WENDY DAVIS

A FEMINIST PERSPECTIVE ON SEXUAL HARASSMENT IN EMPLOYMENT LAW IN NEW ZEALAND

LLM RESEARCH PAPER
FAMILY LAW (LAWS 513)

LAW FACULTY
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CONTENTS

ABSTRACT

This research paper describes and discusses, from a feminist perspective, the sexual harassment provisions of the Employment Contracts Act 1991 (and the Labour Relations Act 1987) and analyses the cases in which those provisions have been applied by the employment institutions. The main thesis of this paper is that gender bias has affected the application of those provisions and has undermined the effectiveness of sexual harassment law. The paper begins with a brief description of the feminist framework within which the sexual harassment provisions of the Employment Contracts Act are later analysed and notes the differences between traditional methods of legal decision making and feminist legal method. In Part II of the paper the writer describes how sexual harassment harms women and how the law recognises that harm as a legal injury. The writer also summarises some of the social and legal myths about women and sexual behaviour, and notes that women's and men's perspectives about sex are different.

Part III of the paper describes the development of sexual harassment law as part of New Zealand employment law and summarises the positive aspects of those provisions with reference to the objects of sexual harassment law, the law in some other jurisdictions, and the sex discrimination provisions contained in the Human Rights Commission Act 1977. The writer concludes that, from a feminist perspective, the sexual harassment provisions in the Employment Contracts Act are the best in the world. Part IV of the paper develops the thesis that the effectiveness of these provisions has been undermined by gender bias in the application of those provisions in particular cases. This thesis is developed through an analysis of the way in which gender bias has influenced the exercise of legal discretion by decision makers in sexual harassment cases. The discretionary tools analysed include the granting of remedies, application of the rules of evidence, interpretation of particular words and phrases in the legislation, and the importation of irrelevant factors into the decision making process.

The paper concludes with some suggestions for legal and other reforms.

The text of this paper (excluding contents page, notes and acknowledgements, footnotes, bibliography and annexures) comprises approximately 30,000 words.

NOTE ON ABBREVIATIONS

A Books, Articles and Reports

Full references to material referred to in this research paper are contained in the bibliography. The following abbreviations are used in the text:

Aggarwal	A P Aggarwal *Sexual Harassment in the Workplace* (2 ed, Butterworths, Toronto, 1992)
Backhouse	C Backhouse "*Bell v The Flaming Steer Steak House Tavern*: Canada's First Sexual Harassment Decision" (1981) 19 UWOntLR 141
Blackwood	E M Blackwood "The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity" (1992) 16 Vermont LR 1005
Colbert	A Colbert *Dealing With Sexual Harassment. A New Zealand Handbook for Employers/Employees, Students and Educators* (GP, Wellington, 1989)
Coleman "Trade Union Perspective"	M Coleman "A Trade Union Perspective on Sexual Harassment" (1988) NZJIR 195
Cross 3ed	D L Mathieson *Cross on Evidence* (3 ed, Butterworths, Wellington, 1979)
Cross 4 ed	D L Mathieson *Cross on Evidence* (4 ed, Butterworths, Wellington, 1989)
ELRC Report	Evidence Law Reform Committee *Report on Corroboration* (Department of Justice, November 1984)
Equality and Judicial Neutrality	S L Martin and K E Mahoney (eds) *Equality and Judicial Neutrality* (Carswell, Toronto, 1987)
Fechner	H B Fechner "Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts" (1990) 23 J Law Reform 475
Gallivan	K Gallivan "Sexual Harassment after *Janzen v Platy*: The Transformative Possibilities" (1991) 49 U Tor Fac LR 27
Gutek	B Gutek *Sex and the Workplace* (Jossey-Bass Publishers, San Francisco, 1985)
Husbands	R Husbands "Sexual Harassment Law in Employment. An International Perspective" (1992) 131 International Labour Review 535
Joychild	F Joychild *A Critique of the Law of Sexual Harassment in Aotearoa-New Zealand* (Unpublished paper presented to the Women's Law Conference, Wellington, 22 - 23 May 1993)
Lipper	N R Lipper "Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States" (1992) 13 Comp Lab LJ 293
Littleton	C A Littleton "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 Stanford LR 751
MacKinnon *Feminism Unmodified*	C A MacKinnon *Feminism Unmodified. Discourses on Life and Law* (Harvard University Press, Cambridge, Mass, 1987)
MacKinnon *Sexual*	C A MacKinnon *Sexual Harassment of Working Women. A Case of Sex Discrimination* (Yale University Press, Cambridge, Mass, 1979)
Minow	M Minow "The Supreme Court 1986 Term. Foreword: Justice Engendered" (1987) 101 Harv LR 10
O'Donovan	K O'Donovan *Sexual Divisions in the Law* (Weidenfeld and Nicholson, London, 1985)
Pollack	W Pollack "Sexual Harassment: Women's Experiences vs Legal Definitions" (1990) 13 Harv Women's LJ 35
Sexism and the Law	A Sachs and J H Wilson *Sexism and the Law. A Study of Male Beliefs and Judicial Bias* (Martin Robinson, Oxford, 1978)
Steele *No Laughing Matter*	D Steele *No Laughing Matter. The Ford's Sexual Harassment Dispute* (Rev ed, Wellington Trades Council Women's Subcommittee, Wellington, 1983)

Rape Study	W Young *Rape Study. A Discussion of Law and Practice Vol 1* (Department of Justice and Institute of Criminology, 28 February 1983)

B Cases

Names of cases cited several times may be abbreviated in the text and in footnotes eg *NID Distribution Workers IUOW* v *AB Ltd* becomes *AB Ltd*. A table of sexual harassment cases adjudicated on by the employment institutions is contained in Appendix II. For ease of reference, Appendix II should be referred to for full citations rather than earlier footnotes. Full citations for cases are given in footnotes the first time a case is cited and, generally, the first time a case is cited within each Part of this paper.

C Organisations and Judicial Bodies

The following abbreviations are used for organisations and judicial bodies referred to in the text and footnotes:

Arb Ct	Arbitration Court
AEC	Auckland Employment Court
AET	Auckland Employment Tribunal
HRC	Human Rights Commission
CEC	Christchurch Employment Court
CET	Christchurch Employment Tribunal
LC	Labour Court
WEC	Wellington Employment Court
WET	Wellington Employment Tribunal

D Legislation

The following abbreviations are used for legislation referred to frequently:

ECA	Employment Contracts Act 1991
HRCA	Human Rights Commission Act 1977
IRA	Industrial Relations Act 1973
LRA	Labour Relations Act 1987

ACKNOWLEDGEMENTS

Thanks to Bill Atkin and Graeme Austin for their helpful advice. Thanks also to Frances Joychild, to Graeme Buchanan (Department of Labour) and Trish Mullins, (New Zealand Nurses Organisation) for their comments, and to Paul McBride (Employment Court) and the staff of the Department of Labour Information Centre.

I INTRODUCTION: A FEMINIST PERSPECTIVE ON SEXUAL HARASSMENT IN EMPLOYMENT LAW IN NEW ZEALAND

The reality is that this powerful beast is used to perpetuate a sense of inequality, to keep women in their place notwithstanding our increasing presence in the workplace. What we have yet to explore about harassment is vast. What we have yet to explore is what will enable us to slay the beast.[1]

Anita Hill

This research paper presents a feminist perspective on the developing law of sexual harassment within the context of employment law.[2] The following analysis of sexual harassment cases dealt with by the employment institutions[3] reveals that the gender bias of decision makers[4] has resulted in decisions which perpetuate male power and privilege, disregard the interests of women, and threaten to undermine the objects of the legislation which makes sexual harassment unlawful.

The writer's feminist perspective places sexual harassment in a framework where discrimination against women in society is deep-seated, pervasive and continual (but ultimately able to be eradicated). It places sexual harassment, the legal claim, in a legal system which both reflects and creates discrimination against women in society. It recalls our legal herstory, a slow progression from compulsory discrimination against women to, in New Zealand at least, the removal of almost all discriminatory laws, and the introduction of limited protection against discrimination on the grounds of sex. In late twentieth century New Zealand it is possible to forget the role which the law in general, and the common law in particular, have played and still play as instruments through which inequality is perpetuated. To understand how gender bias works, it is appropriate to remind ourselves of the historical framework of the legal oppression of women. As each individual decision maker brings his or

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[1] A F Hill "Sexual Harassment: The Nature of the Beast" (1992) 65 S Cal LR 1445, 1448.

[2] This paper does not discuss the law of sexual harassment in the context of human rights or other areas of law. F Joychild *A Critique of the Law of Sexual Harassment in Aotearoa - New Zealand* (Unpublished paper presented to the 1993 Women's Law Conference, Wellington, 22 - 23 May 1993) (hereafter Joychild) and R M Robertson " 'What is Not Part of the Job': An Assessment of the Equal Opportunities Tribunal's Handling of Sex Discrimination in Employment" (Unpublished LLB(Hons) research paper, Victoria University of Wellington, 1992) 25 - 41 discuss sexual harassment as part of the law of sex discrimination in New Zealand.

[3] The term "institutions" is used in Part VI of the Employment Contracts Act 1991 ("ECA") as a generic term to describe the Employment Court ("the Court") and the Employment Tribunal ("the Tribunal") established under ss 103 and 77 of that Act. The writer has used the term "employment institutions" (in the absence of any more elegant alternative) to describe not only the Court and the Tribunal but also the range of courts, tribunals and services established by previous labour legislation, including the Court of Arbitration (Industrial Concilation and Arbitration Act 1954), the Industrial Court and Industrial Mediation Service (Industrial Relations Act 1973), the Arbitration Court and Industrial Conciliation and Mediation Services (Industrial Relations Amendment Act 1977) and the Labour Court and Mediation Service (Labour Relations Act 1987).

[4] In this research paper the term "decision makers" denotes persons with statutory responsibility for adjudicating on, or otherwise making binding determinations about, sexual harassment. The term "judges" is too narrow, since it does not include Tribunal members.

her own individual history to the decision making process, so the legal system brings the collective history of the law to each judicial[5] decision about sexual harassment.

Bracton said: "Women differ from men in many respects, for their position is inferior to that of men."[6] The decisions and commentaries of the great common lawyers, Coke, Hale and Blackstone, reinforced the social subjugation of women.[7] Those decisions, and the attitudes on which they were based, have been used to justify legal oppression of women for centuries. The common law made discrimination against women mandatory in many fields: the law of property;[8] tort;[9] contract;[10] family law;[11] criminal law;[12] evidence.[13] The common law, in male legal mythology associated with concepts of fundamental right and justice, was "the main doctrinal justification for preventing the advancement of ... women of the middle and upper classes."[14] The very nature of the common law is, in a sense, male:[15]

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[5] In this research paper the term "judicial" is used in a broad sense to describe the legal process of adjudication on disputes about sexual harassment, whether made in the general courts or in more specialist institutions such as tribunals, and by judges as well as other decision makers.

[6] Bracton *On the Laws and Customs of England* (cited in K O'Donovan *Sexual Divisions in Law* (Weidenfeld and Nicolson, London, 1985) 31 (hereafter O'Donovan).

[7] Blackstone said that husband and wife were treated as one person; a wife's legal existence was incorporated or merged into that of her husband (Halsbury's *Laws of England* (4 ed, para 1012, p 628). More modern legal commentators have relied until recently on the writings of Sir Matthew Hale for the rationale for the marital rape exemption, as well as the "easy to allege, hard to refute" doctrine in rape law (M Hale *History of the Pleas of the Crown* (1736) 636 (quoted in O'Donovan, above, 119): "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract". The courts which denied women legal status as persons last century relied on Coke's "assumption of permanent legal subordination of women" to support their views on the public disabilities of women: A Sachs and J H Wilson *Sexism and the Law. A Study of Male Beliefs and Judicial Bias* (Martin Robinson, Oxford, 1978) 44 (hereafter *Sexism and the Law*).

[8] O'Donovan 29 - 30.

[9] K Cooper-Stephenson "Past Inequities and Future Promise: Judicial Neutrality in Charter Constitutional Tort Claims" in S L Martin and K E Mahoney (eds) *Equality and Judicial Neutrality* (Carswell, Toronto, 1987) 226, 227 (hereafter *Equality and Judicial Neutrality*); W Parker "The Reasonable Person: A Gendered Concept" in E McDonald and G Austin (eds) *Claiming the Law. Essays by New Zealand Women in Celebration of the 1993 Suffrage Centennial* (Victoria University Press, Wellington, 1993) and (1993) 23 VUWLR Volume 105 (hereafter cited to VUWLR).

[10] M J Frug "Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am ULR 1065.

[11] M D A Freeman "Legal Ideologies, Patriarchal Precedents, and Domestic Violence" in Freeman (ed) *State, Law and the Family. Critical Perspectives* (Sweet and Maxwell, London, 1984) 51, 57.

[12] S Estrich *Real Rape* (Harvard University Press, Cambridge, Mass, 1987) 28.

[13] R Slovenko "Witnesses, Psychiatry and the Credibility of Testimony" (1966) 19 U Fla LR 1, 3.

[14] *Sexism and the Law* 43. P Grimshaw *Women's Suffrage in New Zealand* (Auckland University Press, Auckland, 1972) notes (8 - 9) the effect of property disabilities on married working class women in New Zealand.

[15] *Sexism and the Law* 45. C A Littleton "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 Stanford LR 751 (hereafter Littleton) describes methods of feminist legal reasoning with reference to sexual harassment law. Compare traditional methods of legal reasoning: "The distancing of self from subject. The use of only material facts when relevance is result-driven, rather than perception driven. The linear method. The tableau of boredom when someone cries context. ... [F]eminist legal theory must begin by taking these rules away": E McDonald "The Law of Contract and the Taking of Risks: Feminist Legal Theory and The Way It Is" (1993) 23 VUWLR 113, 114.

> This special emphasis on the word rather than the concept, on the fact rather than the sentiment, on the cited instance rather than the overarching principle, is usually attributed by defenders of the common law to the peculiarly pragmatic character of the English people.

Changes in the legal status of women usually came because social pressure forced Parliament to amend the common law to remove discriminatory provisions. Only rarely did judges respond directly to changes in prevailing social attitudes:[16]

> The great changes in gender status have come about not through the harmonious unfolding from within of legal concepts, but through vigorous attacks against the legal system from outside. Contrary to common assertion by lawyers, the law and the judges did not stand on the side of equality and individual rights, nor were they even neutral. By and large they acted as a barrier to, rather than a guarantee of, equality between men and women. This was for the reason so obvious to outsiders and so invisible to lawyers, that the structures of the law were part of wider social structures rather than apart from them.

While, in New Zealand, the law now makes overt discrimination against women unlawful, gender bias in society and the gendered nature of legal reasoning mean that sexism in the law remains a problem. What is judicial gender bias? It occurs:[17]

> [W]hen judges assess a woman's role in relation to traditional sex-role stereotypes while ignoring her personal characteristics and women's changing social role; when they fail to appreciate and act upon the real life experience of women; when they rely upon inaccurate, common, ingrained and socialized beliefs; and when they fail to recognize or scrutinize their use of sexist stereotypes and untested assumptions. Gender bias also occurs when judges analyze concepts from a strictly male perspective and therefore fail to measure or measure and underestimate the immediate and long-term consequences their decisions have on women.

Gender bias is able to affect the result of sexual harassment cases through the use of specific legal tools which enable decision makers to use their discretion in determining particular legal questions and in determining the outcome of cases generally: the allocation of meaning to a particular word or phrase; the assessment of the relevance and weight of evidence; the assessment of credibility; the allocation of the burden of proof; the setting of the standard of proof at a particular level; the awarding of remedies. It is not suggested that in all, or even in many cases, decision makers consciously or deliberately use these tools to favour men's interests over women's and to give greater weight to men's perspectives than women's. Gender bias is often invisible, inadvertent, and unintentional. Yet this should concern rather than console us, because "power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination."[18] The use of these tools means that prejudice and bias are less transparent and therefore more difficult to eradicate. If gender bias is sufficiently pervasive, and sufficiently

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16 *Sexism and the Law* 42.

17 S L Martin "Persisting Equality Implications of the 'Bliss' Case" in *Equality and Judicial Neutrality* 195, 196.

18 M Minow "The Supreme Court 1986 Term. Foreword: Justice Engendered" (1987) 101 Harv LR 10, 68 (hereafter Minow).

hidden, it can not only affect the outcome of individual cases, but also undermine the effectiveness of legislation which is intended to promote the interests of women.

Feminist legal analysis enables us to see how gender bias affects judicial decision making. The tools of feminist legal reasoning also enable decision makers to make decisions which are based on a fairer, more just foundation than the traditional tools of legal reasoning. Feminist legal analysis reveals how the unspoken assumptions of decision makers influence their decisions: by adopting an "unstated point of reference" when assessing others;[19] by treating the decision maker's perspective as objective, not subjective, and ignoring that the decision maker *has* a perspective; by ignoring the perspectives of those being judged, or assuming that the decision maker can and does take those into account; and by assuming that existing social and economic arrangements are "natural, uncoerced, and good."[20] Feminist legal reasoning challenges these unspoken assumptions and argues for a perspective in which lawyers see one of the functions of law as being to facilitate positive social change, including the elimination of discrimination against women (as well as other unjustified discrimination). For centuries the law has conspired with structures and attitudes in society which oppress women. Feminist lawyers say that the law can and should be used to promote the interests of women.

From this feminist perspective the writer describes in this paper her concern that gender bias in sexual harassment cases dealt with by the employment institutions is in danger of undermining the objects of the sexual harassment provisions of the Employment Contracts Act 1991 ("ECA") and therefore of removing an important part of the legal "basket" of measures designed to remove discrimination against women workers.[21]

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[19] For example, women are different in relation to the unstated male norm; Maori are different in relation to the unstated pakeha norm.

[20] Minow 31 - 57.

[21] This "basket" includes the Equal Pay Act 1972; the Human Rights Commission Act 1977 (to be replaced by the Human Rights Act 1993 with effect from 1 February 1994); the Parental Leave and Employment Protection Act 1987; Part V of the State Sector Act 1988; and the personal grievance provisions contained in Part III of the ECA.

II SEXUAL HARASSMENT: THE NATURE OF THE INJURY

If no one can really know another's pain, who shall decide how to treat pain, and along what calculus? These are questions of justice, not science. These are questions of complexity, not justifications for passivity, because failing to notice another's pain is an act with significance.[22]

Martha Minow

A How Sexual Harassment Harms Women

A helpful non-legal definition of sexual harassment is "any sexually oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity."[23] Sexual harassment can range from relatively mild behaviour, such as telling smutty jokes, to sexual assault and rape. The overwhelming majority of victims of sexual harassment are women.[24] The overwhelming majority of harassers[25] are male, although there are exceptions.[26] Group harassment, by several harassers of one or more victims, is also common.[27] Sexual harassment is the meeting point of at least two inequalities or hierarchies: the inferior position of women in society compared to men and the inferior position of workers compared to their employers.[28] At this meeting point the two inequalities react with and reinforce each other to produce a workplace where the employment of women is sexualised.[29] Sexual harassment may also take place in the context of discrimination on the grounds of race, sexual orientation or other factors.[30]

The damage caused to women by sexual harassment at work can be severe. Damage often takes the form of economic harm.[31] Actual or constructive dismissal, denial of promotion, and loss of seniority or other disadvantage, with consequent economic loss, can result from the harassment itself or from the retaliatory actions of the harasser. Women who stay away from work temporarily or leave work permanently to escape harassment also suffer

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22 Minow 11.

23 A P Aggarwal *Sexual Harassment in the Workplace* (2 ed, Butterworths, Toronto, 1992) 1 (hereafter Aggarwal). This paper is about the law of sexual harassment, not sexual harassment itself. New Zealand publications about sexual harassment include Human Rights Commission *Sexual Harassment in the Workplace* (GP Print Ltd, Wellington, 1991) and A Colbert *Dealing With Sexual Harassment. A New Zealand Handbook for Employers/Employees, Students and Educators* (GP, Wellington, 1989).

24 Colbert 11 - 12.

25 "Harasser" and "harassment" in this paper refer to sexual harassment.

26 Colbert 11 - 12. To reflect social reality in this paper the feminine pronoun is used for victims and complainants of sexual harassment and the masculine pronoun is used for harassers.

27 Colbert 57.

28 C A MacKinnon *Sexual Harassment of Working Women. A Case of Sex Discrimination* (Yale University Press, Cambridge, Mass, 1979) 217 (hereafter MacKinnon *Sexual Harassment*).

29 MacKinnon *Sexual Harassment* 217 - 221.

30 E R Arriola " 'What's The Big Deal?' Women in the New York City Construction Industry and Sexual Harassment Law, 1970 - 1985" (1990) 22 Colum Human Rights LR 21, 42, 54, 62; MacKinnon *Sexual Harassment* 30 - 31.

31 N R Lipper "Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States" (1992) 13 Comp Lab LJ 293, 299 - 300 (hereafter Lipper "Comparative Study").

economically. Sexual harassment also reinforces the economic subordination of women in a broader sense, by acting as a barrier to women wishing to enter the many work areas currently dominated by men[32] or simply by making it harder for women to keep their jobs.

Damage may also take the form of emotional and physical injury. Psychological and emotional stress, as well as loss of self-confidence affecting the victim's ability to perform her job, are common reactions to sexual harassment.[33] Surveys of the effects of sexual harassment show that victims may suffer from severe emotional trauma, anxiety, nervousness, depression, and feelings of low self esteem, powerlessness or anger.[34] Many women report adverse physical reactions to sexual harassment, such as headaches, insomnia, indigestion, exhaustion and skin ailments.[35]

B Development of the Law of Sexual Harassment

1 Recognition of sexual harassment as a legal injury

Sexual harassment has only recently been recognised as a legal injury, with a consequent right on the part of the victim to legal redress. The process of recognition began during the rise of the most recent women's movement in the 1960s and 1970s when women in consciousness raising groups began to discuss their experiences of oppression, including sexual harassment.[36] The problem was named,[37] surveyed,[38] researched[39] and analysed. Women began to seek legal redress through the courts in the United States in the mid-1970s, arguing that sexual harassment at work was sex discrimination under Title VII of the Civil Rights Act of 1964.[40] The Federal District Court for the District of Columbia in *Williams* v *Saxbe*[41] was

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[32] Lipper "Comparative Study" 300. E M Blackwood "The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity" (1992) 16 Vermont LR 1005, 1020 (hereafter Blackwood).

[33] K Gallivan "Sexual Harassment after *Janzen v Platy*: The Transformative Possiblities" (1991) 49 U Tor Fac LR 27, 34 - 35 (hereafter Gallivan).

[34] Lipper "Comparative Study" 299.

[35] Colbert 40.

[36] W Pollack "Sexual Harassment: Women's Experience vs Legal Definitions" (1990) 13 Harv Women's LJ 35, 38 - 44 (hereafter Pollack); H B Fechner "Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts" (1990) 23 J Law Reform 475, 480 - 487 (hereafter Fechner).

[37] C Backhouse "*Bell* v *The Flaming Steer Steak House Tavern*: Canada's First Sexual Harassment Decision" (1981) 19 UWOntLR 141 (hereafter Backhouse) states that the term sexual harassment was first used in 1975.

[38] Arriola, above n 30, 39.

[39] MacKinnon *Sexual Harassment* 26 - 27; L Farley *Sexual Shakedown: The Sexual Harassment of Women on the Job* (McGraw-Hill, New York, 1978); D Steele *No Laughing Matter. The Ford's Sexual Harassment Dispute* (Rev ed, Wellington Trade's Council Women's Subcommittee, Wellington, 1983) (hereafter Steele *No Laughing Matter*).

[40] Aggarwal describes (16 - 32) the development of sexual harassment law in the United States.

[41] 413 F Supp 654, (DCC 1976).

the first United States Court to accept this argument.[42] The conceptualisation of sexual harassment as unlawful sex discrimination was subsequently accepted in Canada in 1980,[43] Australia in 1984,[44] New Zealand in 1985,[45] and Great Britain in 1986.[46] A small number of countries have adopted legislation which deals specifically with sexual harassment in the workplace.[47] In most countries sexual harassment is still dealt with as part of the law of discrimination. MacKinnon concludes that sexual harassment is unique in the law because it is a woman-defined legal action:[48]

> Sexual harassment, the legal claim - the idea that the law should see it the way its victims see it - is definitely a feminist invention. Feminists first took women's experience seriously enough to uncover this problem and conceptualise it and pursue it legally. ... The legal claim for sexual harassment marks the first time in history, to my knowledge, that women have defined women's injuries in a law.

Judicial extension of the concept of sex discrimination to include sexual harassment is a rare example of judicial creativity being used to benefit women.[49] The way in which the law of sexual harassment develops is therefore of great importance to women seeking to use the law to promote gender equity and justice. If the law of sexual harassment fails to develop in a way which does promote women's interests, the law's potential as a means of securing justice for women in other areas seems doubtful.

2 *Legal myths*[50] *about women, sex and truth*

Recognition of sexual harassment as a legal injury occurred in the same period as substantial reform of rape law occurred in many common law jurisdictions.[51] Feminist legal analysis of rape laws, and particularly the special rules of evidence relating to rape cases, revealed that

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[42] The US Supreme Court confirmed this approach in *Meritor Savings Bank v Vinson* 477 US 57 (1986).

[43] *Bell v The Flaming Steer Steak House Tavern Inc* (Ont 1980), 1 CHRR D/155, 27 LAC (2d) 227 (sub nom *Re Bell and Korczak)* (Shime).

[44] *O'Callaghan v Loder & Anor* (1984) EOC 92-023 (Equal Opportunity Tribunal, New South Wales).

[45] *H v E* (1985) 5 NZAR 333.

[46] *Porcelli v Strathclyde Regional Council* [1986] ICR 564.

[47] R Husbands "Sexual Harassment Law in Employment. An International Perspective" (1992) 131 International Labour Review 535 - 559 (hereafter Husbands). See also International Labour Organisation *Conditions of Work Digest. Combating Sexual Harassment at Work* (Vol 11 No 1 1992, ILO, Geneva) (hereafter ILO Digest).

[48] C A MacKinnon *Feminism Unmodified. Discourses on Life and Law* (Harvard University Press, Cambridge, Mass, 1987) 103, 105 (hereafter MacKinnon *Feminism Unmodified*).

[49] MacKinnon *Sexual Harassment* notes (158 - 159) that "[c]ontract doctrine ... did not have to be changed to prohibit sexual harassment in employment; it merely had to be applied. With a little more creativity and a little less sexism, sexual harassment might long have been a recognized tort". See also Fechner 485 and *Sexism and the Law* 4 - 40.

[50] "Myth" in this research paper means a popular fiction, not a traditional narrative or legend.

[51] From the preparation of the first cases in the United States in 1974 (see MacKinnon *Sexual Harassment*, 59 - 63) until, say, the acceptance of sexual harassment as sex discrimination in the UK in 1986. Obviously the law is still developing, but the acceptance of sexual harassment as a legal claim was really complete in the major common law jurisdictions by 1986.

many of the evidential rules relating to rape were based not on any factual or scientific foundation, but on acceptance by the legal system of societal myths about rape.[52] These myths often reflected public misperception of the nature of the crime of rape: that virtuous women do not get raped; that rape is impossible; that men rape women because they are overcome by sexual desire; that rape victims are young, attractive women; that victims provoke rape by dressing provocatively or placing themselves in dangerous situations; that women enjoy rape.[53] In New Zealand the 1983 Rape Study[54] listed among the myths about rape the assumption that "[w]omen, especially if they are promiscuous or of dubious sexual morality, frequently make false complaints of rape", that a woman who has really been raped "will have physically resisted, screamed and tried to escape, and she will usually have some physical injuries", will complain immediately, and will report it to the police.[55]

These propositions are not supported by social reality. The "easy to make, hard to defend" view is "directly counter to the available statistics on rape and related offences" and was based "primarily upon the anecdotes and personal opinions of various legal authorities".[56] The empirical evidence in the Rape Study showed that "rape is *not* a charge easily to be made, and that a complaint to the police is usually made at considerable personal cost to the complainant".[57] Rather than there being large numbers of false complaints, rape is generally under-reported and many complaints are withdrawn for compelling reasons, not because they are false.[58]

Many of these myths - the provocative victim, the spurned woman out for revenge, the lying woman, the perpetrator overcome by sexual desire for an attractive victim - also permeate judicial consideration of sexual harassment cases. The development of the law of sexual harassment has also revealed some new - or at least hitherto invisible - myths about sexual

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[52] Above n 12, 43. T M Massaro "Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony" (1985) 69 Minn LR 395, notes (410) that "judges are as susceptible to those factually incorrect and legally irrelevant myths as the general population."

[53] Massaro, above n 52, 402 - 410. See also Estrich, above n 12, 42 - 56 and 57 - 79. The "rape myths" are summarised by E McDonald "An(other) Explanantion: The Exclusion of Women's Stories in Sexual Offence Trials" (Challenging Law and Legal Processes - The Development of a Feminist Legal Analysis, New Zealand Law Society Seminar, August 1993) 43, 45.

[54] W Young *Rape Study. A Discussion of Law and Practice* (Department of Justice and Institute of Criminology, 28 February 1983) Vol 1 (hereafter *Rape Study*).

[55] *Rape Study* 8.

[56] *Rape Study* 9, 139.

[57] *Rape Study* 139 - 140.

