

SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION

National Inquiry into Sexual Harassment in Australian Workplaces

from

THE LAW SOCIETY OF TASMANIA'S EMPLOYMENT AND EQUAL OPPORTUNITY COMMITTEE

Introduction

The Employment and Equal Opportunity Committee (**EEOC**) is a committee of the Law Society of Tasmania (**LST**). The EEOC provides advice and recommendations to the LST, and advocates for and supports initiatives aimed at achieving equal opportunity for all within the legal profession and in respect of related law reform issues.

This submission represents the views of the EEOC as distinct from the LST itself. Time constraints in the drafting process have meant that the LST has not had the opportunity to formally review this submission and as such, the submission should not be taken to reflect the LST's official position. However, it is the EEOC's hope the LST will adopt the EEOC's position and recommendations as contained in this document, and give priority to addressing the issue of sexual harassment in the Tasmanian legal profession in coming years.

Nature and prevalence of sexual harassment in the Tasmanian Legal Profession

The EEOC first surveyed members of the LST (solicitors and barristers in Tasmania) regarding sexual harassment and inappropriate workplace behaviour in 2007. The survey was completed by 132 men and 89 women. The resulting survey data included:

- a) 47 respondents stated they had been subjected to inappropriate workplace behaviour, with 21 stating this had affected their work performance, job satisfaction or health or a combination of those matters;
- b) of those 47:
 - i. 7 respondents reported the matter to their employer;
 - ii. 1 respondent reported the matter to the LST;
 - iii. 19 respondents complained of or reported the matter to anyone;
 - iv. 18 respondents considered leaving their employment;
 - v. 5 respondents considered leaving the legal profession; and
 - vi. 7 respondents reported actually leaving their employment.
- c) 115 respondents reported that their employer had workplace policies to deal with inappropriate workplace behaviour with 65 stating their employer did not have any such policies.

Following this survey the EEOC lobbied the LST to promote employer policies to address inappropriate conduct in the workplace, and to include rules in the profession's conduct rules to address sexual harassment, discrimination and bullying.

The EEOC is not aware of any further formal studies or surveys of the Tasmanian legal profession with respect to inappropriate workplace conduct or sexual harassment since 2007.

The LST conducts profession-wide surveys on an ad-hoc basis, generally every 2–3 years. However, those surveys do not specifically focus on sexual harassment or inappropriate workplace conduct, and tend to deal with generic statistics such as age, areas of practice, years in practice, remuneration, and so on. The results of those survey, when published, have consistently indicated a gender pay gap in the Tasmanian legal profession as well as a significant attrition rate of women in the legal workplace as seniority increases.

In 2018 the LST's Law Council, in considering adoption of the National Model Conduct Rules (**NMCR**), agreed to include the NMCR's rules against sexual harassment, discrimination and bullying. The EEOC understands the draft, new Tasmanian Conduct Rules are currently with the Parliamentary Drafting Committee (i.e. yet to come into effect).

On the EEOC's recommendation, the LST has recently agreed to conduct a profession-wide survey on sexual harassment and inappropriate workplace behaviour. The EEOC has drafted the proposed survey questions and is hopeful the survey will be rolled out shortly.

In the EEOC's view, based on both anecdotal and empirical evidence, the experience of lawyers in Tasmania, particularly women lawyers, is likely to be similar to that reflected in the comprehensive National Attrition and Re-engagement Survey Report (**NARS Report**) conducted by the Law Council of Australia in 2014¹. In particular, the NARS Report found that:

"The relative lack of women in senior leadership positions is seen to contribute to a male-dominated culture in which it is difficult for women to progress. A number of women also indicated that the prevalence of men in senior positions presented cultural barriers to their own progression. Whether conscious or unconscious, the role of favouritism, personal relationships and alliances in the promotion process was seen to potentially favour male candidates in workplaces led by fellow men."

The EEOC is of the view that the Tasmanian experience almost certainly aligns with the NARS Report observations and findings, and considers the factors identified in that report to be significant contributors to the occurrence of sexual harassment in the Tasmanian legal profession.

