BE JUST & FEAR NOT[**]

Gill Gatfield[*]

Almost four decades of unequivocal evidence proves the systemic discrimination and sexual harassment of women in New Zealand's legal profession. From 1981 to 2018, comprehensive reports and surveys, commissioned and conducted by law societies, women lawyers' groups and independent scholars, have demonstrated the ongoing and pervasive pattern of unlawful and unethical discrimination and harassment. Throughout that same period, law society working groups, consultative groups and taskforces have been formed. The profession has been lectured by its leaders, and ethical rules discussed and reviewed.

In 1982, two major district law societies proposed that a specific rule on discrimination be added to the New Zealand Law Society (NZLS) rules of professional conduct.[1] That ethical rule contained a hard-won explanatory note acknowledging the difficulties faced by women in the law. Its breadth was sufficient to cover sexual harassment. The 1982 ethical rule gave comfort to the major law societies, pushed into action by women lawyers' groups to form working parties to investigate the experiences of women in the law. Their rationale is documented in *Without Prejudice*:[2]

> The Wellington working party, like the Auckland working party, placed considerable reliance on the 1982 ethical guideline as an answer to the

---

** 'Be Just & Fear Not' is the inscription on the New Zealand Law Society Coat of Arms. This paper comments on the Law Society's governance and response to recent reports of sexual harassment and discrimination. Further scrutiny is warranted of legal employers and other legal bodies' actions. This paper is dedicated to the women in law who bravely face adversity and act in the pursuit of justice.

* LLB, MFA(Hons). After working in legal practice and as a senior advisor on human rights law, Gill founded Equity Works Ltd as a barrister advising corporates, professional bodies and government on discrimination practices. She is an internationally recognised artist, a human rights advocate and author of *Without Prejudice: Women in the Law 1896–1996* (Brookers, Wellington, 1996; Heritage Title, 2011; Thomson Reuters, Auckland 2018) See <www.gillgatfield.com>

1 Gill Gatfield *Without Prejudice: Women in the Law 1896–1996* (Brookers, Wellington, 1996; Heritage Title, 2011; Thomson Reuters, Auckland 2018) at 108–109.

2 At 114.

> problem of discrimination in the profession. In effect, the law societies saw the 1982 ethical rule and explanatory statement as "a confirmation of the place of women … and, as such [it] would be of considerable support to them".

The Working Group's optimism was misguided. Widespread legal workplace discrimination and harassment continued to go unchecked. The rule was in name only. By 1994, twelve years after the rule had been introduced, the Auckland Law Society had received only two complaints of sex discrimination, and neither were referred to the Disciplinary Tribunal. The three other major law societies received no complaints. Again, the background was explained in *Without Prejudice*:[3]

> Despite the New Zealand Law Society's explanatory statement, there was no intention on the part of the law societies that a breach of the rule against discrimination would lead to disciplinary proceedings. On the contrary, the national president, Bruce Slane, told the 1983 Conference of Law Societies in Surfers Paradise that the new ethical guideline was "not suggested with the aim of fostering formal complaints". Discrimination, he said, was widely believed to be "notoriously difficult to establish" [and] there was a "natural reluctance" on the part of those who experienced it to publicise the fact.
>
> No consideration was given to a complaints procedure or enforcement mechanisms that might overcome that "natural reluctance" or ensure that discrimination was fairly established — the ethical guideline had a purely educational purpose.

Ten years after the ethical rule was introduced, I commenced my research on women in the law. To establish a baseline, I conducted a 1992 national survey with sociologist Alison Gray, the first national survey of the legal profession.[4] The results were clear-cut. I presented the findings at the 1993 National Law Conference to a room packed with lawyers, QCs and judges. Evidence showed prevalent sex discrimination (reported by 82 per cent of women lawyers), pay inequity (20 to 30 per cent pay gap), and unlawful sexual harassment (reported by 32 per cent of women lawyers). Women lawyers were leaving the profession at nearly three times the rate of men. At the end of my presentation, the audience was silent.

---

3 At 114.

4 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993).

Law societies and women lawyers' groups rallied in a frenzy of activity reminiscent of the early 1980s. Education, equal employment opportunities practices, sexual harassment procedures were developed and promoted, and in many cases delivered. Yet the problems persisted. A 2012 survey of 300 lawyers by Natalya King revealed similar results to those in the 1992 survey.[5] A 2016 study by Josh Pemberton of 800 junior lawyers found almost two-thirds of women lawyers reported that their gender impacted negatively on their prospects in the profession.[6] Reasons given included — pay inequity, discriminatory hiring practices, conscious and unconscious bias in the workplace, client bias, poor promotion prospects, sexism, and sexual harassment. And again, in 2016 a study of Auckland law students by Julia Tolmie and Anna Hood contained further evidence of sex based discrimination in the profession.

Explicit findings on the extent of bullying and sexual harassment of legal professionals was outlined in an Australian study shared with the NZLS. The 2015 report by Dr Rebecca Michalak found that around half of all survey respondents were exposed to at least some form of sexual harassment, consisting of three dimensions: gender harassment, unwanted sexual attention and sexual coercion.[7] The recommendations included:[8]

> Given a) incivility, interpersonal deviance and mistreatment behaviours are culturally pervasive, b) mistreatment can escalate into bullying, and c) gender harassment can escalate into unwanted sexual attention and sexual coercion, a culture of "zero tolerance" should be established and effectively maintained in all workplaces, including targeted policies to promote prevention, enable reporting of and effectively discipline any deviation from zero tolerance.

In early 2018, the Law Society's own data on the profession confirmed an ongoing problem with retention of women lawyers. Despite entering the profession in greater numbers for the previous 25 years, the Law Society reported as at 1 February 2018 "There was a big difference between female and

---

5 Natalya King *Raising the Bar: Women in Law and Business* (Thomson Reuters, 2014).

6 Josh Pemberton *"First Steps: The Experiences and Retention of New Zealand's Junior Lawyers"* (New Zealand Law Foundation, 2016).

7 Dr Rebecca Michalak *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015) at 46.

8 At 50.

male lawyers, with female lawyers in practice for an average of 13.3 years and male lawyers for an average of 21.8 years."[9]

The body of quantative evidence and qualitative analysis is comprehensive. The reports are published, presented at seminars and conferences, promoted in *LawTalk*, held in law libraries, and listed on the Law Society's website. Yet, when the two-year old complaints of sexual harassment and sexual assault involving five law clerks in the Wellington office of Russell McVeagh surfaced in national headlines, the Law Society and employers were caught off guard. Queenstown former lawyer Olivia Wensley spoke up about her experiences. Others followed. Coupled with the testimony of over 200 mostly women lawyers on a #Metoo blog set up by legal researcher Zoë Lawton,[10] and on other media platforms, the previously paper-based testimony became digital, and the word spread.

Despite decades of overwhelming proof of an endemic problem, the law's leaders were asleep on the job. NZLS President Kathryn Beck was caught by "surprise".[11] The new Minister of Justice Andrew Little claimed he had never heard stories of sexual harassment in the profession until February 2018. He was, he said "absolutely stunned".[12] What then was the point of all the reports and surveys? To whom were the members of the profession reporting? Thousands of women and men have ticked boxes to carefully drafted questions, their collective reporting clearly falling on deaf ears.

Confidentiality and non-disclosure agreements muddy the waters. Kathryn Beck claimed the Society could not know of the problem because no one had formally complained. Dame Margaret Bazley noted, up to 2016, no sexual harassment or sexual assaults in the context of an employment relationship had been reported to the Law Society.[13] The Standards Committee, empowered to initiate "own motion" investigations, had undertaken none. Yet women lawyers and law clerks claim they brought complaints to the attention of the

9 Geoff Adlam "Snapshot of the Profession" LawTalk (March 2018, Issue 915) at 47.

10 Zoë Lawton "#Metoo Blog" (2018) <www.zoelawton.com>.

11 Alison Mau "Why is buck stopping with Kathryn Beck on culture change at legal firms?" (26 September 2018) *Stuff* <www.stuff.co.nz>.

12 Cherie Howie "Andrew Little's warning to the New Zealand Law Society" *New Zealand Herald* (online ed, 10 March 2018).

