Sexual harassment in the medical profession: legal and ethical responsibilities

"the medical profession can nurture wider efforts to promote women's rights through its status in society and its broad interaction with the population"

Sexual harassment in medicine became a national concern after a senior surgeon warned that trainees who complain about these incidents are not well supported, and advised trainees that the safest action to protect their careers was to comply with unwanted requests.[1] The surgeon referred to the case of Dr Caroline Tan, who was found by a tribunal to have been sexually harassed by a neurosurgeon who was involved with her surgical training. While Dr Tan successfully sued for sexual harassment,[2] she reportedly faced substantial career detriment after pursuing her rights.[1]

While the prevalence of sexual harassment in Australian medicine is unknown, reports suggest it is an entrenched problem for both trainees[3] and specialists.[4,5] This is consistent with surveys in Australia, the United Kingdom, the United States, Sweden and Canada that have found between a quarter and three-quarters of women experienced sexual harassment in training or practice.[6-9]

Sexual harassment is an umbrella term covering a range of behaviour, from everyday exchanges communicating derogatory messages ("micro-aggressions"), through to direct acts of physical sexual assault.[10]

As we will show, some forms of harassment also constitute criminal sexual assault. Sexual harassment can adversely affect women's safety and wellbeing, choice of specialty[11] and career progression. The vast majority of incidents are unreported due to: lack of confidence that reporting would help; fear of adverse consequences; reluctance to be viewed as a victim; complicity of senior staff; and cultural minimisation of the problem.[12] Men also experience harassment, but women are more frequently targeted.[6,7]

While sexual harassment occurs across professions, women in medicine are at particular risk because of male dominance of senior positions[13] and the "patronage" system of training, whereby trainees depend on a small group of powerful senior colleagues for entry into training, assessment, job opportunities and career progression.

In this article, we review four dimensions of legal responsibilities owed by individuals and employers across Australia, and analyse professional standards and ethical frameworks. There are compelling legal, reputational and economic reasons for medical schools, hospitals, colleges and other organisations to create cultural change to reduce sexual harassment. These interests are further supported by an ethical and professional duty to promote gender equality and equal opportunity.

Summary

- Sexual harassment of women in medicine has become a subject of national debate after a senior female surgeon stated that if a woman complained of unwanted advances her career would be jeopardised, and subsequent reports suggest that sexual harassment is a serious problem in the medical profession.
- Sexual harassment of women in the medical profession by their colleagues presents substantial legal, ethical and cultural questions for the profession.
- Women have enforceable legal rights to gender equality and freedom from sexual harassment in the workplace.
- Both individual offenders and employers face significant legal consequences for sexual harassment in every Australian state and territory, and individual medical practitioners and employers need to understand their legal and ethical rights and responsibilities in this context.
- An individual offender may be personally liable for criminal offences, and for breaching anti-discrimination legislation, duties owed in civil law, professional standards and codes of conduct.
- An employer may be liable for breaching anti-discrimination legislation, workplace safety laws, duties owed in contract law, and a duty of care owed to the employee.
- Employers, professional colleges and associations, and regulators should use this national debate as an opportunity to improve gender equality and professional culture in medicine; individuals and employers have clear legal and ethical obligations to minimise sexual harassment to the greatest extent possible.

Four legal dimensions of sexual harassment

Criminal law

Criminal laws in every Australian jurisdiction make it an offence to commit sexual assault and more serious acts such as rape. Other criminal offences include indecent exposure, obscene communications and stalking.

Sexual assault is defined as an "unlawful and indecent assault" punishable by maximum prison terms of 5–21 years (Box 1). An assault is "indecent" if it has a sexual connotation and is "contrary to the ordinary standards of morality of respectable people within the community".[14] The acts found by the civil tribunal to have been committed without consent in *Tan v Xenos*[2] (paragraphs 15–16 and 532–546) included embracing the complainant, kissing her on the lips, touching her breast, pinning her

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1 Sexual harassment as a criminal offence in Australian states and territories

- The offence of sexual assault or indecent assault exists in each state and territory, with substantial penalties: *Crimes Act 1900* (ACT) s 60 (7 years); *Crimes Act 1900* (NSW) s 61L (5 years); Criminal Code (NT) s 188(2)(k) (5 years); *Criminal Code 1899* (Qld) s 352 (10 years); *Criminal Law Consolidation Act 1935* (SA) s 56 (8 years); *Criminal Code Act 1924* (Tas) s 127 (21 years: s 389); *Crimes Act 1958* (Vic) s 39 (10 years); *Criminal Code Act Compilation Act 1913* (WA) s 323 (5 years).
- Consent only exists if freely given and will not be present if obtained by threat, force or abuse of position: ACT s 67; NSW s 61HA; NT s 187(a); Qld s 348; SA s 46; Tas s 2A; Vic s 36; WA s 319.
- Consent is not shown simply by lack of physical resistance: ACT s 67(2); NT s 192A(a); Vic 37AAA(e); WA s 319(2)(b). ◆

against a desk, and asking for oral sex. Such acts would constitute sexual assault if proved beyond reasonable doubt in a criminal prosecution.

