims, and make recommendations upon the following Terms of Reference:

- The systems and processes for investigating and resolving internal sexual harassment claims used by the HRC, having regard to legal and other public-sector standards and the fact the Commission is expected to be an exemplar in this respect
- Whether the governance and management structures and arrangements of the HRC adequately support the prudent handling of sexual harassment claims
- The organisational culture of the HRC.

The Review does not investigate or make factual findings about any individual incidents or allegations.

The Review invited past and present HRC personnel to participate¹. Participants contributed their experiences of and perspectives on the issues raised in the Terms of Reference through an online survey, written submissions and face-to-face interviews.

The contributions of these participants raised a number of consistent themes and issues that form the basis of this report and of my conclusions and recommendations.

Conclusions

The main conclusions in this report are summarised below.

In relation to the systems and processes for investigating and resolving internal sexual harassment claims used by the HRC:

- a. some sexual harassment has occurred within the HRC, but it is not prevalent or endemic
- b. the Dignity at Work (DAW) 2009 policy, which was used to investigate the October 2017 incident, was aged and outdated. There was no specific, stand-alone policy for dealing with cases of sexual harassment
- c. the DAW policy was not sufficiently visible to staff and management and, in this case, was not correctly followed in a number of respects, which are detailed in this report
- d. the Chief Executive became more engaged in the DAW policy process adopted in the October 2017 incident than the policy contemplated and more than she wished to. The lack of human resource (HR) capacity in the HRC led the Chief Executive to call on a part-time, albeit very experienced, HR contractor to assist
- e. the HRC has recently improved its systems and processes for dealing with sexual harassment complaints by adopting a new Prevention and Response to Sexual Harassment 2017 policy, but it was formulated without full consultation with the HRC employees who were subject to it.

¹ Personnel refers to Commissioners, the Chief Executive and all other staff including contractors.

In relation to the governance and management structures and arrangements of the HRC for handling sexual harassment claims:

- a. staff members' lack of information and trust in management to deal appropriately with their complaints is a potential impediment to the successful implementation of the Prevention and Response to Sexual Harassment 2017 policy
- b. there is a deep divide between some staff and some managers and a lack of trust in the management and the Commissioners among some staff. The reasons for these are detailed in this report
- c. strategic leadership by the current Board is compromised by a lack of cooperation and communication between Commissioners and between Commissioners and the Chief Executive.

In relation to the organisational culture of the HRC:

- a. the structure of the HRC, including the Commissioner/Chief Executive relationship, is problematic but has always been so despite some legislative attempts to resolve it
- b. notwithstanding its historical structural problems, the HRC continues to meet its national and international responsibilities. It maintains a good reputation as a champion of human rights in New Zealand
- c. participants expressed pride in the achievements of the HRC and passion for the work that they do. They want the values of the HRC to be echoed in the workplace, and look forward to a time when the current divisions and tensions are no longer part of their working lives
- d. the responsibility for the culture of the Board is ultimately that of the Chief Commissioner, but it is not his alone. All the Commissioners have corporate responsibilities that they should be able to meet separately from their day-to-day activities. All Commissioners bear responsibility for the often uncooperative and unprofessional dynamics of their relationships
- e. the dysfunctional relationship between the Chief Executive and some of the Commissioners is a major reputational risk to the HRC and to the ability of the Chief Executive to meet her responsibilities for managing the staff of the HRC
- f. there has been a chronic lack of the resources required for the Commissioners to undertake the work of the HRC, caused by the Government's long-term cap on funding
- g. the Chief Executive cannot operate effectively given the structure, the lack of a unified Board, and resource constraints
- h. there is a need within the HRC workplace for genuine engagement between the Chief Executive and her staff when remedial and educational measures, such as training and workshops on workplace issues, are being devised and selected
- i. the Chief Executive cannot achieve this level of engagement without good advice from experienced HR experts
- j. the subject of the appointments of Commissioners could be seen to be outside the scope of the Review, but many of those interviewed referred to this as one of the factors that influence the conduct of Commissioners and hence the organisational culture of the HRC.

Recommendations

Terms of Reference One: The systems and processes for investigating and resolving internal sexual harassment claims used by the Human Rights Commission, having regard to legal and other public-sector standards and the fact the Commission is expected to be an exemplar in this respect

It is recommended that:

1. HRC management adopt a more inclusive approach with its personnel when introducing change and resolving workplace issues
2. the HRC develop a process for engaging with its staff (through the New Zealand Public Service Association and individually with non-unionised personnel) on the development and/or revision of all health and safety policies in order to comply with the Health and Safety at Work Act (HSWA) 2015. The process should include sharing relevant material, receiving the views of the staff, engaging staff in the decision-making process, taking their views into account and advising them of the outcomes
3. the HRC revisit the Prevention and Response to Sexual Harassment 2017 policy to enable full consultation with all current HRC personnel in compliance with the HSWA 2015
4. at least two skilled HRC managers be delegated the responsibility of receiving and conducting initial assessments of all internal complaints, including but not limited to complaints of sexual harassment, until the policy has been revised
5. the present Prevention and Response to Sexual Harassment 2017 policy be updated to include the names of the specified contact people referred to in clause 2.14
6. all complaints that are dealt with under the complaints policy be monitored for compliance by soliciting feedback from all affected parties.

Terms of Reference Two: Whether the governance and management structures and arrangements of the Human Rights Commission adequately support the prudent handling of sexual harassment claims

Governance structures

It is recommended that:

7. the Board include oversight of workplace policies as a standing item on its agenda
8. papers to the Board recommending the adoption of policies that affect or are likely to affect the health and safety of HRC personnel certify that the policies have been subjected to consultation with the staff/workers and are compliant with the HSWA 2015
9. the Chief Commissioner clarify the day-to-day activities in which Commissioners may participate separately from their roles in governance and strategic leadership, in accordance with paragraph 79 of the Governance and Responsibilities Manual 2017
10. Commissioners be required to comply with the designations of the Chief Commissioner and not intrude on the role of the Chief Executive, in accordance with paragraph 80 of the Governance and Responsibilities Manual 2017.

Management structures

It is recommended that:

11. the HRC management on its own, or in conjunction with other state-sector groups, provide an external professional support service to which internal complaints can be directed and investigated on its behalf
12. the HRC review the roles and strengthen the capacity of the HR team to increase its expertise and improve its ability to support the Chief Executive and oversee the implementation of workplace policies
13. the HRC urgently commence a process to consult on and implement or review all workplace policies, including those on bullying and discrimination, which is compliant with the HSWA 2015.

Terms of Reference Three: The organisational culture of the Human Rights Commission

It is recommended that:

14. all existing Commissioners be encouraged to undertake general governance training or refresher courses
15. all new Commissioners have either significant governance experience or commit to receive training in governance before commencing their duties
16. all present and future Commissioners receive specialist training on the contents and practical application of the Governance and Responsibilities Manual 2017 and the Crown Entities Act 2004
17. the Board devise and regularly update standard operating procedures for implementing the Governance and Responsibilities Manual 2017, including a mechanism for early-intervention conflict resolution between Commissioners
18. the Board conduct a review of the allocation of core support staff and funding between Commissioners to ensure that the allocation of these resources reflects the needs of each Commissioner while maintaining a fund for administration and shared corporate services
19. independently facilitated Board reviews of the Chief Commissioner and the other Commissioners be undertaken regularly
20. the position and person description of the role of Commissioners of the HRC be reviewed and consulted on widely before finalising in order to ensure that the candidates who are selected are the most suitable for the challenging nature of the work of the HRC and in accord with the Paris Principles. Such appointments should be as apolitical as possible in the current legislative regime
21. the Minister of Justice be urged to make decisions on the tenure of each of the Commissioners whose term has expired or is near expiry. Where appropriate and necessary, commence the recruitment process for any new appointments without undue delay
22. the process for the appointment of Commissioners be formalised in a policy document
23. consideration be given to whether the Commissioners of the HRC should be officers of Parliament, similar to the Ombudsman, Auditor-General and Office of the Parliamentary Commissioner for the Environment.

Relationships between the Chief Executive and the Commissioners

It is recommended that:

24. notwithstanding their present disagreements, the current Commissioners use their best endeavours to cooperate professionally as a Board in order to give the Chief Executive clear and united strategic direction
25. Commissioners familiarise themselves with and make all attempts to act in accordance with the Governance and Responsibilities Manual 2017. Where they recognise organisational gaps in capacity or process, they should raise these as a Board with the Chief Executive rather than take unilateral steps that may intrude on operational matters
26. unresolved personal and professional conflicts between the Chief Executive and the Board or individual Commissioners be proactively addressed using, where necessary, external mediation or facilitation.

Relationships between the Chief Executive and the staff

It is recommended that:

27. the HR capacity of the HRC be urgently reviewed and strengthened
28. the induction of new HRC personnel at all levels include awareness training in human rights in the context of the workplace
29. the Chief Executive obtains advice and assistance in devising procedures for consulting all staff effectively on the formulation and revision of workplace policies
30. team managers be equipped with the skills to receive and resolve workplace issues in the first instance and triage these appropriately as necessary
31. the HRC regularly reviews its workplace policies at least every two years to ensure that they are kept up to date and in tune with prevailing issues.

Introduction

In October 2017 a senior manager was found to have sexually harassed an intern at the New Zealand Human Rights Commission (HRC). An internal investigation was carried out. The outcome was agreed to by both the complainant and the respondent.

Between December 2017 and February 2018, there were widely publicised media reports of that incident.

On 21 February 2018, pursuant to section 132 of the Crown Entities Act (CEA) 2004, the Minister of Justice appointed former Judge Coral Shaw to conduct a Review of the HRC's culture and its practices, policies and procedures for handling internal complaints of sexual harassment.

The Review does not extend to the HRC's handling of external sexual harassment claims referred to it under the Human Rights Act (HRA) 1993.

The Minister stated that the public must have trust and confidence in the HRC's ability to carry out its statutory functions effectively, including promoting awareness of sexual harassment and dealing with sexual harassment complaints.

Terms of Reference

The Review is to inquire into and report upon:

- the systems and processes for investigating and resolving internal sexual harassment claims used by the HRC, having regard to legal and other public-sector standards and the fact the Commission is expected to be an exemplar in this respect
- whether the governance and management structures and arrangements of the HRC adequately support the prudent handling of sexual harassment claims
- the organisational culture of the HRC.

The Review does not investigate or make factual findings about any individual incidents or allegations.

Methodology

Protocols established to guide and inform the Review process are included in *Appendix A*.

Apart from present HRC personnel, the Review team invited former staff who had left the HRC since January 2017 to participate. Others who had left the HRC before that also asked to participate. It was decided to include only those who had left in the previous five years. An estimated 110 people contributed to the Review.

a. Document search

A number of documents were requested and analysed for the purpose of informing and completing the Review. A full list of these documents is included in *Appendix B*. This report draws on and quotes directly from these materials where relevant.

b. Online survey

A voluntary, anonymous, online survey was designed by the Review team. It was completed by 86 participants. The survey template is included in *Appendix C*.

c. Interviews

Participants in the online survey could also choose to talk to the reviewer, privately and confidentially, about any other matters relevant to the Terms of Reference.

Interviews were held with 49 people. Almost all the interviews occurred at the request of the interviewees. The interview template is included in *Appendix D*.

A number of participants provided additional written submissions.

All correspondence between interviewees was conducted by way of a dedicated email address established specifically for the Review.

The purpose of the survey and the interviews was to identify the subjective views of the participants about the way in which internal complaints of sexual harassment were dealt with at the HRC and the organisational culture at the HRC. It was not to establish the veracity of the opinions and facts expressed by the participants.

Highlighted comments at the beginning of each section are verbatim quotations of participants that exemplify frequently expressed opinions.

The Human Rights Commission

The HRC is constituted by the HRA 1993. It is also an independent Crown entity under the CEA 2004. The CEA 2004 sets out the Commission's accountability and reporting requirements to the Government, and some governance matters.

The HRC's primary responsibilities are to:

- a. advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society
- b. encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society
- c. promote racial equality and cultural diversity
- d. promote equal employment opportunities (including pay equity)
- e. promote and protect the full and equal enjoyment of human rights by persons with disabilities².

The HRC has capacity for five full-time³ Human Rights Commissioners but currently has four:

1. The Chief Commissioner
2. The Disability Rights Commissioner
3. The Equal Employment Opportunities (EEO) Commissioner
4. The Race Relations Commissioner.

The Commissioners have both governance and operational responsibilities. Collectively, the Commissioners are governors of the Board. Individually, Commissioners are involved in the day-to-day operations of and activities within their designated portfolios.

The Chief Commissioner is the Chair of the Board and is responsible for overseeing and managing the Disability Rights, EEO and Race Relations Commissioners to ensure that they act in alignment with the Commission's agreed strategic direction and other decisions agreed to by the Board. In turn, the Chief Commissioner is held to account by the other Commissioners as the Board.

The Board has delegated its authority to manage operational matters to the current Chief Executive, including the employment and management of staff. The Chief Executive reports to and is appointed by the Chief Commissioner. The HRC personnel report to the Chief Executive.

² HRA 1993, section 5(1).

³ The Human Rights Amendment Act 2016 removed the appointment of part-time Commissioners and made changes to the role and structure of the Commission.

The HRA 1993 sets out the criteria for the appointment of Commissioners by the responsible Minister⁴. They must have among them, as a collective, knowledge of and experience in a range of issues including the Treaty of Waitangi and the rights of indigenous people, and the needs and aspirations of different communities and population groups in New Zealand society⁵. Pluralism in the HRC is a requirement under the Paris Principles⁶ (defined in the section below).

The HRC (including the Office of Human Rights Proceedings [OHRP], which is located within the HRC but is independent of the Commission's Board) employs full-time, part-time, permanent and temporary staff. At the time of the Review there were 65 people engaged, including contractors and statutory appointments.

The Review does not include the OHRP, which has its own governance and administrative responsibilities.

The staff are organised into six teams under the following managerial positions:

1. Chief Mediator
2. People and Support Manager
3. Chief Financial Officer
4. Communications Manager
5. Advisory and Research Manager
6. Chief Legal Adviser.

The Commission operates from offices in Wellington and Auckland, and has some staff based in Christchurch.

International requirements

The HRC is an independent national human rights institution (NHRI). The Paris Principles provide the normative framework for the roles, functions and structures of NHRIs⁷ and set minimum international standards for them. NHRIs that are in full compliance with the Paris Principles are accredited 'A status', which entitles the NHRIs to speak at the United Nations, and to participate at the highest level when reporting on the promotion and protection of human rights through the United Nations' reporting processes⁸. The HRC has 'A status' accreditation.

The Paris Principles require that an NHRI have:

- a broad mandate based on universal human rights standards, including a dual responsibility to both promote and protect human rights, covering all human rights
- independence from government
- independence guaranteed by constitution or legislation
- adequate powers of investigation
- pluralism including through membership and/or effective cooperation
- adequate human and financial resources⁹.

The Paris Principles emphasise the importance of the independence of those appointed to NHRIs and in their functioning; independence is crucial to the credibility and effectiveness of an NHRI¹⁰.

