



28 February 2019

**Submission to the National Inquiry into Sexual Harassment in Australian
Workplaces**

Submitted by:	Women Barristers Association (WBA)
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1. Introduction

Women Barristers Association (WBA) is an independent association of women at the Victorian Bar. It aims to:

1. Provide a professional and social network for women barristers;
2. Promote awareness, discussion and resolution of issues which particularly affect women;
3. Identify, highlight and eradicate discrimination against women in law and in the legal system; and
4. Advance equality for women across the legal profession generally.

WBA welcomes the opportunity to provide a submission to the National Inquiry into Sexual Harassment in Australian Workplaces.

It acknowledges the National Inquiry's Terms of Reference and its focus on the nature and prevalence of sexual harassment in Australian workplaces, the drivers of this harassment and the measures to address it.

WBA also acknowledges the submissions made by the Victorian Bar¹ and the Victorian Women Lawyers Association (**VWL**). The former submission addresses recent surveys, which have collected statistical data about sexual harassment at the Bar, and measures that have been taken at the Bar to address it. The latter submission contains extensive research and commentary, and proposes five (5) recommendations to address sexual harassment in Australian workplaces more broadly.

WBA generally endorses both of these submissions (except in relation to particular points outlined below) and welcomes the measures they propose to address sexual harassment against barristers and solicitors. In particular, WBA supports the following recommendations for reform made by VWL:

- (a) Recommendation 3 – abolishing or extending the time limits for a victim to make a complaint to Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) and the Australian Human Rights Commission (**AHRC**);
and
- (b) Recommendation 4 – enacting a standalone provision within the *Fair Work Act 2009* (Cth) relating specifically to sexual harassment within the workplace.

WBA submits, however, that notwithstanding existing mechanisms and the aforementioned proposals for reform, there are gaps in the protection available to women barristers who experience sexual harassment, which are outlined below.

¹ WBA refers to the submission made to the Law Council of Australia by The Victorian Bar Incorporated, contributing to the Law Council's submission to the AHRC National Inquiry into Sexual Harassment in Australian Workplaces.

In preparation for this submission, and following the receipt of statistical data about sexual harassment at the Bar, WBA sought written reflections of real-life personal experiences of sexual harassment from its members. Three written reflections were received.

While the responses are few in number, they provide illustrations of the harmful consequences and impacts of sexual harassment, and demonstrate some of the particular issues arising from the unique nature of employment as a barrister.

WBA responds below to Items 3, 4, 5, 6 and 7 of the National Inquiry's Terms of Reference.

2. The Nature and Prevalence of Sexual Harassment at the Victorian Bar – recent statistical data and personal reflections (Terms of Reference Item 3)

In 2018, two separate surveys were completed which collected information about the health and wellbeing of the Victorian Bar. Both sought data about the nature and prevalence of sexual harassment at the Victorian Bar.

2.1 Case for Change Survey

The *State of the Victorian Bar report* (completed in March 2018) presented an analysis of the State of the Victorian Bar based on the results of the *Case for Change* survey conducted in 2016-17 of responses from 627 members of Counsel, or **31%** of the total practising Counsel. Sixty-one percent (**61%**) of respondents were men, **39%** were women.

In relation to sexual harassment, the survey asked the following question:

In the last five years, do you believe you have been subjected to any of the following (all within the meaning of the Legal Profession Uniform Conduct (Barristers) Rules 2015)?

- *Discrimination*
- *Sexual harassment*
- *Workplace bullying*

The term “sexual harassment” is defined at r 125 of the Rules to mean “sexual harassment as defined under the applicable state, territory or federal anti-discrimination or human rights legislation”.

Thirty (30) percent, or 189 survey respondents, reported being subject to at least one instance of discrimination, sexual harassment or workplace bullying in the last five years.

Twenty (20) percent of women at the Bar and **1%** of men reported that they had experienced sexual harassment in the past 5 years. The overall percentage figure was 8%.