[58] *Rape Study*. Reform of rape laws in 1985 (Crimes Amendment Act (No 3) 1985 and see n 256 below) removed many of the discriminatory legal rules which resulted from judicial and legislative acceptance of these myths and resulted in rape laws which were intended to more accurately reflect women's experiences of sexual violation. As McDonald notes, above n 53, while the legal rules have been changed, myths about rape continue to affect judicial decision making in sexual offence trials.

behaviour in the workplace. Some of the myths about sexual harassment in the workplace include:

- women who complain about sexual harassment are prudes and overly sensitive;[59]
- women really enjoy being treated as sexual objects at work. If women really found harassment offensive, they would not put up with it;[60]
- women encourage and benefit from sexual advances at work, because women with little ability can get promotions or pay increases by granting sexual favours to their male superiors;[61]
- women who flirt and engage in sexual banter at work with one person will automatically welcome sexual advances from another person;[62]
- women who swear and talk about sex at work can not find behaviour of a sexual nature offensive or unwelcome;[63]
- women who dress "provocatively" invite and welcome sexual harassment;[64]
- unless the victim is physically assaulted, sexual harassment does not seriously harm her.[65]

The reality is that, as with rape, women find it extremely difficult to complain about sexual harassment.[66] Women are in an extremely vulnerable position at work. They are vulnerable to male economic power, since men occupy most positions of authority in the workplace. They are also vulnerable to male sexual power, which stereotypes women's roles as submissive partners in sexual relations, and stereotypes women as people who function primarily as sex objects, even in the workplace.[67] Women are also frequently disadvantaged rather than assisted by sexual relationships with a male superior at work. Continuing discrimination against women at work, which makes it harder for them to achieve pay rises and promotions on merit, makes them particularly vulnerable to claims of having "slept their way" into a pay rise or promotion.[68]

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[59] *Rabidue v Osceola Refining Co* 805 F 2d 611 (1986); 484 F Supp 419 (E D Mich 1984), aff'd, 622. MacKinnon *Sexual Harassment* 25.

[60] "Since women 'go along' with sexual harassment, [the assumption is that] they must like it, and it is not really harassment at all. This constitutes little more than a simplistic denial of all we know about the ways in which socialization and economic dependence foster submissiveness and override free choice ...": L Wehrli "Sexual Harassment at the Workplace: A Feminist Analysis and Strategy for Social Change" (M A Thesis, Massachusetts Institute of Technology, 1976) cited in MacKinnon *Sexual Harassment* 48.

[61] MacKinnon *Sexual Harassment* 37; B A Gutek *Sex and the Workplace* (Jossey-Bass Publishers, San Francisco, 1985) 95 - 96 (hereafter Gutek).

[62] Aggarwal, 65.

[63] Aggarwal, 66. See also *Snowball v Gardner Merchant Ltd* [1987] ICR 719, 723.

[64] *Meritor Savings Bank, FSB v Vinson* above n 42; *Snowball v Gardner Merchant*, above.

[65] Aggarwal, 89 - 90.

[66] Gallivan 32.

[67] Gallivan 31 - 34.

[68] MacKinnon *Sexual Harassment* 37 - 40. Gutek notes (96) that similar statements about men are comparatively rare.

Women are often too intimidated to reject advances unambiguously and their "most common response is to attempt to ignore the whole incident, letting the man's ego off the hook skilfully by *appearing* flattered in the hope he will be satisfied and stop."[69] In other cases the very nature of the harassment makes it hard for women to stop it. The quid pro quo "sleep with me or I'll sack you" form of sexual harassment is much less common than harassment which is abusive and demeaning, but which falls short of being a specific "advance" to which a definite response can be made:[70]

> [T]here's often no clear point when a woman has to make a decision - a "yes, go ahead and harass me" decision. A touch that seems almost accidental is laughed off, an invitation that is made could be taken two ways - suddenly you're tolerating it and then when do you make a stand?

Women are also reluctant to complain because they fear that they will not be believed, or that management will be unsupportive, or, worse still, that they will be ridiculed.[71]

3 Gendered perspectives about sex

Some of these "myths" may not necessarily be universally "wrong". Rather, they may accurately reflect *male* perceptions of sexual behaviour, while misrepresenting *women's* perceptions, because "men and women experience sexuality in our culture differently."[72] One study of the impact of sexual behaviour and harassment in the workplace revealed a "giant gender gap" in attitudes to sexual behaviour at work: "Men consistently say they are flattered by sexual overtures from women. Women consistently say they are insulted by sexual propositions from men."[73] Because the law tends to favour the perceptions and fact descriptions of the dominant social group,[74] decision makers tend to accept what men say about sexual harassment and to discredit what women who are harassed say. Rather than conceptualising men's and women's perceptions as "myth" or "reality", it may be more

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[69] MacKinnon *Sexual Harassment* 48; Aggarwal 69.

[70] Steele *No Laughing Matter* 19.

[71] MacKinnon *Sexual Harassment* 49 and 51 - 52.

[72] Blackwood 1018; R D Weiner "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983) 6 Harv Women's LJ 143, 147.

[73] Gutek xiii. This gender gap and its impact on judicial consideration of sexual harassment is discussed by Blackwood, Fechner, and Littleton. MacKinnon *Feminism Unmodified* describes (90) how this gender gap works in the law:

> We criticise the idea that rape comes down to her word against his - but it really *is* her perspective against his perspective and the law has been written from *his* perspective. If he didn't mean it to be sexual, it's not sexual. If he didn't see it as forced, it wasn't forced. Which is to say, only male sexual violations, that is, only male ideas of what sexually violates us as women, are illegal.

[74] Fechner 504.

appropriate to consider the question in terms of whose perspective - men's or women's - is valued more in the law and whose perceptions are more often accepted as "fact".[75]

Blackwood argues for a woman centred analysis[76] of sexual harassment "not just because men find certain conduct 'fun' while women find it offensive" but also because "sexually harassing conduct intimidates and degrades women, and therefore, prevents women from fully participating in the workplace."[77] Because the main object of sexual harassment law is to promote equality for women at work, sexual harassment law must enable women to define what standard of behaviour meets their right to dignity in the workplace.[78] A sexual harassment law which works for women must value women's perspectives of sexual behaviour at work, while questioning male perspectives. A purposive approach to the interpretation of sexual harassment law requires that weight be given to women's stories.

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75 V Grainer "Refining the Regulation of Sexual Harassment" (1993) 23 VUWLR 127, 128.

76 There is no universally true "women's perspective" on sexual harassment. Perceptions are affected by race, class, sexual orientation, and other factors and life experiences. However, the writer considers that there is a broadly defined "women's perspective" on sexual harassment. "Feminist legal analysis should emphasise women's experiences not as windows to a universal or unmediated reality, but as vehicles to understanding how law credits certain experiences of reality and denies others": M T McClusky "Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case" (1992) 44 Maine LR 261, 265.

77 Blackwood 1019 - 1020.

78 Blackwood 1013.

III SEXUAL HARASSMENT IN EMPLOYMENT LAW IN NEW ZEALAND

"All night, he felt up my leg as I brought out their food. I was waiting on another table, in the end, and as I went by he pinched my bum. I just up and dumped the whole plate of soup all over him. I felt great at the time but of course I got the sack. How do you fight it without losing your job, that's what I'd like to know."[79]

A Development of Sexual Harassment Provisions in Employment Law

Personal grievance provisions in the Industrial Relations Act 1973 ("IRA") provided limited access[80] to compensation for victims of sexual harassment who could establish that the harassment had affected their employment to their disadvantage. The IRA procedures were unsatisfactory, however. Although in practice personal grievance committees dealt with sexual harassment cases, no Arbitration Court ruling ever established that they had jurisdiction to do so. This made personal grievances based on sexual harassment vulnerable to attack on jurisdictional grounds. The lack of any statutory definition of sexual harassment or statutory procedures for dealing with sexual harassment cases placed a premium on the skill, or lack of skill, of the mediator dealing with the case, and this often worked against complainants. There was a lack of clarity and consistency of decisions, particularly in the absence of precedents from the Equal Opportunities Tribunal ("EOT") established under the Human Rights Commission Act 1977 ("HRCA"). Women invoking personal grievance procedures were also unable to gain protection from employers who brought evidence of their previous sexual history and this acted as a disincentive to the bringing of cases.[81]

The call for a specific industrially based procedure to deal with complaints of sexual harassment in the workplace was based on union concern that the HRC procedures were ineffective[82] and on the fact that unions lost control over sexual harassment complaints once they were referred to the Human Rights Commission ("HRC").[83] On top of union lack of

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[79] One woman's experience of sexual harassment, quoted in Steele *No Laughing Matter* 27.

[80] Through s 117(1)(a)(ii) of the IRA.

[81] M Coleman "A Trade Union Perspective on Sexual Harassment" (1988) NZJIR 295 (hereafter Coleman "Trade Union Perspective").

[82] J Hughes *Labour Law in New Zealand* (The Law Book Co Ltd, Sydney, 1989) para 4.465 p 2401.

[83] Grainer, above n 75, notes (127) that in *H* v *E* the EOT "virtually apologised to a defendant for finding him guilty of sexual harassment." Steele *No Laughing Matter* criticises the HRC's handling of a 1982 industrial dispute over sexual harassment of women workers by a foreman at the Ford Motor Company plant in Petone. The HRC found that the foreman and Fords were in breach of the HRCA. When the women's union requested that the foreman be shifted away from the area where they were working, the women were shocked when the HRC responded that he had "been punished enough" (14). They felt that they were being pressured into dropping their complaint when the Commissioner described the difficulties of having to appear before the EOT (14). The HRC also advised that "questions of penalty were not appropriate" (15). The eventual settlement prevented the foreman from supervising any of the women who had complained. There was a strong feeling that the HRC was toothless and that "[t]he investigation and decision of the Commission would have been so much hot air if we hadn't used a bit of force" (16).

confidence in the way in which the HRC handled sexual harassment complaints,[84] there was concern that the sex discrimination provisions of the HRCA, even following the EOT decision in *H* v *E*,[85] may not cover "hostile environment" sexual harassment, including behaviour such as displaying pornographic material in the workplace.

The view that a parallel "industrial" procedure for dealing with sexual harassment would benefit women was also a corollary of the union movement's more collective approach to human rights issues rather than the individualised processes followed by the HRC.[86] Taking cases of harassment through the personal grievance procedure could provide a platform for unions to pressure for change to attitudes to sexual behaviour in the workplace generally, thus preventing sexual harassment, rather than simply dealing with individual complaints. The more private, individualised approach of the HRC was seen as a potential brake on changing workplace attitudes although it might assist individual complainants.[87] Unions lobbied for an effective law to make sexual harassment unlawful. The opportunity to have such a procedure included in labour legislation was presented by the Labour Government's review of the industrial relations system in 1985 and 1986.[88] As a result, sexual harassment provisions were included in the Labour Relations Act 1987 ("LRA"). These provisions were reproduced with minor amendments in the ECA.[89]

B Advantages and Disadvantages of the ECA Provisions on Sexual Harassment

1 Advantages of the ECA provisions

The objects of the sexual harassment provisions in the ECA are:[90]

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[84] The HRC's more pro-active approach to sexual harassment following the *H* v *E* decision (1985) 5 NZAR 333) made unions more confident about handing cases over to the HRC: Annual Report of the HRC for the year ending 31 March 1988, 20.

[85] Above n 45.

[86] The provision for class actions in s 38(2) of the HRCA is rarely used. The emphasis on individual cases may have been a product more of the HRC's policies and practices in the first years of the HRC's existence, than of the actual provisions of the HRCA.

[87] New Zealand Federation of Labour *Sexual Harassment in the Workplace* (Wellington, June 1982) 5 - 11 and Steele *No Laughing Matter* 1 and 3 - 16.

[88] A Green Paper ("Industrial Relations: A Framework for Review") was released on 17 December 1985. A Supplement to the Green Paper (Volume 2) specifically requested comment on the problem of sexual harassment. See, eg, the submissions of the NZ Woollen Workers' Union para 8.3.1.1 - 8.3.1.8 (held by the Department of Labour, Industrial Relations Service).

[89] The only provision not re-enacted in the ECA was s 221 of the LRA, which enabled a personal grievance committee to carry out an investigation into the grounds of the grievance where sexual harassment was alleged. This provision was criticised by some mediators: C Hicks "Does the Sexual Harassment Procedure Work?" (1988) NZJIR 291.

[90] These objects represent the writer's understanding of the policy reasons behind sexual harassment legislation. The ECA does not set out the objects of the sexual harassment provisions. The advantages of the ECA sexual harassment provisions are summarised, rather than discussed in depth, in this part of the paper.

- to establish that sexual harassment is unlawful behaviour which causes harm to women;
- to recognise the right of women to equality, job security and dignity at work;
- to make available adequate procedures through which women who are being sexually harassed can have such harassment stopped;
- to provide a procedure to settle disputes about sexual harassment;
- to provide real remedies for women who have been sexually harassed;
- to prevent sexual harassment in the workplace.

In this section the positive aspects of the ECA provisions are summarised with reference to the objects of sexual harassment law, the law of sexual harassment in some other jurisdictions, and the HRCA provisions on sexual harassment. The writer concludes that the ECA provisions are, on paper, the best in the world. They recognise sexual harassment as an expression of gender inequality in the workplace, define sexual harassment in terms which reflect women's experiences of sexual coercion at work, acknowledge the real nature of the harm which sexual harassment causes women, and provide effective procedures through which sexually harassing behaviour can be challenged.

(a) The ECA definition of sexual harassment prohibits a broad range of sexually harassing behaviour

Section 29(1) of the ECA provides that sexual harassment occurs in employment if the employee's employer or a representative of that employer:

> (a) Makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity which contains -
> (i) An implied or overt promise of preferential treatment in that employee's employment; or
> (ii) An implied or overt threat of detrimental treatment in that employee's employment; or
> (iii) An implied or overt threat about the present or future employment status of that employee; or
> (b) By -
> (i) The use of words (whether written or spoken) of a sexual nature; or
> (ii) Physical behaviour of a sexual nature -
> subjects the employee to behaviour which is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and which is either repeated or of such a significant nature that it has a detrimental effect on that employee's employment, job performance, or job satisfaction.

The definition makes a broad range of behaviour unlawful. Section 29(1)(a) defines "quid pro quo" harassment, where the harasser demands compliance with sexual activity in return for either advancement at work or as the price of protection from detrimental treatment, including dismissal. Section 29(1)(b) covers verbal or physical sexual behaviour which is unwelcome or offensive to the victim, and which is either repeated or results in detriment. This includes "hostile work environment" or "poisoned workplace" harassment, where the harasser does not

make a specific demand for sexual activity, but creates an intimidating or offensive work environment through his behaviour.[91] Such sexual harassment may be targeted at a particular woman or be untargeted, but nevertheless offensive.[92] Although the definition does not specifically mention harassment such as display of pornographic material, it is submitted that, depending on the circumstances, this type of behaviour would usually fall into the categories of "words (whether written or spoken) of a sexual nature" or "physical behaviour of a sexual nature" ie the placing of the pornographic material in the workplace. There have been no decisions based on complaints of untargeted "hostile environment" sexual harassment in New Zealand, although some cases have involved a specific instance of targeted harassment against a background of generally offensive behaviour.[93] The ECA provisions also provide a "safety net" in the unlikely event that sexual harassment occurs which does not fall within the section 29 definition but which may nevertheless constitute sex discrimination. Under section 34 of the ECA a personal grievance committee, Tribunal or Court may find that "a personal grievance is of a type other than that alleged." Since discrimination on the grounds of sex is also a type of personal grievance,[94] any sexually harassing behaviour which is also sex discrimination is covered by the ECA provisions.

The breadth of the ECA provisions may be contrasted with the narrowness of definitions in some other jurisdictions. In its new criminal code, France has made unlawful only quid pro quo harassment.[95] Several other jurisdictions have unfair dismissal legislation under which complainants have successfully argued that refusal of unwanted sexual advances by a supervisor is not a valid reason for dismissal.[96] Husbands states that a limited number of countries recognise both quid pro quo and hostile environment harassment.[97] Case law in the

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91 The nature of "quid pro quo" and "hostile environment" harassment is described by MacKinnon *Sexual Harassment* 32 - 47. Later analyses of sexual harassment have viewed it as a range of behaviour rather than necessarily falling into rigid categories: *Janzen* v *Platy Enterprises Ltd* [1989] 1 SCR 1252 (Supreme Court of Canada) per Dickson CJC, 1283.

92 The ECA definition is discussed by Grainer, above n 75, 129 - 130.

93 *A v Foodstuffs (South Island) Limited* [1993] 1 ERNZ 81; *C v L D Nathan* [1988] NZILR 304. One mediator (see above n 89, 292) stated that the LRA provisions did not cover "hostile environment" harassment. The mediator reported (292) a case where "a worker who was thought to be a bit 'straight-laced' by her fellow male workers suffered behaviour ... of similarly abhorrent nature, but because there was no request for sexual favours or any such intent, the definitions as set out did not cover the case." With respect, s 212(1)(b) of the LRA, which is in identical terms to s 29(1)(b) of the ECA, clearly covered this type of behaviour. A failure to apply the broader definition in s 212(1)(b)of the LRA seems to have resulted in a remedy being incorrectly denied to a complainant.

94 Section 27(1)(c) and s 28(1) of the ECA.

95 Law No 92-1179, *Journal Officiel* (Paris) 4 November 1992, noted in (1993) 192 International Labour Review (ILO, Geneva) 5. According to this note the definition has been criticised by feminist organisations in France because "it fails to take into account other forms of sexual harassment at work ... such as stroking or touching, sexist language and insults and the use of pornography, intended to humiliate the person being harassed without necessarily trying to obtain sexual relations ... ".

96 For example Austria, Denmark, Norway and Sweden: see Husbands 541.

97 Husbands 541 (Australia, Canada, New Zealand, Switzerland, United Kingdom, United States).

United States, Canada, Australia and the UK under sex discrimination laws has recognised both types of harassment.[98]

(b) The ECA recognises sexual harassment as a specific legal claim

The ECA provisions recognise sexual harassment as a distinct wrongful act. Where the law has defined sexual harassment as a specific injury and has provided procedures for women to directly challenge sexually harassing behaviour, the result has been more effective protection for complainants than where the issue has been dealt with tangentially through tort law, criminal law or labour laws dealing with unfair dismissal.[99] Although sexual harassment is recognised as sex discrimination under equal employment opportunity laws in the United States,[100] the United Kingdom,[101] and Australia,[102] the lack of specificity in general anti-discrimination statutes has led to the development of sexual harassment law on a case-by-case basis. This has resulted in inconsistencies in sexual harassment jurisprudence, particularly regarding the type of behaviour which constitutes sexual harassment, whether the standard of offensiveness is objective or subjective, and employer liability for the actions of co-workers, customers and clients.[103] Where sexual harassment has been defined by the policy of agencies responsible for enforcing anti-discrmination legislation, rather than by the legislation itself, the definition of sexual harassment also becomes vulnerable to the changing policies of those enforcement agencies.

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[98] Lipper "Comparative Study"; M Einfeld "Sexual Harassment"(1989) 21 Aust J Forensic Sciences 43; and Aggarwal. The European Community Commission Recommendation on the protection of the dignity of men and women at work, adopted by the Council of Ministers on 19 December 1991, defines sexual harassment as "any form of verbal, non-verbal or physical behaviour of a sexual nature, which the perpetrator knows, or ought to know, offends the dignity of women and men at the workplace": (*Official Journal* L 49/92 (Brussels) 24 February 1992) (noted in International Labour Review, above n 95, 4 - 5).

[99] Husbands 558. The ILO Digest survey of 23 industrialised countries found that only 9 have statutes which specifically define or mention sexual harassment. In some cases, sexual harassment is mentioned in the context of equal employment opportunity laws, particularly in European countries. Only 5 countries have labour laws which explicitly prohibit sexual harassment (Belgium, Canada, France, New Zealand and Spain). Trish Mullins, Legal Officer, New Zealand Nurses Organisation, also advised the writer that having a "stand alone" legal provision making sexual harassment unlawful has facilitated the process of educating people about sexual harassment. It has made it easier to change workplace attitudes (explaining that sexual harassment is unacceptable behaviour) and has encouraged women to be more assertive in speaking out about unacceptable behaviour.

[100] Civil Rights Act 1964 Title VII (US).

[101] Sex Discrimination Act 1975 (UK).

[102] Sex Discrimination Act 1984 (Federal) (Aust). Some individual states and provinces also have more specific laws eg Fair Employment Practices and Housing Act, California Government Code, Section 12940 (West 1987 & Supp 1990) makes harassment on grounds of sex unlawful.

[103] Einfeld, above n 98, 43; Lipper "Comparative Study" 293. Even where the appropriate enforcement agency (eg the US Equal Employment Opportunity Commission) issues guidelines on these matters, those guidelines have not always been accepted by the courts or interpreted consistently: Aggarwal 25 - 27.

Several commentators have also noted that same sex harassment or harassment by a bisexual harasser do not fit easily into a framework in which sexual harassment is categorised only as sex discrimination.[104] To establish sex discrimination, complainants must show that "but for" the fact that the victim is of a particular sex, the behaviour would not have occurred.[105] Same sex harassment may not involve "discrimination" in the sense that the perpetrator of the discrimination and the victim are part of unequal groups in society.[106] Sexual harassment of a man by a man may involve a hierarchy, but a worker/employer or class hierarchy, or other more subtle and complex social hierarchies, rather than a gender hierarchy. Conceptualising harassment by a bisexual harasser as sex discrimination is even more difficult. The law should make all sexual harassment an actionable wrong. The ECA provisions apply to all sexual harassment, not just to male perpetrators and female complainants,[107] thus removing theoretical difficulties in conceptualising same sex harassment or harassment by a bisexual harasser as sex discrimination. Making sexual harassment a "stand alone" legal claim also creates more certainty and consistency in the law, provides the opportunity to establish more appropriate procedures for dealing with the problem, and ensures that the categorisation of behaviour as sexual harassment is not affected by the changing policies of enforcement agencies.

(c) The ECA defines the harm in subjective terms

Sexual harassment law usually requires the adoption of an objective or subjective test in relation to 2 issues: firstly, whether the behaviour complained of was unwelcome or offensive; and secondly, whether the behaviour constitutes a sufficient detriment to the complainant's employment to warrant the intervention of the law.[108] Under section 29(1) of

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[104] E F Paul "Sexual Harassment as Sex Discrimination: A Defective Paradigm" (1990) 8 Yale L and Policy R 333, 352 - 353. The HRC states that around 98 percent of complaints of sexual harassment received by it are from women, with the other 2 percent largely males complaining about other men: *The Evening Post*, Wellington, New Zealand, 3 August 1993, 13.

[105] MacKinnon *Feminism Unmodified* 107 - 108.

[106] Backhouse (141) states that "all sexual harassment except bisexual attention directed equally at both male and female employees is sex discrimination. This illustrates the problem of using the concept of discrimination to deal with the phenomenon of sexual harassment. Society should not tolerate bisexual harassment any more than it tolerates heterosexual or homosexual sexual harassment" (143). Same sex harassment may be sex discrimination if one subscribes to the "differences" approach to sex discrimination, that discrimination is about ensuring that differences between men and women do not lead to disadvantage to one sex or the other. However, if one sees gender as a hierarchy, and sex discrimination as being primarily about inequality between men and women, as the writer does, same sex harassment is not sex discrimination. The writer considers that the inequality analysis is a more useful analysis for looking at sex discrimination and sexual harassment generally, notwithstanding that the result of this may be that sex discrimination (analysed in terms of gender inequality) does not cover same sex harassment. The most effective way of preventing same sex harassment is a provision such as section 29 of the ECA, in which the injury of sexual harassment is defined in non-gendered terms.

[107] Section 62 of the Human Rights Act 1993 contains a similar definition: see n 126 below.

[108] The question whether the behaviour was behaviour "of a sexual nature" is an objective one: *NID Distribution Workers IUOW* v *AB Ltd* [1988] NZILR 761 (Labour Court) (hereafter, *AB Ltd*); *A v Z* (Unreported, 29 September 1992, Wellington Employment Tribunal, WT 69/92) (D Hurley).

the ECA the test for offensiveness or unwelcomeness is subjective: is the behaviour offensive or unwelcome *to the particular complainant?* The ECA also measures detriment subjectively. Under section 29(1) the relevant question is whether the behaviour had a detrimental effect on the employment, job performance, or job satisfaction *of the complainant*, not whether the behaviour would have resulted in detriment to a mythical reasonable person or reasonable woman.[109] Many other jurisdictions require an objective test of offensiveness. For example the Canada Labour Code defines sexual harassment as:[110]

> [A]ny conduct, comment, gesture or contact of a sexual nature
> (a) that is *likely to cause offence or humiliation* to any employee;
> (b) that might, *on reasonable grounds*, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion".

United States courts have adopted differing standards of objectivity.[111] In *Meritor Savings Bank, FSB* v *Vinson*[112] the US Supreme Court assumed that the test of "unwelcome-ness" in the context of a Title VII complaint was subjective.[113] However, the Court did not determine if the assessment whether the harassment affected the complainant's employment (ie whether it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"[114]) was to be based on the complainant's subjective view or on some objective standard. In a much criticised decision, *Rabidue* v *Osceola Refining Co*,[115] the US Court of Appeals for the Sixth Circuit refused to find that sexual harassment had occurred because the behaviour complained of was not "unreasonably offensive", using the standard of a "reasonable person".

In *Ellison* v *Brady*[116] the Court of Appeals for the Ninth Circuit adopted a "reasonable woman" standard for assessing offensiveness. The Court specifically acknowledged that adopting a "reasonable person" standard would reinforce the status quo and the prevailing

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[109] Grainer, above n 75, 130, describes this part of the ECA definition as "a subjective test qualified by an objectively ascertainable requirement that the behaviour be repeated or be of such a significant nature that it has the prescribed detrimental effect".

[110] Section 247.1, as noted in ILO Digest 82 (emphasis added). The Queensland Anti-Discrimination Act 1991 imports the "reasonable person" standard or, alternatively, requires proof of intent. Sexual harassment occurs where the harassing conduct is done "with the intention of offending, humiliating or intimidating the other person; or *in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct*" (noted in the ILO Digest 68 (emphasis added)).

[111] The US cases are summarised in S L Bass "The 'Reasonable Woman' Standard: The Ninth Circuit Decrees Sexes Perceive Differently" (1992) Lab LJ 449, 452 - 453.

[112] Above n 42.

[113] See Blackwood 1007.

[114] Above, noted in G M Dodier "*Meritor Savings Bank v Vinson*: Sexual Harassment at Work" (1987) 10 Harv Women's LJ 205, 216.

[115] Above n 59.

[116] 924 F. 2d 872 (1991).

level of discrimination[117]. The Court stated that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women"[118]. However, the reasonable woman test is still an objective, not a subjective test. In *Andrews* v *City of Philadelphia*,[119] for example, the Court said that the test had to be objective to protect the employer from the "hypersensitive employee"[120]. And in *State* v *Town of Milton* a Vermont Court directed a jury that the test "is designed so as not to punish a worldly Plaintiff on one hand, and to protect an employer who has a very fragile, overly sensitive employee on the other hand."[121]

From a feminist perspective the "reasonable woman" test is defective on at least 2 grounds. Firstly in a judicial system where the decision makers are overwhelmingly male, the adoption of a reasonable woman standard has an air of unreality and artificiality about it: "[G]iven that men and women experience sexuality differently, how then can decision makers determine how a reasonable woman would have reacted without resorting to male defined culturally biased perspectives?"[122] Secondly, because the purpose of sexual harassment law "is to change prevailing attitudes to women in the workplace, requiring it to meet a prevailing consensus negates its purpose."[123] An objective test also obscures the relevant line of reasoning:[124]

> If a woman suffers insult, indignity, and job discrimination because of her supervisor's or co-worker's harassment of her as a woman, she should be compensated and the behaviour should be stopped. It does not matter whether she is particularly sensitive or insensitive. She has been discriminated against, and the law should protect her.

In establishing that the tests of offensiveness and of detriment are to be measured subjectively with reference to the particular complainant, the New Zealand Legislature recognised that, for sexual harassment law to be effective, the law must give priority to women's perceptions of whether sexual behaviour is sexual harassment. This recognition appears to be unique in common law jurisdictions.

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117 Above, 878.
118 Above, 879.
119 895 F 2d 1469 (1990), 1483.
120 Above.
121 No S1149-87 CnC (Vt Super Ct Chittenden County 4 November 1991).
122 Blackwood 1021.
123 Above, 1022. Problems with the application of the reasonable person concept are discussed by B B Westman "The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace" (1992) 18 William Mitchell LR 795 and by N S Ehrenreich "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale LJ 1177 (both advocating the adoption of the reasonable women standard).
124 Blackwood 1024. Blackwood also notes (1025) that subjectivity is recognised in tort law, where tortfeasors take their plaintiffs as they find them (the "eggshell skull" cases).

(d) Repeated harassment and sole instances of "serious" harassment

The ECA definition of sexual harassment covers harassing behaviour which is repeated, even if such behaviour cannot be shown to have affected the complainant to her detriment.[125] The policy appears to be that unwelcome or offensive sexual behaviour, if repeated, is *ipso facto* detrimental. This provision also appears to be unique.[126] The United States Supreme Court in *Vinson,*[127] for example, held that hostile environment sexual harassment, even if repeated, must also be shown to have *unreasonably* interfered with the complainant's work or have created an intimidating, hostile or offensive working environment.[128] Under the ECA a single instance of sexually harassing behaviour may also be sufficient for the complainant to establish a personal grievance if the behaviour was of such a significant nature that it had a detrimental effect on that employee's employment, job performance or job satisfaction.[129] Decisions in other jurisdictions are inconsistent about whether a single incident may constitute harassment.[130] In Canada, for example, decision makers have required a "combination of frequency and offensiveness (gravity of offence)" before they will infer "that exposure to such conduct was a discriminatory condition of employment."[131] The advantage of the ECA definition, in which sexual harassment is established if the behaviour is *either* repeated *or* sufficiently detrimental, is that the law allows women a greater opportunity to define acceptable standards of workplace behaviour and thus to eliminate harassment.

Another postive aspect of the ECA definition is that, to make out a claim of sexual harassment, the victim is not obliged to first convey to the harasser the fact that she is offended or that the behaviour is unwelcome. This is important because, as noted in Part II B 2 above, many women find it difficult to directly confront an harasser about his behaviour.

(e) The ECA prevents account being taken of the complainant's prior sexual history

Section 35 of the ECA provides:

> Where a personal grievance involves allegations of sexual harassment, no account shall be taken of any evidence of the employee's sexual experience or reputation.

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125 *AB Ltd* 767.

126 Section 62 of the Human Rights Act 1993 appears to require that detriment be established even if the behaviour is repeated, thus differing from the ECA definition. The writer considers that s 62 as drafted is grammatically defective and may create rather than remove confusion.

127 Above n 42.

128 Above n 114, 206.

129 *AB Ltd* 767.

130 Aggarwal 115.

131 Aggarwal 115. In the UK it was not settled until 1990 that a single incident may constitute sexual harassment within the meaning of section 6(2)(b) of the Sex Discrimination Act 1975: *Bracebridge Engineering Ltd* v *Darby* [1990] IRLR 3. The word "harassment" usually connotes continued or repeated behaviour: Husbands 542.