4 HRA (1993), section 11(1).

5 Asia Pacific Forum of National Human Rights Institutions. (2012). *Capacity Assessment of the New Zealand Human Rights Commission*, p 8.

6 Paris Principles: *Composition and guarantees of independence and pluralism*, paragraph 3.

7 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. (2013). *General Observations of the Sub-Committee on Accreditation*, p 1.

8 Human Rights Commission. (2017). *Framework of Statutory Powers of the Commission, the Board of the Commission and the Officers of the Commission*.

9 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. (2013). *General Observations of the Sub-Committee on Accreditation*, p 7 – 44.

10 *ibid*, p 16.

Legal standards for investigating and resolving sexual harassment claims

Employers have a legal obligation and responsibility to prevent harassment and to respond to complaints, including complaints about their employees and clients.

Human Rights Act 1993

Section 62 of the HRA 1993 states that sexual harassment is unlawful, and protects all people, including employees, against sexual harassment. The Act holds employers to a high standard with regards to sexual harassment. An employee may make a complaint about the employer or another employee. Section 68 holds the employer liable for the sexual harassment behaviour, and the employer must show that it has taken reasonably practicable steps to prevent the employee doing that act.

The Crown Entities Act 2004

The CEA 2004 requires the HRC to be a 'good employer'. This includes operating a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including a provision to provide a good and safe working environment. The employer must make sure that the policy is available to its employees, ensure its compliance with that policy, and report in its annual report on the extent of its compliance¹¹.

Employment Relations Act 2000

The Employment Relations Act 2000 is the main legislation governing employment relations in New Zealand. Section 108 of the Act protects employees against sexual harassment. Section 103 of the Act recognises that experiencing sexual harassment may be grounds for a personal grievance.

Health and Safety at Work Act 2015

The Health and Safety at Work Act (HSWA) 2015 does not have a specific standard governing sexual harassment, but the Act places obligations and due diligence responsibilities on the employer to ensure the health and safety of workers. Sexual harassment in the workplace is a health and safety issue.

A Person Conducting a Business or Undertaking (PCBU) has a duty, so far as is reasonably practicable, to engage with its workers on health and safety matters that will or are likely to affect them¹². This duty extends to having practices that provide reasonable opportunities for workers to participate effectively in improving health and safety.

Worker engagement plays an important part in contributing to a positive workplace culture¹³. A PCBU engaging with workers must:

- provide relevant information about a health and safety matter to workers in a timely manner
- give workers a reasonable opportunity to express their views and to raise work health and safety issues in relation to the matter, and contribute to the decision-making process relating to the matter
- take workers' views into account
- ensure that workers are advised of the outcome of the engagement in a timely manner¹⁴.

Worker engagement is required¹⁵ when (inter alia) an employer is:

- proposing changes that may affect the health or safety of workers
- making decisions about ways to eliminate or minimise risks or procedures for resolving health and safety issues
- making decisions about procedures for engaging with workers or for monitoring workers' health and workplace conditions
- developing procedures for providing information and training for workers.

¹¹ CEA (2004), section 118(1).

¹² HSWA (2015), section 58.

¹³ WorkSafe New Zealand. (2016). *Work Engagement, Participation and Representation*, p 15.

¹⁴ HSWA (2015), section 59.

¹⁵ HSWA (2015), section 60.

Public-sector standards for investigating and resolving sexual harassment claims

Sexual harassment in the workplace is a health and safety issue. WorkSafe New Zealand (WorkSafe) has produced a number of ‘good practice guidelines’ for New Zealand organisations on what it perceives to be good practice, and ways in which organisations can do their due diligence and better comply with their health and safety obligations.

Two documents relevant to this report are WorkSafe’s Worker Engagement, Participation and Representation and WorkSafe’s (in partnership with the Institute of Directors) Health and Safety Guide: Good Governance for Directors.

The key elements are quoted below:

“Directors should ensure there is an active commitment and consistent behaviour from the board that is aligned with the organisations’ values, goals and beliefs. This will encourage a positive workplace culture”¹⁶.

“Ensure leadership is ‘informed leadership’. Board members need to be aware of the organisation’s risks. They should have an understanding of the control methods and systems so they can identify whether their organisations’ systems are appropriate... and are being implemented effectively”¹⁷.

“All businesses and undertakings must have worker engagement and participation practices, regardless of their size, level of risk or the type of work they carry out”¹⁸.

“Worker engagement and participation is an important part of growing workplace culture. All workers should be encouraged to contribute to continuous improvements by raising issues, generating ideas and participating in policy development, implementation, monitoring and review”¹⁹.

The State Services Commission has a role to lead the public sector in relation to integrity and conduct issues. It has developed a policy guideline template²⁰, which organisations can adopt directly or use as the standard for measuring their existing policies.

Several public-sector organisations were approached by the Review team for copies of their internal sexual harassment-related policies and procedures. Due to confidentiality requirements they cannot be referenced in this report. However, they were used as a benchmark against which the HRC’s sexual harassment policies were assessed.

16 WorkSafe New Zealand & Institute of Directors. (2016). *Health and Safety Guide: Good governance for directors*. p 10.

17 *ibid*, p 10.

18 WorkSafe New Zealand. *Worker Engagement, Participation and Representation*, p 20.

19 WorkSafe New Zealand & Institute of Directors. *Health and Safety Guide: Good governance for directors*, p 12.

20 See <http://www.ssc.govt.nz/sexual-harassment-policy-guideline>.

The United States Equal Employment Opportunity Commission has published Promising Practices for Preventing Harassment, which is based on recommendations from its Select Task Force on the Study of Harassment in the Workplace report. This document includes five core principles that have generally proven effective in preventing and addressing harassment:

- a. Committed and engaged leadership
- b. Consistent and demonstrated accountability
- c. Strong and comprehensive harassment policies
- d. Trusted and accessible complaint procedures
- e. Regular, interactive training tailored to the audience and the organisation²¹.

The HRC's policies for investigating and resolving internal sexual harassment claims

Previous policy – Dignity at Work (2009)

The HRC's Dignity at Work (DAW) policy dated 25 June 2009 outlined the procedures to "address any problems associated with discrimination, harassment (workplace, sexual and racial harassment), bullying or victimisation"²². The policy was supported by and developed with the New Zealand Public Service Association (PSA). It remained in force until its retirement in mid-2017.

The DAW policy provided a detailed and relatively clear process for self-help, informal, formal and external procedures and the resolution of complaints. However, the policy was generic and applied to all the workplace issues listed above. A small section of the policy defined sexual harassment and gave some examples of what behaviours might constitute sexual harassment. There was no other specific reference to sexual harassment.

The Policy Review Project

In 2016 the HRC initiated the Policy Review Project to review and update existing policies and develop any new policies to give greater clarity and alignment. A number of policies were out of date, and there were multiple versions of policies. The DAW policy was identified as an out-of-date policy.

The core purpose of the project was to review existing policies and ensure that there was one source of the most recent information available to staff.

This project came to an end in mid-2017, but due to funding and resourcing constraints the creation of new policies could not be finalised. A single, overarching policy, 'The Ground We Stand On' (GWSO) was created that included some of the Commission's policy documents. Policies older than 18 months (pre-October 2015) were retired. Policies approved by the Board within the previous 18 months were to remain as stand-alone policies until they could be eventually incorporated into the GWSO policy. The DAW policy was one of these.

Current policy – The Ground We Stand On (2017)

The GWSO policy was approved by the Board on 30 June 2017 but was not implemented by management until December 2017. It was a response by the Commission's Board to the outcomes of an external review undertaken by BoardWorks International, and in light of the impending changes to the HRA 1993 in June 2016.

²¹ See Chai R. Feldblum & Victoria A. Lipnic, Equal Employment Opportunity Commission. (2016). *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*. https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

²² *ibid*, p 1.

It outlines principles and fixed policy rules, with specific guidelines relating to (inter alia):

- working at the HRC
- health and safety
- harassment-free workplace
- working with clients
- enquiries and complaints.

The GWSO policy forms part of the employment terms and conditions of all personnel at the HRC and OHRP.

Current sexual harassment policy – Prevention and Response to Sexual Harassment policy (2017)

On 9 November 2017 a new policy for addressing complaints of sexual harassment was devised by the HRC as a result of the 2017 incident.

It was adopted directly from the State Services Commission policy guideline for the prevention of and response to sexual harassment, with minor changes of detail to reflect the HRC's structure. It was approved by the Board on 13 December 2017.

Correspondence suggests that changes to the sexual harassment policy were notified to HRC union delegates on 31 October 2017 and 22 November 2017. This is the only evidence of any consultation with staff. The results of the online survey indicate that only 10% of participants were consulted on the policy.

Differences between the old and the new

The 13 December 2017 Board paper indicates that the reason for the development of the new Prevention and Response to Sexual Harassment policy was to recognise that the DAW policy provided “a response to a range of disparate workplace problems without also providing guidance for managers on the avoidance of such problems”²³.

The new policy is an improvement on the previous DAW policy. As a stand-alone, dedicated sexual harassment policy document it is more accessible and more fit for purpose. It contains many of the elements of the former policy but goes into more detail. For example, the stages outlined in the complaint process (self-help, informal, formal and other options) are more substantial to prevent any ambiguity and inconsistency in how the policy is interpreted and subsequently applied. However, like its predecessor it does not refer to the possibility of an independent investigation of a complaint.

²³ HRC Board paper, 13 December 2017.

Terms of Reference One

Review of the HRC systems and processes for investigating and resolving internal sexual harassment claims, having regard to legal and other public-sector standards and the fact the Commission is expected to be an exemplar in this respect

The findings in this section are based on: the results of the online survey, including notes made by the participants; a review by the HRC's external employment lawyer of the process used to investigate the recent incident; interviews with almost all of the affected parties and personnel who were or who became aware of the complaint; and the DAW policy in force at the time of the incident.

As sexual harassment in the workplace is a health and safety issue, the survey sought information about the knowledge, awareness and satisfaction of the respondents with the HRC's systems and processes for investigating and resolving claims of sexual harassment.

From the survey

- 17.44% of the participants stated that in the previous five years they had personally witnessed or experienced sexual harassment behaviour within the HRC. The behaviour included: touching, hugging, encroaching on someone's personal space or kissing; staring or leering; insults or taunts of a sexual nature; unwanted invitations to go out on dates; repeated or inappropriate advances on email and social networking websites; intrusive questions or comments about a person's private life, clothing or physical appearance; sexually suggestive comments or jokes, or other forms of inappropriate language; and stalking or sexual assault.
- 46.51% were not familiar with the HRC process for reporting a claim of sexual harassment. 49% knew who they would report a claim to but 36.05% had not considered reporting sexual harassment incidents they had experienced or witnessed. Those who had reported incidents had done so to a manager or trusted person. None had contacted an identified contact person or support person.
- Those who chose not to report incidents selected the following reasons: they were worried about how they would be perceived; they were afraid of repercussions/ongoing relationships; it would not have made any difference; the behaviour would not have seemed bad "on paper" or "you had to be there"; or they did not know how to complain.
- 63.95% stated they were not aware of specialist services made available for victims of sexual harassment by the HRC.
- 69.77% did not know or were unsure about the contact people within the HRC who were designated to assist with questions or concerns about sexual harassment.
- As at the date of the survey, over 80% had not been provided with training as designated contact persons or to receive claims or complaints of sexual harassment.
- Of the very small number of participants who had made claims of sexual harassment, none had been given information about support services provided by the HRC.

The personnel at the HRC had low levels of knowledge about the systems and processes, and a significant proportion of HRC staff who participated in the Review expressed little or no confidence in the way that HRC complaint procedures are conducted.

“I was aware of the HRC’s ‘dignity at work’ policy but I never received any training on this policy, despite working at the HRC for many years. I suspect I was given a copy of this policy when I first joined the HRC but I can’t be sure.”

“While the processes and systems are good in theory they’re often not followed by certain managers and staff.”

“There are a number of people, particularly within HR, who do not have the confidence of staff. This undermines staff confidence in processes involving them, and discourages the raising of issues.”

“Staff have little confidence that decisions made are the right decisions, staff are never consulted but rather informed, and there is a real lack of transparency on processes or decision-making.”

Several of the participants in the Review expressed the view that any investigation of sexual harassment claims should be carried out by a person external to the HRC and independent of it.

SUMMARY

- The online survey and interviews revealed that, as it is in most organisations, some sexual harassment had occurred within the HRC but it was not prevalent or endemic.
- Two-thirds of HRC personnel were not aware of the process for reporting sexual harassment.
- The majority of those who did have knowledge of the processes did not think that they were adequate, appropriate or fair.
- The majority of staff had not been consulted about the development of the most recent policy.
- Staff lacked training and information about available support.
- There was a significant reluctance to report sexual harassment.

The systems, processes, practices, policies and structure of the Commission applied in the incident that gave rise to the Review

The DAW 2009 policy was in force when three incidents of sexual harassment that have occurred in the HRC in the past five years were investigated internally by the HRC.

The policy contained mechanisms to “address any problems associated with discrimination, harassment, bullying or victimisation”. It defined types of harassment including sexual harassment, bullying and victimisation. It stated (inter alia):

“Such behaviour is not tolerated by the Commission and will be regarded as serious misconduct if found to be occurring”

“Complaints will be dealt with speedily, confidentially and fairly and complainants will not be victimised because they have made a complaint”

“Natural justice for those involved, including those complained against”

“Appropriate action will be taken, which could involve warnings, removal from the work area or dismissal”.

The DAW policy complaints procedure provided for a complainant to choose from three procedural options that were discrete but complementary: self-help, informal and formal.

The self-help option allowed the complainant to communicate verbally, in writing or by email with the respondent or to meet the respondent with a support person to request that the behaviour stop. A complainant who chose the informal option would ask a third person to help resolve the situation by talking to both parties. If both agreed to settle it informally, the matter would be resolved. Mediation was an option at this stage.

Complainants were encouraged to work through the informal procedure before lodging formal complaints in writing. A manager who received a formal complaint would identify an appropriate impartial person to investigate the complaint. The procedure contemplated the investigation being undertaken by a line manager or the Corporate Services Manager or an alternative person in their stead. The report of the investigation was to be submitted to the Chief Executive, who would decide what action was to be taken.

The formal process specified the steps necessary to ensure natural justice and the safety of the complainant.

The incident that gave rise to the Review

Between December 2017 and February 2018, there was a period of intense media interest in an incident of sexual harassment involving HRC personnel that had occurred in late October 2017. The incident and the subsequent investigation then became the subject of public comments, some of which were based on inaccurate facts.

In the course of the Review the facts on the way the complaint was dealt with became clear once all the parties who had had direct involvement had an opportunity to give their versions of events. As the Terms of Reference expressly state that the Review does not investigate or make factual findings about any individual incidents or allegations, the following findings are focused on the process that was undertaken once the complaint was received by the HRC.

The complainant was a young woman from overseas who was working at the HRC on a short-term internship. Her assignment was due to end at the end of 2017. The respondent was a young man who was the HRC’s Chief Financial Officer. Both worked in the Auckland office. The incident occurred at a social gathering for a former staff member held at a nightclub on Friday 27 October 2017. Several staff members attended. The complainant and respondent were dancing and among the last to leave. It was at that time that the event that led to the Review occurred.

