**Submission**

**to**

**Expert Advisory Group
Royal Australasian College of Surgeons**

**Issues Paper: discrimination, bullying and sexual harassment in the practice of surgery**

**by the**

**Anti-Discrimination Commission Queensland**

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# Introduction

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland Anti-Discrimination Act 1991.
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the Anti-Discrimination Act 1991 and of whistle-blower reprisal. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.
3. The Royal Australasian College of Surgeons (the College) has established an Expert Advisory Group (EAG) to advise the College on how to prevent and address discrimination, bullying and sexual harassment in the practice of surgery. The College has conducted research, and has published a Background Briefing and an Issues Paper calling for ideas about preventing and addressing discrimination, bullying and harassment in the practice of surgery.
4. The Commission has been dealing with complaints of discrimination and sexual harassment for over twenty years. Our work also includes engaging with stakeholder groups, providing training, and receiving feedback on human rights issues such as discrimination, bullying and sexual harassment in workplaces. This submission is based on our experiences and knowledge acquired in carrying out these functions. It responds to some of the issues and proposals in the Issues Paper, by reference to the headings in the Issues Paper.

# Organisational culture

1. It is acknowledged in both the Background Briefing and the Issues Paper that problems of discrimination, bullying and sexual harassment persist despite the legal prohibitions and regulatory framework that have existed for many years. One of the questions in the Issues Paper is whether the right skills are being taught.

## Possible next step – refocus training

1. One of the possible next steps suggested in the Issues Paper is refocusing training to prevent discrimination, bullying and sexual harassment by emphasising patient safety as well as compliance.
2. Although emphasis on patient safety is extremely important, the Commission considers that training should equally focus on the impact of discrimination, bullying and sexual harassment on the individuals involved and on the morale and efficacy of the workplace. Some of the impacts at the individual, team and organisation levels are identified in the Background Briefing on page 9. The Background Briefing also refers to the report of the Australian Human Rights Commission on the review into the treatment of women at the Australian Defence Force Academy, which states:

It is essential that harassment and discrimination are framed as damaging to operational effectiveness, rather than merely a breach of the law.

1. Conciliation of complaints of discrimination and sexual harassment provides an opportunity for the parties to talk about the issues in a private forum. An important aspect can be the ability of the person subjected to the alleged inappropriate conduct to describe its impact to the others involved. It can help the other parties understand more clearly the inappropriateness of the conduct, and in some cases that understanding can change behaviours.
2. A brief outline of some of the impacts of sexual harassment and discrimination in decided cases is provided in the attached **Annexure**.
3. Consequences to the individual include losing their job or chances of promotion, and in high pressure industries the capacity of the individual to do the work can be corroded completely. Consequences for the workplace can include a hostile environment, poor morale, increased absenteeism and reduced productivity.
4. Research conducted by the University of Melbourne identified physical effects suffered by people who personally experience racism. Negative effects of racism on the health of Aboriginal and Torres Strait Islander people included heart disease, premature births, hypertension and mental illness. This research led to the national ‘Racism makes me sick’ campaign to provide important information to the public on the effects of racism.

## Possible next step – Review current professional development and traineeship education

1. Another of the possible next steps is to review current professional development and traineeship education about discrimination, bullying and sexual harassment.
2. The Commission suggests that training about discrimination, bullying and sexual harassment should occur across all phases of the education and professional practice of health workers. At page 8 of the Background Briefing research focussing on craft groups has been referenced, including to following:

The culture of abuse in the family physicians’ workplace may be perpetuated through the modelling of abuse starting in medical school, moving through residency and into the daily workplace of family physicians.

1. Appropriate training at all these phases would help to model respect and dignity rather than a culture of abuse. The training should be considered as a requisite component of compulsory professional development after the education and training phases. Training options should include the topics of ‘unconscious bias’ and ‘mindfulness’.

# Culture of surgery

## Gender inequity

1. The Issues Paper sets out some statistics relating to gender in the practice of surgery. For example; in 2013 although 52 per cent of medical students in Australia and New Zealand were female, only 11 per cent of qualified surgeons were female. Women made up 28 per cent of people entering surgical training, but are a least twice as likely to leave the programs compared to men. The College is reaching why more female than male trainees drop out of the training program.
2. The practice of surgery is not the only profession or industry faced with gender inequity; the legal profession, finance/banking and engineering are trying to achieve gender diversity. Earlier this year the Law Council of Australia released the report of its National Attrition and Re-engagement Study, which investigated and analysed the drivers for attrition of women from the legal profession in Australia. The research involved both quantitative and qualitative methodologies. Key findings, included:
	* The relative lack of women in senior leadership positions is seen to contribute to a male-dominated culture in which it is difficult for women to progress. For some, the prevalence of men in senior positions presented cultural barriers to their own progression.
	* Half of all women reported experiencing sex discrimination, and one in four experienced sexual harassment in the workplace.
3. Both the Law Council of Australia and the EAG acknowledge that their respective professions are not alone in trying to address the consequences of male dominated industries. It might be advantageous for these key industry bodies to work together to some extent to share experiences and learnings in dealing with these issues.
4. The Commission supports the possible next steps set out in the Issues Paper, which include identifying and eliminating potential barriers for females entering and staying in the profession, introducing targets, making gender equity a strategic priority, and developing a Code of Practice linked to a public reporting cycle.