This provision applies not only to complaints of sexual harassment, but also to personal grievances where the harasser alleges that he has been unjustifiably dismissed or that other unjustified disciplinary action has been taken against him. This prohibition is important in enabling a woman to complain of sexual harassment to her employer without fearing that her previous sexual history will become a major issue in any subsequent investigation. Section 35 does not prohibit absolutely the introduction of evidence about the complainant's sexual experience or reputation. It states only that "no account shall be taken" of such evidence. Nevertheless, the provision appears to have been effective in excluding the worst of this type of evidence. Before the introduction of a similar provision in the LRA in 1987,[132] cross-examination of a complainant on her prior sexual history was a major problem in personal grievance hearings under the IRA.[133] In its submissions on the Labour Relations Bill in 1987, the NZ Clerical Workers Association commented that this was "a key provision in ensuring that the [grievance] committee focuses on the offence and not the victim."[134] Previous lack of protection from such cross examination of complainants meant that the union had to "choose between pursuing justice for the worker as against preventing her from being subject to further humiliation and personal attack by such allegations being made in open court."[135]

Legislation making such evidence irrelevant is rare in overseas jurisdictions. In most jurisdictions the decision maker may in his or her discretion admit evidence of a complainant's prior sexual history, including evidence designed to show that the complainant was likely to welcome sexual advances or was not likely to be offended by them, or was prudish and therefore "oversensitive" to particular conduct.[136] For example the US Supreme Court in *Vinson* held (overruling the Court of Appeals decision that such evidence was irrelevant and inadmissible) that evidence of the complainant Vinson's "sexually provocative speech or dress" was relevant to the question of whether the conduct was unwelcome.[137] In a UK decision, *Wileman* v *Minilec Engineering Ltd*,[138] the complainant alleged that over a period of 4 years she had suffered physical and verbal harassment by a director of the company (but, significantly, not by anybody on the shop floor) and was awarded 50*ll* compensation. The Employment Appeal Tribunal said:[139]

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132 Section 221(c).
133 Coleman "Trade Union Perspective" 296.
134 NZ Federated Clerical, Administrative and Related Workers Industrial Association of Workers, submission to the Labour Select Committee, para 271.
135 Above, para 275.
136 Although many jurisdictions now prohibit evidence of a rape complainant's prior sexual history only California in the United States has enacted a similar shield in sexual harassment cases: C A O'Neill "Sexual Harassment Cases and the Law of Evidence: A Proposed Rule" (1989) U Chi Legal Forum 219, 219 - 220 and 236.
137 Above n 36, 56.
138 [1988] ICR 318. See also *Snowball* v *Gardner Merchant* above n 63, 723.
139 *Wileman* v *Minilec Engineering Ltd*, above n 138, 325.

> [I]f a woman on the shop floor goes around wearing provocative clothes and flaunting herself, it is not unlikely that other work people - particularly the men - will make remarks about it; it is an inevitable part of working life on the shop floor. If she then complains that she suffered a detriment, the tribunal is entitled to look at the circumstances in which the remarks are made which are said to constitute that detriment.

Section 35 recognises that the rationale for admitting such evidence, that sexually experienced women cannot be offended or harmed by sexual harassment, and that women who engage in sexual banter with one person welcome sexual advances from anyone, is based on myth. The ECA removed this matter from the discretion of decision makers in New Zealand, perhaps wisely in view of the attitudes of decision makers in other jurisdictions.

(e) Process

Sexual harassment is a type of personal grievance.[140] A complainant alleging that she has been sexually harassed by her employer or an employer's representative[141] may invoke the personal grievance procedure[142] immediately. Where harassment by a fellow employee or a customer or client of the employer is alleged, section 36 of the ECA applies. Under section 36 a complainant must submit a written complaint to the employer (or employer's representative). The employer, on receiving such a complaint, must investigate it. If the employer concludes that sexual harassment has taken place, that employer is obliged to take "whatever steps are practicable" to prevent any repetition of the harassment. With co-worker, client or customer harassment, it is only if the harasser repeats the harassment and the employer has not taken all practicable steps to stop the behaviour that a personal grievance of sexual harassment can be established.

Joychild stresses that "[p]rocess is all important to whether there is a *real* remedy in law for sexual harassment."[143] The processes available to the Tribunal in sexual harassment cases are flexible. Under section 78(4) of the ECA the parties may seek "informal" mediation

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[140] "Personal grievance" is defined in s 27(1) of the ECA to include unjustifiable dismissal; unjustifiable action affecting an employee to her disadvantage; discrimination (on grounds set out in s 28(1)); and duress in relation to membership or non-membership of an employees' organisation. For a general discussion of the law relating to personal grievances see J R P Horn (ed) *Employment Contracts* (Brooker and Friend Ltd, Wellington, 1991) section 1C paras 26.01 - 42.05 pp IC-1 - IC-64. See also G Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) NZJIR 257.

[141] Defined in s 27(1) of the ECA as an employee who either "has authority over the employee alleging the grievance" or "is in a position of authority over other employees in the workplace of the employee alleging the grievance."

[142] This paper is about judicial gender bias in sexual harassment decisions ie at Tribunal level or higher. A more general discussion of the adequacy of the personal grievance procedures at workplace level is beyond the scope of this paper. A standard personal grievance procedure is set out in the First Schedule to the ECA. Other procedures may be (but are rarely) included in employment contracts, provided they are not inconsistent with the requirements of the First Schedule: s 32(1) and (2) of the ECA. Under s 39 of the ECA a complainant may invoke either the ECA procedures or the HRCA procedures but not both.

[143] Joychild 31.

assistance even for matters not within the jurisdiction of the Employment Tribunal. The parties may also apply to the Tribunal for "formal" mediation to settle disputes within its jurisdiction.[144] Mediation is relatively "complainant friendly" and a complainant need not enter an adversarial hearing unless mediation has failed to resolve the matter. The process of mediation and any settlement of a mediated matter is private and treated as confidential to the parties. The Tribunal Member acting as mediator has a great deal of flexibility in assisting the parties to reach agreement. Grievant and alleged harasser need not even sit in the same room while mediation takes place. Mediation also enables the complainant to "[c]onfront the harasser in a way that provides an opportunity to relate directly what she feels and to explain why he is responsible, so as to educate rather than to punish, and to preserve their future working relationship should that continue."[145] The differing perspectives of men and women about sexual behaviour were noted in Part II B 3. Stamato notes:[146]

> [o]ften, however, the question is not a difference in perception, but denial or intentional misrepresentation of what occurred. In either case mediation affords each party an opportunity to see the other's perspective without having to agree with it, and presumably to reach an agreement that satisfies future needs and interests, again without having to share the same view of what took place.

Where a matter is not settled by "formal" mediation, or in cases where mediation is not appropriate, for example where a harasser simply refuses to admit that obvious sexual harassment is unlawful and blameworthy, the complainant may seek to have the matter determined in the more formal, public, and adversarial adjudication jurisdiction.[147] The ECA process also provides some protection for complainants from attempts by an alleged harasser to stop a complaint from going ahead by filing or threatening to file defamation proceedings. Such threats are common.[148] Section 37 of the Act provides:

> Any statements made or information given in the course of submitting a personal grievance in accordance with the procedure applicable under [any] employment contract or in the course of any proceedings in respect of a personal grievance shall be absolutely privileged.

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144 Employment Tribunal member D E Hurley discusses current issues in mediation in "Accessible Remedies - Access to the Law. A Review of Alternative Dispute Resolution including Mediation and Arbitration" (1993 New Zealand Law Conference Papers Vol 2) 38.

145 L Stamato "Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?" (1992) 10 Mediation Quarterly 167, 169. Stamato also notes (169) that "[b]lame and punishment are seldom high on the list of outcomes sought by the harassed person. Why then use a system, litigation or variations on the fact-finding or arbitration themes, that seek to find fault and levy costs or impose sanction?"

146 Above.

147 Part VI of the ECA (Institutions) sets out the mediation and adjudication functions of the Tribunal. How mediation and adjudication work in practice are described in detail in 2 articles by Tribunal Member W R Grills: "Dispute Resolution in the Employment Tribunal. Part One: Mediation" (1992) NZJIR 333 and "Dispute Resolution in the Employment Tribunal. Part Two: Adjudication" (1993) NZJIR 84. See also Chief Judge T G Goddard "Mediation - Past Endeavours, Future Trends" [1993] ELB 47.

148 Colbert 48 - 49. The HRC has also noted this problem: above n 23, 33 - 34, and see n 213, below.

In terms of process, the HRC as an enforcement agency in discrimination matters has wide powers of investigation not available to the Tribunal.[149] Nevertheless the processes available to the Tribunal are adequate to enable parties who wish complaints of workplace harassment to be dealt with in an "industrial relations" environment to have their problems dealt with effectively and sensitively.[150] The Tribunal also has the advantage of being seen as an "independent" third party, rather than the agency responsible for enforcing particular legislation. This may, for some parties, make the ECA procedures a more attractive process for disputes resolution.[151] The employment institutions and the HRC have different statutory functions and different procedural powers to deal with cases of sexual harassment. Their roles are complementary rather than conflicting.

(g) Liability

Section 29 of the ECA makes sexual harassment a personal grievance if the behaviour complained of is carried out by the employee's employer or "a representative of that employer".[152] "Representative" is defined in 27(2)(b) of the ECA as a person who is employed by the employer and who either:

> (i) Has authority over the employee alleging the grievance; or
> (ii) Is in a position of authority over other employees in the workplace of the employee alleging the grievance.

Section 36 also provides that an employer is liable for harassment by that employer's customers or clients or by co-workers. This provision was sharply criticised by employer groups and others when the Labour Relations Bill was before the Labour Select Committee. Dr R E Harrison commented:[153]

> The whole procedure is unworkable and potentially productive of serious injustice. Is Farmers Trading Company really to be liable for sexual harassment of a female employee *merely* because the same customer twice in a row makes an indecent proposal to that employee?

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[149] See Part VII of the HRCA (Proceedings of Commission).

[150] The writer considers that mediation under the ECA provisions *can* be used in women's interests to resolve sexual harassment cases. In practice, mediation and other alternative methods of dispute resolution do not always protect women's interests: above n 75, 134 - 135. A discussion of this question is beyond the scope of this paper.

[151] Treatment of sexual harassment cases in an industrial relations environment is discussed by S A Fitzgibbon "Sexual Harassment and Labor Arbitration" (1990) 20 Georgia J Int Comp L 71.

[152] Section 33 of HRCA also makes employers liable for acts done by a person "as the employee of another person" (s 33(1)) or "as the agent of another person" (s 33(2)).

[153] Submissions to Labour Select Committee dated 2 March 1987 (General Assembly Library Collection) (emphasis added). Similar objections by the Hotel Association of New Zealand, the New Zealand Bankers Association, and Air New Zealand did not result in the provision being changed: (Submissions to the Labour Select Committee (General Assembly Library Collection))

Although no complaints of customer or client harassment have been adjudicated on by the employment institutions,[154] section 36 may in practice have been effective in enabling women to require their employers to take action to prevent such harassment in the workplace. Under section 36 legal responsibility for sexual harassment committed by co-workers of the complainant (but not representatives of the employer), or customers or clients of the employer, may be avoided only if the employer has fulfilled its duty to take "whatever steps are practicable" to prevent a repetition of the behaviour.[155] In overseas jurisdictions the question of employer liability for the actions of other employees or clients or customers is still unsettled or has been resolved unsatisfactorily for women. In *Vinson*, for example, the US Supreme Court confirmed that employers were strictly liable for the actions of supervisors in "quid pro quo" cases, where the harassment more clearly relates to the receipt or denial of tangible job benefits.[156] In "hostile environment" cases, however, employers are not strictly liable. In many countries, the issue simply has not been addressed.[157] Because the ECA spells out that employers are legally responsible for sexually harassing behaviour in the workplace, the employer has an incentive to ensure that sexual harassment does not occur in the workplace. Complaints of sexual harassment in New Zealand are also protected from challenge on the grounds that the employer is not legally responsible for the harassment.[158]

(h) Remedies

If the Tribunal (or Court) determines that sexual harassment has occurred, it may award, pursuant to section 40(1)(d) of the ECA, the following remedies to the complainant:

> (a) The reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
> (b) Reinstatement ... in the employee's former position or ... in a position no less advantageous to the employee:

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154 One complaint of co-worker harassment has been made: *Fulton v Chiat Day Mojo* [1992] 2 ERNZ 38. The unjustified dismissal cases discussed in Part IV are also the result of complaints of co-worker harassment.

155 The word "practicable" was substituted for the word "necessary" (contained in the Labour Relations Bill as introduced) on the basis that it was not fair to impose strict liability on an employer except in relation to the employer's representatives. This was because an employer has less control over the actions of clients, customers, and co-workers: Report of the Department of Labour on the Labour Relations Bill to the Labour Select Committee 27 April 1987. "Practicability" is discussed in *Fulton v Chiat Day Mojo Ltd* 46 - 47.

156 Above n 114, 222. See also M M Carillo "Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991" (1992/93) 24 Colum Human Rights LR 41.

157 Husbands 550 - 553. Lipper "Comparative Study" 326 and 333 - 334 notes that the law relating to employer liability in the UK is in a state of flux. In Canada, the Supreme Court confirmed in *Robichaud* v *R* (Can 1987) 8 CHRR D/4326 (SCC) "in no uncertain terms that an employer is absolutely liable for the discriminatory acts of its employees": Aggarwal 198. Ontario is an exception. The Ontario Human Rights Code specifically exempts employers from liability in relation to acts of sexual harassment committed by employees or agents.

158 Under the ECA women cannot take legal action directly against the harasser unless the harasser is the employer. Under the HRCA action can be taken against both harasser and employer (s 33).

> (c) The payment to the employee of compensation by the ... employer, including compensation for-
> (i) Humiliation, loss of dignity, and injury to the feelings of the employee; and
> (ii) Loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen.

In sexual harassment cases the employment institutions also have a special power to make (non-binding) recommendations to the employer "concerning the action the employer should take in respect of the [harasser], which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person".[159] The range of remedies available to the EOT[160] where civil proceedings under the HRCA are successfully taken is far wider than those provided for in section 40 of the ECA, although until 1992 awards of compensation made by the EOT were subject to a limit of $2000.[161] Compensation under the LRA and ECA has never been subject to a statutory limit.[162] While compensation is not the only measure of how well statutory procedures for dealing with sexual harassment work, it is an important measure of how seriously the courts view the harm to women that sexual harassment constitutes. Section 40 provides for adequate remedies to be granted to women who have been sexually harassed.

2 *Disadvantages of the ECA provisions*

The sexual harassment provisions in the ECA are not perfect. Firstly it would be desirable for the definition of sexual harassment to explicitly include harassment such as the display of pornography. Secondly the requirement for complaints of co-worker, client and customer harassment to be put in writing before an employer is obliged to take action to prevent a recurrence of the harassment is an onerous one for some women and may dissuade women from pursuing complaints.[163] Thirdly section 36 defines co-worker harassment narrowly. A

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[159] Section 40(1)(d) of the ECA. Mediated settlements (as opposed to adjudicated decisions) may include a broader range of remedies eg an apology or an agreement that the harasser attend an education programme.

[160] See ss 38(6) and 40 of the HRCA and ss 86 and 88 of the Human Rights Act 1993.

[161] The limit was imposed by s 40(1) of the HRCA and removed by s 15(1) of the HRC Amendment Act 1992.

[162] The Court of Appeal in *Post Office Union v Telecom South Ltd* [1992] 1 ERNZ 711, 716, however, stated that awards of compensation in excess of $50,000 were exceptional and that awards over this level would in all but exceptional cases not be "fair and reasonable between the parties as a matter of good industrial practice in the current economic climate" (per Cooke P, 717). See *Minister of Education* v *Bailey* (Unreported, 9 August 1993, Court of Appeal, CA 236/92) for an example of an exceptional case in which compensation of $123,000 was awarded.

[163] Above n 89, 292. Under s 36 employers are required to request complainants to put complaints in writing before they can investigate. Such requests have been used by some judges to imply that the complaint is employer driven rather than complainant driven, and is therefore somehow less worthy for that reason: *Parlane v NZ Police* [1991] 3 ERNZ 721, 723, 725; *C v L D Nathan* [1988] NZILR 306, 307. This implication is unfair. The reality is that women who are unfamiliar with the procedures are likely to first make a verbal complaint. The employer, having checked the procedures, will then ask for the complaint to be put in writing so that it can proceed to deal with the complaint in accordance with the ECA provisions. This indicates not that the complaint is employer driven, but rather that the employer is attempting to ensure compliance with the ECA provisions.

personal grievance can only be taken where, following a complaint to an employer, the same harasser repeats sexually harassing behaviour and the employer has not taken whatever steps are practicable to prevent the repetition of the behaviour. Fourthly the Employment Tribunal and Court cannot investigate complaints and the range of remedies available, although adequate, is limited. The power to make recommendations to the employer concerning possible disciplinary or rehabilitative action is of no use where the harasser is the actual employer, particularly in a small enterprise. Nevertheless, the ECA provisions appear to provide an effective means of settling sexual harassment complaints in the interests of complainants.

C How Effective Are the ECA Procedures in Practice?

On paper the ECA provisions are the best in the world. In practice they have been largely ineffective, firstly because they have been rarely used by women and secondly because decision makers applying the provisions have failed to treat sexual harassment as a serious problem for women workers.

Although sexual harassment is widespread and perhaps increasing,[164] very few women have sought to use the LRA and ECA procedures.[165] Only one sexual harassment appeal was dealt with by the Labour Court under the LRA provisions.[166] Under the ECA provisions only 4 complaints of sexual harassment have been dealt with by the Tribunal in its adjudication jurisdiction. The mediation jurisdiction of the Tribunal appears to be virtually unused in the settlement of sexual harassment cases, despite its apparent suitability.[167] Since 1982 the employment institutions have also dealt with least 7 personal grievance cases brought by men alleged to have sexually harassed women.[168] In 6 of these cases, the Court or Tribunal found

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The disadvantages of the personal grievance procedures generally, eg the 90-day rule contained in s 33(2) of the ECA, are not discussed in this paper.

164 "Sexual Harassment Cases Increase" (*The Evening Post*, Wellington, New Zealand, 3 August 1993, 13).

165 From 1 April 1989 until 30 June 1993 only 21 cases of sexual harassment were filed with either the Mediation Service (prior to 15 May 1991) or the Employment Tribunal out of a total of 5127 personal grievances dealt with. Only 5 sexual harassment cases have been adjudicated on. In each of the years ending 30 June 1992 and 30 June 1993, only 2 complaints of sexual harassment were disposed of by the Tribunal out of a total of 929 and 1242 personal grievances respectively. Figures are not available for any period prior to 1 April 1989. See Appendix 1 for a more detailed breakdown of these figures.

166 *AB Ltd.* The LRA was in force from 1 August 1987 until 14 May 1991. Details of cases dealt with by the Mediation Service under the LRA are confidential to the parties and cannot be analysed. Cases which were not resolved at Mediation were sent to the Labour Court for resolution.

167 The Tribunal dealt with no sexual harassment cases in its mediation jurisdiction in the 2 years ending 30 June 1992 and 1993: see Appendix 1.

168 There have been at least 3 other personal grievance cases in which sexual harassment has been a factor: *Verboeket v du Pont Peroxide Ltd* [1993] 1 ERNZ 124 (and see Appendix 2 for related decisions). In this case there was no sexual harassment but "only a massive breakdown of a former close relationship fueled by both participants and supporters" (7). V's dismissal was procedurally unfair. He was awarded 3 months lost wages and $16,000 compensation.

that the man's dismissal was unjustified. There appears to have been no research conducted into the reasons why the ECA sexual harassment provisions are used so rarely.[169] What is clear is that sexual harassment as a problem has not disappeared. Sexual harassment complaints to the HRC have increased dramatically over the period since the LRA and ECA provisions have been in force. Since 1 April 1989 229 formal complaints of sexual harassment have been made to the HRC. The vast majority of these are employment-related.[170] Nor has legal reform of the labour market apparently affected numbers of personal grievances taken generally against employers. These have remained at high levels despite the ECA reforms.[171]

Secondly, as Part IV below illustrates, many of the sexual harassment cases reveal gender bias in the application of the law. This gender bias, which is both founded on and promotes societal myths about sexual harassment, favours men's versions of events over women's, values men's interests over women's, makes the legislation less effective, and undermines its objects. *Hetei* v *Feltex Woven Carpets & New Zealand Dairy Food & Textile Workers Union*,[172] *A* v *Foodstuffs (South Island) Limited*[173] and *P* v *S*[174], stand out as exceptions which

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In *Lane v Mayuri Trading Co Ltd* (Unreported, 27 October 1992, Wellington Employment Tribunal, WT 70/92 (P Stapp)) the grievant was dismissed for failure to disclose criminal convictions, poor attendance, and "conduct towards female staff" (1) for which he had been warned on 2 occasions. On the latter point the Tribunal found, without giving the facts, that there was no "particular incident associated with these two matters at the time of the dismissal to justify the dismissal" (3). The Tribunal found that the grievant was unfairly dismissed. He received 3 months lost wages and compensation of $800.
In *Williams v Wanganui Area Health Board* [1989] 1 NZILR 617 the grievant was accused of sexually harassing 2 fellow workers and was transferred to another location without loss of salary but with the loss of the opportunity to earn overtime. He successfully applied for leave to direct access to the Labour Court on the grounds that the employer refused to act or act promptly to deal with his grievance. The employer appealed and in *Wanganui Area Health Board v Williams* [1989] 2 NZILR 174 the Court of Appeal reversed the Labour Court's decision. There is no discussion of the substance of the sexual harassment complaint in these judgments, but they contain interesting observations about possible conflict of interest where both a complainant of sexual harassment and the alleged harasser are members of the same union.
See also *M* v *Independent Newspapers Ltd* [1992] 1 ERNZ 202. None of these cases is discussed in this research paper.

[169] The ECA provisions may be having an effect on behaviour at workplace level. The writer is not aware of any research in this area. Trish Mullins, Legal Officer, New Zealand Nurses Organisation, has suggested to the writer the following reasons why the ECA provisions are not used: the HRC procedures are more visible; sexual harassment is seen as a human rights, rather than an industrial, issue; unions may be resolving sexual harassment cases at workplace level; unions may not be sufficiently sensitive to the problem or may be handing sexual harassment cases on to the HRC to deal with; the ECA procedures may be viewed as inevitably adversarial; women may have more confidence in the HRC and its investigative approach.

[170] See Appendix 1. At a workshop on sexual harassment at the Women's Law Conference on 22 and 23 May 1993, Frances Joychild, Legal Officer, HRC, stated that not only were more complaints of sexual harassment being made, but also that the harassing behaviour was more serious and was occurring in a wider range of situations (eg job interviews).

[171] 1090, 929 and 1242 cases disposed of in the years ending 30 June 1991, 1992 and 1993 respectively. Appendix 1 contains more detailed figures. The decline of union influence, and consequent loss of available and affordable advocates for women complainants may have affected the numbers of complaints, but no data is available on this point. Under the HRCA no "advocate" is necessary, because the HRC itself is responsible for enforcing the Act.

[172] [1990] 3 NZILR 132 (Labour Court).

[173] [1993] 1 ERNZ 81 (CET, D S Miller).

recognise the harm that sexual harassment causes, the right of women to dignity at work and as workers, and that women's perspectives on sexual harassment must take precedence if sexual harassment law is to be effective. The statements of principle made by Goddard CJ in the recent Employment Court decision, *Z & Y Ltd* v *A*,[175] should also assist in eliminating gender bias from Tribunal and Court consideration of sexual harassment cases. Gender bias in sexual harassment cases has nevertheless been so pervasive that it would be tempting to advise women complainants to avoid the employment institutions altogether and to seek redress in the HRC. The writer considers that this option should not be pursued for two reasons.

Firstly the ECA provisions are capable of providing effective protection for women against sexual harassment in the workplace. It is unacceptable that authorities with statutory responsibility for applying legislation should, however inadvertently, undermine the effectiveness of that legislation through allowing gender bias to influence the outcome of decisions. Secondly, the employment institutions will continue to adjudicate on cases where men accused of sexual harassment allege that they have been unjustifiably dismissed or otherwise unfairly treated. Decisions of the employment institutions in those cases will set parameters for and give guidance to employers in assessing the acceptability of their own behaviour and the behaviour of their employees, and in determining whose dignity, men's or women's, is worth protecting. Procedural fairness in investigating a sexual harassment complaint is not always easy to achieve. If the time and money cost of compensating a sexually harassed woman is significantly less than the cost of compensating an unfairly dismissed harasser, employers may eventually conclude that it would be less expensive (and considerably less trouble) to simply ignore complaints of sexual harassment.

Thus, even if women complainants avoid the employment institutions, gender biased decisions in unjustified dismissal cases brought by alleged harassers may make it harder for women to have complaints of sexual harassment by co-workers dealt with effectively in the workplace. The failure by the employment institutions to treat sexual harassment seriously in unjustified dismissal cases may therefore undermine the effectiveness of the ECA provisions at the most important level - in the workplace. If women complaining of sexual harassment are to get justice and the protection the law *says* it offers, the gender bias of the employment institutions must be confronted and defeated.

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174 Unreported, 22 July 1993, Christchurch Employment Tribunal, CT 87/93 (J M Goldstein).

175 Unreported, 3 September 1993, Employment Court, Wellington, WEC 21/93 (Goddard CJ), an appeal from the Tribunal decision in *A* v *Z*.

IV THE TOOLS OF GENDER BIAS AND JUDICIAL UNDERMINING OF THE OBJECTS OF SEXUAL HARASSMENT LAW

> Life becoming law and back again is a process of transformation. Legitimized and sanctioned, the legal concept of sexual harassment reenters the society to participate in shaping the social definitions of what may be resisted or complained about, said aloud, or even felt. Similarly, when a form of suffering is made a legal wrong, especially when its victims lack power, its social dynamics are not directly embodied or reflected in the law. Legal prohibitions may arise because of the anguish people feel or the conditions they find insupportable, but the legal issues may not turn on the social issues that are the reasons they exist. Distanced from social life, yet part of its imperatives, the law becomes a shadow world in which caricatured social conflict is played out, an unreal thing with very real consequences.[176]
>
> Catherine MacKinnon

The contention that the ECA sexual harassment provisions are the best in the world was discussed in Part III. In Part IV the writer examines the way in which those provisions have been applied in sexual harassment cases determined by the employment institutions. This examination reveals gender bias[177] in the cases (both allegations of sexual harassment by women, and unjustified dismissal actions by alleged harassers): analysis of concepts from a male perspective; failure to appreciate and act upon the real life experience of women; underestimation of the effects of decisions on women; reliance on myths about sexual harassment; and failure to recognise unstated assumptions or to scrutinise untested assumptions. Although one of the objects of sexual harassment law is to challenge existing social hierarchies, decision makers tend to accept those hierarchies as "natural, uncoerced, and good."[178] Some decision makers appear to neither understand nor, in some cases, even to accept the basic premises on which the legislation is founded: that sexual harassment is unlawful and can seriously harm women, and that sexually harassed women are entitled to real remedies. Ultimately these judicial attitudes have the potential to subvert the objects of the sexual harassment provisions in the ECA.

Gender bias is seldom overt. Rather, it finds its way into the decision making process via the use of the tools of legal discretion: the nature and type of remedies granted; application of rules of evidence, such as requirements for corroboration and cross-examination, and the admission of similar fact evidence; the setting of the standard of proof and the allocation of the burden of proof; assessment of credibility of witnesses; and interpretation of statutory provisions, including importing irrelevant factors into decision making. The discretionary tools of legal decision making, laid on a foundation of socially sanctioned gender bias, give legal sanction to gender bias. The process by which that has happened in sexual harassment cases, through which the effectiveness of the ECA provisions on sexual harassment has been undermined, is analysed below.

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176 MacKinnon *Sexual Harassment* 57.
177 As defined above n 18 and by Minow 31 - 57.
178 Minow 54.

A Remedies

The question seems to be whether a woman is valuable enough to hurt, so that what is done to her is a harm.[179]
Catherine MacKinnon

Remedies allow decision makers, in their discretion,[180] to decide how much people are worth, what sorts of behaviour should be rewarded, and how severely society should punish particular behaviour. The types and amounts of remedies granted can indirectly condone or discourage particular behaviour. One of the most direct methods of measuring gender bias in the application of the sexual harassment provisions in the ECA is to analyse the remedies granted to women who have succeeded in proving that they were sexually harassed in their employment. The following analysis of remedies reveals measurable inequality of treatment between, on the one hand, women who are sexually harassed and, on the other, men dismissed for sexually harassing behaviour. It also reveals that the employment institutions are failing to grant adequate remedies to women who are sexually harassed, thus undermining one of the objects of the legislation.

1 Remedies granted to sexually harassed complainants

(a) The cases

In *A* v *Z*,[181] *AB Ltd*,[182] *Fulton* v *Chiat Day Mojo Ltd*,[183] and *P* v *S*[184] the employment institutions recognised that the complainants had been sexually harassed. In each case the harassment caused the complainant to leave her job. The economic consequences of sexual harassment for these women were therefore severe, yet, with the exception of *P* v *S,* the amounts of compensation awarded to them were relatively low.

In *A* v *Z* the complainant was employed as a bar person in a tavern for approximately 3 years and was allegedly sexually harassed by the owner/manager for approximately half of that period. She said that her work became intolerable because of the harassment and she had to leave because of it.[185] The Tribunal accepted that A had been sexually harassed and that she had a personal grievance. It is not clear from the Tribunal judgment whether A was also constructively dismissed, although on appeal the Employment Court judgment makes it clear

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179 MacKinnon *Feminism Unmodified* 110.
180 See *Cain* v *H L Parker Trusts* [1992] 3 ERNZ 777, 786 (WEC, Goddard CJ).
181 Unreported, 29 September 1992, Wellington Employment Tribunal, WT 69/92 (D Hurley).
182 [1988] NZILR 761 (Labour Court).
183 [1992] 2 ERNZ 38 (AET, C Hicks).
184 Unreported, 22 July 1993, Christchurch Employment Tribunal, AT 87/93 (J M Goldstein).
185 *A* v *Z* 1.

that there was both a claim and a finding of constructive dismissal by the Tribunal.[186] A was awarded 2 months loss of wages, compensation of $5000 for loss of dignity, humiliation and injury to feelings,[187] and costs of $1800. The Tribunal did not use its power under section 40(1)(d) of the ECA to make formal recommendations about rehabilitative action in respect of the employer,[188] but it did make "observations" about the desirability of employers liaising with the HRC over sexual harassment programmes, providing posters and brochures for staff, and establishing a sexual harassment complaints procedure.

