

Sexual harassment

Sexual harassment was recognised as a form of sex discrimination in Australian law in the early 1980s. Courts have generally adopted a liberal interpretation of behaviour which may be classified as sexual harassment, to include unwelcome conduct of a sexual nature and have recognised the relevance of power relations, particularly in the workplace. Decision-making in this area raises important legal principles, notably the ‘reasonableness test’ and the standard of proof, both of which have been subject to sustained feminist critique. This case study maps judicial responses to complaints of sexual harassment across all Australian jurisdictions for the 30 year period 1984 to 2014. Links to cases are provided if they are publicly available. This text is up to date to December 2014.

Introduction

The introduction of sex discrimination legislation was the product of feminist campaigns for law reform in relation to equal opportunity and discrimination in the workplace. In Australia, complaints of sexual harassment were first pursued under state anti-discrimination legislation, first introduced in South Australia in 1975 (*Sex Discrimination Act 1975*). However, initially, there were no specific provisions covering sexual harassment and it was necessary to prove that such unwanted sexual behaviour was a form of sex discrimination.

The [Sex Discrimination Act 1984](#) (Cth) (SDA) was the first legislation in the world to introduce a separate cause of action for sexual harassment. Importantly, unlike sex discrimination, there were no exceptions to the prohibition of sexual harassment. However, the prohibition of sexual harassment applied only in the areas of employment and education and only to situations where the harassment resulted in the complainant fearing that rejection of sexual advances or behavior would lead to a detriment to her employment or education. In situations where the harassment was part of a generally sexualised environment which was hostile to women, it was still necessary to establish that this constituted a form of sex discrimination under the regular sex discrimination provisions.

In 1992, a new definition of sexual harassment was introduced into the SDA which extended to all areas otherwise covered by the legislation. This attempted to encompass both ‘quid pro quo’ (where a complainant fears that rejection of sexual advances or behavior would lead to a detriment to her employment) and ‘hostile environment’ types of sexual harassment (where a workplace is permeated by sexualised behavior which is hostile to women). The legislative provisions concerning sexual harassment were adopted subsequently in all state and territory jurisdictions. In New South Wales, sexual harassment is unlawful under the [Anti-Discrimination Act 1977](#) (NSW) ss 22A-22J; in Victoria, under the [Equal Opportunity Act 2010](#) (Vic) ss 92-102; in South Australia, under the [Equal Opportunity Act 1984](#) (SA) s 87; in Western Australia, under the [Equal Opportunity Act 1984](#) (WA) ss 24-26; in Queensland, under the [Anti-Discrimination Act 1991](#) (Qld) ss 118-120; in Tasmania, under the [Anti-Discrimination Act 1998](#) (Tas) s 17; in the Australian Capital Territory, under the

[Discrimination Act 1991](#) (ACT) ss 58-64; and in the Northern Territory, under the [Anti-Discrimination Act 1992](#) (NT) s 22.

Sexual harassment is one of the most common types of complaints made to the Australian Human Rights Commission under the SDA and to state and territory anti-discrimination and equal opportunity agencies. While legislative provisions now cover sexual harassment in a range of contexts, the major area in which complaints of sexual harassment are made is in the context of employment.

Most complaints of sexual harassment do not result in tribunal or court hearings, but are settled through conciliation. If a complaint proceeds to a hearing, decision makers have sometimes declined to recognise the type of behaviour which may be classified as sexual harassment. However, in some key cases, they have acknowledged the relevance of power relations, particularly in the workplace.

Feminist commentary

“Sexual harassment law has offered Australian women an invaluable means of redress for the harms that they have experienced, and continue to experience, in the public sphere (particularly in the workplace). It has also engendered a plethora of educational and policy campaigns designed to highlight the unacceptable nature of such harassment and, in turn, to reduce its prevalence. Despite these achievements, the current legislative definitions of sexual harassment continue to attract significant critical evaluation (Mason and Chapman 2003, p. 196).

“The impetus to introduce sexual harassment provisions as part of Australian sex discrimination legislation needs to be understood as part of a broader international movement for recognition of the human rights of women. This movement involved a number of distinct influences. In the United States, for instance, discrimination legislation was introduced in the early 1970s. Although the term sexual harassment is said to have come into popular usage in the United States shortly afterwards, it was not until later in the decade that there was a tentative acceptance of some forms of sexual harassment within sex discrimination law. ... In tune with these developments in the United States, women’s organisations in Australia, such as the Women’s Electoral Lobby began pressing for legal and social recognition of sex discrimination from the early 1970s. This movement was strongly influenced by Australia’s ratification of two key international conventions. In 1973 Australia ratified the ILO’s Discrimination (Employment and Occupation) Convention (*‘ILO Convention 111’*) and, later in 1983 it ratified the UN *Convention on the Elimination of All Forms of Discrimination Against Women, 1979* (*‘CEDAW’*). In consequence of ratifying ILO Convention 111, later that year the federal government established a National Committee on Discrimination in Employment and Occupation and six state committees.” (Mason and Chapman 2003, p. 197-8)

“Unlike the 1984 Commonwealth Act, which would include sexual harassment as a separate ground of complaint, this earlier state legislation did not make mention of sexual harassment. Nevertheless, the Commissions and Boards established to administer the state legislation and to investigate and attempt to conciliate complaints, began to use the term sexual harassment before it was defined in legislation” (Mason and Chapman 2003, p. 199).

“The one area of the legislation [*Sex Discrimination Act 1984*] with which all three decision making bodies have had little difficulty is sexual harassment. HREOC [Human Rights and Equal Opportunity Commission], the FMC [Federal Magistrates Court], and the Federal Court have all made decisions giving full effect to the sexual harassment provisions of the SDA (hence, perhaps, the generally higher success rates enjoyed by complainants under the SDA than those under the DDA and RDA). Arguably, sexual harassment cases present few difficulties because they involve relatively straightforward and broad statutory provisions, with no statutory exceptions. Most cases involve a factual inquiry into what occurred, and while they may involve a contest of credibility, once the facts are ‘found’, the application of the legislative provisions defining sexual harassment to the facts is relatively unproblematic. It is also possible that the kind of egregious behaviour evident in most sexual harassment cases that reach a public hearing elicits little sympathy from decision makers, who can readily understand the humiliation or offence that the behaviour could have caused. Other areas of the legislation have not been so sympathetically applied. (Gaze and Hunter 2010, p. 184).

Pre-SDA Cases

Prior to the introduction of the *Sex Discrimination Act 1984* (Cth) (SDA), sex discrimination legislation existed in some Australian states. In a couple of landmark cases in NSW and Victoria, courts found that sexual harassment was a form of sex discrimination under this legislation. These cases provided impetus for the law reform making sexual harassment a specific form of unlawful behaviour.

- *O’Callaghan v Loder and The Commissioner for Main Roads* (1983) 3 NSWLR 89

Equal Opportunity Tribunal, Mathews DCJ, Members Thiering and Swinburne

This was the first case of sexual harassment brought in Australia. While the *Anti-Discrimination Act 1977* (NSW) did not initially make sexual harassment unlawful, in *O’Callaghan v Loder and The Commissioner for Main Roads*, Matthew DCJ found that sexual harassment was a form of sex discrimination. Canvassing developments in anti-discrimination law in the United States, Canada and England concerning sexual harassment, she found that a ‘broad, liberal approach should be adopted to its interpretation rather than a narrow, technical one’ (p.11).

Summary

The two complainants were lift drivers with the Department of Main Roads. They alleged sex discrimination on the basis that they had been sexually harassed by Mr Loder, the Commissioner for Main Roads. The complainant, Ms O’Callaghan, at the invitation of Mr Loder, visited his office on frequent occasions between June and September 1981. She alleged that on one occasion Mr Loder forced her to hold his exposed penis until he ejaculated.

The Tribunal found that the complainant had experienced ‘less favourable treatment’ than a man would have in the same or similar circumstances and that this had occurred within the terms and conditions of her employment, meeting the first and second requirements under the legislation. However, it found that although the behaviour was clearly unexpected and unwelcome by the complainant, and had

caused her much distress, she did not adequately convey to Mr Loder that his conduct was unwelcome and therefore it did not amount to unlawful sex discrimination.

The Tribunal outlined a definition of sexual harassment which would constitute sex discrimination under the legislation:

1. A person is sexually harassed if he or she is subjected to unsolicited and unwelcome conduct (of a sexual nature) by a person who stands in a position of power in relation to him or her.
2. Sexual harassment by an employer can amount to discrimination on the ground of sex in the following circumstances:
 1. if the conduct is such as to create an unwelcome feature of the employment in a continuing rather than an isolated sense, or to be detrimental, and regardless of whether it leads to a loss of tangible job benefits; or
 2. if the employer secures compliance with his sexual demands by threatening adverse employment consequences; or
 3. if the rejection of the employer's sexual demands leads to retaliation in the form of loss of access to employment opportunities; or
 4. if the rejection of the employer's demands leads to retaliation in the form of loss of tangible employment benefits.
3. The phrase "terms or conditions of employment" in s 25(2)(a) should be interpreted broadly to cover and include all substantial terms or conditions relating to employment which may be imposed upon an employee during the course of that employment.
4. The word "detriment" in s 25(2)(c) requires that a complainant has been placed under a substantial disadvantage in comparison with other employees of the opposite sex.
5. In the context of sexual harassment conduct creating an unwelcome feature of the employment and therefore coming within s 25(2)(a) would also lead to a detriment under s 25(2)(c).

Per Matthews DCJ:

“The above definition is obtained from a reading of the relevant literature and case law on the subject. Issues relating to the extent to which sexual harassment is proscribed by anti-discrimination laws have arisen on a number of occasions over recent years in both the United States and Canada.” (p.5)

“... sexual harassment can consist only of unsolicited and unwanted sexual advances. That being the case, I have no difficulty in finding that such treatment amounts to less favourable treatment within the meaning of the *Anti-Discrimination Act*, s 24(1).” (p.8)

“I adopt as a starting point that a person is sexually harassed if he or she is subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.”

Feminist commentary

Negative

“Such a case may be a legal ‘success’ in establishing doctrine, but a practical failure because the complainant receives no remedy if proof cannot be made. Assessment of legal doctrine alone is not sufficient to make a judgment about whether a law is successful in achieving its aims.” (Gaze 2005B)

“In this case the heterosexed nature of organisational power, or what Catharine MacKinnon has referred to aphoristically as 'dominance eroticised', was clearly in evidence. The male respondent, the Commissioner of Main Roads, was the most senior person in the organisation, while the female complainant, a lift driver, was one of the lowliest. The Commissioner was in the habit of inviting the complainant into his office with the explicit intention of soliciting sexual favours. Despite Mathews J's initial courage in acknowledging the discriminatory harm of sexual harassment, Her Honour faltered in applying her test to the crucial element of power. The harassing conduct was found not to amount to unlawful sex discrimination because the complainant had failed to make known to the respondent that his attentions were unwelcome. The implications of 'power over' were thereby undermined. Was the complainant to slap the Commissioner's face and tell him to 'get lost'? She knew perfectly well that any intimation of rejection could have resulted in job-related repercussions, as she indicated at the hearing. Despite the unsuccessful outcome for the complainant, this was a trailblazing decision that laid the groundwork for new ways of thinking about gendered harms in the workplace. Indeed, it led to the express proscription of sexual harassment within anti-discrimination legislation.” (Thornton 2002, pp.428-429)

“The problem with *O'Callaghan v. Loder* is that it began with a theoretical definition of sexual harassment drawn from the literature, rather than proceeding from the facts in the complaint. This seems to be an impermissible, non-adversarial mode of reasoning.” (Hunter 1991, pp.324-325)

“On this analysis, it seems clear that for the tribunal the really pivotal legal question is that the sexual conduct should be *unwelcome* and *unsolicited*, and that the employer should know or be in a position where he ought to know that his conduct was unwelcome. In an analysis of considerable subtlety, the tribunal stated firmly that sexual harassment in itself, without threats to the job security of the victim, can be discriminatory conduct; but this aspect of the analysis is limited in its potential impact on the practice of sexual harassment because of the insistence on the employer's subjective knowledge of the victim's distress.” (Mills 1984, p.6)

“Why should it be necessary to prove that a sexual advance was unsolicited and unwelcome *and* that the employer knew it was unwelcome? In other instances of unlawful sex discrimination not involving sexual harassment, tribunals have held that there is no need to prove that the respondent actually intended to treat a woman less favourably than a man on account of her sex.” (Mills 1984, p.6)

“... it must be possible for sexual harassment to be unlawful where the employer thinks he is paying his employee an enormous compliment by favouring her with his sexual attentions. Add to this basic quality of male sexual egotism the disparity in power in the employment relationship, and it is probable that many a man in the

position of a Commissioner of Main Roads actually thinks, because he cannot conceive otherwise, that his attentions are a bonus, a “chance” for the woman involved.” (Mills 1984, p.6)

Positive

“Despite O’Callaghan’s ultimate failure, the tribunal decision was hailed as a landmark. In this first Australian attempt at a legal definition, sexual harassment was found to be a form of direct discrimination as it amounted to less favourable treatment of a person on the ground of their sex, when compared to a person of the opposite sex, in similar circumstances. Justice Mathews, in ascribing the widest possible meaning to the phrase, defined sexual harassment as occurring where a person is ‘subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.’ In order to come within the legislative proscription of direct discrimination on the ground of sex, the sexual harassment must have either constituted an ‘unwelcome feature of the employment’, or must have been accompanied by (tangible) adverse employment consequences to the complainant, such as dismissal or reduction in hours worked. According to Mathews J, a single act of sexual harassment can potentially constitute unlawful sex discrimination. Importantly, if the single act was followed by retaliation involving tangible employment detriment to the employee, this would be within the direct discrimination provisions. Alternatively, where a single incident so tainted the working environment as to ‘create an unwelcome feature of the employment in a continuing rather than an isolated sense’, this would also constitute unlawful sex discrimination.

The most controversial requirement imposed by the tribunal was the finding that the sexual harassment must occur in circumstances where ‘the employer knew or ought to have known that the conduct was unwelcome’. In other words, the employer ‘must either know that his conduct is unwelcome, or the circumstances must be such that he should know it’. This placed an onus on the employee to make the unwelcomeness known to her employer. It was on this point that O’Callaghan failed, despite the tribunal’s acknowledgement that the larger the disparity in status and power between the employer and employee, the greater the obligation on the part of the employer to observe any unwillingness on the employee’s part. Although the tribunal had drawn an adverse inference against Loder, in consequence of his blanket denial that any sexual activity had taken place, it was not prepared to extend this adverse finding further to infer that Loder knew his conduct was unwelcome.” (Mason and Chapman 2003, p.203)

“Early critics of the decision found tangential support for their critiques in the annual report of the NSW Anti-Discrimination Board published the year after the judgment in *O’Callaghan* was handed down. For the first time since sexual harassment had been recognised by the Board, there was a marked decline in the numbers of complaints. The President cited the failure of the complaint brought by O’Callaghan and the accompanying publicity that enveloped the case as reasons for this decrease. Conversely, the decision also attracted praise as a well-argued and courageous judgment in extremely difficult circumstances by Mathews J, who was the only woman Judge within the NSW court system at the time. Of particular import for the present discussion was the influence that the case brought to bear on the drafting of the Commonwealth SDA.” (Mason and Chapman 2003, pp.205-206)

Neutral

“It has been widely acknowledged that work-related power imbalance is often a significant contributing factor in facilitating, and perhaps motivating, work-related sexual harassment. Indeed, the first Australian decision to recognise sexual harassment as being unlawful emphasised the significance of abuse of a position of power as a hallmark of sexual harassment.” (Hely 2008, p.201)

- R v Equal Opportunity Board; Ex parte Burns (1985) VR 317 | [austlii](#)

Supreme Court of Victoria, Nathan J

Summary

The complainant, an apprentice motor mechanic, was sexually harassed by other employees with Burns Corporation Pty Ltd. She claimed there had been regular sexual harassment leading up to an incident when a respondent, Mr Hayat, “bit me on the neck” and “held me while Jeff Priest fingered me and when Robert Hayat fingered me twice other times during the day.” The case required the Victorian Supreme Court to make a judgment on an order to prohibit the Victorian Equal Opportunity Board from further hearing two complaints about sexual harassment lodged on behalf of the complainant.

The Court held that detriment to one employee usually confers a benefit upon another. It followed that sexually harassing behaviour diminishes the enjoyment of life in the work place. Nathan J said “I do not purport to adjudicate upon the facts in this case. In this instance, I have found that if the substance of the complaints were made out, a breach of the *Equal Opportunity Act 1977* could be found. Behaviour of the type complained of, if it occurred, is discrimination on the basis of sex but the procedures of the Board must follow as I have ruled.”

Commentary

Positive

“[E]ven if *O'Callaghan v. Loder* is demolished, there is now strong authority from other jurisdictions that could be relied on to support the proposition that in the absence of specific sexual harassment provisions, sexual harassment complaints can be brought as sex discrimination cases. See for example *R. v. Equal Opportunity Board; ex parte Burns* [1985] V.R. 317; *Hall and Others v. Sheiban Pty Ltd* (1989) E.O.C. 92-250.” (Hunter 1991, p.324)

Negative

“Apart from *Burns'* case (1984) E.O.C. 92-112 (where the sexual harassment was by co-employees), sexual harassment cases before boards and tribunals in Australia have involved women and girls harassed by the ‘boss’ or manager, a person in a superior position. Yet despite the *O'Callaghan v. Loder* case stating that sexual harassment involves ‘a person in a position of power’, nominating ‘boss’ or superior, sexual harassment also occurs where an employee is harassed by a fellow employee.

Provisions now included in the Victorian and Western Australian Acts, and the *Sex Discrimination Act 1984* (Cth), now make this clear.” (Scutt 1990, p.151)

1984-1992–*Sex Discrimination Act 1984* (Cth)

The *Sex Discrimination Act 1984* (Cth) was introduced into Australian law subsequent to Australia’s ratification of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 28 July 1983. It was the first legislation in the world to provide a definition of ‘sexual harassment’ with a separate cause of action. However, it initially applied only in the areas of employment and education and only in cases where there was an ‘abuse of power’ harassment, where the complainant feared that rejection of sexual advances or behaviour would lead to a detriment to her employment. In cases where there was hostile or sexualised environment harassment, it was still necessary to establish that this constituted a form of sex discrimination under the regular sex discrimination provisions. Many of the first cases were brought by young women in unskilled or semi-skilled jobs in small workplaces. These cases demonstrate the initial difficulty experienced by complainants in persuading decision makers to recognise sexual harassment as unlawful and to apply the legislation as it was intended.

- Sex Discrimination Act 1984 (Cth), s 28

The *Sex Discrimination Act 1984* (Cth) was introduced as a private member’s Bill by Senator Susan Ryan. It included provisions relating to sexual harassment which occurs in the areas of employment and education.

