Confidentiality Hides the Prevalence of Sexual Harassment in Australian Workplaces

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CONFIDENTIALITY HIDES THE PREVALENCE OF SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

Like many countries, Australia has felt the impact of the #MeToo movement, and experience a renewal in the momentum around combatting sexual harassment. It continues to be a problem in many Australian workplaces. A 2018 national survey by the Australian Human Rights Commission («AHRC») found that 23% of women and 16% of men had been sexually harassed at work during the previous 12 months. Victims were likely to be aged between 18-29. Although sexual harassment occurs in all industries, it was most likely to occur in the information, media and telecommunications industries¹. It is high amongst lawyers. 47% of Australian females who participated in the International Bar Association's survey about sexual harassment in the legal profession said that they had been sexually harassed at work, which is higher than the global figure of 37%².

Earlier this year, Hollywood actor Geoffrey Rush won a defamation case against a Sydney newspaper. Nationwide News, publisher of the *Daily Telegraph*, was found to have defamed Rush when it published articles which said that the actor had behaved in a sexually inappropriate way towards a female actress (later identified as Eryn Jean Norvill) when they performed in *King Lear* together in Sydney³. The case thrust many well known members of the Australian film industry into the spotlight. Over the course of the trial, Rush and Norvill were the subject of intense media scrutiny.

While we might say that actors are used to being in the spotlight and that it is part of the job, the type of scrutiny that they were both subject to (inside and outside the court room) was intense. For the «average» complainant, the potential media interest in a sexual harassment claim is a strong reason to reach a confidential settlement, as it is for employers.

Confidentiality clauses are very common in settlement agreements in sexual harassment claims, as this note explores, and as the vast majority of sexual harassment complaints are settled rather than litigated, these clauses privatise sexual harassment claims and hide the extent to which it remains a problem in Australian workplaces.

Sexual harassment is prohibited in Australian workplace by national legislation and laws in each State and Territory. The laws and how they are enforced are very similar across the country. For example, the *Sex Discrimination Act 1984* (Cth) makes it unlawful to make an unwelcome sexual advance or request for sexual favour or other unwelcome conduct in circumstances in which a reasonable person would have anticipated that the complainant

- 1 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018), p. 21: <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>
- 2 International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (2019), p. 87: <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>
- 3 *Rush v Nationwide News Pty Ltd* (no. 7) [2019] FCA 496.

would be offended, humiliated or intimidated, having regard to all of the circumstances⁴. An employer will be vicariously liable for an employee's unlawful conduct unless it can show that it took all reasonable steps to prevent the sexual harassment⁵.

To make a sexual harassment claim, the complainant is required to lodge a complaint at the federal AHRC or at their local equality agency. Provided the complaint has substance and falls within the agency's jurisdiction, it will attempt to resolve the claim using alternative dispute resolution, usually conciliation. Other than in Victoria, it is compulsory to attempt to conciliate the claim before the complainant can litigate.

Sexual harassment complaints are one of the most common type of complaints that the equality agencies receive. The AHRC received 321 in 2017-18, which represents 27% of complaints it received under the *Sex Discrimination Act 1984* (Cth). Complaints about sexual harassment are the fourth most common type of complaint that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) receives after disability, sex and race discrimination complaints⁶. Although the VEOHRC reported a 20% increase in sexual harassment complaints as a result of the #MeToo movement⁷, the AHRC found that only one in five people make a formal complaint about sexual harassment. Twenty percent of those that did were labelled a troublemaker, or ostracised, victimised or ignored by their colleagues, or they resigned⁸.

Most sexual harassment complaints are not litigated; they are settled earlier in the process or withdrawn⁹. Many of the reasons complainants choose not to litigate are common to litigation generally and include the cost, the time required to pursue legal action, and the risk of losing. The reasons for settling a sexual harassment complaint in particular include not wanting to give evidence about an unpleasant experience and being cross-examined, avoiding the perpetrator, wanting to move on with life, the media's interest in sexual harassment cases, and confidentiality. Across the country, the equality agencies' complaint resolution processes are confidential. For instance, the *Australian Human Rights Commission Act 1986* (Cth) says that conciliation conferences are to be conducted in private and anything said or done during the course of a conciliation conference cannot be used in evidence if the claim proceeds to court¹⁰. This allows the parties to discuss the issues and negotiate freely.

4 Section 28A.

5 Section 106.

6 Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2017-18*, 11.

7 *Ibid.*, no. 7, p. 5.

8 *Ibid.*, no. 1, p. 73.

