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SEXUAL HARASSMENT CLAIMS UNDER THE HARASSMENT ACT 1997: A FEASIBLE OPTION?

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CONTENTS

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A) INTRODUCTION

Sexual harassment is one issue in the category of "invisible" wrongs in society, whose actual existence is doubted by some, and for which regulation has traditionally been very limited. "[T]he Court System as a whole does not have a tradition of protecting women's rights and understanding specifically gender harms, whether for sexual assault, domestic violence or sexual harassment."[1]

The "male voice"[2] of our legal system has resulted in a perceptible reluctance to regulate problems and harms primarily faced by women. Marital rape, which was not a crime until 1986,[3] is a prime example.

In the past decade, the Employment Contracts Act 1991 (ECA), the Human Rights Act 1993 (HRA), and the Domestic Violence Act 1995 (DVA) have been enacted. These Acts contain provisions on sexual harassment. The DVA provisions are confined to persons in a domestic relationship.[4] The ECA provisions have been praised as "the best in the world",[5] but are limited to sexual harassment occurring in employment situations. It is also arguable that the law's past failure to regulate sexual harassment means that only conservative, *nominally* effective provisions have ever been implemented. Therefore, even the best provisions in the world may be unsatisfactory.[6] The HRA sexual

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[1] C Baylis "The Appropriateness of Conciliation / Mediation for Sexual Harassment Complaints in New Zealand" (1997) 27 VUWLR 585, 597.

[2] See C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Massachusetts, 1982).

[3] Crimes Act 1961 s 128(2).

[4] The section 4 definition of "domestic relationship" includes partners, family members, persons ordinarily sharing a household, and persons in a close personal relationship.

[5] W Davis *A Feminist Perspective on Sexual Harassment in Employment Law in New Zealand* (Monograph No 3, New Zealand Institute of Industrial Relations Research, Wellington, 1994) 28.

[6] Davis, above n 5. Although the author praises the ECA provisions, she is critical of their implementation.

harassment clause has a wider scope than the ECA and DVA provisions,[7] but the claimant must still show that the harassment was executed in one of eight specified contexts.[8]

The Harassment Act 1997 was enacted primarily because of a perceived need to introduce an offence of stalking.[9] The Act does not identify sexual harassment as a distinct offence. Indeed, the term "sexual harassment" is not specified at all. Sexual harassment proceedings under the Act must therefore be framed within the provisions which were fundamentally designed to encompass "ordinary" harassment or stalking.
It is my belief that the Harassment Act should adequately address all types of harassment. Sexual harassment provisions should not be confined to employment and domestic violence settings. I advocate the enactment of general provisions for sexual harassment occurring in *any* setting, and criminal as well as civil liability is needed for sexual harassment to be recognised as a sexual crime; a real societal harm.

I believe that it is crucial to recognise and *name* sexual harassment as a distinct class of harassment. It should not be squashed into the elements of "ordinary" harassment and stalking. Sexual harassment must be recognised as unacceptable behaviour in its own right.

There is also a need to expand popular notions of what constitutes sexual harassment. Sexual harassment is distinguishable from "ordinary" harassment, which is acting to "trouble or annoy [another person] continually or repeatedly".[10] While sexual harassment

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[7] Human Rights Act 1993 s 62.

[8] These contexts are specified in section 62(3), and include employment, training, education, participation in a partnership, membership of an association, access to a qualification, and access to places, vehicles, facilities, goods, services and accommodation. These contexts would probably not cover sexual harassment perpetrated by a stranger in a public street, for example.

[9] (27 November 1997) 565 NZPD 5729-5746.

[10] One definition of "harass" in D Thompson (ed) *The Concise Oxford Dictionary* (9ed, Clarendon Press, Oxford, 1995) 618. Note also that there is no definition of "sexually harass", which reinforces the invisibility of sexual harassment.

involves such annoyance, I believe that it is fundamentally different in its objectification of the victim as a sexual object. Sexual harassment, in its usual form of a male harassing a female, reinforces the gender power differential entrenched in our patriarchal society. The annoyance is experienced from the view of a woman who is made to feel biologically inferior and powerless, rather than from the view of a person of equal rank.[11]

Daily examples of sexual harassment include being subjected to whistles and car horn toots when walking down the street, and receiving derogatory personal comments and proposals which are yelled from a construction site or across a public bar. Such examples are so commonplace in our society that most people probably think that a woman should *expect* to experience them, and is perhaps *asking* for them, if she wears a short skirt or knee-high boots, for example. While some women feel flattered or are able to ignore such attention, the self-consciousness and humiliation it engenders in others should not have to be expected or tolerated. The prevalence of sexual harassment is simply *no excuse* for its perpetration.