## The boys’ club

1. The Background Briefing states that research has shown that a ‘boy’s club’ mentality in male-dominated settings is strengthened by organizational and professional structure and assumptions that promote traditional gender stereotypes.
2. Making traditionally male-dominated industries and professions inclusive of women is not easy, and there is no single strategy. The Commission agrees that proactive plans to attract and retain women in the profession are necessary. Training about discrimination and sexual harassment at all stages of education and professional development is necessary. An important component of the education program is training to recognise and address unconscious bias.
3. Training in unconscious bias is one of the strategies promoted by the Law Council of Australia following the NARS report. The Law Council of Australia has also released a Diversity and Equality Charter that commits the Australian legal profession to promoting diversity, equality, respect and inclusion in the profession.
4. Visible commitment at the leadership level is a vital start to achieving gender diversity. The Commission suggests the College consider committing to a gender inclusive practice of surgery through a charter or statement of commitment.

# Complaints

1. Both the Background Briefing and the Issues Paper acknowledge an under-reporting of discrimination, bullying and sexual harassment in the practice of surgery, as well as more widely in the health sector. Reasons for not complaining are identified as fear of reprisal and response to complaints. The Briefing Background refers to two reported decisions involving sexual harassment and sex discrimination in the legal provision, respectively, as illustrating the extent to which workplace culture and systems contribute to discriminatory behaviour as much as the behaviour of the individual perpetrators.[[1]](#footnote-1)
2. It is not unusual in complaints of discrimination and sexual harassment made to the Commission that respondents, particularly employers, will argue they were not aware of the issues because the person did not complain to them. There are a variety of reasons why a person does not complain of discrimination, bullying or sexual harassment. Often there is a power imbalance. Where the conduct persists, the employment relationship comes to an end, one way or another.
3. In a decision of the Queensland Civil and Administrative Tribunal on a complaint of sexual harassment in the workplace, the tribunal member considered the various ways people respond to being subjected to sexual harassment:

48. …a woman at the receiving end of unwanted sexual comments in a male environment has to make a decision. Ideally, the woman would make it abundantly clear to the perpetrator that the comments are unwanted. Then if they continue she would complain to management.

49. The ideal approach is not always practical and may not be available if the employer is likely to be unsupportive, or to require proof: some employers regard the making of unsubstantiated allegations as a disciplinary matter. Whilst such a reaction to an allegation of sexual harassment might be victimisation under the *Anti-Discrimination Act 1991*, it can be seen that a complaint by the victim might result in a risky battle with the employers.

50. Other employers faced with this problem might try to ignore the comments and hope that they cease. A further way to deal with it would be to go along with the banter to some extent and that way try to stop it getting out of hand. This is the way Ms Nunan decided to deal with it. One of the reasons for this was that she was strongly committed to her job and did not want to jeopardise it by reporting the matter. She thought in this way she would be able to indicate to Mr Hotson when he went too far.[[2]](#footnote-2)

1. The published decisions also illustrate that making a workplace complaint can have a deleterious effect on the complainant. An investigation may be poorly conducted with an unsatisfactory outcome, leaving the individual feeling they have been treated unfairly. Other actions by an employer feeling victimised, whether perceived or real. The following are examples from cases that have gone before a court or tribunal:
	* An employer directed a worker to apologise to a colleague for racially derogative comments and behaviour. In the verbal apology the worker referred to the colleague’s colour in the context of suggesting he needed to move on. The botched apology was itself a further act of race discrimination, and exacerbated the psychological injury suffered by the colleague.[[3]](#footnote-3)
	* A bungled investigation of complaints of sexual harassment resulted in the employer finding the allegations were not ‘substantiated’, despite the evidence, and the worker feeling undermined and unsupported. The combination of the sexual harassment and mishandling of the complaint caused her to suffer psychiatric injury.[[4]](#footnote-4)
	* A senior manager, who complained of a series of sexual advances and slurs over a period of months, was required to continue to work with the person she complained about during the course of the investigation. The investigation took a number of weeks and she began looking for work elsewhere, and later resigned.[[5]](#footnote-5)
	* A pharmacist in a hospital made a number of complaints about staff and superiors, including public interest disclosures. The hospital decided to transfer the pharmacist to another hospital on a new ‘rotation plan’. The pharmacist claimed the proposed transfer would cause her anxiety and depression, and she was suspended from work for an extended period. A complaint of impairment discrimination by the hospital was dismissed after a hearing in the tribunal.[[6]](#footnote-6)
	* The tribunal found that the investigation of complaints by a hospital worker of sexual harassment and bullying was unsatisfactory, and that it contributed to the worker’s psychological injury. The investigator was inexperienced, made comments that appeared to be biased, did not consider all the available statements and conclusions were not supported by the evidence.[[7]](#footnote-7)
2. Though not a panacea, individual complaints have to capacity to effect systemic change. A fair, transparent and effective complaints process within each workplace is a crucial component to addressing discrimination, bullying and harassment in any workplace.

