RESPONSE BY AUSTRALIA TO STUDY COMMISSION 4

“HARASSMENT, IN A BROAD SENSE – MORAL AND SEXUAL – AND ITS CONSEQUENCES ON LABOUR RELATIONS”

THE HONOURABLE JUSTICE JOSH WILSON
INTRODUCTION

1. Harassment in the workplace based on sexual orientation, race or disability is unlawful in Australia. Perpetrators of it face severe consequences. Very little reported evidence exists of judicial misconduct related to harassment or bullying.

HARASSMENT

2. Harassment takes many and varied forms. The precise activities that are unlawful differ depending on the context in which the harassment takes place.

Sexual harassment

3. Sexual harassment is defined by s 28A of the Sex Discrimination Act 1984. Sexual harassment occurs in circumstances where the victim would be offended, humiliated or intimidated by another person –

(a) making an unwelcome sexual advance;

(b) making an unwelcome request for sexual favours; or

(c) engaging in other unwelcome conduct of a sexual nature in relation to the victim.

4. Sexual harassment need not be explicit for it to be unlawful as subtle and implicit conduct can suffice.

5. The Australian Human Rights Commission (“AHRC”) is a statutory body that was established to deal with harassment, among other things. AHRC has provided illustrations of sexual harassment to include –

(a) sending explicit or sexually suggestive emails or text messages;

(b) displaying pornographic posters or screensavers; or

(c) asking intrusive questions about a person’s personal life, including about that person’s sex life.
Racial discrimination

6. Racial discrimination is prohibited by s 18C of the *Racial Discrimination Act 1975*. By that section, offensive behaviour based on racial hatred is unlawful. Offensive behaviour includes any act that is likely to offend, insult, humiliate or intimidate another by reason of that other person’s race, colour, national or ethnic origin.

7. AHRC has provided illustrations of racial discrimination. They include –

(a) displaying racially offensive posters or screensavers; or

(b) telling insulting jokes about particular racial groups.

8. In a landmark Australian case, *Eatock v Bolt* [2011] FCA 1103, the Federal Court of Australia ruled that a journalist and the newspaper for which he wrote had contravened s 18C of the *Racial Discrimination Act 1975*. The decision attracted widespread notoriety. The journalist, one Andrew Bolt, wrote two newspaper articles that concerned persons of aboriginal heritage having fair skin rather than dark skin. In the articles, Bolt asserted that fair-skinned aboriginal people were not genuinely aboriginal and were instead pretending to be aboriginal so they could access social welfare benefits that were available to aboriginal people. The judge held that s 18C required Ms Eatock to establish –

(a) it was reasonably likely that fair-skinned aboriginal people (or some of them) were offended, insulted, humiliated or intimidated by Mr Bolt’s conduct; and

(b) Mr Bolt’s conduct was done because of the race, colour or ethnic origin of fair-skinned aboriginal people.

9. Ultimately, the court decided that s 18C of the *Racial Discrimination Act* had been contravened.

Disability discrimination

10. Section 15 of the *Disability Discrimination Act 1992* prohibits harassment in relation to an employee’s disability. AHRC has said that disability harassment includes making derogatory comments or taunts about a person’s disability.
11. In Australia, bullying and harassment are different yet bullying – as with harassment – attracts serious consequences. It too is forbidden in the workplace. A worker is bullied at work where a person or group of people repeatedly act unreasonably towards another person and their behaviour creates a risk to health and safety. Unreasonable behaviour includes victimising, humiliating, intimidating or threatening conduct. Whether particular behaviour is unreasonable depends on the circumstances but includes whether a reasonable person might in the circumstances regard the behaviour as being unreasonable.

12. The Fair Work Ombudsman, the statutory officer created under the *Fair Work Act 2009* to address, among other things, contraventions of workplace laws imposed by that Act, has given examples of bullying. Those include –

(a) behaving aggressively;

(b) engaging in teasing or making practical jokes;

(c) pressuring another to behave inappropriately;

(d) excluding another from work-related events; or

(e) making unreasonable work demands.

13. In s 789F of the 2013 *Fair Work Amendment Act*, the interpretation of “bullying” was enlarged to include the following –

(a) yelling, screaming or offensive language;

(b) excluding or isolating employees;

(c) psychological harassment;

(d) intimidation;

(e) assigning meaningless tasks unrelated to the job;

(f) allocating impossible jobs to employees;
(g) deliberately changing work rosters to cause inconvenience to particular employees;

(h) undermining work performance by deliberately withholding information vital for effective work performance.

14. As can be seen, the definition is very broad, deliberately aimed at capturing wide and far ranging conduct.

15. Under the federal Work Health and Safety Act 2011, an employer’s duty of care towards his, her or its employee is breached if bullying occurs in the workplace. Such an occurrence can result in a prosecution under that Act. In addition to federal legislation, each state and territory of Australia has its own legislation concerning occupational health and safety.