[11] See my subsequent discussion of sexual harassment as a power issue, under "Criminal Harassment" on page 11.

B) WHY THE HARASSMENT ACT SHOULD ENCOMPASS SEXUAL HARASSMENT

1) The Invisibility of Women's Harms

The law's traditional distinction between the regulated public sphere (the business world) and the unregulated private sphere (the home and family) meant that women, who usually resided in the private sphere, were invisible to the law. "The invisibility of women masked the absence of women's rights."[12] The male-dominated legislature and judiciary saw no need to regulate outside their own sphere, and women's concerns were therefore not heard. Indeed, a woman in the nineteenth century had few individual rights and was seen as "one flesh" with her husband, "whose every whim - violent or sexual - could be forced upon her".[13] This is shown in English law where, until 1882, a husband was the sole owner and manager of his wife's previously held property, and, until 1992, marital rape did not legally exist, "for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."[14] Another reason for the lack of legal recognition of harms faced by women is the law's traditional emphasis on physical evidence of harm, for which there is often none.[15]

The public and private spheres are no longer so distinct. Women are often employed in the public arena, and the State increasingly regulates the family in matters such as domestic violence and social security. While our laws have responded to violence against women, these laws "are characterized by a silent male referent that masks rather than

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[12] H Barnett *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd, London, 1998) 65.

[13] Barnett, above n 12, 61.

[14] M Hale (Sir) *The History of the Pleas of the Crown* (1736) (London Professional Books, London, 1971) ch 58, 629.

[15] See R Hunter "Gender in Evidence: Masculine Norms vs Feminist Reforms" (1996) 19 Harvard Women's Law Journal 127, 157.

eliminates sexual hierarchy and inequality".[16] That is, laws which seek to eliminate and punish violence against women are problematic because the predominantly "male voice" of the judiciary struggles to understand an almost uniquely female experience. The legal claim of sexual harassment is probably the first time *women* have defined women's injuries.[17] "[T]he idea that the law should see it the way its victims see it … is definitely a feminist invention."[18]

Our culture is still fairly unreceptive to both the making and receiving of sexual harassment claims. "Women, after all, are the tension managers in our society, so it goes against deeply ingrained behaviour for them to challenge this form of male behaviour, particularly when it is presented as 'friendly' and 'harmless'."[19]

I believe that the Harassment Act's failure to name sexual harassment will mean that claims under the Act will be viewed as unisex harms and adjudicated through the objective and rational perspective of the "male voice". In contrast, naming sexual harassment would imply that the male-dominated judiciary must acknowledge the necessity of a more open mind in trying to understand an essentially female harm. In this way, it would represent a step towards recognising the patriarchy inherent in our culture and legal system:[20]

> Labelling sexual harassment transforms the private and personal experiences into a general problem for working women in a patriarchal society. The term *sexual harassment* enables women to see these personal encounters as part of an institutionalized system of male domination and thereby to struggle against it[.]

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[16] E Grauerholz & M Koralewski *Sexual Coercion: A Sourcebook on its Nature, Causes and Prevention* (Lexington Books, Massachusetts, 1991) 170.

[17] See C MacKinnon *Feminism Unmodified* (Harvard University Press, Harvard, 1987).

[18] MacKinnon, above n 17, 103.

[19] E Wilson *What is to be done about Violence Against Women?* (Penguin Books Ltd, Middlesex, 1983) 178.

[20] Grauerholz & Koralewski, above n 16, 175.

Naming sexual harassment would also publicly acknowledge the seriousness and unacceptability of sexual harassment. "Especially when you are part of a subordinated group, your own definition of your injuries is powerfully shaped by your assessment of whether you could get anyone to do anything about it, including anything official."[21] This would serve to both send a powerful message of unacceptability and deterrence to potential sexual harassers and empower victims by validating their feelings of being wronged.

It needs to be recognised that sexual harassment can occur outside employment and domestic situations. Many cases will therefore not be covered by the ECA or DVA. Furthermore, there are acknowledged problems in the application of the mediation provisions in the HRA and the ECA to sexual harassment cases.[22] Women are often disadvantaged through mediation because of their weaker bargaining power, the control of the mediator and lawyers, and the mandatory nature of some mediation provisions.[23] The State needs to take responsibility to ensure that *all* victims of sexual harassment have adequate legal protection and remedies.

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[21] MacKinnon, above n 17, 105.

[22] Human Rights Act 1993 s 81 and the Employment Contracts Act 1991 ss 78, 80(2) and 88(2). See Baylis, above n 1, 585-620.

[23] See H Dixon *Counselling, Mediation, in the Family Court* (LLB[Hons] Legal Research & Writing Requirement, Victoria University of Wellington, 1994).

