

SEXUAL HARASSMENT IN THE WORKPLACE: KNOW YOUR RIGHTS

Women Lawyers Association NSW

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Sexual Harassment.

The conversation men
don't want to have (with
each other).



Everyone's business: Fourth national survey on sexual harassment in Australian workplaces

- In the last 12 months, 23% of women experienced some form of workplace sexual harassment compared with 16% of men in the workforce.
- In the last five years:
 - almost two in five women (39%) and just over one in four men (26%) have experienced sexual harassment in the workplace in the last five years.
 - people aged 18 to 29 were more likely than those in other age groups to have experienced workplace sexual harassment in the past five years (45%).

Everyone's business: Fourth national survey on sexual harassment in Australian workplaces

- **What:** offensive, sexually suggestive comments or jokes. One in four women (25%) experienced this type of workplace harassment in the last five years.
- **Where:** 52% incidents occurred at the victim's workstation or where they work. 26% happened in a social area for employees.
- **Witnesses:** 40% of workplace sexual harassment incidents witnessed by at least one other person. In 69% of incidents, the witness did not try to intervene.

Experience of sexual harassment: how do lawyers compare to the rest of the community?

1995 Keys Young (NSW)

- 39% women barristers experienced sexual harassment by solicitors
- 59% experienced sexual harassment by another barrister
- 35% experienced sexual harassment from both

2014 NARS Report

- 24% women experienced sexual harassment
- 50% women experienced bullying or intimidation
- 55% women barristers reported experiencing sexual harassment
- 80% women barristers experienced bullying or intimidation

2015 NSW Bar

- 42% women barristers in NSW experienced sexual harassment (3% men)

What have women lawyers done?

- **1995** (Keys Young Report) no woman lodged a formal complaint.
- **2014** (NARS)
 - 56% of women did nothing;
 - None of the women lodged a formal complaint.
- **2015**, NSW Barristers:
 - Over half (56%) of females and close to half of males (49%), took no action.
 - A minority raised the issue with a colleague or a clerk;
 - Not one person (male or female) made a formal complaint of sexual harassment.

Why is this happening?

- Hierarchical and adversarial profession
- Traditionally male dominated
- Women lawyers are assigned gendered roles.
- Fear of speaking out: reputation, damage to career, retribution

	Barristers in NSW	Solicitors in NSW
Total	2,393	33,214
Women	22.9%	51.3%
Over 50 years of age	Male = 47% Female = 8.4%	Male = 19.4% Female = 9.3%
Under 50 years of age	Male = 30% Female = 14.5%	Male = 29.3% Female = 42%
Senior levels	QC/SC Male = 89.10% (335) Female = 10.9% (41)	Principals of law firm Male = 70% Female = 30%
	https://www.nswbar.asn.au/the-bar-association/statistics	http://www.lawsociety.com.au/ [stats for June 2018]

Well you know what
we had to have done to
Rex when he couldn't
contain his urges...



Wilcox

What are your rights and duties?

- Internal complaints and processes
- External complaints and processes
 - SDA, ADA
 - Fair Work Act (adverse action and discrimination)
 - Duty of care - tort
 - Work, health and safety
 - Contract and policies
 - Professional conduct

Is sexual harassment a professional conduct issue?

- 2006: New Zealand barrister was struck off with respect to allegations involving sexual harassment - suggestive and inappropriate comments to a female lawyer, suggestive and persistent phone calls to her and that this amounted to misconduct.
- 2011: a former municipal court judge in Arizona was suspended from practising as a lawyer for two years and was prohibited from serving on the bench in the future.
- 2017: Singaporean solicitor disbarred for sexually harassing an employee.

Australian Solicitors Conduct Rules

Barristers Rules

Rule 42 (Solicitors) Rule 123 (Barristers)

A solicitor/barrister must not in the course of practice, engage in conduct which constitutes:

- (a) discrimination,
- (b) sexual harassment, or
- (c) workplace bullying.

Sexual harassment means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation

“... in the course of practice”

- A solicitor in NSW was convicted under workplace surveillance laws. He fined \$1000, a little under 50% of the maximum fine for one count.
- Between 1 October - 24 December 2000, he had unlawfully videoed a number of female employees in a staff toilet by way of a video camera inserted in a toilet roll holder.
- Those videos were kept and found in a suitcase at the law firm's premises and turned over to police.
- The Law Society received a complaint. One of the issues was whether the conduct occurred in the practice of law.
- The women pursued a civil claim.

“... in the course of practice”

New South Wales Bar Association v Cummins [2001] NSWCA 284 at [36] – [43] Spigelman CJ (Mason P and Handley JA)

- ‘professional misconduct’ extends to acts not occurring directly in the course of professional practice.
- Two kinds of relationships that justify applying the terminology in this broader way.
 - (1) acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice.
 - (2) conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice.

Australian cases

- 2004: Victorian barrister was suspended from practice for six months for making sexual advances toward a client during a pre-trial conference. The Legal Profession Tribunal found the barrister guilty of unsatisfactory conduct. The barrister was also reprimanded.
- 2014: Victorian solicitor sexually harassed a trainee/employee. VCAT cancelled his practicing certificate for 8 months and ordered he not be eligible to regain his certificate unless he satisfied a set of conditions. He was ordered to pay compensation \$100,000 (later set aside)

Application of the Bar Rules

- *Legal Services Commissioner v Nguyen* [2015] QCAT 211
 - The conduct was described as “*near the lowest possible edge of seriousness for such offences*” and reference is made to Mr Nguyen’s “*mistaken belief ... that his flirtatious behaviours were not unwelcome*”.
 - Unsatisfactory professional conduct with public reprimand and \$20,000 fine.
 - QCAT said:
“*...the Bar cannot be the last bastion where sexual harassment and assault is countenanced in the workplace. Whilst it is not suggested that this is the case, such conduct must be strongly deterred....[Sexual harassment and sexual assault] is conduct which must be discouraged.*”

What to do?

- **Victims:**
 - Take direct action – confront and call out the behaviour
 - Document the event
 - Speak up – you may not be alone
- **Bystanders:**
 - The standard we walk past is the standard we accept
 - Do something – step in
- **Profession as a whole**
 - Cultural changes
 - Clear rules and zero tolerance

Sources and credits

- Slide 2: First Dog on the Moon, 13 October 2017, *The Guardian*
- Slide 3 and 4: www.humanrights.gov.au/our-work/sex-discrimination/publications/everyone-s-business-fourth-national-survey-sexual
- Slide 9: Cathy Wilcox, 12 January 2018, *The Sydney Morning Herald*
- Slide 13: <https://www.investigators.net.au/downloads/5.pdf>