
15 March 2019

Ms Kate Jenkins
Sex Discrimination Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

By email: SH.Inquiry@humanrights.gov.au

Dear Ms Jenkins

Re: National Inquiry into Sexual Harassment in Australian Workplaces

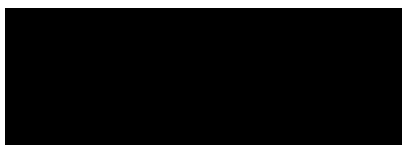
The LGBTI Legal Service is pleased to provide the **enclosed** submission in response to the Australian Human Rights Commission's (**Commission**) National Inquiry into Sexual Harassment in Australian Workplaces (**Inquiry**). We thank the Commission for the opportunity to make a submission to this important inquiry.

The LGBTI Legal Service (**Service**) is a non-profit community-based legal service that began operation on 7 July 2010. The organisation was officially launched on 1 December 2010 by former Justice of the High Court of Australia, the Hon Michael Kirby AC CMG.

The Service recognises the difficulties faced by the LGBTI community and seeks to assist the Queensland LGBTI community to gain access to justice through the provision of free and accessible legal services. We facilitate community legal education activities and provide resources in order to increase awareness of legal rights and responsibilities for the LGBTI community in Queensland. The Service includes a Law Reform division that actively advocates for law reform and human rights across Australia.

This submission was prepared by the LGBTI Legal Service Law Reform team members. The Service welcomes the opportunity to consult further with the Commission concerning these issues.

Yours faithfully



Thomas Clark
Law Reform Director
LGBTI Legal Service



Submission to the Australian Human Rights Commission's: 'National Inquiry into Sexual Harassment in Australian Workplaces'

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Summary of recommendations

Recommendation 1:

Continue to encourage organisations to deliver LGBTI cultural competency training to staff and to foster a confidential and understanding complaint reporting environment

Recommendation 2:

Clarify sexual harassment and discrimination law to include the unique circumstances faced by the LGBTI community.

Recommendation 3:

Consult with relevant LGBTI organisations with regards to any proposals to amend the laws relating to sexual harassment arising out of the Inquiry.

Introduction

The current National Survey on Sexual Harassment in Australian Workplaces demonstrates that sexual harassment is a widespread and pervasive issue in the Australian workplace.¹ An alarming one in three workers report that they have been sexually harassed at work in the last five years. Whilst this statistic is serious in itself, the Service laments that the LGBTI² community is over represented and/or not accurately captured in this figure. Whilst Australia, and Queensland in particular, has developed strong anti-discrimination laws that protect an individual's sexual orientation, gender identity and intersex status, more than half of workers who identify as LGBTI have experienced sexual harassment in the workplace.³

This submission outlines the unique issues relevant to workplace sexual harassment experienced by members of the LGBTI community. Additionally, the Service provides an analysis of, and recommendations for, the current sexual harassment legislative framework as it relates to LGBTI people.

Unique Issues Faced by LGBTI People

Organisational Support

An organisation's attitude towards sexual harassment has a large influence on whether a culture of harassment or cooperation exists. In addition, organisational support (or lack thereof) can be a major determining factor in the presence and prevalence of heterosexism (discrimination against LGBTI people).⁴ LGBTI employees report feeling significantly less satisfaction with their treatment in many workplaces⁵ and the support networks they require are often nonexistent. There is also a lack of mainstream understanding of how an individual's sex or gender identity, variation of sex characteristics, and/or sexual orientation play a role in experiences of sexual harassment. This means that organisations fail to implement policies and procedures that address the unique experiences of sexual harassment that LGBTI people experience. Evidence suggests that reports of harassment made by LGBTI people are considered less important, subsequently discouraging LGBTI people from reporting their incidences.⁶

¹ Everyone's business: Fourth national survey on sexual harassment in Australian workplaces – Australian Human Rights Commission 2018.

² We have chosen to use the term "LGBTI" to refer to the diverse and unique community which also includes gender and sexually diverse people, brotherboys, sistagirls and those who use other terms to describe their sexuality and/or gender identity.

³ Australian Human Rights Commission, *op. cit.*

⁴ Smith, Ian P. and Grace McCarthy, "The Australian Corporate Closet: Why It's Still So Full!" (2017) 21(4) *Journal of Gay & Lesbian Mental Health*; Wax, Amy, Kimberlee K. Coletti and Joseph W. Ogaz, "The Benefit Of Full Disclosure" (2017) 8(1) *Organizational Psychology Review*.