Criminal laws in every state and territory set clear principles. Importantly, consent must be "freely and voluntarily given" for any sexual act to be lawful (Box 1). Consent is invalid if obtained by threat or intimidation, or by abuse of a position of authority (Box 1). Mere lack of physical resistance does not prove consent (Box 1). Therefore, sexual acts committed without any agreement will be criminal; as will sexual acts where a medical practitioner obtained "agreement" through threats, intimidation or reliance on a position of authority.

Anti-discrimination law

Legislation in all jurisdictions prohibits discrimination in the workplace. This legislation imposes two duties: individuals must not sexually harass a colleague; and employers must provide work environments free of sexual harassment.

The legislation prohibits unwelcome conduct of a sexual nature in circumstances where a reasonable person would have anticipated the other person would be offended, humiliated or intimidated (Box 2). Prohibited conduct includes inappropriate comments, sexual propositions, indecent exposure and sexual assault. Circumstances relevant in determining whether the other person would be offended, humiliated or intimidated include each person's sex and age, and the relationship between the individuals. The concept of "unwelcome conduct", with the element of offence, humiliation or intimidation, distinguishes unlawful harassment from lawful interactions between consenting adults. Therefore, even forms of harassment which are apparently more minor are serious and cannot be dismissed as trivial or justified as banter.

Sexual harassment under anti-discrimination legislation has consequences for individual offenders and employers. Individuals may face civil proceedings and be ordered to pay damages (Box 2). Employers are vicariously liable for an individual's acts unless reasonable steps were taken to prevent them (Box 2). It is insufficient for an employer to merely respond after a complaint. Proactive steps include making policies, educating staff, establishing grievance procedures and monitoring workplace environments.

Where sexual harassment is proved, damages are awarded to approximate the hurt caused to the victim. In *Tan v Xenos*, the award was $100 000.[2]

Tort law

Tort law gives individuals a further range of rights enforceable in civil law, separate from their rights in anti-discrimination law and the state's capacity to bring criminal proceedings. Some of these rights can be pursued in civil lawsuits against individuals and employers for sexual harassment. For example, an individual may be liable for battery for intentionally causing harmful or offensive physical interference with another's body. An individual may also be liable for breach of duty, enabling a victim to sue for compensation when further losses have crystallised, such as the nature and extent of psychological injury, and the victim's economic loss.[15]

Employers have a positive obligation to provide a safe workplace for employees, including an environment free of sexual harassment.[16] In the branch of tort law known as negligence, employers owe employees a duty of care to prevent damage being suffered. An employer will be liable for breaching its duty of care to a harassed employee if the employer knows, or ought to know, of an employee's propensity to harass other employees, does not take reasonable steps to prevent further offending, and the individual offender subsequently causes damage to the harassed employee.

Contract law

Employment contracts contain an implied duty requiring the employer not to engage in conduct likely to damage the relationship of trust between employer and employee.[17] Connected with this is an implied term to provide a safe work environment free of sexual harassment.[17]

2 Sexual harassment as discrimination in Australian states and territories

- Sexual harassment can be constituted by a single act. It is generally defined as unwelcome sexual conduct in relation to the other person, committed in circumstances where a reasonable person would have anticipated the other person would be offended, humiliated or intimidated: *Discrimination Act 1991* (ACT) s 58(1); *Anti-Discrimination Act 1977* (NSW) s 22A ; *Anti-Discrimination Act 1992* (NT) s 22; *Anti-Discrimination Act 1991* (Qld) s 119; *Equal Opportunity Act 1984* (SA) s 87(9); *Anti-Discrimination Act 1998* (Tas) s 17(3); *Equal Opportunity Act 2010* (Vic) s 92; *Equal Opportunity Act 1984* (WA) s 24(3-4).
- Sexual harassment is prohibited, with substantial penalties for the individual offender: ACT s 58; NSW s 22B; NT s 22(2); Qld s 119; SA s 87(1); Tas s 17(2); Vic s 93; WA s 24(1).
- Substantial penalties can also be imposed on an employer, who will be vicariously liable unless appropriate preventive steps were taken: ACT s 121A; NSW s 53; NT s 105; Qld s 133(2); SA s 91; Tas s 104; Vic ss 109-110; WA s 161. ◆

3 Sexual harassment as a breach of good medical practice

Under *Good medical practice: a code of conduct for doctors in Australia*,[18] "good medical practice" includes:

- Communicating professionally, respectfully and courteously with colleagues (clause 4.2)
- Understanding the nature and consequences of harassment, and seeking to eliminate such behaviour in the workplace (clause 4.4)
- Acting as a positive role model and supporting students and practitioners (clause 4.4) ◆

These terms may support an action for breach of contract against the employer where an employee experiences sexual harassment by another employee.