2) Aim of Act to Provide Adequate Protection For All Harassment Victims

One of the objects of the Harassment Act is to "[e]nsur[e] that there is adequate legal protection for all victims of harassment."[24] Section 6(2)(b) provides that one of the ways in which the Act aims to achieve its objects is to "[e]mpowe[r] the Court to make orders to protect victims of harassment who are not covered by domestic violence legislation". *All* victims of harassment who are not protected by domestic violence legislation must therefore have access to the Court's protection for the Act's object to be achieved. Sexual harassment, as a distinct class of harassment, must be adequately covered by the Act. The specification of sexual harassment as a separate offence would enable the Act's protection provisions to readily extend to sexual harassment victims. Without such a specification, the Court may be reluctant to invoke the protection mechanisms in the Act in sexual harassment cases.

Women must also have access to the definitional process of their injuries before effective sanctions can be put in place. "Feminism seeks to empower women on our own terms … [w]e seek not only to be valued as who we are, but to have access to the process of the definition of value itself."[25]

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[24] Harassment Act 1997 s 6(1)(b).

[25] MacKinnon, above n 17, 22.

3) Aim of Act to Criminalise Serious Types of Harassment

Section 6(2)(a) states that one of the ways in which the Act aims to achieve its objects is by "[m]aking the most serious types of harassment criminal offences".

The effects of sexual harassment on a victim can be just as serious as the effects of "ordinary" harassment. I would go so far as to argue that sexual harassment may, in fact, be more harmful, as unwelcome sexual behaviour often has undertones of a potentially imminent sexual assault. Therefore, the criminalisation of sexual harassment is just as warranted as that of "ordinary" harassment or stalking.

However, the Act's failure to name sexual harassment as a distinct offence means that criminal sexual harassment actions must be framed within the generic provision in section 8. This section was primarily designed to criminalise stalking or "ordinary" harassment.

The Act simply "glosses over" the fact that much "traditional" harassment and stalking involves a sexual element, as if sexual harassment is *incidental* to the stalking, rather than a serious offence in its own right. This implies that the legislature believes that the criminalisation of sexual harassment is only warranted as one of "the most serious types of harassment" if it occurs *within* stalking or "ordinary" harassment behaviour. Sexual harassment must be named as a distinct offence before it will ever be seen as a sexual crime.

4) Aim of Act to Provide Effective Sanctions

Under section 6(2)(c), the Act aims to achieve its objects by "[p]roviding effective sanctions for breaches of the criminal and civil law relating to harassment." The Act therefore aims to be an avenue for *all* harassment victims to obtain effective remedies. The use of the word "sanctions" also indicates that *punishment* of all perpetrators of harassment is available under the Act.

I believe that the seriousness of sexual harassment must be recognised before effective sanctions can be provided. I would argue that the legal remedy of restraining orders fails to demonstrate that harassment is a serious problem and its perpetrators deserve punishment. This failure is particularly marked in relation to *sexual* harassment because of its prevalence in society. Other civil and criminal remedies must be available under the Act for effective sanctions to be accessible for victims of sexual harassment.

C) PROBLEMS WITH THE HARASSMENT ACT IN ENCOMPASSING SEXUAL HARASSMENT

The boundaries between sexual harassment and "ordinary" harassment are not always clearly defined. A lot of sexual harassment will implicitly be covered by the Harassment Act. This will be the case when a perpetrator of stalking or "ordinary" harassment is sexually motivated or incidentally performs acts of a sexual nature. Sexual harassment will also come under the Act if it is part of a pattern of behaviour which causes the victim to fear for her or his safety, and would cause a reasonable person in the victim's circumstances to fear for her or his safety, as this will constitute a specified act of harassment under section 4(1)(f).

However, I do not believe that most acts of sexual harassment cause the victim to fear for her or his safety, as specified in the Act. Likewise, sexual harassment does not usually occur within a pattern of stalking behaviour. I believe that the Act therefore fails to adequately include sexual harassment victims within its protective ambit.

1) Requirement of Repetition of Harassment

"Harassment" is defined as[26]

> a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a period of 12 months.

This requirement of repetition of behaviour is common among New Zealand statutory provisions on sexual harassment.[27] The message appears to be that a one-off incident of

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[26] Harassment Act 1997 s 3(1).

sexual harassment must be endured, as if it is not something for the courts to bother with, and, indeed, is perhaps something a person should expect or at least tolerate in society.

This requirement of a repetition within twelve months implicitly condones an annual perpetration of sexual harassment. There is no protection for a person who is sexually harassed every year at a Christmas party, for example.

This requirement may have been introduced in such provisions for reasons such as a desire to lighten caseloads, or a belief by male legislators that two incidents of sexual harassment are needed to "overstep the mark". However, I believe that sexual harassment is never trivial nor acceptable.