**MISCONDUCT IN THE LEGAL PROFESSION**

16. From that brief survey it will be apparent that harassment and bullying in the workplace applies with full force and effect in a legal environment. Accordingly, firms of lawyers are caught by the operation and effect of the legislative provisions mentioned above. So, too, is the courtroom. That is construed as a “workplace” to which laws relating to harassment and bullying apply. A recent survey conducted by the Victorian Bar concluded that a large number of counsel appearing before state and federal courts felt bullied and subjected to harassment through the behaviour of discourteous judges. However, beyond highlighting the inappropriateness of such conduct, the individual barrister’s remedy for judicial bullying and harassment did not travel very far beyond a complaint to the head of the relevant court jurisdiction about the judge’s conduct. In the federal arena no federal body presently exists that has power to censure federal judges although, as canvassed at [49] below, the Judicial Misbehaviour and Incapacity (Parliamentary Commissions Act exists. Conversely, certain states have statutory bodies with power to discipline judges, including (in some states) the power to recommend to parliament that a judge’s judicial commission be revoked.

17. Having regard to the constitutional guarantee of judicial tenure until 70 years of age, a federal judge may only be removed from office upon a finding of proven misbehaviour on the address of both Houses of Parliament.
18. The states of New South Wales, Victoria and South Australia and the Australian Capital Territory have Judicial Commissions with power to recommend a judge’s removal from office on the grounds of proven misbehaviour or of proven incapacity.

19. No precedent yet exists in Australia for a Judicial Commission recommending the removal of a judge on the grounds of proved misbehaviour or proved incapacity on the basis of –

(a) bullying;

(b) sexual harassment;

(c) racial discrimination; or

(d) disability harassment.

20. Prior to the establishment of Judicial Commissions in such jurisdictions as have them, complaints about the conduct of judges that may have approximated conduct akin to bullying or harassment were referred to the head of jurisdiction and dealt with by way of a conscience vote. As the judge had tenure until 70 years of age, in the absence of an address to both Houses of Parliament praying for the removal of the judge, no basis existed for the judge’s removal. In that eventuality the head of jurisdiction was forced to address the issue in a manner that may have involved –

(a) reprimanding the judge and counselling the judge;

(b) preventing the judge from hearing certain types of cases; or

(c) aligning the judge with a judicial mentor who could train the judge into better behaviour.

21. Temporally topically, on 26 March 2019 the Judicial Commission of New South Wales (the most populous state in Australia) handed down its report into the conduct of an intermediate trial judge’s behaviour. The judge was suspected of having an impairment by reason of his Honour’s inability to deliver reserved decisions in a timely manner. The particulars of the complaint against the judge included 15 cases in which judgment was reserved for 12 months or longer and the longest was 34 months. The Judicial Commission found that the judge had been offered assistance to attend to the
outstanding judgments but in most instances the offer of assistance was not taken up. The judge then gave an undertaking to complete the judgments within a particular time to which he did not adhere. The Judicial Commission considered the judge’s reasons offered by way of mitigation, including –

(a) the judge’s depressive illness;

(b) the judge’s reading difficulties and other health issues; and

(c) the volume of documentation the judge was required to read in the conduct of a busy circuit court practice.

22. The Judicial Commission observed that the judge exhibited defiance and recalcitrance of a high order in his failure to respond to the Chief Judge of that court. In the end, the Judicial Commission found that the judge was guilty of unacceptable delay in the delivery of a large number of reserved decisions. The Commission found that it had no confidence the judge would focus on the performance of his judicial work. It considered that the subject matter of the complaint against the judge could justify Parliament’s consideration of the removal of the judge from office.

23. As at the date of writing, Parliament is considering its decision for the judge’s removal.

24. There is nothing to suggest that a similar enquiry could not be undertaken in relation to a judge against whom significant allegations of harassment were made. That said, I am not aware of any civil litigation brought against a sitting judge for harassment, nor am I aware of a public censure having been administered to a sitting judge for harassment of staff. More commonly emerging are submissions of counsel to the effect that a courtroom is a workplace in which the judge is responsible for controlling the conduct of all persons present in the courtroom, and that the judge is therefore responsible for eliminating behaviour that may be construed as bullying. To that end, conduct by the judge which intimidates counsel is often described by barristers as a form of bullying. So far as I am aware, no judge has been dealt with by the Fair Work Ombudsman for bullying arising out of in-court behaviour.
REMEDIES FOR WORKPLACE MISCONDUCT

25. Depending on the nature of the relevant misconduct the victim has an array of remedies. Misconduct that takes the form of criminal conduct (for example, assault, threat to cause harm, intimidation, acting with menace, etc.) is dealt with in the usual way by police or prosecuting authorities. The same misconduct may give rise to civil remedies, depending on the nature of the misconduct. An assault will give rise to a claim in damages, for example, as well as vicarious liability for the employer according to ordinary principles of the law of tort. If the conduct is in the nature of a statutory contravention, the victim may have remedies against the employer grounded largely in its failure to provide a safe workplace that is free from bullying or harassment.

