

27 May 2022

Trisha Randhawa
Policy Officer
Policy, Reform and Legislation Branch
Department of Communities and Justice
By email only: trisha.randhawa@justice.nsw.gov.au

Dear Ms Randhawa,

Implementing Recommendation 39 of the *Respect@Work* Report

The Kingsford Legal Centre (**KLC**) thanks the Department of Communities and Justice for the opportunity to comment on the Implementation of Recommendation 39 of the *Respect@Work* report.

KLC is a community legal centre providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC also runs a specialist, NSW state-wide Sexual Harassment Legal Service. The Sexual Harassment Legal Service works across a range of areas, including:

- Legal advice, assistance and representation to people who have experienced sexual harassment;
- Community legal education aimed at preventing sexual harassment and empowering people to speak up when it happens;
- Law reform work to advocate for better legal protections for people who experience sexual harassment; and
- Leading cultural and institutional change. KLC is a leader in the conversation within legal institutions and with the next generation of lawyers about sexual harassment in the profession.

Overview

KLC endorses the submission of the Women's Legal Service NSW dated 16 May 2022 on the implementation of Recommendation 39 of the *Respect@Work* report.

In addition to this, KLC makes the following comments, drawing upon its extensive experience in providing legal advice and support to victim-survivors of sexual harassment and sex discrimination for over 40 years.

Key principles for reform

For convenience, we extract recommendation 39 of the *Respect@Work* report:

The Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings. Measures could include amending state and territory legislation governing defamation proceedings to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment. Consideration should also be given to additional witness safeguards and protections including:

- a. having the proceedings conducted in a closed courtroom*
- b. giving evidence from a remote room*
- c. having their evidence in chief be audio-visually recorded prior to the hearing*
- d. having an audio-visual recording of their evidence during the hearing be re-used in any subsequent proceedings*
- e. being protected from direct cross-examination by a self-represented party*
- f. having a support person present while giving evidence.*

Standard direction or presumption of confidentiality for victim-survivors of sexual harassment in defamation and other civil proceedings

KLC supports reform to strengthen protections for victim-survivors of sexual harassment who are witnesses in civil proceedings, including defamation proceedings. While we do not practice in defamation law, we support amending state and territory legislation on defamation to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details where defamatory material includes allegations of sexual harassment.

Impact on victim-survivors of high standard for defence of substantial truth

We submit that reform favouring non-publication of details of witnesses in defamation proceedings relating to sexual harassment is particularly important given the obstacles that many victim-survivors and other defendants face in establishing a defence of substantial truth.¹ The ability to gather evidence supporting the truth of allegations of sexual harassment in these (and other) proceedings can be difficult given that many forms of sexual harassment occur in the absence of witnesses. In particular, the *Respect@Work* report found that verbal forms of sexual harassment are among the most common types of

¹ *Defamation Act 2005* (NSW), s 25.

sexual harassment in workplaces,² and often occur in the absence of co-workers or other people who could serve as witnesses to the behaviour.³ However, as cases such as *Geoffrey Rush V Nationwide News and Anor*⁴ establish, even where there are multiple witnesses in defamation proceedings, the defence of substantial truth can be difficult to establish given that the court is often called upon in defamation proceedings to make findings as to the credibility of witnesses with diametrically opposed versions of events.⁵

Where victim-survivors are unable to successfully establish the defence of substantial truth or other defences, the publication of their personal details in court proceedings can have profound and long-lasting impacts on their personal and professional lives. Indeed, high profile sexual harassment cases such as Kristy Fraser-Kirk's sexual harassment complaint in 2010 against the then CEO of David Jones, Mark McInnes, demonstrate the negative publicity that victim-survivors of sexual harassment can face even when sexual harassment matters settle outside of court.⁶

Impact on victim-survivors of being forced to engage with defamation proceedings

We support reform which favours non-publication of details of witnesses in defamation proceedings relating to sexual harassment. This is because these proceedings are generally initiated by alleged preparators of sexual harassment. Unlike other civil proceedings involving allegations of sexual harassment where victim-survivors instigate proceedings, defamation proceedings are generally instigated by alleged preparators. This has the effect of compelling victim-survivors to provide evidence and engage with public proceedings that they themselves have not initiated. This runs counter to many tenets of victim-survivor centred complaints processes and can have a highly traumatising impact. This can be particularly problematic when victim-survivors have made a conscious choice not to make a formal complaint for very valid reasons.

This problem was particularly highlighted in the case of the Geoffrey Rush defamation trial. For example, in the first instance Wigney J noted the particular difficulty that Ms Norvill faced in being “dragged into the spotlight” as a witness in the defamation proceedings against her will.⁷ As his honour noted, despite not wanting to make a formal complaint against Mr Rush, and not wanting to speak out publicly about her experiences, Ms Norvill

² Australian Human Rights Commission, *Respect@Work* Report (2020) 124.

³ *Ibid* 125.

⁴ [2020] FCAFC 115.

⁵ Richard Leder, Sanjay Schrapel, ‘Defamation Trials: Why Plaintiffs are Rush(ing) to File in the Federal Court’, *CAMLA Communications Law Bulletin* (2018) 37(3) 4-5.