Second Reading Speech, 2nd June 1983, Senator Ryan:

“The need for such a law is now widely understood and accepted. Throughout Australia women experience discrimination on the basis of their sex and their marital status. In three States there are avenues for redress of infringements of women's rights. In other States and in the range of areas which are the responsibility of the Commonwealth there is no remedy. The result is economic and social disadvantage and a significant impediment to the exercise by Australians of fundamental rights and freedoms.”

“The statistics give clear evidence of deeply embedded structural inequalities in our society ... This Bill offers an opportunity to combat some of these inequalities.”

“The Bill does not attempt to deal with all forms of sexual harassment but only with sexual harassment which can be characterised as discriminatory in nature, in the sense that it is linked to a belief that a rejection of an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome sexual conduct would disadvantage the person in relation to employment or educational studies. The Government will be considering how best to deal with other forms of sexual harassment and will be seeking the views of women's organisations on this matter.”

The original definition of sexual harassment under s 28 was as follows:

"(3) A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or

an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and—

1. the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible employment or possible work; or
2. as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.

(4) A reference in sub-section (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to, or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing."

Feminist commentary

Positive

“In 1981, Senator Susan Ryan (Australian Labor Party) introduced a private member's Bill into the Commonwealth Parliament to proscribe sex and marital status discrimination. The Bill failed to gain the support of the incumbent (Liberal National Party Coalition) government and it lapsed with the federal election held in 1983. The election saw a change in government and later that year Senator Ryan introduced a second Sex Discrimination Bill into the Senate. This second attempt coincided with the *O'Callaghan* decision. After lengthy and heated parliamentary debate, considerable redrafting and compromise, the SDA was enacted in 1984. Unlike the earlier 1981 federal Bill, and the earlier state sex discrimination statutes, the 1983 Sex Discrimination Bill expressly prohibited sexual harassment. Thornton [1990] writes that this explicit inclusion was a result of pressure brought to bear by women's groups. Those opposed to this inclusion had to be content with assurances from Senator Ryan that it was not an 'attempt to deal with all forms of sexual harassment but only with sexual harassment which can be characterised as discriminatory in nature'. It was thus the first Australian statute to define sexual harassment, while confirming its status as a form of sex discrimination.” (Mason and Chapman 2003, p.206)

“The passage of the *Sex Discrimination Act 1984* (Cth) (*SDA*) represents a high political moment in the history of gender relations in Australia. The seemingly protracted debates of 1983–84 were marked by a deep anxiety about sex roles, the patriarchal family and the wellbeing of children. The hysterical propaganda campaign and the fear engendered by the Bill were out of all proportion to its modest liberal intent that women be ‘let in’ to certain domains of public and quasi-public life, including employment, on the same terms as men.” (Thornton and Luker 2010, p.25)

Negative

“While this definition is not concerned with the perceptions of the employer, it may cause difficulties by putting too much stress on the reasonableness or otherwise of fears

for disadvantage if the advances are rejected. The definition may not be very helpful in a case where there is no real reason for an employee to fear actual dismissal, but where the employment detriment consists of the stress of having to constantly negotiate and control a sexual situation at work. A workable legal definition of sexual harassment should be able to comprehend the reality of this stress (and there is as much stress in "going along" with sexual suggestions as there is in rejecting them) in the unequal power situation typical of women's employment." (Mills 1984, p.7-8)

“[T]he legislation was complaint based, not proactive, which meant that the onus was on an aggrieved individual, male or female, to lodge a complaint with the Human Rights Commission (HRC) alleging discrimination. The HRC would endeavour to conciliate the complaint in private. If this was unsuccessful, the HRC had the power to conduct a formal public hearing. At the hearing, the complainant would bear the onus of proving the discrimination according to the civil standard. The HRC did not have the power to make binding orders. Thus, even if the heroic complainant were successful at the HRC hearing, she could find herself confronted with a hearing de novo before the Federal Court in pursuit of binding orders. The debates contained no inkling of just how difficult this would prove to be.” (Thornton and Luker 2010, p.30)

- Aldridge v Booth & Ors [1986] EOC 92-177 | [austlii](#)

Commissioner Mitchell (Chairman), Bailey (Deputy Chairman), Ford (Commissioner)

Summary

The complainant, a 19-year old woman, was employed under a government employment scheme in a cake business. She had been unemployed for 12 months when she took up the position. She was interviewed by Mr Booth, who ran the business in partnership with his wife and parents, who were co-respondents. The applicant, Ms Aldridge, said at the time of interview Mr Booth had enquired how she would react if, in his own words, “he slapped her on the bum”. The complainant said that after the first week, Mr Booth began kissing her on the back of the neck, touched her buttocks and asking her would she make love to him. She said that he twisted her arm, put his hand up her dress and, if she screamed or if she protested, he would say, “How would you like a holiday on the Government?”

The complainant said that under pressure, she consented to have sexual intercourse with her on a number of occasions. On one occasion he made approaches to her, as a result of which she ended up on the floor and he took his penis from his shorts. She said to him, “Okay, I'll do it if you get some protection”. He then went to a chemist's shop and obtained a condom. He came back and they had intercourse. She said that Mr Booth said that he would not touch her again. However she said that the acts of which she complained continued, and on numerous occasions they had intercourse.

The Commission found that although there was evidence that her attitude towards the respondent may have been ambivalent at times, ‘by and large ... his sexual acts and advances were unwelcome to her.’ They said that she was in an extremely vulnerable position and had endured the situation only because she was afraid of losing her job.

The Commission found the complaint of sexual harassment was substantiated and the complainant had reasonable grounds for expecting the rejection of sexual harassment would lead to her dismissal. An order was made for the respondents to pay to the applicant a sum of \$7000 as compensation. However, the respondents failed to pay the sum and as a result, the applicant applied to the Federal Court in order to give effect to the determination of the Commission.

Per Commissioners Mitchell (Chairman), Bailey (Deputy Chairman), Ford (Commissioner)

‘It may seem surprising today that any young woman would endure the conduct of which she complained without taking some steps to bring it to an end. But...I believe that this young woman was unsophisticated, was very keen to remain in employment, and apparently thought that this was the tariff which she had to pay. It was not, and she should be recompensed. She is entitled to damages for the humiliation and injury she suffered at the hands of one who knew that she had been unemployed and that she was eager to have employment.’

- Aldridge v Booth (1988) 80 ALR 1

Federal Court of Australia, Spender J

The applicant applied to the Federal Court for an order to enforce the determination of the Tribunal. The Human Rights and Equal Opportunity Commission also sought leave to intervene for an order to enforce its determination. The Court was asked to consider whether s 28 of the *Sex Discrimination Act 1984* (Cth) giving effect to the International Convention on the Elimination of All Forms of Discrimination Against Women was a valid exercise of the external affairs power under the Constitution. It found that it was a valid exercise of this power.

However, it was not possible to appeal a decision of the Tribunal to the Federal Court, because decisions of the Tribunal were not a binding exercise of judicial power. This meant that the Federal Court was required to hear the complaint de novo, and necessitated that the witnesses give their evidence again, in accordance with the rules of evidence which apply in civil proceedings. The standard of proof for such evidence is the balance of probabilities.

The Court found that Mr Booth had engaged in conduct that amounted to sexual harassment and awarded damages of \$7000. The applications against the three other respondents on the grounds of vicarious liability were dismissed.

Feminist commentary

Negative

“The decision in at least one case, *Allridge v Booth and Ors* (1986) appears to reflect an understanding of the inherent power game in harassment and that a woman may be in ‘an extremely vulnerable position’ and only endures the situation because of her fear. This understanding, unfortunately, appears to equate vulnerability with youth.” (Tyler and Eastal 1998, p.213)

At the federal level, another difficulty arises, not specific to sexual harassment but germane to all cases brought to the Human Rights and Equal Opportunity Commission, before which the matter is initially heard. The commission has no power to enforce its orders. Thus, in the Queensland case of *Aldridge v. Booth* (1988) E.O.C. 92-222, although harassment including forced sexual intercourse was found proved and an award of \$7,000 damages made, when Mr Booth refused to obey the order, Ms Aldridge was obliged to take the matter to the Federal Court. The entire case had to be re-argued. At its conclusion, sexual harassment was again found to be proved against Mr Booth and the award of \$7,000 confirmed. But the necessity for reiterating all the evidence previously given, requiring the woman to repeat her story and subject herself again to cross-examination, is inappropriate and unfair. Sexual harassment cases are likely to be particularly stressful. Either the commission should be reconstituted as a judicial body with power to enforce its own orders or the Federal Court should be the tribunal at first instance.” (Scutt 1990, p.152)

Neutral

“In one of the few cases that have gone to the Federal Court on the *Sex Discrimination Act* provisions, *Aldridge v Booth*, Spender J held that because the rules of evidence were not applicable to proceedings before the Commission, its findings were of no assistance. He stated that he did not ‘think it right to attach any particular weight to the determination made by the Commission’ because section 82 of the Act required the Court to be satisfied that there had been an unlawful act or conduct. Spender J held that this meant that the Court had to be satisfied on the basis of the civil standard of proof in respect of both the facts and law ... I would conclude that unless a complaint is amenable to settlement by conciliation, proceedings under the *Sex Discrimination Act* effectively differ little from the common law paradigm based on an individualised and formalistic adversarial model. Arguably this is of little consequence as conciliated settlements are expressly made the object of the Act.” (Purdy 1989, pp.364-365)

“In *Aldridge v Booth*, Spender J found that despite the investigation of a complaint by the HREOC, subsection 82(1) of the *Sex Discrimination Act* 1984 required the Court to satisfy itself that as a matter of law and fact the actions in question were unlawful ... This approach meant that a complaint was investigated afresh by the Federal Court and therefore a determination by HREOC was without effect if challenged or not complied with.” (Nand 1997, p.17)

“It is clear that active preventive measures must be in place for an employer to avoid liability. In the leading Federal Court decision of *Aldridge v Booth*, Justice Spender noted that the onus under s 106 SDA falls on the employer or principal to establish that all reasonable steps have been taken to prevent sexual harassment.” (Parker 1999)

- Hall, Oliver and Reid v Sheiban [1988] HREOCA 5 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Einfeld

Summary

Three female complainants, Susan Hall, Dianne Oliver and Karyn Reid, were employed by the first respondent, a male medical practitioner, as receptionists. The second respondent, the first respondent's company, was the formal employer of the three women. The complainants said that in their pre-employment interviews, the respondent asked questions which were unnecessarily intrusive and personal, including how often they had sex and whether they would have an abortion if they fell pregnant. Further to this, the allegations of sexual harassment by the women against the first respondent included the following:

- the respondent cuddling the complainant by placing one arm around her waist and squeezing her towards him;
- placing his hands on her shoulder, pressing her against the wall and attempting to kiss her;
- grabbing hold of her by the waist and trying to pull her down onto his knee and kiss her;
- grabbing her, placing his right hand around her neck and trying to pull her head down towards his in order to kiss her. It was physically hurtful and she screamed and shouted at him;
- the complainant Oliver said that the respondent:
 - made comments to her that "You've got a nice backside", "Do you like sex?", "I'd like to get on top of you, and "I'd like to have sex with you";
 - placed his hands on her shoulder whilst she was sitting down and moved his hands down towards her breasts;
 - placed his hand under her uniform and touched her inner thigh, whilst filling in the consultation book one night;
 - pulled down the zip on the front of her uniform past bra level and then pulled it up again after telling her that it was too low.

In considering whether the pre-employment conduct was unlawful under s 28, Einfeld J commented that the law requires a link between the private sex-based remarks of the interviewer and the possible employment of the complainants, and in the case of these complainants the "link was entirely missing." Einfeld J found the first respondent had sexually harassed the three complainants. However, he rejected Oliver's evidence that the respondent proposed intercourse. Einfeld J found that the first respondent engaged in "occasional" and "mild" attempts at physical contact and statements that "may be seen as juvenile and thoughtless and quite disregarded the feelings of the complainants." He refused to award damages to any of the complainants.

Per Einfeld J

"Rampant discrimination in employment has been practised against women for generations. A feature of the discrimination has been the actual or attempted imposition by males or females of overt, unsought and unwelcomed sexual suggestions or impositions, and the taking of unacceptable liberties with, and the overbearing of the will of, women by the pressure of employment or the male dominance of economic power. Such physical demonstrations, if unsolicited and without consent, invade the dignity of the women involved and discriminate against them. They also demean the men and debase the human rights of the whole society. Some cultures have historically and ethnically made greater use than others of taction as a normal part of everyday life. This may explain but does not permit unlawful

sexual harassment in Australia by persons who have absorbed those societal heritages.” (p.1)

“Much remains to be achieved in the quest for equal opportunity and proper treatment for women in employment. This legislation is intended to assist in that quest. However, it is not designed to be administered in the absence of balance, realism and commonsense. It is concerned with providing for and reinforcing the dignity of women, not with creating a marketplace for exaggerated or imagined allegations against men, even men engaging in conduct which had immature or unlawful features. It is especially not intended to provide an opportunity for vindictive or collusive allegations by a group of women against one man because of their dislike of or distaste for him as a man or as an employer or for some other extraneous reason.” (p.7)

Feminist commentary

Negative

“I believe that the refusal to award compensation trivialises the harm suffered by many women in the workplace and legitimates sexual harassment as an appropriate way for men to behave. The terms in which the decision was framed indicate a failure to understand the nature of the injury involved. Furthermore, in my opinion, President Einfeld misunderstood the legislation on sexual harassment he was enforcing.” (Morgan 1988, p.157)

“Einfeld said that the *Sex Discrimination Act* is not concerned with:

creating a marketplace for exaggerated or imagined allegations against men, even men engaging in conduct which had immature or unlawful features. It is especially not intended to provide an opportunity for vindictive or collusive allegations by a group of women against one man because of their dislike of or distaste for him as a man or as an employer or some other extraneous reason.

This ‘policy statement’ was unnecessary given Einfeld’s own finding that the complaints were not, in substance, made up. Such statements contribute to the creation of a climate where allegations of sexual harassment are not believed, where women are once again constructed as liars.

A similar misogynist construction of the nature of sexual harassment complaints is evident in Einfeld’s criticism of the Anti Discrimination Board’s handling of the complaints. In one page of his reasons, Einfeld referred to ‘Ms Hall’s *small* complaint’, he referred to all three complaints as ‘these *simple matters*’ and again says that ‘the claims were *small*’. As will be seen below, the complainants alleged quite serious forms of sexual harassment, and Hall alleged that Sheiban had committed an assault, (which Einfeld apparently found proved) on which she said the police would not act. Einfeld criticised the Board for delay, ineffective attempts at conciliation and a possible lack of impartiality, although on the latter point he said no positive findings could be made. Einfeld concluded this section with further derogatory references to the ‘smallness’ of the complaints stating that ‘everyone involved has been allowed the dream that if the cases take so long to reach a hearing, they must be significant in size

and importance' and that '[t]he Commission will in future consider exercising its power if public money will be wasted on complaints subjected to excessive delays, especially those which are trivial or insubstantial'." (Morgan 1988, p.158)

"[T]he really disturbing aspect of the statements made about how the 'ordinary woman' would or should behave is not that Einfeld overlooked the fact of two of the complainants' limited work experience but the notion that is present throughout his decision that if a woman is used to dealing with men's harassment, it should not upset her. This appears to take us back to an era when the law did not recognise sexual harassment as unlawful behaviour. I realise, of course, that Einfeld did make a finding of unlawful sexual harassment, but if it is not worthy of compensation, it appears as if it is not a real injury." (Morgan 1988, p.159)

"The decision illustrates one of the difficulties of anti-discrimination legislation: it is ultimately enforced, at least at the tribunal or court level, largely by men who seem to have no understanding of the oppression experienced by women and other subordinated groups. Einfeld reserves his greatest criticism for the women complainants (and the Anti-Discrimination Board) rather than the respondent whom he found had engaged in unlawful behaviour. Beyond the description of Sheiban's evidence as 'uncertain', 'vague' and as indicating 'rank prevarication', the 'fault' seems to lie in the women, even where there is no suggestion that they failed to 'dress sensibly' or otherwise encouraged the 'taction' to which they were exposed. Their fault appears to lie in their failure to accept with equanimity the respondent's behaviour." (Morgan 1988, p.160)

"The 'reasonable woman' standard does not overcome the problem of individual decision-makers using their own standards to reach a decision ... [t]he oft-quoted decision of Justice Einfeld in *Hall, Oliver and Reid v Sheiban* provides a case on point. Einfeld J found that any 'sensible woman' would not have been offended by the employer's behaviour, which included asking women in an interview if they were sexually active and, once they were employed, lowering the zips on their uniforms and making sexualised comments. Although overturned on appeal, this decision does show that the views of the decision-maker can easily infiltrate the standard of 'reasonableness'." (Mackay 2009, p.198-199)

"Despite finding for the complainants, the President of the Commission, Justice Einfeld, noted much of what was complained of was "mild if ridiculous advances or conduct" and could be considered within the bounds of the normal life experiences of most women. In one sense we might agree with Justice Einfeld's words though not with his interpretation. It is true that forms of harassment such as these women complained of "can be considered within the bounds of the normal life experiences of most women". That is precisely our point. Sexual harassment should not be part of 'normal life experiences' of any women. In his view no discernible (or at least lasting) harm had occurred and he therefore ruled that awarding damages was not appropriate." (Jose and Bacchi 1994, p. 2)

- *Hall v A & A Sheiban Pty Ltd* (1989) EOC 92-250 | [austlii](#)

Federal Court of Australia, Lockhart, Wilcox and French JJ

Summary

The applicants sought a review under the *Administrative Decisions (Judicial Review) Act 1977* of the decision of Einfeld J in *Hall & Ors v Sheiban & Anor* (1988) EOC 92-222.

It was held that the finding of the Commission that the respondent's behaviour in interrogating the applicants in the pre-employment interviews was not sexual harassment was an incorrect application of the statutory test of sexual harassment. The court also found that the Commission had made an error in law in its failure to order the payment of compensation to the applicants for the sexual harassment.