2.2 Quality of Working Life Survey

In June 2018, the Victorian Bar, in conjunction with the Health and Wellbeing Committee, conducted a “Quality of Working Life Survey” (the **QoWL Survey**). The Final Report and analysis were presented in October 2018.

The QoWL Survey was completed by 856 (of 2160) or **40%** practicing barristers.

Sexual harassment was one of four types of harassment examined in this survey (the others being discrimination, workplace bullying and judicial bullying).

Sixteen (16) percent of female barristers, and **2%** of male barristers reported they had been sexually harassed in the past year. In other words, women were eight times more likely to report that they had experienced sexual harassment than men.

Twenty-five (25) percent of female barristers, and **1%** of male barristers reported they had been sexually harassed in the past five (5) years.

Seven (7) percent of women barristers reported having been subjected to unwelcome sexual advances in the last year, **2%** reported unwelcome requests for sexual favours, **10%** reported unwelcome sexual conduct and **10%** some other form of sexual harassment.

WBA disagrees with the assessment in the Victorian Bar submission (para [10]) that rates of sexual harassment experienced by members of the Bar appear to be below those of the legal profession generally, in terms of women's experiences.

Rates of sexual harassment experienced by men do appear to be significantly below reported levels, and the 25% of women barristers who experienced harassment in the last five years is below the 39% figure in the 2018 Sexual Harassment Survey.² However, the figure in the QoWL survey of 25% of women reporting that they experienced sexual harassment in the past five years is consistent with the results of the Law Council's 2012 survey findings that **24%** of women between the ages of 25-44, and **27%** of women between the ages of 45-54 had experienced sexual harassment in their career. It is also consistent with the 2017 International Bar Association survey finding that 27% of women had experienced sexual harassment in the legal profession.

In the QoWL survey, respondents who considered themselves as belonging to an ethnic minority did not report markedly different rates of sexual harassment to other respondents (**9%** of respondents belonging to an ethnic group reported they had been sexually harassed in the past year compared to **7%** of respondents who did not belong to an ethnic minority.). However, the statistics for this category do not appear to distinguish between women and men, hence it is not possible to say what percentage comprises female barristers.

² <https://www.humanrights.gov.au/news/stories/everyone-s-business-2018-sexual-harassment-survey>

Respondents who were disabled reported twice the level of sexual harassment (**14%** of respondents identifying as disabled reported they had been sexually harassed in the past year, compared to 7% of respondents who did not identify as disabled). Nevertheless, these percentages reflected very low numbers (out of 14 respondents who considered themselves disabled, 2 reported they had been sexually harassed in the past year). Again, for this category, the statistics for this category do not appear to distinguish between women and men, hence it is not possible to say what percentage comprises female barristers.

As the Victorian Bar submission states, perpetrators of sexual harassment at the Victorian Bar were reported to be “predominantly internal to the Bar”. That is, sexual harassment at the Bar is predominantly by other barristers.

Two of the three women who provided personal reflections to WBA spoke of multiple experiences of sexual harassment by male barristers. These included the following:

Barrister A

About 10 years ago, when I had been at the Bar only a year or two, a silk many years my senior tried to kiss me at our floor Christmas party. By that, I mean that as he and I waited for a taxi at the end of the night, he put his arm around me, leaned down and tried to kiss me on my mouth. I immediately pushed him away and, through my shock and confusion, told him that it wasn't going to happen. The incident blindsided me and I was rattled. This was a much older man, married with adult children, and I had never shown any interest in him romantically whatsoever. On the contrary, our interactions had been purely professional and platonic.

....

At the next Christmas party, a year after the first, the silk once again tried to kiss me in a similar way and in similar circumstances. Again, I pushed him away and told him I wasn't interested. ...

In the years since those two incidents, I've come to appreciate just how unacceptable and inappropriate that the behaviour was.

...

