National Inquiry into Sexual Harassment in Australian Workplaces

Submission by Susan Price

28 February 2019

I am an employment lawyer with over 25 years' experience, and have acted for employers and employees in matters where sexual harassment at work was alleged. That work has included running matters from inception and initial advice, through to fully defended Court hearings in the Federal Court and Federal Circuit Courts, and equivalent State tribunals. I have also developed and delivered training sessions on sexual harassment laws in a variety of workplaces.

I contributed to the submission made to this Inquiry by the Women Lawyers Association of New South Wales WLANSW), but make this submission in my personal capacity. I support the recommendations made in the WLANSW submission and will not repeat them here.

What I do want to cover goes to matters the need for additional judicial education to allow decision making to occur in a way that is alive to issue of gender-based violence and power dynamics, and the need for consideration of defamation law reform in the light of recent court cases where such actions have been brought based on the publication of details about sexual harassment allegations, and then finish with my practical observations of access to justice challenges.

Role of the Judiciary as standard setters

It was of great concern to me in the recent defamation case involving Geoffrey Rush to see reports in media outlets such as the Australian Financial Review[1] relaying comments that the presiding Judge had apparently made during the defamation trial.

Those comments as reported included things like:

- He was struggling to see anything sinister in a flirting text sent by Geoffrey Rush to his former King Lear co-star
- He had difficulty reading anything into the possibility that Mr Rush might have called the actor involved "*yummy*" and "*scrumptious*"
- He could not give any weight to a line about Mr Rush's reputation
- He was concerned about the absence of any corroborating witnesses for many of the incidents of "*inappropriate*" conduct and sexual harassment alleged by the actor
- Querying what an emoji might have inferred, and when being informed it was an invitation, replying "*Are you seriously suggesting he is expecting to have some sort of affair with her. That's bizarre*"
- Saying he "*would not say yummy or scrumptious in my workplace, but I am a boring lawyer*."

It struck me that in a courtroom where the judge was male, and senior counsel appearing for the parties were male, what might seem incomprehensible and hard to understand for senior male figures in the legal profession, was in fact very believable and could have been familiar and well understood by many female members of the legal profession.

This is borne out by the survey conducted by WLANSW into experiences of sexual harassment in the legal profession which found that 71% of the 242 respondents reported that they have been sexually harassed at work while engaged in the legal profession. However, only 18% had ever made a complaint to their employer.[2]

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[1] "Nothing wrong with Rush calling co-star 'yummy' says judge'" Australian Financial Review, published 7 November 2018 and accessed at https://www.afr.com/business/legal/nothing-wrong-with-rush-calling-costar-yummy-says-judge-20181107-h17lke

[2] Full details of the WLANSW survey can be found in the WLANSW submission to this Inquiry.

NSW Law Society reported last year on the results of the International Bar Association survey conducted in 2017, and the Australian results from around 1,000 lawyers who participated in that survey, and reported[3]:

> *"The IBA's Legal Policy and Research Unit has collated responses from the 1,000 Australian lawyers involved in the survey and revealed them exclusively to LSJ for this story. Alarmingly, the data shows sexual harassment is occurring at an even higher rate in Australia than the rest of the legal world. About one third (37 per cent) of Australian lawyers reported experiencing sexual harassment."*

Again, as reported in the Law Society Journal

> "*Studies have shown this is a familiar story. The Law Council's 2014 National Attrition and Re-engagement Study (NARS) found that one in four Australian female lawyers had experienced sexual harassment at work. Researchers found the experience was one reason more than one in three women said they were considering a new job in the next five years."*

Give the prevalence of sexual harassment within the legal profession, comments made by a presiding judge that suggested he himself was not familiar with the indicators of what sexual harassment may look or feel like, or was making a comparison based on his own workplace experiences, are out of touch, and send a message to those in the courtroom and beyond it, that the law is not keeping up with societal experiences and expectations in this area.