Feminist commentary

Positive

“All three judges concluded that Einfeld J had erred in law in his understanding of the statutory definition. They stated that he had substituted a definition requiring the applicants to actually suffer disadvantage (in the form of a failure to get the job), or had treated the complainants' own beliefs (manifest in a refusal to answer some questions) as determinative for the statutory definition as laid out in s 28(3)(a). This required an assessment of whether it was reasonable to believe employment disadvantage would follow their rejection of the questions. Any finding by Einfeld J that the belief could not be reasonably held was also wrong. In the court's view, even though the complainants had all been employed, and had answered many of the questions, it was reasonable, in the circumstances, to believe that employment disadvantage would follow rejection of the questions.” (Morgan 1989, pp.278-279)

“The judges also made interesting observations on the scope of s 28. Section 28(1) provides that it is illegal to harass sexually an employee, employment seeker, or for an employee to sexually harass a fellow employee. (Compare s 28(2) covering commission agents and contract workers.) Section 28(3), according to the Federal Court, is a provision which goes on to deem that certain behaviour amounts to sexual harassment. The court decided that s 28(3) should not be read as narrowing the scope of s 28(1). (Lockhart J at 77,389-90; Wilcox J at 77,402, though he found it was not necessary to decide the point because Sheiban's conduct fell within s 28(3); French J at 77,428).” (Morgan 1989, p.279)

“Whilst some shared the concern of Einfeld J about the way that the legislation might unduly limit working relationships, others were alarmed at the message that Einfeld J transmitted to the working public ... Indeed, the view of Einfeld J on the need for repetition in the conduct was later overturned by the Federal Court in the ensuing *Sheiban* appeal. Justice Lockhart stated that the definition of sexual harassment in the SDA 'clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct'.” (Mason and Chapman 2003, pp.207-208)

- *Bennett v Everitt & Whyalla Fish Factory* [1988] HREOCA 7 (1 December 1988) | [austlii](#)

Human Rights and Equal Opportunity Commission, Einfeld J (President)

Summary

The two applicants, a single mother aged 19 years old and a 15 year old girl, complained of sexual harassment by the respondent, the director of Whyalla Fish Factory. The applicants' complaints included a pattern of sexual assaults, intimidating behaviour and underpayment for their work.

Sexual harassment and sex discrimination were found in respect of the respondent's conduct throughout the complainants' employment. Compensation for both the underpayment of wages and sexual harassment was ordered.

Commentary

“[The court in Bennett] held that the complainants in this case answered the questions because of the belief that if they did not do so they would or might not be employed. And that they were entitled to believe that they would not get the jobs if they did not answer what were offensive embarrassing, and essentially irrelevant and unnecessary questions. The pre-employment questioning or the interview where such questions are asked places the complainant in a quandary. The complainant has to establish a nexus between the employer's conduct and her allegations. ... [This was] illustrated in Bennett:

1. if she refuses to answer, she may not get the job. She will then have a case under the Act but no employment;
 2. if she refuses to answer but gets the job, she has employment but no case (because there was no disadvantage);
 3. if she answers and does not get the job, she has neither employment nor a case (because there has been no rejection) unless the answers are a constructive rejection, in which event the case will often be an obviously poor practical substitute for the employment;
 4. if she answers the question freely and without act or imputed objection, and gets the job, she has employment but no case (because there has been neither rejection nor disadvantage). If the answers amount to constitute to a constructive rejection, there is no disadvantage.” (Srivastava and Sharma 2000, p.175)
- A v B and C [1991] HREOCA 6 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Moss

Summary

The complainant worked as a matron in a boys' school boarding house. She alleged that she had been subjected to sexual harassment by a resident Master in the boarding house and the school. The allegations of conduct of a sexual nature involving the first respondent included the following:

- he made unwelcome sexual advances to her;

- uninvited conduct of a sexual nature;
- allegations about the headmaster's sexual orientation;
- on two occasions he mutilated clay dolls made by the complainant by making gashes with a ruler in the genital area;
- he tackled her and laid on top of her in the common room;
- he grabbed her head whilst she was taking dishes from the food warmer in the dining room, holding it towards his genital area and saying "While you are down there ..."; and
- on one occasion he touched her intimately as she sat down on the passenger seat of his car;
- walking around in the dormitory in front of students with genitals exposed;
- threats of violence.

There were also allegations concerning the general conduct and behaviour of teachers at the boarding house, such as sexual jokes, comments and innuendo creating a sexually discriminatory work environment. While the Commissioner accepted that such conduct *was* sexual in nature and possibly unwelcome, she was not *satisfied* that it was conducted 'in relation to' the complainant, but 'rather, it appears to have been part of the general work environment'. Commissioner Moss described some of this behaviour as 'physical horseplay' which, while childish and puerile, often occurred in a predominantly male environment.

The Commission held the allegations of sexual harassment were not substantiated and, as a consequence, there was no case in relation to the second respondent. The Commission held that for two of the incidents there was no independent evidence that the incidents occurred. Commissioner Moss stated that "[e]ven accepting her account as accurate, it is nevertheless difficult to apprehend that any disadvantage flowed to her in relation to her work as a result of the incident or her protests, other than a relatively insignificant and transitory embarrassment. Accordingly, it would not amount to sexual harassment." (p.9)

Feminist commentary

Negative

"Although the removal of a need to show employment disadvantage (additional to the unwelcome sexual conduct) provides greater opportunity to bring hostile work environment within the legislative parameters of sexual harassment, this potential may still be limited by the requirement under the SDA that the sexual conduct occur 'to' or 'in relation to' the person harassed. For example, in *A v B*, a nurse, the only woman employee at a boarding school for boys, complained that her work environment was imbued with sexual jokes and innuendo, and that this constituted a hostile work environment. The complainant failed in her complaint of sexual harassment on the ground that the sexual comments and innuendo did not occur 'in relation to' her. Rather, the comments appeared to be 'part of the general work environment and there was no evidence that ... [the behaviour] was directed to or accentuated by the presence of the Complainant'." (Mason and Chapman 2003, pp.216-217)

- Dobrovsak v AR Jamieson Investments Pty Ltd [1995] HREOCA 32 | [austlii](#)

Summary

The complainant performed secretarial duties in a small office. She argued that the three men she worked with, Mr Smillie, Mr Eastwood and Mr Jamieson engaged in conversations which led to them asking her personal questions relating to her private life and that this constituted sexual harassment. Furthermore, the complainant argued that after a work Christmas party, Mr Jamieson engaged in sexual conduct which included both sexual propositions and touching her breasts and other parts of her body.

The Commission held that Mr Jamieson sexually harassed the complainant on the evening of the Christmas party. Accordingly, the second respondent was also liable. The Commission also found, in accordance with the propositions from *Aldridge v. Booth*, both the first and second respondent also discriminated against the complainant on the ground of her sex in breach of s. 14(2)(d) by subjecting her to a detriment. The Commission found that the incident was sufficiently serious and sufficiently connected with the complainant's employment that both respondents also discriminated against her on the ground of her sex in the terms or conditions of employment, that the company afforded to her in breach of s. 14(2)(a).

However, in regards to the conversations, Commissioner Keim found that although Mr Jamieson admitted making sexual comments, he could not find such conduct was unwelcome. He found this was evidenced by the complainant's failure to express any objection at the time; the absence of any reference to this conduct in the complaint made to the Human Rights and Equal Opportunity Commission; and the difficulty for the complainant to separate her attitude to that conduct at the time, from her view of that conduct after a considerable period of time while suffering the detrimental effects of the events of the night of the Christmas party.

Note: This case was heard under the legislation prior to the amendments to the definition of sexual harassment under s 28A(1), which came into effect on 13 January 1993, on the grounds that the behaviour complained of occurred mainly in the latter part of 1992.

Commentary

Negative

“Amendment of the definition of sexual harassment was a significant change which set the bar for establishing sexual harassment at a markedly lower level than under the previous s 28(3). A complainant no longer had to demonstrate detriment or a reasonable belief that detriment would occur in addition to the unwelcome harassment itself. Under s 28A, the incidents of sexual harassment that failed for perceived lack of detriment in *Tracey Lee Thompson v Nissan Motor Co (Australia) Ltd*, *Liddle v Morley*, *A v B & Anor*, *Dobrovsak v AR Jamieson Investments Pty Ltd & Anor* and *Flewell Smith v Rolson Street Pty Ltd & Fiorelli* (discussed above) would arguably have succeeded.” (Pace 2003, p.199)

1992–2014 Expansion of coverage

In 1992, the sexual harassment provisions of the *Sex Discrimination Act 1984* (Cth) were strengthened to prohibit sexual harassment not only in employment but also in other areas of public activity. A new definition of sexual harassment was also introduced (s 28A(1)), predicated on a single requirement, that a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated. Nevertheless, during this period, decision-makers sometimes failed to recognise sexual harassment, but rather, attributed it to normal workplace culture.

During the following two decades, cases of sexual harassment were characterized by a range of themes. The distinction between ‘quid pro quo’ (where a complainant fears that rejection of sexual advances or behaviour would lead to a detriment to her employment) and ‘hostile environment’ types of sexual harassment (where a workplace is permeated by sexualised behaviour which is hostile to women) continued to be a feature in some cases, as did the standard of proof to be applied. Some cases were characterised by multiple forms of discrimination, such as race and sex discrimination, demonstrating the intersectionality of forms of oppression. In a few cases, men pursued claims of harassment and some cases concerned harassment outside the context of employment, such as in the provision of goods and services. The question of the vicarious liability of employers for the actions of their employees was an important area of jurisprudence. Decision-makers do not always award damages in sexual harassment cases, however, in a few instances, cases have attracted significant attention, particularly when they involve substantial amounts in damages.

The following section includes an explanation of the revised legislation. The cases are then organised according to these themes. Of course, many cases are characterised by multiple and overlapping themes.

- [Quid pro quo vs hostile environment harassment](#)
- [The application of the *Briginshaw* test](#)
- [The test of ‘reasonableness’](#)
- [Intersectionality](#)
- [Sexual harassment of men](#)
- [Non-employment cases](#)
- [Vicarious liability](#)
- [Remedies](#) (apologies, refusal to award damages, size of damages awards, availability of aggravated and exemplary damages)
- Sex Discrimination and other Legislation Amendment Act 1992 (Cth)

Summary

The legislation amended the *Sex Discrimination Act 1984* by repealing Div 3 of Pt II and inserting a new Div 3 which extended the parameters of sexual harassment to other areas of public activity, namely:

- employment and partnerships (s 28B);
- by bodies concerned with occupational qualifications (s 28C);
- in registered organisations (s 28D);
- by employment agencies (s 28E);

- in educational institutions (s 28F);
- in the provision of goods and services (s 28G);
- in the provision of accommodation (s 28H);
- in land dealings (s 28J);
- in clubs (s 28K);
- in the administration of Commonwealth laws and programs (s 28L).

The new definition of sexual harassment in s 28A(1) was predicated on a single requirement, that a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Commentary

Neutral

“The new definition of sexual harassment, in s 28A, also differed from the old in that the two requirements in s 28(3)(a) and (b) ... were replaced with a single requirement, in s 28A(1), that a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated. In my opinion, it is clear from the terms of the above amendments (and also from the Explanatory Memorandum and Second Reading Speech to the Amending Act) that the Amending Act was not intended to alter the relationship between ‘sexual harassment’ and ‘sex discrimination’ under the S D Act. Rather, the introduction of Div 3 in its expanded terms was intended simply to replace the test for sexual harassment and to extend the prohibition against sexual harassment into other areas of public life.” (Rees et al 2008, p.513)

Feminist commentary

Negative

“The recent amendments to the Commonwealth Sex Discrimination Act – redefining sexual harassment, and extending the areas and situations in which a claim of sexual harassment might be brought – may well reinsert notions of morality (albeit together with notions of equality) into our understanding of sexual harassment. The Commonwealth Act continues to define sexual harassment as an unwelcome request for sexual favours, an unwelcome sexual advance or other unwelcome conduct of a sexual nature, but this is unlawful only if ‘a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be **offended**, humiliated or intimidated. There are undoubtedly many positive things about these legislative amendments, not least the clear protection against hostile environment harassment. There are also many aspects that remain problematic – for example, the issues of whose perspective is embodied in the notion of ‘reasonableness’ – which are outside the scope of my discussion here. Of particular concern is the operative phrase describing the reaction of the target of sexual harassment (and the reasonable observer): that she be ‘offended, humiliated or intimidated’. Sexual harassment is not about being offended by some ‘off-colour’ remark or by conduct that may amount to an indecent assault or rape. It may well be about being ‘intimidated’ or ‘humiliated’ by such behaviour. To maintain that one was offended is to call on the paternalistic protection of law, rather than to assert a

claim to equality. There is an easy elision between ‘being offended’ and moral prudery, which could well undercut the force of the legislative amendments. At the very least, the use of the language of offensiveness promotes an understanding of sexual harassment as being ‘about’ morality rather than being ‘about’ equality.” (Morgan 1995, p. 92)

‘Quid pro quo’ vs ‘hostile environment’ harassment

Introduction

In some cases, sexual harassment results in a complainant fearing that rejection of unwanted sexual advances or behavior would lead to a detriment to her employment. This is commonly referred to as ‘quid pro quo’ or ‘abuse of power’ harassment. However, in many cases, rather than specific incidents, there is a generalised workplace environment which is hostile to women. Under the amendments to the SDA introduced in 1992, it was no longer necessary for a complainant to establish that the unwelcome sexual conduct led to actual work-related disadvantage or detriment, or that she had reasonable grounds for believing that if she complained it would. It became possible for a complainant to argue that there was a generalised and/or pervasive workplace environment which is sexualised and/or hostile to women and this may be found to be sexual harassment. The following cases demonstrate this theme.

- Ashton v Wall & Anor (1992) EOC ¶92-447

Equal Opportunity Tribunal of Western Australia, President Hasluck, Members Buick and French

Summary

“The complainant was a part-time salesperson in a shop owned by the respondent. She alleged that during the time of her employment with the respondent, he sexually harassed her. The respondent denied the allegations, claiming that he and the complainant had a love affair which had come to an end.” (CCH 1992: 79, 162)

“The Tribunal identified the main issue in the case as whether the acts of sexual intercourse complained of were unwelcome.” (CCH 1992: 79, 164)

The complaint was dismissed by the majority of President Hasluck and Deputy Member French, but would have been upheld by Member Buick, in dissent.

Per President Hasluck and Deputy Member French:

1. “The parties were involved in a love affair or romantic attachment ... The affair may have been misguided, and caused the complainant pain eventually, but the presence of a deeply held affection, as evidenced by the anniversary card, meant that the relationship and the sexual conduct associated with it was characterised essentially by mutual attraction, rather than by fear or domination of the kind required to make out a complaint of discrimination or sexual harassment.” (CCH 1992: 79, 164)

2. “The test [of the welcomeness of the sexual conduct] was not how the complainant viewed the advances and sexual conduct in retrospect, after she had time to dwell upon the one-sided nature of the relationship, and the futility of what had occurred but, viewed objectively, whether the advances and the acts of sexual conduct were unwelcome at the time they happened, and whether the respondent reasonably understood that his conduct was acceptable.” (CCH 1992: 79, 164)
3. “During the initial phase of her employment the complainant may have been subjected to suggestive remarks and fleeting physical encounters ... The first act of sexual intercourse occurred in circumstances which ... took her by surprise, as it took place suddenly, in cramped surroundings and in a rather perfunctory way. This suggested that the respondent’s conduct on that evening, although not the subject of a specific protest by the complainant, contained an element of domination. However, any sense of the respondent’s conduct being unwelcome was then overshadowed and condoned by the love affair that followed.” (CCH 1992: 79, 164)

Per Member Buick:

4. “The respondent’s propensity to sexually touch his female employees was a pervasive pattern at his business. He clearly believed it was his right as an employer to sexually harass his shop assistants.” (CCH 1992: 79, 165)
5. “Sexual harassment of the complainant occurred from the beginning of her employment by the respondent, up to and including the first occasion of sexual intercourse. Evidence to conclude that the sexual relationship was coercive after that date was not conclusive.” (CCH 1992: 79, 165)

Per President Hasluck and Deputy Member French:

“In a recently published work, *The Liberal Promise* by Margaret Thornton, the learned author suggests that sexual harassment is pervasive within the workplace because there is a coincidence between maleness and domination on the one hand, and femaleness and subordination on the other hand, in the same way that sexual relations have been constructed in our society. Since the latter are understood as “natural” they are not easily separable from the normative workplace paradigm. Thus, most incidents of sexual harassment do not crystallise into complaints.

“Even though the acts of sexual intercourse might not have amounted to a criminal offence, it is inconceivable that a woman subjected to repeated acts of sexual intercourse occurring without consent, or as a consequence of a consent reluctantly given ... would endure such a state of affairs except from dire necessity.”(CCH 1992: 79, 188-9)

- *Zoiti v Cheesecake Factory & Quirk* [1993] HREOCA 12 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Nettleford

Summary

The complainant was a 17-year-old assistant at The Cheesecake Factory, the first respondent. The second respondent, Mr Quirk, was a pastry cook supervisor. A typical example of something in this period which irritated the complainant was that Mr Quirk called her "a sweetie and better looking than the last girl" and described her as having "big tits". She was accused of being late for work, when, in fact, she arrived early or on time. Comments were made about her appearance with accusations that she was not clean. On one occasion, as she was passing Mr Bosco, he made two different attempts to grab hold of her. She was made the target of comments such as "she's calling up her lesbian mates again". The complainant was dismissed from the company. She called on evidence from other employees to support her allegations.

The Commission found the complainant was correct when she contended that the first respondent dismissed her because of the problems which could be seen ahead, and it was easier to dismiss her than to dismiss three men, two of them senior tradesmen. The Commission found she was subjected to sexual harassment and found the employer vicariously liable.

Commentary

Neutral

“In *Zoiti v The Cheesecake Factory Pty Ltd & anor*, the complainant who was a factory worker with the respondent company, alleged that the second respondent, a senior pastry cook, had harassed her sexually with the knowledge of the management of the company, which subsequently dismissed her from employment. In support of these allegations, the complainant sought to have other witnesses testify to the fact that they also had been sexually harassed by the individual respondent and that the company was well aware of these incidents. The effect of the similar fact evidence was that it confirmed the reliability of the Human Rights Commission's finding that the evidence of the complainant was to be preferred to that of the respondent company and the second respondent. Just as it is open to a complainant to rely upon evidence of previous misconduct to prove discrimination indirectly, so a respondent may bring evidence of past conduct that tends to rebut such an allegation.” (Rajapaske 1998, pp.99-100)

- Horne and Anor v press Clough Joint Venture and Anor (1994) EOC 92-556

Western Australian Equal Opportunity Commission, Deputy President Roberts-Smith

Summary

The complainants were the only female workers at a construction site. In the offices and crib huts where the complainants cleaned, there was a large amount of pornographic material on the walls. After a request that a particular poster be removed, there was an increase in the number of offensive posters displayed. When the complainants complained to the Metal and Engineering Workers Union (MEWU) about the posters and their desire that they be removed, the MEWU site organiser criticised their attitude and advised that the complainants not persist in complaining as it would make them very unpopular on site. The display of the material continued and the complainants were insulted and criticised both when requesting the material be

taken down and in the normal execution of their duties. Conditions deteriorated to the point where even more explicit material was displayed and there was a risk of physical attack.

The complainants contended that the union had allowed the employer to discriminate against them on the basis of their sex, through their employees' failure and/or refusals to support the complainants in their efforts to remove the pornographic material from the work site and vicariously for its employees' responsibility for the display of the pornographic poster in the union site office. The complainants alleged that the presence of pornography in their workplace amounted to sex discrimination; that their employer knew of the presence of the posters and was therefore directly liable under the Act; that their employer was liable for victimisation and that their employer had failed to take reasonable steps to prevent the discrimination and victimisation. The complainants also claimed victimisation under ss 67 and 161 of the *Equal Opportunity Act 1984* (WA).

The Tribunal found in favour of the women against their employer. The women were awarded damages of \$92 000.