13 Dame Margaret Bazley *Independent Review of Russell McVeagh: March – June 2018* (5 July 2018) at 31.

Society.[14] The Wellington Women Lawyers Association's position was reported by New Zealand journalist Alison Mau:[15]

> The Association's members have known about the problem for "all of our careers" said WWLA Convenor Steph Dyhrberg. They've held seminars, workshops and panels, written articles, pleaded and cajoled, even written a draft sexual harassment policy which the Law Society declined to formally adopt.
>
> The Association is scathing about Kathryn Beck's claim to have learned through media reports about the situation at Russell McVeagh, pointing out that the Law Society's executive director was told by one of the survivors two years ago.
>
> "No investigation was initiated until the scandal became public," says Dyhrberg. "We owe the media a debt of gratitude for forcing the Law Society to act."

In the midst of the harassment and sexual assault disclosures, the NZLS disciplinary process did go into motion — to censure a woman advocate for speaking out about sexism and unconscious bias. Barrister and journalist Catriona MacLennan was subjected to a National Standards Committee investigation for public comment on a judge whose sexist remarks in a domestic violence judgment gave cause for legitimate concern.[16] This time, the voices of men lawyers were clearly audible, in her defence.[17] The Chief District Court Judge, the Police, the Crown and the High Court "had all criticised or objected to either the Judge's comments or sentence".[18] The Law Society backed down.[19]

---

14 Melanie Reid and Farah Hancock "What Russell McVeagh told its summer clerks" (13 March 2018) *Newsroom* <www.newsroom.co.nz>.

15 Alison Mau "How much proof does Law Society need of sex pests in ranks?" (3 June 2018) *Stuff* <www.stuff.co.nz>.

16 Catriona MacLennan "Lawyer: I will not be silenced" (21 April 2018) *Newsroom* <www.newsroom.co.nz>.

17 Belinda Feek "Probe called 'repugnant': High court barrister calls for Law Society committee to be sacked" *New Zealand Herald* (online ed, 15 April 2018); and James Farmer QC "Criticising Judges" (7 May 2018) James Farmer QC <www.jamesfarmerqc.co.nz>.

18 Emma Hurley "Lawyer facing discipline for criticising judge's controversial domestic violence comments" (13 April 2018) *Newshub* <www.newshub.co.nz>.

19 Nikki Preston "Lawyers are free to speak out against the judiciary, NZLS president says" *New Zealand Herald* (online ed, 17 April 2018).

To ascertain the extent of the problem in April 2018, the NZLS surveyed the profession.[20] Again, it was demonstrated nearly one third of female lawyers have been sexually harassed during their working life. Two-thirds of lawyers who had experienced sexual harassment reported unwanted physical contact.[21] Only seven per cent of lawyers who had experienced harassment within the last five years made a complaint.[22] They fear for their careers, do not trust the process or the people, nor believe anything good will come of making a complaint.[23] In addition, 52 per cent of lawyers reported being bullied at work.[24] The New Zealand Bar Association added its own research to the pool, with equally concerning results.[25]

A flurry of largely Law Society led responses have again stilled the waters. Two major initiatives aim to address the big picture.[26] Led by Dame Silvia Cartwright, the NZLS Regulatory Working Group will address the complaints process and the disciplinary regime, and the NZLS Culture Change Taskforce is charged with considering that report, and finding systemic and cultural solutions. Progress will be slow. The Taskforce is set up for a three year term, with its initial draft strategy and action plan not due until November 2019.[27] This will feel like a lifetime for those facing harassment and discrimination today. A faster track is needed.

To the extent solutions are premised on members of the profession having shared values and interests, caution is due. Proven constant values are those that have enabled the perpetuation of discrimination, harassment and bullying. Power, self-interest, profit, professional reputation, among other drivers, motivate action and inaction. Paternalism continues — the professed need to "protect" young lawyers, yet women lawyers have been young and entering the profession en masse for decades without effective protection. A motive of protection has a double edge, it confirms the status of women

20 Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018).

21 At 17.

22 At 28.

23 At 29.

24 At 33.

25 Jenny Cooper and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts: Report of the New Zealand Bar Association* (New Zealand Law Foundation, 3 September 2018).

26 "Bullying and harassment in the legal profession" New Zealand Law Society <www.lawsociety.org.nz>.

27 "Law Society Taskforce focused on culture change" (25 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

and young women in particular as powerless, while the protectors remain in control.

Within the legal profession, which is small by international standards, there are multiple potential conflicts of roles and interests. Perpetrators of sexual harassment and discrimination are quite likely to be among those the NZLS has already looked to, to act, report, and educate on sexual harassment and discrimination. What tools will they need to lead future cultural and systemic change? In the 1990s, as in the 1980s, partners and employers were most likely to harass women lawyers, being named by 49 per cent of women lawyers surveyed in 1992. The same abuse of power is recounted in the 2018 survey, and in studies in between. Currently, in 52 per cent of the reported cases of unlawful harassment, the perpetrator is a manager/supervisor/partner/director.[28] For the women lawyers harassed, 98 per cent of the harassers are men. When will those lawyers be held to account? An immediate plan of action is needed to stop and manage perpetrators, and give their targets support and redress. In situations of professional "misconduct" or "unsatisfactory conduct",[29] professional action and discipline should be invoked.

Inevitably the Law Society and the profession will seek to refocus internally. There is much work to be done. Throughout, it is essential that diverse voices and especially those of complainants are valued and heard. Their testimony stands at the heart of the profession's response. Wider public debate and dissenting views serve to better inform the work ahead. In earlier eras, retreating behind closed doors and requiring others to conform only caused further harm. Against a track record of under-performance, criticism of employers and professional bodies within context is expected. Recent comments in the media that the Law Society was protecting vested interests were labelled "irresponsible", and challenges to Kathryn Beck's suitability to lead the Culture Change Taskforce were met with a closed response. Explaining Beck's appointment as Chair, the NZLS observed:[30]

---

28 For the male lawyers who experienced sexual harassment (12 per cent of men surveyed), the harasser was more likely to be a woman (74 per cent).

29 These tests trigger disciplinary action under Lawyers and Conveyancers Act 2006 and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

30 "Law Society statement supporting appointment of Culture Change Taskforce chair" (28 September 2018) New Zealand Law Society <www.lawsociety.org.nz>.

> The Law Society asks that the Taskforce be measured by the actions it takes and that it be given the opportunity to begin its vital work. It will need the support and collaboration of the entire legal community to change the culture of our legal workplaces. Now is the time for us to all work together.

Caution is needed when categorising problems and solutions in "cultural" terms. In previous rounds, this rationale, like conscious and unconscious bias, was labelled a problem of 'attitudes'. These frameworks can be a slippery slide, providing easy excuses and opportunities to deflect. Andrew Little proved the point when he observed, "If I put my Minister of Justice hat on, [sexual violence in the legal profession] is a cultural thing that we need to address as a nation."[31] Sexual harassment and sexual assault may be enabled by cultural contexts but where unlawful and unethical they need effective legal pathways and redress. Cultural change will not change the outcomes inside workplaces without inclusive leadership and structural change.

Sexual harassment also must be considered within the context of discrimination. In the workplace, it forms part of a system of discrimination where access to employment opportunities (jobs, client briefs, client social functions) can be predicated on tolerating sexual comments or advances, or complaints are not made for fear of disadvantage (pay, promotions, client briefs). Where decision makers focus on harassment only, and ignore other forms of discriminatory behaviour, the full extent of the problem will remain unchanged, and actions taken will be limited in scope and outcomes.

Assessing the extent of wider discrimination in the survey will enable the profession to address the now pressing need for an intersectional approach. Seminars on diversity and unconscious bias are not enough. All forms of discrimination compound sex/gender discrimination, and occur alone. The 2018 NZLS survey established that 35 per cent of Pacific lawyers and 34 per cent of Māori lawyers reported bullying behaviour in the last six months,[32] but gave no statistical breakdown of the experience of sexual harassment by ethnicity. If the wider framework of discrimination is not targeted at the same time then the profession will address only part of the problem and the solutions fashioned will work predominantly for white, heterosexual women and men.

---

31 Sasha Borissenko "Students to march on Russell McVeagh" (15 March 2018) *Newsroom* <www.newsroom.co.nz>.

32 *Workplace Environment Survey*, above n 21, at 33.

