

1 September 2022

Libby Fulham
Executive Director
Legal Practice Board of WA
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Email only: lfulham@lpbwa.com

Dear Ms Fulham

CONSULTATION TO DEVELOP THE PRACTICES CONCERNING SEXUAL HARASSMENT REPORTING

The Law Society supports the Legal Practice Board of Western Australia's (LPBWA) initiative in changing the culture in the WA legal profession and in supporting people who have been harassed to come forward. It agrees that as the regulator of the legal profession, the LPBWA has both the responsibility and capacity to address sexual harassment in the legal profession.¹

However, the Law Society is also aware that the LPBWA has indicated that it receives relatively few complaints in respect of sexual harassment.² This seems anomalous in light of reported statistics revealing the prevalence of sexual harassment in the legal profession.³

The LPBWA has taken positive steps to improve its ability to receive, consider and address reports of sexual harassment. This includes the establishment of an email address (harrasmentreport@lpbwa.com), accessible through the LPBWA website.

However, the operation of the complaints process could be clarified, and more certainty given to complainants.

The Law Society invites the LPBWA to work with our Young Lawyers Committee and Joint Law Society/Women Lawyers Committee to:

- a. consider improvements to the harassment report processes, and to develop a factsheet to improve transparency; and
- b. develop awareness of what is involved in the making, consideration, and resolution of harassment reports.

For instance, the following matters might be discussed, and the answers could inform a factsheet that could appear directly on the LPBWA's website:

- Upon receiving a 'harassment report' email, what is the process that the LPBWA will follow to consider or investigate the complaint, and how might it be improved (if at all)?

¹ *Brief*, June Edition, 'The Regulator and Sexual Harassment in the Legal Profession', Libby Fulham, 30.

² *Ibid.*

³ One in four women in the legal workplace experienced sexual harassment: Law Council's National Attrition and Reengagement Survey, 2014. Cited in Law Council of Australia, 'National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession' 23 December 2020; 9

- Is there or should there be another way to make a confidential harassment report (e.g. if the complainant does not want to send an email because it is possible that the complainant's email address would identify them)?
- Will and should the LPBWA investigate a complaint if it is not recent, or is there or should there be a time limit on complaints that can be investigated?
- Can and should a complainant's confidentiality be maintained throughout the complaint process? If not, at what stage of the complaint process should the complainant have to identify themselves?
- Generally, what are and should be the outcomes that can be achieved through the complaints process? For example, might an apology be issued to the complainant, or should the harasser face a penalty of any kind?
- Can or should the information which a complainant submits in a harassment report or during the complaints process be obtained under freedom of information legislation, either in full or in redacted form?

The Law Society considers that ensuring there are accessible and clear answers on, and improvements made to those, and any other matters would go some way to addressing the existing uncertainties and provide complainants greater clarity about the complaints process so that they are not discouraged from reporting harassment. In turn, the LPBWA may improve the assistance it offers complainants, how it assesses and investigates reports, and how it facilitates the resolution of complaints.

Please let me know whether we can assist in facilitating the discussion between the LPBWA and the Young Lawyers and Joint Law Society/Women Lawyers Committees to address the above matters.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au.

Yours sincerely



Rebecca Lee
President



The Regulator and Sexual Harassment in the Legal Profession

By **Libby Fulham**
Executive Director
Legal Practice Board

There is no doubt there are a number of participants when it comes to addressing sexual harassment in the legal profession. As the regulator of the legal profession in Western Australia the part the Board has to play is more than simply being reactive to individual complaints, and there are clear steps the Board can take when it comes to proactive engagement with a view to long term behavioural change.

The Board's purpose is to protect the public and advance the administration of justice by regulating the competence

and behaviour of legal practitioners and importantly by promoting the integrity of the Board and its Committees.

Sexual harassment in the profession is behaviour not to be tolerated. If a matter of this kind comes before the Board it will be considered and addressed, and where appropriate investigated by the Legal Profession Complaints Committee.

It seems fairly obvious to say that sexual harassment by a legal practitioner is a breach of professional obligations

and may impact on fitness to practice, and can also amount to professional misconduct or unsatisfactory professional conduct. Though the message is somewhat worn, particularly when there are further reports of the embedded norms regarding this type of unwanted and unwelcome behaviour in the legal profession¹ and little traction in eradicating it. New, or more, rules are not, on their own, going to change attitudes or be the catalyst for systemic cultural change, nor will they help substantiate a complaint.

Some attitudes towards sexual harassment in the profession require a significant shift. While various recommendations being implemented in relation to our laws and behaviours in our courts and tribunals will contribute, these should not be the only tools in our armoury to compel change.

As a regulator all too often our role starts too late and finishes too early and does not offer satisfaction. When we do receive complaints, of which there are very few, they have been dealt with on an individual basis. In other words we are left to consider the alleged conduct on a case-by-case basis that is all too often either inconclusive or so anonymous or not-attributable as to cripple any possibility of a finding. This system relies on punishment for individuals so few in number some may ask if the game is worth the candle.

In relation to an issue considered rife in our profession why don't we as the regulator receive more complaints of sexual harassment? For a number of well-known reasons, that include:

- The complainant fears retribution or persecution, becoming a victim all over again, and the prospect of facing other legal consequences, all for no outcome if the complaint is not upheld.
- The complainant is embarrassed and fears being ultimately disadvantaged.
- The complainant considers there will be a high evidentiary burden.
- There has been an agreement of 'silence' after a workplace investigation has taken place.
- The complainant fears a risk of reputational damage.

What we can do is to take the onus from the individual as a complainant and make the universal problem one that the wider profession can own and be instrumental in the solution. For the Board's part it is being proactive in:

1. Calling out sexual harassment as an embedded issue in our profession, and not an individual's problem.
2. Improving awareness of sexual harassment – what it is, how it can be identified, and the action to take when it is identified.
3. Promoting the utmost ethical and professional responsibilities of members of the profession.
4. Providing resources to practitioners to understand the issues surrounding sexual harassment and other inequality behaviours.
5. Promoting best practice policy and procedure to support the prevention, identification, reporting, and resolution of sexual harassment complaints.
6. Promoting cultural excellence in stamping out sexual harassment in our profession. Calling perpetrators out goes a long way to ensuring that as a profession we are united in upholding our professional obligations.

7. Promoting our credibility as a regulator so the profession is confident in our capability to equip them with an appropriate response to this issue and with the means to bring about effective change.
8. Working with other regulators in this jurisdiction and nationally to challenge accepted bad behaviours in the legal profession.

So where are we at? There is still a long way to go, but together the Board and Legal Profession Complaints Committee have started the processes set out above, in particular through:

- The establishment of a dedicated hub with an email address harassmentreport@lpbwa.com accessible through our website so harassment reports can be made, anonymously or otherwise, and showing we are 'open for business' and can provide guidance through the complaint process.
- A collaboration with the Law Society of WA and the College of Law to develop a dedicated CPD activity using the platform of experiential learning, to be delivered in August 2021.
- Training our staff to take information about, address and where appropriate investigate this conduct, and to be active in the education and promotion of cultural change.

The Uniform Law will also assist by allowing the Board to consider the management of a law practice and issue management system directives, which not only require remedial action but include regular review and education to reinforce positive culture.

The ongoing focus will be on long term behavioural change and strengthening the profession by promoting excellence in standards and expectations on equality. ■

Endnotes

¹ See the report from the South Australian Equal Opportunity Commission 'Review of Harassment in the South Australian Legal Profession' April 2021, and the report and recommendations of the Review of Sexual Harassment in Victorian Courts and VCAT March 2021 by Dr Helen Szoke AO.