



**SPRINGVALE MONASH
LEGAL SERVICE Inc.**

Celebrating 40 years of Working for Justice

SUBMISSION

Prepared by Springvale Monash Legal Service for the

**AUSTRALIAN HUMAN RIGHTS COMMISSION,
NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES**

Date submitted: 27 February 2019

Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong and its surrounds. The City of Greater Dandenong is the second most culturally diverse municipality in Australia, and the most diverse in Victoria. People from over 150 different countries reside in Greater Dandenong and 60% of the residents were born overseas. It also has highest number of resettlements from newly-arrived migrants, refugees and asylum seekers in Victoria. Data from the 2011 Census revealed that Greater Dandenong was the second most disadvantaged LGA in Socio-Economic Indexes for Areas (SEIFA) ratings.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

Terms of Reference:

1. A national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by 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 use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment
4. The drivers of workplace sexual harassment, including whether:
 - 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
 - Some workplace characteristics and practices are more likely to increase the risk of sexual harassment
5. The current legal framework with respect to sexual harassment
6. existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health and the economic impacts of such workers compensation claims, employee turnover and absenteeism and
7. recommendations to address sexual harassment in Australian workplaces.

Acronyms:

SMLS: Springvale Monash Legal Service

INTRODUCTION

SMLS offers an employment law clinic for members of the community seeking advice and support with concerns about unfair and unlawful dismissals and a joint sexual assault clinic in conjunction with the South East Centre Against Sexual Assault. The latter involves advice and support for victim survivors of sexual assault and options for compensation through the Victims of Crime Assistance Tribunal. SMLS also provides outreach services at the Fairwork Commission headquarters in Melbourne CBD and for international students in employment law matters at a student hub also located in the city. It is primarily through these programs that SMLS sees clients in relation to sexual harassment in the workplace.

RESPONSES TO TERMS OF REFERENCE

1. A national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces, by sector

SMLS has offered general advice and legal assistance in discrimination matters in relation to sexual harassment in the workplace and advice and legal assistance with victims of crime applications for sexual harassment and sexual assault in the workplace. The numbers of these matters are not large and we believe there are a range of reasons for this which we will discuss below.

Given SMLS's location in the most multicultural local government area in Victoria, many of our clients are from non English speaking backgrounds and have lived in Australia for varying periods of time from new arrivals to immigrants from the early 1950's. The nature of this community is that people find themselves in workplaces where they may not understand their workplace rights or the tenure of their employment is uncertain and shaky. Many have a strong desire to do anything that will protect their employment so they can support their families both in Australia and in their home countries.

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

Community members in the sex industry within the SMLS catchment area have reported that social media has been used to 'out' their past when they have moved into other areas of employment. Given the anonymity of social media it can be very hard for the victim in these instances to trace the original perpetrator. The ease of social media means that victims of sexual harassment can be victimised many times before they can seek to have the post removed or trace the person behind the harassment. The effect can be that their security in their new employment can be taken from them. In some cases, it has been a colleague in the new workplace who has threatened the victim with the 'outing' in return for favours. This conduct can have a major impact on the victim's future employment prospects.

SMLS can understand the reasons these clients are reluctant to formalise their complaints. They have experienced their complaints not being taken seriously by people in authority including police and members of the judiciary.

3. The use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment

SMLS has assisted many newly arrived community members who operate as sub-contractors who are often discriminated against due to their 'difference' and lack of knowledge of their rights. This can include non-payment of work performed, being subject to inappropriate behaviours and threats not

to report these behaviours. Social media is the means by which these clients make contact with their 'workplaces', quite often through Gumtree. They often do not know the names and addresses of the contractors and their only means of contact are through text messages or online chat platforms. Once discriminated against, it is very hard to trace the perpetrators of that conduct. This means it is almost impossible to seek action against the perpetrators. Even if a company name is known, by the time a complaint is made, that company is often no longer trading and cannot be contacted or held accountable.