I believe that the requirement of a pattern of behaviour is more appropriate for a stalking offence than for a sexual harassment offence.[28] "Ordinary" harassment, by definition,[29] involves a *pattern* of harassing behaviour, which I do not believe so instinctively attaches to the concept of sexual harassment. Sexual harassment usually involves a more direct, personal attack than stalking, and is more likely to entail a physical invasion of the victim's bodily integrity. A person is likely to immediately *know* when she or he is being sexually harassed. However, a person may initially be unsure if the actions of an alleged stalker, such as loitering near or watching,[30] are actually connected to her or him.

One act of sexual harassment should be enough to warrant the victim's future protection from a repetition of such an incident. One act could doubtlessly suffice to frighten the

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[27] Employment Contracts Act 1991 s 29(1)(b)(ii) and the Human Rights Act 1993 s 62(2)(b). Note though that the requirement of repetition in both these provisions can be subverted by the harassment being "of such a significant nature that it has a detrimental effect" on certain matters relating to the applicant.

[28] This appears to be evidenced by the option to subvert the repetition requirement in the specific *sexual* harassment provisions in the ECA and the HRA (as opposed to the *general* harassment provisions in the Harassment Act). See above, n 27.

[29] Thompson, above n 10.

[30] Harassment Act 1997 s 4(1)(a).

victim or make her or him feel too uncomfortable to ever go near the perpetrator again. A victim of one incident of sexual harassment may foresee a potentially imminent sexual assault but is unable to seek protection unless the perpetrator repeats such harassment within twelve months.

An abolition of the repetition requirement in the Harassment Act would go further than the ECA and the HRA by publicly declaring that *any* event of sexual harassment need not be tolerated in this day and age.[31] However, it is foreseeable that, in practice, a judge may look for repetition if the act is seen as *ambiguous* as to whether or not it constitutes sexual harassment. This would diminish the effectiveness of the provision by perpetuating male notions of objectivity rather than relying on women's subjective responses to sexual harassment. One must hope that such judicial discretion will be discouraged by the elimination of all references to repetition.

2) "Specified Acts"

The meaning of "specified act" in section 4 includes examples of behaviour, such as watching, following, and interfering with property, which clearly seem to be designed to cover traditional stalking behaviour. I believe that acts of sexual harassment, examples of which are touching, making offensive comments, and sexually propositioning a person, are often very different from acts of stalking and are not encapsulated in the section 4 examples of a specified act.

Several acts in section 4(1), especially those in subsections (1)(a), (1)(b) and (1)(c), could not ordinarily constitute sexual harassment. Such acts are watching, loitering near, hindering access to a place and interfering with property. However, following, stopping and accosting are specified acts which *could* constitute sexual harassment under these

[31] The sexual harassment would not have to come within a specific exception, such as those in the ECA and HRA, in order to avoid the repetition requirement. See above, n 27.

subsections. The giving of offensive material of a sexual nature may also constitute sexual harassment, and would be a specified act under subsection (1)(e).

If "making contact" in subsection (1)(d) can include physical contact of a sexual nature, this can encompass some types of sexual harassment. However, the examples given of making contact "by telephone [or] correspondence" indicate that this subsection refers to communication. Such communication could be of a sexual nature, such as the displaying of pornographic material or the making of sexual remarks over the telephone, and could constitute sexual harassment.

Sexual harassment which is serious enough to cause a person to reasonably fear for her or his safety would also constitute a specified act under subsection (1)(f). However, I believe that this is insupportable as a threshold which a victim of sexual harassment must meet before she or he can seek protection via a restraining order. I believe that restraining orders should also be obtainable by a person who merely *does not want to put up with* future sexual harassment from a perpetrator.

This high threshold also implies that sexual harassment does not cause harm to a victim unless she or he is at the point of reasonably fearing for her or his safety. Typical examples of sexual harassment, such as being subjected to sexual remarks while passing a construction site, would not usually invoke fear for one's safety, but may cause humiliation and a reduction in confidence. The State should recognise that such victims of sexual harassment need to be granted some relief, because these feelings are damaging to a person's dignity and self-esteem.