The challenge then becomes how to bring this lived experience into the court room where men are still overrepresented in terms of judicial appointments, and at the Bar, where currently in NSW women comprise under 12% of Senior Counsel and just over 23% of junior counsel.[4]

In terms of the gender split of judges, the ABS records[5] show that:

> *In 2018 there were 56 female and 100 male Commonwealth Justices and Judges. Male Federal Court Justices/Judges outnumber female Justices/Judges by three to one (75% compared with 25%), however the proportion of High Court Justices was much closer to parity (57% male and 43% female).*
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> *In the State Supreme Court and Court of Appeal in 2018, there were 42 female and 132 male Justices/Judges (24% and 76% respectively).*

While I am not suggesting that male judges do not "*get it*" and female judges "*do*" as experiences and understanding will vary across all judges irrespective of gender, the very existence of such an unbalanced gender composition in the judiciary is itself a factor to consider in what the range of experiences on the bench are, and how to raise all to a level of understanding of the drivers behind sexual harassment.

One option is for there to be judicial education to raise awareness and understanding of gender inequality, and how this plays out across a number of different areas including sexual harassment.

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[3] #TimesUp for the legal profession, report by Kate Allman, Law Society Journal 27 November 2018 accessed at https://lsj.com.au/articles/timesup/

[4] Figures from the NSW Bar Association Statistics accessed at https://www.nswbar.asn.au/the-bar-association/statistics

[5] ABS 4125.0 - Gender Indicators, Australia, September 2018, *Democracy, Governance and Citizenship*

That education should be conducted through the Judicial Commission of New South Wales, and equivalent Federal and State bodies. I would argue that educating judicial officers in matters of gender quality is squarely within the remit of these bodies, as the Judicial Commission states it is "*designed to enhance public confidence in the judiciary by promoting the highest standards of judicial behaviour and decision making"* and is concerned with

- *"promoting high standards of judicial performance*
- *assisting in the development of appropriate judicial skills and values*
- *keeping judicial officers up-to-date with current legal developments and emerging trends."6*

The administration of justice must keep up with changing social expectations.

Any education that is carried out needs to be framed in the broader context of addressing gender inequality, and not just be focused on understanding the dynamics of sexual harassment.

A number of recent events have brought domestic and family violence, sexual assault, and sexual harassment much attention and pushed the issues more squarely into the public arena. The tragic murder of Rosie Batty's son brought national attention to domestic and family violence, the #metoo movement has changed the conversation about sexual harassment, and the election of Donald Trump sparked women's marches all around the world calling for change.

These issues are not new, but what is new is a growing awareness that we need different solutions to respond to and prevent violence against women and their children.

What is also new is the realisation that all of us have a part to play in this. It is not just a matter for the legal system to address, the entire community needs to be reached and engaged if we are to prevent violence, with a particular focus on areas where people live, work, learn, socialise, and play as key settings for prevention activity.

As part of the Second Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010 – 2022*[7] (a bipartisan commitment of all Australian governments) Our Watch in conjunction with ANROWS and VicHealth, developed a world-first framework for the primary prevention of violence against women and children called "*Change the Story*".[8]

The framework recognises a three-tiered approach:

- Primary prevention - a whole of population approach that addresses the primary or underlying drivers of violence
- Secondary interventions – targeting those who are at higher than average risk of perpetrating or experiencing violence
- Tertiary response - supports those who have experienced violence and holds perpetrators to account, also aiming to prevent the recurrence of violence.