4. The drivers of workplace sexual harassment, including whether:

- **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**
- **Some workplace characteristics and practices are more likely to increase the risk of sexual harassment**

Research suggests that ethnic minorities experience more sexual harassment than the dominant ethnicity¹. Importantly, as discussed by Fielden et al, sexual harassment is often of a different nature, due to the racialisation of sexual harassment experienced by racial minorities². Victims often report encountering sexual harassment that they believe they would not experience if they were not a member of their specific ethnic group³. This increased rate of sexual harassment can be partially attributed to assumptions regarding the intersection of sexuality and ethnicity; for example, the stereotype that Asian women will stay silent about sexual harassment due to cultural values of honour⁴. Similarly, sexual harassment is more commonly experienced by LGBTQIA+ people⁵. Again, this often differs from sexual harassment experienced by heterosexual and cisgender people; a 2018 study showed that a significant part of this LGBTQIA+ specific sexual harassment is 'gender-policing', where traditional gender norms are reinforced through sexual harassment⁶. As such, 'masculine' women and 'feminine' men report more sexual harassment⁷, as do non-binary individuals⁸. Interestingly, gender-policing was not deemed 'harmful' by the study's participants, contrary to prejudice- or power-based sexual harassment⁹. Participants found sexual harassment of transgender people more prejudice-based and less acceptable than sexual harassment of gay and lesbian people, indicating a failure to understand the specific kind of prejudice involved in the sexual harassment of gay and lesbian victims¹⁰.

¹ Sandra L Fielden et al, 'A Model of Racialized Sexual Harassment of Women in the UK Workplace' (2010) 62(1-2) *Sex Roles*, 21

² *Ibid* 27

³ *Ibid*

⁴ *Ibid*

⁵ Australian Human Rights Commission (AHRC), *Everyone's business: Fourth National survey on sexual harassment in Australian workplaces* (2018), 8, 21, 22, 23

⁶ Sheila T Brassel, Isis H Settles and Nicole T Buchanan, 'Lay (Mis)Perceptions of Sexual Harassment toward Transgender, Lesbian and Gay Employees' (2018) *Sex Roles* 1, 3.

⁷ *Ibid*

⁸ AHRC, above n 5, 21

⁹ Brassel, Settles and Buchanan, above n 6, 10.

¹⁰ *Ibid*, 9

Oftentimes, sexual harassment is conceptualised as a product of structural hierarchies within an organisation that promote abuse of power¹¹, implying that more senior employees encounter less sexual harassment. Conversely, in Wynen's study of the Australian public service, women aged 30-44 in positions of authority were in fact more likely to be harassed¹², a trend that does not exist for males¹³.

This can be explained by the power-threat theory, whereby women in supervisory roles are seen as a threat to men's power, and thus become subject to higher rates of sexual harassment¹⁴. Additionally, men who fear they are underperforming are more likely to partake in sexual harassment¹⁵, further reinforcing the power-threat model.

This demonstrates that social and cultural factors outside the workplace play a significant role in the prevalence of sexual harassment. As discussed above, the very nature of the community that SMLS serves there are a significant number of clients who come from a culturally and linguistically diverse (CALD) background. Being from different minority groups mean they will face a range of factors which impact their employment. They may not understand due to language difficulties, what their rights to a safe working environment are, the codes of conduct that are acceptable in a workplace, how to complain when faced by poor behaviour from a colleague, particularly if that co-worker is competent in English and most importantly fearing for their ongoing employment if the poor behaviour that they are subjected to is from an employer or someone in management within the workplace.

The number of cases SMLS has assisted in the area of sexual harassment in the workplace is small, given the number of clients assisted overall. SMLS' experiences support the research quoted above, in that the majority of cases have involved women from the dominant culture and within an age range of 25 – 40years. Additionally, SMLS' comments in this submission come from anecdotal experience and our in depth knowledge of the community rather than direct case management.