In *AB Ltd* the complainant worked at the respondent's retail business for only a few days before she left because of sexual harassment. The harasser had touched the complainant on the breast and buttocks, and had deliberately brushed against her on several occasions, as well as verbally harassing her. On two occasions the complainant "was left alone in the shop with the manager which terrified her so that she called her mother and her boyfriend to ask them to help."[189] She eventually left her job on the advice of her union. The Labour Court was "not disposed to hold that what was proved was sexual harassment of a grave order" and awarded her compensation of $1500 in respect of the harassment.[190] The Court made a specific finding that there was no constructive dismissal, saying that it did not wish to "encourage a view that an allegation by a worker of sexual harassment is sufficient ground for abandonment of employment."[191] For this reason the Court refused to award any reimbursement of wages lost, and no order for costs was made.

In *Fulton* v *Chiat Day Mojo Ltd* the complainant had been employed for less than 2 months when she was constructively dismissed after complaining of sexual harassment. The Tribunal found that the complainant was sexually harassed but did not have a personal grievance on that ground because the employer had taken all practicable steps as required under section 36 of the ECA to stop the harassment by the complainant's co-workers. The complainant was

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[186] *Z & Y Ltd* v *A* (Unreported, 3 September 1993, Wellington Employment Court, WEC 21/93 (Goddard CJ)) 2. The finding of constructive dismissal was set aside on appeal. The Court did not discuss the question of remedies in any depth, but set aside the decision and referred it back to the Tribunal for a rehearing.

[187] Pursuant to s 40(1)(c)(i) of the ECA.

[188] The limitations of the power to make recommendations under s 40(1)(d) of the ECA is mentioned in Part III B 1(h).

[189] *AB Ltd* 762.

[190] Compensation for humiliation, injury to feelings and loss of dignity in cases dealt with by the HRC has also been modest, although since the removal in 1992 of the $2000 limit (see above n 161), amounts have been increasing. Nevertheless levels of compensation awarded to sexually harassed women continue to be insultingly low. A sexually harassed complainant who was raped and repeatedly sexually assaulted was recently awarded $9000 compensation (*The Evening Post*, Wellington, New Zealand, 3 August 1993, 13). Compare the A$120,000 damages awarded to a sexually harassed Hobart City Council worker on 10 July 1993 for assault and battery, false imprisonment, defamation and negligence (*The Evening Post*, Wellington, New Zealand, 13 July 1993, 6). Tasmanian local authorities are not covered by any specific provisions prohibiting sexual harassment in the workplace.

[191] *AB Ltd* 767 - 768.

awarded compensation of $3000 for stress, humiliation, loss of dignity and injury to feelings in respect of the constructive dismissal[192] and costs of $1250.

In *P* v *S* the complainant was a high school student who worked for 7 months as a part time shop assistant in the respondent's shop before she "resigned" because of sexual harassment by the employer. The harassment consisted of the harasser:[193]

> [L]ooking [the complainant] up and down, tapping her on the bottom with his hand as he walked past, making unwelcome and inappropriate comments about her appearance and changing his trousers (thus being clad in underpants) in front of her and drawing her attention to himself.

P also gave evidence that:[194]

> [S]he felt scared when she was alone in the shop with T [the harasser] at the end of work. So scared that she was worried that T would rape her. She gave evidence that she would try and have one of the other shop assistants wait for her to leave. She was afraid to be alone in T's company even for a few minutes.

The Tribunal found that sexual harassment had occurred and had caused P to resign. Hence she was constructively dismissed. In assessing the amount of compensation the Tribunal took into account P's age, the fact that the harassment was "at the lower end of the scale",[195] the "apparent quick return of the applicant to her old self",[196] the length of time she was employed, and the length of time during which she was harassed. She was awarded compensation of $3500, 3 months lost wages ($884), and costs of $1500.

(b) Constructive dismissal

The "harassment" decisions are inconsistent in terms of whether constructive dismissal occurred. Constructive dismissal takes place where a worker has to leave her employment because the employer's conduct or breach of duty "forces" resignation on the worker.[197] Implied in all contracts of employment is a term "that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and

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192 Pursuant to section 40(1)(c)(i) of the ECA.
193 *P* v *S* 3.
194 Above.
195 Above 7.
196 Above.
197 Constructive dismissal may also arise in other circumstances: *Auckland etc Shop Employees IUOW* v *Woolworths (NZ) Ltd* [1985] ACJ 963 (CA). See also *Wellington etc Clerical etc IUOW* v *Greenwich* [1983] ACJ 965 (Arb Ct); Hughes, above n 82, para 4.150 pp 1928 - 1930; and Horn, above n 140, para EC 27.04 pp IC-3 - IC-4.

employee."[198] The decisions in *Fulton* v *Chiat Day Mojo Ltd* and *P* v *S* establish that where sexual harassment is of a sufficiently serious nature or effect, it may destroy or seriously damage that relationship, thus breaching the implied duty and resulting in constructive dismissal of the employee.

Whether constructive dismissal has occurred is essentially a question of fact.[199] In *AB Ltd* the employee was terrified to be alone in the workplace with her employer who had sexually assaulted her, yet the Labour Court held that there was no constructive dismissal. If sexual assault and other conduct by an employer inducing a reasonable fear on the part of the employee for her physical safety is not a sufficient breach of the implied term of confidence and trust to cause constructive dismissal, it is difficult to imagine in what circumstances constructive dismissal could ever be established. It is submitted that the approach of Finnigan J in *AB Ltd* is incorrect because it establishes that even sexual harassment of a serious nature[200] may not be a sufficiently serious breach of the relationship of trust and confidence implied in employment contracts to warrant the employee resigning. Although the *AB Ltd* finding is a finding of fact, it is submitted that the decision on this point is effectively inconsistent in principle with the finding of the EOT in *H* v *E*,[201] that sexual harassment by an employer may destroy the relationship of trust and confidence so that constructive dismissal occurs, and with the approach of the employment institutions in cases of constructive dismissal generally.[202] Where sexual harassment leads a worker to resign, the worker has effectively established two grievances (dismissal and sexual harassment)[203] and should be compensated in respect of both grievances. The Tribunal's decision in *P* v *S* supports this approach.

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[198] *Auckland Provincial District Local Authorities Officers IUOW* v *Auckland Electric Power Board* [1992] 1 ERNZ 87, 95 (AEC, Colgan J).

[199] *Auckland etc Shop Employees IOUW* v *Woolworths (NZ) Ltd*, above n 197, 969.

[200] The Labour Court found (768) that the sexual harassment in *AB Ltd* was "serious" but not "grave".

[201] Above n 45, 336 relying specifically on the *Woolworths* decision, above n 197.

[202] See n 197. Finnigan J suggested (768) that "the grievance could have been remedied while the employment continued", that "[w]ages could have been payable for any period of absence", and that the union should have advised the complainant to "stay away from work until the matter was sorted out." With respect this is unrealistic. It took almost 2 months for the grievance to reach a grievance committee and a further 9 months until the case was heard by the Labour Court. An employer is highly likely to dismiss a worker who is absent from work for that length of time. Moreover, in other cases of constructive dismissal workers are not required to "stay away from work" until matters have been sorted out. The Court also stresses that the worker had found it very difficult to get another job, and that if she had not "abandoned" her employment she "could have had both compensation and her job" (768). However, the worker did not claim reinstatement, so presumably did not want her job back. Nor, it is submitted, did she abandon her employment, since it was the employer who initiated the termination by breaching his implied duties under the employment contract. In requiring the worker to remain employed in the circumstances, the Court simply failed to acknowledge the seriousness of the harassment in this case. This is gender bias.

[203] *Z & Y Ltd* v *A* 16.

In the recent Employment Court decision, *Z & Y Ltd* v *A*, Goddard C J makes it clear that an employer has an obligation under the employment contract to refrain from sexual harassment. To prove constructive dismissal, three things must be shown: "breach of duty by the employer, resignation by the employee, and a causal link between the two."[204] A complainant alleging constructive dismissal because of sexual harassment must show that "but for" the harassment, she would not have left her employment.[205] The Court found that the Tribunal in *A* v *Z* had not actually made a determination about the cause of the termination of the employment contract and that the Tribunal decision was defective for this reason (although the outcome of the case did not turn on this point because the complainant also had a separate personal grievance based on the claim of sexual harassment). The Court's approach to constructive dismissal in *Z & Y Ltd* v *A* is a positive one for women, since it focuses attention on the reason for the termination of the employment relationship, rather than requiring, as the Labour Court did in *AB Ltd*, that the harassment reach a certain level of seriousness (determined objectively) before a finding of constructive dismissal will be made.

2 *Remedies granted to men dismissed because of allegations of sexual harassment*

While women's jobs have been valued at a low level, the employment institutions have valued the right of men to job security extremely highly, to the point of being overly generous in some cases. A union commentator has noted:[206]

> In many instances workers who may have been dismissed unfairly on procedural grounds, but who have been held to have contributed to their dismissal by their actions, receive no compensation or very little compensation. Sexual harassers who are dismissed procedurally unfairly, seem to be awarded large and in some cases huge amounts of compensation.

In *Northern Butchers' Union* v *Peach & Vienna Foods*,[207] the earliest case in which sexual harassment was adjudicated on in the employment institutions, the harasser was found to have been unfairly dismissed on procedural grounds (but not on substantive grounds). He was awarded compensation of $2000[208] and wage arrears of $1800. He was not reinstated. While this amount of compensation may appear modest by today's standards, it was the highest (equal) amount awarded by the Arbitration Court in any personal grievance in 1982.[209] The

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204 Above, 4. See also *H* v *E* above n 45.

205 *Z & Y Ltd* v *A* 16.

206 Coleman "Trade Union Perspective 297.

207 [1982] ACJ 379 (Arb Ct).

208 Section 117(7) of the Industrial Relations Act provided that where a personal grievance was established the settlement, decision or award could provide for "the payment to [the grievant] of compensation by his employer." No separate heads of compensation were specified, as they were under s 227(c) of the LRA and are now under s 40(1)(c) of the ECA.

209 See *New Zealand Merchant Service Guild IUOW* v *Coastal Shipping Ltd* [1982] ACJ 445, in which $2000 compensation (and $5000 lost wages) was awarded to a ship's captain whose dismissal was found to be substantively and procedurally unfair. Compare also *Auckland Hotel etc IUOW* v *Kentucky Fried Chicken Ltd*

Court commented that the amount of compensation awarded to the alleged harasser, Mr Epps, was "heavily discounted" because he was "substantially to blame for his loss". [210] One wonders what the level of compensation would have been had it not been discounted.

In 1988 in *C* v *L D Nathan Ltd*[211] the Labour Court found that harassment had not occurred. The alleged harasser, the manager of a supermarket meat unit, was reinstated and awarded compensation of $3000 and reimbursement of all wages lost. In a private arbitration the same year[212] the arbitrator found that sexual harassment had occurred but that the alleged harasser had been unfairly dismissed because he had not been given a proper opportunity to explain. He was awarded $10,000 compensation. A report of this arbitration notes that this "sizeable sum" of compensation "became rather a reward for misconduct".[213] In *Parlane* v *NZ Police*[214] the harasser, who had been employed by the respondent employer for less than 2 years when he was dismissed, was awarded 3 months wage arrears and compensation of $4000 in respect of both job loss and humiliation.

In *New Zealand Association of Polytechnic Teachers* v *Nelson Polytechnic*[215] the level of compensation awarded by the Labour Court was outrageously high. Complaints of sexual harassment made by students against a Polytechnic tutor were not sustained. The chairperson of the personal grievance committee found that the dismissal was unfair and awarded the grievant an unspecified amount of wage arrears and compensation of $5000. The grievant was employed on a temporary contract which had most of the year to run when he was dismissed. He was not a permanent employee, which would have been an indicator for relatively higher compensation. On appeal to the Labour Court he was awarded lost wages of $30,000, compensation of $25,000 for humiliation, and $40,000 compensation for future economic loss.[216]

[1982] ACJ 379, in which a worker unfairly accused of theft was awarded $1400 compensation and *Wellington District Hotel etc IUOW* v *Napier Cosmopolitan Club Inc* [1982] ACJ 343, in which a casual and part time worker was constructively dismissed following an implication of dishonesty in her behaviour and was awarded $250 compensation.

210 *Northern Butchers' Union* v *Peach & Vienna Foods* 388.

211 [1988] NZILR 304 (Labour Court).

212 *T P Co* v *Staff Union* [1987] ILB 53. Compare *Northern Clerical IUOW* v *Queen City Cabs* [1988] NZILR 1040, a successful application to the Labour Court to enforce a personal grievance committee decision awarding a sexually harassed woman $4000 compensation. No details of the grievance are given. The decision notes (1041) that the complainant was dismissed "for other reasons."

213 Coleman "Trade Union Perspective" also notes in relation to this case (296) that "[s]uch an enormous sum in compensation by the mediator, led the harasser to the conclusion that he had been badly wronged over the incident of harassment. Buoyed up by this feeling he then proceeded to take a defamation case against our [union] member. This resulted in our member having to employ legal counsel including a Queen's Counsel to defend her. As if this was not bad enough, the harasser appeared back on the worksite in the employ of an independent contractor".

214 [1991] 3 ERNZ 721 (Labour Court).

215 [1991] 1 ERNZ 662 (Labour Court).

216 Even though his salary for the whole year was set at only $37,392.

In *B* v *Amalgamated Engineering Union*[217] offensive behaviour of a sexual nature was found to have occurred but not detriment. Despite the opposition of the employer and the complainant, which is usually a strong contra-indicator for an order of reinstatement,[218] the Tribunal reinstated B and awarded compensation of $2000 for humiliation, loss of dignity and injury to feelings. This level of compensation was awarded despite the Tribunal's finding that compensation should be discounted because B himself had not behaved with any dignity, the employer had not been guilty of any blatant or outrageous conduct, B himself had substantially contributed to his own dismissal, and taking into account the principle that damage for "job loss" is compensated for when a grievant is reinstated, so that compensation becomes an award solely in respect of humiliation, loss of dignity and injury to feelings.[219]

3 *Compensation*

(a) Compensation for job loss

The employment institutions have denied adequate compensation for job loss to women who have lost their jobs as a result of sexual harassment. In *AB Ltd*, *Fulton* v *Chiat Day Mojo Ltd* and *A* v *Z*, the complainant received no compensation for the fact that the harassment caused her to lose her source of livelihood. Under the ECA, compensation for job loss can be awarded under section 40(1)(a) as "reimbursement ... of a sum equal to the whole or part of any wages or other money lost ... as a result of the grievance." In general, although not necessarily, this remedy is used to compensate an employee for loss which occurred up until the date of the hearing. Compensation for job loss may also be awarded under section 40(1)(c)(ii) for "[l]oss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen". This provision has generally been used to assess future loss. However:[220]

> [I]n the end it is not material whether compensation in respect of loss of remuneration is assessed in two bites or one so long as there is no double counting and at some stage the overall position is assessed.

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217 [1992] 2 ERNZ 554 (hereafter *B* v *AEU*).

218 The test of whether reinstatement is practicable is whether the employee "would be a harmonious and effective member of her employer's team if ... reinstated ...": *Northern Hotel etc IUOW* v *Rotorua RSA (Inc)* [1989] 3 NZILR 497, 501 (Labour Court). The same test was recently applied by Travis J in *Du Pont Peroxide Ltd* v *Verboeket* [1993] 1 ERNZ 124, 130 - 131 (AEC).

219 *STAMS* v *Denhard's Bakeries (No 2)* [1991] 3 ERNZ 941, 954 (WEC, Goddard CJ). The AET decision on remedies is *B* v *AEU (No 2)* (Unreported, 30 June 1992, Auckland Employment Tribunal, AT 79A/92 (A Dumbleton)). The relevant findings are at 4 - 5.

220 *Telecom South* v *Post Office Union* [1992] 1 ERNZ 711 (CA), 720 (per Richardson J). Double counting may have occurred in the *Nelson Polytechnic* case, since the grievant received a substantial amount for future economic loss even though he was a temporary employee only. Amounts awarded in respect of wages lost is usually limited under s 41(1) to a maximum of 3 months.

With the exception of *P* v *S* (in which one combined amount of compensation for job loss and injury to feelings was awarded) the employment institutions have failed to adequately assess and compensate the complainant for the economic damage she has suffered because of sexual harassment. The employment institutions have effectively placed a zero value on the right of women to job security. Yet the protection of women's right to job security is one of the objects of the sexual harassment provisions in the ECA. The assessment of compensation for job loss is based on a variety of factors.[221] Of particular importance are the salary and nature of the position held, length of service, and the period for which the employee could reasonably have expected to work but for the dismissal. In the sexual harassment cases these factors, if applied, would have resulted in relatively higher compensation for the men and lower compensation for the women. Yet even these factors cannot explain the zero value placed on the value of the complainants' jobs as compared to the generous remedies awarded to the men who claimed unjustified dismissal, in particular to those who did engage in sexually harassing behaviour but whose dismissals were unfair because of procedural defects in the dismissal process.[222] What does explain the discrepancy is gender bias.

There is also an element of inherent gender bias in placing too great an emphasis on type of job, rate of pay and length of service as factors to be taken into account in assessing compensation for job loss. Women, because of their unequal position in the labour market,[223] start from an unfair position in such assessments. Ms Fulton and the grievant in *AB Ltd*, for example, never even got a chance to build up a substantial period of employment with their employers. Using the length of service factor in assessing the value of job loss caused by sexual harassment discriminates against women twice; firstly because women usually have less service than men; and secondly because it fails to recognise that in these cases the harassment itself has made it impossible for women to build up long service. Sexual harassment as a cause of economic inequality for women is at its most obvious where harassment prevents, or makes it harder for, women to work at all, or to work under the same conditions as men. A union commentator poses the question in the following way:[224]

> [H]ow can one describe the feelings of a woman who maybe went to night school for years to get a decent qualification, and then on returning to the workforce finds herself having to try to ignore daily the dirty sexual innuendoes of her boss - and still get some joy out of a job she's waited years to get?

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[221] Discussed in the 5 separate Court of Appeal judgments in the *Telecom South* case, above n 220.

[222] Section 40(2) of the ECA obliges the Tribunal or Court, in awarding remedies to an unjustifiably dismissed grievant, to "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and ... if those actions so require, reduce the remedies that would otherwise have been awarded accordingly." Such reductions have, it is submitted, been minimal in the dismissal cases.

[223] *Beyond the Barriers. The State, the Economy and Women's Employment 1984 - 1990* (National Advisory Council on the Employment of Women, Department of Labour, Wellington, 1990) 87 - 92.

[224] Steele *No Laughing Matter* 19.

It is submitted that in all sexual harassment cases in which sexual harassment has caused job loss, the employment institutions are obliged to evaluate the job loss of the complainant and compensate her for it, re-examining the traditional factors according to which the value of job security is usually assessed, and taking into account the gender bias inherent in the labour market and the way in which sexual harassment contributes to this.

The value of wages lost has also been evaluated in a discriminatory way. The ECA provides that the employment institutions must reimburse wages lost by an employee up to a total amount equivalent to 3 months ordinary time remuneration.[225] The Tribunal or Court may in its discretion award a higher amount[226] and must reduce the amount "to such extent as it thinks just and equitable" where satisfied that "the situation that gave rise to the personal grievance resulted in part from the fault of the employee in whose favour the order is to be made".[227] The complainant in *AB Ltd* received no award for lost wages. The complainant in *A* v *Z* was awarded only 2 months wages because of her "stupidity ... on one of the more *minor* matters."[228] The award of wages in *B* v *AEU* was also reduced to an amount equivalent to 2 months even though this was said to reflect *substantial fault*.[229] No reduction was made in the wages reimbursed to Mr Parlane, who did sexually harass his workmates, nor to C, despite his apparent fault.

(b) Compensation for loss of dignity, humiliation and injury to feelings

Awards of compensation for loss of dignity, humiliation and injury to feelings have also been unfairly generous to male harassers and unfairly low in the case of complainants of sexual harassment. The dignity of A, a permanent employee of 3 years standing, was worth $5000. The dignity of the complainant in *AB Ltd* was worth $1500. The dignity of Ms Fulton was worth $3000. None of these complainants had contributed towards the situation which gave rise to the personal grievance.

Nor, according to the Labour Court, had Mr Luckhurst in the *Nelson Polytechnic* case. His dignity was worth $25,000. Mr C was found not to have sexually harassed fellow employees. In awarding him $3000 compensation (as well as reinstating him), the Labour Court stated

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225 Section 41(1) of the ECA (and s 229(1) of the LRA). The differences between s 40(2) (assessment of remedies to an unjustifiably dismissed worker whose *actions* contributed to the situation which gave rise to the grievance) and s 41(3)(b) (Court or Tribunal obliged to reduce amount of lost wages where personal grievance results in part from the *fault* of the employee) are discussed in *Paykel Ltd* v *Ahlfeld* [1993] 1 ERNZ 334 (AEC, Travis J) and *Macadam* v *Port Nelson Ltd* [1993] 1 ERNZ 300 (WEC, Goddard CJ).

226 Section 41(2) of the ECA; see also s 229(2) of the LRA.

227 Section 41(3) of the ECA; see also s 229(3) of the LRA.

228 The view that A was not at fault at all is discussed below, Part IV G 1 (emphasis added).

229 *B* v *AEU (No 2)* above n 219, 4.

that it was taking into account his "length of service."[230] Obviously only a limited "reinstatement discount" was made. The Court therefore doubled up on at least part of his remedy. The Court also indicated that it discounted the amount of compensation because "after the November 1987 complaint he continued or allowed to continue talk of a nature which some people could find unpleasant. To some extent he has contributed to his problem."[231] Compensation of $3000 was extremely high given the lost wages awarded to C, the fact that he was reinstated, and his contributory behaviour. It was equal to the amount awarded to Ms Fulton, even though she had done nothing wrong. B, who sexually harassed his workmate, had the value of his dignity assessed at $2000, even though he had substantially contributed to his own dismissal. What level of compensation would he have got if he had not contributed to his own dismissal? And how can the amount of damage done to the dignity of a person wrongly accused of injuring someone else be worth as great as or more than the amount of damage done to the dignity of the person to whom that injury is actually done?

These decisions indicate that, for the employment institutions, the dignity of a "blameless" woman who has been harassed is worth considerably less than a man's dignity, even where that man has sexually harassed a woman. A man's right to dignity during the dismissal process is apparently worth more than a woman's right to freedom from sexual harassment. This is gender bias in a very raw form. Is there a deeper inequality still? For many men, the value of a woman *is* her sexuality and women exist for the sexual pleasure of men.[232] To assess the value of a woman's dignity is to answer the question "whether a woman is valuable enough to hurt, so that what is done to her is a harm."[233] Sexual harassment law says that for a man to use a woman for sexual pleasure at work is legally wrong. The law says this, but harassers do not understand it. Do the decision makers understand it? Or do the minimal awards of compensation for humiliation, loss of dignity, and injury to the feelings of sexually harassed women reflect a social perspective, that women really exist for sex, and cannot be injured by it, rather than reflecting the substance of the law?

One may conjecture whether the high awards of compensation made to male harassers are the result of an unconscious desire on the part of decision makers[234] to award a sort of "boy's own top up" to compensate men for having been caught out in a situation where men believe the law should not make this behaviour unlawful, but can not say so publicly. And are the extraordinarily high awards to those accused of sexual harassment, but found not to have

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230 *C v L D Nathan* 308.
231 Above.
232 MacKinnon *Feminism Unmodified* 110.
233 Above. MacKinnon says that this question is often answered in the negative: "Women being compensated in money for sex they *had* violates male metaphysics because in that system sex is what a woman is for."
234 No woman has ever adjudicated on a "dismissed harasser" case.

harassed, exponentially increased for a similar reason? Not only shouldn't it be unlawful, but they didn't even get the pleasure of doing it anyway! The writer is not suggesting that the decision makers in these cases are giving effect in any conscious way to the "male metaphysic"[235] that women exist for sex. Yet the effect of their decisions is to undermine the very heart of the sexual harassment provisions in the ECA - the principle that sexual harassment is an injury, for which those injured deserve real compensation. The writer concludes that an analysis of the sexual harassment decisions supports MacKinnon's view on how far enforcement of the law of sexual harassment still has to go:[236]

> [T]he state has never in fact protected women's dignity or bodily integrity. It just says it does. ... [T]he promise of "equal protection of the laws" [must] be *delivered upon* for us, as it is when real people are violated. It is also part of a larger political struggle to value women more than the male pleasure of using us is valued.

(d) *A* v *Foodstuffs (South Island) Ltd*: A cause for optimism

Some decisions give cause for optimism, however. In *Hetei* v *Feltex Woven Carpets Ltd & NZ Dairy Food & Textile Workers Union*[237] the Tribunal recognised that sexual harassment is a serious injury to women and upheld the employer's decision to dismiss the harasser. In *A* v *Foodstuffs (South Island) Ltd* the Tribunal found that the alleged harasser had been unfairly dismissed on procedural grounds. The Tribunal noted that "this is one of those rare cases where I think it can be said that if the employer had handled the matter with more care then his ultimate conclusion would have been strengthened, rather than weakened."[238] The Tribunal came to a conclusion that, in comparison to findings in other sexual harassment cases, was both radical and inspired. It held that the extent to which the employee had contributed to his own dismissal in terms of section 40(2) and 41(3) of the ECA was "total". The Tribunal ignored the incorrect concession made by the advocate for the respondent employer that, if the dismissal was found to be unjustified, reinstatement would be automatic, and awarded the grievant "an award of costs, and nothing more."[239] In this case, the Tribunal valued the woman more than the male pleasure of using her.

The $3500 compensation awarded in *P* v *S* is also cause for some optimism that the employment institutions may be beginning to place a slightly higher value on the right of women to job security and dignity. In that case the Tribunal chose not to discount the award it made, although the complainant was a high school student, the job was not her sole source of financial support and she worked part time on only 2 days a week. In these decisions the

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235 Above n 233.
236 MacKinnon *Feminism Unmodified* 105.
237 [1990] 3 NZILR 132 (Labour Court).
238 [1993] 1 ERNZ 81 (CET, D Miller) 102.
239 Above. The award of costs was set at $1000.

Tribunal gives effect to the objects of the sexual harassment provisions in the ECA and provides real compensation for the victims of sexual harassment.

B Corroboration and the Recent Complaint Rule

The unremitting indulgence in the Lying Woman/Innocent Man panic feeds the belief that women's concerns are second rate, always trumped by someone else's interests.[240]

Ann Althouse

1 The rules of evidence

The rules of evidence are another set of tools which assist in the process of judicial decision making. Historically the law of evidence has doubted the competence and reliability of women as witnesses. The common law regarded women as incompetent witnesses in criminal cases.[241] Women were also unable to testify for or against their husbands, "because in theory husband and wife were one, and that one was the husband."[242] The pervasive myth that women are unreliable and untrustworthy witnesses still influences decision makers. There is a "common perception that women are less capable, less rational, and therefore less credible than men".[243] An extra dimension to this perception has always been present in cases with a sexual content, because of the myth that women, especially sexually experienced women, lie about sexual matters. The employment institutions have effectively required corroboration, in the sense of independent confirmation, of complainants' stories of sexual harassment, reflecting historical gender bias in the rules of evidence. In this section the writer discusses the unwarranted emphasis on the need for corroboration of complainants' stories, and concludes that this emphasis is based on sexist assumptions, and in particular on the myth that women tell lies about sexual matters.

2 The requirement for corroboration in sexual cases

"The general rule of modern law is that the Court may act upon the uncorroborated testimony of one witness."[244] Traditionally, corroboration was considered necessary or desirable in certain types of cases before a Court could convict a defendant or find for an applicant or

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240 A Althouse "Beyond King Solomon's Harlots: Women in Evidence" (1992) 65 S Cal LR 1265, 1277.
241 Above n 13, 3. In New Zealand women could not be jurors until the Women Jurors Act was passed in 1942. Jury service for women was made compulsory by the Juries Amendment Act 1963.
242 Above n 13, 3.
243 K Kinports "Evidence Engendered" (1991) 2 U Ill LR 413, 435.
244 D L Mathieson *Cross on Evidence* (4 ed, Butterworths, Wellington, 1989) para 8.1 p 171 (hereafter Cross 4 ed).

plaintiff.[245] Corroboration is independent testimony which implicates the defendant in the crime or act in issue:[246]

> [E]vidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

Corroboration is required when the decision maker believes that "the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth."[247] Corroboration was required until recently as a matter of law in paternity cases and as a matter of judicial practice in cases of sexual offences.[248] Judges were required to warn juries in rape and other sexual assault cases that it was "not safe to convict on the uncorroborated evidence of the complainant, but that they may do so if satisfied of its truth" or that it was "really dangerous to convict on the victim's evidence alone".[249] The rationale for the corroboration requirement in sexual offences rested on the following propositions:

(a) That rape (and other sexual offences) were accusations "easily to be made and hard to be proved and harder to be defended by the party accused, tho never so innocent".[250]
(b) That false accusations of rape are common: "There is sound reason for ... [the corroboration requirement], because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, fantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed".[251]
(c) That juries feel particularly sympathetic to wronged women.[252]

The "easy to make and hard to refute" assumption was also one of the main reasons for the imposition of the corroboration requirement in paternity cases,[253] along with the view that the

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245 See generally Cross 4 ed, paras 8.1 - 8.18 pp 171 - 183; Evidence Law Reform Committee *Report on Corroboration* (Department of Justice, November 1984) (hereafter *ELRC Report*).
246 *R* v *Baskerville* [1916] 2 KB 658, 667 (Lord Reading CJ).
247 *R* v *Ventrovec* (1982) 67 CCC (2d) 1, 12.
248 See generally D L Mathieson *Cross on Evidence* (3 ed, Butterworths, Wellington, 1979) (hereafter Cross 3 ed) and Cross 4 ed and *ELRC Report*. For comment on the continued use of corroboration requirements in sexual offence trials, see McDonald, above n 53, 47 - 53.
249 Cross 3 ed 189 - 190.
250 M Hale *History of the Pleas of the Crown I* (Professional Books, London, 1971) 635 (originally published in 1646), cited in Estrich, above n 12, 6. At a Rape Symposium in Wellington in 1982, over half the men (the vast majority of whom worked within the criminal justice system) at the Symposium agreed with the statement that "rape is an accusation easily to be made and hard to be defended": *Rape Study* 8.
251 See, eg, Professor Glanville Williams *The Proof of Guilt* 159, cited by C B Cato "The Need for Reform of the Corroboration Rule in Sexual Offences" [1981] NZLJ 339.
252 J H Wigmore *Evidence in Trials at Common Law* (3 ed, Little Brown & Co, Boston, 1970) Vol 3A, para 924a, p 736 - 47.
253 Cross 3 ed 180.

civil consequences of the granting of a paternity order were extremely serious.[254] As noted above, these propositions were not supported by social reality. The main reason for amending the corroboration rule in rape cases was that the rule "encourages the false assumption, which is insulting and derogatory to women, that women 'are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.' "[255] In 1984 the Evidence Law Reform Committee ("ELRC") recommended accordingly that the corroboration rule in sexual cases be abrogated by statute.[256] The corroboration requirement in paternity cases was abolished for similar reasons.[257] The ELRC also recommended that the term "corroboration" be used only in relation to perjury and treason cases.[258] In other cases reference should be "in the course of a general summing up on credibility, to evidence which tends to confirm or support other evidence or which tends to show that a witness is telling the truth because other evidence independently confirms it as the truth."[259] The emphasis has changed from a requirement for independent confirmation of evidence to a more general assessment of credibility in all the circumstances.[260] The law of evidence no longer contains a presumption that women have a tendency to lie about sexual matters.