Again, as recommended in *Without Prejudice*, the experiences and needs of women clients and of non-professional staff, and of those who have been forced to leave the profession due to harassment and discrimination need to be uncovered. Where health, wellbeing, careers and opportunities have been undercut by the adverse actions of lawyers, the profession has a duty to act.

Overlooking the economic framework within which discrimination thrives will do further disservice to those adversely impacted. In the 1880s when the colonial law societies supported the legal exclusion of women from legal practice, they did so on moral and economic grounds — women would be paid less, undermining the value of legal services, and were potential competitors. If the profession allowed women to practice, a "flood" was predicted. Entry was hard won. The Female Practitioners Act 1896 undid 15 years of legislative effort to re-enforce the law against women lawyers.

Conversely now, and for the past 20 years, the business case for change is advanced as a primary reason for legal employers to eliminate barriers to women's entry and progression in the law. Again, education, policies and practices have been promoted and in many cases delivered. Women lawyers and law societies have run seminars, penned articles and issued a Gender Equality Charter. "Signing up" was assumed enough. Effectiveness was not monitored.

From here, the Law Society's reach inside places of work is crucial to the ability to self-govern. In the case of harassment and discrimination, the disciplinary system has been set up to fail. Lawyers, law societies and law firms have proven their inability to prevent and discipline unethical and unlawful conduct. Successive law societies have been seen as unwilling or unable to investigate and discipline individuals, firms and other legal employers, despite having power to do so. Justice has been deferred and bravery is in absentia. Instead, the focus remained resolutely on education, voluntary uptake of policies, and yet more reliance on more time and numbers, while the ever steady stream of new graduates replaced those who leave.

Finally, after 122 years, a flood of women into the profession has occurred. For the past 25 years, from 1993 on, the number of female law graduates admitted exceeded the number of male graduates. On 1 February 2018 the Law Society reported that women made up 62 per cent of law graduates admitted

as barristers and solicitors.[33] Ironically, just as the number of women in the profession exceeded the number of men, the lid blew off the profession's exceptionally well documented "secret". Fuelled by the #Metoo movement, the internet, and social media, and under the persistent spotlight of the Fourth Estate, the balance has finally tipped. Reports of sexual harassment and assault captured the public's attention. For the first time, women law students marched in protest. Women lawyers, law clerks and students are again audible and, in many cases, angry. Within a few months since the publicity "erupted", the NZLS received 14 complaints.[34]

Sexual misconduct and other forms of discrimination are not confined to one law firm nor to the legal profession but there are distinct cultural and systemic reasons why these forms of power abuse persist within the practice of law. To unpick these, the law's leaders need to reflect on the issues in the legal profession within the wider historical, economic and cultural contexts. Lessons can be learnt from the channels presently chosen for complaints. In terms of disclosures and documenting, external systems (social media/media) and anonymous surveys have been the most effective methods to date. In each case, these methods may better serve the needs of complainants and reduce subjective bias and risks encountered when dealing face-to-face with people and systems. Complainant inclination towards objective reporting mechanisms lends support to the potential for new online platforms to aggregate and manage complaints, such as Callisto and Vault. Supplemented with complainant support systems, this approach can enable natural justice and empower complainants. Where people continue to run complaints processes or have related roles, they need "fit and proper person" testing and training in handling sensitive claims. Outcomes and standards should be set and monitored through audits and reporting, including where complaints processes are outsourced.

If the profession cannot effectively regulate itself, what action should be expected from the Government? Targets, audits and an independent external complaints process need to be considered. Is it time the Human Rights Commission is given real teeth? Is Law Society and legal employer inaction a future cause of action? What steps is the Minister of Justice taking to monitor and

33 "Snapshot of the Profession", above n 9, at 48.

34 Interview with Kathryn Beck, President of the Law Society (Kathryn Ryan, Radio New Zealand, 30 May 2018).

evaluate the effectiveness of the Law Society's work? Disclosure of timeframes and mechanisms is a minimum. At earlier points in time, governments have stepped in and reviewed the legal profession and its self-regulation. This action may be warranted again to achieve just outcomes for women and minorities in the law and to restore public faith in the legal profession and its role as a conduit for justice. At the core of any sustainable solution will be recognition, remedies and redress for the thousands of women in law whose careers and lives have been derailed or curtailed, and for whom the only redress is for the profession or someone, now, to be just and fear not.

The following chapter is reproduced in an abridged form from Gill Gatfield's work Without Prejudice: Women in the Law.[1] *This text was originally published in 1996 to discuss issues facing women in the legal profession, including discrimination and sexual harassment. Gatfield has recently republished the book under a new title,* Without Prejudice: Women in the Law – Same Issue New Cover 1896–2016.[2] *The issues and solutions Gatfield discusses are just as relevant today as they were in the 1990s.*

CHAPTER 11: SEXUAL HARASSMENT

Although "sexual harassment" did not exist as a concept before the early 1960s, women law students' and women lawyers' sexuality was certainly a subject of discussion. Male politicians and lawyers in the late 1800s expressed concerns that the entry of women into law offices would result in unnecessary "flutter and flirtation". They thought that women barristers would charm judges and juries with their physical presence. One solution proposed was for law firms to employ only plain and uninviting women lawyers. No one suggested that the men could change their behaviour.

In the 1950s, when more women were in practice, "blue jokes" were being told at Bar dinners and law students' functions. Women present at these events generally considered the behaviour objectionable. However, the majority of women who practised law from the 1950s to the 1960s pointed out that they did not experience unwanted sexual attention during their careers. The few who said they did, added that it was nothing they could not cope

1 Gill Gatfield *Without Prejudice: Women in the Law* (Brookers, Wellington, 1996).

2 Gill Gatfield *Without Prejudice: Women in the Law — Same Issue New Cover 1896–2016* (Gill Gatfield, Auckland, 2016; Thomson Reuters, Auckland, 2018).

with. One woman, for example, described an experience in her first job where one of her bosses chased her around a table a few times but, she pointed out, he did not resent the fact that she refused his overtures. She did not complain because she felt she could cope and, in any case, was moved to other duties eventually.

A number of women lawyers noted that they did receive compliments from colleagues. Nadja Tollemache, who was admitted to the Bar in 1960, recalled that male colleagues were very gentlemanly — it was only "the odd judge" at social parties who made comments which, she thought, were "probably intended to be 'gallant'". In this context, there was no need to seek assistance in dealing with the attention. She simply handled it by herself.

However, since the 1970s, at the same time that more women entered the law schools and the workforce, social expectations about interactions between women and men changed. Women lawyers, exposed to the new ideas about women's rights to control their bodies and their sexuality, were more inclined to be suspicious of or object to behaviour that emphasised their physical attributes. They were more likely to pride themselves on their academic ability, professional skills and expertise than on their hairstyles or clothing. Compliments about beauty or clothing seemed inappropriate and irrelevant and raised concerns about the intentions of the person commenting.

Despite the changing social climate, harassment of women law students still occurred. At a law lecture at Canterbury University in the early 1970s, when one of the female students came in late, the lecturer stopped what he was doing, and very obviously drew the other students' attention to her. When she sat down with great embarrassment, he said with sexual overtones: "Oh, I've lost my concentration now." In response the male students began to call out: "We lose our attention too when she comes into the room." In reply, the lecturer invited the men students to "Come and see me afterwards about a cold shower". Another woman law student at Canterbury University was experiencing constant comments of a sexual nature in a tutorial where she was the only woman. One day a comment was made by a lecturer about what she was wearing and she was invited to get on to the table and parade in front of the men so they could eye her clothing.

Women appearing in court were also subjected to unwarranted sexual attention. When Silvia Cartwright made her first appearance as counsel in the

High Court, she encountered the premeditated antics of the Crown Prosecutor who, she said: [3]

> … decided to make something of an occasion out of this particular event. There was a jury in the Court waiting for my appeal to finish so they could resume a jury trial. Within the sight of the jury, but so the Judge could not see, of course, the Crown Prosecutor drew this large picture out of his bar jacket and held it up … It depicted a woman barrister with the correct wig and gown on, except the gown stopped at thigh level.