A few hours after the event, at 1.55am, the complainant contacted the respondent by email to confront him with what had happened and to explain the effect that it had had on her. The respondent apologised by email that day at 3.40pm. The complainant then reported the incident to a colleague. With her permission, on Monday 30 October 2017 the colleague advised a manager who offered support through the employee assistance programme (EAP). At the manager's request the complainant provided a written statement giving her account of what had happened.

At that stage the complainant made it clear that she did not want to pursue a formal complaint option. She wanted information about informal and other complaint procedures, hoping to have the matter settled between her and the respondent. She did not want to be in the office where she and the respondent worked. She was extremely upset and disturbed by what had occurred.

The Chief Executive was advised of the incident on Monday 30 October 2017. She contacted the HRC human resources (HR) advisor, who read all the relevant emails and the complainant's statement. He also read the DAW policy, which he had not seen before.

On 31 October 2017 the Chief Executive formally requested the HR advisor to review the case and make recommendations. She also wrote to the complainant expressing her concern and advising that she had asked for a report.

The HR advisor who was requested to review the case (the 'investigator') worked on contract in the Wellington HRC office for a minimum of two days a week, and sometimes more as required by the Chief Executive. He occasionally attended office functions and worked closely with the People and Support Manager and the Chief Executive. He was engaged in this matter as a substitute for a Corporate Services Manager, a position referred to in the DAW policy but that had been disestablished. He immediately travelled to Auckland on 1 November 2017, separately contacted the complainant and respondent and arranged to meet each of them that same day.

At the time they were interviewed, neither the complainant nor the respondent was fully aware of the stage the process was at.

The complainant believed that she was meeting an independent investigator to discuss her options and approaches, although the term investigator was not used when the Chief Executive engaged the HR Advisor to review the case or when the meeting with the complainant was being set up.

The meeting was held in the foyer of an office building chosen by the investigator as a quiet location. The complainant was alone. The question of her having a support person was not discussed. The investigator explained to her verbally what her options were. The complainant confirmed that she wanted to make a complaint to the Commission as the employer, have the respondent apologise to her, and for the respondent to know that he should not treat any woman that way in the future. Having read the complaint, the investigator then questioned her about what had happened and began his investigation at that initial meeting.

The respondent was not given any notice of his meeting with the investigator or what it was about. The investigator called him from outside the HRC office and asked if he could have a chat. The respondent agreed without knowing what the 'chat' would be about, and met the investigator a few minutes later at the HRC office. He was assured by the investigator that the process would be strictly confidential to him, the complainant, the investigator and the Chief Executive. The respondent says he was also assured that his employment would not be affected. The investigator does not remember saying that. The respondent did not have a support person with him and was not offered an opportunity to have support or take advice.

Although the respondent says that he disputes the complainant's version of events, he recognised his error of judgement and accepted what had been alleged at the time because of the assurances he had received. He believed this response was the most restorative approach and he was keen for the complaint to be resolved quickly and to the satisfaction of all parties.

Finding that there was little apparent dispute about what had happened and what the parties wanted as an outcome, the investigator told the parties that the matter would be dealt with informally and arranged for the respondent to prepare a letter of apology.

On 2 November 2017 the investigator then proceeded as per the formal process. He produced a draft report for the parties to consider, and the parties were shown the drafts and given the opportunity to respond.

The complainant was unhappy with the first draft and asked for several significant changes to be made so that the report adequately reflected the severity of the events that she had complained about and their effects on her. After several iterations, a report that both parties were willing to accept was finalised by the investigator, but not before the complainant had made it clear that although she had agreed to the report she was still shell-shocked by both the event and the fact that she had had to virtually rewrite the first draft by the investigator.

The Chief Executive and the manager who had earlier assisted the complainant were not involved in the interview of either party, but contributed to the wording of the final version of the report, including the finding of sexual harassment.

Before this process was completed, the complainant asked the Chief Executive and the investigator about the possibility of mediation, as she believed it was in the best interests of the Commission, the respondent and herself to resolve it restoratively. The investigator discussed the possibility of mediation with both parties. Although both parties expressed an interest, no mediation occurred. It seems that each misunderstood the other's position. This is now regretted by both the complainant and the respondent as well as the investigator and the Chief Executive.

When the complainant was advised of the outcome of the investigation she expressed satisfaction with the recommendations, which included a written apology, anti-harassment counselling and a formal warning to be recorded on the respondent's file for three years, as well as support and follow-up for her. The final report, including these recommendations, was completed on 8 November 2017 and provided to the parties on 10 November 2017.

The complainant did not want to return to the office for fear of having contact with the respondent. She resigned on 8 November and left New Zealand shortly afterwards, having told some close work colleagues the reason for her early departure date.

Before she left New Zealand, the complainant spoke to some other work colleagues of her concerns about the way her complaint had been handled. She corresponded with them further by email after she left and gave them permission to share those concerns with the Chief Executive on her behalf. This was done on 23 November 2017. The Chief Executive responded at length to her the same day and agreed that a number of issues raised needed further clarification and addressing. She also defended the HRC on some issues.

HRC personnel from all parts of the organisation began to ask questions about the lack of transparency and clarity in the process that had been followed. Issues raised at this time included the perception of partiality by the investigator, the failure of confidentiality, and the eventual outcomes. Rumours, some of them inaccurate, circulated about the incident. A Commissioner who had learned of the incident from staff contacted the Chief Executive to ask why they had not been told of the incident formally and to convey the concerns she had been hearing from staff members about the process followed.

On 15 December 2017 the HRC received its first media query about the complaint. That same day the first media story was published. On 16 December 2017 the complainant advised the Chief Executive that she had been contacted by the media about the circumstances of her departure but that she had advised them that she was not interested in discussing it, and expressed to them her deep respect and admiration for the HRC.

In spite of this, further information about the incident and how it had been handled internally, some of which was inaccurate, was obtained by the media and was published widely. This had a severe impact on the respondent.

What appeared to have been a swift process with an agreed outcome of the complaint became the subject of criticism and concern to many HRC personnel, including the complainant. Several participants, from Commissioners to managers and staff members, described the whole affair as traumatic.

Issues arising from the handling of the complaint

Transparency

It is incumbent on an organisation like the HRC to have transparent processes for dealing with internal disputes and complaints. Those who are reliant on a process must know what it is so that they can avail themselves of the protection afforded by the process. Transparency of process is also essential to hold an organisation accountable.

The DAW policy was transparent to the extent that it was in writing and available to all personnel in the HRC as part of its policies, but the survey results showed that there was low awareness of it among personnel. As a matter of fairness, a person who makes an internal complaint should have a fair opportunity to learn of or refresh their knowledge of the applicable process, especially where they have the right to select the process to be applied in their particular case.

Before her meeting, the complainant had a limited opportunity to read the DAW policy and wanted to discuss it in detail with the investigator. The respondent had no opportunity at all to look at the policy before he was interviewed.

The investigator

The DAW policy provided for an initial informal process to be facilitated by a third person requested by the complainant. The formal process outlined in the policy involved an investigation by a line manager or the Corporate Services Manager. The DAW policy expressly stated that the complainant should be encouraged to work through the Commission's informal system in the first instance. The investigator had not seen the DAW policy until just before he embarked on this investigation.

The investigator was contracted by and reported to the Chief Executive. He worked closely with the entire management team on people matters. As such he was not independent; however, the DAW policy did not specify the need for an independent investigator.

The investigator's regular presence in the HRC office performing his HR functions, and his professional working relationship with the Chief Executive and other managers, including the respondent, caused some HRC personnel to question whether he could have been impartial. The appearance of impartiality is as important as actual impartiality. However, having reviewed all the available material about this, it is fair to say that the investigator took his professional independence to the investigation and did all he could to be objective and impartial in his dealings with both parties.

The main issue in relation to the decision to appoint an investigator immediately was that it missed out the important option for the complainant to have the assistance of a contact person chosen by her to help resolve the situation. She had stated that she wanted it resolved informally, but never got that opportunity.

Natural justice

The DAW policy stated that the process had to be carried out speedily, fairly and confidentially.

An investigator canvassing an allegation should ensure that the person who stands accused receives the minimum requirements of fair process: reasonable notice of the allegation and an opportunity to take advice and have a support person.

A complainant is similarly entitled to fair treatment. They need to: be able to consider carefully the available options of formal or informal processes and the implications of each; be given the opportunity to make informed decisions about all types of resolution available; and be given certainty about the process that will be followed. It is essential that the complainant be offered support at meetings with the investigator and given a reasonable opportunity to obtain a support person.

These safeguards were lacking for both complainant and respondent in this case.

Interim measures

The DAW policy stated that it may be appropriate to consider interim measures to ensure that the complainant and the respondent did not work closely together until the matter was resolved. These were to be discussed with the complainant and respondent before they were implemented.

Although the complainant received considerable and careful support from those work colleagues to whom she disclosed her complaint, the HRC as an institution did not take any active interim measures following her report of sexual harassment. The respondent remained at work while she stayed at home by default. The continuing presence of the respondent in the workplace while the issue was being resolved was of concern not only to the complainant but to a significant number of staff for whom this has been a continuing source of grievance.

Confidentiality

The DAW policy required an investigation to be carried out confidentially, but otherwise did not make confidentiality mandatory for all concerned.

The respondent was assured of confidentiality before he accepted the allegations of the complaint as being correct. This assurance could not realistically be kept. From an organisational perspective, at least the HRC legal advisors, Human Resources and the Chief Commissioner would have had to be advised. He did not know that the complainant had disclosed her complaint to at least two other persons before the investigation began.

Participants had different views on this issue. There was recognition that a person who discloses that they have been sexually harassed should have their identity protected. There was concern that not identifying a harasser means that others are unfairly suspected. Others felt that complainants need to be able to disclose in confidence to a trusted person, but that if an investigation is to take place the matter has to be escalated and inevitably others need to be told. There was recognition that in a small workplace it is unrealistic to expect such a matter to be kept strictly confidential.

Speed

There is merit in avoiding a drawn-out process of investigation, but also a danger in a process that is too quick. The complainant was entitled to a reasonable time to consider her options and their implications before the investigation was commenced. The investigation took less than 24 hours and neither party had time to reflect fully on the implications of what was happening to them. Although appreciative of the swift response by the HRC, the complainant wanted more time to process her options.

The outcome

The complainant appreciated that the HRC asked her what she wanted as an outcome, but was not aware that that would be the only outcome. She expected the HRC to have some minimum response or examples of appropriate responses to sexual harassment so that the outcome would not be entirely victim driven.

She also had concerns about the way the investigator handled the issue. Reading his first draft was re-victimising to her. She felt that she had to push for recognition and every outcome and did not feel that she had closure from the issue.

The respondent remains at work, although he has worked from home since the beginning of 2018. He has been badly affected by the publicity about this matter. He deplores the way it was escalated when it could have been resolved at a much lower and more satisfactory level.

CONCLUSIONS

1. The systems and processes used in the incident were aged and outdated. There was no specific, stand-alone policy for dealing with cases of sexual harassment. The DAW policy referred to contact people in the office being available, and to a Corporate Services Manager when such positions no longer existed.
2. The policy was not sufficiently visible to staff and management and, in this case, was not correctly followed.
3. Management overlooked vital elements of the process. For example, the self-help option was not raised as an option for the complainant. She was not given the opportunity to designate a third party to assist her with an informal resolution. The procedure that was adopted combined elements of the informal and the formal, and as a result neither complainant nor respondent received the fair treatment to which they were entitled.
4. Important safeguards of natural justice were overlooked. The right to a support person during the investigation was not sufficiently explained or facilitated for either the complainant or the respondent, and the respondent was not given a copy of the complaint in advance and was taken by surprise.
5. The option of mediation was not satisfactorily explained or facilitated. The opportunity for the parties to reach a confidential, agreed and durable resolution was lost.
6. Fairness and confidentiality were sacrificed to speed.
7. Although an agreed outcome was reached, concerns about the process began to surface very shortly afterwards. Management lost control of the process, the flow of information and any attempts at confidentiality as gossip and rumour took over.

In relation to other workplace issues:

“I felt I was not really listened to in terms of my grievances – my managers were lovely and supportive but never seemed to have any sway to enable change, and I felt were largely reluctant to fight my corner. Comes back to the top-heavy nature of the organisation, probably.”

During the Review some participants referred to other complaints and issues that, in their view, had not been handled well. Some were described in detail by the complainants. Two of these were complaints of sexual harassment. One dated back to 2009 but had not been resolved until 2014, when the present Executive Director engaged an external, independent investigator. The second had occurred in November 2017. Both of these were eventually resolved by the resignations of the respondents. However, from the accounts of the complainants and the reports of the respondents' dissatisfaction, there remains lingering discontent and significant resentment on all sides about the process that they underwent.

One participant disclosed behaviour that, if verified, would amount to significant sexual harassment that was not reported for fear of retaliation and negative effects on the complainant's career. At least one other unreported matter was referred to by a participant.

Participants raised several other examples of negative treatment in the workplace. At least one had been the subject of a complaint to management. The subject matter of these included, but was not limited to, Māori/Treaty matters, treatment of disabled personnel, flexible working hours and returns to work after parental leave, and issues that managers had with their working conditions.

These issues fall outside the terms of this Review and some of them have not been independently verified. Some of them are historical. However, all of them raise issues of human rights, which the HRC is charged with promoting and protecting effectively. It is worth noting that the participants raised common concerns about the process for making complaints, including the reasons for some reluctance to do so, and the way in which complaints are managed.

The negative effects on these participants included, at worst, suicidal thoughts and even attempts at suicide, staff choosing to leave the HRC rather than put up with the alleged behaviours, severe stress and disillusionment. In addition to the negative effects on the individuals involved and their supporters, the ongoing sense of grievance and resentment among a significant number of both past and current personnel is potentially damaging to the reputation of the HRC and to the current and future culture of the organisation. This latter aspect is dealt with in more detail under the third Term of Reference.

Can the systems, processes, practices and structure of the Commission applied in the incident that gave rise to this Review be improved?

Respondents were asked to select their levels of agreement with statements about the HRC systems and processes for investigating and resolving internal harassment claims.

From the survey:

- Between 52% and 70% of the participants did not know whether or tended to disagree or strongly disagreed that:
 - the support services available at the HRC for victims of sexual harassment are appropriate (68.6%)
 - the responses of HRC management to allegations of sexual harassment are adequate (68.61%)
 - the options available for a person who discloses sexual harassment at the HRC are adequate (68.61%)
 - people who face an allegation of sexual harassment at the HRC are treated fairly (56.97%)
 - allegations of sexual harassment against colleagues at the HRC are dealt with according to the HRC policies (52.36%).
- Just over 20% agreed or strongly agreed that the HRC ensures that allegations of sexual harassment are treated confidentially, and that HRC policies for dealing with allegations of sexual harassment are adequate.
- 69.76% did not know whether or tended to disagree or strongly disagreed that management actively solicits input from staff before major decisions are made.

“My experience has been that the confidentiality of the harasser is more protected than the safety of the complainant. There are inadequate processes in place to keep the complainant safe. When we do raise concerns about safety, we are seen as being ‘alarmist’.”