3 *Rules of evidence in the employment institutions*

The employment institutions have had, since the earliest days of a specialised industrial jurisdiction in New Zealand, the power to dispense with the application of the formal rules of evidence (such as corroboration requirements) and the broad discretion to admit such evidence as they think fit.[261] In *Winstone Clay Products Limited* v *Inspector of Awards*[262] the Court of Appeal noted:[263]

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254 *ELRC Report* paras 62 - 86 pp 19 - 26, and in particular para 66 p 20.

255 *Rape Study* 140, quoting J Temkin "Towards a Modern Law of Rape" (1982) 45 MLR 399, 417. The supporting reasons are summarised in Cross 4 ed para 8.10 p 179.

256 The corroboration requirement in cases involving sexual violation was removed by s 23AB of the Evidence Act 1908 (inserted by s 3 of the Evidence Amendment Act (No 2) 1985.

257 See *ELRC Report* para 66 p 20. The corroboration requirement in s 52(2) of the Family Proceedings Act 1980 was removed by s 4 of the Family Proceedings Amendment Act 1986.

258 Independent confirmation from some other source of suspect evidence is still required as a matter of law in cases of perjury and treason (Crimes Act 1960 s 75(1) (treason) and s 112 (perjury)). In this paper the writer uses the term "corroboration" in a broad sense, because the employment institutions themselves have continued to do so despite the *ELRC* recommendation.

259 *ELRC Report*, para 19 p 9. This approach was effectively confirmed by the Court of Appeal in *R* v *Daniels* [1986] 2 NZLR 106, 112, 113.

260 Cross 4 ed para 8.10 p 179.

261 In an early case, *Seed v Somerville* (1904) 7 GLR 199, the Court of Arbitration, in considering a workers' compensation claim brought by the widow of a deceased worker, admitted hearsay evidence from a doctor and the deceased's father as to the cause of an injury, to assist in determining whether an accident arose out of and in the course of the deceased's employment.

262 [1984] 2 NZLR 209.

263 Above, 211, considering s 48(4) of the IRA, one of the predecessors to s 126(1) of the ECA.

> ... [I]t would be most dangerous to overlook the special nature of the Arbitration Court, its purpose and its powers. It is not to be assumed that propositions of law, however prestigious and well established in the High Court and the Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for a specific field. In the matters directed by the statute to come before it, it has exclusive jurisdiction, and, when exercising it, must take into account other considerations besides legal issues. It is concerned primarily with fairness ... It is not bound by the rules of evidence with which we are most familiar.

The broad discretion is even more relevant in the Employment Tribunal, which is a "low level, informal, specialist" body to provide "speedy, fair, and just resolution of differences between parties to employment contracts".[264] The discretion available to the employment institutions to admit such evidence as they think fit and the abolition of corroboration rules requiring independent confirmation of evidence[265] should have, but has not, led to a gradual cessation of use of the term "corroboration", along with an increasing use of general assessments of credibility. Continued reliance by the employment institutions on the need for independent confirmation of evidence in sexual harassment cases raises the issue of the extent to which decision makers are still influenced by the myth that cases with a sexual element are "particularly subject to the danger of deliberately false charges."[266] The emphasis on corroboration of the complainant's story carries with it a flavour of mistrust. The question whether a woman's word is enough to establish that sexual harassment occurred has, in general, been answered in the negative by the employment institutions.

4 The treatment of corroboration in sexual harassment cases

In *AB Ltd* the Labour Court said:[267]

> Evidence called to corroborate allegations of sexual harassment ... is clearly admissible at law if the Court in equity and good conscience sees fit to admit it, and if admitted may be challenged in this Court only as to its probative value. Evidence said to be corroborative must be carefully weighed for the credibility of the witness, and if the evidence is evidence of an alleged statement or complaint, the credibility of that statement or complaint itself.

The Court said that its jurisdiction to admit such evidence as it thought fit "overrides ... the operation of the principles governing the admissibility of corroborative evidence that may apply in other Courts. The Court however should and does in such cases consider those principles."[268] These comments may be interpreted to mean that the Court considered that corroboration requirements in cases involving sexual matters were still current in "other

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264 Section 76(c) of the ECA. The statutory discretion of the Employment Court is now contained in s 126(1) of the ECA which provides that the Court may "accept, admit, and call for such evidence as in equity and good conscience it thinks fit, whether strict legal evidence or not." Section 96 of the Act confers a similar broad discretion on the Employment Tribunal.

265 Cross 4 ed Chapter 8 (Corroboration) paras 8.1 - 8.18 pp 171 - 183.

266 Above n 251.

267 *AB Ltd* 766.

268 Above, 764.

Courts" in 1988. This interpretation is reinforced by the manner in which the Court was careful to ensure that each of the complainant's allegations was supported by other evidence.[269]

A similar approach was taken in *A* v *Z*, in which the Tribunal treated corroboration as a discrete issue for consideration. The Tribunal noted that there was "little corroborative evidence either way" on the competing contentions of the alleged harasser, who said that the complainant flaunted a tattoo near her breast to patrons in the bar where they both worked, and the complainant, who said that the harasser pulled her top down so that patrons could see the tattoo.[270] In considering the complainant's allegation that the harasser had on one occasion held up a chippie box and stated, "I bet you wish you had a box this big", within hearing of others in the bar, the Tribunal noted that although this incident was *not* sexual harassment,[271] it did occur, having been attested to by a third witness. Because the harasser denied that it occurred, "[t]he matter had its relevance ... in issues of credibility."[272] The Tribunal also noted that the complainant's evidence was supported in other aspects by her mother and her partner.

Such a heavy emphasis on corroboration is not a feature of most personal grievance cases.[273] The comments in *AB Ltd* and in *A* v *Z* indicate that corroboration in the sense of independent confirmation is still being required in sexual harassment cases and that the foundation of that requirement, the view that women lie about sexual matters, is still an unstated assumption in the decisions. This approach was also taken in *Y* v *X Ltd*, in which the "recent complaint rule" was discussed.

5 *The recent complaint rule*

In cases of sexual offences, the fact that a complaint was made to another person by the victim has long had relevance. In the Middle Ages "it was essential that the victim should have raised the hue and cry if an appeal of rape were to succeed".[274] The failure to complain within a reasonable period once raised a presumption against the complainant, although this is no

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269 Above, 762 - 764.
270 *A* v *Z* 4.
271 This finding is discussed in Part IV G 1 "Surrounding circumstances".
272 *A* v *Z* 8.
273 Although it is fair to say that in some personal grievance cases credibility and the existence of corroboration in the sense of supporting evidence is an important issue: see *Honda New Zealand Ltd* v *New Zealand Boilermakers' etc Union* [1991] 1 NZLR 392 (CA). It is also fair to say that in other cases, there is much less of an assumption that the inherent weakness of the grievant's evidence needs to be supported by other witnesses. This assumption is made in sexual harassment cases.
274 Cross 4 ed para 9.27 p 204.

longer the case.[275] In criminal cases complaints, to be admissible, must be made as speedily as could reasonably be expected.[276] Evidence of recent complaint is not evidence of the truth of the complainant's story: "If the jury were to consider that the detail had been proved by the narration of the complaint, they would be accepting hearsay as evidence of the truth of that which was heard".[277] However, the relevance of a complaint is its support of the consistency of the complainant's story, and therefore of her credibility.[278] It is not corroboration, in the sense of independent confirmation, of the truth of the complainant's evidence.[279]

In *Y* v *X Ltd*, the Tribunal noted that following an incident in which the complainant, Y, alleged that X had showed her obscene photos of himself, Y asked the waitress in charge if she could knock off immediately and left. She then attended a party with her boyfriend who gave evidence of her distressed condition. The Tribunal described this evidence in the following terms:[280]

> At that party Ms Y unburdened herself to a friend Candy Smith. Ms Smith who is a final year law student gave evidence to the Tribunal.
>
> I must indicate here that while the Tribunal heard evidence subsequently from Ms Smith and from Ms Y's boyfriend as to what Ms Y had told them and the advice they had subsequently given Ms Y, I did not rely on this evidence of a complaint being made to people in whom she might naturally have been expected to confide as being evidence of corroboration of the facts complained of but only in so far as it bears on the credibility of her testimony to the facts alleged in that it shows consistency of conduct, or otherwise on her part.
>
> The same applies to the testimony of three other witnesses who testified that Ms Y had complained to them about Mr X's conduct. Those three were the Student Job Search official, the official from the Working Women's Resource Centre, and the union official from the Service Workers' Union.

Having referred to these recent complaints, the Tribunal did not actually proceed to analyse the extent to which they confirmed consistency of behaviour or credibility on the part of the complainant. The recent complaints were ignored by the Tribunal in assessing the credibility of the complainant's story. Nor did the Tribunal take account of the evidence given by the complainant's boyfriend of her distressed condition that night. While a recent complaint may not amount to technical corroboration, since it is not "independent" evidence, the distressed

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275 Above para 9.35 p 208.

276 Above para 9.33 p 207. See s 23AC of the Evidence Act 1908 (as inserted by s 3 of the Evidence Amendment Act (No 2) 1985. See also McDonald, above n 53, 49 - 53 regarding the application of the recent complaint rule in sexual offence trials.

277 Cross 4 ed para 9.27 p 204. See also *R* v *Nazif* [1987] NZLR 122, 126;. *R v O'Dowd* [1985] 1 NZLR 388n; *R v Aramoana* [1985] 1 NZLR 390n.

278 Cross 4 ed para 9.28 p 205.

279 Above para 9.36 p 208. In *R v Accused* [1993] 2 NZLR 286 the Court of Appeal affirmed the decision of the judge at trial to admit a complaint of sexual abuse made 4 to 5 years after the alleged indecent conduct. The Court of Appeal said (288) that this was not a recent complaint, but was admissible to rebut the defendant's allegation of recent fabrication and could be taken into account in assessing consistency and credibility.

280 *Y* v *X Ltd* 5.

condition of a complainant may be corroboration.[281] However, the Tribunal ignored this evidence. Given the immediacy and number of complaints made by the complainant in this case, the Tribunal should have accepted the evidence of the "recent complaints" as being broadly supportive of the facts alleged. It had a statutory discretion to do so pursuant to section 96 of the ECA; it had a discretion to admit hearsay evidence "in equity and good conscience"; the Tribunal is a "low level, informal" body which may accept such evidence as it thinks fit; it was dealing with a civil matter, and even in criminal cases the Court of Appeal has taken a more flexible approach[282] than the Tribunal did in *Y* v *X Ltd.* It should not have applied technical rules to the complainant's disadvantage. Also of concern is the Tribunal's failure to recognise that the point about corroboration was of little significance:[283]

> Although a complaint is received because it enhances the reliability of the victim's testimony, it does not constitute corroboration of his or her evidence, because corroboration must come from a source independent of the witness to be corroborated. But this point, *which used to be so important, is now without importance because of the abolition of the rule of practice requiring the Judge to warn the jury of the danger of acting on the uncorroborated evidence of the complainant in sex cases.*

So concerned do the employment institutions appear to be that women might lie about sexual harassment, and so pervasive is the mistrust of complainants, that the rules which must be met before a woman's story of sexual harassment will be believed are effectively as stringent as those in pre-reform rape cases. To require independent confirmation of evidence is to require a complainant to meet an extra element not required of other grievants. This extra element makes it more difficult for the party trying to prove her case, particularly when "women don't choose to be sexually harassed in the presence of witnesses".[284] Effectively it prevents women who are not harassed in the presence of witnesses from establishing personal grievances based on sexual harassment. A woman's word is, apparently, never enough.

C The Standard of Proof in Sexual Harassment Cases

> Proof is when what you say counts against what someone else says - for which it must first be believed.[285]
>
> Catherine MacKinnon

The standard of proof is an apparently value-free, objective and gender-neutral tool of decision making. Yet flexible standards of proof, like rules relating to relevance and corroboration, enable a decision maker to manipulate the point at which it can be said that a fact or proposition has been proven, and therefore whose story, the plaintiff's or the defendant's, is accepted as being legally "true". For this reason, the standard of proof may be

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281 *R v Poa* [1979] 2 NZLR 378 (CA).
282 Above n 279.
283 Cross 4 ed para 9.36 p 208 (emphasis added).
284 MacKinnon *Feminism Unmodified* 113.
285 Above.

used as an instrument through which gender bias can influence the outcome of cases, because it enables the decision maker to make it harder for a woman to prove her story, and therefore to protect men who harass. In this section the writer discusses the application of the standard of proof in sexual harassment cases dealt with by the employment institutions, and in particular the lowering of the standard of proof by the Employment Court in *Z & Y Ltd* v *A*.

1 Function and operation of the standard of proof

The function of the standard of proof "is to instruct the factfinder as to the degree of confidence that our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[286] The standard of proof allocates the risk of error between the parties and indicates the relative importance attached to the final decision.[287] In civil cases, the standard of proof which must be reached by the plaintiff is proof on the balance of probabilities.[288] The balance of probabilities, is, however, a flexible standard.[289] In *T* v *M*,[290] an application for a paternity order, the appellant argued before the Court of Appeal that the Family Court judge had lifted the standard of proof above the ordinary civil standard, by requiring that the standard of proof on the balance of probabilities be consistent with "the seriousness of the allegation". The Court of Appeal did not agree that a higher standard had been imposed:[291]

> ... [I]n any evidential context it is logically right for conclusions in the area of inference and judgment to be influenced both by the purpose to which they are directed and the significance of the assessment being made. Just as there are shades of possibility so the point at which there is satisfaction as to probability will vary depending upon the subject matter. ...
>
> It is the principle of good common sense that the more serious the issue the greater should be the care used in assessing it.

Although the application of the standard varies according to the seriousness of the matter before the Court, the standard is said to be a constant. There are no gradations.[292] There is no "kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt."[293] Rather, the seriousness of the subject matter before the court requires that a greater degree of care be exercised "in estimating whether or not the inference to be

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286 *Addington v Texas* 441 US 418, 423 (1979). See also C D Browning "The Burden of Proof in a Paternity Action" (1986) 25 J Fam L 357, 359.

287 Browning, above.

288 Cross 4 ed Chapter 5 (Degrees of Proof) paras 5.1 - 5. 12 pp 131 - 143.

289 See, eg, *Honda New Zealand Ltd* v *New Zealand Boilermakers' etc Union*, above n 273, 395; *Khawaja* v *Secretary of State for the Home Department* [1983] 1 All ER 765, 782 - 784.

290 (1984) 2 NZFLR 326.

291 Above, 327, 328 (Woodhouse P).

292 Above, 327.

293 *New Zealand Shipwrights, Coachworkers etc IUOW* v *Honda New Zealand Ltd* [1989] 3 NZILR 82 (Labour Court). See also *Loveridge* v *Adlam* [1991] NZFLR 267, 273.

drawn is probable rather than merely possible."[294] Despite the Court of Appeal's advice that there is only one standard of proof in civil cases, some courts have expressed the matter in terms of a "higher standard of proof".[295] In a personal grievance case in which the grievant claimed he had been dismissed because of union activities and had therefore been discriminated against, the Labour Court held that "there is no reason for this Court in this case to set a higher standard of proof as did the Court in *AB* in relation to some of the evidence which it heard."[296] In discussing the standard of proof in paternity cases, the ELRC said that "it is clear that the standard of proof is something more than that required in ordinary civil cases"[297] and that the leading case[298] "elevates the standard of proof considerably."[299]

Whether the matter is expressed as "the degree of kinetic force the evidence must generate"[300] or a higher standard of proof, the effect is the same. If the standard of proof is higher, or if the degree of scrutiny applied to the evidence is closer, an extra hurdle is placed in the way of the plaintiff or applicant seeking to prove her case. If a greater "quantum of persuasive energy"[301] is needed, the plaintiff or applicant must use more energy in jumping that extra hurdle and the task of proving her case becomes more difficult.

2 *Application of the standard of proof in paternity cases to sexual harassment cases*

In *NID Distribution Workers IUOW* v *A B Ltd*[302] the Labour Court stated:

> There was no disagreement between the advocate for the union and counsel for the employer that the standard of proof to be adopted by the Court in such cases should be at or about the same level as that adopted by the Family Court in contested allegations of paternity.

The headnote for *AB Ltd* said that "sexual harassment must be proved on the balance of probabilities to a similar standard to that in contested allegations of paternity." The "paternity standard" was effectively adopted as the appropriate standard of proof in subsequent sexual harassment cases. Boast asks "[w]hy the test for paternity cases, of all things, was thought of as appropriate in this context ...".[303] The employment institutions do not often adopt family

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294 *T* v *M*, above n 290, 328. See also *Cook* v *Gibbons* (1986) 3 FRNZ 257, in which McGechan J, 261, attempts to explain the process in scientific terms. *Honda New Zealand Ltd* v *New Zealand Boilermakers' etc Union*, above n 273, is the leading case on the standard of proof in cases of unjustifed dismissal.

295 Including Goddard CJ in *Z & Y Ltd* v *A*, 6. For the sake of simplicity, the writer refers in this section of the paper to a "higher standard of proof".

296 *Post Office Union (Inc)* v *Telecom (Wellington) Ltd* [1989] 3 NZILR 527, 548 (Colgan J).

297 *ELRC Report* para 69 p 21.

298 *Hall* v *Vail* [1972] NZLR 95.

299 *ELRC Report* para 72 p 21 and para 66 p 20.

300 *Loveridge* v *Adlam*, above n 293, 272.

301 *Cook* v *Gibbons*, above n 294, 261.

302 [1988] NZILR 761.

303 R Boast "The Sexual Harassment Provisions of the Labour Relations Act" (1988) NZJIR 285, 288.

law analogies to assist in an industrial relations context. The two areas of law are not considered to overlap to any significant extent. Commenting that the adoption of this test is "odd" and "hard to understand", Boast submits:[304]

> In view of the ... subsequent discussion of ... *T* v *M* ... (where Woodhouse J made it very clear that in his view 'the gravity of the allegation' component was implicit in the test of the balance of probabilities in any event) it might have been better for the Labour Court, with respect, to have said that the appropriate standard was the ordinary civil standard and to have left it at that.

The adoption of this standard is odd, unless one fits the imposition of that standard into a historical framework of judicial gender bias in the law of evidence. The paternity standard itself is based on the same set of sexist assumptions which provided the rationale for the corroboration rule in cases involving sex:[305] that an allegation of paternity is easy to make and hard to refute;[306] that women are unreliable witnesses; that women's evidence is particularly suspect in cases involving sex; and that sexually experienced women (as a woman applying for a paternity order must inevitably be) are particularly prone to lying and are particularly good at hiding this talent. It is submitted that these unstated assumptions were also the hidden rationale for the Labour Court's comments on the relevance of the paternity standard of proof. Once the unstated assumption, that women are untrustworthy and lie about sexual matters, is revealed, the adoption of the paternity standard assumes its own perfect, sexist, logic. In elevating the standard of proof above the ordinary "balance of probabilities" standard, the Labour Court made it harder for women to prove that sexual harassment had happened and therefore used the standard of proof as a tool of gender bias.

The *AB Ltd* paternity or "serious matters" standard was applied in two recent Tribunal decisions: *A* v *Z*[307] and *Y* v *X Ltd*.[308] In *Y* v *X Ltd* the Tribunal found that harassment had not occurred and elevated the standard of proof to an even higher level, accepting the employer's submission that the Tribunal had to take care that "the evidence addressed and weighed in the inquiry is admissible evidence given in the most persuasive manner."[309] The submission, and, with respect, the finding, were incorrect. All relevant evidence may be admitted by the Tribunal under section 96 of the ECA. The reference to "admissible evidence" was therefore misleading. Secondly, there is no requirement that evidence must be given in a "most persuasive manner" and no authorities were cited to support this finding. The *Y* v *X Ltd* standard of proof was extraordinarily high for a civil case, coming close to a requirement for proof beyond reasonable doubt. The more recent decision in *P* v *S*, however, indicated a

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304 Above.

305 See W Davis "Serious Matters: The Standard of Proof in Paternity Cases" (unpublished LLM Family Law seminar paper, July 1993).

306 Cross 3 ed 180.

307 Unreported, 29 September 1992, Wellington Employment Tribunal, WT 69/92 (D Hurley).

308 Unreported (Auckland Employment Tribunal, 15 July 1992, AT 126/92) (C Hicks).

309 *X* v *Y Ltd* 13.

less stringent test. The Tribunal referred to the submission on behalf of the applicant that the standard was "on the balance of probabilities however this really depended on the seriousness of the matters placed before the Tribunal."[310] The Tribunal made no reference to the paternity standard of proof.

3 *The Employment Court removes the hurdle; back to the balance of probabilities*

In *Z & Y Ltd* v *A* the Employment Court rejected the notion that a higher standard of proof was called for in sexual harassment cases. The Court confirmed that the proper standard in a sexual harassment case is the ordinary civil standard of proof: proof on the balance of probabilities. Before issuing his judgment, Goddard CJ took the unusual step of enquiring from Finnigan J, the presiding judge in *AB Ltd*, as to his understanding of the effect of that case on the standard of proof. Finnigan J's memorandum in response is reproduced in the *Z & Y Ltd* v *A* decision. Finnigan J advised that the headnote of *AB Ltd* was incorrect; the principle adopted in *AB Ltd* was not the paternity standard, but the statement of principle laid down by Woodhouse P in *T* v *M* (the "serious matters" principle). Unfortunately the wording of the headnote and the references to paternity issues in *AB Ltd* resulted in the adoption of the paternity standard. The view that, in sexual harassment cases, the paternity standard, or at least an elevated standard, of proof was required by the *AB Ltd* decision has been taken by academics,[311] Tribunal members,[312] and other judges.[313] The extent to which this understanding has discouraged women from taking complaints of sexual harassment in the intervening 5 years between *AB Ltd* and *Z & Y Ltd* v *A*, and the effect of the application of a higher standard in the decisions made in that time, is unclear. It seems likely that the error has worked to the disadvantage of women. Goddard CJ noted that:[314]

> [R]eference to the standard of proof used by the Family Court in paternity suits might not be an accessible, appropriate, helpful, or even meaningful analogy to the parties who appear before the Tribunal and many of their advisers. In saying this, I should be understood to be trying to express a real concern that the scope for misunderstanding seems unacceptably high.

In clearly rejecting the paternity standard, Goddard CJ also rejected the myth that women are untrustworthy witnesses in cases with a sexual element:[315]

> There is no reason to place in the way of those who say that they have been victims of sexual harassment any barriers which start with the premise that the complaint is more likely to be untrue than true. If there has to be any preconception, commonsense indicates that the Tribunal will wish to ask itself how

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310 *P* v *S* 4.
311 Above n 303.
312 In *A* v *Z* and *X* v *Y Ltd*.
313 Colgan J in *Post Office Union (Inc)* v *Telecom (Wellington) Ltd*, above n 296.
314 *Z & Y Ltd* v *A* 4.
315 Above, 6 - 7.

> likely the particular grievant is to have elected to undergo the undoubted and foreseeable ordeal involved in prosecuting a personal grievance on this ground if the allegation is untrue. The law against sexual harassment is there for the protection of the victim, and its protective shield should not be allowed to be deflected by extraneous considerations of the effect of the allegation on other persons. They are extraneous because Parliament, in enacting the law, must be taken to have had in mind the possibility of collateral damage for others.

His Honour also disagreed with Finnigan J's comments that the standard of care in assessing allegations of sexual harassment increased in proportion to the seriousness of the harassment alleged.[316] Nor did the Court consider it appropriate in sexual harassment cases to adopt the approach of the Court of Appeal in *T* v *M*[317] and in the *Honda*[318] case, that the more serious the nature of the allegations and the gravity of the consequences of a finding, the greater should be the care in assessing the issue. Goddard CJ noted that there was a distinction between cases where, on the one hand, an employee claims that she has been sexually harassed by her employer, and, on the other, cases where an employee complains of having been unjustifiably dismissed or disciplined by reason of a false or unproved allegation that he has been guilty of sexual harassment:

> In the latter kind of case the allegation of sexual harassment is serious in the *Honda* sense because its acceptance has been allowed to affect a person's livelihood. The consequences of the acceptance of that allegation for the person about whom it is made are what render it serious in this sense. An employer contemplating disciplinary action on this ground should therefore apply the *Honda* standard to have any real prospect of being held to have carried out a fair inquiry.
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> In the former case, however, the allegation that an employer has to meet usually takes the form that one of its employees has been sexually harassed in that employee's employment. Such an allegation cannot be said to be any more serious in its consequences for the employer than the more usual allegation that an employer has to answer upon a personal grievance that an employee has been unjustifiably dismissed. The ordinary civil standard of proof should be applied, without reference to *Honda*.

In assessing the seriousness of the consequences for an employer of a finding that sexual harassment had occurred, His Honour accepted that there may be a stigma attached to such an allegation, but that this was met by ensuring that the alleged harasser received notice of the proceedings and the opportunity to be heard. His Honour might also have mentioned that any stigma attached to a finding of sexual harassment is likely to be limited in its effect because many people do not necessarily disapprove of sexual harassment, despite the fact that it is unlawful:[319]

> [T]here are many people, especially men, who believe that a sexual harassment complaints mechanism is merely a forum for trivial or vindictive allegations against men in circumstances largely provoked by the women complainants, and therefore should be done away with.

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316 Above, 7.
317 Above n 290.
318 Above n 273.
319 Above n 98, 51 - 52. See also Ehrenreich above n 123, 1226.

It is also difficult to justify the imposition of the "serious matters" approach in sexual harassment cases in the light of the very low awards of compensation made to the victims of harassment. Even if those awards were more substantial, the imposition of a higher standard of proof would not be justified. As the ELRC pointed out in relation to the issue of whether the corroboration warning should be retained in paternity cases, the economic consequences of a finding of paternity were not a good reason for imposing that "extra hurdle". If it were, then in all cases where large sums of money were at stake, for example defamation cases, a corroboration warning or a higher standard of proof would be required.[320]

The Employment Court ruling on the standard of proof in *Z & Y Ltd* v *A*, and Goddard CJ's statements of principle that complainants of sexual harassment "should not be treated at the door with scepticism",[321] is a positive step towards the elimination of gender bias in sexual harassment cases. Unfortunately, as Part IV E indicates, the outcome of that appeal does not give cause for unguarded optimism.

D Credibility

> Society has historically stereotyped women as emotional, unpredictable, impulsive and irrational. The effect of such age old stereotypes may be that a woman is presumptively viewed as incredible when she enters a courtroom.[322]
>
> N D Rizzolo

1 Treatment of credibility in sexual harassment cases

Because sexual encounters do not usually occur in public or in front of witnesses, credibility is crucial in cases where sexual harassment is alleged:[323]

> A general survey of sexual harassment cases in Canada reveals that most (almost all) of the cases were won or lost on the credibility of the witnesses, particularly that of the complainant(s) or respondent(s), rather than on any other ground.

One of the consequences of this emphasis on credibility is that decisions in sexual harassment cases are difficult to appeal because "[a]ppellate courts have traditionally accorded generous deference to trial judges' factual findings, particularly where the findings involve determinations of the credibility of oral testimony."[324]

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320 *ELRC Report* para 68 p 20 - 21.
321 *Z & Y Ltd* v *A* 7.
322 N D Rizzolo "A Right With Questionable Bite: The Future of 'Abusive or Hostile Work Environment' Sexual Harassment as a Cause of Action for Women in a Gender-Biased Society and Legal System" (1988/89) 23 New Eng LR 263, 272 - 273.
323 Aggarwal 140.
324 O G Wellborn "Demeanor" (1991) 76 Cornell LR 1075, 1094 - 1095.

The writer contends that gender bias is the rationale behind much of the emphasis on credibility in sexual harassment cases, and in particular the myths and unstated assumptions we have already identified as being touchstones for the law's treatment of women in cases involving sex: that women are unreliable and untrustworthy witnesses and are particularly untrustworthy in matters where sexual behaviour is at issue. This emphasis on credibility disadvantages women, since conflicts in evidence are likely to be resolved in favour of the alleged harasser. Even where the employment institutions find that sexual harassment has occurred, the tendency of decision makers to stress the importance placed on a thorough testing of the complainant's evidence through cross examination and the detailed explanations (which often have an air of apology about them) for preferring the complainant's evidence to the alleged harasser's evidence, betray a mistrust of women which is offensive in its pervasiveness. This section of the paper begins with comments about the unreliable nature of assessments of credibility of witnesses generally, and then discusses the treatment of credibility in *Y* v *X Ltd*, in which the complainant's allegations of sexual harassment were not believed.