Drivers of sexual harassment

The EEOC has identified below a number of driving factors it considers to underpin sexual harassment in the legal profession. There is a common theme which unites these factors: the nature and structure of the profession is such that those who experience sexual harassment may not report it in the first instance. Those who do report it may not receive satisfactory support. There also remains an attitude within

¹ National Attrition and Re-engagement Study (NARS) Report, Law Council of Australia 2014.

the profession, particularly at senior levels, that sexual harassment is not a problem within the profession and therefore reports of sexual harassment may be glossed over or dismissed without appropriate investigation.

Nature and size of the profession

The practice of law and the legal profession more broadly is inherently competitive, individualistic and adversarial. There is a focus within the profession on individual performance. Employees are expected to meet financial targets, bring in new clients, and win cases. Those in senior positions hold the decision-making power to promote or support junior staff (or otherwise).

The hierarchical structure of the profession creates power imbalances giving opportunity for those in more senior positions to take advantage of those in more junior roles; empirical and anecdotal evidence suggests those in junior roles begrudgingly accept that sexual harassment is something to be tolerated and overlooked in order to progress in their careers.

Evidence suggests harassment of female solicitors can begin very early on in their careers:

A 2012 survey conducted by the Victorian Equal Opportunity and Human Rights Commission into the experiences of female lawyers in Victoria² found that 24% of respondents had experienced sexual harassment while working as a lawyer or legal trainee in Victoria. 74% of those who had experienced sexual harassment did not make a complaint.

The Victorian report revealed themes of hostility, pressure to work more hours, lack of support from managers, lack of flexible working arrangements, negative attitudes towards working mothers and lack of action or victimisation as contributing to a broader workplace culture that condoned sexual harassment.

More recently, in the wake of the #MeToo movement, it appears lawyers may be paying more attention to the issue of sexual harassment in the workplace but remain fearful of reporting incidents because of the nature of the profession³.

While there is a lack of recent, locally conducted empirical studies in Tasmania on the issue, there is no reason to believe the Tasmanian experience would differ to that in Victoria.

The Tasmanian legal profession is small – less than 750 practising certificate holders (or deemed holders of practising certificates)⁴. Within the Tasmanian profession, each practice area tends to be monopolised by a relatively small group of practitioners. Those who experience sexual harassment by a colleague or opposing lawyer may be reluctant to make a report for fear that they will have to work with, or against, the perpetrator in future.

² *Changing the rules: the experiences of female lawyers in Victoria*, Victorian Equal Opportunity and Human Rights Commission, 2012.

https://www.humanrightscommission.vic.gov.au/media/k2/attachments/Changing_the_Rules_Web.pdf_Final_1.pdf

³ "MeToo is 'yet to hit the legal profession': Female lawyers reveal workplace sexual harassment", Katherine Gregory, ABC News Online, 13 September 2018

<https://www.abc.net.au/news/2018-09-13/female-lawyers-reveal-sexual-harassment-in-legal-profession/10239078>

⁴ Profile of the Legal Profession in Tasmania 2017-2018, The Law Society of Tasmania, available at: https://lst.org.au/wp-content/uploads/2018/10/Profile_Tas-Law-Society_FINAL.pdf

Concern that a complainant's confidentiality will be put at risk may have a dampening effect on willingness to report sexual harassment. Complainants face a difficult process in raising a complaint. Although making an anonymous report or anonymising the identity of the perpetrator may be an option, the small Tasmanian profession means that parties to a complaint are usually readily identifiable from anonymised facts or the non-anonymised characteristics of the parties involved.

The legal profession quite rightly holds itself out as an important stakeholder in upholding the rule of law, civil order, obedience, and fairness. The legal profession may therefore be reluctant to turn the spotlight back onto itself, to examine where and how it falls short of the standards it purports to play a role in upholding for the rest of society.

The legal workplace is largely unregulated in the sense that most legal practitioners work the hours necessary to complete the tasks required of them and often have to juggle a number of competing demands on their time, which for many legal practitioners are largely outside of their control. In addition, the legal workforce is largely un-unionised and, with very few exceptions, is not subject to external scrutiny such as the Fair Work Ombudsman and Work Health & Safety authorities. All of these factors are likely contributors to workplaces and a profession in which inappropriate workplace behaviour including sexual harassment can occur and continue to occur.