“I think we should have an independent person outside of the Commission to go to on complaints of a sexual nature. It’s difficult to talk to a manager who may be a friend of the person you’re complaining about and the same goes for the person who is being accused.”

“I was not privy to any instances of sexual harassment, however in a small organisation like that I would not have felt safe that anything I reported would remain confidential. It’s a terrible shame, as there are wonderful people working there who don’t have the opportunity to deliver their best due to the top-heavy structure and lack of support from management.”

The majority of participants wanted the systems to be improved.

As noted earlier in this report, the DAW policy has been replaced with the Prevention and Response to Sexual Harassment policy. It contains many of the elements of the former policy but is more detailed in each of the steps and elements of the complaint process. It also has a strong emphasis on prevention, which is to be commended. To that extent there has been an improvement.

However, it is of concern that the new policy was drafted and adopted by the Board without any significant input from the staff who are subject to and protected by the policy. There was no compliance with the letter or spirit of section 58 of the HSWA 2015.

Even at the date of this Review the sexual harassment policy was not entirely operational. Clause 2.14 of the policy states that the HRC provides designated contact people to assist those who have questions or concerns about sexual harassment. None of the participants who were interviewed was aware of such designated persons or any training to enable people to be designated persons.

During the course of the Review, training on sexual harassment was commenced for HRC personnel using an outside agency. Some participants had recently attended this training and were moved to write to express their concerns about it. It is not clear whether there was any consultation with staff or their representatives about the type and nature of the training, but if the training is to be accepted and effective it makes sense to approach it collaboratively.

“The training was problematic for the following reasons: a lack of information and transparency regarding what the training would cover, how it would be conducted and what its purpose was; poorly pitched training perpetrator focussed; triggering activities; covered definition of SH and didn’t cover SH pathways and processes within HRC, poorly thought through feedback process.”

“I hugely resented this directive (to attend) the mandatory sexual harassment training that everyone in the organisation was required to attend... the report back is that it was so inappropriate, ineffective and unsafe. What a complete waste of time, money and energy that was as it has only set the Commission back more in mistrust and miscommunication.”

The EAP to which personnel can be referred was perceived by the participants as a useful but somewhat remote service. None of the nine participants in the survey who had experienced or witnessed sexual harassment had used the EAP. Apart from the EAP there are as yet no support services readily available to personnel who make specific complaints.

CONCLUSIONS

1. The HRC has recently improved its systems and processes for dealing with sexual harassment complaints by formulating a new policy.
2. The new policy was unilaterally devised by management without the consultation with staff required by the HSWA 2015.
3. The necessary practices, including the appointment of contact people to implement the new policy, have not been finalised.
4. Given this, it is not possible to conclude that the HRC is an exemplar in its systems and processes for investigating and resolving sexual harassment, and there is still room for improvement.

RECOMMENDATIONS

1. That the HRC management adopt a more inclusive approach with its personnel when introducing change and resolving workplace issues.
2. That the HRC develop a process for engaging with its staff (through the New Zealand Public Service Association and individually with non-unionised personnel) on the development and/or revision of all health and safety policies in order to comply with the Health and Safety at Work Act (HSWA) 2015. The process should include sharing relevant material, receiving the views of the staff, engaging staff in the decision-making process, taking their views into account and advising them of the outcomes.
3. That the HRC revisit the Prevention and Response to Sexual Harassment 2017 policy to enable full consultation with all current HRC personnel in compliance with the HSWA 2015.
4. That at least two skilled HRC managers be delegated the responsibility of receiving and conducting initial assessments of all internal complaints, including but not limited to complaints of sexual harassment, until the policy has been revised.
5. That the present Prevention and Response to Sexual Harassment 2017 policy be updated to include the names of the specified contact people referred to in clause 2.14.
6. That all complaints that are dealt with under the complaints policy be monitored for compliance by soliciting feedback from all affected parties.

Term of Reference Two

Whether the governance and management structures and arrangements of the HRC adequately support the prudent handling of sexual harassment claims

“The path to an effective response to sexual harassment and sexual assault in any organisation starts at the top. Strong leadership, along with well-designed policies, can set the tone and standard of the behaviour that is expected in the organisational environment²⁴.”

“Health and safety governance is as important as any other aspect of governance. It is a fundamental part of an organisation’s overall risk management function, which is a key responsibility of directors²⁵.”

Governance structure as it relates to sexual harassment

From the survey

- 66% of participants tended to disagree or strongly disagreed that, or did not know whether, the governance structures at the HRC adequately support the prudent handling of sexual harassment claims.
- A new policy on sexual harassment was adopted by the HRC in late 2017. 67% of respondents did not know that it was being created or were not consulted about it before it was created.
- 76.75% were not consulted or were not sure about being consulted on it before it was created.

“The main risks discussed at the Board level were financial risks. Not enough emphasis on health and safety issues such as bullying and sexual harassment and their prevention.”

According to the HRC’s Governance and Responsibilities Manual 2017, the Board delegates authority to the Chief Executive to manage operational matters including employment²⁶, but has overall responsibility for ensuring that the HRC meets its employment obligations. The Chief Executive is responsible for the appointment of all HRC employees and for managing their work outputs and their performance. Section 18(3) of the HRA 1993 states that “employees of the Commission are responsible to the general manager and report to him or her”. The Commission must comply with the ‘good employer’ obligations set out in the CEA 2004.

The Chief Commissioner has a high-level role rather than full responsibility for matters of employment. The employees of the Commission are responsible to and report to the Chief Executive. The Chief Executive reports to the Chief Commissioner.

24 Broderick, E & Co. (2017). *Effectively Responding to Sexual Harassment and Sexual Assault at James Cook University*. Sydney, Australia.

25 WorkSafe New Zealand & Institute of Directors. (2016). *Health and Safety Guide: Good Governance for Directors*.

26 Except for operational matters relating to the OHRP, which is legally required to operate independently of the Commission.

The Board's formal role in the management of sexual harassment complaints is to set appropriate policies. The Board has been slow to do this. The investigation of a sexual harassment complaint in 2014 did not prompt it to revisit the DAW policy. The lack of a stand-alone sexual harassment policy was not attended to during a major review and update of all HRC policies that was completed with the implementation of the GWSO policy in December 2017.

The Board raised the requirement for a separate health and safety report to the Board in its October Board meeting, but did not discuss a sexual harassment policy. It was not until the October incident occurred that management drafted a stand-alone sexual harassment policy, which was approved by the Board on 13 December 2017.

The Board is a PCBU under the HSWA 2015 and has a due diligence responsibility to ensure that the HRC complies with its health and safety duties and obligations.

Policies that concern the health and safety of staff, such as sexual harassment policies, must be developed in active consultation with the employees²⁷. In this case there was no evidence that there had been active consultation with staff on the new policy and no reference to that in the document that recommended that the Board adopt it.

One issue that participants raised was the extent to which the Board should be made aware of significant employment issues such as claims of discriminatory behaviour including sexual harassment. In the case of the October 2017 incident, the Chief Executive immediately advised the Chief Commissioner of the complaint that she was managing and kept him informed. She believes, in hindsight, that it would have been best to inform the whole Board straight away via the Chief Commissioner, but felt constrained because in the past some Commissioners had involved themselves in disciplinary and operational matters. She was wary of sharing information with the whole Board because, based on previous experience, she did not trust that all Commissioners would keep the information confidential or deal with it appropriately.

On the other hand, some Commissioners felt strongly that they should have been told, as the incident was a matter of high risk, particularly to the reputation of the HRC, and the Board should have a 'no surprises' policy.

As the Board has delegated all employment matters to the Chief Executive, the only reason for her to advise the Board is for the purpose of assessing and overseeing risk management for the organisation. It therefore is a matter of fine judgement as to what is a workplace issue to be managed only by the Chief Executive and what is a matter with the potential to have reputational or other risks for the Board.

The Chief Commissioner stated: "I do not expect to be made aware of all complaints involving staff. I do expect to hear the most serious complaints involving staff and all complaints involving Commissioner conduct. We have to deal with the issue of people being too scared to raise issues." He was concerned about other Commissioners acting outside their governance roles.

At the December 2017 Board meeting, the Board resolved to give the Executive Director the discretion to decide which matters should be referred to the Board, but made it clear to her that the matters should be recorded on the workplace safety register.

Before that resolution, Commissioners who had not been informed of the investigation learned about it through the grapevine. By then the investigation into the incident had been completed and the outcome decided. The process had been reviewed by an employment lawyer. One Commissioner in particular became engaged with the issues by discussing the matter with staff.

Commissioners were divided on the approach that should have been taken in the aftermath of the October incident, including the content and management of media statements, whether the respondent should return to the workplace, and whether and how a review of what had occurred should be managed.

²⁷ HSWA 2015, section 59.

Conclusions on Governance

1. The Board has work to do to meet properly its obligation to set the policies of the organisation, especially in relation to internal workplace issues. Although it is reliant on the Chief Executive to manage the policies of the HRC, the Board has oversight of and ultimate responsibility for approving the policies. The Prevention and Response to Sexual Harassment policy was formulated without full consultation with HRC employees who were subject to it, and was adopted by the Board without any apparent debate or proper consideration.
2. The Board is some distance from being an exemplar in the handling of sexual harassment cases internally, based on the manner in which the October incident was handled. It needs to be able to show that it adheres to the core principles identified by the US Equal Employment Opportunity Commission²⁸ that have generally proven effective in preventing and addressing harassment: committed and engaged leadership; consistent and demonstrated accountability; strong and comprehensive harassment policies; and trusted and accessible complaint procedures. To date it has not encouraged regular, interactive training tailored to the audience (ie HRC personnel) and the organisation, although the Review was advised that some training has just commenced.
3. There is a difference between what Commissioners acting as a Board **want** to know from the Chief Executive about internal workplace issues and what they **should** know according to the Governance and Responsibilities Manual. Commissioners are in conflict about the extent to which they can and should be involved in operational matters, including employment disputes. This tension arises in part from the conflicting roles of Commissioners as governors and Commissioners who are responsible for the operation of their individual portfolios. This structural issue is compounded by deep-seated personality clashes. This is a matter that is discussed in more detail under the third term of reference.

RECOMMENDATIONS

7. That the Board include oversight of workplace policies as a standing item on its agenda.
8. That papers to the Board recommending the adoption of policies that affect or are likely to affect the health and safety of HRC personnel certify that the policies have been subjected to consultation with the staff/workers in accordance with section 59 of the HSWA 2015.
9. That the Chief Commissioner clarify the day-to-day activities in which Commissioners may participate separately from their roles in governance and strategic leadership, in accordance with paragraph 79 of the Governance and Responsibilities Manual 2017.
10. That Commissioners be required to comply with the designations of the Chief Commissioner and not intrude on the role of the Chief Executive, in accordance with paragraph 80 of the Governance and Responsibilities Manual 2017.

Management structures as they relate to sexual harassment

From the survey

- 65% of participants tended to disagree or strongly disagreed that, or did not know whether, the management structures at the HRC adequately support the prudent handling of sexual harassment claims.
- 78% of participants registered that they tended to disagree or strongly disagreed, or did not know whether, 'HRC treats everyone fairly – it doesn't play favourites'.
- 65% of participants had not been consulted on the 2017 Prevention and Response to Sexual Harassment policy. Only 10% of participants indicated that they had been consulted on the policy.

²⁸ See Chai R. Feldblum & Victoria A. Lipnic, Equal Employment Opportunity Commission. (2016). *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic.*

Participants said:

“The fall-out from the latest sexual harassment matter in my view was probably due to happen – maybe not so much because of the incident itself (of which I know little) but because of the inability of the current organisation to effectively manage such an incident.”

“Total lack of procedure. Many, many, many outdated policies. Lack of transparency.”

“There are a number of people, particularly within HR, who do not have the confidence of staff. This undermines staff confidence in processes involving them and discourages the raising of issues.”

“There’s a culture of victimisation and secrecy, no one feels that they can speak the truth or be heard. Where there are issues, people are scared to take them to their managers. Things could be solved in this place with a genuine apology, but they get escalated.”

“I do not think sexual harassment for example is endemic at HRC. What is endemic is poor leadership, poor process and hypocrisy. New Zealand deserves better from its human rights watchdog. It needs leadership and culture which is responsive to victims, robust, clearly understood and owned by all. HRC needs to regain its moral leadership. It is just a brutal place to work at.”

“I do not feel confident that I will be supported when raising issues that concern me, but which might be perceived as damaging to or challenging the HRC.”

“My personal feeling is that the CEO does have some favourites on staff and this led to the poor decision making in regard to this incident of sexual harassment.”

Both the former DAW policy and the present sexual harassment policy clearly define the roles of management in the taking and resolution of complaints.

The DAW policy directed that all complaints (except those against the then Executive Director) were to be referred to the Corporate Services Manager, who was responsible for the investigation with appropriate legal assistance and advice when necessary. The Executive Director was to become involved only once a report of an investigation was submitted for action, or if required to decide on any interim measure that should be taken.

The role of Corporate Services Manager was disestablished.

There is now a position of People and Support Manager, whose responsibilities include not only HR, particularly payroll and administration, but also facilities and IT. The present incumbent is relatively inexperienced in dispute resolution. The Chief Executive has contracted a more experienced HR advisor to assist.

When a new cloud-based information management system was introduced in 2017, management made the decision to focus on the policies that were necessary to operate the new online tool. The revision of other policies that required rationalisation, review and updating could not be completed due to a lack of resources that financial year. The DAW policy was therefore not updated to reflect changes in personnel and was retired in June 2017.

The new 2017 sexual harassment policy requires the Chief Executive to ensure that there is a high level of awareness and effective implementation of the sexual harassment prevention approach in the organisation, and that staff are aware of their rights and responsibilities under the policy. Complaints are to be directed to the Chief Executive or the People and Support Manager, who will make the decision as to whether a formal investigation will proceed and will appoint an internal or external investigator to determine what happened and whether sexual harassment occurred.

For reasons noted earlier in this report, this policy is an improvement on the former DAW policy. However, the successful implementation of the new policy is dependent on three factors: management applying it according to its intent and tenor; the experience and training of the people who are responsible for implementing the processes; and gaining the trust of the staff that any complaints will be investigated in a fair and appropriate manner.

Many participants observed that the human resource capabilities of the HRC were not sufficient to deal with complaints, and it is clear that few of the present staff would be comfortable taking a complaint of sexual harassment to the present incumbents or the Chief Executive. In part it is an issue of personality and capacity, but it is also an issue of perception. The People and Support Manager position is perceived by many staff to be too close to the Chief Executive.

Some managers disclosed to the reviewer that they have serious complaints that they would like to bring against certain Board members, but they are scared of repercussions and do not feel safe saying anything.

The new policy states that the HRC provides designated and trained contact people to assist those with questions or concerns about sexual harassment. Only 5% of participants were aware of this requirement and the names of the contact persons have not been updated.

Some participants believed that those who criticised the process adopted in the October 2017 investigation did so in an attempt to undermine and even get rid of Commissioners and/or the Chief Executive. On the other hand, the staff and Commissioners who criticised the process said they did so because of justified concerns about its unfairness.

There is no doubt that the October incident and aftermath was the trigger point for the unleashing of some long-held grievances about management that went beyond the incident and beyond the issue of sexual harassment to reveal underlying animosity and distrust.