2 *Assessment of credibility*

The assessment of credibility of witnesses is generally a hit and miss exercise.[325] In making a decision as to whether a witness is credible, the decision maker is required to assess the truthfulness (sincerity) of the witness, as well as the reliability of the witness (accuracy of perception, memory, and narration).[326] This assessment is usually carried out on no greater scientific basis than the decision maker's common sense.[327] "Common sense" is shorthand for the judgment exercised on the basis of one's life experiences, including education, and one's values.[328] In assessing credibility, decision makers should make a careful examination of the consistency of the witness's story measured against "the preponderance of the probabilities which a practical and informed person readily recognize as reasonable in that place and in those conditions."[329] Yet research indicates that those who make decisions on credibility often lack the experience necessary to assess both the truthfulness of witnesses and the reliability of those witnesses. The prejudices, myths and discriminatory attitudes of witnesses affect the stories that they tell to the courts, and the prejudices, myths and discriminatory attitudes of the decision makers in turn affect the way in which the credibility of those

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325 S I Friedland "On Common Sense and the Evaluation of Witness Credibility" (1989/90) 40 Case Western Res LR 165.

326 Above, 174.

327 Above, 176. Jurors, judges and lawyers generally receive no training in how to assess witness credibility.

328 Above, 176 - 177.

329 *Langevin v Engineered Air Division of Air Tex Industry Ltd* 6 CHRR D/2552 (BC 1985) para 21155 (a decision of the British Columbia Council of Human Rights).

witnesses is assessed.[330] The tools of assessment of witness credibility are flawed, because they place a premium on the decision maker's own prejudices.

Some commentators do not consider that a flawed system of assessment of credibility is necessarily problematic. Friedland concludes that "[t]he realist exposure of biases and prejudices may reveal that common sense is not value-neutral, but not necessarily that its use is invalid",[331] because part of the function of a judicial decision maker is to represent community values in the judicial system. The writer accepts that this approach may be valid for a community where decision makers are truly representative of the community. However, it is not valid where decision makers are not representative, as in the employment institutions,[332] or where the law is specifically designed to *change* the values of the community, as in the case of sexual harassment law. Relying on common sense, on prejudice and intuition, on myths and on unstated and unsanctioned values to assist in decision making where the law is trying to eliminate prejudice and myth, will tend to subvert, not uphold, the law.

In assessing credibility, decision makers often rely on demeanour.[333] Many studies have been carried out to assess the ability of people to test whether others are sincere or honest or telling the truth. These studies indicate that demeanour is generally an unreliable indicator of truthfulness and that:[334]

> [T]o the extent that the experiments show that ordinary people cannot make effective use of demeanor in detecting deception, they probably depict a similar inability on the part of jurors, judges, and hearing officers in trials.

Demeanour is an unreliable indicator of the sincerity or honesty of witnesses and it is an even more unreliable indicator of accuracy.[335] The confidence with which an assertion is made is a

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330 Friedland, above n 325, 179.

331 Above, 219.

332 The employment institutions suffer from an absence of women judges and decision makers as do other areas of the justice system. There has never been a woman judge on the Employment Court, Labour Court, Industrial Court or Arbitration Court. Of the 17 permanent members of the Employment Tribunal, only 4 are women: Horn, above n 197 para EC 81.05 - 81.06 pp 1G-13 - 1G- 14. The recent appointment of a further 8 temporary members of the Employment Tribunal, all male, and all pakeha, has been the subject of criticism, particularly since "anecdotal evidence showed the people most exploited under the Employment Contracts Act were women, Maoris (sic) and Pacific Islanders and the young": Elizabeth Tennet, MP for Island Bay and Opposition Employment Spokesperson (*Dominion*, Wellington, New Zealand, 15 July 1993, 7). Employment Court judges must be barristers and solicitors of at least 7 years standing: s 113(2) ECA. Tribunal members may be legally trained or have industrial relations experience or both. "Without a bench that is broadly representative of the people it serves, those who use the courts could be forgiven for thinking that justice was for the most part a male concept, and distinct from the experience and concerns of half the population": Justice Cartwright, *LawTalk (Newsletter of the New Zealand Law Society)* 399, 23 August 1993, 1.

333 For example *Y* v *X Ltd* 14, and *Parlane* v *NZ Police* [1991] 3 ERNZ 721, 725.

334 Wellborn, above n 324, 1082.

335 Above, 1088 - 1089.

major influence on the fact finder's assessment of witness reliability and sincerity. However, confidence is an unreliable indicator of the accuracy of witness perception.[336] People often make completely incorrect assertions in a very confident manner. *What people say*, rather than *how they say it*, is a more accurate indicator of honesty and accuracy.[337] Nevertheless, Wellborn concludes that the consequences of the unreliability of demeanour as an indicator of witness honesty and accuracy do not indicate that oral testimony is of no value:[338]

> It is probably more important that the results of litigation be accepted than that they be accurate. Accuracy is merely a factor, albeit a rather important factor, in acceptability. Live testimony may be essential to perceptions of fairness, regardless of the real relation between live testimony and accuracy of outcomes.

The writer does not accept this approach because it fails to ask: "Acceptable to whom?" From a feminist perspective, diminishing the importance of the accuracy of decisions may in itself contribute to outcomes which favour the interests of men and not women. Prejudice, intuition and myth in society generally work against women, not in their favour, because the prejudices, intuition and myths which count in society are generally male prejudices, intuition and myths. The myths perpetuated inside a court room are likely to be the myths of those whose perceptions shape society's attitudes and the law. In the context of a gender hierarchy, this is likely to be men rather than women. Forgoing accuracy for acceptability in decision making is a recipe for the perpetuation of, rather than a challenge to, gender bias.

The studies summarised by Friedland and Wellborn indicate that assessment of credibility is an extremely efficient channel for gender bias in judicial decision making. The emphasis on credibility in sexual harassment cases is consistent with historical gender bias in the rules of evidence and imposes yet another burden on complainants. The complainant starts out as a witness in a judicial system where her femaleness and the fact that the case involves sex immediately marks her out as a less reliable witness. Since men and women view facts, particularly facts relating to sexual conduct, differently,[339] and since most decision makers in the employment area are men, as are most harassers, while most complainants are women, it follows that the alleged harasser starts off with a better than even chance of having his story believed. The harasser's demeanour is more likely to accord with the fact finder's view of how a truthful person behaves, and the fact finder's experiences of life and sex are more likely to accord with those of the harasser. Where decision makers are not conscious of the unstated assumptions on which their assessments of credibility proceed or the possibility of their own

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336 Above, 1089. See also Friedland, above n 325, 185 - 186.

337 Above 1087 - 1088.

338 Above, 1092. See also C Nesson "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" (1985) 98 Harv LR 1357.

339 The law of sexual harassment developed because "judges and society at large began to look at facts differently, not because courts simply decided a new theory was more appropriate": Fechner 487. The way in which facts are viewed by the fact finder is crucial to the outcome of sexual harassment cases.

gender bias, the chances of success for women whose stories of harassment can be established only if the decision maker accepts their credibility, are reduced.

3 *Assessment of credibility in* Y *v* X Ltd

In *Y* v *X Ltd*, the Tribunal's conclusion that there was no sexual harassment and therefore no personal grievance was based on the Tribunal's assessment that the complainant was not a credible witness. Y, a university student who worked part-time in a restaurant owned by the respondent, X, resigned as a result of alleged sexual harassment. Y alleged that X: repeatedly asked her out to lunch with him; touched her whenever he spoke to her, and pressed his body up against her on occasion; repeatedly told her she was beautiful and asked her if she loved him; told dirty jokes, along with one of the other waitresses; asked her to visit him in a back room where she found him looking at sexually explicit photos of a male, which he proceeded to talke to her about; and made sexually explicit gestures towards her back during a social function at the restaurant.

The only real issue for the Tribunal was credibility. In assessing credibility, the Tribunal placed great weight on apparent discrepancies between the written brief of another waitress, Elizabeth, and her replies in cross-examination and re-examination. Elizabeth gave similar fact evidence that X had also harassed her and corroborated Y's evidence regarding X's behaviour. The discrepancies led the Tribunal to conclude that the behaviour was "of a much more minor nature"[340] than that stated in the brief. Yet the extracts from the transcript quoted in the decision reveal no inconsistencies in Elizabeth's evidence about what X did to Y. Nor do the examples given of apparent "discrepancies" in Elizabeth's evidence about X's behaviour towards Elizabeth herself indicate a lack of sincerity. They indicate rather a minor change in emphasis, not a change in her basic story. But even if the discrepancies were major, this should not have had any direct impact on the complainant's credibility. The decision reads as if the fact that Elizabeth was not believed meant that Y was automatically an unreliable witness also. In relation to the incident at the function, Y stated that she leaned over a table to cut a 21st birthday cake, when she heard a lot of laughter:[341]

> I turned around to see what the laughter was all about and saw X standing very close behind me with his hands held out on both sides of, but not touching, my backside. I got the impression he was thrusting his pelvis towards me, just the look on his face and the way of the laughter.

The parents of the person celebrating his birthday, who were sitting nearby, gave evidence that they saw no such behaviour. The Tribunal member visited the functions room and

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340 *X* v *Y Ltd* 16.
341 Above, 6.

concluded that the behaviour "was unlikely to have been missed by those in the room" and that:[342]

> Mr X would have been most unwise to behave in such a fashion. In doing so he would have risked offending his guests who struck me as representative of the average New Zealand family and who would not have been likely to appreciate such behaviour.

Several questions arise from the Tribunal's decision on this point. Firstly, eyewitness testimony is notoriously unreliable; the prejudices and values of witnesses often affect their perceptions of events.[343] Secondly, the supposition that X might be worried about what his guests thought of him seems inconsistent with the Tribunal's earlier finding that X's European origin was part of the ethnic setting of the restaurant and that X "played up to his image with customers and also that for him English language and customs might not be perfectly well understood."[344] X was also able to call on "[a] number of respected members of the legal fraternity, including two Queen's Counsel"[345] to attest to his good character. This suggests, contrary to the Tribunal's finding, that X was able to be very confident that his style of behaviour was appreciated by his customers and that he was unlikely to be concerned about their perceptions of his behaviour. Nor is there any evidence to support the Tribunal's finding that these people were representative of the average New Zealand family, whatever that might be, or that average New Zealanders disapprove of lewd behaviour at functions. Thirdly, the Tribunal stated that it found that "Mr X did not behave on that occasion in the way described by Ms Y."[346] Does this mean that the incident did not occur at all, or just not in precisely the way Y described? And does this finding include what Y actually saw (his hands held on either side of her backside), or just her impression of the other behaviour she was concerned about (the thrusting of the pelvis)? Most importantly, does this finding mean that the Tribunal believed that Y was making the whole story up?

In relation to the photo incident, the Tribunal, having found that the birthday function incident did not occur, simply stated that that finding "impacts on how I view her evidence with regard to the photograph incident."[347] In this way, the Tribunal discounts the most serious complaint

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342 Above, 17.

343 Friedland, above n 325, notes (fn 94) that "[w]itnesses, due to social pressure or other reasons, tend to fill in the gaps of their memory through speculation about or modification of what they remember." Friedland notes one experiment in which "a 'semi-dramatic' photograph was shown to subjects of varying backgrounds. In the photograph, a black male and a white male were standing and conversing. Despite that fact that only the white male was holding a razor, more that half of the subjects reported that the black man had been holding the razor, and several described the black man as 'brandishing it wildly'. ... The study concluded that people's expectations and stereotypes cause them to see and remember what they want to see or remember, even if the manipulations are not done consciously or in bad faith."

344 *X* v *Y Ltd* 2.

345 Above, 14.

346 Above, 17.

347 Above.

made by Y without ever discussing the parties' demeanour or consistency on this most important point. X's version of his behaviour on that occasion was completely unsupported by any independent evidence. Y's version was supported by evidence of several complaints made by her to others immediately after the "photo" incident[348] and the evidence of the complainant's boyfriend as to her distressed condition the same night. The Tribunal gave no weight at all to this evidence. It concluded that it had "considered carefully the competing versions of events, the credibility of Ms Y and Mr X, and how well their stories stood up, as well as the demeanour of the witnesses before the Tribunal"[349] and "was unable to find on the balance of probabilities sexual harassment did occur."[350]

4 Assessment of credibility in other cases

Doubting the credibility of women complainants is also a consistent theme in several decisions in which alleged harassers have been dismissed by their employers. In *NZ Polytechnic Teachers* v *Nelson Polytechnic*[351] the Labour Court described the evidence of sexual harassment of students by a polytechnic tutor as "pitiful and totally unconvincing."[352] The Court, unfortunately, did not relate the evidence nor give reasons for its finding. The facts, so important to an assessment of the reasoning in these cases, are hidden. The Court noted that the three witnesses in the *Nelson Polytechnic* case "showed a degree of animosity towards Mr Luckhurst".[353] The implication, that animosity leads to a lack of credibility, is unwarranted. A degree of animosity by a complainant towards someone who has harassed her is entirely understandable, and is perhaps an indicator *for* credibility. The Court also noted that one of the witnesses "read her evidence from a typewritten brief prepared for her ...".[354] The implication was that this somehow detracted from the credibility of her evidence, but it is standard practice in employment law cases for witnesses to read their evidence in chief from prepared briefs.[355] In *Z & Y Ltd* v *A* Goddard CJ was critical of the complainant's counsel for *not* preparing written briefs, noting that he felt "confident that the provision for confirming a written statement has sexual harassment cases particularly in mind."[356] In *C* v *L D Nathan* the Labour Court indicated a similar distrust of the evidence of one complainant who had

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348 See Part IV B 5.
349 *Y v X Ltd* 14.
350 Above, 18.
351 [1991] ERNZ 662.
352 Above, 667.
353 Above.
354 Above.
355 As recognised in regulation 49(b) of the Employment Tribunal Regulations 1991 (SR 1991/227) and the Employment Court Regulations 1991 (SR 1991/226) Second Schedule Form 13: "You may give your evidence by reading from a typewritten or written brief and swearing or affirming its contents; but should in that case supply 3 copies of that brief to the Registrar of the Employment Court."
356 *Z & Y Ltd* v *A* 20.

"developed a distrust of men generally and in the witness box displayed great animosity towards Mr C". The Court said that "[o]n considering her evidence and considering her bearing in the witness box we find it difficult to accept all the specifics of her allegations against Mr C".[357]

The decision in *P* v *S* contains a different treatment of credibility. The element of mistrust present in many of the other decisions is absent from *P* v *S*. The Tribunal even commented that "P was courageous in the giving of her evidence which undoubtedly raised the upset and humiliation she had earlier felt."[358] It is fair to say, however, that P's evidence was supported by: similar fact evidence from another worker; uncontested hearsay that another senior employee admitted that the employer harassed nearly everyone; evidence of recent complaints to several other witnesses, including P's mother; and P's mother's evidence of a change in P's behaviour when she started work for the employer, the change disappearing soon after she stopped work. The Employment Court's treatment of credibility in *Z & Y Ltd* v *A* is discussed in Part IV E 3 below.

5 Summary

The common evidential denominators in successful sexual harassment claims (except in the *Fulton* case, where the behaviour was admitted) are the existence of similar fact evidence, other supporting evidence, and evidence of recent complaints. In the only unsuccessful[359] sexual harassment claim, *Y* v *X Ltd*, the similar fact evidence of another employee was discredited, and other supportive evidence and evidence of recent complaints was ignored or given no weight by the Tribunal. In dismissal cases where harassment was found to have occurred, the behaviour complained of (although not its sexually harassing nature) was admitted, to a greater or lesser extent, by the harasser or had been confirmed following thorough investigations by the employer.[360] In the dismissal cases where harassment was

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357 *C* v *L D Nathan* 307.

358 *P* v *S* 2.

359 With the exception of *A v Z*, reversed on appeal in *Z & Y Ltd* v *A*.

360 In *Northern Butchers' Union* v *Peach & Vienna Foods Ltd* and *B* v *AEU* the behaviour was admitted, although not necessarily to the degree of seriousness alleged by the complainant. In *A* v *Foodstuffs (South Island) Ltd* the harasser admitted touching the complainant, but effectively denied touching her on the breast. In *Hetei* v *Feltex Woven Carpets & NZ Dairy Food & Textile Workers Union* the harasser had been previously warned for sexually harassing behaviour and was dismissed following an investigation by the employer. When the harasser approached the union for assistance, the union carried out its own investigation and also concluded that the harassment had occurred. In *C* v *L D Nathan* there was limited similar fact evidence in the form of a written statement by a former employee who was overseas at the time of the hearing and therefore unable to give evidence. The alleged harasser had been given a previous warning. There was no corroborative evidence and the evidence of recent complaint was weak. In *Parlane* v *NZ Police* the behaviour appeared to have been admitted by the alleged harasser and in the *Nelson Polytechnic* case the facts relating to the alleged harassment are not given.

found not to have occurred, the supportive evidence was limited in amount and scope, or the decisions do not provide sufficient detail to make an assessment of how much supportive evidence there was.[361] The message of these cases is that where the case becomes "her word against his", her word is not accepted. Fearing that they will not be believed acts as a major disincentive to women seeking a remedy for sexual harassment.

E Weighing the Evidence: The Employment Court Decision in Z & Y Ltd *v* A

The decision of the Employment Court in *Z & Y Ltd* v *A* was the result of an appeal by the employer from the earlier decision of the Tribunal in *A* v *Z*, that the complainant had been sexually harassed, and awarding her compensation of $5000. Although *A* v *Z* contained elements of gender bias, it was a positive judgment from a feminist perspective for at least two reasons. Firstly, the amount of compensation awarded was significantly higher than that awarded in any previous case. Secondly, the Tribunal effectively found that the complainant was more credible than the alleged harasser. In the light of the Employment Court's positive statements of principle rejecting the untrustworthy woman myth[362] and clarifying that the assumption that complaints of sexual harassment are more likely to be untrue than true is unjustified, the Court's decision to set aside these findings and to require the complainant to go through the ordeal of a second hearing before the Tribunal requires closer examination.

1 Use of feminist method by the Employment Court

The *Z & Y Ltd* v *A* decision is positive from a feminist perspective because of the Employment Court's use of social science research, books, and articles[363] to assist it in reaching its conclusions that women do not have a tendency to lie about sexual harassment and find it difficult to complain about sexual harassment "for the very reason that it involves a confrontation with the person who has effectively wielded a reign of terror over [the victim]."[364] The tenacity of advocates in presenting, and the willingness of decision makers to accept, women's stories of and social science research about sexual harassment enabled the legal claim of sexual harassment to be first established and then developed. MacKinnon's ground-breaking work *Sexual Harassment of Working Women. A Case of Sex Discrimination* was constructed around women's stories and has been cited extensively by US courts[365] as

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361 *C* v *L D Nathan* and the *Nelson Polytechnic* case.
362 See Part IV C 3 above.
363 *Z & Y Ltd* v Z 23.
364 Above, 15.
365 Some of these cases are listed in Fechner 485 n38. See also Blackwood 1012.

well as the Supreme Court of Canada in *Janzen* v *Platy Enterprises*.[366] The approach of the Employment Court is consistent with the application of feminist legal method in the law:[367]

> Feminist legal method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experiences is important and valid ... The reason, MacKinnon asserts, that feminism has been able to uncover reality previously hidden from social view is "its methodological secret, ... that feminism is built on believing women's accounts of sexual use and abuse by men."

2 *The failure to cross-examine*

The Employment Court's approach is flawed, however, because it failed to apply feminist method consistently. The most serious grounds for appeal[368] were that the respondent's counsel failed to cross-examine several witnesses called for the appellant, that the evidence of these witnesses was not contradicted, and that the finding was against the weight of the evidence. These witnesses included current and past employees of the appellant company and a character witness, the alleged harasser's solicitor. Some of the past and present employees gave evidence that they had not seen any incidents of inappropriate behaviour by the appellant, with the implication that if there had been, they were likely to have noticed it.[369] Some witnesses also said that they saw no sign of the respondent being bullied or victimised by Z, nor had they noticed any tension arising out of such behaviour. At least one of these witnesses also gave evidence that Z always behaved in a respectful manner towards women.[370] The Tribunal found that these witnesses were impressive and that their evidence carried significant weight. However, it noted:[371]

> [F]irst, a fine reputation is not of itself a guarantee there is not another side of a person's character.
>
> Secondly, the majority of the witnesses called, were employed by the respondent.
>
> Thirdly, some expressed personal animosity or, at least, were very critical of the applicant.
>
> Fourthly, none was present to see or witness any incidences, other than the two called by the applicant.
>
> Fifthly ... there was no evidence that any of the witnesses for the respondent were under emotional strain, which is clearly the position for both the applicant and Witness 'T', which could render them more vulnerable.

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366 [1989] 1 SCR 1252. This is discussed by Gallivan 53 fn 135 and also by J Brockman "Social Authority, Legal Discourse, and Women's Voices" (1992) 21 Man LJ 213. Brockman explains that LEAF (Legal Education and Action Fund), a women's group, filed a factum in the Supreme Court of Canada in the *Janzen* case referring to the work of MacKinnon and Aggarwal. Dickson CJC used and quoted from these sources.

367 Littleton 764.

368 This paper does not discuss all the grounds of appeal. It should be noted, however, that the Court accepted that the personal grievance had been taken incorrectly against the alleged harasser personally rather than the actual employer, a registered company and exercised its discretionary powers under ss 138 and 140 of the ECA to join the company as a second respondent and to validate the Tribunal proceedings (18).

369 *Z & Y Ltd* v *A* 22 - 23.

370 Above, 24 - 25.

371 *A* v *Z*, above, 9.

The Court held that the Tribunal's approach was wrong. This was important evidence, because it was directed to a negation of the very propositions which the Tribunal accepted.[372] While the Tribunal was not bound to accept the evidence of the appellant's witnesses, it should not have rejected it without good reason[373] "because the respondent, by not challenging it in the usual way, must be taken to have accepted it or not contradicted it."[374] Goddard CJ went on to say:[375]

> A witness called by a respondent or defendant may contradict, directly or indirectly, evidence given for the applicant or plaintiff. Is it necessary to cross-examine such a witness since it may already be clear inferentially that his or her evidence is not accepted? The answer is yes, if it is intended to invite the Tribunal to reject that evidence. Without cross-examination, the Tribunal would have no basis for rejecting it in the absence of one of the exceptional situations mentioned by Phipson ... .

The Court found that the bases on which the Tribunal rejected the evidence of these employees and former employees - that the incidents could have happened without these witnesses seeing them, or that the witnesses were untrustworthy because of present or past economic dependence on Z or bias against A - were never put to these witnesses. The effect of the failure to cross-examine was to leave before the Tribunal two conflicting, but apparently credible, stories. The Court concluded that the Tribunal's finding was against the weight of the evidence "not in the sense that the evidence was one way, but rather in the sense that the unchallenged evidence accepted by the Tribunal could not logically lead to the result which emerged."[376]

3 Weighing the Evidence

Having found defects in the Tribunal's decision, the Court then assessed whether those defects were sufficiently serious that the decision could not stand and found that it could not. In reaching its decision on this point, the Court does not use feminist legal method, but reverts to traditional methods of legal reasoning. As the following analysis shows, the use of these tools enabled gender bias to influence the Court's decision firstly, as to what factors were relevant to its assessment of the seriousness of the defects, and secondly, what weight should be given to those factors. The use of feminist method in weighing the evidence may well have led to a different result. Goddard CJ signals the deliberate alteration in method by saying: "I have taken into account all the literature on the subject *but also have to give weight to conventional wisdom about the assessment of evidence*."[377] In determining whether the Tribunal's decision

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372 *Z & Y Ltd* v *Z* 23.
373 "Good reason" is discussed in the judgment at 22.
374 Above, 21.
375 Above, 22.
376 Above, 25.
377 Above, 28 (emphasis added).

should stand, the Court noted that favouring the respondent was the fact that she proved her case even despite the imposition of an unnecessarily high standard of proof, and the strong unlikelihood of her making up such a story. The main factors favouring the appellant are discussed below.

(a) Complaint

A did not mention the alleged harassment to anyone. The Court says that "it seems reasonable to expect some mention of this behaviour if it went on unremitting for 18 months or to expect someone to have noticed some signs of oppression of this kind even without being told."[378] When A did finally write it down, after the employment was over, she "gave it no prominence at all."[379] Yet women's well-documented reluctance to complain about sexual harassment leads to the conclusion that it would *not* be reasonable,[380] from a women's perspective, to expect A to have complained (either to the alleged harasser or to anyone else). The Court's expectation brings to mind the former presumption in rape cases against the credibility of a rape complainant who did not complain within a reasonable time.[381] This approach is also inconsistent with the Court's own earlier comment, discounting the evidence of some of the appellant's witnesses that they were surprised that the respondent never complained about the alleged treatment, because it "preferr[ed] to attach more weight to the well known phenomenon that many victims are reluctant to complain."[382] In the most well-publicised instance of sexual harassment since the problem was named, Anita Hill kept silent about sexual harassment by Clarence Thomas for nearly a decade before "mentioning" it:[383]

> She never filed because Professor Hill is no different from countless others who have been sexually harassed; who fear retaliation or fear that they won't be believed and will be further humiliated with no remedy for the discrimination they have experienced.

A consistent feminist analysis would have led to the Court concluding that the failure to complain was totally consistent with the existence of sexual harassment, and was therefore not a factor which favoured the appellant.

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378 Above.

379 Above.

380 See the articles listed in n 123 above regarding the gendered nature of the concept of reasonableness in sexual harassment law.

381 Cross 4 ed para 9.27 p 204.

382 *Z & Y Ltd* v *A* 23.

383 A J Leibman "Doubting Thomas: Sexual Harassment Truth and Consequences" (1992) 65 S Cal LR 1441, 1443. There is a considerable body of academic writing supporting Anita Hill's story, and disbelieving Clarence Thomas's story. See, eg, T Morrison (ed) *Race-ing Justice, En-Gendering Power. Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality* (Chatto and Windus, London, 1993) and the articles in (1992) 65 S Cal LR.

(b) Lack of corroboration

The Court said that the failure to cross-examine meant that A's counsel accepted the evidence that the numerous incidents alleged were unlikely to have taken place without being seen, and none were seen. Feminist legal method, on the other hand, would have treated this evidence as irrelevant because, as Aggarwal notes,[384] "as a general rule, sexual encounters do not occur openly in public." This point is discussed further in (c) and (d) below.

(c) Similar fact evidence

The Court found that similar fact evidence regarding other workers was "weak and contradictory"[385] and there was little of it. The treatment of similar fact evidence in *Z & Y Ltd* v *A* effectively puts in place an extra hurdle for complainants. This is unfortunate, since the Court was careful to remove the hurdle of the higher standard of proof. The rule relating to similar fact evidence is the rule "which prevents a party, usually the prosecutor, from leading evidence showing the discreditable disposition of the other, usually the accused, as derived from his discreditable acts, record, possessions, or reputation".[386] Similar fact evidence may be admitted in exceptional cases, however, when it has a "strong degree of probative force":[387]

> This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by *experience* and *common sense*, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.

The Employment Court in *Z & Y Ltd* v *A* said that the "safe rule for the Tribunal is that in all fairness it can rely on evidence of facts said to be similar if there is a real and striking, as opposed to a superficial or unimpressive, similarity with the central allegations."[388] The employment institutions in sexual harassment cases had previously taken a broad approach to the admission of similar fact evidence. A "striking similarity" was not required. In *AB Ltd* the Labour Court allowed similar fact evidence by a former employee that she and another worker had been touched on the bottom by the manager and had had offensive things said to them.[389] The Labour Court referred to its discretion to admit such evidence as it thinks fit and noted that this discretion overrode the operation of the principles governing similar fact evidence.[390] Similar fact evidence was also admitted in *P* v *S* and *Y* v *X Ltd*.

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384 Aggarwal 140.
385 *Z & Y Ltd* v *A* 28.
386 Cross 4 ed para 13.1 p 347.
387 *DPP v Boardman* [1975] AC 421, 444 (HL) per Lord Wilberforce (emphasis added).
388 *Z & Y Ltd* v *A* 27.
389 *AB Ltd* 764.
390 Contained at that time in s 303(1) of the Labour Relations Act 1987.

In *A v Z* the Tribunal admitted similar fact evidence of a kitchen hand who said that she had been subject to unwanted touching on the buttocks.[391] The Tribunal found the evidence of this witness impressive and was satisfied that what happened to her was both repeated and unwelcome. The Employment Court, on the other hand, said that this evidence was "weak and contradictory" and that "it seems more striking in its difference from than its similarity to the conduct alleged."[392] Backhouse has criticised the imposition of too onerous a degree of similarity before treating evidence in sexual harassment cases as similar fact evidence, noting that requiring a "striking similarity" before accepting evidence of sexual behaviour towards other employees as similar fact evidence "is likely to eliminate the usefulness of this legal doctrine in sexual harassment cases."[393] If assessing whether there is a "striking similarity" depends on experience and common sense, as Lord Wilberforce noted, and decision makers are male, the experience and common sense which will count are male experience and common sense. Gender bias may therefore influence decisions as to whether similar fact evidence will be admitted in sexual harassment cases. For this reason the broad approach in *AB Ltd* is preferable to the narrower approach recommended by Goddard CJ in *Z & Y Ltd* v *A*.