In July 1985, sexual harassment in the male-dominated legal system, possibly for the first time, was placed under scrutiny in the public arena. The year before, an Auckland woman lawyer seeking to interview a client at Christchurch Police Station had reluctantly agreed to be strip-searched. After the search she was shocked to find that a male police officer had been watching her undressing on a series of monitors in another room. On the advice of a senior colleague she "let the whole thing drop and [did] not make a fuss about it". Almost a year later, she was approached during a court recess by two prominent Auckland men lawyers who told her they had seen a video of her being strip-searched. They claimed that there were four copies of the video; the one they had watched was at the Crown Law Office premises in Auckland.[4]

The woman lawyer, despite her colleague's threats of adverse publicity, immediately complained to the Minister of Justice, the Minister of Police and to the New Zealand Law Society (NZLS). She demanded that the videos be located and destroyed. Although the Auckland lawyers' detailed account accurately described the Christchurch strip-search, the police denied there was any substance to the report. According to Deputy Assistant Commissioner of Police John Jamieson there was no capacity to videotape at the Christchurch Police Station: "this was just a joke between two lawyers."[5] Presumably, he was referring to the men.

---

3 Interview with Silvia Cartwright (*First Lady in Law*, TVNZ documentary, 19 January 1988).

4 "Report of the strip-search" (Morning Report, National Radio, 12 July 1985) transcript provided by Radio NZ Sound Archives.

5 "Police response to the report" (Midday Report, National Radio, 12 July 1985) transcript provided by Radio NZ Sound Archives.

I RESEARCH REVEALS WIDESPREAD PROBLEM

From 1981, research on the status of women in the legal profession demonstrated that sexual harassment was common. Where, previously, there had been only anecdotes of harassment, there was now evidence of it being widespread.[6]

The first study, by the Auckland District Law Society in 1981, found that 42 per cent of women lawyers surveyed said they had been "subjected to discrimination in the form of belittling or embarrassing talk or conduct".[7] The Wellington District Law Society survey the following year found that 23 per cent of women surveyed had experienced sexual harassment; 54 per cent had experienced derogatory or belittling comments directed at them personally; and 70 per cent had been subjected to belittling talk or derogatory remarks directed at women in general. In all types of harassment, colleagues and employers were the main culprits.[8]

In the 1987 Auckland study, over half the women practitioners surveyed had experienced some form of sex-related harassment in the course of their employment or practice. For example 54 per cent of women had personally experienced derogatory remarks from partners and 51 per cent had this experience from colleagues.[9] Over 10 per cent of women said they were experiencing offensive sexual talk from clients and partners. Another eight per cent of women, mainly employed solicitors, were being subjected to unwanted sexual advances from clients at the time of the survey.[10]

During this time, sexism also occurred in social interactions between men and women lawyers. In Wellington in 1982, women lawyers referred to the "maleness" of law society functions as a deterrent to them attending.[11] In Auckland in 1987, the law society working party reported that social interaction between the sexes was still occurring largely on male terms. Men gathered in clubs or bars where women could not attend or did not wish to

6 Letter from Frances Joychild (legal adviser, Human Rights Commission) (2 September 1993).

7 Auckland District Law Society *Report of the Working Party on Women in the Legal Profession* (1981) at [4.4.3].

8 Wellington District Law Society *Full Report: Women in the Legal Profession* (1983) at [10.1]–[10.4].

9 *Tabulations, Women in the Legal Profession: Vol 3* (Heylen Research Centre, Auckland, 1987) at 211.

10 *Tabulations*, above n 9, at 54 and 212; Jeannine Cockayne (ed) *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Auckland District Law Society, Auckland, 1989) at 32.

11 Wellington District Law Society *Full Report*, above n 8, at [7.1] and [7.2].

attend. Social talk was considered "exclusionary", centring on "stereotypically male pursuits" such as rugby and cricket and involving coarse, sexist jokes. Women remained outside the social circle "unless they participated as 'one of the boys'".[12]

In 1988, a similar conclusion was reached by Stephanie Knight in her research on the use of alcohol by Auckland women lawyers. She found that the women were cautious drinkers, constantly striking a balance between being accepted as "one of the boys" and maintaining respect. They had little scope for letting their guard down, particularly when drinking with colleagues.[13]
[…]

A Harassment of women lawyers

By the early 1990s, an estimated one-third of the women lawyers in practice and half the women judges have experienced some form of sexual harassment during their careers.[14]

Men lawyers have also been subjected to sexual harassment. Of the 685 men surveyed in 1992, six per cent had experienced sexual remarks and sexual innuendo; four per cent had experienced deliberate touching; three per cent had experienced unwanted advances; and a striking 19 per cent had experienced misuse of position or power.[15] However, women lawyers are much more likely to have personally experienced sexual harassment.

From the comments made by women lawyers, and especially younger women practitioners, harassment is very much a current reality.[16] The most common form of harassment recorded in the 1992 national survey were sexual remarks and sexual innuendo: 38 per cent of women lawyers had personal experience of this type of harassment. Over a quarter had experiences where another person misused their position or power; 18 per cent had experienced

12 Cockayne, above n 10, at 60.

13 Stephanie Knight "The place of alcohol in the lives of women in the legal profession living in Auckland" (BA(Hons) Thesis, University of Auckland, 1988) at 21–23.

14 Gill Gatfield and Alison Gray *Women Lawyers in New Zealand: A Survey of the Legal Profession* (Equity Works, Wellington, 1993) at table 29; Gill Gatfield W*omen Judges in New Zealand: A Survey* (Equity Works, Auckland, 1996) at table 17.

15 Gatfield and Gray, above n 14, at table 29.

16 In 1996, equal employment opportunities and sexual harassment consultants in Auckland and Wellington confirmed that they were aware of current sexual harassment incidents in law firms. See also Ruth Arcus "Sexual harassment in the workplace: the responsibilities of law firm partnerships" *LawTalk* (7 August 1995, issue 440) at 16.

unwanted advances; 16 per cent had experienced deliberate touching; and 5 per cent had either received requests for sexual favours or been told that a promotion depended on a sexual favour.[17]

Sexual harassment in the early 1990s was experienced by women lawyers regardless of their position in the profession or type of workplace. Women lawyers were subjected to harassment regardless of their age and women partners were as likely as women employees to have been exposed to harassment.[18]

Status, however, may reduce exposure to harassment for women who are appointed to the Bench. Before appointment, six of the ten women judges surveyed in 1993 had been subjected to harassment in the form of misuse of position or power, sexual remarks or innuendoes, unwanted advances, or being deliberately touched or brushed up against. After appointment, only two women judges had experienced harassment — in the form of sexual remarks and innuendo.[19]

As in the 1980s, male lawyers were the group largely responsible for sexual harassment of women lawyers and women judges. Partners and employers were most likely to harass women lawyers, being mentioned by 49 per cent of women lawyers surveyed in 1992. Second to bosses were other colleagues, mentioned by 29 per cent of women, and then clients, mentioned by 17 per cent of women. Staff solicitors, who are in most cases the workmates of women lawyers, were said to be responsible for only 14 per cent of sexual harassment.[20] The pattern was the same for women judges. Harassment had been from partners or employers and from other colleagues, but also from other judges. In no instances had women judges been harassed by court staff, clients, offenders, witnesses, plaintiffs or defendants.[21]

Men lawyers and judges, it seems, do not inadvertently harass women lawyers and judges. Of the six women judges who had experienced sexual harassment none said that the behaviour was completely unintentional: three said there was a mixture of intentional and unintentional behaviours, while two said it was simply intentional.[22] This corresponded with women lawyers'

17 Gatfield and Gray, above n 14, at table 29.

18 Gatfield and Gray, above n 14, at [8.3].

19 Gatfield *Women Judges*, above n 14, at [4.1].

20 Gatfield and Gray, above n 14, at table 30.

21 Gatfield *Women Judges*, above n 14, at table 18.

22 Gatfield *Women Judges*, above n 14. The sixth judge did not answer that part of the question.

experiences of discrimination in general.[23]