In a similar vein, staff who insist on their rights and the need for the HRC to 'walk the talk' by demonstrating the same values it is advocating for externally, are viewed as oversensitive by some in management.

Conclusions on Management

1. The Chief Executive became more engaged in the DAW policy process adopted in the October 2017 incident than the policy contemplated and more than she wished to. The lack of human resource capacity in the HRC led the Chief Executive to call on a part-time, albeit very experienced, HR contractor to assist.
2. The informal part of the DAW complaints process was overlooked.
3. Staff members' lack of information and trust in management to deal appropriately with their complaints is a potential impediment to the successful implementation of the Prevention and Response to Sexual Harassment policy. The current lack of trained contact people in the HRC to implement the new process for receiving and investigating sexual harassment complaints means that should it need to be invoked at this time it is unlikely to be adequately resourced.

4. If this policy had been devised in consultation and collaboration with HRC personnel, these issues could well have been addressed and resolved before it was signed off by the Board.
5. There is a deep divide between some staff and some managers and a lack of trust in management and the Commissioners among some staff. Many participants referred to bullying and acts of discrimination, either involving themselves or observed. These issues emerged as a serious issue for a significant number of participants from all levels of the organisation, and demonstrate the need for comprehensive, stand-alone policies on bullying and other workplace issues.

RECOMMENDATIONS

11. That the HRC management on its own, or in conjunction with other state-sector groups, provide an external professional support service to which internal complaints can be directed and investigated on its behalf.
12. That the HRC review the roles and strengthen the capacity of the human resources team to increase its expertise and improve its ability to support the Chief Executive and oversee the implementation of workplace policies.
13. That the HRC urgently commence a process to consult on and implement or review all workplace policies, including those on bullying and discrimination, which is compliant with the HSWA 2015.

Term of Reference Three

The organisational culture of the HRC

“Organisational culture refers to the beliefs and practices that everyone shares. A positive workplace culture is essential for worker engagement and participation to work well²⁹.”

“Relationships between Commissioners / Members and managers, and, in particular, between Commissioners, the Chairperson / President / Chief Commissioner and the Senior Executive Officer (SEO) are critical to the effectiveness of a national human rights institution³⁰.”

From the survey

Taken together, the answers to the survey questions, the additional comments, the submissions and the interviews showed consistent patterns of common experience and a remarkable unity of opinion about the organisational culture of the HRC, both past and present.

- 68% of participants tended to disagree or strongly disagreed that communication at the HRC is open and honest.
- 70% tended to disagree or strongly disagreed that communication channels are very open among management and staff.
- 68% tended to disagree or strongly disagreed that, or did not know whether, communication channels at the HRC are very open between management.
- In contrast, 66% strongly agreed, tended to agree or found it hard to decide that the communication channels between staff are very open.

“HRC is a great organisation... the work is wonderful. The problematic behaviours are not necessarily motivated by bad faith. It is more an inability of some individuals to self-regulate their own behaviour.”

“I was very disillusioned and saddened by the organisational culture there. I don't know if it's because it is the HRC and my hopes were too high (it had always been my dream job) but it didn't fulfil many of the ideals I had for a human rights workplace.”

“This dysfunctional culture has contributed over time to creating a culture which I think was always going to 'blow' somewhere.”

29 WorkSafe New Zealand. (2016). *Work Engagement, Participation and Representation*, p 15.

30 Noonan, R. & Collinge, J. (2017). *Reflections from the Antipodes: Leading and managing national human rights institutions*, p 25.

"I do not think the Human Rights Commission has a culture of sexual harassment. I do think there is an issue with the procedure and systems for dealing with claims, and a wider issue of organisational culture."

"Because culture is anchored in unspoken behaviours, mind-sets and social patterns a cultural void was expressed and underpinned within the Commission due to unwritten rules; failure to conduct internal business in a responsive, open-minded, fair and transparent way."

"I have faith in the team managers of each division of this organisation who have absolute credibility as professionals."

"I think the organisational culture at the HRC is fair, honest and good and they try very hard to be inclusive and transparent."

"Unfortunately, the HRC is plagued by a dysfunctional Board. The Board members don't really set a benchmark of model behaviour and do not work well together as a team."

"My enormous disappointment, and distress at times, has been about the leadership at the Board table – the bullying and disrespectful behaviour among/between some Commissioners, and from the Commissioners to some of the staff and to the Chief Executive."

"The dysfunction in Board did tone down. It was better in 2017 than 2012."

"The values of the Commission are great however they are not strongly modelled from Board level down so that impacts on all aspects of an organisation's ability to build and strengthen the trust, transparency and respect amongst all members of the agency."

"From the beginning when I started there was a behaviour of double standards."

"The last audience survey showed increased reach and relevance, and general comments from people [show that there] has been significant positive change in reach and relevance of the Commission."

Relationships between Commissioners

Inherent characteristics of the Boards of NHRIs

In 2017, the former Chief Commissioner and the former Executive Director produced an information booklet for the Northern Ireland Human Rights Commission (titled *Reflections from the Antipodes: Leading and managing national human rights institutions*), which clearly described the unusual nature of Boards of NHRIs³¹. Their description of the organisational structure is a good starting point for the review of the current organisational culture of the New Zealand HRC³²:

“National Human Rights Institutions (NHRIs) have an unusual structure. Commissioners form the Commission, similar to a Board, with governance responsibilities, but usually also undertake human rights activities in fulfilment of the NHRI’s strategic priorities. Individual Commissioners may have a specific mandate for an issue or a population group. This means the Chief Commissioner must accommodate different interests and mandates of individual Commissioners, but also ensure the NHRI has a coherent programme that is financially sustainable.

“The Chief Executive usually reports to the Chief Commissioner. The relationship between Chief Commissioner and the Chief Executive is critical. They should have a shared view of the direction of the Commission, on priorities, and on organisational style and culture. The Chief Executive must directly support the Chief Commissioner by providing appropriate support to all Commissioners and ensuring an efficient organisation. The Chief Commissioner must support the Chief Executive in his / her role.”

In New Zealand, the collective responsibilities of the HRC Board are set out in section 49 of the CEA 2004. Section 50 provides that the Board must ensure that it performs its functions efficiently and effectively, in a manner that is consistent with the spirit of service to the public and in collaboration with other state entities. The Act also defines the individual duties of Board members, which include acting with honesty and integrity, in good faith and “not pursue his or own interests at the expense of the entity’s interests”³³.

Governance manual

A Code of Conduct formerly set the standards and mode of conduct for the Board. This was replaced by the Governance and Responsibilities Manual 2017, the last version of which is dated October 2017.

It covers, inter alia, the distinction between governance, the provision of strategic leadership for the organisation and the performance of day-to day activities in executing the functions and expectations of the statutory powers of the Chief Commissioner and the other Commissioners and their collective duties which are owed to the responsible Minister.

³¹ *ibid*, p 25 – 27.

³² This extract from *Reflections from the Antipodes: Leading and managing national human rights institutions* has been changed to refer to ‘Chief Executive’ rather than to ‘Senior Executive Officer’.

³³ CEA (2004), section 55.

Strategic leadership

The strategic leadership of each Commissioner requires them to lead discussions on the HRC outside the boardroom as well as provide high-level input to and oversight of specific areas of responsibility. This requires input from other Commissioners, the consideration of reports from management, discussions about key stakeholders and communication, and matters of support between the Commissioners and the Chief Executive. In other words, strategic leadership requires cooperation and communication between Commissioners and between Commissioners and the Chief Executive.

Management of day-to-day activities

The Chief Commissioner has the function of supervising and liaising with the Chief Executive on matters of administration and has input to administration. Commissioners may participate in day-to-day activities but in line with the designations of the Chief Commissioner. Commissioners and the Chief Executive need to work together as a team to deliver the strategy of the HRC and are to ensure that they do not intrude on or cut across the role and functions delegated to the Chief Executive. The Chief Executive is responsible to the Chief Commissioner for managing the quality of work output and the performance of managers and employees of the HRC.

The relationships between Commissioners

Former and present HRC Commissioners unanimously acknowledged that the HRC is an important institution that they are proud to work in, and that everyone in the Commission is passionate about their work. It is also undisputed that the current issues faced by the present Board are not unprecedented. Former Commissioners told the Review of their experiences of dysfunction in the HRC Board going back many years while under the leadership of former Chief Commissioners. To a significant extent these issues stem from the unusual structure and responsibilities of all NHRIs, as referred to in *Reflections from the Antipodes*. It is also acknowledged that the personalities of the people working at the HRC strongly influence the culture. One former Commissioner commented:

“The people at all levels of the Commission are strong on their rights and weak on their responsibilities”.

However, there are undermining divisions and tensions between the current four Commissioners that go beyond the structural challenges. Each of the current Commissioners accepts that there are serious problems, and almost every other participant in the Review referred to them as well.

The relationship between the Chief Commissioner and his colleagues both past and present has been described as problematic since the start of his tenure in 2011, although the Chief Commissioner does not accept this. Some Commissioners are critical of his style and method of interacting with them at Board level.

The quality of the relationships between Commissioners, both past and present, seems to have fluctuated over the years from workable to unworkable. The trigger point for the current schism began in May 2017 following a public event when a Race Relations Commissioner observed the Chief Commissioner speaking loudly to the Chief Executive. The Race Relations Commissioner had long held concerns about the manner of the Chief Commissioner’s communication style and method of interacting with them at Board level. She spoke to the Chief Executive about what she had observed.

The Chief Executive wanted no part in making allegations against the Chief Commissioner and remains supportive of him. The matter did not end there and became mired in meetings and email exchanges. Similar problems have surfaced in the past when, to some extent, they were addressed. There is some, although not universal, acknowledgment that there has been some improvement as the Chief Commissioner has taken active steps to try to do things differently. However, the state of the relationship between the Chief Commissioner and the Race Relations Commissioner has deteriorated again. The October incident contributed to this deterioration. Presently, they are barely communicating with each other.

Commissioners accept that the Chief Commissioner is not obliged to inform the Board about staff issues, but nevertheless want him to raise important matters of potential risk with the Board to avoid their being blind-sided. They referred, in particular, to the 2014 and 2017 sexual harassment allegations, which they only learned about from staff when matters had almost reached crisis levels. Two of the current Commissioners strongly feel that they are not given enough information about other disputed employment decisions and outcomes and that there has been a lack of engagement by the Board about health and safety issues and good employer obligations.

Commissioners lament the lack of collegiality, which they find isolating. They cannot seek advice from their fellow Commissioners, a fact attributed by some to a failure of leadership or direction from the top. Others attribute it to a reaction to unacceptable behaviour by individual Commissioners who overstep the boundaries between governance and management.

Examples of failed leadership given by participants, included:

- the alleged chaotic response to the media attention on the October 2017 incident
- the difficulties of the Board in reaching amicable consensus on important strategic decisions
- the alienating leadership style of the Chief Commissioner
- the lack of transparent decision-making
- the inequitable distribution of limited financial resources across the three Commissioners.

Examples of unacceptable behaviour by Commissioners, given by participants, included:

- the treatment of staff by one Commissioner, which has resulted in or has the potential to result in personal grievances
- intemperate public comments about politicians
- Commissioners not acting in conformity with the human rights values they are charged with advocating, such as through inappropriate, disrespectful and offending comments to colleagues and staff
- breaches of confidentiality and Commissioners acting out of role, often because staff have sought their support.

There is a perception among some Commissioners that the resources of the Commission are not being distributed equably by the Chief Executive, and that they do not have proper and reliable access to the staff with whom they work most closely. This is denied by the Chief Executive and the Chief Commissioner.

There are some obvious gaps in process. Board reviews of the Chief Commissioner and the other Commissioners have not been completed. The Commissioners have not received any specific training on the Governance and Responsibilities Manual.

The Commissioners want to rebuild the organisation and its corporate morale, but there is little individual acceptance of responsibility or blame for the current state of affairs. Commissioners independently suggested to the Review that the solution to the present impasse may be for at least one of their colleagues to leave the organisation. Commissioners appear to fall into one of two camps: those who more or less support the Chief Commissioner and those who more or less support the Race Relations Commissioner.

Staff who have worked closely with the Commissioners have observed and personally felt the negative impacts of these behaviours. However, while the behaviour of Commissioners is described by some of their colleagues as destructive, a number of staff applaud the behaviour as fearless challenges to wrongs within the Commission. These staff appreciate those Commissioners who actively support them, and they are trusted by employees in what is otherwise a low-trust environment. The nature and extent of interference by Commissioners in the day-to-day matters of staff relations is a continuing problem for the Board.

Audit and Risk Committee

The Audit and Risk Committee was established some years ago. It has an independent Chair whose expertise is in finance. All Board members attend the Audit and Risk Committee meetings, which are held about four times a year. The committee makes recommendations to the Board as a whole on finance and operational matters that may raise risks to the organisation and policies.

The committee does not deal with health and safety issues and has not had any matter of sexual harassment or other internal disputes referred to it.

The committee oversees new and revised policies relating to financial matters but does not deal with policies concerning health and safety or other workplace issues. These are referred directly to the meetings of the Board.

Reputational risk is a standing item on the list of 10 risk factors that are assessed regularly by this committee, but it has recently been elevated to the top of the list above other items such as financial performance and service delivery. These are presently running well and are regarded as low risk.

Tenure

Both the CEA 2004 and the HRA 1993 provide for five-year terms for members of an independent statutory entity such as the HRC. Members may be reappointed and there is provision for a member to continue in office despite the expiry of their term of office until the member is reappointed or the member's successor is reappointed.

Former Commissioners commented on the usefulness of the latter provision, which in their experience provides the opportunity for an orderly transition and continuity. However, the widespread view of the participants is that the continuation in office has, on occasion, been allowed to last too long.

The term of a previous part-time Commissioner was extended for more than three years after its expiry.

The terms of three of the current Commissioners have expired or are about to. The Chief Commissioner's first term expired in August 2016, but he has remained in office under the carry-over provisions of the HRA 1993³⁴. The Race Relations Commissioner's first term expired in March 2018 and the EEO Commissioner's term will expire in June 2018. There is concern that no steps have been taken to date to either formally reappoint the Commissioners whose terms have expired or begin the process of appointing replacements.

The Paris Principles recognise that there can be no real independence for the members of an NHRI without a stable mandate³⁵.

The uncertainty of the terms of appointment has engendered a sense of paralysis for some Commissioners and their staff. One described it as having a chilling effect. It raises a perception of and is potentially an actual threat to the independence of the incumbents, whose functions must be carried out independently but for whom there is no certainty about the terms of their appointment.

Appointments

A number of participants, including past and present Commissioners, shared three main concerns about the appointment of Commissioners. The HRC has a standard but unwritten process that has been adopted when selecting and appointing Commissioners.

³⁴ HRA 1993, section 20(f).

³⁵ HRA 1993, section 20(f).

The first concern is that this process has not been formalised in writing and may not have certainly of procedure to the standard required by the Paris Principles. These state that the appointment process shall afford “all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights etc”³⁶. There is some concern that this may put at risk the ‘A status’ accreditation currently accorded to the New Zealand HRC by the GANHRI³⁷ Sub-Committee on Accreditation.

