

NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN
AUSTRALIAN WORKPLACES

SUBMISSION
OF THE
WOMEN LAWYERS ASSOCIATION
OF THE ACT

FEBRUARY 2019

ABOUT WLA ACT

The Women Lawyers Association of the Australian Capital Territory (WLA ACT) is a not-for-profit organisation providing networking for, and promoting the interests of, women lawyers in the Australian Capital Territory (ACT). WLA ACT provides support for women in the ACT legal profession by:

- representing, advocating for and promoting their interests;
- providing a common meeting ground;
- providing opportunities for development and advancement;
- encouraging and advocating for the improvement of diversity in the legal profession;
- participating in law reform and the administration of the law particularly as affecting women and children;
- participating in other matters of interest and relevance to the legal profession; and
- cooperating and collaborating with other entities for the advancement of women in the law and women more broadly.

INTRODUCTION

As shown by the Australian Human Rights Commission's 2018 report *'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces'*, in Australia sexual harassment at work is endemic. Women are more likely to be the victims of sexual harassment and perpetrators of sexual harassment are overwhelmingly male.

While lawyers who are victims of sexual harassment may be more likely to know their rights when compared to the general populous and lawyers who are perpetrators may be more likely to understand the laws that prohibit their conduct, this has not translated into lower levels of sexual harassment in the legal profession, nor better outcomes for victims. Far more needs to be done to address sexual harassment in the legal profession and ensure perpetrators are not able to act with impunity.

In December 2018, WLA ACT conducted an online survey on the nature, prevalence and reporting of sexual harassment in the ACT legal profession. The survey also asked for respondents' views on current workplace sexual harassment management measures and asked for suggestions for responding to workplace sexual harassment.

The purpose of the survey was to provide members of the ACT legal community with an opportunity to anonymously provide information about their experiences of sexual harassment in the legal profession, as well as their views and comments about how the legal profession can better address sexual harassment in the workplace.

This submission is informed by the data collected as part of the survey findings.

This submission responds to the following terms of reference:

1. The prevalence, nature and reporting of sexual harassment in the ACT legal sector.
2. Online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment.
3. The drivers of workplace sexual harassment. Including whether:
 - a. Some individuals are more likely to experience sexual harassment due to particular characteristics, including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability.
 - b. Some workplace characteristics and practices are more likely to increase the risk of sexual harassment.
4. Existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment.
5. Recommendations to address sexual harassment in Australian workplaces.

RECOMMENDATIONS

Workplace sexual harassment is primarily driven by the power imbalance between victims and perpetrators. In the legal profession this includes both gendered power imbalances and workplace seniority power imbalances.

WLA ACT is of the view that these imbalances are reflective of broader societal norms regarding gender stereotypes and gender inequality.

Measures to prevent and respond to sexual harassment require cultural change in the profession in order to be effective, as well as broader societal and legal change.

The results of the WLA ACT survey indicate the key issues with sexual harassment in the legal profession are:

- the lack of understanding of the legal definition of sexual harassment and the behaviours that constitute sexual harassment;
- the cultural and institutional barriers to reporting, which lead to an under-reporting of instances of sexual harassment;
- the inadequacy of current complaints processes, including the perceived inability to produce satisfactory outcomes for complainants, as well as a perception that the complaints process will irrevocably hurt the complainant's career.

Taking into account these key issues, WLA ACT recommends the legal regulatory bodies:

1. Provide guidance on best practice policies and workplace training.
2. Report on the number of sexual harassment complaints they receive each year.
3. Mandate continuing professional development (CPD) training on sexual harassment
4. Undertake a review of current complaint mechanisms relevant to the legal profession (including the complaint mechanisms of the law societies) in order to strengthen the efficacy of the complains process, including by allowing for anonymous complaints when appropriate.

More broadly, WLA ACT recommends:

1. Develop and deliver a wide-spread public education campaign on sexual harassment, including its drivers and what constitutes unacceptable behaviour (similar to current domestic violence and drink driving campaigns).
2. Make it mandatory for all employers to have a sexual harassment policy in place and to provide education and training to all employees on sexual harassment.

3. Consider statutory minimum standards regarding the content of policies and training and encourage professional and regulatory bodies to provide guidance on these.
4. Make it mandatory for industry professional representative bodies (for example, law societies, legal services boards and bar associations) to have sexual harassment complaint handling mechanisms which allow for anonymous complaints.
5. Amend the *Fair Work Act 2009* to introduce a regime similar to the current anti-bullying provisions. This would allow victims of sexual harassment to seek orders from the Fair Work Commission compelling employers to take steps to stop sexual harassment, with civil penalties imposed if employers fail to take necessary action.
6. Amend the *Sex Discrimination Act 1984* to create a reverse onus of proof for sexual harassment claims, similar to the reverse onus of proof for adverse action claims under the *Fair Work Act*.
7. Prohibit the use of nondisclosure or confidentiality clauses in settlement agreements for matters that involve sexual harassment or discrimination, unless requested by the complainant.