For example, there have been a range of cases of women experiencing behaviour that constitutes sexual harassment as defined in the *Sexual Discrimination Act (SDA)*¹⁶ and the Equal Opportunity Act (Vic) (EOA).¹⁷ These have included unwanted sexual advances, use of lewd comments and advances, inappropriate behaviour outside of the workplaces as in conferences, training sessions and social gatherings to the more serious criminal behaviours of sexual assault and rape.

One client was sexually harassed by a work colleague. The male colleague had been at that workplace for some time and seemed to believe he could behave as he wished. The client made a complaint in relation to sexualised comments, sexual harassment she experienced at the hands of this colleague. Management did not take her complaint seriously in fact minimising the behaviour saying "you know how boys are".

SMLS understands the rationale that cases can be confined to this narrow group of clients as they can be in positions where they understand what behaviour is acceptable in the workplace and feel secure

¹¹ Jan Wynen, 'Sexual Harassment: The Nexus Between Gender and Workplace Authority: Evidence from the Australian Public Service' (2016) 75(3) *Australian Journal of Public Administration* 345, 346

¹² Ibid, 353

¹³ Heather McLaughlin, Christopher Uggen and Amy Blackstone, 'Sexual Harassment, Workplace Authority, and the Paradox of Power' (2012) 77(4) *American Sociological Review* 625, 632, 635, 637

¹⁴ McLaughlin, Uggen and Blackstone, above n 13, 626; Wynen, above n 11, 347

¹⁵ Leah R Halper and Kimberly Rios, 'Feeling Powerful but Incompetent: Fear of Negative Evaluation Predicts Men's Sexual Harassment of Subordinates' (2018) *Sex Roles* 1,5

¹⁶ *Sexual Discrimination Act 1984* (Cth), s 28A

¹⁷ *Equal Opportunity Act 2010* (Vic)

and confident enough to make a complaint. That is not to say that SMLS clients have not suffered greatly as a result of the sexual harassment which we will discuss further, it is simply an explanation.

For those community members not of the dominant ethnic group, work security is particularly important for those trying to establish themselves in a new community that may have different community expectations and different cultural and religious norms. SMLS understands that these community members can also experience sexual harassment in their workplaces and why they feel they cannot complain or take legal action against that behaviour.

SMLS has also assisted clients with disabilities as it has been a partner with SECASA and Victoria Police in a multi-disciplined project. Clients with a disability face discrimination due to their disability and they often need to rely on work colleagues in order to function in the workplace. This can put them in a position of vulnerability with those co-workers and management. Being able to complain and being taken seriously when they do complain are common concerns we have heard from clients.

Types of workplaces that exist in our community are also worth discussing. Many newly arrived community members find themselves in low skilled workplaces even if they have qualifications from their home countries. These include low skilled workplaces such as factory work, hospitality, home care and cleaning.

Clients fear losing their employment if they complain. Such was the case for Client 2 who raised the sexual harassment during a conciliation at the Fair Work Commission hearing. This had not been the first time she had experienced sexual harassment in this workplace but she felt she had to complain when it happened again. As she feared, she was dismissed from her employment after making the complaint. The employer claimed her dismissal was due to poor performance. Although the matter settled at conciliation, Client 2 still suffers from mental health issues as a result of the behaviour she was subjected to and the impact of the dismissal from her employment.

5. The current legal framework with respect to sexual harassment

Jurisdictions

SMLS has assisted clients to deal with sexual harassment complaints through a range of legal procedures. Where a police complaint has been made, clients can make a Victims of Crime application through the Victims of Crime Tribunal. This is likely to be more successful where a conviction has been recorded. If there is no police report, there is very little likelihood of success. This is the case even in matters dealing with historical abuse.

The alternate ways SMLS has dealt with sexual harassment complaints is through a complaint to the Victorian Equal Opportunity Commission, the Australian Human Rights Commission or as part of a workplace action for unfair dismissal or general protections application at Fair Work Commission. Compensation can be awarded if successful.