26. A person asserting that he or she has been the subject of harassment or bullying is entitled to apply to the AHRC.

27. Where bullying is involved, the federal statutory agency known as the Fair Work Commission is empowered to make what are called “stop orders” requiring the perpetrator to desist in the relevant conduct.

28. Where sexual harassment is involved, the victim is entitled to commence a proceeding alleging sexual discrimination. That is brought in the Federal Circuit Court of Australia.

29. In addition, where a person’s contract of employment incorporates terms that forbid harassment or discrimination, usually on grounds of race, sex or disability, then a breach of that contractual provision becomes actionable in a court of competent jurisdiction. The usual remedy would be damages or an injunction to stop the contravening conduct.

30. A recent case illustrates the law on point in relation to a lawyer in a firm. The case was *Hill v Hughes* [2019] FCCA 1267. Hill commenced employment at the firm Bessley & Hughes where Hughes was a principal solicitor. Throughout the course of her employment Hughes made numerous sexual advances to Hill which resulted in the finding that the conduct of Hughes amounted to sexual harassment. Hughes was ordered to pay $170,000 in damages.
The curious case of Geoffrey Rush

31. Amidst the swirling winds of the #MeToo worldwide phenomenon came the Australian defamation case of *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, a decision of Justice Wigney of the Federal Court of Australia. Its subject matter was the internationally acclaimed Shakespearean actor Geoffrey Rush. An Australian newspaper had published an article of widespread circulation entitled “KING LEER”. The article referred to Mr Rush allegedly engaging in what it asserted was “inappropriate behaviour” during rehearsals and performances of King Lear. Specifically, in relation to Eryn Norville an actress who played the role of Cordelia the article asserted that Rush had touched her several times on her breasts and acted in a sexually predatory manner towards her. Rush commenced defamation litigation against the newspaper. The trial was the largest defamation case in Australian legal history. Ultimately, Rush was successful in obtaining an award of damages of $850 000 with an investigation into costs and loss of earnings yet to be conducted.

32. Then followed a national inquiry into sexual harassment in the workplace, undertaken by the federal Sex Discrimination Commissioner. In launching the enquiry, the government stated that it wanted to investigate the intersection between defamation laws, sexual harassment laws and human rights laws. The inquiry was commissioned in the face of concerns that a victim of sexual harassment was wrong to have complained about being subjected to sexual harassment. The inquiry is to report before year end 2019.

33. The inquiry arising from the Rush case is set against the backdrop where, according to the AHRC’s latest survey on sexual harassment in Australian workplaces, only 17% of people experiencing sexual harassment in the workplace over the last five years lodged formal complaints or reports. The AHRC survey highlighted that the media, arts and entertainment industries reported the highest rates of sexual harassment.

Rule 123

34. In the state of Victoria, Australia, barristers are bound by the provisions of Rule 123 of the Legal Profession Uniform Conduct (Barristers) Rules 2015. That rule states as follows –
A barrister must not in the course of practice, engage in conduct which constitutes:

(a) discrimination;

(b) sexual harassment; or

(c) workplace bullying.

35. In an illuminating article by a senior Australian barrister Dr Richard Ingleby, ‘Racial Vilification and the Practice of Family Law’ (2019) 93 Australian Law Journal 173, the learned author contrasted rule 123’s reference to proscribed conduct “in the course of practice” against the measure imposed by the English Bar Standards Board, BSB Handbook Equality Rules, which promotes an anti-discrimination policy “in relation to your chambers”. Dr Ingleby incisively pointed out the following –

One impediment faced by all professions is the instinct to deny the existence of a problem for fear of damaging the image of the profession more generally.

36. There is considerable force in the observation.

Specific examples of judicial misconduct

37. Although the following matters do not relate specifically to harassment or bullying, some of the more notable cases of judicial misconduct are these.

Council of the New South Wales Bar Association v Einfeld [2009] NSWCA 255

38. Marcus Einfeld was called to the Bar of New South Wales in 1962 and was appointed Queen’s Counsel in 1977. Einfeld served as Judge of the Federal Court of Australia from December 1986 to April 2001 when he returned to practise at the Bar. Einfeld was sentenced to a maximum three years in prison, with a non-parole period of two years, for knowingly making a false statement under oath and for attempting to pervert the course of justice. Einfeld give evidence under oath and signed a statutory declaration which detailed that an old friend was driving his car at the time in which he received a speeding fine. It was later established that the friend had died in the United States three years earlier. Einfeld then described a fictitious second friend by the same name. On 26 November 2008, Einfeld’s commission as Queen’s Counsel was revoked
and his Order of Australia was rescinded in April 2009. In 2009, the New South Wales Court of Appeal ordered that Einfeld’s name be removed from the roll of lawyers and Einfeld agreed not apply for re-admission.