Sexism is not confined to the office or to social interaction between colleagues. According to women judges surveyed in 1993, it also features in courtrooms. Seven of the ten judges surveyed had experienced inappropriate or disrespectful comments or behaviour on account of their sex in the courtroom. For three of the judges this occurred while they were on the Bench. Another four judges had encountered inappropriate comment or behaviour towards women counsel, women victims and other women in the courtroom. One judge explained: "Women counsel appear to attract more derogatory comments than men and more comments on appearance." Another referred to "deliberate sexist jokes or barbs about women".[24]

Again those responsible for this behaviour were more likely to be lawyers than lay people. All seven of the judges who had experienced gender bias pointed to practitioners or counsel as those responsible. Four women judges referred to other judges as the source of inappropriate gender-related comments or behaviour toward either women counsel, women victims, women judges, or other women in the courtroom.[25]

Again, as with the sexual harassment, in no instance was the behaviour unintentional. All of those who behaved or commented negatively toward or about women did so with an element of intention.[26]

B Appearance and body shape

In the 1992 national survey, 43 per cent of women lawyers said that appearance and body shape discrimination occurred in the profession. Twenty-six per cent of the men lawyers surveyed agreed. […]

It is apparent that for many women lawyers there is an emphasis on their appearance unrelated to any professional dress standard. "Appearance and body shape" are in fact criteria applied to women lawyers in a way that differs considerably from the criteria applied to their male colleagues. In some cases, what may have been referred to or dismissed as "a personal compliment" in the past is now considered a form of discrimination. Where a comment is unwelcome or offensive, and is either repeated or of such a significant nature

23 Gatfield and Gray, above n 14, at [8.2].

24 Gatfield *Women Judges*, above n 14, at table 22 and [5.1].

25 Gatfield *Women Judges*, above n 14, at [5.2].

26 At [5.3].

that it has a detrimental effect on an employee, a "compliment" will be considered unlawful sexual harassment.[27]

There is also a discernible link between appearance and sexuality or race. The resulting "impression" clearly influences whether some women lawyers get jobs, promotions and unwanted sexual attention.

With regard to employment prospects, the comment of one newly-admitted woman solicitor working in a large Wellington law firm was typical of many: "How one looks seems to play a huge part in job prospects — especially for women. Comparing young female solicitors to young male solicitors, looks seem to play quite a large part. I cannot think of one overweight woman lawyer." The same double standard was referred to by a city-based woman solicitor who pointed out: "While it is acceptable for male lawyers to be balding, grey and pot bellied, women are not forgiven any flaws in their appearance." Another newly-admitted woman lawyer put the problem this way: "If you are not a white middle class male you have problems! A fat middle-aged Tongan lesbian is highly unlikely to be hired by a mainstream big firm."

Comments by employers confirm that women's "appearance and body shape" are relevant factors at entry, promotion and partnership levels. A man partner in a small Wellington firm said: "I think that women, homosexuals, plain, fat and short people are discriminated against. A short, plain, fat lesbian would have no chance of employment or partnership." For other employers, however, women's appearance can strengthen their preference to recruit women lawyers. One man partner with twenty-five years' experience in the law said: "I would rather employ a woman because they are better workers in my experience — they are also visually more appealing most times."

Just as Ethel Benjamin was expected to charm judges and juries with her sexuality,[28] some women lawyers today are still said to owe their successes to their looks or their sexuality. When a newly-admitted woman lawyer reported her success in court to a male partner in a large Auckland firm, he winked and asked if she had smiled at the judge. A senior partner in a provincial law firm, when speaking with a client, observed how a newly-employed woman lawyer was "a beautiful woman" and that this was "advantageous to the firm in that it enhanced [her] ability to create a client base". Silvia Cartwright (later

27 Human Rights Act 1993, s 62; Employment Contracts Act 1991, s 29.

28 See Gatfield *Without Prejudice: Women in the Law*, above n 1, ch 4.

Justice Dame Cartwright) had a similar experience after obtaining her first law position. She recalls her first employer telling everyone, in humour, that she got the job over the other contenders because of her legs.[29]
[…]

Stereotypically "beautiful" women lawyers are frustrated by the fact they repeatedly receive unwanted comments and attention. One solicitor who describes herself as "young, blonde and small in stature" was repeatedly told by colleagues that she appeared to be "a blonde bimbo" — until she opened her mouth. An Otago woman lawyer observed: "If you're 'pretty' you are either dumb or there for another purpose." That other purpose is sex, or at least sexual gratification.

Many women lawyers are offended by comments about their appearance where the same comments would not be made to men. As one woman lawyer put it: "Other solicitors and police comment on my appearance — they would not do so if I were a male lawyer." An Otago-based woman lawyer recalled her experience where a High Court judge approached her at a function, tipped her under the chin and said: "Let me have a close look at you." Her physical appearance was the first point of scrutiny and from this examination she could be summed up. It is difficult to imagine a male High Court judge measuring a male lawyer in this same way.

Understandably some women lawyers feel they have had no choice but to play the part. An Auckland associate partner described how the appearance and body criteria were "particularly insidious" because "young female solicitors fall for appearances at all costs — which in turn reinforces 'empty-headed' stereotypes". The American television show *LA Law* is blamed for perpetuating the "model" image required of women lawyers. According to a Christchurch-based solicitor: "in the *LA Law* mould a woman lawyer must look under 30 and dress impeccably." Failing to do so means she does not meet the standard.

Age is another appearance-related factor that affects women and men lawyers differently. Social convention holds that women's beauty dissipates with youth, hence the mass of beauty products to disguise aging and the wide range of plastic surgery options aimed at women so they can regain youthful

29 Interview with Silvia Cartwright (Part 3 of *Standing in the Sunshine*, TV3 documentary series, 25 November 1993).

looks. By comparison, maturity in men is much admired — particularly where those men are dispensing wisdom as in the legal profession. But for women who have been valued at least in part for their appearance, aging is a scourge to be avoided.

For many women lawyers, unwanted and inappropriate comments about their appearance and body rankle and undermine confidence. The clear implication is that women do not succeed in the profession on their merits or, even worse, that their sexuality is part and parcel of their professional merit.
[…]

C But women don't complain

From 1981, sexual harassment has been clearly defined and has been prohibited by law — a fact arguably better known to women lawyers than any other group of women in society. Yet, in over two-thirds of the cases of harassment reported by women lawyers in the 1992 national survey, no action was taken.[30]
[…]

In addition, women lawyers have not hesitated for lack of avenues for complaint, as three formal avenues exist. First, sexual harassment is grounds for a personal grievance complaint under the Employment Contracts Act. Secondly, they could have made a complaint to the Human Rights Commission, requesting an investigation or (failing settlement) initiating proceedings before the Equal Opportunities Tribunal (now the Complaints Review Tribunal). Thirdly, women lawyers could have made a complaint to their district law societies on the basis that sexual harassment would be covered by the ethical rule on discrimination.

A number of firms also offered an in-house alternative: 21 per cent of those surveyed in 1992 worked in law firms which had formal written procedures for dealing with sexual harassment. Regardless, the existence of the procedure did not affect the likelihood of action being taken.[31]

So, why don't women lawyers complain? The answer is found in the stories men and women lawyers have told.

---

30 Gatfield and Gray, above n 14, at [8.3].

31 Gatfield and Gray, above n 14, at [8.4].

D Men's view

1 The problem is exaggerated

According to a considerable number of men lawyers, the problem of sexual harassment is exaggerated. Men in the profession are more inclined to dispute the existence, the extent and the seriousness of sexual harassment than of discrimination generally.[32]

Typical comments by men lawyers in the 1992 survey included:

> I believe the issue of sexual harassment is now over-exaggerated. A lot of situations can be taken out of context.
>
> In spite of *LA Law* I do not believe that this happens as often as is reported or represented but who am I to comment?
>
> I have yet to see sexual or other harassment in a legal office. Maybe I lack sensitivity! Or are others overly sensitive?

When commenting on in-house harassment procedures, one man, a partner in an Auckland firm, commented: "None needed. It does not happen." Harassment, according to another male partner, is "an unlikely event".
[…]

In categorising sexual harassment as inconsequential, men lawyers are reinforcing the idea that women fabricate or exaggerate the problem. This reaction is not unique to women lawyers' complaints but is also a tactic used by lawyers in the courtroom.

