

SEXUAL HARASSMENT AND THE SEX DISCRIMINATION ACT: THE MICRO EFFECT

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I INTRODUCTION

In 2003, the Human Rights and Equal Opportunity Commission ('HREOC') issued a report on sexual harassment entitled *A Bad Business*.¹ The report reviewed the sexual harassment claims dealt with by HREOC between July 2001 and June 2002 and reported on the results of a national telephone survey on sexual harassment conducted by the Gallup Organisation on HREOC's behalf.

The NSW Working Women's Centre ('Centre') welcomes *A Bad Business* and considers its innovative approach to be another example of the way in which the Sex Discrimination Unit, under the leadership of Pru Goward, is strategically highlighting the key practical concerns of women at work.

The HREOC report confirms some things that we at the Centre have suspected for some time, because of what our clients are telling us about their experiences of sexual harassment at work. These are:

- that sexual harassment is still going on despite the existence for almost 20 years of legislative provisions making it unlawful in Australia;
- that sexual harassment seems to be on the rise;

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1 HREOC, *A Bad Business: Review of Sexual Harassment in Employment Complaints 2002* (2003), <http://www.hreoc.gov.au/sex_discrimination/bad_business/docs/SH_BadBusiness.pdf> at 7 October 2004.

- that women are generally the targets of harassment, and it is men who are the principal perpetrators;
- that many incidents go unreported;
- that many businesses still don't have a sexual harassment policy or procedure;
- that where there is a policy, it is not always implemented, or is not implemented properly; and finally
- that many women who do report sexual harassment are being let down within the workplace, and must resort to external procedures available through HREOC and other tribunals.

On this final point, we at the Centre know the importance for women who have experienced harassment at work of the existence of legislative protection and external avenues of redress, as provided, in particular, by the *Sex Discrimination Act 1984* (Cth).

We commend HREOC on the speed and professionalism with which they conciliate and deal with complaints. Our experience at the Centre is that, in matters notified to HREOC, our clients receive personalised attention from conciliators in a manner that is not always received in other areas of the legal system.

The conciliators are fair and impartial. Clients are kept well-informed about the progress of their case. Their lives are not left hanging in the balance with uncertainty. HREOC's approach also does not give clients unrealistic expectations about the potential outcomes of their cases.

We also note that businesses are not treated like pariahs in this process. Instead, they are assisted to formulate practical policies and procedures that will assist them to comply with the law and avoid future litigation.

I would like to address two key points in this article, and these are both issues raised by HREOC in the report. The first of these is the issue of unreported harassment. The second is the impact of sexual harassment on the lives of the women who experience it. These two issues are, of course, connected.

In order to outline how the Centre is able to provide some insight into these two key questions, I need first to outline the services that we provide to the women of New South Wales.

II THE NSW WORKING WOMEN'S CENTRE

First, we have established a 'Working Women's InfoLine'. The InfoLine receives approximately 1600 calls a year from women who need advice, information and assistance about a range of work-related issues, from pay and conditions to dismissal, redundancy, maternity entitlements, discrimination and, of course, sexual harassment.

The Centre provides additional representation, advocacy and assistance to individual clients with specific needs in relation to problems or disputes at work, including in relation to sexual harassment.

We also undertake outreach, education and training work with a range of different organisations, groups and women. For instance, since its inception, the Centre has worked closely with education providers and community organisations in New South Wales to conduct workshops for women who are seeking to enter the labour market, providing them with a better understanding of their rights at work. These workshops are targeted at women from non-English speaking backgrounds entering the Australian labour market for the first time or re-entering the labour market with upgraded skills, and at women from the white Australian community and the Aboriginal community who have spent considerable time outside of paid work.

In preparing our response to HREOC's report, we actually had a look at the calls to the InfoLine service during the period roughly corresponding to the complaints reviewed by HREOC in *A Bad Business* (that is, from July 2001 to June 2002). We also took into account the casework relating to sexual harassment undertaken by the Centre, and feedback from our education and training programs, and discussions with women about sexual harassment at work. The statistics from the InfoLine are instructive because, although they are raw data and have not yet been subject to close analysis, they do back up the findings of the HREOC report.