Feminist commentary

Positive

“In the case of *Horne & Anor v Press Clough Joint Venture & Anor* (‘Horne’), the Western Australian Equal Opportunity Commission recognised that the prolific display of pornography in a male dominated workplace amounted to sex discrimination and victimisation by the women’s employer and trade union. The case is an example of how a sex discrimination approach to the regulation of pornographic harm allows women to take action against the discrimination pornography causes, while educating the public against discriminatory behaviour that, like pornography, is gender-based.” (Evans 2006, p.81)

Negative

“While reinforcing the right of employees to 'quiet enjoyment of one's employment', which extends to 'not having to work in an unsought sexually permeated work environment', the case was decided on the basis that the complainants had been discriminated against, as distinct from sexually harassed.” (Mason and Chapman 2003, pp.216-217)

- *Dunn-Dyer v ANZ Banking Group* (1997) EOC 92-897 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Keim

Summary

The complainant worked for the ANZ Bank. She alleged 14 acts of discrimination over the course of her employment, which involved the existence of hostile working conditions associated with the male dominated workforce. It was alleged that office rituals involved the giving of lewd gifts at Christmas and the process by which when a

woman left a department, her bra was cut off and removed. It was also alleged that she was referred to as a 'mother hen' and her department called a 'nursery', a reference to her gendered role in the workplace. She alleged that the management had not only passed her over for promotion and refused to cooperate with her plans for further education, but had made her redundant.

The Commission held:

1. All of the incidents taken together and even some of the matters taken on their own are capable of constituting, in some circumstances, a hostile workplace such as to constitute sexual harassment or sex discrimination in breach of the Act. On the basis of onus of proof issues, however, the events complained of did not constitute sex discrimination in breach of the *Sex Discrimination Act*.
2. The decision not to appoint the complainant in the State Treasurer's position was not influenced in any way by the fact that the complainant was a woman. The decision to appoint another person was based on long experience and seniority in the bank.
3. The use of terms such as "mother's club", "the nursery" and "mother hen" were not only derogatory but also reflected the strongly held views of the employer's supervisors. These views intruded into their assessment of the managerial qualities of the complainant and caused their assessments of her to be in error.
4. The bank's overall position was to be supportive of its employees carrying out further studies. The supervisors' uncooperative and non supportive treatment of the employee with regard to her quite simple and basic request was found to be directed at her personally. Their conduct in obstructing the employee's access to the Masters studies was conduct which occurred on the basis of sex.
5. The restructure leading to the employee's redundancy was made principally for the purpose of getting rid of her. The employee also suffered in the redeployment process. The employee did not have a chance to be judged properly because her managerial ability and performance was misjudged. If the employee had been judged fairly and not in a skewed manner, the chances of obtaining employment in the bank would have been significantly higher.
6. The bank was liable for the actions of its senior employees.
7. The respondent must pay to the complainant \$10,000 for emotional upset and \$125,000 for economic loss resulting from its discriminatory conduct.

Feminist commentary

Negative

“In this case, a senior money market manager had claimed sex discrimination in the hostile working environment in her work area and in being made redundant. Sexual harassment formed part of the background to Ms Dunn-Dyer's sex discrimination complaint about her role as a female manager. HREOC accepted that evidence of incidents from the giving of sexual 'Kris Kringle' presents to pornographic posters located in the dealing room were capable of constituting sexual harassment or sex discrimination, 'in some circumstances'. However, HREOC was not satisfied that the events complained of constituted sex discrimination in this case and stated that upholding such complaints 'can depend on subtleties of atmosphere which are difficult

to ascertain years after the event'. The lack of subtlety in the work environment described by Ms Dunn-Dyer is evident, however, with a plastic jumping penis given to her as a Christmas present and women having their bras cut off from behind when they left the department. Despite the findings by HREOC in respect to a workplace culture that denigrated women, there was a reluctance to deal with the contribution of a sexualised work environment to this culture. *The Dunn-Dyer case* points to the contradictions in the way risk management works.” (Charlesworth 2002, pp. 364-365)

“The Inquiry Commissioner was of the view that the onus of proof had not been satisfied so as to distinguish between ‘consensual and harmless bawdiness’ and a hostile workplace. The subtext here would seem to be that, in order to succeed on the sexual harassment count, Ms Dunn-Dyer was expected to step into the subject position of woman employee as ‘fragile flower’ and to demonstrate how she was personally offended, rather than demonstrate how such conduct created an environment that discriminated against women.” (Thornton 2002, p.436)

“The disaggregation of the sexual harassment and the sex discrimination in this case reveals the artificiality of the approach. Clearly, the dealing room atmosphere and the disparagement of Ms Dunn-Dyer were related. A more holistic approach would have shown how the complainant’s competence was systematically undermined by the various kinds of harassment – including sexualised displays and gender disparagement – all of which contributed to the creation of a hostile working environment, which would have been damaging for any woman in an authoritative position. Dunn-Dyer illustrates my point that disaggregation has the effect of trivialising sexual harassment claims by disconnecting them from the discriminatory factors that animate them.” (Thornton 2002, p. 437)

- Hopper v Mount Isa Mines Ltd and others [1997] QADT 3 | [austlii](#)

Queensland Anti-Discrimination Tribunal, Member Atkinson

Summary

The complainant, the first woman to work in her position as a diesel fitter apprentice for Mount Isa Mines, alleged that following consensual sexual intercourse with a fellow male apprentice, she was subjected to verbal abuse regarding the relationship from the apprentice and other colleagues. Her superiors expressed scepticism about her ability to complete her duties due to her gender and no bathroom facilities for the complainant nor any education for her male colleagues were provided.

Sexual harassment was proved and an award of damages was ordered.

- Mount Isa Mines Limited, Joe Kirvensniemi, Darryl Jameson, Chris Ahern, Percy Elliot v Narelle Marie Hopper [1998] QSC 287 | [austlii](#)

Queensland Supreme Court, Moynihan J

Summary

This was an appeal from a decision of the Queensland Anti-Discrimination Tribunal. The Tribunal made findings of sexual harassment and sex discrimination. The respondent on appeal argued that it was not vicariously liable for the actions of its employees.

Ms Hopper, was employed as an apprentice diesel fitter mechanic. The allegations of sexual harassment were against the first appellant's employees and included:

- Mr Manning saying about the respondent, in front of other employees “Narelle's hole is the size of (indicating a size by holding his hands apart). I wouldn't touch Narelle she's probably got a sexually transmitted disease.”
- Numerous employees of the first appellant in the presence of the respondent conjectured about her sexual activity.
- Three appellants approached the respondent and engaged in a suggestive conversation with her as to the hourly rate she would charge for sexual services.

The respondent gave evidence that she had not seen any information posters about discrimination and sexual harassment and that neither she nor her co-workers went to any training workshops covering these issues. There was evidence that there was no proactive dissemination of anti-discrimination information in the apprentice, training and trades areas and that offensive photographs were frequently on display.

The Court held that the Tribunal had not erred in its conclusions or findings.

Commentary

“... in a 1997 decision of the Queensland Anti-Discrimination Tribunal, *Hopper v MIM, Kirvesniemi, Jameson, Ahern, Elliott*, the employer, MIM, was not able to escape vicarious liability on the basis of a policy that had not been implemented comprehensively enough. Ms Hopper's complaints of sexual harassment and discrimination against various MIM employees were found to be justified. In order to decide whether MIM was vicariously liable, the tribunal examined the implementation of MIM's anti-discrimination policies in some detail. While training sessions and seminars for managers had been held and circulars distributed, the Tribunal held that MIM had not done enough to ensure that its policies were actually communicated to the employees in the mine with whom Ms Hopper had to work ... Nor had MIM monitored the high attrition rate of female apprentices recruited to the mine or followed up the reasons for it. The Tribunal noted that a new and more effective policy and practices were promulgated in late 1994 and early 1995 well after Ms Hopper had left ... Thus training of line managers will not be enough if the company has not so ensured that its policies are actually communicated to staff.” (Parker 1999)

Feminist commentary

“Harassment that involves inappropriate assignments is not sexual according to the legislative formulation, but sexed, because it constitutes less favourable treatment than would have been accorded a comparable male apprentice. In *Hopper*, the discriminatory activity was not disaggregated from the more overtly sexualised

activity, so it did not prove to be a problem. It is when the harassment occurs in the absence of sexualised conduct that it is more difficult for the complainant to prove that it was sex-based. In any case, the sexualised conduct itself may be probatively problematic because a woman in a non-traditional workplace may not necessarily be 'offended, humiliated or intimidated' by the harassing acts." (Thornton 2002, pp.431-432)

- Carroll v Zielke & ors [2001] NSWADT 146 | [austlii](#)

Administrative Decisions Tribunal of New South Wales, Members Rice, McDonald, Edwards

Summary

The complainant, Mr Zielke and Mr Favell were at the relevant times employees of W & S Zielke Investments Pty Ltd. The complainant was employed first as a shop assistant for some weeks and then as an apprentice pastry chef. She submitted that Mr Zielke, more than once:

- asked her to wear shorter, tighter shorts, saying her "legs look so tall sexy and good";
- asked her about her boyfriends;
- asked "how many roots [have you] had?";
- asked her if she had body piercing;
- asked her to join him in swimming naked;
- asked her to go out with him;
- asked her to go back to his house;
- having left newspaper clippings of advertisements for escort agencies and brothels on her workbench, invited her to call them;
- changed cakes and pastries into shapes of sexual organs.

The complainant said that Mr Favell, more than once said to her that she would be "a good root", and "a good one to fuck" and changed sex-related song lyrics while singing along to the radio, replacing names in the songs with the complainant's name. He also said to her "I'd love to fuck you and fuck you hard".

The Tribunal found Mr Zielke and Mr Favell each engaged in sexual harassment. Zielke Investments Pty Ltd were also found to be vicariously liable for their conduct.

Per Members Rice, McDonald & Edwards

"In our view this is indicative of a strikingly disrespectful view he has of, at least, Ms Carroll as a woman, if not of women generally. Mr Zielke's subsequent denial of having expressed a similar sentiment at the workplace is disingenuous. In our view Mr Zielke further demonstrated his attitude to women's entitlement to equal status in the workplace when he described his attitude to having a sexual harassment policy at work: he would in future employ "strictly boys" to avoid problems such as sexual harassment complaints." (paras 146-147)

Feminist commentary

“As we move away from individualised sexual overtures and sexual desire, the conduct tends to be less direct, albeit sexualised, as it consists of imagery that mimics heterosex with masculine actors and objectified women. Such conduct commonly includes pornographic displays, obscene language and crude sexist jokes. The display of pornographic images has served to mark certain workplaces as masculinised spaces, a practice that has been conventionally tolerated by management [*see Home v Press Clough Joint Venture; Carroll v Zielke*].”(Thornton 2002, p.431)

- *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152 | [austlii](#)

Administrative Decisions Tribunal of New South Wales, L Behrendt (Judicial Member), M Gill and L Mooney (Non-Judicial Members)

Summary

The complainant alleged sex discrimination and sexual harassment by her employer, Railcorp. She was employed as manager of the Train Crew Assignment Centre, the first woman appointed to that position. In that role, she was expected to implement significant changes to the workplace, including staff changes.

The complainant alleged that a number of incidents had occurred. Over a two year period, graffiti appeared inside the men’s toilets and on one occasion in the women’s toilets which referred to her in terms such as “slut face” and “bitch face”, referred to her husband (also a Railcorp employee) in insulting terms and referred to sexual acts, and illustrated sexual acts identifying her as performing them. The incidents occurred over a two-year period. She complained about each incident to Railcorp’s Workplace Conduct Unit and identified the people she believed to be responsible in each case, naming four employees.

Another incident involved comments made by a talkback radio host that were derogatory about Railcorp and specifically mentioned the complainant. A further incident involved an envelope containing a pornographic magazine with the complainant’s name on it being placed under the door to her office.

In each instance, Railcorp claimed that it could not identify who was responsible. The complainant was later told that she would have to relocate to another Railcorp building. She expressed concern about this, because three of the men involved in the above incidents would be working there. After receiving the direction to move, the complainant went on stress leave and did not return to work.

The Tribunal found that the graffiti amounted to sexual harassment, and that Railcorp had taken insufficient steps to prevent it from occurring. However, it dismissed the claims of sex discrimination, finding that the problems that had occurred were more the result of a generally hostile and badly managed work environment than discrimination against a woman. They said: ‘Although H genuinely felt discriminated against and victimised, there was also substantial evidence that the work environment in general was hostile and poorly managed, with serious staffing issues within the Train Crew Assignment Centre and various tensions between employees leading to

widespread conflict. ... the evidence showed that other employees were equally unhappy and frustrated in this work environment.'

The complainant was awarded damages of \$20,000 for sexual harassment. This amount reflected the graphic and highly sexualised nature of the early graffiti incidents.

Per L Behrendt (Judicial Member), M Gill and L Mooney (Non-Judicial Members)

'There is no doubt that Ms Hunt genuinely felt that the atmosphere within the workplace was stressful and that she felt that she was unfairly targeted and targeted because she was a woman. However, ... On the basis of the evidence presented to it, the Tribunal draws the conclusion that the oppressive and dysfunctional nature of the workplace was a result of the management, organisational and staffing issues that existed in the Train Crew Assignment Centre. In this environment, it is understandable that Ms Hunt felt that she was being targeted. However, the evidence showed that the environment was such that other staff members were equally unhappy and frustrated in the work environment'.

Feminist commentary

Neutral

"... sexually permeated workplaces involving the display of pornographic imagery and the normalisation of obscene language and crude sexist jokes may ground a finding of sexual harassment. They are frequently masculinist workplaces where the female complainant may be the first woman. Such a case was *Hunt* in which the complainant was the first woman to be appointed as manager of the Train Crew Assignment Centre for the New South Wales Rail Corporation. The hostile sexually permeated work environment was exacerbated by poor management practices, which caused the complainant to go on stress leave and then resign." (Thornton 2010, p 141)

The application of the *Briginshaw* test to evidence of sexual harassment

The common law recognises two standards of proof, 'the balance of probabilities' for civil matters and 'beyond reasonable doubt' for criminal matters. The 'Briginshaw' test refers to a standard of proof which may apply in cases involving serious civil matters, which was discussed by the High Court in *Briginshaw v Briginshaw* (1938) 60 CLR 336, (a family law case under the pre-1975, fault-based, matrimonial causes regime) where Justice Dixon stated that 'when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence ... It cannot be found as a result of a mere mechanical comparison of probabilities'. The Briginshaw test involves a requirement that the decision maker be 'reasonably satisfied' as to the existence of the facts in issue. This higher standard of proof for civil matters has been applied in sexual harassment cases, creating a more onerous threshold of proof and sometimes making it difficult for complainants to meet the evidentiary requirement. Many cases of sexual harassment reflect this theme.

Feminist commentary

“Ever since the case of the lift-driver who accused the New South Wales Commissioner for Main Roads of sexually harassing her, Australian anti-discrimination tribunals have demanded that complainants prove their case to the ‘*Briginshaw* standard of proof’.

In fact, ‘standard’ is a misnomer as in the common law there are only two standards of proof: beyond a reasonable doubt for criminal cases and on the balance of probabilities for civil. As anti-discrimination complaints raise civil issues, the appropriate standard is the balance of probabilities, though what that term means is by no means clear. It is generally accepted that it will require ‘satisfaction on the evidence that the matter found to have occurred is more likely than not to have occurred’.” (de Plevitz 2003, p. 309).

- *Patterson v Hookey and Healesville Piquant Palate Pty Ltd t/a Piquante Palate Gourmet Deli* [1996] HREOCA 35 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Rayner

Summary

The complainant alleged sexual harassment in the course of her work for the second respondent. The first respondent was a director of Piquante Palate Gourmet Deli. The complainant alleged that Mr Hookey had ‘made a pass’ at her at the conclusion of her shift. The Commissioner found that the complainant’s allegations were substantiated.

In the course of her judgment, Commissioner Rayner referred to the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336, which provided for a heightened standard of proof in light of the seriousness of the allegations made, the unlikelihood of their occurrence and the gravity of the consequences flowing from a positive finding. Previous sexual harassment cases had applied this test unquestioningly, making it more difficult for complainants to discharge their burden of proof. Commissioner Rayner explained why the *Briginshaw* test will not always be appropriate in sexual harassment cases:

“The *Briginshaw* test was enunciated in a very different context. Proof of adultery determined whether or not a marriage was dissolved at all and entitlements to maintenance, property division and the custody of and access to children were determined on the basis of fault. The social climate was such that divorce, adultery and sexual intercourse between unmarried people were much less common or acknowledged, and had far graver social and economic consequences than today.

“The Sex Discrimination Act was passed by the Commonwealth in 1984 in pursuance of its international obligations to prevent discrimination. There have been decades of law reform and social change since *Briginshaw*’s case, and we now have very different attitudes to sex, more egalitarian relationships between women and men, considerable change in the status of women and in the law and rules of evidence about the evidence of women and children concerning sexual matters.

“The definition of ‘sexual harassment’ in the *Sex Discrimination Act 1984* covers a very broad range of unwanted sexual conduct involving a sexual advance or request for sexual favours and a statement of a sexual nature to or in the presence of a person. The *Briginshaw* test is obviously inappropriate for all sexual harassment complaints.”

Feminist commentary

“Commissioner Rayner in *Patterson v Hookey & Healesville Piquant Palate Pty Ltd* (1996) recognised these dynamics. She had been invited by counsel for the respondent to see the complainant as a liar with a motive to fabricate, or at best, as inconsistent. Reference was made to the delay in reporting the matter to the police and Ms Patterson’s failure to confront the respondent with the allegations. However, in determining the credibility of the complainant, Rayner took the following into account: the fact that Ms Patterson ‘immediately and consistently complained that she had been indecently assaulted’, her ‘visibly distressed emotional state’ and that her failure to confront Mr Hookey

... was entirely consistent with a desire to avoid Mr Hookey and a difficult situation. I consider that Ms Patterson thought her story would probably not be believed, given Mr Hookey’s relative status and the lack of any independent witness to his unexpected behaviour.” (Tyler and Eastal 1998, p.214)

“There is a tension in the decision between the application of evidentiary rules and the reality of a woman’s experience with sexual harassment. On the one hand, Ms Patterson was able to satisfy the rules of credibility because she made immediate and consistent complaint to some members of her immediate family, and her emotional reaction fit the expected reaction of one who is sexually harassed despite the ‘unlikely’ nature of the allegations, she was constructed as credible. She had met at least some of the evidentiary hurdles placed in front of her and was forgiven for not making prompt and assertive complaint to the relevant agency because she was ‘young [and] not particularly well educated’.” (Tyler and Eastal 1998, p.214)

The test of ‘reasonableness’

Under the *Sex Discrimination Act 1986* (Cth), the definition of sexual harassment requires that a ‘reasonable person’, having regard to all the circumstances, would have anticipated that the person who was harassed would be offended, humiliated or intimidated (s. 28A(1)). The reasonableness test is considered an objective test: what is reasonable will depend on the circumstances of a particular case; the age of the complainant, other subjective characteristics, the context in which the events occurred and the relationship between the parties may all be taken into account.