Women judges have observed for example that some prosecutors and defence counsel "speak down to women witnesses and belittle their experiences and reactions".[33] One judge described the inappropriate comments made by defence counsel when dealing with women victims as including "put down comments or suggestions that no harm was done or that the parties were reconciled therefore she was not serious in making a complaint in the first place".[34] In effect this strategy belittles the complaint and the complainant. It

---

32 One-third of the men who commented on sexual harassment downplayed the seriousness or the existence of the problem: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

33 Gatfield *Women Judges*, above n 14, at [5.1].

34 Gatfield *Women Judges*, above n 14.

is also reminiscent of the historical argument used to keep women out of the legal profession: that women cannot be trusted to tell the truth.

2 *"But some women like the attention"*

Many of the men who doubt or minimise the existence of sexual harassment have been in practice for more than twenty years. The social conventions with which this generation were most familiar dictated that men should notice and compliment women on their appearance and that women would be flattered by this attention. As Auckland barrister Kevin Ryan observed: "males of my generation often think women are fair game."[35] Younger men in the profession are also aware that the attitudes of older men lawyers, often senior partners, are problems in their firms. As a Wellington-based partner in a national firm pointed out: "In the case of unintentional innuendo (which happens all too often) older partners, in particular, simply refuse to acknowledge the reality of the situation."

That women lawyers consider their colleague's sexual attention as harassment has been well documented in surveys and studies since the early 1980s. Arguably men lawyers — of any generation — have been on notice long enough that sexual innuendo is inappropriate in the work context.

3 *It's just a joke*

Regardless of age, men lawyers have frequently responded to suggestions or complaints of sexual harassment by saying: "It was just a joke." This was the response, in 1985, from the Deputy Assistant Commissioner of Police John Jamieson, when the Auckland woman lawyer lodged a complaint with the Minister of Police, the Minister of Justice and the NZLS about the video-taping of her being strip-searched.[36]

Likewise when a Māori woman lawyer complained of racism and sexual harassment in 1990, her concerns were "treated as a joke". A woman lawyer in the 1992 survey commented: "In a semi-social business setting a client persistently tried to kiss me. I told one of the partners and he laughed about it." Another woman who complained of harassment by a colleague brought this to a manager's attention — he thought she was joking.

---

35 Interview with Kevin Ryan, barrister (Radio NZ, 12 August 1993).

36 "Police response to the report", above n 5.

E Women's realities

1 It's not a joke

The reality for women in the legal profession is that very few think that sexual harassment is a joke. Of the women who commented in the 1992 survey on the nature of the harassment experienced, less than 20 per cent said that incidents were of a humorous nature and were not intended to offend.[37] For the majority, the behaviour is offensive hence the use of negative descriptions such as "unwanted advances" and "misuse of position or power".

Even women lawyers who thought that what looked like sexual harassment could sometimes be genuine attempts at "humour" had their doubts. They still referred to feeling uncomfortable about the "underlying innuendo" or the times when the humour was "carried away beyond normal conversational banter". Even the few who thought that women can and do "exploit our femaleness" by using sexual remarks in fun recognised they, in turn, were being exploited also. As one Auckland woman lawyer in a large national firm explained: "The difficulty is often that it is not a particular instance of harassment but the creation of an environment where you feel that you shouldn't take these things too seriously — if it happens, it should be laughed off."

Failing to see the "humour" in the harassment opens women lawyers to criticism from their male colleagues. The most common criticisms are that they take things too seriously, they are not "good sports" or they are radical feminists. One woman associate partner in a national firm who complained of sexual harassment was told that she was "an uptight frigid feminist" while others point out that they refrained from complaining for fear of attracting a negative label such as "strident feminist".[38]

The overwhelming reality of the joke is that it is on women. By failing to take complaints of sexual harassment seriously, employers and partners have effectively silenced the problem. In every case where the incident of harassment was treated as a joke by the employer or the firm, no action was taken.

---

37 Of 94 voluntary comments on the type of sexual harassment, 17 women referred to the humorous nature of the incident: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

38 These labels were also referred to by five women lawyers surveyed in Auckland in 1987. Assertive women were labelled "aggressive", "feminist", "radical" and "stroppy", while assertive men were referred to as "strong- minded", "firm" or simply "assertive": Cockayne, above n 10, at 59.

2 *Complaining is career suicide*

Another way in which potential sexual harassment complaints have been silenced in the legal profession has been by ensuring the repercussions of complaints are, or are perceived to be, so severe that women lawyers cannot afford to take action. Ironically, it is the women who are in line for punishment rather than the perpetrators or the firms.

The publicly reported experience of the Auckland woman lawyer in the 1985 strip-search video case was instructive. When she told the "two prominent male lawyers" who had volunteered to her that they had seen the video that she intended to make a complaint, one was reported to respond: "I wouldn't even think of laying a complaint if I were you, because *Truth* will get hold of this. They'll probably get hold of the video as well, and then you'll be splashed in your underwear right across the front page of that newspaper."[39] Whether or not the advice was genuine, the message was clear: she would be the loser if she made a complaint.

In the 1990s, women lawyers have received the message loud and clear that speaking out about sexual harassment is a bad career move. A woman barrister who had received requests for sexual favours and been told that her opportunities in a firm would depend on her providing sexual favours said, quite simply: "It would be suicidal to speak out — both career wise and personally." Women fear they will be forced out of the firm as a result of the complaint and this message is learnt fast. One newly-admitted Wellington woman lawyer wryly observed: "You can't take action against a partner in your firm — realistically, you'd probably be fired. In this economic climate that's not a good idea." Lawyers are also expected to be ferocious in their defence if personally "accused" of harassment. Frances Joychild, a legal adviser at the Human Rights Commission, pointed out that for women who are sexually harassed in law firms:

> … there is an extreme fear of making a complaint … because the person they are complaining against is a lawyer who they believe will 'know every trick in the book' and will pull out every legal defence and create every legal obstacle to make it very difficult to establish their case.

For this reason, one woman employed by a barrister who approached the

39 "Report of the strip-search", above n 4.

commission for help concluded she had no option but to leave her job. The daily harassment was making her ill but the barrister concerned was so aggressive on behalf of his clients, she feared "he would be even more so if he was the accused".[40]

The worse cases of sexual harassment are veiled in secrecy. Women lawyers, from personal experience or otherwise, know of severe incidents of sexual harassment but are sworn to confidentiality. One women lawyer, for example, commented: "I know of a 'rumoured' case where a woman partner was raped by the Office Manager. Eventually he was dismissed. She was told (effectively) to shut up about it." A first year lawyer noted: "Rumours abound about women receiving requests for sexual favours and stories of promotions depending on sexual favours. I don't know if these are true."
[…]

On some occasions, the action taken by an employer in response to sexual harassment has the unintended effect of damaging the woman lawyer's career. Women who have suffered sexual advances from supervising partners are sometimes relocated in the firm to another department or team. The objective is to minimise their contact with the harasser but, particularly in small or medium sized firms this relocation will also mean the women lawyers are now working outside their areas of expertise. Not only do they need to deal with the personal effects of the harassment, professionally they have to start again.

3 A heavy burden of proof

Although ignoring harassment is a common response, at the other extreme some men lawyers claim that any incidents of sexual harassment warrant severe legal penalties. The emphasis on the legal consequences suggests that to some extent male lawyers, and employers in particular, are mindful of the legal implications and want to be seen to be taking harassment seriously or perhaps are simply concerned at the potential for bad press.

Some lawyers, partly as a result of their training, have an excessive fixation with the legal implications of sexual harassment complaints. They often talk in terms of the "guilty party" and "proving" the harassment occurred. This has a strong deterrent effect on women who have experienced harassment and are

40 Letter from Frances Joychild, above n 6.

concerned at the effect on them and their careers. Women comment that "it is virtually impossible to 'prove' harassment … therefore nothing is done".

Treating harassment in a strictly legal sense can also act as a deterrent to accepting the validity of complaints. Some employers jump the gun and assume that harassment, where proved, warrants severe penalties. Employers make comments like: "If real sexual harassment is proved to have occurred I would support severe action to remedy it" and "I would regard harassment of a sexual nature as being a fireable offence."

Assuming that only the severest penalties would be warranted is an indication that there is little appreciation that sexual harassment occurs in degrees and that the penalty must be matched to the problem.