This threshold is made even higher by concerns regarding the male-dominated judiciary applying concepts of reasonableness to a predominantly female experience. It is more likely that a male judge will relate to the harasser's position, as most perpetrators are male, than to the victim's position, as most victims are female. "[A]nyone dealing with

this (or any other) issue will bring to it a particularized perspective, so that a 'neutral' assessment is simply not possible."[32]

This reasonableness standard also suggests that the male-dominated judiciary will interpret the term "safety" with respect to the danger that *objectively* exists, and will not pay enough regard to a female victim's subjective belief about her own vulnerability. "Even if a woman does not 'rationally' think that this man would force sex on her, rape her, there is the possibility, the fear of that."[33]

In summary, acts of sexual harassment *can* fit within the examples of specified acts in section 4. However, it seems to pose a bit of a challenge to fit acts such as touching, grabbing, propositioning, and making remarks and innuendos into "making contact with that person" in section 4(1)(d). The apparent necessity of stretching the meaning of this provision to include sexual harassment indicates that the Act was really not designed to cover sexual harassment. It appears that some modification of the Act is required to properly recognise sexual harassment as an unacceptable, distinct offence.

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[32] E Wall (ed) *Sexual Harassment: Confrontations and Decisions* (Prometheus Books, New York, 1992) 235.

[33] Baylis, above n 1, 596.

3) Criminal Harassment

The provision for criminal harassment requires an offender to intend to cause, or be reckless about causing, the victim to reasonably fear for her or his safety.[34]

The Harassment Act was part of a package of reforms relating to gang-related criminal activity.[35] Members of Parliament were concerned about incidents of gang members intimidating, or encouraging someone else to intimidate, prosecution witnesses for their trials.[36] Therefore, the criminal harassment provision appears to be modelled on this kind of calculative perpetrator of stalking or "ordinary" harassment who intends to frighten a potential witness into not testifying.

Although there is usually an element of power in all types of harassment, I believe that the subjective motives of stalkers are often very different from those of sexual harassers. While a stalker often aims to frighten her or his victim, a person who sexually harasses usually intends to obtain sexual gratification.[37] However, all sexual harassment occurs within a background of established patriarchy and inherent power imbalance. "Power inequality is seen as the root of all forms of discrimination and violence directed at women; it is the result of and represents an attempt to maintain that imbalance."[38] Thus sexual harassment further entrenches the objectification of women in our patriarchal society, and this objectification itself may provide a basis for a man to believe that he can

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[34] Harassment Act 1997 s 8.

[35] Harassment and Criminal Associations Bill 1996, No 215-1.

[36] NZPD, above n 9.

[37] M Studd "Sexual Harassment" in D Buss & N Malamuth (eds) *Sex, Power, Conflict: Evolutionary and Feminist Perspectives* (Oxford University Press, New York, 1996) 54. The researchers in this chapter sampled the 92 published case reports in Canada from 1980 to 1989 which involved a male harasser and a female victim. Data was collected on the motivation of the harasser in each case, which involved combining the stated goal of the harasser described in the legal testimony and the behavioural means used to achieve that goal.

[38] Grauerholz & Koralewski, above n 16, 62.

get away with sexual harassment. However, this is distinct from the harasser's actual *conscious* motive to sexually harass in the first place: "[S]exual access and not the exercise of power is the ultimate goal … however, it is clear that power may often be used as a means to achieve sexual goals."[39]

As power is often not the *primary* motive of sexual harassment, the judiciary is more likely to find that the perpetrator's intention was to gain sexual access rather than to cause fear for personal safety. Similarly, a court is likely to find that there was no recklessness because the risk of causing this fear for personal safety may not have been *consciously* considered. In failing to take account of the generally different motives of stalkers and sexual harassers, the criminalisation provision is effectively confined to "ordinary" harassment or stalking.

I would argue that a restriction of the victim's liberty is a more likely consequence of sexual harassment than a fear for personal safety. I believe that a court could more easily find that a sexual harasser was reckless as to causing a restriction of the victim's liberty. A refused sexual proposition *usually* causes awkwardness, and sexual harassment, by going one step further, could certainly cause a victim's liberty to be subsequently restricted in the conscious avoidance of her or his harasser.

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[39] Studd, above n 37, 68-69. Sexual harassment involving a goal of sexual access and the overt exercise of power comprised 43.5% of cases. Sexual harassment involving a goal of sexual access without the overt exercise of power comprised 38% of cases. Sexual harassment involving neither overt sexual demands nor overt power manifestations comprised 18.5% of cases.

4) Effective Sanctions

I believe that denunciation is the main reason why we need to substantively punish sexual harassers. The principle of denunciation justifies a heavier sanction or penalty because it "increase[s] other people's moral disapproval of the offence, or respect for the prohibitions of the criminal law, by means of the message conveyed by the severity of the sentence".[40] I believe that this is especially important for misunderstood offences like sexual harassment.

The theory of retribution also provides a reason for the need to really sanction offenders. The real harm that sexual harassment can cause justifies the perpetrator's punishment:[41]

> It is unfair that the offender should be allowed to 'get away with' that advantage, and it is therefore right that he should be subjected to a disadvantage so as to cancel out (at least symbolically) his ill-gotten gain.