⁵ Lewis, Gregory B. and David W. Pitts, "LGBT–Heterosexual Differences In Perceptions Of Fair Treatment In The Federal Service" (2015) 47(5) *The American Review of Public Administration*

⁶ Dwyer, A., Ball, M., Bond, C., Lee, M., and Crofts, T. (2017). "Exploring LGBTI Police Liaison Services: factors influencing their use and effectiveness according to LGBTQ people and LGBTI police liaison officers." *Report to the Criminology Research Advisory Council*. Criminology Research Grants.

Employers and coworkers can also face a range of challenges while trying to support their LGBTI peers. Staff who witness harassment or discrimination against LGBTI people with a desire to intervene overwhelmingly report an uncertainty about how to do so, or a fear of retaliation from the party committing the harassment.⁷ Many employers feel the requirement to juggle the needs of diverse (including LGBTI) staff with the opinions of often conservative clients, for fear of losing those clients.⁸ Furthermore, research has shown that where organisations have strong policies of inclusion and diversity, these policies can decrease direct heterosexist behaviours, but increase indirect ones.⁹ This creates additional barriers to reporting, especially when LGBTI people may already feel as though they are a burden on the organisation for having unique needs.

Issues affecting trans and gender diverse people

Whilst progressive attitudes towards lesbian and gay people have become more common in recent years, trans and gender diverse people¹⁰ are still not widely understood by their peers.¹¹ Trans and gender diverse people face particular difficulty in experiences of harassment in the workplace. Multiple investigations into the topic show that trans and gender diverse people have significantly higher rates of sexual risks, substance use, and psychological vulnerability.¹² These risk factors combined with the lack of understanding mean trans and gender diverse people face a greater risk of harassment and discrimination. The National Survey on Sexual Harassment in Australian Workplaces¹³ indicates that people who did not sexually identify as straight, gay or lesbian reported much higher rates of harassment.

Transitioning

Transitioning is the process a person goes through when changing their outward gender presentation, to match their affirmed gender.¹⁴ Some, but not all trans or gender diverse people, may choose sex affirmation surgery, take hormones and/or alter their physical appearance. If a person is transitioning while in the workplace, the effects of sexual harassment and discrimination can be particularly difficult. The process of transitioning does not have a set timeframe, but transgender people are under particularly high stress and anxiety

⁷ Martinez, Larry R. et al, "Standing Up And Speaking Out Against Prejudice Toward Gay Men In The Workplace" (2017) 103 *Journal of Vocational Behavior*

⁸ Egan, Matthew, "LGBTI Staff, And Diversity Within The Australian Accounting Profession" (2018) 9(5) *Sustainability Accounting, Management and Policy Journal*

⁹ Smith, Ian P. and Grace McCarthy, *op. cit*; Wax, Amy, Kimberlee K. Coletti and Joseph W. Ogaz, *op. cit*.

¹⁰ We have used the phrase "trans and gender diverse" as an umbrella phrase that includes all identities within the gender identity spectrum, including but not limited to people who identify as transgender, transsexual, genderqueer, gender fluid, non-binary, sistagirl, brotherboy, transman or transwoman.

¹¹ Colgan, Fiona and Nick Rumens, *Sexual Orientation At Work – Contemporary Issues And Perspectives* (Routledge, 1st ed, 2015)

¹² McCann, Edward and Michael Brown, "Vulnerability And Psychosocial Risk Factors Regarding People Who Identify As Transgender. A Systematic Review Of The Research Evidence" (2017) 39(1) *Issues in Mental Health Nursing*

¹³ Australian Human Rights Commission 2018 *op. cit.* – s2.3 (c), (d)

¹⁴ Affirmed gender refers to the gender that matches a person's innermost concept of self.

levels during this period.¹⁵ Transgender people transitioning in the workplace who become victims of sexual harassment (either resulting from or unrelated to their gender identity) have a more difficult time seeking assistance to stop the behaviour. The Service has found that whilst transitioning, people are exposed to;

- Jokes about their appearance, body and clothing;
- Personal questions about medical information including surgical procedures and bodily functions; and
- Inappropriate and suggestive comments about their sex life

Whilst this type of behavior is commonly experienced by LGBTI people, its impact on trans and gender diverse people whilst transitioning is significant and has a major impact on their well-being, as well as work performance.