I didn't report it at the time because, as I say, I managed to explain away the conduct. In particular, I accepted that this was what people had meant when they said things were tough for women at the Victorian Bar. I also told myself that I hadn't felt deeply traumatised at the time and therefore I hadn't been harassed or assaulted. ...

Barrister B

In the first year I was at the Bar a male barrister on my list found my address via the clerk's records and turned up at my house and called me from his mobile phone out the front of my house because he wanted to have a drink with me. He called me a few more times until I had to get my mentor to contact him and ask him to stop calling.

I overheard a group of male barristers talking about me at the Essoign club when I first came to the Bar. They were talking about which female barrister they would put on a calendar - as in, which female barrister for which month. One of them suggested January - [my name]; February - [my name], March - [my name], April - [my name]. Everyone thought that was hilarious.

A male barrister approached me at the Essoign Club when I was sitting with a group of friends and stood in front of me and said: 'I want to fuck you.' He then put his hand in the shape of a gun and pointed it at one of the male colleagues

I was sitting with and pretended to shoot him. A female barrister I was sitting with at the time discouraged me from reporting it because he was 'a really nice guy' when he wasn't drunk.

A QC (very elderly) that I had been regularly talking to at the Essoign invited me over to his place. My mentor said he was a great guy, no need to worry. I went there ever hoping that I might be able to get a junior brief. After dinner he lunged at me and kissed me.

...

These examples also demonstrate in graphic detail how intolerable and offensive sexual harassment is for female barristers.

3. Drivers of Sexual Harassment (Terms of Reference Item 3)

VWL at Part 3 of its submission sets out some of the key drivers of sexual harassment in the workplace. It is suggested that:

- (a) there is evidence indicating that workplace sexual harassment is experienced differently due to characteristics such as sexual orientation, cultural background, age and disability; and
- (b) some workplace characteristics such as after work social events, and after parties following end of year functions, the increased availability of staff via work phones and lap tops, and most significantly, the imbalance of power between men and women *increases* the risk of sexual harassment.

The Victorian Bar submission also refers to the issue of power as a driver of sexual harassment, including as reported in the Safework Australia study (2016) (cited at paragraph 11 of the submission).

However, the atypical nature of work at the Bar means that the findings of other studies as to the primary causes of harassment and bullying may not be directly applicable to the types of sexual harassment experienced by barristers, which generally occurs within the context of the unique relationships that exist between barristers, and between barristers and instructing solicitors.³ Additionally, the Safework Australia study considered “harassment” as defined more broadly as “unwelcome behaviour that intimidates, offends or humiliates a person” and may “target personal characteristics such as race, age, gender, disability, religion or sexuality”.

Notwithstanding the particular features of barristers’ working relationships, some of the characteristics cited above are reflected in both the survey statistics for sexual harassment at the Victorian Bar, and in the personal reflections.

Both Barrister A and Barrister B experienced sexual harassment as first year barristers, and from male barristers who were considerably older (“silks” or “QCs”).

Both also described their experiences at social events: “our floor Christmas party” (Barrister A); or “at the “Essoign club” (Barrister B).

The experiences of both Barrister A and B implicitly involve an imbalance of power between the male perpetrator and the female barrister.

The third personal reflection describes harassment experienced at an interstate legal conference dinner organised for members of the profession (a formal social event). This time it was by a male partner of a major law firm with a practice the barrister was targeting. The power imbalance is implicit: the barrister is seeking to develop her practice, and is targeting the work of the male partner’s legal practice:

³ See for example the Safework Australia survey cited at para [11] of the Victorian Bar submission.

I was at an interstate conference dinner for members of the profession held by the Law Council of Australia. I sat next to a top tier law firm partner on one side and a head of a major Federal regulator on the other side.

It became clear that the law firm partner had a leading practice in an area that I was targeting. I asked him how I would go about getting some briefs from the firm. He said to come in and present and if they liked me then they would use me. I agreed.