⁶ Patricia Easteal, Skye Saunders, Keziah Judd and Bruce Arnold, ‘Sexual Harassment on Trial: The DJs Case’, *Alternative Law Journal* (2011) 36(4) 233.

⁷ *Rush v Nationwide News Pty Ltd* (No 7) [2019] FCA 496 at 327.

was forced into providing evidence in the proceedings because of the actions of Nationwide News Pty Ltd and Jonathon Moran in publishing the relevant defamatory material.⁸

KLC is very concerned that the risk of being publicly sued in defamation proceedings or being forced to publicly engage in such proceedings as a witness, is a major deterrent for many victim-survivors to make formal or informal complaints about sexual harassment and/or seek other forms of support. We also note that in NSW defamation proceedings occur in a costs jurisdiction which can add to further stress and worry for victim-survivors. There is also limited free legal assistance and other assistance in this area of law for victim-survivors. As noted earlier, as the purpose of defamation proceedings are different to discrimination/ sexual harassment complaints, proceedings are not conducted in a trauma informed manner and the nature of proceedings is substantially different to complainant focussed processes at the Australian Human Rights Commission or Anti-Discrimination NSW.

There is also the unique difficulty faced by some victim-survivors of sexual harassment who are witnesses in defamation proceedings but not a party to such proceedings, as their legal interests may not always align with the party that has called them as witnesses. As such, we strongly recommend the introduction of the kind of standard direction or presumption in favour of confidentiality as proposed for defamation proceedings. Witnesses in these cases should also have access to a grant of Legal Aid or free legal assistance.

Consistent approach needed for standard direction or presumption of confidentiality for victim-survivors of sexual harassment in all civil proceedings

We also strongly support a consistent approach to the issue across all civil proceedings involving allegations of sexual harassment. We support introducing a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in other civil proceedings in NSW relating to sexual harassment, such as anti-discrimination and professional misconduct proceedings in the NSW Civil and Administrative Tribunal. We support the reasons for this as set out in the *Respect@Work* report, in particular to ensure the privacy and confidentiality of victim-survivors and other witnesses.⁹ There is scope here for Best Practice Guidelines to inform judicial and quasi-judicial decision making across all NSW jurisdictions.

We note that section 8(d) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) currently enables the court to make a suppression order or non-publication order if such an order is “*necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature.*”

⁸ Ibid.

⁹ Australian Human Rights Commission, *Respect@Work* Report (2020) 572-573.

In addition to any standard direction or other reform favouring confidentiality of witnesses in sexual harassment matters, we support amending section 8(d) of the Act to enable the court to make a suppression order or non-publication order if necessary to avoid causing undue distress or embarrassment to a party to or witness in civil proceedings involving allegations of sexual harassment. However, we also note that a more appropriate drafting of the section may be that such an order can be made if “*necessary to protect the privacy and confidentiality of a party to or witness in*” these proceedings. This revision may better capture the range of interests and concerns of witnesses in civil proceedings involving allegations of sexual harassment which may lead them to seek suppression or non-publication orders about their identity/other personal details.

Key principles to inform recommendations 39(a)-(f)

We support law and policy reform of the kind proposed in recommendations 39(a)-(f). While greater consultation is required on the precise nature of such reforms, we submit that it is essential that the following principles guide the reform:

- Any reform must be victim-survivor centred, and clearly provide victim-survivors with the opportunity to request that any standard direction or presumption in favour of confidentiality in sexual harassment proceedings does not apply. The government must adequately fund a range of specialist gender-based violence legal and other support services to enable victim-survivors to make an informed and supported decision on whether to request publication of any identifying details.
- Any additional witness safeguards and protections in civil proceedings relating to sexual harassment must be extended to all witnesses in these matters. From our experience, the threat of publication of identifying details of bystanders and disclosure witnesses in sexual harassment matters can constitute a key barrier for witnesses in these matters to support victim-survivors and provide evidence.
- The judiciary, administrative decision-makers and legal professionals working in this space must receive appropriate trauma-informed training on the nature and impacts of sexual harassment, in particular on how experiences of sexual harassment can shape the way that victims-survivors report sexual harassment and provide evidence in proceedings.
- There must be clear guidelines for journalists to not publish the names and/or other identifying details of witnesses in sexual harassment matters without their consent, and to encourage such witnesses to get independent legal advice before publishing their names and/or other identifying details. These guidelines must also prohibit the publication of details of witnesses in sexual harassment matters without their informed consent once proceedings have commenced.

If you have any questions about this letter, please contact Emma Golledge at legal@unsw.edu.au.

Yours faithfully,

KINGSFORD LEGAL CENTRE



Emma Golledge

Director



Madeleine Causbrook

Law Reform Solicitor

F8-003 Kingsford Legal Centre | UNSW Law

UNSW SYDNEY NSW 2052 AUSTRALIA

T +61 (2) 9385 9566 | F +61 (2) 9385 9583 | ABN 57 195 873 179
CRICOS Provider Code 00098G



UNSW
Kingsford
Legal Centre