MacDermott argues that the type and quantum of compensation awarded produces unfair outcomes and contributes to a lack of a deterrence¹⁸. MacDermott acknowledges that even though there has been a recent shift towards increasing damages¹⁹, courts and VCAT often undervalue the impact of sexual harassment on victims.

¹⁸ Therese MacDermott, 'Reassessing Sexual Harassment: It's Time' (2015) 40 *Alternative Law Journal* 157, 157-158.

¹⁹ See, eg, *Richardson v Oracle Corporation Australia* (2013) 232 IR 31

Process

The latter two can involve hearings using telephone hearings which for some clients have been more beneficial as they have not had to come face to face with the perpetrator or management representative who they believe have let them down. Skilled conciliators are able to move to private sessions to minimise any further trauma inflicted by the process.

Having complaints dealt with in a timely manner is a commonly heard concern about both jurisdictions. This can sometimes be outside the control of the conciliator. For example, in large workplaces a complainant may not know the name of the perpetrator, particularly where there are many employees who are casual or on short term contracts. It is then up to management to fulfil their responsibility in investigating the complaint at the workplace. Some workplaces take this responsibility more seriously than others, with some minimising the impact of the conduct. This was the situation for a client who was sexually assaulted by more than one Client 3. The workplace deemed the victim was mentally unstable enabling the supervisor in the workplace to not take her complaint seriously or provide details of co-workers to the police during their investigation. As such no charges were laid.

In another case, the perpetrator left the workplace and the small country town as soon as the client (Client 4) informed her employer of the sexual harassment. The employer felt there was no need to investigate further.

For many clients, formalising the complaint can be very stressful, then if the legal process is slow and drawn out then some clients decide not to proceed as they feel their health cannot withstand the further stress. Even when they do proceed, the impact of the process on their health can be significant. Clients have reported that they simply wanted to be heard and believed. Compensation was secondary. When confidential settlements are reached the client can be prevented from sharing their experiences and therefore not prevent the behaviour happening to others.

FWC require both parties to respond and participate in the conciliation. Sexual harassment complaints can be made in conjunction with broader complaints of bullying. When this occurs the sexual harassment can be overlooked when remedies are being considered.

6. existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally the impacts on individuals and business of sexual harassment, such as mental health and the economic impacts of such workers compensation claims, employee turnover and absenteeism and

Contemporary literature suggests 'no tolerance' policies and an internal complaint system for affected people demonstrate to employees that formal reports are treated seriously and will be dealt with in a professional and considerate way²⁰. While the number of formal reports continue to be an inaccurate representation of the actual number of incidents²¹, those that are reported through an

²⁰ AHRC above n 5, 29-31; C M. Hunt et al, "Reviewing sexual harassment in the workplace – an intervention model" (2010) 39(5) *Personnel Review* 655, 667; Patricia Wise, *Harassment in the workplace: sexual, racial and religious complaints* (Thompson Information Services, 2013), 23,24

²¹ Paula McDonald, Sara Charlesworth, and Somali Cerise, 'Below the "tip of the iceberg": Extra-legal responses to workplace sexual harassment' (2011) 34 *Women's Studies International Forum* 278, 278-280; Hunt et al, above n 24, 658

internal complaint system are often finalised promptly²², suggesting that the procedure itself is effective to some extent. A commitment to both elements ensures that every employee is treated with respect, which is critical in preventing an intimidating environment where sexual harassment is likely to occur²³. As discussed above, the longer-term impacts of sexual harassment in the workplace can be considerable. Those who have been harassed can take some time to report the incident resulting in mental health issues that can be exacerbated if the behaviour continues. Other workers can see how seriously management takes complaints and this can impact their desire to continue their employment or their commitment to that employer and employment.

Clients have spoken of the importance of being believed in the workplace and this sometimes can happen if there is a designated HR department that follows procedures. There are many workplaces however that do not have designated personnel or policies and procedures to cover these situations. The most stressful for victims are the workplaces where the perpetrator is part of management and is simply told not to tell anyone for fear of losing their job. Clients have reported that it is only where the victim receives support from other colleagues who can call in Worksafe investigators or union representatives to investigate the culture of the workplace, that they feel they can report the abuse.