A lack of effective punishment for sexual harassment "adds insult to injury" for the victim: "not to penalise it seems to add to the infringement."[42]

Section 16 outlines a court's power to make a restraining order, which is the sole remedy for civil harassment under the Act. The requirement in subsection (1)(c) that "[t]he making of an order is necessary to protect the applicant from further harassment" shows that the focus of the Act's sole civil harassment remedy is on protecting the victim, but not punishing the offender. "Protection orders are not an exercise in the allocation of blame or reward … [t]he purpose is to protect people who are in need of protection, for whatever reason."[43]

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[40] N Walker *Sentencing: Theory Law & Practice* (Butterworths, London, 1985) 113.

[41] A Ashworth *Sentencing & Penal Policy* (Weidenfeld & Nicolson Ltd, London, 1983) 18.

[42] Walker, above n 40, 110.

[43] New Zealand Law Society Seminar *Domestic Violence* (Wellington, 1993) 56.

It seems likely that a case of sexual harassment will be confined to the civil sphere because it is unable to fulfil the stringent requirements for criminal harassment. Therefore, it appears almost impossible to punish the perpetrator and satisfy the object of section 6(2)(c) in relation to sexual harassment.

As sexual harassment is so prevalent in society, while stalking appears to be comparatively rare, I believe that accessible sanctions are required to demonstrate that sexual harassment will not be tolerated in today's environment of supposed liberty and equality. If sexual harassment is confined to the civil sphere under the Act, there will be no real discouragement to sexually harass, as a restraining order is the harshest "penalty" which can be imposed. The State's message is that, while such behaviour will be disallowed for a certain period of time,[44] the sexual harassment which has already occurred is not deemed to sufficiently offend societal morals to warrant punishment and censure.

In many cases, restraining orders are also ineffective in protecting victims. In the domestic violence arena, it has been recognised that[45]

> [v]iolent men and their lawyers have developed strategies for reducing the effectiveness of protection orders and are well aware that the consequences of breaching orders are usually minimal ... [a]s a result women increasingly see protection orders as being ineffective.

I believe that provision should be made in the Act for compensatory damages for civil sexual harassment. The confinement of civil remedies to restraining orders under the Act does not provide the means for effective civil sanctions, and arguably disadvantages the victim more than the perpetrator, in terms of the time and money required to file a claim.

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[44] Section 21 provides that a restraining order continues in force for one year, in the absence of a discharge under section 23 or a direction by the Court that the order is to be in force for a specified period that the Court considers necessary to protect the applicant from further harassment.

[45] New Zealand Law Society Seminar, above n 43, 31.

Restraining orders are also disempowering because victims must apply for protection from the State rather than for a recognition of their rights and suffering in an award of compensation. "[M]ale supremacy is a protection racket. It keeps you dependent on the very people who brutalize you so you will keep needing their protection."[46]

The fact that it would be straining a judge's interpretative skills to fit most cases of sexual harassment within the criminal harassment provision in section 8, coupled with the difficulties which may occur when the male-dominated judiciary attempts to apply requirements of reasonableness[47] to a problem traditionally faced by women, justifies the conclusion that the Harassment Act does not sufficiently address sexual harassment or achieve its objects in relation to sexual harassment.

[46] MacKinnon, above n 17, 31.

[47] Harassment Act 1997 ss 4(1)(f), 4(2)(c), 8(1), 16(1)(b), 18(2)(b) and 20(1).

D) PROPOSED CHANGES TO THE HARASSMENT ACT TO ADEQUATELY ADDRESS SEXUAL HARASSMENT

There is a lack of judicial and public understanding of the seriousness of sexual harassment and the patriarchy which gives rise to it. Sexual harassment is also much more pervasive in society than stalking. In view of these differences, I believe that some separate provisions need to be enacted for sexual harassment to be properly adjudicated as a distinct offence under the Harassment Act.

1) Section 3A - Separate Meaning of "Sexual Harassment"

A separate definition of "sexual harassment" would serve two purposes. Firstly, it would signify that sexual harassment is a separate gendered harm which cannot adequately be subsumed within "ordinary" harassment. In doing so, it would imply that sexual harassment involves a different kind of inquiry and open-minded adjudication, as it is an alien experience to most of the predominantly male judiciary. It would raise awareness of "women's issues" and influence societal norms by demonstrating the legal (and social) unacceptability of sexual harassment.

Secondly, it could be drafted to exclude the requirement of a pattern of behaviour for sexual harassment. This would demonstrate the unacceptability of even one act of sexual harassment. Despite the prevalence of sexual harassment in daily life, it is not something that should have to be tolerated once before any legal action can be taken. "If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable."[48]

[48] MacKinnon, above n 17, 115.

