



## Breaking the culture of silence – sexual harassment at the Bar

By Kate Eastman SC

Sexual harassment of women lawyers has been a recurrent and persistent feature of many women's experiences in legal practice. Anecdotal evidence indicates that many barristers in New South Wales have experienced sexual harassment, with women barristers who have experienced sexual harassment reporting being subjected to a wide range of behaviours. However, there has been very little research into the working conditions of barristers and their experience of sexual harassment. There is also limited data. In 2015, a Practising Certificate Renewal Survey asked about barristers' experience of sexual harassment.

The results of the Practising Certificate Renewal Survey were (as at June 2015):

- 42% of all women barristers who responded said they had experienced sexual harassment compared with only 3% of male barristers; and
- 64% of women barristers reported experiencing bullying at the Bar.

The majority (85%) of women who experienced sexual harassment indicated that the



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source of harassment was a fellow barrister, while men who experienced sexual harassment were more likely to report the source of harassment as a client (59%) or solicitor (41%).

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with only a minority raising the issue with a colleague or a clerk. Not a single respondent (male or female) made a formal complaint of sexual harassment.

The Diversity and Equality Committee sought to explore the reasons why sexual harassment occurs at the Bar and the reluctance to report such incidents when preparing a submission for the Australian Human Rights Commission's national inquiry into sexual harassment in Australian workplaces.<sup>1</sup>

We asked whether there are any particular features of the Bar that might explain why sexual harassment occurs. We have also considered whether the Bar is different to other workplaces and whether those differences may account for why sexual harassment occurs.

Anecdotal evidence and experience show sexual harassment by barristers and towards barristers bears the same features and causes as other professions that are historically hierarchical male dominated professions.

To a significant degree, the Bar remains male dominated and retains a hierarchical structure.<sup>2</sup> The culture of the Bar is adversarial. While barristers, as members of

chambers, operate as a collective of practitioners, as sole practitioners they remain in competition with every other barrister. The adversarial nature of the work barristers do in court also permeates the interactions of barristers outside of court.

Depending to a significant degree on the area of practice and the nature of the brief, stereotypical views continue about lawyers, particularly women barristers; and women

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still experience discrimination when decisions are made about engaging barristers. In the early days, women barristers were expected to practise in 'so-called' women's areas – family law and matters concerning children.<sup>3</sup> While the areas where women now practise have expanded, the legacy of the "women's work" remains and the structure of the legal profession continues to present barriers for women. The nature of practice and the demands on lawyers can be challenging for women who are still usually the primary carers of children.

One particular concern for barristers is the patchy coverage of Commonwealth and New South Wales laws proscribing sexual harassment, relevant to their workplaces and professional relationships. One significant feature of the Bar, compared with other workplaces is the limited coverage of the *Sex Discrimination Act* 1984 (Cth) (SDA) and *Anti-Discrimination Act* 1977 (NSW) to barristers. These laws presently provide little or no protection for barristers sexually harassed by another barrister in chambers or in court.

Furthermore, we found the reasons for a victim's reluctance to make a complaint or take action are complex. All victims of sexual

harassment have agency, in the sense that an individual has the ability to make effective choices and to transform those choices into desired outcomes. There is no obligation to report sexual harassment, make a complaint or take action. However, those barristers who experienced sexual harassment indicated that their reluctance to make a complaint was due to embarrassment, trauma, the absence of relevant or effective policies or processes to make a complaint, fear of retribution, damage to professional reputation,



the cost, the risk of adverse financial outcomes if the barrister loses work, publicity, threats of defamation as well as the absence of an effective remedy. In *Precedent* (Issue 144 February 2018), Catherine Branson QC, retired Federal Court Judge and former President of the Australian Human Rights Commission said:

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Reluctance of this kind extends not only to those harassed but also to bystanders and witnesses to sexual harassment. The 'usual suspects' may be able to engage in inappropriate conduct because no one has stopped them. This may breed a culture of silence, in turn creating a culture of complacency when it comes to tolerating sexual harassment. In those ways, those engaging in sexual harassment may be protected by a culture of inaction.<sup>4</sup>

The New South Wales Bar Association

made a number of recommendations to the National Inquiry to address these issues, including:

- the SDA be amended to reflect the provisions of s 94 of the *Equal Opportunity Act* 2010 (Vic) and s 87(1) of the *Equal Opportunity Act* 1984 (SA) whereby the protections are not limited by the status of the persons involved but directed to the circumstances where the conduct takes place – i.e., at work.

- the SDA be amended to make it unlawful to cause, instruct, induce, aid or permit another person to engage in sexual harassment; and
- the introduction of a new provision in the SDA to provide for positive measures to be taken to eliminate sexual harassment.

Ongoing work is required to shift adverse stereotypical views and break the culture of silence. This work will involve legislative change as well as the effective enforcement of relevant professional conduct standards and policies. As the Sex Discrimination Commissioner says, sexual harassment in workplaces is everyone's business.

## ENDNOTES

- 1 New South Wales Bar Association Submission to the National Inquiry into Sexual Harassment (18 February 2019) [https://inbrief.nswbar.asn.au/posts/382308183e574d49c74b3e9609103aba/attachment/NSWBA\\_submission\\_AHRC\\_inquiry\\_sexual\\_harassment.pdf](https://inbrief.nswbar.asn.au/posts/382308183e574d49c74b3e9609103aba/attachment/NSWBA_submission_AHRC_inquiry_sexual_harassment.pdf)
- 2 <http://theconversation.com/australian-women-must-hold-their-nerve-until-justice-is-served-21464>
- 3 Chambers J 'The First Woman to Clear the Bar in New South Wales' [2010-2011] (Summer) *Bar News* p.99.
- 4 See e.g., Cunningham G: <https://theconversation.com/why-bystanders-rarely-speak-up-when-they-witness-sexual-harassment-85797>