4 Ineffective procedures

Predictably, the negative stance on sexual harassment taken by men lawyers surfaces in the procedures implemented within law firms. Since the mid-1980s, women lawyers have been faced with non-existent or ineffective procedures for handling sexual harassment complaints.

At best, an estimated 20 per cent of New Zealand law firms had sexual harassment procedures in 1992,[41] and even then 11 per cent of lawyers in those firms are likely to believe the procedures are inadequate.[42] Even more of a concern is the fact that in 1992, the existence of a written sexual harassment procedure in the workplace made no difference to whether any action had been taken in response to an incident of harassment.[43] Doubts about the efficacy of procedures were more likely to come from women than men and usually related to the attitudes of partners or their involvement in the complaints process.

Many law firms have no management structure and so partners are apparently considered the best people to receive and act on complaints of sexual harassment. Where firms employ management staff, they too are frequently involved in handling complaints.

With good reason, women lawyers express doubts that a partner-based

41 Twenty-one per cent of lawyers surveyed knew that their firms had formal written procedures for sexual harassment complaints, 20 per cent were unsure and 50 per cent said their firms did not. Some of those who definitely knew of procedures would be working in the same firms so it is likely that the proportion of firms having procedures would be less than 21 per cent: Gatfield and Gray, above n 13, at [8.4].

42 Gatfield and Gray, above n 14.

43 Gatfield and Gray, above n 14.

complaints procedure will work impartially. Partners, according to women lawyers, are involved as the perpetrators in half of the cases of sexual harassment, so why would a victim of harassment seek assistance from the harasser? The same problem can arise where management staff are involved. In one firm where the office manager was sexually harassing women staff, he was a central figure in the proposed procedure to deal with the problem.

Even where the harassing partner is not the person receiving complaints, experience has taught women lawyers that partners will close ranks. A woman lawyer with three years' experience was "stunned" when she received deliberate touching and unwanted advances from a partner in a large national firm. She immediately told her supervising partner who, she said, "initially tried to 'downplay' the incident". Only when he saw how serious she was did he take "the matter more seriously although he didn't do anything about it as far as [she knew]". In a similar case of partner harassment, again involving a woman with three years' post-admission experience, the woman said: "All the partners were aware of the behaviour (the partners were all men) and the behaviour was approved by all the partners."

[…]

The negative attitudes of some partners present real difficulties for those who advocate the introduction of procedures or harassment prevention education. Regardless of firm size and location, women lawyers relay similar experiences:

> We had completely inadequate procedures — it has taken a full year to get changes made — even after we showed the partners a survey taken of all female solicitors in the firm, which clearly demonstrated an urgent need for change. You would think the benefits would have been obvious to the partners but they preferred to deny that there was a problem.

[…]

Only a minority of women lawyers described confidence in their firm's sexual harassment procedures. One Wellington woman lawyer commented that as a result of what she considered "good procedures" in her current firm, "the atmosphere is positive for women". Another woman working in a large firm that has recently formulated a sexual harassment procedure said: "I would feel confident that if I had a legitimate complaint about sexual harassment there are people I could go to and it would be dealt with."

[…]

In some firms, the partners believe that they will know when harassment is occurring. This was the view of a partner in a medium sized Auckland firm where a staff solicitor had made unwanted advances and requests for sexual favours of others in the firm. There was no sexual harassment procedure except, as the partner said: "We are watchful and would act if aware [sexual harassment] occurred."

While it may be reassuring to the staff members that the partners are on the look out for harassment, this alone is insufficient. Those who harass can be very clever and manipulative about disguising their behaviour, and those harassed, for the reasons mentioned above, are unlikely to disclose the harassment unless the workplace has an open attitude to dealing with incidents as they arise. The publication and implementation of a procedure is a significant statement that complaints will be taken seriously and dealt with properly.

F Women's real choices

Given the inadequacies of the procedures within law firms and the very real disincentives to taking action via the available legal channels, women lawyers' real choices when faced with sexual harassment are limited. Their most common responses are to ignore, avoid, counter or deflect the behaviour, or to resign.

1 Ignore

Women lawyers' most common response to sexual harassment in 1992 was ignoring the behaviour.[44] The reasons for doing so included: not seeking to lower themselves to the level of the harasser; the firm belief that a complaint would not be believed or taken seriously; doubt that any positive action would result; or fear of even worse consequences such as being labelled a trouble-maker or being fired. In each case, women's collective experience confirmed that these were feasible and even probable outcomes when women complained about harassment.

None of these reasons for inaction are positive; all convey an element of fear and distrust.

44 Gatfield and Gray, above n 14, at [8.3]. Twenty three per cent of women lawyers who commented on sexual harassment said it was best to ignore the conduct: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

2 *Avoid*

Since the 1980s, women lawyers have been quite open about the fact that they take steps to avoid being harassed by colleagues, partners and clients. Women lawyers in Wellington and Auckland in the early 1980s, for example, disclosed that they chose not to attend professional social functions where mixing with colleagues could lead to inappropriate behaviour.[45]

In the 1990s, some women lawyers still opt not to attend functions. As one Christchurch lawyer who had experienced unwanted sexual remarks from colleagues said: "I avoid Law Society functions now — they are a joke." Newly-admitted women lawyers comment that they will intentionally leave law firm social functions when they sense that professional barriers are breaking down. They suspect that, as the night goes on and the alcohol consumption increases, they will be perceived as "fair game" for unwanted attention.

As in earlier decades, some women lawyers in the 1990s are limiting their professional interaction with men lawyers. Men lawyers are not noticeably modifying their behaviour, except that they no longer exclude their women colleagues overtly, as they did up to the 1970s. By excluding women from Bar dinners and law school functions, men lawyers were taking steps to remove their temptation to harass women. Likewise, in the 1970s, some Auckland firms would not allow women litigators to go with senior male partners to the Court of Appeal in Wellington because the obligatory overnight stay raised fears of potential sexual impropriety. At this time, the majority of women lawyers were young and unmarried. For a woman lawyer to go out of town overnight alone with a man was considered a risk.[46]

3 *Counter*

A minority of women lawyers deal with unwanted sexual advances or comments on the spot. In approximately 18 per cent of incidents of sexual harassment, women lawyers will have personally approached the person concerned and explained that the conduct was inappropriate and offensive.[47] A woman partner, after receiving sexual remarks from another partner in social situations,

45 See Gatfield *Without Prejudice: Women in the Law*, above n 1, at ch 6.

46 Interview with Margaret Wilson.

47 Seventeen of the 94 women who commented on sexual harassment said they personally spoke to the person involved: Gatfield and Gray, above n 14, "Questionnaire comments summary paper", question 36.

did just that. It was, she said, "straightforward to deal with and certainly not a problem". For another woman lawyer when sexual innuendoes start to cross the boundary of "normal conversational banter" she "immediately makes the point that it is not acceptable. It seems to work."

The competence of some women lawyers in dealing with unwanted or offensive comments has led some employers to think that all women lawyers are equipped to resolve sexual harassment without the need for policies or procedures. The partner in one firm that had no procedure said: "Our female staff are vocal enough to be able to make their complaints known in the unlikely event of sexual harassment." Statistics on complaints made strongly suggest otherwise.

4 Deflect

In response to inappropriate comments, some women lawyers have been able to respond with witty replies that put the comments in context, convey the message that such comments are out of line and still maintain a cordial relationship. An example of one such come-back was used by a woman law student in the early 1970s. A lecturer observing her knitting in class remarked: "I hope you realise that knitting is considered a form of masturbation." She apparently replied: "Fine — you masturbate in your way and I'll masturbate in mine."[48]

[…]

The difficulty for many women lawyers is that the witty response is not always appropriate or easy. The expectation that they will respond "in kind" also places an unfair burden on them. Women usually have no warning that a conversation will turn to sexual remarks about their appearance or to requests for intimacy. Because harassment occurs at work, in court, with clients, or in social professional settings, women lawyers if they were expected to respond in "good humour", would need to be continually on guard and ready with appropriate responses.

In addition, while women lawyers relay stories about quick one-liners like survival stories, for some men they are evidence of women's complicity with the "joke".

---

48 Diana Crossan "Equal Employment Opportunities" (presentation at Wellington District Law Society seminar, 4 August 1993).