During the identified period, the Centre fielded 70 calls from women seeking advice and information in relation to an incident or incidents of sexual harassment in the workplace. From examining the nature of these calls, the following observations can be made:

- Forty per cent of clients worked as clerical or administrative workers, and another 26 per cent in the area of sales, revealing a substantial over-representation of these occupational groups in relation to the Australian workforce as a whole. These figures are perhaps reflective, not only of the gender segregated nature of the Australian workforce, but also of the fact that the overwhelming majority of women who contact our service work in non-unionised areas.
- The industry of the employer is also instructive. The calls over this period can be broken down with the key industries being wholesale/retail (20 per cent), property and business (12 per cent), hospitality (that is, hotels, accommodation, restaurants) (12 per cent) and manufacturing (13 per cent). Taking into account the occupational breakdown, and HREOC's finding of the age and power discrepancy between the perpetrator and the subject of the harassment, the industry breakdown is revealing. When we have a picture of the workplace situation, it is much easier to develop a closer understanding of the circumstances in which harassment is taking place.
- Thirty-three per cent of inquiries from the period were from women under 25 years of age and more than half (51 per cent) were in the 26–44 age group. Whilst our age-collection data is not as specific as HREOC's and uses slightly different categories, the data is nevertheless indicative of our experience that women who are subject to sexual harassment are generally younger than the perpetrator. The perpetrator also tends to be in a more

senior position within the workplace, often in a direct working relationship with the victim of the harassment and with power over their employment – for example, a supervisor, manager or business owner (although the perpetrator can also be a co-worker).

- Almost one third of inquiries (30 per cent) were received from regional and rural areas, supporting HREOC's finding that sexual harassment is not an issue limited to any one area. It is happening everywhere.
- Six per cent of callers had also been dismissed from employment. Of course, without further study, it is not possible to provide details about the outcomes of any disputes in relation to the termination of employment, or whether these women are still employed in the workplace where the harassment occurred. I can state, however, that in all of the sexual harassment cases that we have picked up as intensive casework matters arising out of any of these calls, our staff advise that they are not aware of any clients who have continued their employment at the place of business.

III UNDER-REPORTING OF SEXUAL HARASSMENT

This brings me to one of the key issues, which is the under-reporting of sexual harassment. It is our experience that there are many complex and varied reasons as to why so many instances of sexual harassment do go unreported, and why it is that the calls to our agency and complaints to HREOC and other agencies are, as the report itself notes, 'the tip of the iceberg'.² I believe that the Centre can shed some light on this because, in our direct conversations with women about their concerns at work, we deal with the micro level, the individual experience of the harassment and its impact on the lives of the women who have experienced it.

Many express fears about speaking out or making formal complaints about their harassment, often based on fears of the ramifications of doing so, in particular:

- the fear of not being believed;
- the fear of the reactions of co-workers;
- fears about the perpetrator's response if they pursue a formal complaint, particularly being subject to further and even intensified harassment;
- the fear of the reaction of their partners, husbands, boyfriends, family and friends – that is, that their experience is somehow shameful and will not be understood; and
- the fear of losing their job.

These fears are not unfounded. They are borne out by the data of the HREOC report, with the vast majority of complainants no longer being employed in the workplace where the harassment occurred. These fears are also borne out by what our own clients are telling us. Furthermore, as the HREOC report indicates, the perpetrator is often older and in a position of relative power within the

2 Ibid 10.

organisation. Most of the women who contact our service understand this very well.

It is also important to note that sexual harassment frequently happens in secret. There is some irony in the reality that a much higher public awareness of the illegal nature of sexual harassment – and the existence of policies and legal remedies – has perhaps meant that sexual harassers have become more clever about not being seen.

It has been our experience that where workplace policies are not in place or are badly implemented, women have a hard time being believed. Workplaces can respond punitively towards the complainant rather than seeking to develop appropriate responses to prevent the continuation of harassment.

Cultural issues are also a very important in relation to the under-reporting of harassment. Over one quarter (26 per cent) of the calls to the InfoLine in the identified period were received from women who spoke a language other than English as their first language. We note that the HREOC report found that non-Indigenous Australian-born complainants were over-represented in the complaints data, indicating that these women tend to exercise their right to redress. It is our experience in working with culturally diverse communities that women from non-English speaking backgrounds are less likely to be aware of legal protections, or their rights in relation to work in general.

Our outreach and education work provides further insight into cultural factors that might impact on a woman's capacity to make a complaint. Where employment options are limited by language and skill-recognition barriers, it is simply not realistic to 'vote with your feet'. Women from non-English speaking backgrounds are also far less likely to be aware of legislative and other protections available in the workplace or externally, and while this is more true of certain community groups than others, we are able to make this statement authoritatively, especially as it pertains to more recently arrived groups.