A more fundamental concern has been raised about the present system of Ministerial appointment of Commissioners under the CEA 2004. Almost all Commissioners, past and present, who were interviewed would welcome a review of the appointment process, and in particular they expressed interest in a process that is more apolitical. For example, if Commissioners were officers of Parliament (such as are Ombudsmen and the Auditor-General), their appointment would require cross-party consensus. Such an appointments system may also provide a less partisan funding model. The latter would be in accord with the requirement of the Paris Principles for adequate funding that should enable the institution “to be independent of the Government and not be subject to financial control which might affect its independence”³⁸.

A third issue of concern to participants is the necessity for Commissioners to have all the capabilities required to perform what is acknowledged as a very important and difficult role. The past system of appointing part-time Commissioners was an attempt to strengthen the governance capacity of the Board. Now that there are only full-time Commissioners, all appointees must have or be capable of quickly acquiring an in-depth knowledge and understanding of governance as it applies in the particularly difficult environment of the HRC. This is important if the present mingling of governance and operational functions, which is the source of dysfunction in the present Commission, is to be avoided in the future.

Attempts to get things right

Since 2012, the HRC has on a number of occasions either engaged external providers or undertaken work internally, including self-evaluations, to improve Board cohesion and become better leaders.

Between 2012 and 2015 the HRC undertook an internal organisational review of its strategy, operations and finance which led to a significant restructuring of staff.

As part of that organisational review, in 2012 the HRC (Commissioners and staff) conducted a capacity assessment, facilitated by the Asia Pacific Forum of National Human Rights Institutions. It identified five priority strategies for capacity-building in the HRC in the following five years:

- a. Strategy 1 – Develop an integrated vision and strategy for the HRC that drives its operational plans, programmes and activities.
- b. Strategy 2 – Enhance the effectiveness of the HRC’s programmes and activities.
- c. Strategy 3 – Increase the capacities of the staff available to the HRC.
- d. Strategy 4 – Strengthen the HRC’s leadership, management and staffing structures and systems, to increase effectiveness, accountability and performance.
- e. Strategy 5 – Ensure that HRC staff have the facilities, equipment and other resources required to discharge their responsibilities effectively.³⁹

Around the same time (2012/2013), the Commission commenced an external review of the reach and relevance of the HRC, undertaken by Ideas Shop. This work resulted in the development and subsequent adoption of the HRC’s Communications and Engagement Plan 2013-2016.

36 Paris Principles: Competence and responsibilities, paragraph 3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be affected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution’s membership is ensured.

37 Paris Principles: Composition and guarantees of independence and pluralism, paragraph 1.

38 Paris Principles: Composition and guarantees of independence and pluralism, paragraph 2.

39 Asia Pacific Forum of National Human Rights Institutions. (2012). *Capacity Assessment of the New Zealand Human Rights Commission*, p 19.

The HRC commissioned three anonymous IBM Kenexa culture surveys in 2014, 2015 and 2016, which focused on employee engagement.

All three surveys raised the key issue, and recommended focus area, for the HRC as being the alignment of leadership, in particular the alignment of behaviours with the Commission's values at the Commissioner/Chief Executive level⁴⁰. The results of each successive survey show that by 2016 significant improvements had been made in internal communication and employee engagement.

To address Board issues, three organisations were consulted to assist the Commissioners and Chief Executive:

- In 2013 Paul Driver and Associates was engaged to facilitate a workshop on the 'why', 'how' and 'what' of the Commission's leadership. This work focused immediately on the 90 days after the workshop.
- In 2015 BoardWorks International was commissioned by the HRC to facilitate the Board's self-evaluation process. The report was based directly on interviews with the Commissioner and the Chief Executive and addressed a number of matters related to Board effectiveness and functionality. Governance was not an issue as BoardWorks advised that there was nothing wrong with the governance processes. The GWSO policy was a response by the Board to the outcomes of the BoardWorks review and the coming into force of the Human Rights Amendment Act in June 2016. This piece of work was designed to clarify how the HRC was to operate for the benefit of all the people who worked there.
- In June 2017 the Board resolved to contract Winsborough to carry out a Board development plan with the Commissioners. It was proposed that this would work on Board development matters, such as adding value as Commissioners, clarifying the expectations of Commissioners as team members, and exploring how unique value is added as a Board/team⁴¹. However, one Commissioner did not agree to this and it was decided to not proceed.
- At the June 2017 Board meeting the Commissioners agreed on a new performance review process for all Commissioners. An independent reviewer with guidance from the State Services Commission would annually review the Chief Commissioner, and the Chief Commissioner would review the individual Commissioners.
- In a Board paper of 9 October 2017, it is noted that: "finalising the updated manual, guidance material and delegations is only the first step. Ensuring that Commissioners, managers and staff are fully aware of the content and how to apply the guidelines and statutory requirements in their work is an essential component".

⁴⁰ Note that this was not about the alignment of behaviours between Commissioners, and between Commissioners and the Chief Executive.

⁴¹ HRC, 2017, *Winsborough Board Development Workshop 1 Agenda*.

CONCLUSIONS

1. The HRC is fully aware that it has significant intra-Commissioner relationship issues to resolve and has tried in a number of ways to do this. However, none has been truly successful latterly due in part to a lack of engagement by at least one of the Commissioners. The training that is needed has been delayed by the present issues and the Review.
2. Commissioners come from disparate backgrounds and with a range of experience. Some appear to not properly understand their governance role or choose to overlook it when they perceive that operational matters concern them. There is a need for proper induction and education for Commissioners in governance principles specific to the HRC and its unique structure as a Crown entity.
3. The governance of the HRC is also unique, because while Commissioners are responsible as members of the Board for the overall governance of the organisation, they are also responsible by statute for their individual portfolios and, to a certain, undefined extent, the operational issues that arise from fulfilling that responsibility. The Commissioners can also have allegiances to certain constituencies, for example non-government organisations with stakes in their portfolios. This can lead to potential conflicts of interest.
4. Strategic leadership by the current Board is compromised by a lack of cooperation and communication between Commissioners and between Commissioners and the Chief Executive, and is symptomatic of the fact that the Commissioners do not work as a team. This affects staff, who frequently referred to the toxic culture of the Board. The Commissioners have acknowledged that their relationships and teamwork must be improved.
5. The responsibility for the culture of the Board is ultimately that of the Chief Commissioner, but it is not his alone. All the Commissioners have corporate responsibilities that they should be able to fulfil separately from their day-to-day activities. All Commissioners bear responsibility for the often uncooperative and unprofessional dynamics of their relationships.
6. There has been a chronic lack of the resources required for the Commissioners to undertake the work of the HRC, caused by the Government's long-term cap on funding. The funding shortages have compelled reductions in Commissioners' support staff, which have also caused tensions between Commissioners.
7. The subject of the appointments of Commissioners could be seen to be outside the scope of this Review, but many of those interviewed referred to this as one of the factors that influence the conduct of Commissioners and hence the organisational culture of the HRC. Participants, including all Commissioners past and present, referred to problems relating to the appointment of Commissioners. Concerns were expressed about:
 - a. getting Commissioners with the required skills and experience
 - b. the little, if any, plurality evident in the current Board – a fact that risks compliance with the Paris Principles
 - c. the uncertainty of tenure for Commissioners working after their terms have expired. This creates an unacceptable risk to the independence of Commissioners and is another contributor to the destabilising of the Commission

- d. the potential politicisation of appointments of Commissioners. To a certain extent this is a matter of perception, but having certain Commissioners even perceived as being aligned with a Minister or party is an obstacle to productive relationships within the Board and another risk to the alignment of the HRC with the Paris Principles. There was widespread interest in the idea of having HRC Commissioners being officers of Parliament rather than being under the auspices of the Minister of Justice.
- 8. Another frequent suggestion for resolving the inherent structural problems of the Board was to appoint independent members who could provide some balance and objectivity to the governance of the HRC. This was raised, among others, by past and present Commissioners. The contrary point of view is that this would require legislative change and would not address the personality conflicts that are essentially at the heart of the current HRC dysfunction.

RECOMMENDATIONS

- 14. That all existing Commissioners be encouraged to undertake general governance training or refresher courses.
- 15. That all new Commissioners have either significant governance experience or commit to receiving training in governance before commencing their duties.
- 16. That all present and future Commissioners receive specialist training on the contents and practical application of the Governance and Responsibilities Manual 2017 and the CEA 2004.
- 17. That the Board devise and regularly update standard operating procedures for implementing the Governance and Responsibilities Manual 2017, including a mechanism for early-intervention conflict resolution between Commissioners.
- 18. That the Board conduct a review of the allocation of core support staff and funding between Commissioners to ensure that the allocation of these resources meets the needs of each Commissioner while maintaining a fund for administration and shared corporate services.
- 19. That independently facilitated Board reviews of the Chief Commissioner and the other Commissioners be undertaken regularly.
- 20. That the position and person description of the role of Commissioners of the HRC be reviewed and consulted on widely before finalising in order to ensure that the candidates who are selected are the most suitable for the challenging nature of the work of the HRC and in accord with the Paris Principles. Such appointments should be as apolitical as possible in the current legislative regime.
- 21. That the Minister of Justice be urged to make decisions on the tenure of each of the Commissioners whose term has expired or is near expiry. Where appropriate and necessary, commence the recruitment process for any new appointments without undue delay.
- 22. That the process for the appointment of Commissioners be formalised in a policy document.
- 23. That consideration be given to whether the Commissioners of the HRC should be officers of Parliament, similar to the Ombudsman, Auditor-General and Office of the Parliamentary Commissioner for the Environment.

Relationships between Commissioners and the Chief Executive

Reflections from the Antipodes makes the following relevant observations.

“Generally, the responsibilities of an Executive Director⁴² are to ensure the efficient and effective running of the organisation; provide strategic advice to the Commission; and support Commissioners in the delivery of their statutory functions.

This can be a particularly fraught area of Commissioner-manager relations. Commissioners need good management, and policies and practices that provide for this, but Commissioners work closely with some staff, and the close relationship between a staff member and a Commissioner can make it hard for a line manager to enforce the policies and practice. Boundaries get blurred”⁴³.

From the survey and interviews

“I wanted to work proactively with the Chief Executive but she has done nothing in recent times to support me in trying to do my role.”

“It is very difficult for the Chief Executive to operate in an organisation of this size. It is too small to be big, too big to be small.”

“This environment is the most difficult and demanding I have ever worked in.”

“The Chief Executive does not get clear and consistent messages and directions from the Board. She has 5-8 people telling her what to do and becoming involved in day to day work.”

“With no baseline funding reset since 2007 it has been increasingly difficult to do what Commissioners wanted to do with so few staff.”

Commissioners raised a number of issues about their roles and those of the Chief Executive. Previous Commissioners and senior managers of the HRC informed the Review of similar issues, which appear to be part and parcel of most NHRIs. It was universally acknowledged that it can be difficult for the Chief Executive to work with the Commissioners.

Communication between the Chief Executive and some Commissioners about the engagement and roles of their support staff is generally fraught. There is an expectation that the Chief Executive will work proactively to assist Commissioners in doing their jobs. This includes communication and consultation on the engagement of staff who will be working closely with individual Commissioners.

⁴² Reflections from the Antipodes refers to Executive Director rather than Chief Executive.

⁴³ Noonan, R. & Collinge, J. (2017). *Reflections from the Antipodes: Leading and managing national human rights institutions*, p 26.

The impediments to the ability of the Chief Executive to manage this properly are first and foremost the constraints of a budget that has remained static for 10 years. Second, she has had to balance the competing demands of up to eight individual Commissioners jockeying for limited resources who appear unable to speak with one voice. Budget decisions made by the Executive Director are then criticised by Commissioners as examples of favouritism or a lack of it.

Some Commissioners are critical of the way the Chief Executive has handled some staff matters, including the retrenchment of staff during the latest restructuring exercise and her management of workplace issues including sexual harassment and other complaints. Some are critical of the Chief Executive's appointments of staff, particularly at the higher management level where there is a perception that some people have been promoted above their capacity because of favouritism. The fact is these matters are entirely the province of the Chief Executive's responsibility.

At a personal level, the relationships between the Commissioners and the Chief Executive range from trusting and collaborative to toxic. Some individual relationships have fluctuated between these two extremes. Presently there is a complete breakdown in the formerly good relationship between the Chief Executive and one Commissioner. The Chief Executive now has a more positive view of her relationship with the Chief Commissioner than formerly.

CONCLUSIONS

1. According to the Governance and Responsibilities Manual 2017, not to mention best practice, the Chief Commissioner must support the Chief Executive in their role. However, the dysfunctional Board appears to have chronic difficulty in working together as a team to give the strategic direction that the Chief Executive requires to perform her functions.
2. The dysfunctional relationships between the Chief Executive and some of the Commissioners is a major reputational risk to the HRC and a risk to the Chief Executive's ability to manage the workforce she is responsible for.
3. The structure of the organisation, including the Commissioner/Chief Executive relationship, is problematic. This has always been so, despite some legislative attempts to resolve it. Notwithstanding the historical structural problems, the HRC continues to meet its national and international responsibilities, has retained its 'A status' with the GANHRI Sub-Committee on Accreditation, and has maintained a good reputation as a champion of human rights in New Zealand.
4. The present state of affairs is, by most accounts, considerably worse than has been experienced by those who have worked in and around the organisation for many years with the same structure. This indicates that the reason for the dysfunction is more a matter of conflict of personalities than structural.

RECOMMENDATIONS

24. That, notwithstanding their present disagreements, the current Commissioners use their best endeavours to cooperate professionally as a Board in order to give the Chief Executive clear and united strategic direction.
25. That Commissioners familiarise themselves with and make all attempts to act in accordance with the Governance and Responsibilities Manual 2017. Where they recognise organisational gaps in capacity or process, they should raise these as a Board with the Chief Executive rather than take unilateral steps that may intrude on operational matters.
26. That unresolved personal and professional conflicts between the Chief Executive and the Board and individual Commissioners be proactively addressed using, where necessary, external mediation or facilitation.

Relationships between the Chief Executive and staff

From Reflections from the Antipodes:

“Managing the staff also requires a stakeholder approach. Everyone is passionate about the issues, strong on their rights (and not necessarily so strong on their responsibilities). This results in a huge vibrancy and energy but is not necessarily positive or cohesive. As a manager, command and control is a hopeless approach, but so is laissez faire. It needs a particular kind of management to balance the line between enabling genuine engagement and ensuring this doesn’t cause organisational stagnation/dysfunction”⁴⁴.

44 *ibid*, p 26.

From the survey and interviews

“(The HRC has) good senior leaders who brought in expertise from other agencies who had good ideas – but room and space wasn’t given to flourish and bring ideas in.”

“For a Human Rights Commission the culture was less trusting and open than other agencies I had been in.”

“Some have been bullied by the person who calls them the bully.”

“No-one thrives, only survives.”

“Odd way of inducting people at HRC – it was very paper based and hands off. I was provided several documents by email to go through such as code of conduct and confidentiality. I can’t recall the specific documents provided. There were several and possibly contained some general operating policies but I am not certain.”

“[The Commission] has activists – staff who are proud of the external work and the stance we take but who perceive that inside the organisation there are things happening that would not be acceptable on the outside. These are the same people who are not behaving with basic respect of human rights and dignity.”