(d) Character

The character of the alleged harasser seemed to be an important factor in the Court's determination. The appellant was the manager of a tavern owned by a company of which he was the principal shareholder. He is "prominent in his industry's pressure group and in the administration of his sport, and belongs to a service organisation. He is, in short, a well-known popular figure in Wellington and naturally values his good name." A feminist analysis would have emphasised facts, not reputation, as being a more reliable indicator of truth: "sexual harassers are not dirty old men getting some cheap thrills, they are your 'average decent bloke', trying it on."[394] In weighing the evidence, the Court makes the extraordinary untested assumption that "[i]t is not unreasonable to expect a man of the appellant's age and long business career to have left a clearer trail if inclined to act generally towards women in an inappropriate way as was suggested."[395] There is no evidential or scientific basis for this "reasonable expectation". Fitzgerald describes the atypical case of Richard Berendzen, former President of the American University, a "nationally renowned public figure, a noted physics professor, and a charismatic leader"[396] who was forced to resign and pleaded guilty to making

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391 *A v Z* 8.
392 *Z & Y Ltd* v *A* 27.
393 Backhouse 147.
394 Steele *No Laughing Matter* 23.
395 *Z & Y Ltd* v *A* 9. This comment amalgamates the relevance of evidence of Z's character and of the lack of similar fact evidence.
396 L F Fitzgerald "Science v Myth: The Failure of Reason in the Clarence Thomas Hearings" (1992) 65 S Cal LR 1399, 1406 - 1407.

obscene telephone calls from his university office. Because his victim's husband was a police officer, she was able to tape and trace the telephone calls. As Fitzgerald points out, without this evidence, the victim would not have been believed and the outcome would have been different. Fitzgerald goes on to say:[397]

> Some harassers are blatant; others are subtle. Some are well-known, whereas others may escape detection for years, as victims fear to complain. In many cases, the shame and pain of sexual harassment prevents women from sharing their experiences with one another, [which] increases the likelihood that a woman may be harassed over a long period of time without the knowledge of colleagues and co-workers ... The body of evidence suggests that there is no 'typical' harasser.

(e) The behaviour of the complainant

The Court's judgment focuses on the behaviour of the victim, rather than on the behaviour of the alleged harasser. For example A and her partner visited Z in hospital and gave him a card and present. The Tribunal found that this behaviour "was consistent with courtesy to a boss whom she respected in part, and described as good at times."[398] The Court, on the other hand, found that this favoured the alleged harasser. The Court also mentions that A got her friend to work there without a word of warning, however indirect. This factor was not mentioned in the Tribunal decision. The Court does not state why these factors were relevant or why they favoured the appellant. The Tribunal's approach is more consistent with women's experiences:[399]

> You feel naked. You feel that you (yes, you) have made some ghastly mistake, sent the wrong signals, led him along. At first you try to pretend it didn't happen. You may do what I once did and keep lifting his hand off your knee as if it were some object that happened to fall there. You may even maintain the fiction of friendship for years, because anything is better than being demoted, in your own mind, to a deletable four-letter word.

Section 29(1) of the ECA puts the focus on the *harasser's* behaviour. What did Z in this case allegedly do? First, he allegedly touched A on the breasts and between her legs in his office. Secondly, he allegedly made crude statements such as holding up a beer bottle and saying, "I bet you wish you had this up your box." Thirdly, when at the bar he allegedly used to say quiet things to her which could not be heard by others but were demeaning eg "you useless bitch". Fourthly, he allegedly held up an empty chippie box at the bar and said, "I bet you wish you had a box this big".[400]

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397 Above, 1407.
398 *A* v *Z*, 10.
399 B Ehrenreich "Women Would Have Known" (*Time*, 21 October 1991, Time International New Zealand Ltd, Auckland, New Zealand) 31.
400 This incident is discussed with references to the relevance of "surrounding circumstances" in Part IV G 1.

The fourth incident was independently attested to by a third witness and was effectively unchallenged by the appellant's counsel, yet the Employment Court does not mention this grossly offensive behaviour, which gives the lie to the assertion that Z always behaved with respect toward women. Proof of this incident should also have added strength to the respondent's assertions about other similar behaviour. Nor does the Court discuss the respondent's claim that the offensive remarks made at the bar by the harasser were made *quietly*. This should have been surely relevant to the Court's concern that other workers did not notice the behaviour, since A said that these remarks generally could not be heard by other workers. Focussing on the behaviour of the victim rather than the alleged harasser in weighing the evidence leaves greater room for gender bias to affect decisions. This is true of consideration not only of *what the victim says*, but *how she says it*. Discussion of the victim's evidence in *Z & Y Ltd* v *A* contains a tone of doubt:[401]

> The respondent's evidence was quite vague, devoid of particulars as to time and place, and characterised by generalities about what the appellant "would" do instead of specifics as to what he actually did do.

Yet Ross notes that "[a] problem sexual harassment victims face is that many women have a 'powerless' speaking style that makes them less credible as witnesses than those using a 'powerful' style."[402] In the *Bell* case, the complainant's testimony during the hearing differed slightly from the details of the complaint when it was first made (like Elizabeth's in *Y* v *X Ltd*). Backhouse notes that:[403]

> It is understandable that a board which is forced to choose between the credibility of conflicting witnesses will seize on these evidentiary problems as indications of exaggeration and inaccuracy. However, there are ... problems with Shime's judgment. Firstly, he seemed to be insensitive to the trauma which surrounds sexual harassment ... To disbelieve sexual harassment complainants because they do not appear objective, rational and collected may be unfair.

Goddard CJ recognises that "conventional wisdom about the assessment of evidence ... sometimes penalises diffident witnesses ... ".[404] Since judges are "conventionally" men, and women are often diffident witnesses, the use of conventional tools to weigh evidence allows gender bias to affect the outcome of sexual harassment cases. Even relatively powerful women are not believed. Let us consider again Anita Hill, Professor of Law at the University of Oklahoma:[405]

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401 *Z & Y Ltd* v *A* 25.

402 S D Ross "Proving Sexual Harassment: The Hurdles" (1992) 65 S Cal LR 1451, 1455. See also J M Conley, W M O'Barr & E A Lind "The Power of Language: Presentational Style in the Courtroom" (1978) Duke LJ 1375, 1380 - 1381 and 1386.

403 Backhouse 148.

404 *Z & Y Ltd* v *A* 28.

405 C Sanger "The Reasonable Woman and the Ordinary Man" (1992) 65 S Cal LR 1411.

> Her testimony was graceful and firm and was supported by a superb panel of four corroborating witnesses, 'witnesses to die for' ... But never mind, Thomas denied all of it and was confirmed by the Senate 52 votes to 48.

If Anita Hill was not credible, faced with the denial of a powerful man, what woman ever could be? Significantly, the tone of doubt and mistrust present in judicial consideration of complainant's stories is largely absent from consideration of the credibility of other women employees who give evidence that they were *not* harassed. In *Z & Y Ltd* v *A* the Court gave weight to the fact that several of the alleged harasser's supporting witnesses were bank officers, "and so [were] presumably reliable and responsible people."[406] In *C* v *L D Nathan Ltd* the evidence of other women working in the area that they "found nothing objectionable"[407] and that the alleged harasser had not harassed them "seemed to be given less weight than the two women witnesses called to support the harasser".[408] In *Y* v *X Ltd* the Tribunal gave weight to testimony from other employees who denied that they had ever seen any such behaviour from X or had been made uncomfortable by his actions" on the basis that these young women "worked in the same kind of situation, and in the same kind of power relationship",[409] yet found the evidence of Elizabeth, a supportive witness for the complainant, not credible. This tendency to give greater weight to the evidence of women who have not been harassed illustrates the way in which the legal system accepts those facts which fit a male perspective of events, and discredits women's experiences. The Employment Court's approach in *Z & Y Ltd* v *A* conforms to this pattern.

In *Z & Y Ltd* v *A* the Court also criticised the Tribunal for holding that the fact that some witnesses were employed by the appellant affected the weight which should be given to their evidence, along with the fact that they were critical of the respondent, because these propositions were not put to those witnesses.[410] Yet Goddard CJ, in reviewing the evidence of these witnesses, takes precisely the same approach earlier in the judgment, commenting that:[411]

> I have avoided mentioning any witness still employed in the premises at the date of the hearing before the Tribunal because it is a well known phenomenon that when an allegation of sexual harassment is made there is a tendency for polarisation of employee views, depending on personal experiences and individual preconceptions, about this highly emotive subject.

The effect of the Court's approach appears to be that, while the Court can take into account women's stories, social science research, and "well known phenomena", the Tribunal can not.

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406 *Z &Y Ltd* v *A* 24. This is a classic "untested assumption".
407 *C* v *L D Nathan* 307.
408 Coleman "Trade Union Perspective" 298.
409 *X* v *Y Ltd* 17.
410 *Z & Y Ltd* v *A* 23.
411 Above, 25.

This inconsistency may have resulted from the Court's adoption of both feminist and traditional legal reasoning at different points in the judgment.

4 *The Burden of Proof*

Men use their power as employers and as men to sexually harass women. In *X* v *Y Ltd* and *A* v *Z*, the complainants, a waiter and a bar person, were not powerful people. The alleged harassers were powerful, and, because of that, were able to call on witnesses likely to impress the Tribunal, who attested to the alleged harassers' good character and good behaviour toward young women. Witness after witness gave very similar evidence on behalf of the alleged harasser (apparently unchallenged by counsel for the complainant in either case). The complainants had supportive evidence, but little of it. Given the inequality of power in these situations, it is unfair for decision makers to view credibility as a numbers game. In accepting this approach, the employment institutions allow precisely the same hierarchies and power constructs which enable men to harass women in the first place, to enable men to win their cases in court. By effectively endorsing these tactics, the employment institutions have made it very difficult for women workers to win cases of harassment against their employers.

Is statutory reversal of the burden of proof the answer to this problem? Before *Z & Y Ltd* v *A* the employment institutions proceeded on the basis that the burden of proof was on the applicant throughout, with a heightened standard of proof. By comparison, in an unjustified dismissal case the burden is effectively on the employer to show that the dismissal was justified on the balance of probabilities:[412]

> ... [A]lthough an initial onus in the legal sense may be said to rest upon a worker ... to put forward a prima facie case of grievance that initial responsibility is likely to be sufficiently satisfied once the fact of the dismissal has been established together with the surrounding circumstances which are relied upon as reason for the complaint of unjustified dismissal. At that stage the evidential burden will properly shift to the employer if only for the reason that in the absence of any contrary evidence the complaint would usually be accepted.

In a dismissal case, then, the burden of proof is placed on the party which is in the more powerful position in the employment relationship. In attempting to remove some of the hurdles for women in sexual harassment cases, the Employment Court in *Z & Y Ltd* v *A* appeared to recognise this, stating that:[413]

> [I]nstead of having to prove the circumstances pointing to the worker's sense of unfair treatment relevant to showing a dismissal to be prima facie unjustifiable, the employee has to give some evidence that the behaviour was unwelcome or offensive to the worker and was either repeated or, although not repeated,

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412 *Wellington Road Transport Union* v *Fletcher Construction Ltd* [1982] ACJ 663, 666 (CA). See also the cases cited in Horn, above n 197 para 27.10(b), p 1C 11.

413 *Z & Y Ltd* v *A* 9.

> so significant as to affect detrimentally the employee's work environment. Once that is done, the evidential burden will shift in the way described and for the reasons given by Woodhouse P.

Thus, with respect to the elements of, firstly, unwelcomeness and offensiveness, and secondly, repetition or detriment, once the complainant raises some evidence of these matters, the burden will then shift to the respondent to show that the behaviour was not unwelcome or offensive to the complainant, and was nor repeated or detrimental to her. This approach is helpful to a limited extent, but does not solve the problem that women are not trusted in sexual harassment cases. In most dismissal cases, other than constructive dismissal cases, the threshold issue, *the fact of dismissal*, is admitted by the employer. Proof of this fact will not be a problem. But the threshold issue in sexual harassment cases is not unwelcomeness, offensiveness, repetition, or detriment, but *whether the sexual behaviour complained of actually happened.* This, unlike the fact of dismissal, is unlikely to be admitted and is very difficult to prove. Goddard CJ does not say on which party rests the burden of proving whether sexual behaviour actually occurred, and whether that burden shifts at any stage. His remarks therefore leave room for confusion on this point, particularly in the light of the decision in *Post Office Union (Inc)* v *Telecom (Wellington) Ltd*.[414] The Labour Court determined that the burden of proof in that case, a discrimination case where a failure to act, as opposed to a positive act, was alleged, the burden of proof remained with the applicant throughout.

Backhouse notes that "onus of proof rules are critical to the resolution of most [sexual harassment] complaints"[415] and concludes that the inherent difficulties of proving a sexual harassment complaint suggest that reverse onus legislation may be required. The success of sexual harassment complaints under the ECA provisions should not depend on whether the harasser is confident enough of his position that he concludes he can harass women in public, or on whether the complainant is farsighted enough to complain about the harassment at the earliest possible opportunity, or is lucky enough to have a witness to the harassment. Unless decision makers are prepared to trust women and believe their stories, legislation reversing the onus of proof in sexual harassment cases may be necessary.

5 *The Employment Court decision in* Z & Y Ltd *v* A: *overall positive, or overall negative?*

Despite the Employment Court's failure to acknowledge women's reality consistently throughout the decision, the decision in *Z & Y Ltd* v *A* contains several positive elements

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[414] Above n 296, 546. The Court also noted (546) that the question of onus of proof in sexual harassment cases was not authoritatively determined in *AB Ltd*

[415] Backhouse 149.

for women. The Court's acknowledgement of gender bias and the need to remove legal hurdles to the victims of sexual harassment, along with its rejection of the untrustworthy woman myth, will be influential not only in the Tribunal but also at workplace level. For A, however, the judgment requires her to relive her ordeal, or abandon any attempt to get justice. This is a dilemma which many victims of sexual harassment will face until gender bias in the employment institutions is eliminated.

F Interpreting the Legislation

The interpretation of the actual words contained in the sexual harassment provisions in the ECA has not always been consistent with the object of the provisions, which is to recognise that sexual harassment is an injury to women workers and is unacceptable behaviour. In this section the writer discusses the interpretation of "detrimental effect" in *B* v *Amalgamated Engineering Union Inc*[416] and, in *Fulton* v *Chiat Day Mojo Ltd*,[417] the adequacy of an employer's response to co-worker harassment with reference to the requirement that an employer take "whatever steps are practicable" to prevent a repetition of such harassment. The writer considers the way in which those interpretations were used to justify findings that sexual harassment did not occur.

1 Detriment

> Why should we, as women, accept workplace behaviour that *actually* harms us, simply because it isn't *perceived* as harmful by men?[418]
>
> Abby Leibman

To establish sexual harassment, a complainant must establish that offensive sexual behaviour was "either repeated or of such a significant nature that it [had] a detrimental effect on that employee's employment, job performance, or job satisfaction." In *B* v *AEU*, an unjustified dismissal case brought by the alleged harasser, the Tribunal found that although behaviour of a sexual nature took place, sexual harassment had not occurred because there was no detrimental effect on the complainant's employment. The complainant, K and the alleged harasser, B, were both employed as organisers by the respondent union. K and another male colleague were walking through the reception area of the office when B commented that the two had been walking together arm in arm and flirting madly. K, who gave evidence that she had, for a period of months, put up with verbal sexual harassment from B, responded with words to the effect "that a man is an appendage of a penis."[419] B then took hold of K around

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416 [1992] 2 ERNZ 554 (AET, A Dumbleton).
417 [1992] 2 ERNZ 38 (AET, C Hicks).
418 A J Leibman, above n 383, 1442.
419 Above, 557.

the shoulders, pulled her towards him, and roughly kissed her on the side of the head. After considering the matter for 2 days, K made a written complaint. B was eventually dismissed by the respondent union for misconduct, being sexual harassment of K as defined in section 29 of the ECA. The Tribunal followed the employer's approach and confined itself, in deciding whether sexual harassment had occurred, to a consideration only of the statutory definition.[420]

The Tribunal found that the words used by B about K and her colleague walking arm in arm and flirting madly were "not expressly of a sexual nature. They describe the everyday conduct of people of the same and opposite sexes and of all ages from the very young to the very old carried on in public at all times."[421] The Tribunal missed the point that *B was making a comment*, admittedly relatively mild in the writer's opinion, *about K's sexual behaviour*. Making such comments *is* conduct of a sexual nature. The Tribunal also found that other jokes and words used by B were discrimination on the grounds of sex, not sexual harassment.[422] However, the Tribunal does not indicate what these jokes and words were, so it is not possible to assess whether the Tribunal failed to recognise a sexual element in that behaviour also. The Tribunal did find that the unwelcome kiss was conduct of a sexual nature and that K found it offensive. However, the Tribunal went on to say:[423]

> In my view of the evidence the conduct of Mr B was significant but it has not been established to my satisfaction that it was so to such a degree that it had a detrimental effect on Ms K's employment. Mr B's conduct had an immediate effect on Ms K which caused her to be embarrassed, offended, angered, and to suffer other emotional distress. It will be a question of degree depending on the circumstances of different cases as to how deep-seated or long-lasting such effects may be. Ms K was personally affected by the conduct of Mr B but it is the consequential effects of that conduct on her employment that are relevant. My assessment from the evidence of this case is, in weighing up the significance of Mr B's conduct and the effects of it on Ms K, that she did not suffer such detrimental effect. There is no evidence that her job performance or job satisfaction has suffered.

The Tribunal's treatment of the concept of detriment is confused and tends to trivialise sexual harassment. The Tribunal simply failed to see that sexual harassment harms women. Firstly, the Tribunal emphasised that, in order to show sexual harassment, there must be some effect on K's *employment*. The Tribunal said that "both complainants were upset by the conduct. However, more than upset is required under the definition of sexual harassment. It is the consequences of that upset on the performance of the employment that must be established."[424] This emphasis is misleading, because it does not make it clear that sexual harassment occurs where there is a detrimental effect not just on employment or job performance, but also on job satisfaction. The Tribunal mentioned, but failed to give equal

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[420] Above, 562.
[421] Above, 564.
[422] Above.
[423] Above, 565 - 566.
[424] Above, 566.

prominence to, job satisfaction. It did not discuss what job satisfaction is.[425] It saw no link between the emotional distress suffered by K and the effects of the behaviour on her job satisfaction. Yet the facts that K was "personally affected" and considered the matter for 2 days before complaining are, in the writer's opinion, clear evidence that K's job satisfaction *was* detrimentally affected by the behaviour. Secondly, the Tribunal displays sexism in failing to recognise that "upset" had a legal consequence: damage to K. It appears that men's injuries result in "damage", "humiliation", or "injury to feelings". When women suffer an injury, however, they are merely "upset".

Thirdly, the Tribunal found that since B was suspended shortly after the incident, "any more harmful effects on her work were fortunately not realised."[426] This approach confuses the *existence* of detriment with the *degree* of detriment. The removal of the harasser does not automatically remove the harm suffered. At best it removes the prospect of repetition of the harassment. Was K able to switch off the embarrassment, anger and emotional distress as soon as B was suspended? Did she never again recall the incident as she walked through the reception area? Did she not continue to be embarrassed in front of other staff who witnessed the incident? Did the incident never again come into her mind as she prepared to advocate an industrial agreement, or to act on behalf of a union member who had been sexually harassed at work, or sat with her male colleagues in the tea room?

Behaviour is "significant" under section 29(1)(b) if it causes detriment to the complainant. The "significance" of the behaviour is determined not by reference to any objective standard, but by reference to whether it caused detriment to the complainant. Section 29(1)(b) speaks of behaviour "of *such* a significant nature *that* it has a detrimental effect ...". It does not speak of behaviour that is significant *and* has a detrimental effect. Once there is evidence of detriment to the complainant's job satisfaction, sexual behaviour is, by that very fact, established as significant for the purposes of section 29 and it follows that sexual harassment has occurred. If the detriment suffered is minor, this may affect the job consequences for the harasser or the remedies awarded to a complainant, but it does not affect the determination as to whether sexual harassment occurred. Yet the Tribunal's reasoning,[427] and its conclusion, indicate that the Tribunal assessed "significance" by reference to some "objective" standard ie the

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425 The writer considers that job satisfaction is the enjoyment and sense of fulfilment a person gets as a result of doing their job. In relation to the Tribunal's finding that K was "personally affected" but that her job satisfaction did not suffer, compare the description in MacKinnon *Sexual Harassment* (83 - 87) of findings in early US decisions that sexual harassment was not actionable because it was a "personal" matter: "Personal ... is usually used as if it conclusively renders legal remedies unavailable, as if to the extent an occurrence can be described as personal the person has no legal rights"(84).

426 *B* v *AEU* 566.

427 Particularly in the passages cited in n 423 and 424 above.

perceptions of the Tribunal itself, and not, as the statute requires, with reference to the effects of the behaviour on K.

Fourthly the Tribunal failed to appreciate that detriment also occurs because sexual harassment reduces women at work to the status of sexual objects. Being treated as a sex object is discrimination on the grounds of sex, which is *ipso facto* detrimental to a woman's job satisfaction:[428]

> When we leave our homes to go to work, we assume an impersonal role like "teacher", "secretary" or "judge." We may even don a special costume (black robes, skirted suit) to get the point across: "This is the public me - not the mommy or the sweetheart or the wife, but the secretary or the judge." To be sexually harassed, even verbally, is to have that robe ripped off and the pearls torn from around your neck. The message of the harasser is, *You're* not a secretary, judge, whatever. Not to me you aren't. To me, you're a four-letter word that this magazine refuses to print.

B's actions had the effect of reducing K's standing in her workplace as a professional with equal status to him. His actions showed K that her real status - which he (or any other man) had the power to invoke at any time - was that of a sexual object. The Tribunal's adoption of a male perspective meant that it missed this point entirely. MacKinnon's analysis that sexuality is by its nature coercive in our society may explain why it is so difficult for many men to see why and how sexual harassment harms women. Where women see coercive sexual behaviour resulting in detriment to the victim, men see normality:[429]

> [I]f rape *is* very like normal intercourse, it is, further, no mystery that convictions are so difficult. If most men do similar things all the time, on what grounds should this individual man be sent to jail? Similarly with sexual harassment: if unwanted sex imposed by a man upon a woman who is in no position to refuse only expresses the usual situation in unusually vivid terms, on what grounds should it be illegal?

Several Tribunal decisions state that sexual harassment is about power, not sex, as if the two were mutually exclusive concepts. In *A* v *Z*, for example, the Tribunal notes that most of the behaviour described was "certainly sexual in context, even though I might comment they appear to relate more to power issues ... rather than unwelcome, lustful attentions ...".[430] In *P* v *S* the Tribunal notes the submission of counsel for the applicant that the employer's behaviour "although of a sexual nature was perhaps not lustful but part of his exercise of power in the workplace."[431] The erroneous implication is that, if the harasser did not intend at the end of the day to rape the complainant, there was no detriment, or less detriment. Or if the harasser did not really want to sleep with the complainant, but only wanted to embarrass and humiliate her and reduce her to the status of a sex object, there was no detriment. Or if the

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428 Ehrenreich, above n 399, 31.
429 MacKinnon *Sexual Harassment* 220.
430 *A* v *Z* 6.
431 *P* v *S* 4.

harasser is a co-worker, and not an employer, the detriment is less because there is no visible power relationship. What the "power" paradigm ignores is the reality that "sexuality, as socially constructed in our society through gender roles, is *itself* a power structure." In our society, sex *is* about power and power is often about sex:[432]

> [W]hen men sexually harass women it expresses male control over sexual access to us. It doesn't mean they all want to fuck us, they just want to hurt us, dominate us, and control us, and that *is* fucking us. They want to be able to have that and to be able to say when they can have it, to *know* that. That is in itself erotic.

A different approach was taken in *Hetei* v *Feltex Woven Carpets Ltd and NZ Dairy Food and Textile Workers Union*, in which the Labour Court found that the "integrity and dignity [of the victims] as women is, in our view, seriously - indeed intolerably - compromised by behaviour of a sexually harassing character."[433] The conduct in *Hetei* included deliberately contrived physical contact, often accompanied by sexually connotative remarks and innuendo, but there was no particular evidence of detriment. The Court appears to have assumed that women being subjected to such treatment would inevitably have suffered detriment. A similar approach in *B* v *AEU* would have led the Tribunal to assume that treating a woman as a sexual object at work inevitably results in detriment to her job satisfaction. A more purposive approach to the interpretation of "detrimental effect" would be to establish a rule that, the complainant having established unwelcome and offensive behaviour of a sexual nature, a presumption of detriment arises. The burden of proving that there was no detriment would then fall on the alleged harasser. Application of the Employment Court's directions on burden of proof in *Z & Y Ltd* v *A* may have a similar effect, and may result in cases such as *B* v *AEU* being decided differently in future. The Tribunal's inability in *B* v *AEU* to recognise and understand that sexual harassment harms women also indicates the need for further education for Tribunal members on the nature and effects of sexual harassment.

2 *Section 36: "Whatever steps are practicable"*

Section 36(2) of the ECA requires an employer to take "whatever steps are practicable" to prevent a repetition of sexually harassing behaviour on the part of a co-worker of the complainant or a customer or client of the employer. If a complaint is made and such steps are not taken, and the harassment is subsequently repeated, the employee has a personal grievance "by virtue of having been sexually harassed in the course of the employee's employment as if the request or behaviour were that of the employee's employer ...".[434] The complainant in *Fulton* v *Chiat Day Mojo* had been harassed by other workers, not directly by

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[432] MacKinnon *Feminism Unmodified* 89.
[433] [1990] 3 NZILR 132, 152.
[434] ECA s 36(3).

the employer. They tricked her into uttering obscenities over the paging system. The employer requested the other staff to stop the behaviour, but made it clear to her that he found the behaviour amusing. The Tribunal found that the complainant had been constructively dismissed and that sexual harassment had occurred, but that the complainant did not have a personal grievance because the employer had taken "all practicable steps" to prevent a repetition of the behaviour. This finding is important because *Fulton* v *Chiat Day Mojo Ltd* is the only Tribunal decision which deals with section 36 of the ECA in any detail, and therefore affects the way in which employers applying the legislation will assess their responsibilities under section 36.

The finding itself is open to question. Although the employer took some steps to ensure that the behaviour would not occur again and obtained an undertaking from the employees responsible that no further such behaviour would occur,[435] he also made it clear that he considered the harassment to have been "only a joke" and told the Tribunal that he still found the "joke" amusing:[436]

> By *condoning the behaviour* even though he had taken steps to see it did not occur again he was telling Ms Fulton that she ought to accept such behaviour if she was to "fit in". Couple this to his repeated series of questions as to why she would stay in an environment she did not like and Mr Wills' behaviour tips over that fine line between asking a person to consider their position and making it clear to them that their face does not fit and that they ought to go.

He also told the complainant that she had "no right to tell my staff to change their attitudes. That is my job."[437] The Tribunal found that something of the employer's attitude no doubt conveyed itself to the complainant. Although the Tribunal appreciated that the employer was in a position to set the standards of behaviour in a workplace in relation to the constructive dismissal grievance, it failed to extend this finding to the claim of sexual harassment. Yet by continuing to find the harassment amusing, and by letting other staff know this, the employer was not only making it impossible for the complainant to continue working in the workplace, he was also contributing to the likelihood that the offensive behaviour would reoccur. Condoning sexually harassing behaviour is not taking "whatever steps are practicable" to prevent repetition of the harassment. A sounder basis for a finding that there was no personal grievance in this case would have been that sexual harassment was not repeated after the complaint was made (and therefore section 36 did not apply).

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435 [1992] 2 ERNZ 38, 46..
436 Above, 47 - 48. Emphasis added.
437 Above, 44.

G According Relevance to Particular Facts

In determining cases where sexual harassment is alleged, the employment institutions have sometimes accorded relevance on the basis of untested or unstated assumptions about the culture of the workplace, the personality and behaviour of the complainant, her motives for bringing the action, the personality and behaviour of the alleged harasser, and the conduct of the relevant union. These factors are discussed below.

1 The surrounding circumstances

In *C* v *L D Nathan Ltd* there were two specific incidents of harassment in the meat unit of a supermarket in Kilbirnie.[438] These incidents resulted in the dismissal of the alleged harasser, who brought a personal grievance action claiming that he had been unfairly dismissed. One incident, in November 1987, resulted in the transfer of the complainant from the meat unit to a different area of the store. That complainant was unable to give evidence as she was overseas. The second complaint was "more serious".[439] In February 1988 the manager called a meeting of the meat packers in the meat unit at which the other meat packers complained about the victim's poor work performance and attitude. The Court noted that "[a]t that meeting the young lady made no complaints concerning Mr C of a sexual nature",[440] as if it were surprising that a complainant would be reluctant to raise such a matter in front of a meeting of people who were criticising her work performance. After the meeting the complainant gave a week's notice. She was then interviewed by the staff supervisor and complained about harassment by C. The Court did not accept the complainant's evidence but found that "frequent references of a sexual nature - often jocular and sometimes possibly not"[441] were made in the meat unit. The Court went on to conclude:[442]

> [T]hat there were remarks of a sexual nature, possibly of a rough nature, and also possibly of a jocular nature from time to time. In this Mr C was by no means alone. To the contrary, the other female meat packers found nothing objectionable and spoke well of Mr C but not so well of the other butcher ... In short, the remarks from time to time of at least two of the butchers were below a reasonably acceptable standard. We consider, however, that they fell short of sexual harassment so far as Mr C was concerned.

It is not clear from the decision what relevance the Court considered that the workplace culture had to the complaint of sexual harassment. The Court's remarks may have been made by way of explanation of its finding that the complainant was not credible. Alternatively it may have been indicating that any suggestion that the general atmosphere in the workplace, as opposed to the specific incident of which the victim complained, did not constitute harassment

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438 Although the judgment does not say what actually happened.
439 *C* v *L D Nathan* 307.
440 Above, 306.
441 Above, 306.
442 Above, 307.

in the nature of a "poisoned workplace". Or the Court may have been saying that whether behaviour is acceptable may depend on the surrounding circumstances. It was this latter interpretation which was adopted by the Employment Tribunal in *A* v *Z*.[443] In that case, the complainant was a bar employee in a hotel. The alleged harasser was her boss. The Tribunal cited *C* v *L D Nathan Ltd* as authority for the principle that "in a case such as this, all the surrounding circumstances have to be taken into account":[444]

> The Labour Court ... observed that the context of the alleged behaviour had to be taken into account and this was a situation in which there was evidence of frequent references of a sexual nature, often jocular and sometime (sic), possibly not. There was also evidence of a variety of other female employees who did not find what occurred to be offensive to them.

Although in *A* v *Z* the Tribunal found that sexual harassment had occurred, it used the "surrounding circumstances" factor to find that the "chippie box" incident did not constitute harassment. The Tribunal accepted that the incident took place as the applicant described it but went on to say:[445]

> It was, however, in the context of what might be described as ribald banter in a pub, of a nature in which the applicant acknowledged she, albeit stupidly, had partaken in a very similar way. In itself that is in isolation (sic), I am of the view that that incident does not fall accordingly, within the definition of sexual harassment.