9 See further D. Allen, «Settling Sexual Harassment Complaints - What Benefits does ADR Offer?», *Australasian Dispute Resolution Journal*, 2013, 24, p. 169; D. Allen, «Behind the Conciliation Doors - Settling Discrimination Complaints in Victoria», *Griffith Law Review*, 2009, 18(3), p. 778.

10 Sections 46PK, 46PKA.

Confidentiality of this kind is essential for the dispute resolution process to function effectively. It has meant, though, that the agencies are reluctant to release any information about sexual harassment complaints, other than the volume of complaints that they receive¹¹. So despite being the gatekeepers to sexual harassment complaints, the statutory agencies do not publish any information about the nature of the complaints that they receive or how they are resolved, including the levels of compensation negotiated. This makes it very difficult to examine how sexual harassment is being addressed. The privatised nature of the system as a whole gives the impression that the wrong is a private matter between individuals, rather than part of a broader social problem. One way of addressing this information gap would be for the agencies to publish deidentified information about the nature of the sexual harassment complaints they receive and how they are resolved on their websites and in their annual reports but there is little appetite for doing this.

Confidentiality stretches beyond the complaint resolution process itself. Most settlement agreements include a confidentiality clause, and they are hard to resist. In 2017-18 I interviewed 23 lawyers in Melbourne¹² and asked them about the prevalence of confidentiality clauses in discrimination settlements generally. Two solicitors said that settlement agreements «almost always» include confidentiality, while another described the confidentiality clause as «not negotiable». A barrister said: «no one I know has ever settled on non-confidential terms».

The lawyers said that employers use confidentiality clauses to avoid opening the «floodgates» to other victims of sexual harassment and to prevent those with unmeritorious or vexatious complaints from pursuing them, while employees seek confidentiality if they have left the workplace and are concerned about what their former employer might say about them. These clauses vary in breadth. Some only prohibit the complainant from disclosing that they made a complaint to their work colleagues, while others prevent the complainant from talking about the circumstances of the claim, the parties involved, its resolution and the terms of settlement to anyone at all.

From the community's perspective, confidentiality (of both the agreement and the complaint resolution process) mask the extent to which sexual harassment remains a problem in Australian workplaces. At their most extreme, confidentiality clauses have a chilling effect on complainants who fear the repercussions of discussing any aspect of their claim. And at the same time, they protect the perpetrator at both their current workplace and anywhere they work in the future.

11 For an evaluation of the constraints imposed on the agencies see, D. Allen and A. Blackham, «Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the UK», *Melbourne University Law Review*, 2019, 43(2).

12 The research was approved by the Department of Justice (Victoria) Human Research Ethics Committee (project number: CF/16/23372) and the Monash University Human Ethics Committee (project number 8648). The interviews were conducted as part of a larger project about the Equal Opportunity Act 2010 (Vic). For a complete discussion of the dispute resolution process in the Act, see D. Allen, «Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria», *Monash University*, Victoria, 2019: https://www.monash.edu/_data/assets/pdf_file/0005/1898996/Addressing-Discrimination-Through-Individual-Enforcement_D-Allen_Aug-2019.pdf

In 2018 the Federal Sex Discrimination Commissioner, Kate Jenkins, launched a national inquiry into sexual harassment in Australian workplaces. Recognising that confidentiality clauses were likely to prohibit people who had settled sexual harassment claims from making a submission to the inquiry, the Commissioner called upon employers to issue a limited waiver of confidentiality obligations so that people could make a confidential submission to her inquiry in order to aid her understanding of the underlying causes of sexual harassment in the workplace and the issues that led to it¹³. However, only 38 employers issued the waiver. They are listed on the AHRC's website and include large corporate employers, universities and public sector agencies but as Jenkins lamented, many global employers are missing from the list¹⁴.

The inquiry is due to report later in the year and it is hoped that one of the issues it will examine is why confidentiality clauses have proliferated, their operation, what employees and employers think of them, both positive and negative, and how they could be constructed in such a way so that they protect the parties' interests without hiding the prevalence of sexual harassment in the workplace. The #MeToo movement is a reminder that sexual harassment is still occurring and it cannot be addressed unless we understand why it occurs and the extent of the problem.

13 See further the November 2018 letter written by Kate Jenkins, Sex Discrimination Commissioner: <https://www.humanrights.gov.au/national-inquiry-sexual-harassment-australian-workplaces-limited-waiver-confidentiality-obligations>

14 E. Steel, «Employers who talk up gender equity but silence harassment victims», *The New York Times*, 1 May 2019.