“There is a triangle of control: Chief Executive, Human Resources and Chief Financial Officer. Autocratic corporate management style. Exclusive culture.”

“Staff won’t go to managers with concerns – they are too scared of them.”

“I do not feel confident that I will be supported when raising issues that concern me, but which might be perceived as damaging to or challenging the HRC.”

“My personal feeling is that the CEO does have some favourites on staff and this led to the poor decision making in regard to this incident of sexual harassment.”

“There are a number of people, particularly within HR, who do not have the confidence of staff. This undermines staff confidence in processes involving them and discourages the raising of issues.”

Some participants had a positive view of management and a degree of optimism.

“In my opinion the Commission Management is of great support and they certainly listen to everyone’s opinion, they do their best within the confines of what has to be done/achieved, at the end of the day we’re here to do a job. They have worked hard in the last 3 years, our environment has improved greatly, it used to be quite toxic especially during the organisational review. Since then we have gone from strength to strength and we now have some pretty amazing people here and few that seem to be stuck in the past.”

“I very much enjoyed the collegiality of my colleagues and have huge respect for the CE. In my most recent role I worked with a number of teams / individuals in the Commission and enjoyed good relationships with many across the Commission.”

“I have faith in the team managers of each division of this organisation who have absolute credibility as professionals.”

The management team at the HRC comprises the Chief Executive, who has held the position since January 2015, the Chief Financial Officer, the People and Support Manager, the Chief Legal Adviser, the Chief Mediator, the Advisory and Research Manager and the Communications Manager.

The Government has not increased the baseline funding of the HRC since 2007. To meet the resulting demands on the budget, the size of the organisation has had to shrink from 72 full-time-equivalent staff in 2015 to 40, comprising 65 members – staff, contractors and Commissioners – at the date of this Review. It has become increasingly difficult for management to achieve what Commissioners want.

A major restructure was started by the former Executive Director and completed by the present Chief Executive in 2014. There was another high-level management restructure in 2016, when back-office positions were reduced to enable more capabilities at the frontline.

Some staff who survived these restructures and several former staff who lost their jobs retain a strong sense of grievance about the way they lost their jobs and disappointment that the HRC, of all workplaces, did not do better in managing the changes.

Past capability audits of the organisation identified as a main issue the HRC not being truly a Treaty organisation. Since 2015 that deficiency has been addressed with a specific programme. However, all Commissioners have become aware (some belatedly) that there are internal issues that have not been appreciated by management in the past but that must be addressed. These include how the Commission deals with tangata whenua, bullying, sexual harassment, disability and sexual diversity, and generally treating each with respect.

Participants in the Review, particularly staff members, raised these deficits over and over again as issues that have concerned and, in some cases, severely affected them. To this list of issues several added their concerns about flexible working hours and the treatment of time in lieu.

Many people used the Review as an opportunity to disclose, sometimes for the first time, the full extent of their negative experiences, their often futile or unsuccessful attempts to have them resolved and their continuing sense of grievance and disappointment about their working conditions.

A common theme was the inability of management to recognise and deal properly with their workplace issues. Some participants noted that the organisation was tightly managed or micro-managed by the Chief Executive and the People and Support Manager. They were criticised for managing rather than leading and being reactive rather than proactive in relation to internal issues.

For her part, the Chief Executive is constantly called on to deal with internal issues and is over-involved in complaints. The human resources team was one of the casualties of the cost-cutting in 2016. The People and Support Manager was promoted into that role without a background or experience in managing complaints. The expertise of the part-time HR consultant is primarily technical. He was engaged originally to settle a collective bargaining agreement and to support the People and Support Manager.

Until 2017 the HRC had no systems for performance management. No-one had key performance indicators that were regularly evaluated and managed. A system was introduced to identify outstanding performers and the training and development budget was focused on those people.

This approach was explained as a means of rewarding competence and developing promising staff. From the perspective of other staff members, it is seen as favouritism towards a small elite close to the Chief Executive.

Managers who are close to the Chief Executive see positive changes, and express praise and sympathy for her despite the organisational and personality problems. She is currently implementing a number of measures in response to these issues.

CONCLUSIONS

1. Despite all this, participants expressed pride in the achievements of the HRC and passion for the work that they do. They want the values of the HRC to be echoed in the workplace and look forward to a time when the current divisions and tensions are no longer part of their working lives.
2. The Chief Executive cannot operate effectively given the structure, the lack of a unified Board, and resource constraints.
3. The climate of dysfunction in the HRC is mostly generated from the top down. The disrespectful interactions between Commissioners and between Commissioners and management that are observed by staff result in some staff siding with one faction or the other or at the least emulating that negative tone in their interactions in the workplace.
4. Staff members have sought the support of some Commissioners in default of a trusted place to take their complaints. In order to support the affected staff members, these Commissioners have become involved in some workplace issues. While this is correctly perceived by the Chief Executive as interference in her sphere of operations, the staff and these Commissioners regard it as necessary to give disaffected staff a voice and representation in internal workplace issues that they presently cannot get elsewhere in the HRC.
5. It is clear that the present HRC does not have the human resources capacity to facilitate and ensure that it “walks the talk” as referred to in the Organisational Values, Beliefs and Behaviours of the organisation. Managers recognise that the HRC does not achieve internally what it is charged with promoting. The Chief Executive does not have the level of support and expertise that she needs to deal adequately with these issues in an appropriate and timely manner.
6. The Review was presented with many complaints and examples of overt and covert bullying at and by all levels of HRC personnel, as well as the other long-standing workplace issues raised by staff. There is a pressing need for the HRC to provide induction as well as ongoing workshops and training on the dynamics, prevention and methods of dealing with all of these.

7. There should be genuine engagement between the Chief Executive and her staff when remedial and educational measures, such as training and workshops on workplace issues, are being devised and selected. This engagement must be transparent and inclusive. If staff have input to the selection and planning, the programmes are more likely to meet their needs and be received positively.
8. The recent experience of some staff who attended the training sessions on the resolution of sexual harassment is a case in point. The providers of the sessions were selected by management. Some participants were disappointed with and critical of the method, style and approach of the providers.
9. The development of workplace policies by management in active consultation with staff has already been discussed in the context of health and safety policies. There is good reason to apply the same amount of transparency and consultation to other staff-related policies that are introduced or are being revised so that staff have a stake in and sense of ownership of them.
10. The Chief Executive cannot achieve this level of engagement without good advice from experienced human resource experts.
11. Managers have an important role in absorbing tensions in the workplace before the Chief Executive is brought in. Some managers lack the ability to receive and resolve complaints at a low level. They should also be able to recognise when it is necessary to call on human resource expertise and be very familiar with the complaints process. To achieve this all managers need to be equipped with the necessary skills.

RECOMMENDATIONS

27. That the HR capacity of the HRC be reviewed and strengthened.
28. That the induction of new HRC personnel at all levels include awareness training in human rights in the context of the workplace.
29. That the Chief Executive obtain advice and assistance in devising procedures for consulting all staff effectively on the formulation and revision of workplace policies.
30. That team managers be equipped with the skills to receive and resolve workplace issues in the first instance and triage these appropriately as necessary.
31. That the HRC regularly review its workplace policies at least every two years to ensure that they are kept up to date and in tune with prevailing issues.

The HRC is a workplace that is bound by the general obligations of all employers and by its legislative and international responsibilities. The HRC must be an exemplar by ensuring that it upholds the dignity and human rights of all those who work there, be they Commissioners, managers, staff, contractors or interns. It should provide a safe, inclusive and respectful environment.

Sexual harassment in the workplace is a health and safety issue that has a significant impact on the organisation as a whole. The HRC needs to take a strong, proactive approach in strengthening its sexual harassment policies. These should be supported and made more effective through education and training.

Even a human rights organisation can make mistakes. It is important that lessons are learned from these mistakes, and that things are improved to avoid the mistakes happening again.

As one participant said: "Own it, fix it and never do it again".

It is to be hoped that the recommendations will assist the HRC to do just this.

Appendix A: Protocols

Review of the Human Rights Commission

The Review was commissioned by the Minister of Justice under section 132 of the Crown Entities Act 2004. Section 132(1) states that “a responsible Minister may review the operations and performance of a Crown entity at any time”.

On 21 February 2018, Judge Coral Shaw was appointed by the Minister to conduct a Review of the Human Rights Commission (HRC).

The Terms of Reference direct the Review to inquire into and report upon:

- the systems and processes for investigating and resolving sexual harassment claims used by the HRC, having regard to legal and other public sector standards and the fact the Commission is expected to be an exemplar in this respect
- whether the governance and management structures and arrangements of the HRC adequately support the prudent handling of sexual harassment claims
- the organisational culture of the HRC.

The Terms of Reference exclude the investigation of or making determinations regarding specific incidents.

Protocols

The reviewer will conduct the Review in accordance with the following protocols, which will guide and inform the Review.

1. Integrity

The reviewer will exercise the powers that have been conferred by the Terms of Reference dated 21 February 2018 lawfully, ethically and in an impartial manner.

2. Confidentiality

The reviewer will adhere to the highest standards of confidentiality throughout the course of the Review. The information collected by the reviewer will be treated in confidence to ensure participants' safety and their anonymity. The information will only be seen by the Review team and will not be shared with the HRC.

All personal information collected from the participants will be destroyed at the conclusion of the Review, in accordance with Principle 9 of the Privacy Act 1993, which states that “an agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used”.

The final report will not include any information that could lead to the identification of the participants. Participants will be asked for their written consent if they do want to be identified and/or named in the final report.

3. Informed Consent

Participation in the Review is voluntary.

Participants will be asked for their written consent before disclosing any information to the reviewer.

Participants may withdraw their survey responses or interview participation at any time during the process, and at their request, any information obtained to that point will not form part of the Review.

4. Gender-Neutral Approach

The reviewer will maintain a gender-neutral stance throughout the Review recognising the potential for sexual harassment to be perpetrated against and by persons of any gender.

5. Timeliness

The Review will be conducted in a timely manner.

Methodology

The Review will comprise a three-part process:

1. Document Search

The Reviewer will undertake a document search of:

- HRC policies and governance structures, in particular those relating to the investigation and resolution of claims of sexual harassment; and
- New Zealand and international literature on best practice policies and procedures in relation to investigating and resolving sexual harassment claims in Human Rights and like organisations.

2. Online Survey

An online survey will be sent to all personnel at the HRC including contractors and interns, and all people who have left the HRC since January 2017. Personnel who have left the HRC in the last 5 years and who wish to participate will be sent a survey form. The Review has policies of inclusiveness when deciding issues of participation.

The survey is designed to elicit participants' input on information about the systems and processes for investigating claims of sexual harassment at the HRC, and opinions about the culture, communication channels and day-to-day working environment at the HRC.

Information about participants' time and positions in the organisation will be collected in bands rather than specific positions, dates or years.

Completed survey responses will be collected anonymously and stored securely. Access to the responses is restricted to the Review team.

3. Interviews

Once the survey has been completed, participants will be given the opportunity to talk to the reviewer, on a confidential basis, about their responses and/or any other relevant matters to assist the reviewer to gain a better understanding of the issues raised in the Terms of Reference.

The specific time and location for the interview will be decided after consulting with the participant to ensure their privacy, confidentiality and safety.

The interviews will be audio-recorded, and may be transcribed. Hand-written notes will also be made during the interviews.

All notes and records will be destroyed at the conclusion of the Review.

Protection of Privacy

The information and data collected from the surveys and interviews will be safeguarded both physically and electronically.

Access to electronic data is restricted to the Review team.

All documents relating to the Review including consent forms and interview data is held in a locked filing cabinet at the Ministry of Justice premises or kept on a password protected folder on the Justice ICT network. Access to this data is restricted to the Review team. Storage of this data will end at the conclusion of the Review, at which time all private information is destroyed.

Appendix B:

Documents Considered by the Review Team

Legislation

Human Rights Act 1993.

Crown Entities Act 2004.

Employment Relations Act 2000.

Health and Safety at Work Act 2015.

Internal HRC documents

HRC Organisational Values, Beliefs and Behaviours. (n.d.).

HRC Governance and Responsibilities Manual. (2017).

HRC Framework of Statutory Powers of the Commission, the Board of the Commission and Officers of the Commission. (2017).

HRC Powers, Functions, Delegations and Responsibilities Framework. (2017).

HRC Delegation of the Chief Commission functions in sections 15(b), 15(c) and 15(d) of the Human Rights Act 1993 to the Chief Executive. (2017).

HRC Dignity at Work. (2009).

HRC Prevention and Response to Sexual Harassment Policy Guideline. (2017).

HRC Board paper on Prevention and Response to Sexual Harassment Policy Guideline. (2017).

HRC Ground We Stand on Policy Framework – Responsibilities at the HRC/OHRP. (2017).

HRC Board meeting minutes. (June 2017; October 2017; December 2017).

HRC staff list.

HRC organisational chart.

HRC Commissioners' handbook.

Review by Andrew Scott-Howman. (2018).

Various emails as they related to the Terms of Reference

Board development documents and surveys

HRC IBM Kenexa culture survey 2016.

HRC IBM Kenexa culture survey 2015.

HRC IBM Kenexa culture survey 2014.

BoardWorks International. (2015). *Governance Effectiveness Review Discussion Document*

Winsborough. (2017). *Board Development Workshop 1 Agenda*.

Asia Pacific Forum of National Human Rights Institutions. (2012). *Capacity Assessment of the New Zealand Human Rights Commission*.

Reports and publications

Hunt, C., Davidson, M., Fielden, S. & Hoel, H. (2007). *Sexual Harassment in the Workplace: A literature review*. Working Paper Series No. 59. Equal Opportunities Commission: Manchester.

McGregor, K., & Smith, R. (2015). *Air Force Culture Review*. New Zealand: Tiaki Consultants.

Feldblum, C. R. & Lipnic, V. A. Equal Employment Opportunity Commission. (2016). *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*. United States: Washington.

WorkSafe New Zealand. (2016). *Worker Engagement, Participation and Representation*. New Zealand: WorkSafe.

WorkSafe New Zealand & Institute of Directors. (2016). *Health and Safety Guide: Good Governance for Directors*. New Zealand: WorkSafe New Zealand & Institute of Directors.

Broderick, E & Co. (2017). *Effectively Responding to Sexual Harassment and Sexual Assault at James Cook University*. Sydney, Australia.

Noonan, R. & Collinge, J. (2017). *Reflections from the Antipodes: Leading and managing national human rights institutions*. A series presented to the Northern Ireland Human Rights Commission. Accessed: 20 April 2018.

WorkSafe New Zealand. (2017). *Preventing and Responding to Bullying at Work: Advice for small businesses*. New Zealand: WorkSafe

International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. *General Observations of the Sub-Committee on Accreditation*. Adopted by the Bureau of the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights at its Meeting held in Geneva, Switzerland, 6-7 May 2013.

Paris Principles. Adopted by General Assembly resolution 48/134 on 20 December 1993.

Appendix C: Online Survey Template

To protect as much as possible the identities and confidentiality of the participants, the online survey was entirely anonymous. Completed survey responses were collected and saved against a randomised response ID number (for example: ANON-4GMT-LK6A-7). Participants were explicitly told not to provide any identifying details about themselves or anyone else.