As the night went on he put his hand on my seat under my leg. I kept shifting across. The hand moved and I kept shifting until in the end I was on the edge of my seat which was quite uncomfortable because of the regulator to my right. I turned to him and said words to the effect - you know I'm only interested in the work don't you. He said words to the effect - oh but you offer so much more. I said - what I mean is you've got your hands all over me. He said - I'm sorry.

The barrister opposite me - a young woman - kept asking me under her breath if I was ok. I said yes.

The next day I acted as though nothing had happened as I didn't want him to think he had got to me and I still wanted the opportunity. He said - are you still coming in to present. I said - of course.

I organised the presentation. We have subsequently met for coffee and still no briefs.

I saw him again about two weeks ago at a dinner. I held out my hand to shake his and he insisted on kissing me on the cheek. I now have no expectations of getting any work from him.

4. *The impacts on individuals of sexual harassment (Terms of reference Item 6)*

Many of the impacts of sexual harassment on barristers are those that are experienced by other victims of sexual harassment in other workplaces, namely stress, anxiety and mental health issues. However, there are some impacts that are particular to the work environment and circumstances of barristers and share similarities with the impacts of harassment on those who are self-employed.

Being self-employed, barristers do not have the benefit of recreational or sick leave entitlements. This means that if a barrister suffers stress-related illness due to sexual harassment necessitating time away from work, she will earn no income for the period that she is away from the workplace.

Those barristers experiencing sexual harassment are also required to navigate a series of occupational issues and hurdles that arise as a result of the sexual harassment.

For example, a barrister briefed in a matter who is experiencing sexual harassment from another (likely more senior) barrister engaged on the matter, or from an instructing solicitor, will often need to adopt a series of strategies to negotiate or avoid further harassment, in addition to managing the ordinary legal issues and complexities arising from work as a barrister. Barristers may also not receive a brief, or suffer the loss of on-going briefs, from a particular instructor should she not remain silent or complicit in the sexual harassment.

Some of the complexities involved in responding to sexual harassment, caring for oneself, and at the same time maintaining working relationships and sources of work include:

- how to avoid being left alone with the harasser, particularly where long and late hours are common;
- how to maintain a productive working relationship with a harasser in a way that will not jeopardise the interests of the client;

- how to sensitively or tactfully “knock back” an unwelcome sexual advance or comment in circumstances where the barrister wants to maintain a relationship with the harasser as a source of work or referrals for work;
- how to respond to unwanted sexual comments or invitations in a way that is not likely to cause offence but is also not perceived as “welcoming” or encouraging the unwanted conduct.⁴

Some of these issues are highlighted in the reflections sent to WBA, for example:

Barrister A (sexual harassment by another barrister):

I was and still am a junior barrister and he was and still is a silk. I am trying to establish my career and my standing amongst my peers. I want to be known only for the quality of my work. I don't want to be known as the woman who complained about a silk.

Barrister C (sexual harassment by a solicitor in a social setting):

I was very embarrassed, confused and humiliated. It left me questioning whether I had done anything wrong in striking up a friendly conversation with someone next to me at a dinner and making it clear that I was keen on the work.

I was confused because I wanted the work, and still do. I tried to form a relationship with other members of his team, female, but that didn't really work. I think he holds the power.

As well as the tangible physical and mental impacts of sexual harassment, harassment results in an untold number of productive hours being lost by barristers worrying

⁴ A recent episode of podcast “Witch Hunt”, *Why can't we stop sexual harassment in the workplace?* (30 Nov 2018) discussed the fact that it is common in sexual harassment cases for people subjected to sexual harassment to have attempts to placate or deal amicably with a harasser to have their words used against them as evidence that they have encouraged the harasser's conduct.

about how to negotiate the minefield of a harassment situation and take steps to avoid further harassment.

It may also lead to victimisation whereby women lose out on work because they speak up.