The meaning of "sexual harassment" in section 3A could therefore be the performing of any specified act in relation to sexual harassment.

2) Section 4A - Meaning of "Specified Act" in Relation to Sexual Harassment

The requirement for sexual harassment to fit within the specified acts in section 4 means that there are risks of judicial discretion and bias, both in trying to fit an act within the list and in not recognising sexual harassment as a different kind of inquiry. A separate list of specified acts is required to demonstrate the need for a different investigation and a distinct approach to sexual harassment as a separate gendered harm.

The existing list of specified acts in section 4 was not drafted with sexual harassment in mind. Sexual harassment, as a separate harm, should therefore not have to fit within this list in order to be recognised. A separate list of acts of sexual harassment would reduce the possibility of judicial discretion and help focus the inquiry.

Specified acts of sexual harassment include physical, psychological and verbal harassment of a sexual nature. Physical harassment of a sexual nature involves hugging, grabbing, kissing or touching. Psychological sexual harassment includes sexual propositions and hints. Verbal sexual harassment includes sexual remarks, jokes, innuendos, insults, and the displaying of offensive sexual material. This separate list could clearly cover an incident of brushing against a person, for example, whereas it is not clearly covered by the existing list of specified acts in section 4.

A general provision similar to section 4(1)(f) could be tailored around a broad definition of sexual harassment. I believe that the Harassment Act should go further than the HRA, ECA and DVA, by completely eliminating any reference to reasonableness. Sexual harassment, as a gendered harm, is about how a victim is made to *subjectively* feel. The

legislature cannot truly acknowledge the depth of this misunderstood offence by artificially superimposing notions of objectivity. This would result in adjudication through the "male voice", thus failing to achieve justice for women and defeating the purpose of sexual harassment provisions.

Yet it is arguable that a *reasonable woman* standard would usually be applied because sexual harassment is a gendered harm. This would make it easier for the "female voice" to be heard. However, a reasonable woman standard still imparts an objective enquiry, which is less consistent with the "female voice" than the "male voice" approach.

The general provision should therefore cover acts or remarks of a sexual nature which cause the plaintiff to feel humiliated, uncomfortable, or that her or his personal dignity is undermined.

This provision would exhibit a lower threshold than the requirement of fearing for one's safety in section 4(1)(f). This lower threshold would make the provision receptive to many more sexual harassment claims and demonstrate the unacceptability of *all* harms caused by sexual harassment.

3) Provision for Compensatory Damages for Civil Sexual Harassment

Complainants who do not attain the criminal sexual harassment standard need a further option than a restraining order, for "effective sanctions"[49] to be obtainable. The availability of compensatory damages under the Act would provide a greater deterrent to potential sexual harassers and demonstrate that harms occasioned by sexual harassment will be rightly recognised. Compensatory damages would actually serve to *punish* an

[49] Harassment Act 1997 s 6(2)(c).

offender for the sexual harassment which has already occurred, whereas restraining orders only seek to prevent sexual harassment from occurring in a finite future period.

Compensatory damages would also serve to empower the victim by enforcing her or his rights as an equal citizen, rather than confirming the victim's vulnerability by granting her or him finite protection under a restraining order.

Compensatory damages is also a superior remedy to mediation in sexual harassment cases:[50]

> [A] compromise-oriented settlement process, even if it is facilitated … may not be appropriate to those disputes in which there is a significant power differential between the parties … [i]n this situation empowerment is likely to become a one-sided phenomenon, leaving the complainant potentially dissatisfied, manipulated and vulnerable.

The very essence of mediation is compromise, which is inconsistent with the recognition of a clear breach of a victim's rights. It is unjust to require sexual harassment victims to not only endure the recounting of their experiences in front of their perpetrators but to be required to concede part of their claims through this negotiation process. This demonstrates the lack of understanding of the seriousness of sexual harassment by the legal system:[51]

> To be expected to act co-operatively towards any mutually beneficial outcome is not realistic, feasible or desirable. The message given to the complainant when asked to conciliate, even on a remedy, in sexual harassment cases is that the behaviour is not unequivocally unacceptable.

The lack of public education regarding the seriousness of sexual harassment means that mediators may well introduce prejudices and myths into the mediation process. Myths

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[50] Baylis, above n 1, 595.

[51] Baylis, above n 1, 615.

about the harassment of women by men include victim masochism (she enjoys or wants it), victim precipitation (she invited it), and the acts not really being harmful (he did not physically hurt her).[52] A formal court procedure is more likely to provide safeguards against such prejudices, such as through rules of evidence.