Overview

Introduction

This survey is designed to elicit your confidential input on information about the systems and processes for investigating internal claims of sexual harassment at the HRC, and your opinions about the organisational culture, communication channels and day-to-day working environment at the HRC. This survey should take about 30 minutes to complete.

For this survey to be helpful and accurate, it is important that you answer each question as honestly as possible.

If you would like to contact the Review team at all, please email hcreview@justice.govt.nz.

Confidentiality

Your responses to this survey will be kept completely anonymous.

Please do not sign your name. Please do not provide any identifying details about yourself or anyone else.

As a further safeguard of your confidentiality, no one outside the Review team will ever see your completed survey. The Review team will collect and collate the survey responses, and present the results in a report to the Minister of Justice. Your responses to this survey will then be permanently erased if you consent.

Directions

The first set of questions will ask you for information. The second set of questions will ask you for your opinion.

Read each question carefully.

In the information section, tick the boxes and add comments where sought. Please do not answer questions in a way that will identify you or anyone else.

In the opinion section, circle one number for each question.

Please strive to complete and submit your survey by **5pm, 26 March 2018**.

You can save your survey responses at any time, and return to finish the survey at a later time before the completion date.

What is sexual harassment?

Several questions in this survey refer to sexual harassment. It is important that all participants are working off the same definition.

The State Services Commission guidelines define sexual harassment as unwelcome or offensive sexual behaviour that is repeated or is significant enough to have a harmful effect on an individual's employment, job performance or job satisfaction. Unwelcome means behaviours that are not solicited or invited, and are regarded by a person as undesirable or offensive at the time.

Examples of sexual harassment

- Touching, hugging, encroaching on someone's personal space or kissing
- Staring or leering
- Insults or taunts of a sexual nature
- Unwanted invitations to go out on dates
- Requests for sexual favours, or pressure for sex or other sexual acts
- Repeated or inappropriate advances on email or social networking websites
- Intrusive questions or comments about a person's private life, clothing or physical appearance
- Sexually explicit pictures, posters, gifts, emails or text messages
- Sexual gestures, indecent exposure, or inappropriate display of the body
- Sexually suggestive comments or jokes, or other forms of inappropriate language
- Stalking or sexual assault.

Examples of what may not be sexual harassment

- Friendly banter, mutually acceptable jokes
- Occasional appropriate compliments
- Behaviour based on mutual attraction.

Information questions

Consent

Based on the confidentiality terms in the overview page, I give my consent for the information I provide in this survey to be used to inform the Review.

Please select only one item

- Yes
 No

Please note that for the purposes of this survey, management will include senior leaders, the Chief Executive and Commissioners. All other staff will be referred to as staff.

1. In the past 5 years, have you personally experienced or witnessed sexual harassment within the HRC?

Please select only one item

- Yes
 No
 Not sure
 Prefer not to answer

2. How many such incidents of sexual harassment have you experienced or witnessed? If you do not remember the exact number, please provide your best estimate.

Please specify:

3. If you answered yes, what type of sexual harassment have you experienced or witnessed? Tick all that apply.

- Touching, hugging, encroaching on someone's personal space or kissing
- Staring or leering
- Insults or taunts of a sexual nature
- Unwanted invitations to go out on dates
- Requests for sexual favours, or pressure for sex or other sexual acts
- Repeated or inappropriate advances on email or social networking websites
- Intrusive questions or comments about a person's private life, clothing or physical appearance
- Sexually explicit pictures, posters, gifts, emails or text messages
- Sexual gestures, indecent exposure, or inappropriate display of the body
- Sexually suggestive comments or jokes, or other forms of inappropriate language
- Stalking or sexual assault
- Other (please specify):

If you answered yes, was the harasser:

Please select only one item

- A colleague senior to you or the victim
- A colleague junior to you or the victim
- A colleague of similar status to you or the victim
- Not sure
- Prefer not to answer

4. Approximately when did this occur? Please note that this question is designed to avoid multiple counting of the same incident.

Details of when this occurred (please only state the year and/or month):

5. What effect did the behaviour have on you/the person you witnessed being sexually harassed?

Tick all that apply.

- Loss of confidence
- Reduced desire to continue working in that field
- Stress
- Sleep disturbance
- Fear of re-entering the work environment
- Substance abuse
- Nausea
- High blood pressure
- Anxiety
- Moving to another position/job
- Taking more sick leave
- Withdrawal/isolation
- Breakdown of the professional working relationship
- Other (please specify):

6. Are you familiar with the HRC process for reporting a claim of sexual harassment?
Please select only one item
- Yes
 No
7. Do you know who you would report a claim of sexual harassment to in the HRC?
Please select only one item
- Yes
 No
 Not sure
8. Have you sought support from someone in the HRC about a sexual harassment incident you have experienced or witnessed?
Please select only one item
- Yes
 No
 Prefer not to respond
9. Have you ever considered reporting the sexual harassment incident you witnessed or experienced?
Please select only one item
- Yes
 No
 Prefer not to respond
10. If you did report a claim of sex arassment, who did you first contact within the HRC?
Please select only one item
- Your manager or another manager
 A contact person or support person identified
 An Employee Assistance Programme (EAP)
 A trusted person such as a union representative, colleague or friend
 Prefer not to respond
 Other (please specify):
11. If you did not report a claim or sexual harassment, why not?
Tick all that apply.
- Worried about how I would be perceived
 Afraid of repercussions/ongoing relationship
 Would not have made any difference
 The behaviour would not have seemed bad “on paper” or “you had to be there”
 Did not know how to complain
 Prefer not to respond
 Other (please specify):
12. Have you supported someone who has considered making a claim of sexual harassment?
Please select only one item
- Yes
 No
 Prefer not to respond

13. Have you supported someone who has made a claim of sexual harassment?

Please select only one item

- Yes
 No
 Prefer not to respond

14. Has someone made a complaint of sexual harassment to you?

Please select only one item

- Yes
 No
 Prefer not to respond

15. Are you aware of specialist services made available for victims of sexual harassment by the HRC?

Please select only one item

- Yes
 No
 Prefer not to respond

16. Have you used any of these specialist services?

Please select only one item

- Yes
 No
 Prefer not to respond

17. Have you made a claim of sexual harassment for someone else?

Please select only one item

- Yes
 No

Claim for someone else

18. Were you given information about support services provided by the HRC?

Please select only one item

- Yes
 No
 Prefer not to respond

19. If yes, did you contact the support services offered?

Please select only one item

- Yes
 No
 Prefer not to respond

Questions continued

20. Do you know who the contact people are within the HRC who are designated to assist those who have questions or concerns about sexual harassment?

Please select only one item

- Yes
- No
- Not sure

21. Has the HRC provided you with any training as a designated contact person about sexual harassment?

Please select only one item

- Yes
- No
- Not sure

22. If yes, do you have any comments to make about this training?

23. Has the HRC provided you with any training to receive claims or complaints of sexual harassment?

Please select only one item

- Yes
- No
- Not sure

24. If yes, do you have any comments to make about this training?

25. In the past 5 years, have you personally been accused or witnessed someone being accused of sexual harassment within the HRC?

Please select only one item

- Yes
- No
- Prefer not to respond

26. Approximately when did this occur? This question is designed to avoid multiple counting of the same incident.

Details of when this occurred (please only state the year and/or month)

27. How did you learn of the sexual harassment claim?

Please select only one item

- Informally, through the grapevine
- Verbally from the complainant
- In writing from the complainant
- Verbally by a manager or senior person in the HRC
- In writing from a manager or senior person in the HRC
- Prefer not to respond

28. The HRC produced a new policy called Prevention and Responses to Sexual Harassment Policy Guidelines dated 9 November 2017. Were you aware that this policy was being formulated?

Please select only one item

- Yes
- No
- Not sure

Were your views sought on the policy before it was created?

Please select only one item

- Yes
- No
- Not sure

Opinion questions

30. Terms of Reference 1 – Systems and processes for investigating and resolving internal sexual harassment claims

	Strongly agree	Tend to agree	Hard to decide	Tend to disagree	Strongly disagree	Do not know
<p>The support services available at the HRC for victims of sexual harassment are appropriate.</p> <p>Please select only one item</p>						
<p>The responses of the HRC management to allegations of sexual harassment are adequate.</p> <p>Please select only one item</p>						
<p>The options available for a person who discloses sexual harassment at the HRC are adequate.</p> <p>Please select only one item</p>						
<p>People who face an allegation of sexual harassment at the HRC are treated fairly.</p> <p>Please select only one item</p>						
<p>Allegations of sexual harassment against colleagues at the HRC are dealt with according to the HRC policies.</p> <p>Please select only one item</p>						
<p>The HRC ensures that allegations of sexual harassment are treated confidentially.</p> <p>Please select only one item</p>						
<p>The HRC policies for dealing with allegations of sexual harassment are adequate.</p> <p>Please select only one item</p>						

Opinion questions

31. Terms of Reference 2 – Governance and management structures

	Strongly agree	Tend to agree	Hard to decide	Tend to disagree	Strongly disagree	Do not know
<p>Governance structures at the HRC adequately support the prudent handling of sexual harassment claims.</p> <p>Please select only one item</p>						
<p>Management structures at the HRC adequately support the prudent handling of sexual harassment claims.</p> <p>Please select only one item</p>						

Opinion questions

32 Terms of Reference 3 – Organisational culture

	Strongly agree	Tend to agree	Hard to decide	Tend to disagree	Strongly disagree	Do not know
Communication at the HRC is open and honest. Please select only one item						
Communication channels at the HRC are very open among management and staff. Please select only one item						
Communication channels at the HRC are very open between management. Please select only one item						
Communication channels at the HRC are very open between staff. Please select only one item						
Management actively solicit input from staff before major decisions are made. Please select only one item						
The number of changes that we go through at the HRC is “about right”. Please select only one item						
The HRC is very supportive of change. Please select only one item						
It is “easy” to get things done here. Please select only one item						
Most management changes make my job easier. Please select only one item						
The HRC treats everyone fairly – it doesn’t play favourites. Please select only one item						
People trust one another at the HRC. Please select only one item						
People work well together at the HRC. Please select only one item						

	Strongly agree	Tend to agree	Hard to decide	Tend to disagree	Strongly disagree	Do not know
The management team is highly respected. Please select only one item						
Problems and complaints are effectively handled at the HRC. Please select only one item						
People at the HRC behave in a way that is consistent with the values of this organisation. Please select only one item						
The HRC has a positive and inclusive culture. Please select only one item						

Demographics

Responses to the following questions will help us understand how different personnel at the HRC view things. These and all responses will be kept confidential. However, if you feel uncomfortable answering these questions, you do not have to.

Please indicate your current classification:

Please select only one item

- Management
- Staff

Gender:

Please select only one item

- Male
- Female
- Other

How long have you worked for the HRC?

Please select only one item

- 0 – 2 years
- 3 – 5 years
- 6 – 9 years
- 10 – 14 years
- More than 14 years

Additional comments:

Please use the space below to write additional comments about any other relevant matters raised in the Terms of Reference. For example, you may wish to discuss the HRC’s organisational culture, or, the HRC’s procedures and systems for investigating and resolving sexual harassment claims, and to suggest possible improvements. Please do not respond in a way that will identify you or anyone else.

Consent

I consent for my responses to this survey to be erased at the conclusion of the Review.

Please select only one item

- Yes
 No

Interviews

If you wish to discuss any information or comments relating to the Terms of Reference that you feel have not been covered in your responses to this survey, you may speak in person to the reviewer on a confidential basis.

Please select only one item

- I want to speak to the reviewer
 I do not want to speak to the reviewer

If you have indicated that you wish to speak to the reviewer, upon clicking submit, your survey responses will be submitted anonymously. You will be directed to a new link to enter your details to arrange a time and place for your interview.

If you have indicated that you do not wish to speak to the reviewer, this concludes the survey. Your survey response will be submitted anonymously, and this page will close.

Thank you for your input. It will contribute tremendously to the success of this Review.

Reviewer

Please enter your email address so the reviewer can arrange a suitable date, time and place for your interview:

Appendix D: Interview Template

Interviewee	
Name:	
Title/Occupation:	
Interviewer/Reviewer	
Name:	
Assistant to Reviewer	
Name:	
Interview details	
Date:	
Place/Location:	
Time begin:	
Time end:	
Record of the Interview	

Introduction

Thank you for agreeing to talk to me about the Review. There are a few preliminary matters that I want to tell you about. All participants will receive this same information.

Record of Interview

We are recording this conversation using a digital audio recorder and Rachel will be taking written notes on her laptop. The reason for the audio recording is to ensure that the conversation that we have today is accurately recorded. We do not plan to prepare a word for word transcript of the entire interview from the digital recording. However, essential elements may be transcribed directly. Also, the audio recording can serve as a useful reference if there is any misunderstanding about what was said at interview.

As soon as practicably possible you will be provided with the Record of Interview for review and signing by you. You will have an opportunity to check the Record of Interview and suggest corrections to the text in case the record does not accurately reflect what you stated. We will review any suggested amendments before finalising the record. Usually this will be done by email.

The recording and notes will remain confidential to the Review team until the Review is concluded, at which time both recorded and written notes will be destroyed

Do you agree to participate in this interview and for us to record this interview?

- | Participate | Consent to record |
|---|---|
| <input type="checkbox"/> Yes (proceed) | <input type="checkbox"/> Yes (proceed) |
| <input type="checkbox"/> No (ascertain why) | <input type="checkbox"/> No (ascertain why) |

For the record, the time is xxx. This is an interview with xxx.

My name is Coral Shaw, my colleague is Rachel Priest who is assisting this Review. She will help ensure that we correctly record your answers.

I need to confirm that your participation in this process is entirely voluntary. You can opt out at any stage if you want.

This interview is part of an ongoing exercise to establish facts and to hear your views on the issues raised by the Terms of Reference set by the Minister of Justice on 21 February 2018.

The Review process is confidential. The Review team will not release details of this interview with anyone without your express consent. Likewise, I would appreciate it if you do not discuss details of our interview with colleagues.

We want you to be comfortable during the interview, so please let me know if you need anything or if there are time constraints which we have to deal with before we begin. If you need a break at any time during the interview, or if you wish to stop the interview or you feel unwell, please let me know.

Do you understand what I have just explained?

- Yes (proceed)
- No (ascertain why)

Support person

Do you want a support person with you during the interview?

- Yes
- No

To the support person: As a support person, you should not respond on behalf of xxx or otherwise intervene in the interview process. The interview is strictly confidential and you are bound by that confidentiality.

Do you agree to this?

- Yes
- No

For the supporter:

I, the undersigned, undertake not to divulge any confidential information to which I have access in the exercise of my capacity as a support person to the present interview, and in particular to respect the confidentiality of information obtained during this interview.

Date and signature: _____

Questions about the interview process

Do you have any questions about the interview process I have just explained to you?

- Yes (question/response)
- No (proceed)

RECORD OF INTERVIEW:

START: xxx

END: xxx

1) For the interviewee

This is a true and accurate record of the interview.

Date and signature: _____

2) For the reviewer

This is a true and accurate record of the interview.

Date and signature: _____

