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***Patron, the Honourable Jane Mathews AO***

Supplementary Submission into the National Inquiry into Sexual  
Harassment in the Australian Workplace

Submitted by:	Women Lawyers Association New South Wales (WLANSW)
Submitted electronically to:	Australian Human Rights Commission
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**About us**

Women Lawyers Association NSW (WLANSW) is a voluntary association that promotes and protects the interests of women in the legal profession. WLANSW has been committed to improving the status and working conditions of women lawyers since 1952. It has members (male, female and corporate) throughout NSW. Our members include solicitors, barristers, judicial officers, academics, corporate counsel, lawyers and law students. Members work in private practice, corporations, the public sector, the community legal sector and at the Bar.

WLANSW provides a network for social interaction and continuing education and reform within the legal profession and broader community. WLANSW has undertaken research into work practices affecting women in the legal profession, including an annual published report

on the employment trends in the legal profession titled: *Law Firm Comparison Project*. Details of our publications and submissions are available online at [www.womenslawyersnsw.org.au](http://www.womenslawyersnsw.org.au) under the 'Workplace Practices' tab.

### **INTERACTION BETWEEN DEFAMATION AND SEX DISCRIMINATION LAW**

1. In recent months there has been much commentary in regard to defamation proceedings or threatened defamation proceedings where a publisher publishes material alleging sexual harassment in circumstances where the alleged victim did not make a complaint to the AHRC and may or may not have wanted her allegation published.
2. In these circumstances, these alleged victims, predominantly women have few legal protections. This submission raises a number of law reform proposals that would add a measure of protection.
3. WLANSW Recommends that the AHRC raise the matters in this submission with the Defamation Working Party established by the Council of Attorney-General of NSW.

### **Expand prohibition of non-publication and suppression orders identifying victims of sexual harassment.**

4. Section 578A of the *Crimes Act* 1900 (NSW) prohibits publication identifying victims of certain sexual offences in circumstances where there has been a proceeding involving a prescribed sexual offences as defined in the *Crimes Act*. Its purpose is to guard against interference with a complainant's right to privacy and a public policy purpose of encouraging victims of sexual abuse to disclose abuse to authorities without fear of public exposure.
5. An adapted provision could apply in defamation proceedings. Such a non-publication order would prohibit a person from publishing any matter which identifies a person who alleges sexual harassment in a defamation proceeding which is likely to lead to the identification of the person.

Section 578A is in the following terms:

## 578A PROHIBITION OF PUBLICATION IDENTIFYING VICTIMS OF CERTAIN SEXUAL OFFENCES

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(1) In this section:

"**complainant**" has the same meaning as in Division 1 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* .

"**matter**" includes a picture.

"**prescribed sexual offence**" has the same meaning as in the *Criminal Procedure Act 1986* .

"**publish**" includes:

(a) broadcast by radio or television, or

(b) disseminate by any other electronic means such as the internet.

(2) A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant.

Penalty: In the case of an individual--50 penalty units or imprisonment for 6 months, or both; in the case of a corporation--500 penalty units.

(3) This section applies even though the prescribed sexual offence proceedings have been finally disposed of.

(4) This section does not apply to:

(a) a publication authorised by the Judge or Justice presiding in the proceedings concerned,

(b) a publication made with the consent of the complainant (being a complainant who is of or over the age of 14 years at the time of publication),

(c) a publication authorised by the court concerned under section 15D of the *Children (Criminal Proceedings) Act 1987* in respect of a complainant who is under the age of 16 years at the time of publication,

(d) an official law report of the prescribed sexual offence proceedings or any official publication in the course of, and for the purposes of, those proceedings,

(e) the supply of transcripts of the prescribed sexual offence proceedings to persons with a genuine interest in those proceedings or for genuine research purposes, or

(f) a publication made after the complainant's death.

(5) A Judge or Justice shall not authorise a publication under subsection (4) (a) unless the Judge or Justice:

(a) has sought and considered any views of the complainant, and

(b) is satisfied that the publication is in the public interest.

(6) The prohibition contained in this section applies in addition to any other prohibition or restriction imposed by law on the publication of any matter relating to prescribed sexual offence proceedings.

(7) Proceedings for an offence against this section shall be dealt with summarily before:

(a) the Local Court, or

(b) the Supreme Court in its summary jurisdiction.

(8) If proceedings for an offence against this Act are brought before the Local Court, the maximum penalty that the Local Court may impose on a corporation is 50 penalty units.

(9) Proceedings for an offence against this section that are brought before the Local Court must be commenced within 2 years of the date of the alleged offence.

6. The object and purposes of pseudonym and suppression orders is to protect the identity of the person to whom the pseudonym refers, usually a witness or a person referred to in the pleadings, evidence or decision of the Court.
7. Like the non-publication or suppression order, pseudonym orders qualify the open justice principle. All Courts have powers to order that certain names of persons are obscured in court documents and/or hearings.
8. The *Court Suppression and Non-publication Orders Act 2010* (NSW) similar to other legislation across Australia and at the Federal level states that the primary objective of the administration of justice is to safeguard the public interest in open justice. A suppression order or a non-publication order can be made if one of the grounds set out in s8 is made out. Section 8(1)(d) states that “*the order is necessary to avoid causing undue distress or embarrassment to a party or a witness in a criminal proceedings involving an offence of a sexual nature (including an act of indecency)*”.
9. If section 8(1)(d) was extended to civil proceedings, it could be utilised by witnesses who do not wish to be identified in defamation proceedings.

### **Restriction on pleading the Truth Defence**

10. A publisher can plead the truth defence without the permission of the person who has allegedly been sexually harassed or sexually assaulted. While there may be an application to strike out such a defence if it does not plead the material facts, a greater level of control and protection would be afforded to persons who do not wish their story exposed if there was a requirement on publishers to procure permission from the alleged victim prior to pleading the truth defence.

**Larissa Andelman**

**President WLANSW**

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