We have also found this to be the case with Aboriginal and Torres Strait Islander women, who are, of course, two distinct groups. The HREOC data notes two complaints from Indigenous women in its report. I can advise that, during the identified period, the Centre received no inquiries to the InfoLine about sexual harassment from Indigenous women.

I can state, however, that, in the series of workshops that the Centre has run with Aboriginal women's organisations and communities in New South Wales over the last 18 months, the issue of sexual harassment has been frequently and consistently raised as a major issue of concern, particularly for younger workers.

It is widely recognised that Aboriginal women experience prejudice and extreme racism that impacts on their capacity to access mainstream employment. Their experiences at work are closely tied to issues experienced by their communities more generally and this may account for what is clearly a case of under-reporting.

IV THE INDIVIDUAL IMPACT OF SEXUAL HARASSMENT

This brings me to the second issue I want to raise, which is how women experience sexual harassment and its impact on their lives. In relation to issues of sexual harassment, the Centre operates like a rape crisis centre, assisting the individual to deal with the impact of the assault. We can also be likened to a hospital which treats someone who has been severely burned. Society is sympathetic towards the injured, and has come a long way in extending sympathies and support to the victims of rape in the last 20 years. Fortunately, and rightly, it is now rare that the victim is blamed. Unfortunately, this does not appear to be the case with sexual harassment at work.

So what do women who have been sexually harassed feel? How do they respond to this harassment? Our clients often tell us that they feel invaded. This makes sense if we understand sexual harassment correctly, as a form of sexual assault, motivated by the same factors and based on the same abuse of power.

When describing the experience of sexual harassment to our InfoLine, women often become very upset. They frequently report feeling confused and uncertain. Many are traumatised and express uncertainty about what exactly happened. They also experience self-doubt and uncertainty about why they have been targeted.

The experience can take its toll on health, well-being and other areas of these women's lives. It may also impact upon their relationships with families, partners, husbands, boyfriends, parents, children, co-workers and friends.

In talking to these women, it becomes obvious that it is particularly important to them that others validate their experience. It should also be noted that uncertainty and disbelief are often a factors that impact upon the resolution of the situation, as well as upon the recovery of the woman and her ability to move beyond the experience once the situation is resolved.

'The hardest thing is the feeling that they didn't believe me', a client said recently to one of our advisors. At the time, she was on anti-depressants, which she had been prescribed for the depression that she experienced after she lodged a complaint about a supervisor with her employer. The employer had failed to address her complaint appropriately and she had continued to be subject to harassment until she left her employment. It is doubtful that this woman will return to work in the near future. This is someone with no previous history of depression or any other kind of mental health problem. She has not worked since leaving her employment and is receiving sickness benefits.

V CONCLUSION

A Bad Business provides us with a clear message that women who are subjected to sexual harassment *are* being let down by procedures and protections at the workplace level. The HREOC report confirmed what our clients tell us: that some employees are even dismissed when they make a complaint. A lack of

procedures means that the harassment can be allowed to continue, or, if handled badly, can escalate into other forms of harassment and victimisation.

With more than one in four complainants no longer working at the place of employment where the harassment occurred, we return to the fact that women who have been sexually harassed have genuine and well-founded fears about what will happen if they do report the harassment: that *they*, rather than the perpetrators, will be the ones blamed for what has happened.

The message that this sends to the perpetrators is critical. Inaction or poor implementation of policies, and discipline of the complainant rather than the perpetrator, effectively sanction the inappropriate behaviour. These may also be factors in encouraging repeat offences. This is not healthy for any of the parties involved, and will only ensure that the situation gets worse.

This is a serious business. We know that sexual harassment impacts negatively on workplaces, on women's capacity to work, on broader health issues, and on society more generally. It is, as HREOC rightly points out, 'a bad business' indeed.

Prevention and good management through effective procedures and proper implementation is, as Pru Goward has pointed out, the socially responsible and most cost-effective way to address this problem.

The Centre has a micro-level understanding of the impact of this issue. We are about dealing with real people in real situations, and are concerned that the issue is not demeaned by sensationalism or political point-scoring. It is helpful to our service, and for the collaborative work we do with agencies such as HREOC, to have this recognised.

It is our belief that effective workplace solutions can be achieved, for the benefit of all concerned, through collaboration between employers, employees, governments and agencies such as HREOC and the Centre. Again, I commend the work of HREOC in highlighting the issue and laying foundations to enable effective solutions to emerge.