State and territory legislation also includes the notion of reasonableness. However, its application differs across jurisdictions. Queensland, New South Wales, Victoria and Tasmania take the same approach as the SDA: *Anti-Discrimination Act 1991* (Qld) s 120; *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 2010* (Vic) s 92(1); *Anti-Discrimination Act 1998* (Tas) s 17(1). However, in South Australia and the Australian Capital Territory, the perspective of reasonableness is from the point of view of the complainant, that is, whether it is reasonable that she should feel offended or humiliated: *Equal Opportunity Act 1984* (SA) s 87(9)(a); *Discrimination Act 1991* (ACT) s 58(1). In Western Australia, sexual harassment is said to occur if the complainant has reasonable grounds for believing that she will be disadvantaged by objecting to the conduct: *Equal Opportunity Act 1984* (WA) s 24(3)(a). The Northern Territory adopts a combination of approaches: sexual harassment is unlawful if it could reasonably be foreseen that the complainant would be offended, humiliated or intimidated or that the complainant reasonably

believed that she would suffer a detriment if objections were made: *Anti-Discrimination Act 1996* (NT) s 22(2)(e);(f). The application of the reasonableness test has a significant impact on the outcome of sexual harassment cases.

The ‘reasonable person’ (historically, the ‘reasonable man’) test in law has been subject to considerable feminist critique as a premise of legal ideology, where it is associated with the concept of objectivity in decision-making. In sexual harassment cases, what a decision maker, often male, considered reasonable may have a significant impact on the outcome of the case. In the context of sexual harassment, what may be considered reasonable will vary with respect to the gender, age, race and cultural background of the person concerned.

“The Australian cases where the reasonableness factor is linked to the notion of detriment have tended to be the least successfully resolved. In jurisdictions where the complainant does not have to show an apprehension of a detriment but rather that a reasonable person would have anticipated that she would be offended, humiliated or intimidated by the conduct, the relevant tribunals have had much less trouble in finding that unlawful sexual harassment has occurred. Indeed, once unwelcome sexual behaviour is found to have occurred in these jurisdictions, the issue of reasonableness is rarely in dispute and decision makers have little difficulty in finding that unlawful sexual harassment has been established. Moreover, in Queensland, the bar is set the lowest of all. In section 119 of the *Anti-Discrimination Act 1991*, a complainant needs to show, in addition to the unwelcome and sexual nature of the conduct, that the harasser intended to offend, humiliate or intimidate or, alternatively, that the circumstances were such that 'a reasonable person would have anticipated the possibility that the complainant would be offended, humiliated or intimidated by the conduct' (emphasis added). The reasonable foresight here need only be that it is possible, rather than likely, for the offence or humiliation to be felt by the complainant. The Queensland Act continues by providing in section 120 that in order to determine whether the circumstances were such that a reasonable person would have anticipated the possibility of offence, humiliation or intimidation occurring, the relevant tribunal can consider such factors as the sex, age, race, impairment, or any other circumstance of the complainant, as well as the relationship between the complainant and the harasser. This has been described by one commentator as, in effect, amounting to an objective/subjective test.” (Tahmindjis 2005, pp. 97-98)

- Davidson v Murphy [1997] HREOCA 62 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Wilson

Summary

The complainant commenced employment at Toyworld. She argued that the conduct of the first respondent when they were co-workers in Toyworld involved the following:

- on a regular basis he would brush up against her;
- sometimes the respondent would stand behind her and the front of his body would touch her back and bottom;
- at other times, when she was passing the respondent in the shop aisles, he would move towards her and turn side on to her so as to bring about some bodily contact as they passed each other;
- he put his hand on her bottom and gave a light squeeze;

- on some occasions, when she was vacuuming, the respondent would stand behind her and make unsolicited remarks such as "Gee, you move nice", "Have you ever noticed how your bum moves when you're vacuuming, I like it when it does that", and "You could do my vacuuming". On one occasion, he came up behind her and said "You don't even know I'm watching you";
- on one occasion, she went to the office to pick up her bag as she had ended her shift. The respondent was sitting in a swivel chair. He patted his lap and said "Come and sit here".

Commissioner Wilson found that the complainant's testimony was unreliable. He found the invitation extended by the respondent to the complainant to "sit on (his) lap" was of a sexual nature and unwelcome. However, in regards to the next criteria 'Would a reasonable person have perceived this behaviour as harassment within the meaning of the Act?' he found "[i]n view of this familiarity and the ease with which the complainant, had she wished, could have voiced her disapproval of the respondent's conduct, but did not do so, I find that the reasonable person would not have anticipated that she was offended, humiliated or intimidated by his conduct. I note also that the complainant is a woman of 31 years, married with a child, with a strong personality; I find that the comments displayed a disposition on the part of the respondent to engage in sexual banter which, while in poor taste and sometimes crude, amounted to little more than pathetic attempts at humour. In my opinion, the complainant, had she wished, could readily have rejected the conduct as unacceptable". (para 7.2.3)

The complaint was not substantiated with the Commissioner concluding "I find that, without blaming her for it, with the passage of time the embarrassment and humiliation attributed to the respondent's conduct has become magnified out of all proportion to the reality." (para 7.2.3)

Feminist commentary

Negative

"In *Davidson v Murphy*, incidents were found to have occurred which included physical contact while working and comments by an employer to an employee such as 'What colour are your knickers?', 'You can sit on my lap' and 'Have you ever noticed how your bum moves when you're vacuuming, I like it when it does that'. However, in deciding that the reasonableness test was not satisfied, the Commission considered the familiar relationship between the complainant and the respondent and the *perceived* ease with which she could have complained but did not do so. The Commission also found that because the complainant was 31 years old, married with a child and had a strong personality, a reasonable person would not consider her to be offended ... *Davidson v Murphy* clearly illustrate[s] the proposition that despite progress being made for women with the introduction of s 28A of the SDA, unnecessary difficulties are still faced by complainants in satisfying the current reasonable person test." (Pace 2003, p.203)

- Smith v Hehir and Financial Advisors Aust Pty Ltd [2001] QADT 11 | [austlii](#)

Queensland Anti-Discrimination Tribunal, Member Tahmindjis

Summary

The complainant was employed by the second respondent as a tele-marketer. The first respondent, Mr Hehir, was the Company Manager. The complainant alleged the first respondent sexually harassed her by the following acts:

- after an unpleasant telephone conversation with a potential client, Mr Hehir massaged the complainant's shoulders (and also massaged the shoulders of the other telemarketer present at the time);
- after a phone call from her fiancé (now her husband) the complainant became upset because she was being evicted from her accommodation and, she said Mr Hehir touched her in a manner which was unwelcome to her;
- the complainant said Mr Hehir again massaged her, made various offensive sexual remarks to her and touched her in an unwelcome manner, including trying to kiss her.

The Tribunal found that the complainant had been sexually harassed by the respondent and commented that “[t]he context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female employee who had only worked in the office for two weeks. It occurred not long after another incident when distress due to a phone call had been used as an excuse to massage the complainant. The action was more than just a touch, such as placing a comforting hand on the distressed person's arm or shoulder: it was more in the form of a cuddle. In my opinion, in this instance in the overall context, a reasonable person should have anticipated that there was the possibility that Ms Smith would have found this action offensive, humiliating or intimidating. It should be pointed out that the Act in this regard is quite specific: it provides that "the reasonable person would have anticipated the *possibility* that the other person would be offended ... (s.119(f), emphasis added). In my view, in these circumstances, a reasonable person would have anticipated that possibility.” (para 3.2)

Per Member Tahmindjis

“To console a person it is not necessary that one touches them, although this usually will occur and usually it will not amount to sexual harassment. I do not consider that Mr Hehir intended to sexually harass Ms Smith on this occasion. However, the issue becomes whether a reasonable person taking all the circumstances into account (including the unwelcome rubbing on or after 8 February) would have anticipated the possibility that Ms Smith would be offended, humiliated or intimidated by this action. In my view, it is essential that all employers and employees appreciate both the unlawful and the unacceptable nature of sexual harassment, especially as there remains an unacceptably high incidence of sexual harassment in the workplace, where some men apparently consider female employees to be ‘fair game’.” (para 3.2)

“Nor does it necessarily matter what the complainant thought or felt at the time, as some instances of sexual harassment may leave the victim so stunned that she feels nothing. The Act requires us to consider what an independent and reasonable third party would have thought the complainant could feel given the overall context.” (para 3.2)

Literature cited by Member Tahmindjis

- Graycar, R & Morgan, J 1990 *The Hidden Gender of Law*, Federation Press;
- Stein, L 1999 *Sexual Harassment in America: A Documentary History*, Greenwood Press;
- Nancy, E 1990 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' *Yale Law Journal*, vol.99, at 1777;
- MacKinnon, C 1979 *Sexual Harassment of Working Women*, Yale University Press;
- MacKinnon, C 1987 *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press.

Feminist commentary

“In almost every Queensland case to date, the Queensland Anti-Discrimination Tribunal (QADT), after making detailed findings that the alleged incidents of sexual harassment did in fact occur, had no difficulty in finding that the test was satisfied i.e. that a reasonable person would, in all the circumstances, have anticipated the possibility that the particular complainant would be offended, humiliated or intimidated by the conduct. In the majority of decisions in fact, only bare comments have been made regarding satisfaction of the test. The recent decision of *Smith v Hehir and Anor* is the exception to the rule in that it contains some discussion on how the reasonableness test should be applied under s 119 of the QADA.” (Pace 2003, pp.205-206)

“The decision in *Smith v Hehir and Anor* illustrates the high point of the application of the Queensland reasonableness test and represents a significant shift forward from the difficulties experienced by complainants in other jurisdictions. The incidents complained of in *Smith* could be described as 'low level sexual harassment and might not have constituted sexual harassment under legislative tests in other jurisdictions. Due to Queensland's broad test and the macro approach taken to its application by the QADT, the incidents were considered sufficient to satisfy the Queensland test.” (Pace 2003, p.207)

“In holding that the second incident satisfied the reasonableness test, Member Tahmindjis looked at the overall context in which all of the incidents occurred, including the age difference between the parties and their relationship as employer/employee. Since the perceptions of men and women may differ in relation to what behaviour does or does not constitute sexual harassment, what the respondent thought about his conduct was irrelevant to the determination of reasonableness. Member Tahmindjis also noted that sexual harassment potentially leaves its victims so stunned that they feel nothing and therefore what the complainant thought or felt at the time of the events was not necessarily relevant either. ” (Pace 2003, p.207)

- Johanson v Michael Blackledge Meats [2001] FMCA 6 | [austlii](#)

Federal Magistrates Court of Australia, Driver FM

Summary

The applicant's complaint was that she was sexually harassed when she purchased a bone from Michael Blackledge Meats, a butcher shop owned and operated by the respondent. The bone was shaped to resemble a large penis. The applicant said that she was shocked and sickened when she saw the bone. She alleged that she complained to the manager of the butcher's shop, but was laughed at. She reported the incident to the police.

The Court found that the sale of an ordinary dog bone was not conduct of a sexual nature. However, the provision of a dog bone shaped so as to resemble a human penis was conduct of a sexual nature. The Court held that the test is objective and it does not matter whether the perpetrator intended to act in a sexual way or was aware that he or she was acting in a sexual way. The type of conduct that has been held to be conduct of a sexual nature includes exposure to sexually explicit material and sexually suggestive jokes. The Court was satisfied that a reasonable person would have anticipated that the applicant would feel offended, humiliated or intimidated as a result of receiving the bone.

The Court held the applicant had been the victim of unlawful sexual harassment and that the respondents are vicariously liable for that unlawful harassment.

Commentary

“The issue of reasonableness under s 28A requires an objective assessment as to whether a hypothetical, reasonable bystander would fairly conclude that the person harassed would be offended, humiliated or intimidated by the unwelcome sexual conduct. Reasonableness is therefore addressed by reference to the harasser's conduct rather than the complainant's reaction to the conduct [*see for example, Johanson v Michael Blackledge Meats*].” (Pace 2003, p.199)

- Hughes v Narrabri Bowling Motel Limited [2012] NSWADT 161 | [austlii](#)

Administrative Decisions Tribunal of New South Wales, Members Furness SC, Lowe & Nasir

Summary

The applicant was employed as a casual housemaid at the Narrabri Bowling Motor Inn. Mr and Mrs Welsh, the second and third respondents, were the managers of the motel. The applicant submitted that she had been subject to three acts of sexual harassment by Mr Welsh. Further to this she complained that after making the complaint of sexual harassment against Mr Welsh she was victimised by Mrs Welsh by being given extra work as a housemaid and then given no work at all.

The applicant's job as a housemaid included stacking linen trolleys and stacking cleaning trolleys with cleaning products and replacement items for the rooms. In relation to the first two sexual harassment claims, the applicant said that prior to August 2010, Mr Welsh had brushed up against her on a few occasions but that she had thought nothing of it and ignored it as she was not sure if his actions were intentional. In relation to the third sexual harassment claim, the applicant said that in about August 2010 when she was getting cups and saucers off the trolley which was

located in the carpark, Mr Welsh approached her and said "I am here to get between your legs".

The Tribunal found that a reasonable person, having regard to all the circumstances would have anticipated that the applicant would have been offended, humiliated or intimidated by those words. Mr Welsh was in a position of power in relation to the applicant, in that he and his wife had the discretion to offer or not offer her work. The Tribunal found the complaint of sexual harassment arising from the incident at the trolley was substantiated because the language used by Mr Welsh is that of a request for sexual favours or a sexual advance or conduct of a sexual nature and that it was unwelcome. However, the two accounts of sexual harassment by Mr Welsh between January and August 2010 were dismissed. The complaint of victimisation against Mrs Welsh was dismissed. Two complaints of vicarious liability by the first respondent were also dismissed.

Intersectionality

In some cases, women experience multiple forms of discrimination, such as sexual harassment, sex discrimination and race discrimination. This is often referred to as intersectional discrimination. Feminist theories of intersectionality affirm that it is not possible to understand women's experience of oppression on separate grounds of, for example, race and sex, but that it is at the interface of these identities that oppression often occurs. Discrimination law, however, is structured to facilitate complaints on individual grounds. The following cases demonstrate the operation of intersectional discrimination.

- Djokic v Sinclair and Anor (1994) EOC 92-643| [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Wilson

Summary

The complainant, Mrs Djokic, was employed as a meat packer by the second respondent in a meatworks. The complainant lodged a complaint with the Human Rights and Equal Opportunity Commission against the meatworks and the first respondent, Mr Sinclair, a foreman who supervised Mrs Djokic in the boning room. Mrs Djokic alleged that she was subjected to various forms of sex and race discrimination in the workplace resulting eventually in the termination of her employment. The complainant described a number of incidents at the meatworks which she cited as examples of the discrimination she suffered. The incidents consisted of intertwined elements of race and sex discrimination, including allegations of sexual harassment.

The complainant alleged that the first respondent would refer to her on a regular basis as a "fucking wog bitch" and a "stupid wog bitch" when she commenced working on his chain. Mrs Djokic also alleged that Mr Sinclair would touch her in a sexual way, not accidentally, when he walked past her. She said that he would walk past her and pull her brassiere strap so that it would snap into her back and sometimes would touch her trousers. None of the witnesses were able to corroborate the complainant's evidence. The first respondent denied touching her in this manner or in any sexual way. Other complaints included that the first respondent was the source of rumours

circulating around the meatworks that she was sleeping with a number of men in the meatworks. On one occasion when she was sitting with a male colleague, Mr Dalton, Mr Sinclair walked past them and said to Mr Dalton "You'll be right tonight mate" whilst making an obscene hand gesture indicating coitus.

The complainant was dismissed in 1991 following an exchange with the first respondent where she was asked, but refused, to work overtime. The complainant alleged that Mr Sinclair pressed her for a reason why she wasn't available to do overtime. When she refused to tell him he allegedly said to her "Fuck you woman! I'll bring you to your knees!" She explained that a heated argument ensued in which she swore at Mr Sinclair. A meeting was held and she was dismissed.

President Wilson stated that: 'This is a complex case, with a number of distinct allegations of unlawful discrimination ... I am satisfied that, from the perspective of the complainant, the general atmosphere in the boning room, where the complainant worked as a packer, was deplorable. A great deal of unpleasantness was directed to her.' President Wilson did not accept that the bra strap and touching of trousers incidents could be corroborated, due to the layout of the packing room. Otherwise, he found that the respondent's general demeanour towards the complainant over a sustained period, described by the complainant as "pushing her", reflected a hostility, based on her sex, that was oppressive to her and such as to constitute sexual harassment. President Wilson also accepted that the conduct surrounding the complainant's termination amounted to sexual harassment and stated that he had 'no hesitation in characterising such behaviour as sexual harassment. It was a serious abuse of power.'

Per President Wilson

'The evidence, not confined to that of the complainant, coupled with my observations of the witnesses, inclines me to view the meatworks at the material time as a union-dominated male world which, with a few exceptions, tolerated women only so long as they knew their place ... The widespread enlightenment of recent times in terms of the dignity, equality and worth of all human beings, expressed in the workplace in the principles of fairness and equal opportunity, had not yet penetrated this establishment. The complainant entered this place as a strong, courageous woman wanting to work. She left it, less than 2 1/2 years later, a woman broken in health though not yet in spirit, a victim of pettiness and sexist and racist attitudes. In a sense, the first respondent was also a victim of the system because he was a product of it.'

Feminist commentary

Negative

"... in *Djokic* a female packer at a meatworks complained of race discrimination, sex discrimination and sexual harassment. She had been called a 'stupid wog bitch' by her co-workers (particularly after she complained that some workers took unauthorised toilet breaks during production times) and was sexually harassed by her supervisor who, she alleged, touched her in a sexual way when he walked past, started rumours that she was sleeping with a number of the male workers, and made obscene hand gestures indicating sexual intercourse when he saw her talking to a male colleague.

She was eventually dismissed after an argument with respect to working overtime. The federal Human Rights and Equal Opportunity Commission found that the dismissal was the final episode in a drama of sexual and racist victimisation ... While the Commission conceded that an abuse of power could be characterised as sexual harassment, it had difficulty finding that the complainant had discharged her burden of proof with respect to all of her allegations of sexual harassment (especially with respect to unwelcome touching in a narrow work space). While it did find that, overall, the sustained hostility and oppression constituted sexual harassment, the case illustrates the difficulty Australian law encounters when dealing with circumstances which cumulatively amount to harassment but which separately might not do so.” (Tahmindjis 2005, p.95)

- *Horman v Distribution Group* [2001] FMCA 52 | [austlii](#)

Federal Magistrates Court of Australia, Raphael FM

Summary

The applicant worked for the respondent company at Repco Auto Parts as a spare parts interpreter. She claims that during this time she was subjected to sexual discrimination in the form of unacceptable and inappropriate comments from her fellow workers, some physical approaches such as texta writing on her body, and touching her buttocks. During the course of her employment, the applicant became pregnant. She claims that she was subjected to discrimination because of her pregnancy, consisting of inappropriate comments made by other workers. She also claimed that she was dismissed from Repco because she was pregnant. The applicant also complained of racial discrimination through the use of words such as "wog" being written on time sheets and being referred to as a "witch".