THE PREVALENCE OF SEXUAL HARASSMENT

Sexual harassment is widespread in the ACT legal profession and WLA ACT is concerned this indicates a culture of problematic behaviour and consequent under-reporting in workplaces across the ACT legal sector.

57 percent of respondents to WLA ACT's survey reported having been sexually harassed while engaged in the legal profession.¹ This included harassment at the workplace or at a workplace related event.

WLA ACT's survey found that a further 9 percent of respondents identified as 'not sure' whether they had experienced sexual harassment.

In part, WLA ACT considers this result indicates that there may be a knowledge gap, even amongst legal practitioners, between the legal definition of sexual harassment and its application, and a cultural understanding in legal workplaces as to the behaviours that constitute sexual harassment.²

These results also indicate a tendency to 'play down' experiences as 'not serious enough' to warrant complaint. Relevantly, respondents who gave this answer mostly identified 'unwelcome comments' as the type of unwelcome behaviour they were subject to.

49 percent of respondents to WLA ACT's survey also reported having observed another person being sexually harassed. Notably, our survey found a correlation between those respondents who were sexually harassed themselves, and those who reported observing another person being sexually harassed in the workplace.

¹ Survey respondents were provided with the statutory definition of sexual harassment in section 28A of the *Sex Discrimination Act 1984 (Cth)*.

² WLA ACT notes that these findings are consistent with findings by the Australian Human Rights Commission that there remains a lack of understanding as to what constitutes sexual harassment. Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces 2018*, 24.

THE NATURE OF SEXUAL HARASSMENT

WLA's survey found that 'unwelcome comments' (83 percent of respondents) was the most common form of sexual harassment experienced.

Respondents also identified:

- sexually explicit comments, jokes or insults (57 percent of respondents)
- staring or leering behaviour (41 percent)
- intrusive questions about the individual's, or a colleague's, private life and body (35 percent)
- unwelcome touching (33 percent)
- unwelcome sexual advances (25 percent)
- workplace discussions of sexually explicit matters (22 percent)
- unwelcome requests for sexual behaviours (7 percent)
- receipt of sexually explicit content via email, SMS or other technology service (7 percent)
- display of posters, magazines or screen savers of a sexual nature (6 percent)

Most commonly, the harasser was someone the respondent directly reported to (62 percent of respondents).

We also received a significant number of reports that the harasser was otherwise in a position of seniority or influence over the respondent, including senior practitioners in the same workplace, counsel and clients.

ONLINE WORKPLACE RELATED SEXUAL HARASSMENT AND THE USE OF TECHNOLOGY AND SOCIAL MEDIA

Based on the results of WLA ACT's survey, sexual harassment experienced in the legal profession predominantly appears to centre on interactions occurring in person. 88 percent of respondents to our survey reported that technology was not involved in the sexual harassment they experienced.

When technology was used, it was most commonly via email (60 percent of respondents), followed by phone calls (30 percent), text messaging (20 percent) and social media (10 percent).

While technological-based harassment was not reported as frequently, the ability for perpetrators to sexually harass and intimidate lawyers over technology is of particular concern in the legal profession, given that it is common for lawyers to

work long hours and to remain connected to their workplace even after they leave the office.³

THE DRIVERS OF SEXUAL HARASSMENT

POWER IMBALANCE

WLA ACT recognises that perpetrators of workplace sexual harassment are primarily driven by power imbalances, and this is largely reflective of broader societal norms regarding gender stereotypes and gender inequality that continue to permeate legal workplaces.

While there are power dynamics in any relationship between the genders, WLA ACT's survey results found that the problem goes beyond this and indicate that power imbalances driven by the hierarchical nature of the profession also play a role.

This view is reinforced by WLA ACT's survey results, which found that 62 percent of respondents reported they were harassed by someone they reported to. This was a significant finding, compared to someone at level (26 percent), a client (14 percent) or other (29 percent) (the 'other' identified included barristers, employees from another firm or workplace, opposing counsel, partners, senior colleagues and judicial officers).

Notably, this is a different finding from the recent Australian Human Rights Commission survey results which found that harassers are most often a co-worker employed at the same level as the victim.⁴ This suggests that cultural norms common to the legal profession are contributing to issue of sexual harassment.