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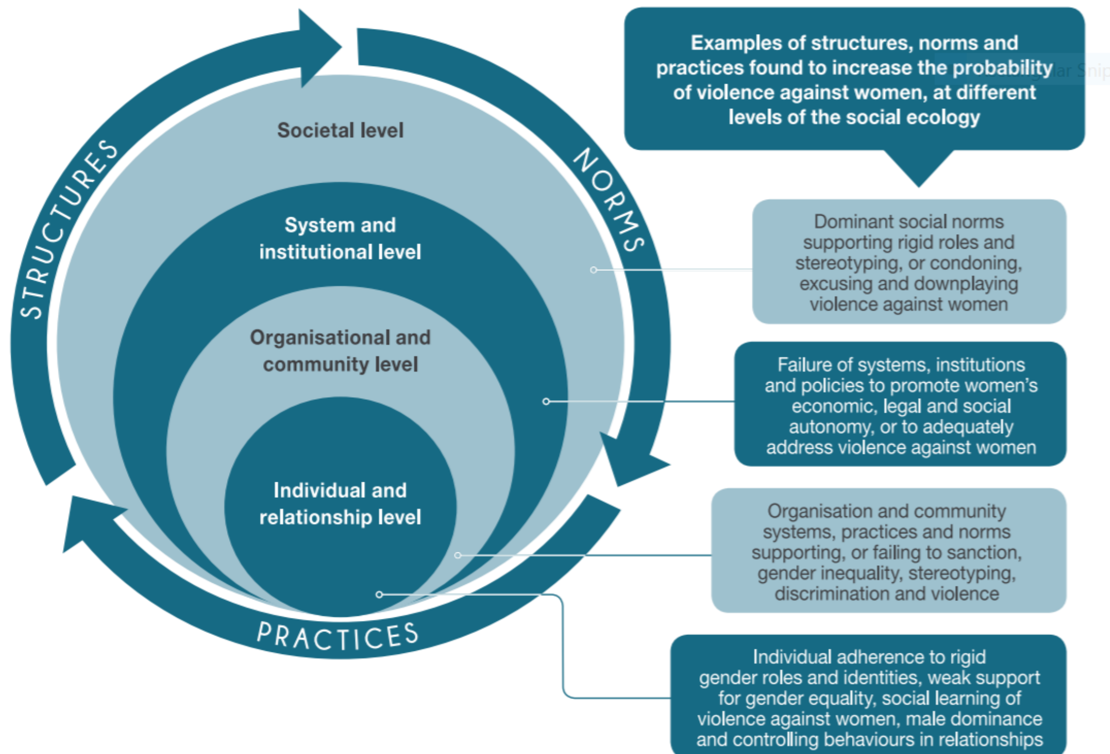
[6] https://www.judcom.nsw.gov.au/about-the-commission/

[7] The full history of the National Plan to Reduce Violence against Women and their Children can be found here https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022

[8] Accessible at https://www.ourwatch.org.au/what-we-do/national-primary-prevention-framework

It recognises that this requires a shared response from the whole of the community, with different actions required in different settings.

Using the following model to analyse behaviour, it illustrates that there are roles to play at each level of the model in shaping our responses to violence.



Socio-sociological model of violence against women, *Change the Story* page 21

The framework recognises that all settings must be engaged if we are to successfully address a complex social problem like the scale of violence against women, and it must include the widest number of people and organisations possible if societal attitudes are to be shifted.

The judicial system must be engaged as it is one of the key systems that exist in this model, and the judicial officers that sit within the justice system must understand their view of the world has itself been shaped by the cultural norms and practices they have grown up to accept.

As an influential player in tertiary response, the court system must support, and be seen to support, those who have experienced violence and hold perpetrators to account, as well as aiming to prevent the recurrence of violence. If unhelpful comments are expressed during the few matters that do go to hearing involving allegations of sexual harassment, that only works to reinforce the social norms and condone, excuse or downplay violence against women.

Recommendations:

1. All Judicial officers should undergo training on gender equality, to understand how that can play out in the workplace as well as in the courtroom.

2. Any such training should be designed to align with the Our Watch Framework for the Prevention of Violence against Women and Children, and recognise the role the legal system plays in setting the standards for condoning or excusing violence against women when it is assessing conduct that includes sexual harassment.

An additional way of ensuring that the full impact of sexual harassment can be understood, and the broader impact of what appears to be an unlikely set of events can be explained to the Court, is through greater use by the AHRC of its power to appear in court hearings as either an intervener or as amicus curiae.