Other acts of sexual harassment included:

- Mr Chamberlin and Mr McDougall said to the applicant " *Show me your tits.* "
- Mr Chamberlin and Mr McDougall approached the applicant and pulled back her bra strap and let it go.
- When the applicant was pregnant Mr Chamberlin and Mr Maulguet asked the applicant " *Are you more sexually active since being pregnant, my wife is particularly with oral sex.* "

The Court found that the decision to make the applicant redundant came about as part of a general review of staffing requirements at Repco, and that there was at the time a genuine downsizing going on.

The Court upheld three of her five complaints of sexual harassment, sex discrimination, and race discrimination against the applicant. The applicant appealed against the Court's rejection of the other complaints in *Horman v Distribution Group Ltd* [2002] FCA 219, but her appeal was dismissed.

Feminist commentary

Neutral

“In the Federal Magistrates Court during the period from April 2000 to September 2004, there were 32 hearings in cases involving sex discrimination, 42 in disability cases and 24 in race cases, including procedural as well as substantive hearings. In only three cases was a substantive claim based on race upheld. Two of these were racial vilification claims. In *Horman v Distribution Group*, a vilification claim relating to calling the applicant ‘wog’ at work was upheld, although most emphasis in the case was on sex discrimination and sexual harassment.” (Gaze 2005B)

Sexual harassment of men

Overwhelmingly, sexual harassment is perpetrated by men against women and the majority of complaints are by women. However, the legislation is non-gender specific and it is possible for men to make complaints of sexual harassment. Workplaces are often highly masculinist and resistant to men who do not fit the normative model of heterosexual masculinity. This may be performed as sexual harassment of men, sometimes on the grounds of presumed homosexuality.

- Daniels v Hunter Water Board (1994) EOC 92-626

New South Wales Equal Opportunity Tribunal, Members Bitel, Tracey and MacDonald

Summary

Mr Daniels alleged that he was harassed and discriminated against by the Respondent over a number of years on the grounds of his presumed homosexuality, even though he did not identify himself as being homosexual. The alleged conduct began after Mr Daniels adopted a ‘trendy’ haircut and an earring in his left ear. He also took up jazz ballet, drama and modelling. At this time, his coworkers started to call him a ‘weirdo’ and to allege that he must be ‘gay’. After Mr Daniels removed a poster of a naked woman from his workplace because it had offended a female colleague, the frequency of derogatory comments made towards him, on the basis of him being ‘gay’, increased. Mr Daniels’ claim on the basis of his presumed homosexuality was upheld.

Feminist commentary

Positive

“Men who resist the dominant norms of the workplace may also be the targets of sexualised harassment by other men. These non-dominant men are not necessarily gay. In *Daniels v Hunter Water Board*, the complainant, an electrician, was subjected to a campaign of harassment because his co-workers thought that he was gay. In addition to taking up jazz ballet, drama classes and modelling, he adopted a ‘trendy’ haircut and wore an earring. He was ridiculed, and taunted with epithets such as ‘Weirdo’, ‘Poofster’ and ‘Gay Boy’. He was also spat upon and physically assaulted. Within the masculinist culture of the workplace, the co-workers made it known that the complainant was ‘not one of the boys’. In pursuing a remedy, the complainant was able to rely successfully upon a provision in the NSW Act proscribing discrimination on the ground of ‘perceived homosexuality’ ... but for his sex, the complainant would not have been harassed. In other words, had Daniels been a woman who took up jazz

ballet, drama and modelling, his conduct would not have given rise to hostile environment sexual harassment in the workplace. The argument is a provocative one, as it confounds the biological binarism of sex that underpins anti-discrimination law Cases such as *Daniels* underscore the animosity towards the feminine in masculinist workplace cultures, no less than in *Hopper*, *McKenna* and *Williams*. The aggressive conduct often found in such cases clearly has more to do with hate than desire. They illustrate how masculinist cultures of homosociality and heterosexism are effectively sustained.” (Thornton 2002, p.433)

- Lulham v Shanahan, Watkins Steel & Ors [2003] QADT 11 | [austlii](#)

Anti-Discrimination Tribunal of Queensland, Member Savage QC

Summary

The complainant had been a boiler maker at Watkins Steel and alleged he had been exposed to sexual harassment by work colleagues including Mr Mitchell and Mr Shanahan, the respondents in this case, and another man (against whom the complaint was settled during the course of the proceedings). He sought to hold Watkins Steel vicariously liable for this harassment. The complainant alleged that the two men had made remarks that he was a paedophile and that he frequented gay bars. Mr Mitchell had described him on occasions in front of work colleagues as a “gerbil,” which was agreed to have a sexual connotation in relation to bestiality. The Tribunal found that these remarks constituted sexual harassment due to their implications that the complainant was involved in proscribed sexual acts.

A defence was raised in respect of causation as the respondent claimed that the complainant’s past sexual abuse rather than the harassment by the defendants was the true cause of his departure from work and depressive illness. The respondent also sought to exempt itself from vicarious liability on the basis that it had taken reasonable steps to prevent the sexual harassment. Member Savage found that it was the harassment that had been the cause of the defendant’s psychiatric injuries. The tribunal found that the steps taken by Watkins Steel to exempt itself from liability were insufficient.

Per Savage QC

“It is a defence to such a liability if Watkins Steel demonstrates to me on the balance of probabilities that it took reasonable steps to prevent the worker contravening the Act. Here it took no let alone any reasonable steps to prevent any such contravention. The submission made by the respondent’s counsel that s.133(2) is satisfied in the instant case merely by the management of Watkins Steel maintaining an “open door” complaints policy and by doing nothing otherwise is unworkable. [...] It should also be noted that at the time these events occurred the management of Watkins Steel were not aware that sexual harassment was legally proscribed conduct and had no policy to identify and prevent such harassment occurring other than the general “open door” policy. Had management acted consistent with the practice now suggested this matter may not have arisen.”

“I have concluded on the balance of probabilities that it was the misconduct to which the complainant was exposed at his workplace that led to the onset of depressive illness. Had the complainant not been harassed as I have found, the complainant would have been able to continue in his employment and continue to deal with the problems he had in confronting his parents concerning his past sexual abuse by others even if that had some consequence for his mood at relevant times. He would not have been (as I find he was) forced to leave his employment.”

Non-employment cases

Most complaints of sexual harassment concern harassment in the context of employment, perpetrated by employers or co-workers. However, under the amended legislation introduced in 1992, it became possible to make a complaint of sexual harassment in the context of a range of public activities, including educational institutions, in the provision of goods and services, in clubs and in the provision of accommodation. The following cases demonstrate this theme.

- Brian Joseph Chambers v James Cook University of North Queensland [1995] IRCA 459 | [austlii](#)

Industrial Relations Court of Australia, Spender J

Summary

Dr Chambers had been employed by James Cook University as a lecturer in theatre. In about November 1993, allegations of sexual harassment were made against him by two of his former students. Complainant A was aged in her forties and Complainant B in her fifties at a time when Dr Chambers was also in his early fifties. A Sexual Harassment Grievance Committee of the University considered the allegations and reported to the Vice-Chancellor of the University who then wrote to Dr Chambers setting out the allegations and advising him of his suspension from duties, with pay, and exclusion from the University.

It was alleged that Dr Chambers had improperly pressured Complainant A to engage in sexual intercourse with him (and had engaged in sexual intercourse with her) on two separate occasions in April 1992 and had since that time, applied further pressure and/or harassment on her to engage in further acts of sexual intercourse.

The second complainant said that during the 1993 academic year, the respondent had taken ‘inappropriate physical liberties and made verbal and physical sexual approaches’ to her and later in that year had improperly pressured her to engage in sexual intercourse with him on two occasions. Complainant B alleged that the acts of sexual intercourse were non-consensual and had involved Dr Chambers using force in the procurement and engagement of the intercourse, violent sexual assault and the use of force in restraining her from leaving.

Dr Chambers denied the allegations of sexual harassment and contended that the acts of intercourse he had engaged in with the complainants had been fully consensual. The respondent’s evidence was accepted by Spender J. He dismissed the other allegations and found that the incidents were ‘occasions on which middle aged

persons, each in their own way suffering matrimonial difficulties, sought solace in a sexual relationship.’

The University submitted on appeal that this admitted consensual sexual intercourse could form an alternative basis for the termination. However, because the termination had been entirely based on a complaint of sexual harassment, a post-facto reason could not be introduced. Spender J ultimately found that the termination of Dr Chambers had been invalid.

Justice Spender ordered:

1. that the respondent be appointed to a position ‘in the University on terms and conditions no less favourable than those on which he was employed immediately before the termination’;
2. that James Cook University treat Dr Chambers as having been continuously employed by it from the date of termination to the date of reinstatement; and
3. that it pay him the remuneration lost due to his termination.

Per Spender J

“In the circumstances of the present case, if it be the case that Dr Chambers was dismissed for the reason that he had engaged in serious misconduct within the terms of the award governing his employment, that serious misconduct being sexual harassment of one or another of his students, his dismissal can not now be justified on the basis of, absent sexual harassment, non-exploitive and voluntary intercourse had occurred between Dr Chambers and one or other of those students. In my opinion, if the question of voluntary non-exploitive [sic] intercourse between a lecturer and a student was not asserted as a valid basis for his dismissal (and in respect of which he was not given an opportunity to defend himself) then it cannot, subsequent to the dismissal, be relied on as the ‘valid reason’ for that dismissal.”

“In the course of submissions it was suggested by Dr Jessup QC on behalf of the University that even voluntarily consensual intercourse between a lecturer and a student amounted to serious misconduct justifying termination. That was not the case that was alleged against Dr Chambers; it was not the case he was called upon to meet as the Award calls for; and, having regard to the provisions of the Act requiring an opportunity to be given to an employee to be heard before his/her employment is terminated, cannot constitute a valid reason for the termination of Dr Chambers's employment.”

- Evans v Lee & Anor (1996) EOC 92-822 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Jones

Summary

The complainant, a businesswoman who ran a pizza restaurant on Hamilton Island, had an account with the second respondent, the Commonwealth Bank. Due to the 24-hour operation of the restaurant, the applicant often had appointments with bank employees outside of business hours. On such an occasion, she invited the first

respondent, a manager for the second respondent, to Hamilton Island to discuss such matters. The first respondent over the course of an evening insisted on massaging the applicant's neck, suggested that she become a 'madam', and then undressed and proposed intercourse.

The first respondent continued to call on the applicant uninvited and suggest that she pose for nude photographs. The applicant alleged that her refusal to do so led to an increase in reporting requirements imposed on her account, a refusal to grant an extension on payment of an overdraft and the granting of a loan that only partly covered that which the applicant needed.

The second respondent sought to avoid vicarious liability by arguing that all reasonable steps had been taken, but it was found that at this branch there had been a failure to follow those company policies without any resulting penalty.

The HREOC accepted that the complainant had been discriminated against on the basis of her sex and sexual harassment was found in respect of the only incident which had occurred after the commencement of s 22A. Vicarious liability attached and both respondents were ordered to apologise to the complainant and made liable for the payment of \$8,000 damages.

Commentary

“[I]n *Evans v Lee* Mrs Evans sought to hold the Commonwealth Bank vicariously liable for acts of sexual harassment and discrimination by one of its branch managers (Mr Lee) in the Whitsundays. The bank showed that it had an extensive policy aimed at preventing discrimination and particularly sexual harassment which included distribution of a code of conduct, a video and circular letters. The bank also showed that it required branch managers to discuss sexual harassment with their staff on a half yearly basis and that failure to do so was supposed to be brought up in regular audits of managers' performance. However the HREOC Inquiry Commissioner also accepted evidence that Mr Lee had never fulfilled his responsibilities by initiating discussion about sexual harassment at his branch; nor had any sexual harassment training been conducted at the branch and only one session on the code of conduct some time before. The Commissioner held that the bank was vicariously liable because it had failed in its duty to 'ensure that its policies are communicated effectively to its executive officers, and that they accept the responsibility for promulgating the policies and for advising of the remedial action when breached'. Furthermore, the policy was only directed at preventing harassment of staff, and did not expressly cover customers and other members of the public.” (Parker 1999, 167)

Vicarious liability

Sexual harassment is sometimes perpetrated by workers against a colleague. In these cases, an employer can be found to be legally responsible for acts of discrimination or harassment that occur in the workplace or in connection with a person's employment, referred to as vicarious liability. In order to avoid liability, employers need to demonstrate that they have taken all reasonable steps to prevent harassment from occurring and that they have responded appropriately to resolve incidents of harassment. A number of cases demonstrate this theme.

- *Moore v Brown and The Black Community Housing Service (Qld) Ltd* [1995] QADT 6 | [austlii](#)

Anti-Discrimination Tribunal of Queensland, Member Atkinson

The complainant, Ms Moore, was employed by the Black Community Housing Service for approximately seven years as the administrator. Mr Brown was a director of the company and its treasurer. During telephone calls with the complainant, he would tell her that he was in love with her or that he wanted her "junoo" (an Aboriginal term for vagina) and that they could make beautiful love. Frequently at work meetings he would ask her when he could sleep with her. Mr Brown gave various gifts to the complainant which she regarded as obscene and offensive. One was a wind-up toy of what appears to be a man in a black coat with an erect penis which rises as the figure walks when it is wound-up. The other was a small statue of a couple engaged in oral sex.

The Tribunal found that Mr Brown was acting as an agent of the company. As there was no evidence of any steps taken by the housing service to prevent Mr Brown from acting in the way in which he did, the defence given by s. 133(2) was not made out. The company was vicariously liable for his actions. At no stage did the housing services have an articulated policy on sexual harassment. There were no documents on the policy and no seminars nor any education given to staff that a policy was in existence. This was the case even though there had been an earlier complaint made by another woman against another man who worked there.

Commentary

Positive

“As *Moore v Brown* (a decision of the Queensland Anti-Discrimination Tribunal) shows, courts and tribunals will also accept evidence that an employer had no articulated policy on sexual harassment to hold them vicariously liable. The cases show that the tribunals will not be satisfied with evidence that there was a paper policy, but will examine both the terms of any policy and whether it was effectively implemented in deciding whether reasonable precautions have been taken.” (Parker 1999)

- *McKenna v State of Victoria* [1998] VADT 83 | [austlii](#)

Victorian Anti-Discrimination Tribunal, Members Wolters, Lanteri, McCallum

Summary

The proceedings concerned two complaints that were heard together. The first complaint was of discrimination on the grounds of sex and marital status against the first respondent. The second complaint was of sexual harassment and discrimination on the grounds of sex against the second respondent engaged in by him in the course of employment by the first respondent. The complainant was a senior constable with Victoria Police. She transferred stations and found the treatment of women very different in the new police station. Men would constantly tell demeaning sexual jokes

in her presence and would make “snide comments all over the place on a day to day basis about women and their role”, saying that a woman's place was in the home, the bedroom or the kitchen.

Asked whether women at the station could not avoid hearing the jokes, the complainant said that the jokes were not said when certain women were there and they were not said when women were there who were married to men at the station. The Tribunal was satisfied that the station provided a work environment where coarse language was common and that obscenities would have been part of that environment. The complainant said the second respondent, who was the officer in charge of the nightshift, “grabbed me around the waist and pulled me on to his lap, and then he put his arms around my chest and hugged me, and I broke free of his grasp virtually straight away, stood up and pushed him backwards off the chair and he and the chair went over backwards on to the floor.”

The Tribunal was satisfied that no reasonable precautions were taken by the first respondent to prevent employees contravening the Act. The Tribunal found in respect to a number of the allegations that the first respondent was vicariously liable for the actions of its relevant employees.

Commentary

“A major reason why Ms McKenna felt reluctant to make a complaint was the culture in the police force that discouraged the ‘dobbing’ in of colleagues. Her concerns were well founded in light of the victimisation and further harm that flowed from her subsequent complaint to an external body. Such a culture should be challenged from the top down. It is submitted that imposing a positive duty on employers to guard against sexual harassment would be a more effective way to facilitate this cultural change than through the current legislative arrangements. At least two reasons can be given. First, imposition of a duty is aimed at prevention of the problem, rather than dealing with complaints after the fact. Second, the onus is on those in power to make sure that harassment is not taking place, or that it is dealt with promptly if it does occur.” (Mackay 2009, pp. 214-215)

- Shiels v James & Lipman Pty Ltd [2000] FMCA 2 | [austlii](#)

Federal Magistrates’ Court of Australia, Raphael FM

Summary

The complainant, Ms Shiels, had obtained work through an employment agency as a temporary clerical assistant in a site office operated by Lipmans, the second respondent, on a construction site. Mr James, the first respondent, was the site manager and the second most senior employee on the site. The plaintiff was the only female worker on the site.

The plaintiff alleged that Mr James began by asking questions about the plaintiff’s relationship with another site worker with whom she shared a house and her social activities. The complainant said that the first respondent then daily made comments about the plaintiff’s underwear and other clothing, continuing for three months. He

then began to ask whether the plaintiff had ‘got any at the weekend’ and other similar inquiries on a regular basis. The plaintiff said that he had engaged in ‘extremely bad’ swearing and inappropriate touching of her breasts, shoulders and legs while the plaintiff was using the photocopier, at least two or three times a week. He also looked up her dress while underneath her desk and had a practice of flicking rubber bands at her, so that he could watch her reaction with other men and laugh.

The incidents were easily identified as sexual harassment. The second respondent, Lipmans, sought to escape vicarious liability by arguing that it had taken all reasonable steps to prevent the first respondent from engaging in sexual harassment by bringing evidence in respect of their anti-discrimination policy. However, the court found that the steps taken had not been sufficient. Both respondents were held liable and ordered to pay damages.

Per Raphael FM:

“The Court finds that the Second Respondent is unable to bring itself within the exception found in sub-section 2 to s.106 SDA for the following reasons:

1. That the Anti-Discrimination Policy, as good as it was, was not delivered to the Applicant or indeed any of the workers on the site until 28 November 1998 some six weeks after the Applicant had commenced work and some four weeks after the allegations of sexual harassment which the Applicant experienced from Mr James commenced.
 2. There was no explanation of an oral nature to any of the work people about the policy nor was its existence specifically drawn to any person's attention.
 3. The Applicant could have expected that her interests would be looked after in a more direct manner in the particular circumstances in which she found herself, a lone female on a building site.
 4. The persons who were nominated as contacts in the case of suspected sexual harassment were persons who were based in Sydney with whom she had little or no contact on an ordinary day-to-day basis.
 5. There is some evidence that Ms Shiels complained to Mr James about the incidents, but he, although a senior employee of the company, did not desist.”
- D v Berkeley Challenge Pty Ltd [2001] NSWADT 92

Administrative Decisions Tribunal of New South Wales, A Britton (Judicial Member), L Nemeth de Bikal and J Strickland (Lay Members)

Summary

The complainant was employed by the respondent (Plarinos) as a cleaner at a school. She alleged that she was sexually attacked by another employee of the respondent (Herrera) while at work. The complainant argued that her later transfer to another school as a relief cleaner and subsequent dismissal disadvantaged her and was an act of victimisation by the respondent. The complainant argued that the acts included Herrera shouting, swearing and threatening the complainant. On the last two occasions, he had threatened her and attacked her with a dildo or vibrator he had pushed in her face, although on later inspection this could not be found. The

complainant went to the police and was interviewed after the third incident on 29 June 1998. The Tribunal found on the basis of the complainant's evidence that Herrera's conduct constituted sexual harassment within the meaning of sec 22A of the Act.