Currently, workplace bullying can be partly regulated by the *Fair Work Act 2009* (Cth), and the Fair Work Commission can issue an urgent stop order to help victims continue in their job. This solution is not available for instances of sexual harassment in the workplace, as the process for reporting them requires that complaints must go through the Commission's conciliation process.¹⁶ This means that trans and gender diverse employees facing harassment at work during their transition period often must either continue to endure the behaviour or seek alternative employment.

Employers also struggle with supporting trans and gender diverse employees and often do not know what resources are available. Data from companies in the UK and USA have found that transgender employees are sometimes forced to quit their jobs due to the increased level of stigma they perceive, and/or asked to take unpaid time off work.¹⁷ While some Australian workplaces offer paid leave to undergo a gender transition it is not a requirement under Australian law. Anecdotal evidence also shows that Australian companies, though becoming more progressive to the issue,¹⁸ still have to face the issue of public attitudes towards trans and gender diverse people.¹⁹ The Anti-Discrimination Commission Queensland have created

¹⁵ Bouman, Walter Pierre et al, "Transgender And Anxiety: A Comparative Study Between Transgender People And The General Population" (2016) 18(1) *International Journal of Transgenderism*

¹⁶ Or the comparable process in the relevant state jurisdiction.

¹⁷ Ozturk, M.B., and A. Tatli. 2016. Gender identity inclusion in the workplace: Broadening diversity management research and practice through the case of transgender employees in the UK. *The International Journal of Human Resource Management*. 28(7): 781–802; Transgender Law Center. 2009. "The state of transgender California report: Results from the 2008 California transgender economic health survey." *San Francisco, CA: The Transgender Law Center*.

¹⁸ Patty, Anna, "Westpac Employees To Get Transgender Leave" *The Sydney Morning Herald*, 2018

<<https://www.smh.com.au/business/workplace/westpac-employees-to-get-transgender-leave-20181108-p50eub.html>>

¹⁹ Stark, Jill, "'We Don't Look After People Like You.' Transgender People Refused Medical Care" *Sydney Morning Herald*, 2015 <<https://www.smh.com.au/national/we-dont-look-after-people-like-you-transgender-people-refused-medical-care-20151015-gk9ss1.html>>

a helpful resource entitled “*Trans*@Work*”.²⁰ The guide highlights how workplaces can accommodate a transition, the employer’s legal responsibilities and questions to ask the trans and gender diverse person concerning their preferences and intentions. The resource is also useful because it provides information for the employer, employee who is transitioning and the co-workers. Having such information readily available is vital to foster an inclusive workplace where LGBTI people can feel comfortable and report their concerns such as sexual harassment.

The stigma associated with ‘coming out’

One of the most challenging barrier to adequately reporting and fighting sexual harassment of LGBTI people in the workplace is the fear of being ‘outed’ to their peers. The term ‘coming out’ refers to the announcement that LGBTI people make to their friends, family and the wider public that they are a member of the LGBTI community in some way. Fears of discrimination, harassment and societal and cultural acceptance often prevent people from coming out entirely.²¹

The question of revealing one’s sexuality is a key feature that increases the vulnerability of the LGBTI community, especially in situations such as workplace harassment. A 2007 survey of Australian and New Zealand transgender people found that almost 90 per cent had experienced at least one form of stigma or discrimination, including verbal abuse, social exclusion, receiving lesser treatment due to their name or sex on documents, physical threats and violence.²² In the same survey, nearly two thirds of participants reported changing behaviour to conceal their sexual or gender identity. Research shows that for many LGBTI people, disclosure of sexual identity is not an ‘all or nothing’ phenomenon.²³ It is very unusual to be ‘out’ to everyone at work, rather LGBTI people often selectively and gradually disclose information about their sexuality to one or more trusted colleagues. Coming out is recognised as a gradual and iterative process, where one must repeatedly come out to new colleagues when entering new work environments or workplaces.²⁴ This process can be quite stressful. Alternatively, LGBTI employees who may feel more comfortable expressing themselves at work may not be out to their friends and families outside of work, for cultural or religious reasons.