# Conclusion

1. By the time complaints of discrimination and sexual harassment in the workplace reach the Commission, the employment relationship has usually deteriorated to an irreparable extent, or has come to an end. This is a negative outcome for both the individual and the workplace.
2. An effective complaints process will not of itself fix the problems associated with discrimination, bullying and harassment in the practice of surgery. Cultural and structural change are necessary to create a gender inclusive profession respecting and valuing diversity.
3. The Commission commends the College and the Expert Advisory Group on working towards eliminating discrimination, bullying and harassment in the practice of surgery.

**Impacts on victims of sexual harassment and discrimination at work**

| **Impact** | **Conduct** |
| --- | --- |
| Adjustment disorder with mixed anxiety and depressed mood over a period of approximately 9 months, with psychological effects lasting longer. | Sexual harassment - comments subsisting for a period of 3 days*McCauley v Club Resort Holdings (No. 2)* [2013] QCAT 243 |
| Major Depressive Disorder which remained untreated and lasted for over 3 years and which was not necessarily going to resolve after the litigation ended. | Sexual harassment - comments, questions, touching*KW v BG Limited, DP & DF* [2009] QADT 7 |
| Endured sexual harassment for over a year and was then dismissed because she did not accept the behaviour.Suffered severe depression over the 3 years before the hearing, expected to improve after the hearing and return to work in 1 or 2 years. | Sexual harassment - comments,, requests for sexual relationship, sending a picture, kiss*Poniatowska v Hickinbotham* [2009] FCA 680 |
| Clinical depression over a period of about 6 months, which continued 3 years later as mild depression. | Sex discrimination – single parent criticised for taking carer’s leave & contract not renewed*Evans v National Crime Authority* [2003] FMCA 375 |
| Major depressive episode of moderate severity with symptoms continuing over approximately 20 months, but still having an affect 5 years later. | Bullying, harassment and racial abuse at work – called a ‘black fella’*Barney v State of Queensland* [2012] QCAT 695 |
| Suffered an emotional breakdown, tried but was unable to return to work and resigned. Diagnosed with anxiety disorder with panic attacks, depression and reduced functioning – worsened and became a Major Depressive Disorder of moderate severity which encompassed also a Generalised Anxiety DisorderThe serious effects of the sexual harassment would continue over a total period of about 3 years. | Sexual harassment – comments, questions, noises and gestures on a daily basis over a period of 5 months*Nunan v Aacton Traffic services Pty Ltd* [2013] QCAT 565 |
| Psychological damage described as ‘not insignificant’ including distress that manifested in changed demeanour; chronic adjustment disorder with mixed features of anxiety and depression; physical symptoms. | Sexual harassment – persistent slurs and sexual advances over a period of months*Richardson v Oracle Corporation Pty Limited* [2014] FCAFC 82 |
| PTSD and depression; resigned from employment; psychological injuries endured for over 3 years (to hearing) and likely to continue for some time. Dramatic changes to personality and lifestyle – often crippled with fear and suffered agoraphobia, disconnected with family and alienated from friends, suicidal ideation. | Sexual harassment – sexual propositions followed by unwanted sexual intercourse*Ewin v Vergara (No. 3)* [2013] FCA 1311; appeal *Vergara v Ewin* [2014] FCAFC 100;  |
| PTSD, chronic adjustment disorder and depressed moor. Suffered for 5-6 years. Unable to work or enjoy a relationship with partner, and impaired social functioning with son and other family members. Suffered fear and at time suicidal. | Sexual harassment – rape*Lee v Smith* [2007] FMCA 59 |

1. *Styles v Clayton Utz (No. 3)* (2011) FLR 364; [2011] NSWSC 1452 – a female solicitor alleged that she was subjected to sexual harassment, and that when she complained to the employer she was victimised; and *Hickie v Hunt and Hunt* [1998 HREOCA 8 (extract at (1998) EOC 92-910 – a female solicitor was required to work full time after returning from maternity leave in order to maintain her area of practice. [↑](#footnote-ref-1)
2. *Nunan v Aacton Traffic Services Pty Ltd* [2013] QCAT 565. [↑](#footnote-ref-2)
3. *Barney v State of Queensland* [2012] QCAT 695. [↑](#footnote-ref-3)
4. *McCauley v Club Resort Holdings (No. 2)* [2013] QCAT 234. [↑](#footnote-ref-4)
5. *Richardson v Oracle Corporation Pty Limited* [2014] FCAFC 82. [↑](#footnote-ref-5)
6. *Webb v Sunshine Coast Hospital and Health Service* [2015] QCAT 31. The decision on the complaint of impairment discrimination is subject to an appeal to Appeal Tribunal. [↑](#footnote-ref-6)
7. *Bell v State of Queensland (No. 1)* [2014] QCAT 297. [↑](#footnote-ref-7)