With respect, it is not at all clear that the Labour Court in *C* v *L D Nathan* decided that the "surrounding circumstances" have to be taken into account in determining whether sexual harassment occurred. That is only one of several possible interpretations of the Court's comments about the nature of the meat unit in that case. However, even if the Court was saying that, it was wrong. The relevant questions under section 29(1)(b) of the ECA are whether behaviour "of a sexual nature" occurred (an objective test); whether the behaviour was offensive or unwelcome to the complainant (a subjective test); and whether detriment occurred (a mixed "subjective/objective" test). By importing an additional requirement that the surrounding circumstances must be looked at, the Tribunal indirectly substituted an objective test for the subjective test of unwelcomeness or offensiveness established by the plain words of the statute. The fact that other employees did not find the behaviour unwelcome or offensive is not relevant. The fact that the employee worked in a bar as opposed to a law office is not relevant. Indeed, to find that the "surrounding circumstances" are relevant is to entrench sexist notions of acceptable behaviour and to undermine the object of the legislation, which is to change current standards of workplace behaviour. The provisions of section 29 of the ECA are intended to validate the standards of complainants of harassment, not to allow harassers to find refuge in the lowest common denominator of

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443 Although in that case the Tribunal found that harassment had occurred.
444 *A* v *Z* 7.
445 Above, 8. This incident is described in Part IV B 4.

behaviour. Blackwood[446] identifies the same judicial attitude in *Rabidue* v *Osceola Refining Co*. Judge Keith, dissenting, noted that "the majority suggests ... that a woman assumes the risk of working in an abusive, anti-female environment":[447]

> [T]he evaluation of the severity or pervasiveness of the conduct by adopting the perspective of a reasonable person begs the question because ... prevailing attitudes do not universally condemn sexually harassing behaviour. It leads ... to the tautology that if society allows the behaviour, it is not actionable. The purpose of sexual harassment law, however, is not to perpetuate existing mores that permit harassment of and discrimination against women but to establish new modes of conduct.

In taking into account the complainant's behaviour on another occasion, when she held up a chippie box and said: "What do you think of the size of my box?",[448] the Tribunal in *A v Z* also failed to recognise that women in a hostile work environment often feel pressured to adopt the "prevailing standards" of behaviour. This may be done, not because women enjoy such behaviour or find it acceptable, but as a defence mechanism which enables them to cope with that hostile environment:[449]

> Many women joke about sex to try to defuse men's sexual aggression, to try to be one of the boys in hopes they will be treated like one. This is to discourage sexual advances, not to encourage them.

The Tribunal's decision in *A* v *Foodstuffs (South Island) Limited*,[450] unlike the *A* v *Z* finding, recognises the legislative policy that the prevailing climate in the workplace does not justify women having to put up with offensive behaviour. This finding is consistent with the wording of the ECA provisions and promotes the objects of the legislation. The Tribunal said:[451]

> Before I conclude this decision I feel I must say something further about the general climate in the workplace ... While I suspect some of the evidence might have overstated somewhat the degree of verbal and physical actions with a sexual content that occurred in the warehouse from time to time nevertheless it is clear that such an element was, and presumably still is, present.
>
> While it is possible these activities are acceptable to a large number of employees, even a substantial majority, at least to Mrs B, and surely a number of others, they were not. Because this is seen as being the norm in this workplace a number of the company's employees have suffered in silence. That is not something they should have to do. They should be able to retain their dignity while they are engaged in their place of work.

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446 Blackwood 1009.

447 *Rabidue* v *Osceola Refining Co*, above n 115, 626. Blackwood summarises Judge Keith's conclusion (1009).

448 *A* v *Z* 4. The complainant said, in relation to this incident: "I was stupid - he was crude."

449 MacKinnon *Feminism Unmodified* 112. Gallivan (45) notes the comments of a woman who worked in a road gang (*Watt v Regional Municipality of Niagara* (1984) 5 CHRR D/2453 (OHRC)) who describes this phenomenon as follows: "In order to be accepted by them [the male employees] you have to put yourself at their level and then when it comes time to go home, then you go back to yourself": (D/2454).

450 [1993] 1 ERNZ 81.

451 Above, 104.

2 *The behaviour of the complainant: blaming the victim*

Section 35 of the ECA provides:

> Where a personal grievance involves allegations of sexual harassment, no account shall be taken of any evidence of the employee's sexual experience or reputation.

Although section 35 should have largely eliminated cross examination of complainants as to their sexual experience or reputation, in several cases the Tribunal discusses the behaviour of the complainant in a manner which reinforces sex role stereotypes about acceptable behaviour for women and sometimes uses these stereotypes either to find that sexual harassment did not occur in a particular situation or to reduce the effectiveness of remedies. In *C* v *L D Nathan* the fact that the complainant was under considerable stress in her private life and had "developed a distrust of men generally" detracted from her credibility as a witness. As Coleman points out, these comments indicate a lack of understanding of the nature of sexual harassment and its effects and "seem to be barely a step away from 'oh she does not have any sense of humour.' "[452]

In *B* v *AEU* the complainant's position as a union organiser was found to minimise the detriment she had suffered. The Tribunal took into account K's "occupation as an organiser both with the respondent and with other unions, which is likely to have left her better equipped than many to handle the personal effects of dissension and confrontation in dealings with others."[453] This extraordinary finding is completely unsupported by any evidence and conflicts with earlier findings that K was humiliated and upset by the harassment. The Tribunal cites no literature or evidence to show that a person who works in conflict situations is better able to deal with being personally sexually harassed than other workers. Indeed, someone who is used to being able to exert control over a situation may find the loss of control of her personal integrity even more disturbing than others, especially if she is the only woman, or one of only a few women, in a predominantly male workplace:[454]

> A woman struggling to establish credibility in a setting in which she may not be, or may not feel, welcome, can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands.

This finding also conveys the attitude:[455]

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[452] Coleman "Trade Union Perspective" 297.

[453] *B* v *AEU* 566.

[454] K Abrams "Gender Discrimination and the Transformation of Workplace Norms" (1989) 42 Vand LR 1183, 1208.

[455] Pollack 65. Pollack, discussing the court's assessment that the complainant in *Rabidue v Osceola Refining Co* (above n 115) was "capable, independent, ambitious, aggressive, intractable, and opinionated", notes that the complainant in that case was "enough like a man so that her claim of injury cannot be taken seriously."

> [T]hat sexual harassment is a woman's personal problem and that she must bear the responsibility to protect herself. With the focus again on the woman's conduct, her personality as well as her speech and dress are subject to scrutiny.

In *X* v *Y Ltd* the employer was said to have harassed the complainant with persistent requests to go out to lunch. The Tribunal's response was that "[t]here may have been requests for lunch dates. Ms Y said she was always too busy. An outright rejection might well have ended this difficulty."[456] This response indicates a "blame the victim" mentality and a lack of understanding that sexual harassment is the meeting place of gender inequality and employer/employee inequality. In *A* v *Z*, the Tribunal noted that the complainant had suffered a traumatic attempted rape some months prior to the harassment. The Tribunal noted that she was therefore "emotionally vulnerable" and that the respondent was aware of that. The Tribunal does not explain the relevance of this evidence, but appears to have used it in the complainant's favour, as if it made the actions of the employer in sexually harassing her more blameworthy. The Tribunal also admitted evidence from the alleged harasser that the complainant had a tattoo on her breast and that she would flaunt it to male patrons of the bar. The exact relevance of this evidence is also not explained. However, the Tribunal did note that if that evidence "is intended to refer to the employee's reputation and it is by no means clear that it was, then s 35 directs me to take no account of it."[457]

Section 29(1)(b) provides that sexual harassment occurs where offensive or unwelcome sexual behaviour takes place "whether or not that is conveyed to the employer or representative", recognising the difficulties which women sometimes experience in stopping sexual harassment. In focussing attention on the victim's response instead of the harasser's actions, the employment institutions have paid less attention to the wording of the statute and more attention to myths and sex stereotypes. This is gender bias.

3 *Character of the alleged harasser*

In *Parlane* v *NZ Police*[458] the Labour Court used the personality of the alleged harasser to support a finding that he had been constructively dismissed. Mr Parlane was a record/mail clerk with the NZ Police. In 1991 a woman police constable complained that on two occasions he had sexually harassed her. These incidents followed an earlier complaint by another officer in 1990 which had been dealt with informally. The court describes the 1991 incidents in the following terms:

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456 *X* v *Y Ltd* 17.
457 Above, 9. The evidence on this point is discussed in *Z & Y Ltd* v *A* 10.
458 [1991] 3 ERNZ 721.

> One of these incidents was alleged to have occurred in the police station and the other outside it, in full view of the public. She alleged that there had been some physical contact, but, although it was minimal on each occasion, she nevertheless found it offensive. She was not unduly distressed as a result of these incidents but spoke to her supervising officer for the purpose of getting something done to put a stop to this type of behaviour by Mr Parlane.

The officer in charge concluded that there was a prima facie case of indecent assault. He informed Mr Parlane that no charges would be laid, but that there would be an inquiry into the circumstances of the harassment and a consequent dismissal recommendation was likely. Mr Parlane then resigned and later claimed that he had been constructively dismissed. The court accepted that the two complainants had been offended by the behaviour but found that the evidence established that "any degree of sexual harassment on his part was minimal or virtually non-existent."[459] The court does not indicate exactly what happened. However, behaviour which offends two police constables sufficiently for them to complain is, in the writer's opinion, unlikely to be "minimal" or "virtually non-existent" sexual harassment. But having dismissed the injury as unimportant, the court then use Mr Parlane's personality to support its finding that he was constructively dismissed:[460]

> However, his actions appear to us to be those of a naive and immature young man, with little self confidence, who has experienced difficulty in establishing normal social relationships with people generally, and not only with members of the opposite sex. Such a person is inherently sensitive and very vulnerable to threats, either express or implied.

Although the Court took into account the feelings of the male harasser, it ignored the effect of the harassment on the women complainants. In this decision sexual harassment is treated as though it is not a real injury and as though it does not harm women.

4 *Conduct of the union*

Decision makers also seem to have been influenced by the way in which unions acting for complainants have taken up cases. The tone of some decisions indicates that, in the opinion of the decision maker, the union has pursued complaints of sexual harassment too vigorously. In *AB Ltd* the Labour Court criticised the union's advice to the worker to leave her job as:[461]

> [I]ll-considered and precipitate ... We would not like to encourage a view that an allegation by a worker of sexual harassment is sufficient ground for abandonment of employment ... [W]e think that the union's reaction to the worker's complaint was headstrong and unnecessarily antagonistic.

In *AB Ltd* the employer had sexually assaulted the worker who was so "terrified" at being alone in the workplace with her employer that she had asked her boyfriend and mother to

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459 Above 725.
460 Above 726.
461 *AB Ltd* 768.

come and be with her. The union's advice appears to have indicated a healthy concern for the welfare of its member. The Labour Court's criticism of this approach makes it difficult for unions to advise members as to the appropriate course of action to take where harassment occurs. In *Y* v *X Ltd* the union threatened to picket the employer's premises, but was eventually restrained by a High Court injunction. The Tribunal said that the union's actions were inappropriate.[462]

In *Parlane* v *New Zealand Police* the Labour Court criticised the union for failing to represent the harasser and said it was a "bad case"[463] of the union failing to act. This case may be contrasted with the decision in *Hetei*, in which the union's comprehensive investigation of the background to the alleged harasser's dismissal was described as careful and comprehensive.[464] Judicial criticism of the appropriateness of the union's behaviour has been visited on the complainant, even though the manner of dealing with her complaint was outside her control. The implication that unions have overreacted to complaints of sexual harassment also seems to trivialise sexual harassment.

5 *The complainant's motives for making a complaint*

A further irrelevant consideration mentioned in *A* v *Z* was the complainant's motives for bringing her action. The employer alleged that the harassment did not occur, and that the employee made the allegations because she was "after money"; "seeking to avoid a stand-down period with Social Welfare"; "subject to a neurotic fantasy"; and "trying to save face".[465] It is submitted that the Tribunal should simply have ruled that the complainant's motives for bringing a claim of sexual harassment were irrelevant. Yet the Tribunal goes on to discuss the merits of these submissions on behalf of the respondent.

The adjudicator found that although the complainant "was stressed with both the aftermath of ... [an earlier] attempted rape trauma and current personal relationship issues, I did not find any evidence of neurosis."[466] This finding appears to have been made in the absence of any expert psychological evidence. The Tribunal also found that the complainant was in a favourable financial position and was therefore not "after money" or "seeking to avoid a stand-down period with Social Welfare." The Tribunal failed to make the point that, even if the complainant was "after money" or had mixed motives for bringing the action, this was irrelevant. The relevant questions were whether she was sexually harassed and, if she had

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462 *Y* v *X Ltd* 11.
463 *Parlane* 726.
464 *Hetei* 153.
465 *A* v *Z* 9.
466 Above 10.

been, what was the appropriate level of compensation. Backhouse notes that "[t]o suggest that the seeking of compensatory damages is an improper motive seems somewhat absurd. Surely every civil litigant is motivated by the desire to obtain compensatory redress for wrongful conduct."[467] Yet the Tribunal in *A* v *Z* used the complainant's motive for bringing the action as being "to stop the behaviour, not to make a monetary windfall", as somehow being relevant to the amount of compensation which should be awarded.[468] "Nice women" are apparently more concerned about their reputations than their job and financial security.

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[467] Backhouse 149.
[468] *A* v *Z* 10.

V SUGGESTIONS FOR REFORM

Until the more powerful own the responsibility for prejudice, it will continue to cripple us all.[469]

Gloria Steinem

Gender bias in the treatment of sexual harassment cases by the employment institutions is pervasive, deep-seated and unacceptable. Identification of gender bias does not involve the allocation of blame. It does involve a call for change. Some suggestions for change to enhance the effectiveness of the sexual harassment provisions in the ECA follow.

A A Culture Change in the Tribunal

The sexual harassment provisions in the LRA made sexually offensive behaviour in the workplace explicitly unlawful for the first time. The law was designed to enhance women's right to job security and dignity at work and to change attitudes about sex and work. As with any law which purports to change behaviour, particularly laws which aim to make discrimination unlawful, the attitudes of the decision makers responsible for applying the law are crucial to its success. The way in which judicial discretion is exercised can "make or break" the effectiveness of statutes designed to remove gender inequality in society. An earlier example of this in employment law is demonstrated by the respective attitudes of the employment institutions firstly, to the implementation of the Equal Pay Act 1972 and secondly, to the establishment of the personal grievance jurisdiction in 1973.[470]

Orr's research indicates that the failure of the Equal Pay Act 1972 to bring about a more equitable ratio between men's and women's earnings in New Zealand is partly explained by the gender bias of the employment institutions. The Arbitration Court failed to use its statutory power[471] "to state, for the guidance of parties in negotiations, the general principles to be observed for the implementation of equal pay"[472] and insisted on a standard of proof that discrimination existed which was "seemingly closer to that used in criminal proceedings than the standard normally adopted in civil cases."[473] The Court also read down the provisions of the Act in reaching a finding that the Act did not provide for the principles of equal pay for

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469 G Steinem quoted in K Reardon "The Memo Every Woman Keeps in Her Desk" (Harvard Business Review, Boston, Massachussets, USA, Vol 71 No 2, March-April 1993) 16, 22.

470 Section 117. Under s 117(4)(e) the grievance was considered by a grievance committee, but could be referred to the Court if not settled. Changes were made to the procedure by amendments to the IRA in 1983, 1984 and 1985, and by the LRA. The current procedure is found in Part III of and the First Schedule to the Employment Contracts Act 1991.

471 Later transferred by the IRA to the Industrial Commission.

472 Although the Committee on the Progress of Equal Pay in New Zealand commented that such a statement of principles would have been "extremely helpful in the early stages of implementation": *Progress of Equal Pay in New Zealand* (Report of a Committee Appointed by the Minister of Labour, Wellington, October 1975) para 5.196 p 61.

473 Above, para 8.71 p 49, referring in particular to *New Zealand Retail Butchers' Case* [1974] BA 153.

work of equal value. Orr notes that the Court, in reaching the conclusion that the Act was not intended to apply universally, misquoted the title of the Act and adopted an interpretation which ignored the wording and punctuation of section 3(1).[474] Overseas research indicates that in equal pay cases, complaints heard by tribunals which include a woman are more often successful than those heard by all male panels.[475] The short-lived Employment Equity Act 1990 wisely provided for an independent Employment Equity Commissioner to oversee the implementation of that legislation.[476] The effect of the Arbitration Court's refusal to promote the objects of the Equal Pay Act has rendered that legislation useless as a means of achieving pay justice for women. That need not have happened.

The court's response to the Equal Pay Act may be contrasted with its response to the new personal grievance jurisdiction established by the IRA, which for the first time empowered the employment institutions to decide whether dismissals were substantively justified.[477] The Arbitration Court established several important principles which were not apparent from a bare reading of the legislation and which gave effective legally-backed employment security to workers for the first time. The reversal of the burden of proof[478] was an important departure from the normal rule that the burden of proof falls on the party bringing an application and recognises the need to reduce the power imbalance between employer and employee. The Court also developed the concept of constructive dismissal, where an

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474 E Orr, Submission to the Labour Select Committee considering the Employment Equity Bill 1989. Orr summarised (13 - 14) the record of the Arbitration Court in equal pay decisions:

1. The Court failed to provide a set of guidelines or principles under section 9, and gave minimal guidance when asked for assistance.
2. It made a number of awards and registered a number of collective agreements which did not fully comply with the Act.
3. The Court determined only one set of equal pay rates, and that after four hearings and using the formula from the 1960 not the 1972 Act.
4. When the Labour Department or unions sought the Court's help in amending awards it failed to identify and remedy discrimination apart from one case where no less that six unions protested at the alleged infringement.
5. It did not find discrimination in any of the four cases brought on behalf of individual women, three of the cases being brought by the Department of Labour.
6. Even if its decisions relating to alleged breaches of the Act were correct the procedures and reasoning by which it reached those decisions are open to question.
7. It fulfilled its responsibilities of interpreting the Act under Section 12(d) by reading Section 3(1), one of the central sections of the Act, in such a way as to render the Act inoperative with respect to awards and collective agreements.

475 "In equal pay cases [under the Sex Discrimination Act 1975 (UK) and the Equal Pay Act 1970 (UK)], success rates were substantially higher where panels included a woman, both with full-time chairmen (40% rather than 25%) and with part-time chairmen (25% rather than 8%). In Scotland, where there was a full-time chairman and a woman on every panel, the success rate was 42%": A M Leonard *Judging Inequality. The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases* (The Cobden Trust, London, 1987) 137.

476 Section 5. Repealed by s 4 of the Labour Relations Amendment Act (No 2) 1990.

477 At common law the relevant query was simply whether the correct period of notice had been given: A Szakats *Law of Employment* (Butterworths, Wellington, 1988) para 30.1 pp 295 - 296.

478 See Part IV E 4 above.

employer's conduct forces a worker to resign[479] and developed a requirement that dismissals must be carried out in a procedurally fair manner.[480] The influence of these judicially developed principles on the personal grievance procedure was made apparent in a study of nearly 600 dismissal appeal cases heard under the LRA. Three quarters of the dismissals were found to be unjustified, most of these on the grounds of procedural unfairness.[481]

With respect to sexual harassment cases, one Tribunal member has expressed "grave doubts as to whether the grievance procedure ... is the appropriate place for [sexual harassment] to be dealt with" and that the "expertise and counselling" of the HRC may be more appropriate, "slow and toothless or not".[482] One is left with the impression that Tribunal members see their role as operating in the "real world" of industrial disputes and executive personal grievances and should not have to deal with "trivial" complaints about sexual harassment. This attitude fails to recognise not just social reality, that sexual harassment has serious consequences for the economic and psychological well-being of women, but the legal reality that sexual harassment is an actionable injury, that it is unlawful, and that harassed women have the right to real remedies. What is required, then, is a culture change in the employment institutions so that the decision makers accept their statutory responsibilities and fulfil them, rather than hoping they will go away. For women, sexual harassment *is* the real world, and the legal process established by Parliament to enable women to obtain redress for sexual harassment must be made accessible to women by those responsible for applying the law.

Despite the negative aspects of the decision, the comments of the Employment Court in *Z & Y Ltd* v *A* indicate that such a culture change may be beginning to take place. Along with the Court's comments mentioned in Part IV E above, Goddard CJ noted that publicity as to the identity of an harasser may advance the public interest[483] and commented that, where harassment is found to have occurred:[484]

> ... [T]he Tribunal should ordinarily recommend to the employer that it arrange rehabilitative counselling for that person or those persons. To enable this to be done effectively, I have asked the chief executive officer to ascertain and make available to Secretaries of the Tribunal information concerning the providers of such counselling services in the main centres.

Taking women and their injuries seriously is an important part of this culture change.

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479 *Wellington etc Clerical Workers' IUW v Greenwich* [1983] ACJ 965 (Arb Ct).

480 *Auckland City Council v Hennessey* [1982] ACJ 699 (Arb Ct). The minimum requirements for procedural fairness are for notice of a specific allegation of misconduct to be given to a worker, a real opportunity to be given to the worker to refute the allegation or explain or mitigate the worker's conduct, and an unbiased consideration of the worker's explanation, free from pre-determination and uninfluenced by irrelevant considerations: *NZ Food Processing etc Union v Unilever NZ Ltd* [1990] NZILR 35 (Labour Court).

481 B Boon "Procedural Fairness and the Unjustified Dismissal Decision" (1992) NZJIR 301, 312.

482 Hicks, above n 89, 293.

483 *Z & Y Ltd* 31.

484 Above 32.

B Training and Education

The sexual harassment cases indicate that many (but not all) decision makers and advocates are ignorant of the nature and effects of sexual harassment. Tribunal Members receive no formal training in any aspect of their duties. Joychild suggests[485] that judges, Tribunal members and advocates receive training about sexual harassment. However, the decisions also indicate a more pervasive gender bias than simply ignorance about sexual harassment. Decision makers also have a statutory responsibility to deal with cases in which discrimination on grounds other than sex is alleged. They currently receive no training to assist them in this task. Because the decision makers of the employment institutions are exclusively pakeha and overwhelmingly male, they need exposure to perspectives other than their own and to consider the possibility of gender bias when making decisions:[486]

> Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated - and treat as a given - the perspective they select. ... Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them.

Tribunal members are also expected, unrealistically, to come to the job with mediation skills. Training in mediation skills is also vital.[487] However mediation can be effective only if freedom from harassment is a serious, valued objective.[488] The need for a culture change must go hand in hand with any training and education programme.

C Better Advocacy

The need for advocates to properly prepare for sexual harassment cases also needs emphasis. Decisions often (although not invariably) reflect the quality, or lack of quality, of the research which precedes the making of submissions to the decision maker:[489]

> The need for careful and competent counsel in equality cases is at least as great. While judges must be educated to the issues of equality, in an adversary system, lawyers must be trained to bring the issues forward effectively during the trial process ... all too often, however, the evidence on critical issues of this kind is so slender that it is not easy for judges to determine these issues equitably, however fair and sensitive they may be.

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485 Above n 2, 79.
486 Minow 94 - 95.
487 Stamato, above n 145, 169 - 170, says that "[t]he design of mediation programmes for sexual harassment cases requires very careful attention, however. ... [and] advanced, sophisticated training for mediators ... is essential."
488 Above, 170.
489 M L Rothman (Judge, Quebec Court of Appeal) "Prospects for Change in Canada: Education for Judges and Lawyers" in *Equality and Judicial Neutrality* 421, 425.

D More Representative Decision Makers

As in other areas of judicial decision making, there is an urgent need for decision makers in the employment institutions to be more widely representative of the diverse groups in New Zealand society than is the case now.

E Research Into and Evaluation of the ECA Provisions

Research is needed into the effectiveness of the ECA sexual harassment provisions at workplace level.[490] The effectiveness of the employment institutions in administering the provisions should also be monitored and evaluated on a regular basis.

F Changes to the Law

The changes suggested above are more likely to increase the effectiveness of the sexual harassment provisions in the ECA in preventing sexual harassment than changes to the law. Further consideration needs to be given to whether the onus of proof in sexual harassment cases needs to be statutorily reversed. Some desirable changes include legislation:

1. Providing for a broader range of remedies than is available at present to the employment institutions. Joychild suggests[491] that the current recommendatory powers in section 40(1)(d) of the ECA be amended to empower adjudicators and the Court to *order*, rather than simply recommend, that harassers undergo counselling and education programmes, and that employers institute anti-sexual harassment programmes in the workplace;
2. Establishing a rebuttable presumption of detriment where sexual harassment is found to have occurred;
3. Removing the requirement in section 36 that complaints of co-worker, customer and client harassment must be put in writing before the employer is obliged to act on those complaints;[492]
4. Amending section 36 to allow women to take personal grievances where sexually harassing behaviour is repeated by *any* co-worker, customer or client, not just in situations where the *same* co-worker, customer or client repeats the sexually harassing behaviour.

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490 The ECA provisions are not used by women who are seriously sexually assaulted by their employers. Research into the reasons for this would be helpful.

491 Joychild 80.

492 As suggested by Hicks, above n 89, 292.

APPENDIX I

TABLE 1: SEXUAL HARASSMENT CASES DEALT WITH BY THE MEDIATION SERVICE OR EMPLOYMENT TRIBUNAL 1/4/89 - 30/6/92

Year ended	Sexual Harassment	Discrimination	Other	Dismissal	Total
30/6/93	2	5	32	1203	1242
30/6/92	2	3	27	468	929[1]
30/6/91	7	13	194	876	1090
30/6/90	4	7	119	681	811
1/4/89 - 30/6/89	6	5	71	984	1066

(Source: Annual Reports of the Department of Labour for the years ending 30 June 1992; 30 June 1991; 30 June 1990; and for the 15 months ending 30 June 1989 presented to the House of Representatives pursuant to section 39 of the Public Finance Act 1989. Statistics of numbers of sexual harassment cases are not printed in the Annual Reports of the Labour Department prior to 1989).

TABLE 2: SEXUAL HARASSMENT CASES DEALT WITH BY THE HUMAN RIGHTS COMMISSION 1/4/89 - 30/6/93

Year ended	Employment complaints	Sexual discrimination in employment	Sexual harassment in employment (Total)	Queries (not formal complaints)
30/6/93			68 (74)[2]	507[3]
30/6/92	146	91	50 (61)	382 out of 2537 total
30/6/91	114	68	(26)	204 out of 2799 total
1/4/89 - 30/6/90	186	124	35 (48)	166 out of 2537 total

(Source: Annual Reports of the Human Rights Commission and the Race Relations Conciliator for the years ended 30 June 1992; 30 June 1991; 30 June 1990, presented to the House of Representatives pursuant to section 81 of the Human Rights Commission Act 1977 and section 28 of the Race Relations Act 1971. The reports do not always give a breakdown of how many sexual harassment complaints are employment related or occur in other areas eg provision of goods and services. Numbers of employment related complaints are shown where these are contained in the report. Otherwise the total number of sexual harassment complaints are given in parentheses.

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[1] This figure includes 500 cases dealth with under the ECA provisions and 429 additional applications disposed of under the transitional provisions of the ECA in the period 1 July 1991 - 31 December 1991.

[2] Estimate only provided to the writer by HRC 1 September 1993.

[3] Figure quoted in the *Evening Post*, Wellington, New Zealand, 3 August 1993, p 13.

APPENDIX II

SEXUAL HARASSMENT CASES ADJUDICATED ON BY THE EMPLOYMENT INSTITUTIONS UNDER THE INDUSTRIAL RELATIONS ACT 1973, THE LABOUR RELATIONS ACT 1987 AND THE EMPLOYMENT CONTRACTS ACT 1991

A COMPLAINTS OF SEXUAL HARASSMENT BY WOMEN

- *NID Distribution Workers IUOW* v *AB Ltd* [1988] NZILR 761 (Labour Court)
- *Fulton* v *Chiat Day Mojo Ltd* [1992] 2 ERNZ 38 (AET, C Hicks)
- *Y* v *X* Ltd (Unreported, 15 July 1992, Auckland Employment Tribunal, AT/126/92) (C Hicks)
- *A* v *Z* (Unreported, 29 September 1992, Wellington Employment Tribunal, WT 69/92) (D Hurley)
- *P* v *S* (Unreported, 22 July 1993, Christchurch Employment Tribunal, CT 87/93) (J M Goldstein)
- *Z & Y Ltd* v *A* (Unreported, 3 September 1993, Wellington Employment Court, WEC 21/93) (Goddard CJ)

B CASES INVOLVING A DISMISSED (OR OTHERWISE DISCIPLINED) HARASSER

- *Northern Butchers Union* v *Peach & Vienna Foods Ltd* [1982] ACJ 379 (Arb Ct)
- *TP Co* v *Staff Union* (Unreported, 3 June 1987, private arbitration, [1987] ILB 53)
- *C* v *L D Nathan Ltd* [1988] NZILR 304 (Labour Court)
- *Williams* v *Wanganui Area Health Board* [1989] 1 NZILR 617 (Labour Court)
- *Wanganui Area Health Board* v *Williams* [1989] 2 NZILR 174 (CA)
- *Hetei* v *Feltex Woven Carpets and NZ Dairy Food & Textile Workers Union* [1990] 3 NZILR 132 (Labour Court)
- *NZ Association of Polytechnic Teachers* v *Nelson Polytechnic* [1991] 1 ERNZ 662 (Labour Court)
- *Parlane* v *NZ Police* [1991] 3 ERNZ 721 (Labour Court)
- *B* v *Amalgamated Engineering Union* [1992] 2 ERNZ 554 (AET, A Dumbleton)
- *B* v *Amalgamated Engineering Union (No 2)* (Unreported, 30 June 1992, Auckland Employment Tribunal, AT 79A/92) (A Dumbleton)
- *Verboeket* v *Du Pont Peroxide Ltd* [1993] 1 ERNZ 124 (AEC, Travis J); (Unreported, 12 November 1992, Auckland Employment Tribunal, AT 152A/92 (J A Newman)); [1992] 3 ERNZ 582 (AEC); (Unreported, 12 August 1992, Auckland Employment Tribunal, AT 152/92 (J A Newman))
- *A* v *Foodstuffs (South Island) Ltd* [1993] 1 ERNZ 81 (CET, D Miller)

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