²⁰ Anti-Discrimination Commission Queensland, ‘*Trans*@Work*’, ADCQ [website], 2015, <https://www.adcq.qld.gov.au/resources/lgbti-people/Gender-identity-and-your-rights/Trans*@Work>.

²¹ Ragins, B. R., & Cornwell, J. M. (2001). Pink triangles: Antecedents and consequences of perceived workplace discrimination against gay and lesbian employees. *Journal of Applied Psychology*, 86(6), 1244-1261.

²² Couch M, Pitts M, Mulcare H, Croy S, Mitchell A, Patel S. *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*. Australian Research Centre in Sex, Health and Society, La Trobe University. Melbourne: La Trobe University, Australian Research Centre in Sex, Health and Society.

²³ Ibid.

²⁴ Ward, J., and D. Winstanley. 2005. “Coming out at work: Performativity and the recognition and renegotiation of identity.” *The Sociological Review* 53(3): 447–475.

The Service seeks to highlight the potential for perpetrators of sexual harassment against LGBTI victims to use the threat of 'outing' them as a way to prevent reporting of the incident. LGBTI victims face a particularly high risk of not being able to seek justice for experiences of harassment in the workplace, as they may not feel comfortable discussing their experiences until after they have 'come out', months or even years after the incidents occur.

When LGBTI people experience sexual harassment in the workplace, it is often at the hands of someone who either knows or suspects their sexual orientation and/or gender identity. In situations like this, there is an increased power imbalance between the harasser and victim. The fear of possibly being outed to either work colleagues or friends and family, and the fear of the stigma that may bring, is often enough to prevent LGBTI victims from reporting incidences of harassment. Investigations of the reporting behaviours of LGBTI victims (not just in harassment) shows a significant reluctance to report an incident due to fear of dismissal or retaliation from authorities.²⁵ Additionally, due to the fact that LGBTI people often are only out to a selection of their friends or colleagues, the support network on which they have to rely and seek assistance is smaller. LGBTI victims of sexual assault and harassment who are still coming to terms with their sexuality can transfer the blame of their experience from the perpetrator to their sexuality or gender; the sentiment "this would not have happened to me if I were not (LGBTI)" was found to be expressed among LGBTI victims of domestic violence by the Brisbane Domestic Violence Advocacy Service.²⁶ This internalised self-hate can be a major barrier to reporting incidences, however it can be mitigated by the workplace actively promoting inclusivity and offering a confidential reporting procedure.

Other issues unique to LGBTI people

Stigma and discrimination by others in the workplace make dealing with harassment when it does occur more difficult. It also increases the feeling of alienation experienced by LGBTI people.

Sexual harassment and discrimination often occurs when a harasser, who is more powerful in a work or social situation (for any reason) chooses to prey on a victim, who they perceive as

²⁵ Dwyer, A., Ball, M., Bond, C., Lee, M., and Crofts, T. (2017). "Exploring LGBTI Police Liaison Services: factors influencing their use and effectiveness according to LGBTQ people and LGBTI police liaison officers." *Report to the Criminology Research Advisory Council*. Criminology Research Grants.

²⁶ *Queer Without Fear – LGBTI Domestic And Family Violence And Its Impacts* (Brisbane domestic Violence Advocacy Service, 2019) <http://www.bdvs.org.au/resource_files/bdvas/IR_1_Domestic-Violence-Resource-040612-web.pdf>

being less powerful, or unable to defend themselves.²⁷ Many of the risk factors potential harassers look for in victims – alienation, proneness to secrecy, anxiety and issues with identity²⁸ – are issues commonly experienced by LGBTI people everywhere. LGBTI people are less likely to seek help due to fear of outing, or fear that authorities will not listen to them. Therefore, the discrimination faced by LGBTI people is sometimes triggered *by* their sexual orientation or identity. That is – their harassment is *because* of their LGBTI status, not independent from it.

Additionally, some LGBTI people are prone to harassment by virtue of the fact that they are poorly understood by their colleagues or employers. For example, bisexual people face increased rates of harassment due to the perception that their sexuality is a “curiosity”, and that they “won’t turn anyone down”. They are also subjected to inappropriate questions about their sex life from both male and female co-workers who would not ask the same questions to a heterosexual colleague. Lesbians also describe experiences of men harassing them as a result of their sexuality, and that their heterosexual female coworkers sometimes are spared the same treatment.²⁹

Finally, HIV+ gay, bisexual and transgender men can also experience additional stigma and harassment at work due to their status. 77% of men surveyed by the National Association of People Living with HIV/AIDS agreed with the statement ‘Telling someone I have HIV is risky’.³⁰ Experiences like these are indicative of the unique sexual harassment commonly experienced by LGBTI people at work.