A cursory review of the matters listed on the AHRC website where the AHRC has either intervened or sought leave to appear as amicus curiae shows that they have been fairly limited, with only one matter appearing to directly relate to sexual harassment.[9]

Recommendation:

3. The AHRC be properly resourced to intervene or seek leave to appear as amicus curiae, if appropriate, in more matters including those that involve sexual harassment.

Protection of complainants

In the Geoffrey Rush case referred to above, it must be remembered that it was not a case deciding whether there had been unlawful sexual harassment in a workplace, but was in the course of defamation trial. In effect though, due to the nature of the defence that was being argued by the publisher of the articles, there was the need for a "*hearing within a hearing*" to examine whether the conduct had in fact occurred.

This identified the person who had experienced the alleged harassment, who had never wanted to make a formal complaint, let alone be involved in any kind of legal action against Geoffrey Rush, in effect facing a trial to assess the veracity of her allegations.

This is very unfair and is likely to act as deterrent to others to make even an informal complaint.

Recent times have shown that this was not an isolated incident, with allegation involving Barnaby Joyce, Craig McLachlan and Luke Foley all made public in circumstances where the person experiencing the harassment had not wanted to make it public, but in the end had been in effect "*outed*" by others as part of a campaign to gain some perceived advantage, political or commercial.

The ability to make a complaint and have it dealt with privately must be respected and protected.

If a person who has experienced harassment makes a public statement then they have made a deliberate choice to reveal their identity, and should bear the consequences of that, but if that is not the case, their identity should be protected.

Reform is needed of the defamation court processes to ensure that where complainants are made about the publisher of the information and that person is not the person who experienced the behaviour, that person's identity can be protected and details about them suppressed. This should

[9] https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae

be analogous to the situation with sexual assault matters and the need to suppress and protect the identity of victims of sexual assault.

There should be a standard direction regarding confidentiality and suppression of witness details in any defamation matters where the defamatory material includes allegations of sexual harassment. It is somewhat ironic that at the moment, it is possible for an employer and perpetrator to protect the revealing of their identity through the use of binding confidentiality deeds, but the identity of a complainant can be revealed by a third party with no recourse for the complainant. If this Inquiry needed an indication of how valuable confidentiality is to employers, it should consider the response to its request to waive confidentiality provisions for the limited purpose of responding to this Inquiry, and the mixed response that received from employers.

It may be that there are other changes to defamation law that are required, but I am aware that the Defamation Working Party, established by the Council of Attorneys-General, is undertaking a review of defamation law in Australia to identify areas for national reform, with submissions due 30 April 2019.

Recommendation

4. The AHRC should consider whether it makes a submission to the Defamation Working Party on any matters which arise out of this Inquiry, including whether standard practice directions should be adopted in all defamation matters where there is an allegation of sexual harassment, to protect the person who has experienced the harassment, and suppress their identity, unless that person is the one who made the publication that contains the defamatory imputation, or consents to being identified.

Practicalities of access to justice

Finally as a lawyer who volunteered for over 10 years at a Community Legal Centre, it is imperative that community legal centres and other sources of legal assistance like Wokrin Women's Centres, be properly funded and supported in order to provide access to justice for those who cannot afford to see a private lawyer.

In my experience we were often stretched just in providing advice on the regular volunteer advice night, let alone for the Centre to take on and run matters.

Discrimination law, including sexual harassment, is complex and cannot be resolved in a 30 minute volunteer advice session. There are issues as to choice of jurisdiction, often related employment issues that might involve adverse action, victimisation, or unfair dismissal. Some clients have visa issues as well. Proper advice and support on a decision to take action is vital.

That extends also beyond legal support, and in some cases clients also needed counselling services, particularly if the sexual harassment is at the more extreme end of the spectrum of behaviour.

Recommendation:

5. Resource and fund legal services such as Legal Aid, Community Legal Centres, and Working Women's Centres, as well as specialist support and counselling services to properly support people who have experienced sexual harassment.

Prepared by Susan Price

Principal

Susan Price Legal

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