INDIVIDUAL CHARACTERISTICS

WLA ACT is of the view that gender is the most significant relevant individual characteristic, where women are more likely to be the victims of harassment and perpetrators of sexual harassment are overwhelmingly male.

In terms of gender, WLA ACT's survey only had a small number of male respondents but nevertheless, our results found that men are experiencing, and have experienced, sexual harassment in the ACT legal sector as well. However, overwhelmingly, those experiencing sexual harassment are women, and often are young women in the beginning of their careers (with less than five years post admission experience).

³ WLA ACT has previously found more than two thirds of lawyers have been supplied with a device for work: *2017-2018 Lawyers Pay and Conditions Survey Findings Report*, 31 May 2018, p 35, available online at <http://www.wlaact.org.au/lawyers-pay-and-conditions-survey/>.

⁴ Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces 2018*, 8.

WLA ACT also acknowledges that certain individuals may be more likely to experience sexual harassment due to different characteristics. However, as only a small proportion of respondents to WLA ACT's survey (21 percent in total) identified as being from one of the demographic groups surveyed (that is persons: from a non-English speaking background (17 percent); persons with a disability (7 percent), and Aboriginal or Torres Strait Islander persons (0 percent)). Accordingly, there were not enough respondents in these groups to draw any specific conclusions for their experiences of sexual harassment in the workplace.

WORKPLACE CHARACTERISTICS AND PRACTICES THAT ARE MORE LIKELY TO INCREASE THE RISK OF SEXUAL HARASSMENT

WLA's survey results indicate there may be certain workplace characteristics and practices more likely to place lawyers at risk of sexual harassment.

Legal practice often takes lawyers outside of their physical office, including by attending court, visiting clients and attending professional networking events.

Consequently, WLA ACT's survey results found that experiences of sexual harassment are not limited to the physical office, although it represented the highest response with 67 percent reporting that incidences occurred at the respondent's workplace. A significant number of respondents reported that sexual harassment occurred at professional social events (45 percent). Respondents also reported experiencing harassment in other locations relevant to legal practice, including while attending court, at a client's site, on the street outside the office and while travelling.

It appears that professional interactions occurring outside of the traditional office space bring with them an opportunity for perpetrators to take advantage of an imbalanced power dynamic. Relevantly, these interactions may be with clients, lawyers for opposing parties and counsel, in circumstances where the perpetrators may not be covered by the same workplace policies and complaint mechanisms and may be less likely to expect any professional ramifications for their behaviour.

REPORTING OF SEXUAL HARASSMENT

WLA ACT's survey results indicate that reporting of sexual harassment in the legal profession is very low. Only 22 percent of respondents said they had made a complaint about their own experience of sexual harassment to either their employer or an external professional body.

The survey results indicate that a fear that making a complaint will impact on career progression is one of the two most common reasons why a complaint about sexual harassment is not made.

'I discussed it with my direct supervisor (a partner, not the culprit). He asked me not to put in a formal complaint and said "if you report it formally it's going to be a huge thing. Don't ask me to do that. Just avoid him'

~ Survey respondent

The second, and arguably related reason, is a perceived lack of confidence that the person responsible for managing complaints at the workplace would deal with that complaint in a thorough, competent and impartial manner. Relevantly, we found that a common reason for this lack of confidence was a view that the complaints process would be mismanaged in such a way that it would impact on the complainant's career.

Many respondents to our survey also indicated they did not make a complaint because of a concern it 'would not be considered harassment' or the complainant 'wasn't sure if it was serious enough'. Other responses expressed concern that they may be told 'it's not that bad'.

'The seniority of the harasser in the context of a hierarchical workplace might mean I would decide not to complain'

~ Survey respondent

Perhaps unsurprisingly, responses also demonstrate that the identity of the perpetrator impacts on the likelihood whether or not an individual will have made a complaint to their employer or an external body.

Unsurprisingly, individuals who

had been sexually harassed by someone more senior were less likely to report this harassment. Of those individuals who indicated that the person who had harassed them was someone they reported to, only 27 percent said they had made a complaint. Of those who had been harassed by someone other than who they reported to (someone who reported to them, someone at their level, a client or other), 43 percent said they had made a complaint.

Responses also demonstrate that fear of impact on career plays a bigger role in choosing not to complain in relation to individuals who were harassed by someone

they reported to. Of those who had been harassed by someone they reported to, 57 percent indicated that fear of impact on their career was a reason for choosing not to complain. This was larger than the 38 percent of those who had been harassed by someone other than who they reported to (someone who reported to them, someone at their level, a client or other), who indicated they chose not to complaint due to fear of impact on their career.