Recommendation 1:

Continue to encourage organisations to deliver LGBTI cultural competency training to staff and to foster a confidential and understanding complaint reporting environment

Current Legal Framework

A brief outline of the current workplace sexual harassment legislation relevant to LGBTI people follows, specifically noting areas which the Service considers not to be adequately protective of LGBTI people. For the purposes of this section, the acts considered will be the Sexual Discrimination Act 1984 (Cth) (‘SDA’) and the Australian Human Rights Commission Act 1986 (Cth) (‘HCA’).

²⁷ Pryor, J. B. (1995). “The phenomenology of sexual harassment: Why does sexual behavior bother people in the workplace?” *Consulting Psychology Journal: Practice and Research*, 47(3), 160-168.

²⁸ Pryor, J. B., *op. cit.*

²⁹ Denissen, A.M., and A.C. Saguy. 2014. Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society* 28(3): 381–403.

³⁰ Slavin, Sean, “Results From The Stigma Audit: A Survey On HIV Stigma In Australia” (2012) 10(1) *HIV Australia*

SDA section 94(1) provides that 'A person shall not commit an act of victimization against another person.' SDA section 94(2) outlines the terms of this victimization, which the Service feels adequately covers the threat of 'outing' a victim in retaliation for reporting an offence. Additionally, the SDA section 28A outlines the meaning of sexual harassment as it relates to the workplace. SDA section 28A(2) defines 'conduct of a sexual nature' as including 'making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.' *This may not adequately capture the issue of outing a victim as a form of harassment, though the protections from retaliation through outing someone at work in SDA section 94 are satisfactory.*³¹

HCA section 20(2) outlines that the Commission may decide not to inquire into an act or practice, or, if the Commission has commenced an inquiry into an act or practice, may decide not to continue to inquire into the act or practice, if in a case where a complaint has been made to the Commission in relation to the act or practice, the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice'. Additionally, HCA section 46PF(1)(b) outlines that the President of the Commission may terminate a complaint to the Commission if the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place. *The service is concerned about this section of the act, as it means that LGBTI victims of workplace harassment have a limited timeframe in which to seek assistance from the commission or their complaint under the SDA will not be heard. As discussed previously, the fear of outing oneself can prevent LGBTI people from seeking help in relation to harassment until they are comfortable with their sexual or gender identity, at which point the time limits may have passed.*

Finally, HCA section 20(3) states that 'before the expiration of the period of 2 months commencing when a complaint is made to the Commission in respect of an act or practice, decide whether or not to inquire into the act or practice.' HCA section 20(10)(b) outlines that if a complaint is made, the Commission 'must use the Commission's best endeavours to finish dealing with the complaint within 12 months after the complaint was made.' *These lengthy time periods unfairly disadvantage transgender people, who may be transitioning and under increased levels of anxiety and stress, putting them at greater risk of harm for the period of time they must wait for the complaint's resolution.*

³¹ In Queensland, sexual harassment has been extended to have occurred outside the context of the workplace if the conduct is in the course of employment; see *STU v JKL (Qld) Pty Ltd and Ors* [2017] QCAT 505 (6 December, 2016).

Recommendation 2:

Clarify sexual harassment and discrimination law to include the unique circumstances faced by the LGBTI community.

Our experience

The Service has handled few cases that directly concern sexual harassment in the workplace. Nevertheless, the people who attend the Service often indicate that they are unsatisfied with their workplaces' lack of understanding and structures in place. Even when the main issue does not concern sexual harassment, clients have described the "jokes", inappropriate comments, intrusive questions and unwanted "advice" that they are subject to in the workplace. It is important for the Commission to take a proactive approach to investigating the basis on which LGBTI people do not commence action or report sexual harassment. The Service considers that with the above information, and recommendations, in mind, any report produced by the Commission will work towards addressing the fear, stigma and chronic underreporting that plagues LGBTI victims of sexual harassment.

Recommendation 3:

Consult with relevant LGBTI organisations with regards to any proposals to amend the laws relating to sexual harassment arising out of the Inquiry.