

## As it was then, so it is now — the law is a cesspit of sexual harassment

The appalling behaviour bawdy barristers got away with 30 years ago wouldn't be tolerated today... would it? Don't be so sure.



(IMAGE: MITCHELL SQUIRE/PRIVATE MEDIA)

Nearly 30 years ago, when I was a junior lawyer, the chairman of the firm at which I was working stood up at the Christmas party and told the crowd of more than 200 staff members that he was awarding a prize. He held it up — a large jar of Vicks VapoRub — and proudly declared that the winner was “the girl with the biggest tits”. He named her, and she did as was expected: made her way to the stage to collect her reward.

The consequences of that act were some awkwardness, a few whispers, and the victim’s voluntary departure from the firm. The chairman sailed on, his illustrious career undimmed.

True story. It has stuck with me ever since.

Things, of course, have changed. You wouldn’t get away with that kind of thing these days, would you?

Consider the case of EFA, a male Sydney barrister whose name we will never know because it has been permanently suppressed by the NSW Civil and Administrative Tribunal (NCAT). Disciplinary action against him has just concluded in NCAT, in a case that tells us something about what hasn’t changed.

In 2017, EFA attended a formal dinner for barristers’ clerks at Doltone House. Clerks are the grease that turn the wheels of a barrister’s chambers; their role is critical and highly valued. The dinner is a form of thank you.

It was nearly 11pm when EFA, who was very drunk, approached a table at which A, another male barrister and friend of EFA, was seated and talking to H, a young female clerk. EFA grabbed A's head and simulated oral sex with him. Apparently they both thought it was hilarious; NCAT found that it was some sort of "ritual" between them.

So hilarious was it that EFA immediately thought he should include H in the joke. On the facts as determined, he turned to H, facing her (she was looking down at the table), placed his left hand behind her head and pushed it down once. At the same time, he said "suck my dick".

Ten minutes later, H reported what had happened to the clerk of her floor. He said she was clearly in distress. She made a formal complaint, leading four years later to the Bar Association asking NCAT to find that EFA had committed an act of professional misconduct. Such a finding could result in a lawyer being struck off.

NCAT said this: "H was offended by the pushing of her head by EFA and the words 'suck my dick' ... [these actions] self-evidently had a sexual character and were inappropriate conduct towards a clerk who was previously unknown to him in the context of the barristers' clerks' dinner. EFA's words and actions were not, however, in context, an "advance". EFA was not actually inviting H to have oral sex with him. It seemed, rather, that he was extending to her an abridged echo of the greeting he had offered to A. He was including her in the horseplay he had engaged in with A. It was very poorly judged, doubtless on account of EFA's significant level of intoxication. EFA failed to take into account H's likely feelings of anger, embarrassment or humiliation."

NCAT decided that EFA's behaviour did not qualify as professional misconduct, partly because it did not take place in a context that had "some real and substantial connection with professional practice". But also, in considering the question of EFA's "good fame and character", NCAT felt that his conduct did not "indicate that he has a character flaw which would render him unfit to practise the law for any length of time, let alone permanently".

Ultimately, EFA copped a reprimand. NCAT did not consider that imposing a fine on him would "enhance" general deterrence; "to the extent that it is possible to deter people from making ill-judged jokes in very poor taste, the awareness of this matter, and its outcome and consequence, is likely to be sufficient deterrence".

What outcome? What consequence? NCAT has permanently suppressed EFA's name, because a psychiatrist warned that he may commit suicide if his identity becomes known. Anyway, "there is no need to disclose EFA's name to warn future prospective clients or solicitors. We have found that EFA does not pose a risk to anyone".

Well, that's all good then. EFA was certainly remorseful, and he was only kidding. Why should his career, as a male barrister, be slowed down even slightly by his moment of ill-judged humour?

Of course, for H, it was not humour but a physical, sexual assault. NCAT was sure it wasn't an "advance", but what the hell would it have felt like to her? It was unprovoked, uninvited, unwanted and undeserved. It left her distressed and traumatised. She then had to be cross-examined on her recollection of the incident and subjected to the tribunal's analysis of her credibility as a witness. All for what? A nameless, pointless, reprimand.

What's changed? Not much.

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ABOUT THE AUTHOR

## Michael Bradley

CRIKEY COLUMNIST [@MARQUELAWYERS](#)

Michael Bradley is a freelance writer and managing partner at Sydney firm Marque Lawyers, which was created in 2008 with the singular ambition of completely changing the way law is practised.