Gender Imbalance

The EEOC does not suggest sexual harassment is exclusively perpetrated by men against women. However, it is beyond doubt that most reported instances of sexual harassment fit that description.

The EEOC perceives a persistent attitude within the profession that gender equality is a "women's issue". While the tide on this is slowly changing for the better, the EEOC's perception is that there are large sections of the Tasmanian profession who do not consider gender imbalance to be a problem. There is little being done at a profession-wide level to actively address sexual harassment in the workplace.

There is a significant gender imbalance at the top level of the profession including in Tasmania: women are now graduating from university and entering the legal profession in higher numbers than men. However, there is a clear pattern of attrition where women leave private legal practice within 7–10 years of entering the profession⁵. Men continue therefore to dominate the senior ranks of the profession. This can support a "boys' club" mentality.

The top-heavy gender imbalance contributes to an environment where sexual harassment is less likely to be taken seriously. Anecdotal evidence suggests that when individual instances of sexual harassment are reported, conduct is brushed off with a "boys will be boys" attitude – if a senior male has perpetrated the conduct then his senior male colleagues will either fail to condemn the behaviour, or will excuse it on the basis that the behaviour is amusing, or that he was drunk, not serious enough to warrant intervention, or is simply a quirky personality trait of the perpetrator. This response (or rather, lack of response) leads to an understanding and perception that such behaviour is acceptable or, in any event, will not lead to an adverse outcome for the perpetrator.

⁵ Profile of the Legal Profession in Tasmania 2017-2018, The Law Society of Tasmania, available at: https://lst.org.au/wp-content/uploads/2018/10/Profile_Tas-Law-Society_FINAL.pdf

The EEOC is of the firm view that changing the culture of the legal profession must start with senior male members of the profession taking a leadership role and making it clear that sexual harassment is unacceptable.

Lack of complaints and disciplinary processes

Many law firms in Tasmania do not have formal policies or reporting processes to address sexual harassment⁶. Firms that do have a formal policy rarely publicise their policies, and employees are unlikely to be familiar with the process available to them to make an internal complaint if they do experience sexual harassment within their firm.

Law firms in Tasmania are small in comparison to their interstate counterparts: the largest Tasmanian firm employs about 80 staff, including support staff. Most Tasmanian firms are significantly smaller. Even if a formal internal reporting process is available, employees may be reluctant to make a complaint because the small size of the firms means that the employee may need to continue working in close proximity with the perpetrator.

There is also a lack of any formal complaints processes at a higher level.

The LST recently adopted the NMCR for the Tasmanian legal profession, with those rules yet to come into force. Once the NMCR do come into force in Tasmania, the NMCR provide no formal process through which a legal practitioner can report sexual harassment as a breach of the NMCR. It is not clear to the EEOC whether the LST intends to handle such reports internally or refer the complaints to the Legal Profession Board of Tasmania (LPBT).

The LPBT was established to handle complaints about legal professionals, with reference to the Legal Profession Act of Tasmania. The majority of complaints are made by members of the public about lawyers, although occasionally complaints are made by one lawyer about another. Sexual harassment could constitute a breach of the Legal Profession Act and, in some instances, be a punishable offence. However, the LPBT is ill-equipped to handle sexual harassment complaints and in the EEOC's view, likely lacks the resources and training required to manage what can be a difficult, delicate and sensitive topic.

It appears therefore that when the NMCR do come into force in Tasmania, there will be a glaring gap as to how complaints of breaches of the NMCR involving sexual harassment will be dealt with.

Measures to address sexual harassment in Australian workplaces

The EEOC has identified a range of measures that could be implemented to address sexual harassment in the Tasmanian legal profession. The EEOC has also identified obstacles that may prevent the effective implementation of these measures.

At the present time, there are limited avenues to address sexual harassment in the Tasmanian legal profession. Even where formal policies do exist they are either not well published, or fail to adequately address the issue. In Tasmania, there is no formal option for a complainant to report sexual harassment where that conduct occurs

⁶ As indicated by the LST's 2007 survey of the profession and referred to at the beginning of this paper.

outside the legal practitioner's workplace. Complainants could be dissuaded from making reports to their employer if the harassment has occurred within their own firm, particularly where the alleged perpetrator may well be a partner or senior lawyer in the practice.