Of those who did make a complaint, we found that complainants generally preferred to seek a resolution from their employer in the first instance, rather than to make a report to an external professional body. Generally, complainants reported to their direct supervisor (54 percent), a human resources staff member (33 percent) or the head of the organisation (33 percent). External complaint processes, including to the Law Society, were used in less than 10 percent of cases.

WLA ACT's survey results found that, generally speaking, the complaints process did not produce a satisfactory outcome. Only 32 percent of respondents to our survey were satisfied, after making a complaint, that the complaints process produced an appropriate outcome.

'I was declared redundant and the complaint was buried'

~ Survey respondent, in response to a question regarding the outcome of their complaint

Significantly, many respondents to WLA ACT's survey felt that the culture of their workplace was at least in part to blame for the way in which they were treated and that this culture was a barrier to effectively dealing with the issue. Relevantly, WLA Act received reports that in some circumstances, 'it was recommended that [the complainant] deal with it', 'nothing' happened or 'the complainant 'was asked not to take it further'.

In only 23 percent of circumstances was the harasser warned about their behaviour as an outcome of the complaint.

WLA ACT also asked those respondents who had witnessed sexual harassment if they had complained or reported the behaviour on another's behalf. Only 5 percent of respondents said they made a complaint about the colleague's experience to their employer or an external body. Again, respondents indicated a concern that the complaints process might impact on their colleague's career and indicated a preference to counsel and support their colleagues instead.

WLA ACT also asked respondents if they *would* make a complaint to their employer *if* they were sexually harassed.

- 45 percent of respondents said they would make a complain to their employer
- 40 percent were unsure
- 15 percent said they would not make a complaint

Through this question, posed as a hypothetical, WLA ACT sought the views of respondents more broadly, whether they had reported experiencing harassment or not, about their general views on the complaints process in their workplace. From our results we identified three key concerns influencing whether or not persons in the legal profession would make a complaint.

Firstly, the nature of the harassment appeared to influence whether a report would be made. Respondents indicated they would likely assess the harassment experienced on an assumed 'scale of seriousness', indicating they would first consider 'how bad the harassment was', or 'if I thought it was serious enough to be reported'. Others reported it would be 'contingent on the nature of the harassment' and 'depend on the circumstances'.

Secondly, respondents indicated they would take into account the position of the harasser and surrounding circumstances, including who was involved and their level of seniority.

Thirdly, many respondents expressed concern that they could not be confident that the employer would handle the complaint appropriately and professionally. Respondents reported concerns to us including 'nothing would be done', 'no confidence that any action would be taken' and 'would not be taken seriously'.

A key theme identified by WLA ACT was a pervasive concern that complainants could not be confident that they would be treated with respect and discretion throughout the complaints process.

Implicit in many respondents' concerns was a view that making a complaint would further undermine their agency over the situation and merely 'add to [their] stress'. Responses included 'it could escalate beyond what I would feel comfortable with', the complaints process might 'backfire' or not achieve a satisfactory outcome.

WLA ACT also found that respondents indicated they would be hesitant to make a complaint in circumstances where they had previously witnessed a colleague suffer detriment to their career as a consequence of having done so.

These results make clear that the legal profession often attracts ambitious professionals who seek to excel in their careers. A challenge for the legal profession is cultivating a high-performance culture whereby a strong and robust complaints procedure is treated as supporting a high-performance workplace culture, not undermining it.

Based on our survey results, at a workplace level, WLA ACT considers that lawyers will be more likely to report sexual harassment where they can be confident that it will not impact on their career. In practice, this means the person or persons handling the complaint will respond objectively, respect the integrity of the

complaint and take account of the need for privacy and discretion so far as is reasonably practicable.

EXISTING MEASURES AND GOOD PRACTICE

The majority of respondents to the WLA ACT survey indicated that their workplace had a workplace policy or provided specific training on sexual harassment as a means of preventing sexual harassment in the workplace.

Concerningly, 18 percent said their current workplace had no measures to prevent sexual harassment, while 17 percent were not sure if their workplace had any measures.

Additionally, only 38 percent considered that the measures in their workplace to prevent sexual harassment were effective. The rest said that they were not sure (45 percent) or did not think the measures were effective (16 percent).

In relation to effective measures, respondents identified three measures as being particularly effective in preventing and responding to workplace sexual harassment: first, a good workplace culture, where inappropriate conduct is not tolerated and there is strong leadership; second,

having a workplace policy on sexual harassment which sets clear guidelines regarding acceptable and unacceptable behaviour; and third, adequate training.

‘Talking about harassment openly, and making it clear that things that can seem innocent like comments and jokes can still be harassment and cause people distress’

~ Survey respondent, in response to a question asking which measures have been effective

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