**Magistrate Carmen Randazzo**

39. Victorian Magistrate Carmen Randazzo was forced to resign after an investigation into an alleged irregularity relating to nine speeding tickets over several weeks. Ms Randazzo informed the Department of Justice that her father, Antonio Randazzo, was driving her car at the time. It was later established that Mr Randazzo was overseas at the time.

40. I have been unable to reliably document an illustration of judicial misconduct by reason of harassment or bullying.

**QUESTION 4**

41. This question asks whether in Australia the judiciary has rules, ethical codes or legislation relating to harassment by judges and judicial staff and it asks for a description of the relevant procedures for reporting and enforcing those rules.

42. The judiciary, like every other person residing in Australia, is bound by the applicable legislation. To the extent that judges’ staff have an ability in the workplace to bully or to harass another, they too are forbidden from doing so. But that proscription does not arise by reason of their position within the judiciary. It arises by reason of the circumstances that attract the operation of laws governing bullying, harassment, sexual discrimination and racial discrimination.

43. Australia is a constitutional monarchy, a federation and a parliamentary democracy, all concurrently. By reason of its status as a federation, Australia’s six states and two territories retain their self-governing status while at the same time the federal Commonwealth under which the states and territories have been federated operate simultaneously in the exercise of the legislative, executive and judicial functions. As with the United States, the Australian judiciary is divided into federal judges and state or territory judges. The Australian states of New South Wales, Victoria and South Australia together with Australian Capital Territory (not a state) have enacted
legislation that regulates and sanctions in certain circumstances behaviour of judges of those states and of that territory. The legislation of those three jurisdictions is not identical. In New South Wales the legislation is the Judicial Officers Act 1986. In Victoria the legislation is the Judicial Commission of Victoria Act 2016. In South Australia the legislation is the Judicial Conduct Commissioner Act 2015 and in the Australian Capital Territory the legislation is the Judicial Commission Act 1994.

44. In New South Wales a judicial officer can only be removed from office upon the presentation to the State Governor of a report by the Conduct Division of the Judicial Commission in which the Conduct Division states that on the ground of misbehaviour or incapacity Parliament may consider the removal of that judge. The decision to remove a judge from office is Parliament’s. As mentioned above a very recent illustration concerned a judge of the District Court of New South Wales who had a large number of decisions under consideration for an unduly long time – 13 months in some instances. The Conduct Division reported to Parliament that in its opinion it was open to Parliament to remove that judge from office on either ground of misbehaviour or incapacity.

45. In the state of Victoria, the most severe sanction is the standing down of a judge if the Judicial Commission so recommends. That is not the same as removal from office, however.

46. In the state of South Australia, upon a complaint being made by any person about a judicial officer, the Judicial Commissioner investigates the complaint and may recommend to Parliament that the judge be removed from office. It will be immediately apparent that the procedure in South Australia resembles that of New South Wales.

47. In the Australian Capital Territory the process is more involved. A person may lodge a complaint concerning a judge. The Judicial Commission then investigates the complaint and reports to the Attorney-General. The Attorney-General has power in an appropriate case to recommend to the Legislative Assembly (the lower of the two Houses of Parliament) that the judge be removed from office. If the Legislative Assembly passes a resolution requiring the government to remove the judge, the government must remove the judge from office.
48. The grounds of the complaint leading to the removal are misbehaviour or physical or mental incapacity.

49. In all of the above regimes, I have not encountered a situation where a judge has been removed for bullying.

50. In the federal arena, only if each House of Parliament resolves to establish one is a commission constituted under the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 to investigate a specified allegation of misbehaviour or incapacity of an identified Commonwealth judicial officer. Specific questions are to be answered by the Commission and those answers are given to Parliament. Parliament then decides whether to remove the judge.

51. The federal arrangements apply to Justices of the High Court of Australia, Justices of the Federal Court of Australia, Justices of the Family Court of Australia, Judges of the Federal Circuit Court of Australia and other judicial offices such as members of the Administrative Appeals Tribunal and persons discharging quasi-judicial functions under the legislation relating to industrial law.

52. So far as I can tell, no federal judge has been removed from office upon an address of both Houses of Parliament for bullying.

53. The law is stated as at June 2019.

THE HONOURABLE JUSTICE JOSH WILSON

FAMILY COURT OF AUSTRALIA

31 May 2019