Where a person resigns because sexual harassment makes the workplace intolerable, a court or the Fair Work Commission may find the person has been subject to "constructive" dismissal. That is, workplace conditions gave the employee no reasonable alternative but to resign. Such indirect forced dismissal warrants compensation from the employer for lost remuneration. Finally, if an employee complains about harassment and resigns because of subsequent pressure or victimisation, this may constitute an additional contractual breach and a separate breach of anti-discrimination legislation (Box 2).

Professional standards

Professional codes of conduct establish clear professional and ethical responsibilities to treat colleagues with fairness and respect. These responsibilities are established for all doctors in the code of conduct of the Medical Board of Australia (Box 3).[18] Other codes reinforce these profession-wide duties. The code of ethics of the Australian Medical Association urges doctors to recognise that their conduct may affect the profession's reputation, and encourages reports of colleagues' unprofessional conduct (clause 2.1).[19]

Many professional colleges address harassment in their codes of conduct. For example, the Royal Australasian College of Surgeons' code of conduct requires surgeons to "eradicate bullying or harassment from the workplace" (clause 4.1.6).[20] This code states that surgeons, by virtue of their position, should be role models for those they supervise and teach (clause 10) and are prohibited from seeking intimate relationships with trainees under their supervision (clause 10.1). Sexual harassment is prohibited by other colleges' codes of conduct, including those of the Royal Australasian College of Physicians[21] and the Australian and New Zealand College of Anaesthetists.[22]

Serious breaches of standards may result in notifications to the Medical Board. Under the Health Practitioner Regulation National Law, which has been enacted in every Australian state and territory, practitioners and employers must notify cases where a practitioner engages in "sexual misconduct in the practice of the profession". Although this usually arises when practitioners breach boundaries with patients, sexual assault of colleagues has been reported to the Australian Health Practitioner Regulation Agency under these provisions or the voluntary notification provisions for unprofessional conduct.

In serious cases, tribunals can suspend or deregister practitioners for misconduct, including for repeated instances of unprofessional conduct or conduct inconsistent with being a fit and proper person to hold registration.

Conclusion

Sexual harassment is illegal and unethical. Prohibitions in Australian laws and codes of conduct are clear. Practitioners face serious consequences for committing sexual harassment, and employers can be liable for failing to take preventive action.

Nonetheless, sexual harassment of women in medicine remains a serious concern in training and clinical settings, but complaints are rare. This suggests that the problem requires cultural change rather than legal reform. A potent alloy of gender inequality, normalisation of inappropriate conduct, professional monopolies and powerful hierarchies combine to create a culture that shields offenders and silences victims.

We suggest that culture change requires a five-pronged approach. First, we need a clearer understanding of the nature and scope of the problem, its effects and potential impacts on clinical care. Many acknowledge the gravity of the problem, but others contend that concerns are infrequent and historical. The establishment of the new Royal Australasian College of Surgeons Advisory Group, which will review policies, establish a reporting framework for harassment and explore problems of gender balance, is a welcome development.

Second, we need to educate students, practitioners, employers and boards about their responsibilities. Improved knowledge can influence attitudinal and behavioural change: the goal is for doctors to cease the sexual harassment of students and colleagues. In designing educational programs, Australia may benefit from the experience of Canadian colleges, which have provided sexual harassment training for 2 decades.[23] Other helpful tools may include the Victorian Equal Opportunity and Human Rights Commission's recommendations for reform of the legal profession, directed partly at preventing sexual harassment.[24]

Third, health practitioners should have access to a sound complaint mechanism. However, this alone is insufficient and does not mean that victims are responsible for resolving the problem. Victims should not simply be ordered to "speak up", as this ignores factors that impede disclosure, and leaves undisturbed the power imbalances, gender discrimination and tolerance of inappropriate conduct which foster the problem.

Fourth, we should recognise and support individuals and employers who promote respectful work environments. It takes courage for victims and bystanders to speak up about sexual harassment. Employers who set new standards of conduct demonstrate leadership and integrity. An environment that unequivocally supports women and rejects harassment

can powerfully influence the behaviour of perpetrators, the careers and wellbeing of women, and the "hidden curriculum"[25] communicated to students and trainees.

Finally, the medical profession can nurture wider efforts to promote women's rights through its status in society and its broad interaction with the population. By modelling a commitment to gender equality and women's rights to safety and dignity in the workplace, the medical profession can embody what should be core aspirations in contemporary Australia.

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