The Tribunal took the view that Plarinos' failure to take action after hearing of the complainant's concerns amounted to inactivity and indifference. Although Plarinos separated the two employees, the evidence also revealed that the complainant was effectively demoted and placed on probation. The Tribunal also decided that it was not enough for the respondent, which sought to rely on the defence provided by s53(3) of the Act, to merely show that it had a policy discouraging sexual harassment. The policy should have been implemented properly in order for the defence to be successfully used. The tribunal awarded the complainant \$11,800 for economic loss and general damages for hurt, humiliation and injury to her feelings of \$15,000.

In considering the complainant's evidence, the Tribunal commented that there was little supporting evidence to support Mrs D's complaint, but that it does not automatically follow that it must reject her evidence concerning the alleged incidents on the basis that it was uncorroborated. They also noted in relation to an alleged incident of the complainant being chased by a 'dark man' prior to police arriving: 'The fact that she asserts that this happened does not necessarily prove that it did, but it is not so inherently implausible that one would dismiss the assertion out of hand. Rather, it is the reverse. Unless we were satisfied that Mrs D is a determined liar, there is no particular reason to reject that story. Even if we were suspicious of her, it would be wrong and imprudent to reject the story outright. At worst we could only find that the assertion was unsubstantiated'.

Moreover, in relation to the complainant's report to the police, the Tribunal considered: 'We have before us no reliable evidence as to why the police did not prosecute. It may be, as suggested by Mr Diamond, that the police did not accept the veracity of Mrs D's claim; it may be, that there was simply insufficient evidence to obtain a conviction applying the criminal standard of proof; it may be that the police investigation (of which we have no details) was inadequate. We simply do not know. At best, such evidence is a form of opinion evidence, offered on what basis we do not know, by whom we do not know, taking into account what evidence and criteria we do not know. The failure of the police to proceed to charge Mr Herrera, in our view, is irrelevant in these proceedings and can carry no weight at all in the assessment of Mrs D's credibility'.

Feminist commentary

'Sexual harassment as heterosex is rife against women in subordinate positions where a male boss exercises 'power over' them. A common scenario is that of a small business enterprise, such as a shop or restaurant, in which a young woman, often in her first job, is employed as a shop assistant, waiter, secretary or cleaner. The manager or sole proprietor is typically a middle-aged man who assumes that an unsophisticated young woman is fair game. He regards her personhood and autonomy as inferior to his and, in hiring her labour, he seems to assume that he can assert a right over her body. When she exercises her free will and rejects him, she may be victimised and downgraded. Of course, respondents in such cases know that they do not have possessory rights in the person of the employee and, if challenged, will

endeavour to rationalise the target's departure in terms of incompetence. Nevertheless, the respondents in such cases are frequently serial harassers.' (Thornton 2002, pp.427-428)

- *McAlister v SEQ Aboriginal Corporation and Anor* [2002] FMCA 109 | [austlii](#)

Federal Magistrates Court of Australia, Rimmer FM

Summary

The applicant was sexually discriminated against and sexually harassed by Mr Lamb whilst he was providing her with legal services as an employee of the Aboriginal Legal Services (ALS). The applicant complained that she attended the ALS to obtain assistance in getting the documents to make an application for a divorce. The applicant said that Mr Lamb was not at his office but later that day he came to her home and offered her the service on the condition that she have sex with him. She said she reported the incident to a local support worker and also to the police.

The Court found the applicant's complaint of sexual harassment against Mr Lamb substantiated. It further found that giving out a divorce application form was a legal service provided in connection with the employment of Mr Lamb, and that this fulfilled the requirement under s 106(1) for a finding of vicariously liable on the part of ALS for Mr Lamb's unlawful conduct. The Court held, however, that the employer must take all reasonable steps to prevent the harassment complained of from occurring, but that it is not necessary to take every step possible to ensure that it does not occur. The ALS had taken all reasonable steps and thus established a defence under [s 106\(2\)](#) and was found not to be vicariously liable for the conduct of Mr Lamb.

Feminist commentary

"[C]ourts have also acknowledged that the reasonable steps defence does not establish a blanket standard required across all employers, but is variable; being moulded by such factors as the size of the employer." (Hely 2008, p.200)

- *Howard v Geradin Pty Ltd Trading as Harvard Securities* [2004] VCAT 1518 | [austlii](#)

Victorian Civil and Administrative Tribunal, Member Davis

Summary

The complainant was employed by the company as an investment portfolio manager. The complainant alleged sexual harassment by a co-worker, Mr Lewis, during the period of the complainant's employment with the first respondent, Geradin Pty Ltd and vicarious liability of the company. The complainant alleged that, at various times during the period of the complainant's employment with the company, Mr Lewis made remarks to the complainant about her body such as "put them away" and "nice legs". She also alleged that Mr Lewis wrote the message "show us your tits" on paper and placed the paper on the complainant's desk so that she would see and read it.

The complainant alleged that the company failed to take reasonable precautions to prevent Mr Lewis from carrying out the acts of sexual harassment, that it victimised the complainant by involving her in discussions as to what should happen to Mr Lewis; and by asking her whether she wanted the company to sack him. Finally, she alleged that the company was aware that Mr Lewis had previously harassed female employees in the company and had done nothing to prevent such behaviour.

The Tribunal held that the company had a sexual harassment policy, informed all employees of the policy, implemented the policy, and provided some feedback to staff on a regular but informal basis concerning issues relating to sexual harassment. Thus, the company made out a complete defence to the complaint and the complaint against it was dismissed. The Tribunal commented, however, “[i]t might have been desirable for the company to hold formal and regular meetings or seminars for its staff to update them in a formal manner on matters relating to the company's sexual harassment policy. However, the test to be satisfied is whether the precautions taken were reasonable, rather than ideal. I consider in the circumstances of this case that the company took reasonable steps to prevent the contraventions of the Act that occurred.” (para 58)

Feminist commentary

Negative

“In the case of lewd conduct on the part of co-workers, all tribunals have not been as quick as Mansfield J in *Poniatowska* to find sexual harassment, especially if the respondent has a sexual harassment policy in place [*see Howard v Geradin Pty Ltd*].” (Thornton 2010)

- South Pacific Resort Hotels v Trainor [2005] FCAFC 130 | [austlii](#)

Federal Court of Australia, Black CJ, Tamberlin and Kiefel JJ

Summary

This was appeal from a decision of Coker FM which raised issues about the application of the [Sex Discrimination Act 1984](#) (Cth) to the territory of Norfolk Island; the circumstances in which an employer is vicariously liable for acts of sexual harassment committed by its employee; and the assessment of damages by way of compensation for loss and damage suffered because of sexual harassment.

Coker FM found that sexual harassment had occurred on two occasions, each of them at night and each in Ms Trainor's room in staff accommodation provided by the appellant as part of its hotel complex on Norfolk Island. Ms Trainor was asleep in her room when Mr Anderson entered uninvited, thereby waking her, and began talking to her. Ms Trainor's evidence was that Mr Anderson remained in her room, uninvited and unwelcome, until about 3:45 am. During that time he engaged in unwelcome conduct described by the Federal Magistrate as “sexual advances or requests for sexual favours or conduct of a sexual nature”. Ms Trainor was harassed on a second occasion which occurred at night in the staff accommodation. Ms Trainor found Mr Anderson lying on her bed. Mr Anderson was subsequently arrested by police and

removed from the premises, his employment was terminated and he was removed from Norfolk Island. Ms Trainor resigned from her employment and left Norfolk Island.

The Federal Magistrate found that Ms Trainor had been sexually harassed on two occasions by Mr Anderson, that the harassment had occurred in the course of employment and that the appellant, South Pacific Resort Hotels, was vicariously liable. Ms Trainor was awarded \$17,536 in damages and costs.

The respondent appealed the decision, claiming that it was not vicariously liable because the conduct in question was not performed 'in connection with the employment' (s.106(1)). Ms Trainor cross-appealed against the award of damages, contending that the award was inadequate and against the weight of the evidence.

The Court dismissed the appeal of South Pacific Resort Hotels and the respondent's cross-appeal.

Per Black CJ and Tamberlin J

'We would add that the expression chosen by the Parliament to impose vicarious liability for sexual harassment would seem, on its face, to be somewhat wider than the familiar expression 'in the course of' used with reference to employment in cases about vicarious liability at common law or in the distinctive context of workers compensation statutes. Nevertheless cases decided in these other fields can have, at best, only limited value in the quite different context of the SDA'. (para 42)

Per Kiefel J

'In my view no narrow approach to the operation of s 106(1) is warranted. It is consonant with its purpose to read the words "in connection with the employment of the employee" as requiring that the unlawful acts in question be in some way related to or associated with the employment. Once this is established it is for the employer to show that all reasonable steps were taken to prevent the conduct occurring, if they are to escape liability under s 106(2). In this way, the aim of the SDA, to eliminate sexual harassment in the workplace, might be achieved.' (para 70)

Feminist commentary

Neutral

"[T]here has been an increased blurring of the relevant factors taken into consideration in employment law and sexual harassment law in assessing the nexus requirement. In particular, as noted earlier, each of the Australian federal decisions on vicarious liability for off-duty sexual harassment had regard to employment law jurisprudence, particularly by noting that the relevant sexual harassment had the capacity to adversely impact on the working environment [*see especially South Pacific Hotels v Trainor; Lee v Smith; Leslie v Graham*]." (Hely 2008, p.196)

"Kiefel J applied the reasoning in both *Robichaud* and *Tower Boot* to support her conclusion that tort principles of common law were not appropriate to the issue of

vicarious liability for sexual harassment under s 106(1) of *the Sex Discrimination Act 1984* (Cth) ('SDA'). The joint judgment of Black CJ and Tamberlin J adopted a similar approach, concluding that cases decided under common law principles 'can have, at best, only limited value in the quite different context of the SDA. '(Hely 2008, p.175)

Remedies

In discrimination law, remedies for sexual harassment include monetary damages (special and general), apologies and injunctions such as workplace education or requirements that a harasser be removed or transferred. Potential remedies do not differ if a matter is resolved through conciliation or is heard before a court. However, as many cases are resolved through conciliation, the nature and size of the damages awarded are often confidential.

Special damages may be awarded for economic loss, such as lost income or wages and general damages for humiliation, hurt and injury to feelings. Damages are compensatory, so punitive and exemplary damages may not be awarded. The calculation of damages is assessed with reference to the effect of the conduct on the complainant. However, in some cases, decision makers have found sexual harassment to have occurred but have refused to award damages. Costs may be awarded in some jurisdictions.

When damages are awarded, the size and nature of the award has often been a source of critique by feminists. The size of the award of damages in sexual harassment cases in Australia have, with few exceptions, been much lower than in other countries, notably the United States. In some jurisdictions, there is a cap on the award of damages. While a few cases established new benchmarks for damages awards, the average amount has remained low. The following cases demonstrate these themes.

- McKenna v State of Victoria [1998] VADT 83 | [austlii](#)

Victorian Anti-Discrimination Tribunal, Members Wolters, Lanteri, McCallum

Summary

The proceedings concerned two complaints that were heard together. The first complaint was of discrimination on the grounds of sex and marital status against the first respondent, the State of Victoria. The second complaint was of sexual harassment and discrimination on the grounds of sex against the second respondent, Mansfield, engaged in by him in the course of employment by the first respondent. The complainant also alleged victimisation against the first respondent and two further respondents, Fyfe and Arnold.

The complainant was a senior constable with Victoria Police. She transferred to Bairnsdale police station and found the treatment of women very different to her experience in her previous location. Men would constantly tell demeaning sexual jokes in her presence and would make “snide comments all over the place on a day to day basis about women and their role”, saying that a woman's place was in the home, the bedroom or the kitchen.

There were three alleged acts of sexual harassment. Two involved another police officer, Mansfield, pulling Ms McKenna onto his lap and saying 'how about a head job?'. The third incident involved Ms McKenna being grabbed and pulled towards a holding cell, followed by an attempt to lock her in the cell.

Asked whether women at the station could not avoid hearing the jokes, the complainant said that the jokes were not said when certain women were there and they were not said when women were there who were married to men at the station. The Tribunal was satisfied that the station provided a work environment where coarse language was common and that obscenities would have been part of that environment. The complainant said the second respondent, who was the officer in charge of the nightshift, "grabbed me around the waist and pulled me on to his lap, and then he put his arms around my chest and hugged me, and I broke free of his grasp virtually straight away, stood up and pushed him backwards off the chair and he and the chair went over backwards on to the floor."

The complainant alleged that her work performance and attitude had been criticised in a degrading manner, that she was denied access to training otherwise available to the male officers, denied access to special duties, was recommended for disciplinary action in relation to an off-duty sports game, her personal address was disclosed to an ex-partner and inaccurate and derogatory comments were made about her.

Constable McKenna sought a transfer to another station and after two years was transferred. She had periods of sick leave resulting from the stress she was experiencing, had ongoing medical attention and obtained counselling from a psychologist after attempting suicide. She said she had a breakdown, her self esteem was affected, she had difficulties with sleep, eating and doing other normal activities and suffered anxiety attacks.

The Tribunal found that the complainant had been discriminated against on the basis of her sex. It found that Mansfield's conduct reasonably induced in the mind of the complainant that her employment was dependent on the acceptance of his sexual advances. It was satisfied that no reasonable precautions were taken by the first respondent to prevent employees contravening the Act. The Tribunal found in respect to a number of the allegations that the first respondent was vicariously liable for the actions of its relevant employees.

The Tribunal found that the Victoria Police and three of its employees had been responsible for sexual harassment by Mansfield as well as sex and marital discrimination. It awarded Constable McKenna \$125,000 in general damages (for hurt feelings, distress and psychological illness), setting a new benchmark in damages for sexual harassment. It found the first respondent vicariously liable for the actions of the second, third and fourth respondents who it found to be jointly and severally liable for the payment of the damages with the first respondent.

It also found that Constable McKenna was subjected to bullying by senior officers once she had made complaints about the sexualised environment of the police force. The award of damages went to pain and suffering, rather than lost wages.

The State of Victoria and police officers concerned appealed the decision to the Supreme Court of Victoria, on 54 grounds; the appeal was dismissed.

Commentary

“A major reason why Ms McKenna felt reluctant to make a complaint was the culture in the police force that discouraged the ‘dobbing’ in of colleagues. Her concerns were well founded in light of the victimisation and further harm that flowed from her subsequent complaint to an external body. Such a culture should be challenged from the top down. It is submitted that imposing a positive duty on employers to guard against sexual harassment would be a more effective way to facilitate this cultural change than through the current legislative arrangements. At least two reasons can be given. First, imposition of a duty is aimed at prevention of the problem, rather than dealing with complaints after the fact. Second, the onus is on those in power to make sure that harassment is not taking place, or that it is dealt with promptly if it does occur.” (Mackay 2009, pp. 214-215)

- Gilroy v Angelov [2000] FCA 1775 | [austlii](#)

Federal Court of Australia, Wilcox J

Summary

The applicant, Leoni Gilroy, was subjected to sexual harassment by a fellow employee, Branko Angelov, the first respondent, over a period of three weeks while she worked as a cleaner for the second respondent, Botting Co. Ms Gilroy said that various incidents occurred, beginning with sexual comments made by Mr Angelov on her first day of work and that virtually every subsequent day, early in the shift, he would ask her: "Are you horny today?" She said that she did not take any action at this time as she needed the money the employment offered.

The plaintiff also said that she was physically attacked, including when the first respondent groped her and then made sexual thrusting movements on her backside whilst in a storeroom. The applicant said that when she informed the first respondent this was sexual harassment, he replied: "If you report me, I will come to your house and rape your daughter. My friend will hold you down while you watch then it will be my turn and I will rape you." She also said that on a later occasion, the first respondent exposed his penis to her while she was cleaning in an isolated part of the building.

The applicant said that when she first informed her employer, Mr Botting, of the harassment, he said that it was the first respondent's 'sense of humour' and that she should not feel threatened. However, she continued to refuse to be left alone with the first respondent when ordered to by Mr Botting. She also said that Mr Botting had witnessed the first respondent yelling at her and placing uncleaned ashtrays under her nose and that she had been a witness to sexual comments made by Mr Botting to Mr Angelov about her and another female employee.

Following the exposure incident, she informed Mr Botting of the extent of the harassment, and this conversation was witnessed by his wife, Mrs Botting. The

plaintiff was subsequently fired from her position because Mrs Botting mistakenly believed that Mr Botting and the plaintiff were having an affair.

Botting Co sought to escape liability on the basis that it had taken all reasonable steps to prevent the sexual harassment. The court rejected this argument and it was found liable for Ms Gilroy's harassment.

Per Wilox J:

“In *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72; (1989) 20 FCR 217 at 256, I observed that "the task of determining the appropriate level of damages in a case of sex discrimination or sexual harassment is not an easy one". I went on to make some comments which I venture to repeat:

"Where it appears that a claimant has incurred particular expenditure or lost particular income as a result of the relevant conduct, that economic loss may readily be calculated. But damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation. The assessor of damages must make a judgment as to an appropriate figure to be allowed in respect of these figures. But to say this is not to denigrate the importance of such non-economic factors in the assessment of damages. It may be unfortunate that the law knows no other way of recognising, and compensating for, such damage; but this is the fact. To ignore such items of damage simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit an injustice upon a complainant by failing to grant relief in respect of a proved item of damage.”

- Williams v Robinson [2000] HREOCA 42 | [austlii](#)

Human Rights and Equal Opportunity Commission, Commissioner Nader QC

Summary

The complainant, Katherine Williams, was sexually harassed by the first respondent, Colin Robinson, while employed in the RAAF by the second respondent, the Australian Defence Force. Ms Williams gave evidence about an incident of sexual harassment which had occurred in 1985, eleven years before the events that were the subject of the inquiry, in which she had been sexually assaulted in her sleep by two men. The assailants were identified, fined and suffered loss of seniority, not for the offence of sexually or indecently assaulting Ms Williams, but for being in the accommodation block with alcohol. The plaintiff's perception that the offenders had not been dealt with appropriately was to be a factor aggravating the deleterious effect of the subsequent assaults upon her. The incidents that formed the subject of the inquiry concerned Mr Robinson, a sergeant and Ms Williams' direct supervisor during 1996. Ms Williams alleged that on two occasions he had grabbed her and held her to his body. These two assaults had a profound effect on her: Ms Williams said she felt embarrassed, ashamed, confused and angry.