As Barrister C commented in her submission:

It's very complex for the Bar to do anything about this. The difficulty with the Bar is that women are subject to market forces in a way that women in firms and companies are not. Women in firms can be the subject of programs to assist and promote them and make sure they get opportunities. As sole traders and independent contractors, women at the Bar cannot be assisted in the same way under the current structures. There is also no financial incentive for barristers to work together to improve things for other barristers.

5. Remedies (Terms of Reference Items 4, 5 and 7)

The Victorian Bar submission at paragraphs 13 to 21 outlines some of the mechanisms which are available to barristers who have been subjected to sexual harassment. They include:

- disciplinary action which may be taken against a perpetrator for breach of the *Legal Profession Uniform Conduct (Barrister) Rules 2015*. The Rules state at cl 123(b) that “a barrister must not in the course of practice, engage in conduct which constitutes sexual harassment”. The term “sexual harassment” takes its definition from state, territory and federal anti-discrimination legislation;
- mechanisms established under the Policy against Sexual Harassment which include an internal grievance procedure (where a complaint is investigated and

responded to by the Bar, and a conciliation process performed by trained Bar conciliators.

WBA supports and applauds the Victorian Bar's adoption of the Policy against Sexual Harassment and the appointment of internal Bar Conciliators to deal with complaints of sexual harassment. These are important and necessary innovations.

In WBA's submission, however, some of the mechanisms referred to at paragraph [18] of the Victorian Bar submission, in terms of complaints to the AHRC and the VEOHRC *may* not be necessarily available to barristers because they do not fall within the categories of relationships covered by the legislation addressing sexual harassment.⁵

This is because the Victorian Bar is an atypical workplace. Barristers are sole traders. That is, the typical relationships protected by existing anti-discrimination such as employer/employee, partnerships and independent contract relationships do **not** exist *between* barristers or *between* barristers and solicitors prior to a formal retainer being entered. It is only when retained by a solicitor that barristers become independent contractors.

At Part 4 of its submission, VWL outlines the current legal framework with respect to sexual harassment.

In broad terms, and relevantly, the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic) prohibit sexual harassment of employees, job applicants, contract workers, partners of firms, commission agents and 'workplace participants'.⁶

More specifically, in respect of "workplace participants":

⁵ See generally *Australian Human Rights Commission Act 1986* (Cth), s 11; *Sex Discrimination Act 1984* (Cth), div 3 of Part II (re sexual harassment); and the *Equal Opportunity Act 2010* (Vic) at Part 6.

⁶ See *Sex Discrimination Act 1984* (Cth) at s 28B and *Equal Opportunity Act* at ss 93 and 94.

- s 28B(6) of the *Sex Discrimination Act* makes it unlawful for a “workplace participant” to sexually harass another workplace participant at a place that is a workplace of either or both of them. While “workplace” is broadly defined to mean “a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant”, the definition of “workplace participant” is confined to mean any of (a) an employer or employee, (b) a commission agent or a contract worker, or (c) a partner in a partnership;
- s 94 of the *Equal Opportunity Act* makes it unlawful for “a person to sexually harass another person at a place that is a workplace of both of them”. For the purposes of this provision, it is irrelevant that each person is an employer, an employee or neither, and “workplace” is defined to mean “any place where a person attends for the purpose of carrying out functions in relation to his or her employment, occupation, business, trade or profession and need not be a person’s principal place of business or employment”. However, while clearly broader than the SDA, and therefore more useful for barristers, the definition of the workplace must be “of both of them”.

Sections 28G of the *Sex Discrimination Act* and s 99 of the *Equal Opportunity Act* are also potentially relevant: in summary, these provisions make it unlawful to sexually harass in the course of providing, or offering to provide, or receiving, goods and services.

WBA submits that there would be no protection under *Sex Discrimination Act* for barristers unless the sexual harassment occurs in the context of a formal retainer, by the solicitor (ss, 28B, 28G). Thus there would be no protection for barristers who are sexually harassed by other barristers or by solicitors where there is no formal retainer as s 28B does not offer protection.