An aggrieved practitioner could make a complaint to the office of the Anti-Discrimination Commissioner, known as Equal Opportunity Tasmania (**EOT**). Complaints not resolved in the EOT process can progress to a hearing in the Anti-Discrimination Tribunal where compensation may be awarded. However, recent experience is that the time for a case to move - from the lodging of a complaint with EOT to a Tribunal hearing - can be anything from 12 to 24 months. A complaint to the EOT or progressing a complaint to the Tribunal may feel too serious a step for some complainants, or the conduct may not fall within the ambit of EOT's role to address. The EOT and Tribunal processes may lack the confidentiality some complainants require.

The EEOC's position is that there needs to be a range of measures available within the Tasmanian legal profession to address sexual harassment. It is important for complainants to have choice in terms of how they report instances of sexual harassment and how those reports are handled. A "one-size fits all" approach will not suffice. The EEOC supports there being a complaints process within private law practices, as well as a multi-tiered system administered by the LST.

Firm-based measures could include:

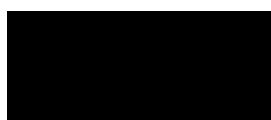
- All firms to develop and implement an internal sexual harassment policy (either as a stand-alone policy or incorporated into the employee code of conduct or other similar policy);
- All firms to conduct annual anti-discrimination and sexual harassment training for staff which is compulsory for all members of staff to participate in;
- Any complaint made internally should be treated with the utmost confidentiality and should not be disclosed to any other member of staff, including the alleged perpetrator, unless or until the complainant consents to the complaint being disclosed;
- A complainant should have liberty to choose whether an allegation of sexual harassment is brought to the attention of the alleged perpetrator. If the complainant does wish for the matter to be raised with the perpetrator, it must be done privately and as soon as possible after the complainant authorises the disclosure;
- Firms should offer an internal confidential mediation or conciliation based process between the complainant and the alleged perpetrator if the complainant consents to that occurring (and, for that purpose, senior staff should either be appropriately trained in such processes or the matter should be delegated to the LST – see the suggestions in the following paragraphs);
- Where a person complains of sexual harassment which is clearly a breach of the NMCR, the Anti-Discrimination Act, or constitutes a criminal offence, firm policy and procedure should require a senior member of the firm to immediately refer that conduct to the appropriate authorities and take appropriate steps to suspend the alleged perpetrator or to ensure that the complainant is not required to work with or come into contact with the alleged perpetrator; and

- Both complainants and alleged perpetrators should be offered counselling and psychological support with an appropriately accredited provider.

Measures that could be implemented at a profession-wide level include:

- Publication of the LST's recent adoption of the NMCR, with the LST to prioritise the development and implementation of a formal complaints process to address breaches of those Rules, and in particular, specific processes to address complaints of sexual harassment (both of which could incorporate other suggestions in these submissions);
- LST drawing a panel of senior members of the profession of both genders willing to directly receive confidential complaints and queries and to provide advice in relation to sexual harassment, bullying, or other forms of discrimination (noting that the LST already offers a similar service for ethics-related queries);
- An independent and confidential conciliation conference process which can be quickly convened at the request of a complainant, perhaps facilitated by the LST;
- A commitment by the LST to provide profession-wide training and education programs targeting sexual harassment and discrimination. Participation in professional development could be encouraged by making it mandatory for all members of the profession to obtain one Continuing Professional Development (also known as Continuing Legal Education) "point" in anti-discrimination training each year;
- For a sexual harassment that occurs in employment, the Fair Work Commission should be able to deal with complaints; this would require an amendment to the Fair Work Act; and
- Complaints made to the LST or the LPB must be treated seriously, confidentially, and handled quickly. Complainants must give consent before a complaint is relayed to the perpetrator.

The EEOC takes the view that none of the above measures (together or separately) will effect real change unless there is profession-wide acknowledgement and acceptance that sexual harassment in the legal workplace is a problem. A top-down approach, where the senior members of the profession lead by example, condemn inappropriate behaviour, and actively address the need for change, is necessary to ensure effective change occurs.



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