5 Resign

Where sexual harassment is serious enough and no action is taken, some lawyers have been left with no option but to resign. In the 1992 survey alone, eleven women and four men lawyers volunteered that they had left a job as a result of discrimination or harassment.[49] This is likely to represent the tip of the iceberg, as the 1992 survey respondents did not include those lawyers who were unemployed or working outside private practice.[50]

When people leave jobs as a consequence of harassment, their confidence, self-esteem, and sense of justice are undermined. Psychologists point out that the victim's distress is often compounded by the continued denial of a problem by the employer.

One woman in the 1992 survey who was both lucky and good enough to find another job commented: "I left my first job without a reference because the senior partner took an 'unprofessional' interest in me. It was easier to resign and not take a stand over the matter." Likewise a woman lawyer who experienced sexual remarks, deliberate touching, and requests for sexual favours from a partner took no official action but said: "The partner in question was a jerk. I left." Another woman who had experienced unwanted advances, sexual comments, deliberate touching and being brushed against said: "I took action but was told the partners would do nothing. I left because of the situation six months later."

In the worst cases, after one victim leaves, the harasser will find someone else to take her place. As one woman lawyer with three years' experience said:

> I was sexually harassed by a partner, my employer at that time. I told him to stop. But the damage to my professional confidence had been done so I left … Other women victims also told him to stop. In each case they left soon after. One subsequent employee made an official complaint.

[…]

49 Gatfield and Gray, above n 14, at [8.3].

50 According to a survey of former policewomen, sexual harassment by male colleagues was a reason why 20 per cent of women surveyed had left the police force: "Sex harassment 'driving women out of police'" *Sunday Star-Times* (21 July 1996) at A5.

II WHY DOES HARASSMENT OCCUR?

A Women's perceived sexual availability

For men to harass women, they must believe that women are sexually available to them as of right. This belief enables harassers to persist with their behaviour even when women object. A person's right to say "no" to unwanted sexual attention is overridden by the belief of the other person that he or she has a greater claim to impose his or her wishes.[51] The first person is most often a woman while the second person is most often a man.

Women's perceived sexual availability to men has a long history. It was only in 1985 that married women in New Zealand were legally granted the right to say "no" to having sex with their husbands. Until then, a husband was entitled to force sex on his wife, without fear of recourse. This view of women as men's property can be traced back to the common law disabilities which limited women's economic and legal rights (including entry into the legal profession) until the 1890s.

In the 1990s wives, at least theoretically, enjoy the protection of their person, while women in the workforce, including women lawyers, are in practice fair game.

B Putting women down

Sexual harassment also serves as a way for men to put women down, and according to researcher Jock Phillips putting women down is a time-honoured "sport" in New Zealand male culture.[52]

The explanation for this behaviour apparently lies in the need for men to deny that they are in any way like women. Social scientists and researchers who have examined male behaviour believe that one of the ways in which boys and men affirm their masculinity (and hence their superiority) is by downplaying or denying any sign of femininity in themselves. So, for example, men who fail to comply with the expected masculine standard are also "put down" by insults such as "You're throwing like a girl."[53]

---

51 For a general discussion on New Zealand rape laws, see Elisabeth McDonald "An(other) Explanation: The Exclusion of Women's Stories in Sexual Offence Trials" in *Challenging the Law and Legal Processes: the Development of a Feminist Legal Analysis* (New Zealand Law Society, Wellington, 1993) at 43–67.

52 Jock Phillips "Mummy's boys: pakeha men and male culture in New Zealand" in Phillida Bunkle and Berry Hughes (eds) *Women in New Zealand Society* (George Allen and Unwin, Auckland, 1980) at 236.

53 Bill Rout "Being 'staunch': boys hassling girls" in Sue Middleton and Alison Jones (eds) *Women and*

C Power and vulnerability

Regardless of the harasser's motives, sexual harassment is a misuse of power. The fact that those with relatively more power (law firm partners and other employers) harass those with relatively less power (employees) demonstrates that sexual harassment is as much a power issue as it is a gender issue.

For this reason, harassment of men does occur and will continue to occur. As more women achieve positions of status and authority on traditional "male terms" sexual harassment of men employees can be expected to increase. Already, an estimated 20 per cent of men in practice have had personal experiences of a partner, client or colleague misusing their position or power. Their vulnerability is no different to that of their women colleagues, as demonstrated by their reluctance to complain about harassment. Men lawyers who reported personal experience of harassment in the 1992 survey were less likely to have taken action than women lawyers.[54]

[…]

Not all people in positions of status and authority harass women, but those who do are likely to adhere to the beliefs that women are sexually available to them, as of right, and that sexual interaction is not incompatible with professional interaction. In addition, the workplace culture and environment, either overtly or covertly, will condone sexual harassment. Judging by the reports of women lawyers, this dangerous combination of power, vulnerability, and workplace acceptability of harassment is relatively common and is a major factor in the perpetuation of the problem.

[…]

III WILL SEXUAL HARASSMENT EVER STOP?

Over the past decade, the incidence of sexual harassment has changed little. What hope is there for the future?

In 1991, Waikato University lecturer Bill Rout studied sexual harassment in a boys' school and in a co-educational school. His results give little hope

---

Education in Aotearoa 2 (Bridget Williams Books, Wellington, 1992) at 174, footnote 6. See also Clare Burton *The Promise and the Price: The Struggle for Equal Opportunity in Women's Employment* (Allen and Unwin, North Sydney, 1991) at ch 1; and Michael King (ed) *One of the Boys? Changing Views on Masculinity in New Zealand* (Heinemann, Auckland, 1988).

54 Gatfield and Gray, above n 14, at [8.3] and table 29. Sexual harassment of a male employee by a woman manager was highlighted in a bestselling 1994 novel, *Disclosure*, by US author Michael Chrichton.

about changes in the attitudes of the next generation of New Zealand men.

Many previously boys-only schools are introducing girls into sixth and seventh form classes. The stated objective of this practice is to encourage competition and allow interaction similar to the university and work environments. But, as Rout's research found, the introduction of girls into a traditionally male school resulted in extensive harassment of the girls. The boys mimicked the girls, made sexist jokes, called the girls nicknames (such as "Horse"), commented out loud on their physical attributes and stared (or ogled) at their bodies. While the girls said they objected to the behaviour, the boys did not perceive the environment as negative or detrimental. Few could explain why they harassed the girls. One boy commented that the harassment was "part of the school tradition".[55]

Rout concluded that boys in single-sex and co-educational schools "learned to accept as 'normal' the sexual harassment of girls and women" — including seeing girls and women as "sexual objects".[56]

IV CONCLUSION

Sexual harassment of women lawyers by men lawyers represents the tip of the iceberg.

If women lawyers are hesitant to complain, with all their knowledge about the law and their comparatively high status in the workforce, how do women support staff fare? An estimated seven thousand women work in the profession as secretaries, word processors, filing clerks, receptionists, librarians and legal executives.[57] If, as the evidence suggests the likelihood of sexual harassment increases as the vulnerability of the victim increases, these women are likely targets for harassment.

Lawyers have also been known to harass women clients. On several occasions in recent years, district law societies have received complaints involving sexual misconduct of male lawyers towards women clients. In response to these complaints, the law societies' disciplinary tribunals have censured the lawyers concerned, awarded payment of costs, and suppressed the lawyers' names. If these complaints were the subject of criminal proceedings,

55 Rout, above n 53, at 176–177.

56 At 179.

57 This estimate is based on the average of one support staff member for every professional staff member. In larger law firms the ratio is lower, while in smaller practices the ratio is usually higher.

imprisonment would be expected.

The law societies' response to solicitor-client sexual harassment requires examination in future as does the non-response to the harassment of women lawyers.

While the New Zealand Law Practitioners Disciplinary Tribunal has recognised that sexual misconduct towards clients is an abuse of power, the district and national tribunals and the law societies need to appreciate that women clients face very similar barriers to making complaints as are faced by women lawyers. Like women lawyers, women support staff and women clients will be reluctant to make allegations of misconduct against lawyers who they would perceive as being inclined and well-equipped to deny, downplay or defend the accusations. The true extent of harassment will not be known until there exists a "woman-centred" complaints process.