There *may* be protection under s 94 of the *Equal Opportunity Act* if the harassment occurs in a “a workplace of both of them”. However, while this phrase has been

broadly defined to include formal social functions, it must be a *common* workplace. Hence, an incident of sexual harassment that occurs at court, or at a formal networking or law conference event, by a barrister, or a solicitor prior to any formal engagement (for example Barrister C above), *may* be covered by the *Equal Opportunity Act*. However, even construing the term broadly (as beneficial legislation must be) the term *may not* be sufficiently broad to cover harassment that occurs when the barrister is working from home (or is simply at home when the harassment occurs), if it occurs in a senior barrister's chambers, or if it occurs in less formal work places (informal coffee meetings or after work drinks). Those places may well not be a "workplace of both of them".

Thus, Barrister A and Barrister B may not be protected in respect of several incidents of sexual harassment described above including the following:

...as he and I waited for a taxi at the end of the night, he put his arm around me, leaned down and tried to kiss me on my mouth. I immediately pushed him away and, through my shock and confusion, told him that it wasn't going to happen. (Barrister A)

...In the first year I was at the Bar a male barrister on my list found my address via the clerk's records and turned up at my house and called me from his mobile phone out the front of my house because he wanted to have a drink with me. He called me a few more times until I had to get my mentor to contact him and ask him to stop calling. (Barrister B)

A QC (very elderly) that I had been regularly talking to at the Essoign invited me over to his place. My mentor said he was a great guy, no need to worry. I went there ever hoping that I might be able to get a junior brief. After dinner he lunged at me and kissed me. (Barrister B)

WBA submits there is a real question about whether barristers are *adequately* protected by existing laws in respect of the most prevalent form of sexual harassment,

namely by other barristers. There may also not be inadequate protection where the harassment is perpetrated by solicitors prior to a formal retainer being entered into.

WBA urges that consideration be given to amending both the *Sex Discrimination Act* and the *Equal Opportunity Act* to expressly and explicitly protect provide a statutory remedy in respect of sexual harassment of barristers by other barristers, and of barristers by solicitors outside of the context of a formal retainer, rather than leaving it necessary to shoehorn incidents of sexual harassment into the existing categories of relationships in the *Equal Opportunity Act*. These protections should extend to all persons who are self-employed and may therefore not be covered by existing protections.

Barristers' most prevalent experiences of sexual harassment in the workplace ought be protected by the statutory complaint mechanisms that exist for most other workers irrespective of where the harassment takes place.

We therefore urge the consideration of amendments to the existing statutory provisions to fully cover these relationships.

Cultural change and education (Terms of Reference Item 7)

WBA also believes that cultural change is an important tool in addressing the issue of sexual harassment. The #MeToo movement has generated broad discussion within the community about sexual harassment, and the serious implications for individuals and organisations. These discussions have had the effect of raising awareness within the legal community about what constitutes sexual harassment, and its harmful effects.

In the interests of continuing this raising of awareness, WBA supports the Victorian Bar's commitment to continuing professional development and education about sexual harassment. This should extend to a relevant component covering sexual

harassment, its definitions, consequences, and mechanisms for dealing with it, in the bi-annual Readers' Course which is undertaken by all Victorian barristers.

WBA also recommends making continuing professional development in relation to sexual harassment (together with bullying and discrimination) a compulsory component of all barristers' continuing professional development requirements.

Developing a culture where sexual harassment is discussed openly and identified and treated appropriately where it is occurring, is vital to addressing the problem. Those who experience sexual harassment should know that it will not be tolerated and that they will be supported in making complaints, while those who observe sexual harassment occurring should be willing and encouraged to provide support to those who experience it.

The AHRC survey found that sexual harassment was witnessed by another person in 40% of cases but the majority of those who did so took no action in relation to the harassment witnessed. WBA believes that programs within the Victorian Bar (and other workplaces) should also focus on the important role played by bystanders in identifying and calling out sexual harassment as and when it occurs.