7. Recommendations to address sexual harassment in Australian workplaces.

- A. Organisational culture and procedures: Whilst clear policy and organisational culture are fundamental, their existence alone is insufficient to render an appropriate response to sexual harassment²⁴.

SMLS supports the development of specific policies and procedures for dealing with workplace sexual harassment. Employers should ensure all employees know that they are working in a safe environment and should they not feel safe, then complaints are welcomed and dealt with quickly and efficiently. The employer will support any investigation both internally and externally and if the sexual harassment is serious, then support police investigations. Co-workers should be encouraged to report inappropriate behaviour that they overhear or witness, with no repercussions.

- B. Specific Training on sexual harassment: A major deterrent for victims to report sexual harassment is an unclear understanding of behaviours that constitute sexual harassment and to whom sexual harassment complaints are to be made²⁵. Effective training involves up to date and consistent workshops to clarify these areas of weakness. Employers make the error of running one-off workshop sessions, assuming that this amounts to adequate training²⁶. Regular training, right from an employee's induction, emphasises the company's view on the seriousness of sexual harassment and continually reinforces what is acceptable in the workplace²⁷.

²² McDonald, Charlesworth, and Cerise, above n 25, 285

²³ Paula McDonald, 'Workplace sexual harassment 30 years on: A review of the literature' (2012)14 *International Journal of Management Reviews* 1, 10

²⁴ McDonald, Charlesworth, and Cerise, above n 25, 280

²⁵ Ibid 285

²⁶ Lori Widmer, 'Combating sexual harassment in the workplace' (2018) *Risk Management* 31,34

²⁷ McDonald, Charlesworth, and Cerise, above n 25, 285; AHRC, above n 5 10,32; Hunt et al, above 24, 661

SMLS supports compulsory training for employers and employees to ensure sexual harassment free workplaces with a particular reference to including sexual harassment in all training related to violence against women.

- C. Specialised training should also be provided to supervisors and risk managers who will be the point of contact for sexual harassment reports²⁸. This will enable consistent and fair responses to allegations²⁹, including proper counselling for victims and fitting punishments for perpetrators³⁰. A large part of the culture a workplace fosters depends on the people of that environment. Ultimately, preventative steps will be much more effective and demonstrate a proactive, rather than reactive approach to preventing sexual harassment³¹.

SMLS strongly supports a system that reduces the burden on victims. When a complaint is made an investigation must be commenced as soon as possible, protecting the victim's privacy as much as possible. Interim measures should be employed to support the complainant, including ensuring that workplace is a safe workplace (which may require making alternative arrangements for the individuals involved in the complaint). Referrals to counselling services should be facilitated by the workplace with time allowed to attend such counselling.

This would require an expansion of government funded counselling services for people experiencing sexual harassment in the workplace.

- D. Regulatory bodies: SMLS' experience has been that cases have taken considerable time to reach an outcome. This is often due to the resourcing of the regulatory bodies with conciliations often taking 3 – 4 months before a hearing date is scheduled. Increased roles for regulatory bodies to hold workplaces to certain standards, including the need for investigatory officers and compliance officers, would be needed.
- E. Responsibility of employer for actions of employees: SMLS believes the employer should be held responsible for the actions or conduct of its employees. This could include a fine placed on a workplace that does not protect an employee from workplace sexual harassment. The employer may have a series of tasks it has to undertake as in development of training, changes in procedure etc within a designated period of time. The workplace would then be inspected to ensure those requirements had been met.
- F. Remedies: SMLS would like to see the various regulatory bodies being able to make binding determinations and enforceable orders.

²⁸ Hunt et al, above n 24, 661, 663.

²⁹ McDonald, Charlesworth, and Cerise, above n 25, 285

³⁰ Hunt et al, above n 24, 668

³¹ Hunt et al, above n 24, 661, 668; McDonald, above n 27, 9