Evidence was accepted that when the plaintiff attempted to notify a superior, Corporal Croft, of the incidents, he responded: 'Oh really?' Following her complaint, the

defendant was instructed to provide a written apology to the plaintiff and he did so. However, no formal investigation was undertaken.

Ms Williams found the environment of working at RAAF so intolerable that she resigned.

The Tribunal found the complaint of sexual harassment by the first respondent substantiated. It concluded that the RAAF had not taken all reasonable steps to prevent members of the RAAF, including Robinson from acting in this way and that it was therefore vicariously liable for the actions of Robinson. It awarded damages for which the first and second respondent were liable jointly and severally. The Tribunal ordered general damages of \$30,000 for emotional pain, humiliation and embarrassment suffered by Williams. It also found that she had suffered to such an extent that she would be unable to pursue her desire of a career in the RAAF. It assessed her economic loss, past and future at \$100,000.

Per Nader QC

“The conduct of the RAAF, through the agency of the officers who dealt with Williams, after she had made her complaint was unsatisfactory. I have already said that apart from the “in-house investigation” upon which I have just commented, there was no formal investigation.”

“This evidence establishes that sexual harassment had for some time been a problem in the RAAF. Against that background, strong measures were required to prevent members from sexually harassing other members.”

“Therefore, in addition to the emotional pain, humiliation, embarrassment and other negative emotions suffered by Williams in the circumstances of and following Robinson’s harassment of her, she also lost the chance to fulfil her desire to follow a career in the RAAF. These are not slight matters, and may be said to have blighted her life to a considerable extent. They are the matters for which general damages are awarded.”

“A claim for aggravated damages was made by analogy with the circumstances in which aggravated damages are awarded in defamation cases, with reference made to the benefits that would have been brought by a proper investigation and an early apology by the RAAF. It was also noted that the defence run by the RAAF in the Inquiry had been without merit and was potentially an aggravator of damage. It was noted that these matters can be adequately addressed by way of general damages.”

“Nevertheless, it is likely that having left the RAAF, Williams would in any event have suffered considerable loss of income for a number of reasons.”

- Font v Paspaley Pearls and Others [2002] FMCA 142 | [austlii](#)

Federal Magistrates Court of Australia, Raphael FM

Summary

The applicant was employed by the first respondent as a sales person in a prestigious car showroom. She claimed that during the course of her employment she was a victim of sexual harassment, sex discrimination and victimisation, for which the first respondent was vicariously liable for the second and third respondents Brian Purkis and Simone Tropiano. The former was the first respondent's retail manager for Australia whose office was at the showroom in Sydney; the latter was the manager of the Sydney showroom.

The applicant said that the second respondent made unwelcome remarks as well as certain physical actions. She said Mr Purkis made comments about her appearance. On one occasion she leaned forward in order to write down a telephone message. She felt a hard jab between her legs in her vagina. She turned around and saw the second respondent standing behind her holding a Carrera walking stick in his hand, laughing. The applicant said that she was forced to terminate her employment with the first respondent as a result of the actions of the second and third respondents. Her claim of victimisation related to the failure of the first respondent to pay the applicant a Christmas bonus which she alleged was paid to other members of staff.

The Court held that the fact that the applicant did not complain about the conduct of Mr Purkis did not mean in itself that it did not occur. In an employment situation, where the applicant is subjected to low level harassment over a period of time, a failure to complain is not unusual. The Court found that Mr Purkis's homosexuality and lack of sexual interest in the complainant did not give him the "defence of homosexuality". Under the *Sex Discrimination Act* a person need not actually intend to offend for his or her conduct to amount to sexual harassment.

The Court found the applicant had been sexually harassed and that the first and second respondents were responsible. It rejected the claim of victimisation. It awarded \$100,000 in general damages and \$7,500 in exemplary damages.

Feminist commentary

Neutral

‘Punitive (or ‘exemplary’) damages are awarded for ‘reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation,’ and have not been a particular characteristic of Australian sexual harassment matters to date. However, the nature of the award has been commented on in a small number of harassment matters and an amount in punitive damages was actually awarded in one case—*Font v Paspaley Pearls* [2002] FMCA 142. Federal Magistrate Raphael awarded \$7500 in exemplary damages, explaining that while the complainant had claimed aggravated damages:

“The Federal Magistrates Court is not a court of strict pleading. ... I do not think that the fact that the conduct which is complained of was described as entitling the applicant to aggravated damages, when in fact a proper description would have included exemplary damages, should prevent the applicant from recovering (at 166).”

However, in the matter of *Frith v The Exchange Hotel Rimmer FM* stated that:

“... it seems clear that the Court does not have power to make an award for exemplary damages in any event, and I respectfully disagree with Raphael FM’s conclusion in *Font v Paspaley Pearls* (2002) FMCA 142 that such a power exists.” (Easteal et al 2011, p. 233).

- *Frith v The Exchange Hotel & Anor* [2005] FMCA 402 | [austlii](#)

Federal Magistrates Court of Australia, Rimmer FM

Summary

The complainant was employed at a hotel. She complained of sexual harassment by the second respondent, the sole director of the company trading as the Exchange Hotel over the course of her two day employment. She alleged that the second respondent had forced her to have sexual intercourse with him a precondition of her employment.

Liability was found against both respondents. The Exchange Hotel was described by Rimmer FM as the ‘alter ego’ of the second respondent and there was therefore no difficulty in relating the acts of the second respondent and the acts and behaviour of the hotel itself. Federal Magistrate Rimmer found that the events had had a significant and negative impact on the complainant. General damages and damages in respect of loss of income were awarded.

- *Lang v Nutt* [2004] QADT 37 | [austlii](#)

Queensland Anti-Discrimination Tribunal, Member Roney

Summary

The complainant sought financial compensation and an apology for sexual harassment she suffered at the hands of the respondent, the general manager, whilst employed as a marketing assistant with the Palm Beach Surf Lifesaving Club. The sexual harassment included subjecting the complainant to demands for sexual favours; making remarks with sexual connotations to her; and kissing her on the lips and head.

The Tribunal found the complaints were substantiated. Member Roney held that “[a]lthough there may have been a level of sexual banter and innuendo engaged in by both the complainant and the respondent, none of that conduct amounted to solicitation or encouragement of Nutt, in any legitimate way, for his conduct toward the complainant. It would have been obvious to him that his advances were unwelcome and that he was attempting to use a position of influence over her to persuade her to engage in consensual sexual activity with him.” (para 27)

The Tribunal ordered payment of damages totaling \$40,505, less refunds due to Workcover or Centrelink. This was made up of general damages for offence, embarrassment, humiliation and intimidation totaling \$15,000, plus interest, and economic damages for loss of income of \$24,700.

Commentary

“[W]here there has been acknowledgement of conduct without an admission of wrongdoing, it has been concluded that an ordered apology would serve no useful purpose [see *Lang v Nutt*].” (Carroll 2010, p.373)

- Lee v Smith (No 2) [2007] FMCA 1092 | [austlii](#)

Federal Magistrates Court, Connolly FM

Summary

Ms Lee was employed as an administrative officer by the Department of Defence at the Cairns naval base. She made a complaint of sexual assault, sexual discrimination, harassment and victimisation engaged in by three officers during the course of her employment, including unwanted touching, sexual advances, comments and messages, displays of pornography, threats, verbal abuse, bullying and intimidation. The threats, abuse, bullying and intimidation coincided with Lee making a complaint to a colleague about the behaviour. The rape occurred following a social event held by a colleague. The Department argued that it had taken all reasonable steps to prevent the assault from occurring, and that it should not be held vicariously liable for the assault.

Connolly FM rejected the department’s argument that it had taken all reasonable steps to prevent the sexual harassment from occurring and found that it took no action to deal with the sexual assault despite being aware of the allegation. He accepted evidence from Ms Lee that she suffered post-traumatic stress disorder and depression, was unemployed, and suffered serious damage to her personal relationships.

In a separate judgment, Connolly FM made an order that the Department and the three male officers pay to Lee damages in excess of \$400,000 plus costs for the unlawful sexual harassment and assault. He also ordered that the federal government re-employ Lee in a different department.

Per Connolly FM

‘In determining the issue of the application of s106(1) of the *Sex Discrimination Act 1984* (Cth) to the incident of rape, I am satisfied that particular regard should be given to the factors I have previously indicated—that the rape was the culmination of the earlier incidents of sexual harassment directly in the workplace. Consequently I accept the submissions of the Applicant’s counsel that the First Respondent’s conduct was an extension or continuation of his pattern of behaviour that had started and continued to develop in the workplace he shared with the Applicant. The nexus with the workplace was not broken.’ (para 206)

Feminist commentary

Negative

‘Even in the recent case of *Lee v Smith & Ors* [2007] FMCA 59 in which the complainant in her Defence job endured ongoing incidents of workplace sexual harassment (such as the passing of offensive notes, discussion of sexually explicit

topics and incidents of indecent touching) and was ultimately raped by a colleague, she was awarded general and special damages in the amount of \$387,422.32 which is remarkably small when considered in light of the DJs case [see *Fraser-Kirk v David Jones Limited* [2010] FCA 1060 below]. Unlike the DJs matter though, Lee's case was pursued solely under the legislative provisions of the SDA and punitive damages were not sought.

Interestingly, despite the extreme severity of the workplace assault in comparison to that complained of in the DJs matter, the public and media did not embrace Lee's case as being interesting in the way that the DJs matter has been regarded. Perhaps this highlights the effectiveness of Fraser-Kirk's punitive damages claim as '... a way to drive home the point, hard, that corporations are responsible for safe workplaces and need to take sexual harassment seriously.' (Easteal 2007, p. 234)

- *Poniatowska v Hickinbotham* [2009] FCA 680 | [austlii](#)

Federal Court of Australia, Mansfield J

Note appeal decision below

Summary

Ms Poniatowska was employed as a building consultant by Employment Services Australia to sell house and land packages on behalf of Hickinbotham Homes Pty Ltd. Ms Poniatowska made complaints to management claiming that she had been subjected to sexual harassment. She was issued with a series of formal warning notices and ultimately terminated for 'unsatisfactory performance'. After an unsuccessful conciliation at the Industrial Relations Commission of South Australia, she made a complaint to the Human Rights and Equal Opportunity Commission of sexual discrimination, racial discrimination and sexual harassment. The allegations of sexual harassment included that:

- The chairman of Hickinbotham Group had told her that she had 'two good assets' while staring at her breasts;
- She had received a number of inappropriate emails from a co-worker, Mr Flynn, inviting her to have a sexual relationship, which humiliated and shocked her. When she reported this to her team leader, she had been told, 'what do you expect with a face like yours?';
- She was rostered to work with another employee, Mr Lolito, even though she had specifically requested that she not work with him and he subsequently sent her a pornographic message and invitations for sex;
- Her team leader had requested that she enter into a sexual relationship to advance a deal for the group; and
- The managing director had kissed her on the mouth at a work function.

The Human Rights and Equal Opportunity Commission found that the dispute was unlikely to be successfully conciliated. Ms Poniatowska applied to the Federal Court to hear the matter. Mansfield J found that the majority of incidents alleged had taken place, although he did not uphold the allegations in relation to the harassment by the Chairman or Managing Director, nor that her team leader had asked her to enter into a

sexual relationship to further a deal. He did find that Mr Flynn and Mr Lolito had harassed her and that the company did not respond adequately.

The court held that the termination of her employment was related to the incidents, not the quality of her work. It ordered that \$466,000 be paid by the employer to Ms Poniatowska as damages for unlawful discrimination. It also ordered that the Hickinbotham Group could apply for an order that some or all of the compensation be paid by the employees involved in the harassment.

- Employment Services Australia Pty Ltd v Poniatowska [2010] FCAFC 92 | [austlii](#)

Federal Court of Australia, Full Court, Dowsett, Stone & Bennett JJ

Summary

Employment Services Australia appealed the decision challenging a number of the factual findings as well as legal findings. Ms Poniatowska cross-appealed. Both appeals were dismissed with costs.

Commentary

“*Poniatowska v Hickinbotham* is thought to involve one of the highest awards of damages for claims of this nature ever awarded.” (Catanzariti 2009, p.43)

- Fraser-Kirk v David Jones Limited [2010] FCA 1060 | [austlii](#)

Federal Court of Australia, Flick J

Summary

Ms Fraser-Kirk was employed by David Jones Ltd as a publicist. She claimed damages in tort, contract, equity and trade practices for sexual harassment against her employer and the CEO and Director, Mark McInnes. Fraser-Kirk claimed that McInnes had made a series of unwelcome sexual advances and other interactions towards her. She alleged that the senior management and members of the board were aware of previous allegations of sexual harassment against McInnes, but had failed to do anything about it. Ms Fraser-Kirk sued her employer, Mr McInnes and a number of senior executives of the company. She also made a complaint to the Human Rights and Equal Opportunity Commission of sexual harassment. The case received extensive media attention, during which McInnes resigned.

The approach taken by Fraser-Kirk to a sexual harassment claim was particularly innovative. She alleged that David Jones had breached the Trade Practices Act because it had engaged in misleading and deceptive conduct in her initial employment interview about the work culture and employment conditions she could expect at David Jones and that there were written policies which indicated that the organization did not tolerate harassment, discrimination or bullying.

Fraser-Kirk sought both compensatory and punitive damages against David Jones and McInnes. She sought compensatory damages for general humiliation, distress and

anxiety, loss of opportunity for promotion and advancement in her chosen career and medical expenses. She also sought punitive damages against David Jones of \$35 million, or 5% of David Jones' profit while McInnes was Chief Executive, and against McInnes of 5% of his remuneration and benefits for the period he was employed, estimated at \$2 million.

The case was settled by David Jones and McInnes for an amount of \$850,000 inclusive of all legal costs.

Feminist commentary

Positive

'In the DJs matter the FCA was able to utilise its powers of accrued jurisdiction to also hear the claims under tort, contract and equity laws which would otherwise normally have been heard at state level. This was strategically important because the FCA is jurisdictionally able to enjoy a high degree of flexibility in awarding damages of a significant quantum.

The tortious component of the claim, while risky, was perhaps the most important tactically. This was because it paved the way for the possible award of punitive damages for breach of the employer's duty of care. It was 'risky' because the amount sought might be perceived by both the court and the media as egregious overreaching. Just as importantly, it was risky because on the facts in the DJs matter, some of the alleged harassment incidents took place at work functions which were held away from the workplace or were text messages which were sent to the complainant while she was at home.

Had the claim been drafted under the traditional SDA provisions, precedent suggests that a broad interpretation of the legislative provisions would have been afforded as in *South Pacific Resort Hotels v Trainor* (2005) FCAFC 130. However Hely reminds us that at common law the same generosity in identifying vicarious liability is not extended:

the employer is liable only to the extent that the employee is acting within the scope of his or her authority and is performing employment duties or is otherwise performing acts incidental to the performance of those duties.

Therefore, on the facts, the 'safer' option may have been to rely on precedent under the legislative provisions of the SDA, although the possibility of a punitive damages award – in addition to loss and damage for offence, humiliation, distress, anxiety and loss of reputation – was an important consideration here" (Easteal et al 2011, p.232).

'The DJs case shows that lawyers can certainly try to use the media as a de facto tribunal in an attempt to gain a more successful result for their clients. However, this method is unpredictable, with the media using its own techniques to examine the credibility of the complainant. The dangers of inaccuracy and being misunderstood must not be underestimated. And, trial by media may backfire when the matter reaches Court. In the preliminary hearing, Flick J warned that 'care should be exercised ... not to make statements which were more in the nature of a media release

than a submission which provided genuine assistance to the Court'. He is reported as commenting that McInnes was being subject to 'a pretty rough form of justice' and raised the prospect of striking out parts of the claim as they appeared to be an 'abuse of the process of the court'. Therefore, what is persuasive in the court of public opinion may not be so convincing to judges.

These caveats notwithstanding, the size of the claim for damages in the DJs case is extraordinary when considered against the backdrop of sexual harassment claims generally in Australian legal history.' (Easteal et al 2011, p.234).

- Cooper v Western Area Local Health Network [2012] NSWADT 39 | [austlii](#)

New South Wales Administrative Decisions Tribunal, J Needham SC (Deputy President), N Hiffernan and J McClelland (Non-Judicial Members)

Summary

The complainant, Ms Cooper, was sexually harassed when a co-worker, Mr Locke, handed her a document that contained graphic descriptions of sexual acts. Both the complainant and Mr Locke were employed by the Western New South Wales Local Area Health Network. They had worked together for about five years and occasionally socialised together. During an off-site work training course, Mr Locke handed the complainant a folded piece of paper. She did not read it until after she returned to her hotel room, but then discovered that it contained extremely explicit sexual material. It did not identify any names, nor state that it was clearly intended for her. She claimed that Mr Locke did not warn her in any way that the contents were sexually explicit. The complainant said that reading the document made her feel physically ill. She rang Mr Locke and said she was disgusted and horrified by it. Ms Cooper reported the matter to the police next day and then reported the matter to her supervisor.

The Tribunal found that Mr Locke's conduct amounted to sexual harassment, but that the employer had taken sufficient steps to prevent sexual harassment at the workplace, which meant that it was not vicariously liable for his conduct.

Per J Needham SC (Deputy President), N Hiffernan and J McClelland (Non-Judicial Members)

'... provision of the note, with its graphic descriptions of sexual acts in very explicit sexual language, must fall within the description of "conduct of a sexual nature". To say that the "conduct" was merely the giving of a letter misses the point that human beings who can read must, having read the note, have some understanding of its sexual content. Ms Cooper gave evidence that she was shocked and disturbed by the contents. We find that the provision of the note to Ms Cooper was "conduct of a sexual nature". ... Even had Mr Locke warned her that it was "graphic", which we have found he did not, the terms of the note are so graphic as to be objectively highly offensive.'

'... the proper approach is not to trawl through the cases to find one with similar facts and to set an amount of damages in a similar range, without references to the specific

circumstances of this case. Reference to other cases can be useful for the assistance they provide in demonstrating the kinds of damages awarded for breaches of the Act ... However [they do not] provide a binding authority on this Tribunal as to the proper amount of damages. Factors which would inform the level of damages include the severity of the breach, the fact that it was a one-off incident, the context of the incident (at work, within a friendly co-worker relationship) and the significance of the ongoing effects of the conduct. In our view, while distressing and upsetting for the applicant, the incident does not command damages in the higher range. It happened once, was not an incident which was intended to upset her (despite the probability, given the nature of the document, that it would do so), and was dealt with by the employer in a way which finalised the impact on Ms Cooper. The psychologist's report does not reveal any ongoing issues. Given that the maximum damages that may be awarded is \$100,000, presumably for the worst offences, we consider that an award of \$10,000 is appropriate in this case.'

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