4) Section 8A - Criminal Sexual Harassment

I. Appropriateness of the Criminalisation of Sexual Harassment

Serious sexual harassment can constitute a criminal offence under several provisions in the Crimes Act. These provisions criminalise sexual violation,[53] attempted sexual violation,[54] inducing sexual connection by coercion,[55] and indecently assaulting a woman or girl.[56] There is also an offence of threatened actions involving "detriment" to the victim,[57] which is "aimed at certain cases of sexual harassment, and covers cases where V is induced to consent by threats".[58] However, these provisions only apply to sexual harassment occurring in particular contexts. They also fail to name sexual harassment as a distinct offence which merits criminalisation. I advocate the need for a comprehensive provision which criminalises serious sexual harassment in *any* situation.

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[52] See L Kelly *Surviving Sexual Violence* (University of Minneapolis Press, Minneapolis, 1988).

[53] Crimes Act 1961 s 128. It is interesting to note that, since 1985, the mens rea requirement for this offence is *objective* recklessness. This covers an offender who does not even contemplate that the victim may not be consenting to the sexual act.

[54] Crimes Act 1961 s 129.

[55] Crimes Act 1961 s 129A.

[56] Crimes Act 1961 s 135. There is no reasonableness element to this offence, as an honest belief in consent constitutes a defence.

[57] Crimes Act 1961 s 129A(1)(c).

[58] A Simester & W Brookbanks *Principles of Criminal Law* (Brooker's Ltd, Wellington, 1998) 561.

Sexual harassment can cause severe harm to victims. "It can cause anorexia, anxiety, sleeplessness and, in extreme cases, nervous breakdown, and is always a source of stress."[59] Despite the prevalence of sexual harassment in daily life, it can have a much more devastating effect on victims than may appear on the surface. A victim will often be scared to be near both the perpetrator and other people who are seen as potential perpetrators. A victim will worry about what she or he wears and says, and stay in perceived "safe" places, because of the fear that harassment will ensue. In short, a victim's liberty is restricted in a very real way.

Sexual harassment also harms society by perpetuating the stereotype of women being weaker than and submissive to men. Through sexual harassment men wield a power of intimidation over women and restrict their freedom. This oppression of women must be recognised as a serious harm to society.

The criminal law aims of punishment, denunciation and deterrence can only be satisfied if crimes are reported and laws are enforceable. The belief by a reasonable section of the community that sexual harassment is immoral will guard against enforcement and reporting problems.

The fact that sexual harassment is somewhat prevalent in society indicates that it may not offend the morality of many people. The attitudinal differences between men and women may also mean that men, who are usually the perpetrators of sexual harassment, are less likely to find it immoral. However, I think that most people would feel that the actual *consequences* of sexual harassment, such as a reduction in confidence or a restriction of freedom, are immoral. I believe the real problem is that many people do not realise that sexual harassment can cause such results.

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[59] Wilson, above n 19, 182.

I believe that the legislature needs to make a stand for public morality, and demonstrate that this form of oppression and harm is intolerable in this day and age. The legislature, after all, is not unfamiliar with instructing citizens on what is morally unacceptable, as is shown by the Crimes against Morality and Decency in the Crimes Act.[60]

Current reporting problems in this area may be more to do with the lack of available protection and vindication than the belief that sexual harassment is acceptable. There will be fewer reporting problems if adequate legal protection, in the forms of criminal regulation and expanded civil remedies, is available.

The criminal regulation of sexual harassment should not attract many reporting problems because one party wants the act to stop. Sexual harassment is different from crimes such as drug-related offences, where neither party may welcome such a cessation, or family violence, where family ties and pressures more strongly discourage reporting.

However, as with acquaintance rape, there will often be little physical proof, and the victim's sexual history may be introduced as relevant evidence.[61] Therefore, victims may feel that they will be disbelieved or that they cannot endure relentless cross-examination. The diminished self esteem which can result from sexual harassment may even lead to victims believing that they deserved their ordeals.

The use of written statements as evidence could possibly assuage the difficulty of such trials, thus encouraging victims to seek justice. Such statements could also offer a clearer

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[60] Crimes Act 1961 ss 124-126. For example, section 124 criminalises the distribution and exhibition of indecent matter, although I would argue that public opinion on such criminalisation may well be divided. Note also the criminalisation of blasphemous libel in section 123, which is probably even more contentious and is very rarely enforced.

[61] Evidence Act 1908 s 23A. Note however that leave is required by the Judge. See E McDonald *The Relevance of Her Prior Sexual (Mis) Conduct to His Belief in Consent: Syllogistic Reasoning and Section 23A of the Evidence Act 1908* (1994) 10/2 Women's Studies Journal, 41.

explanation of the victim's perspective of the sexual harassment, thus assisting a judge in understanding the victim's viewpoint and fairly assessing the case.

In any event, anticipated reporting difficulties did not prevent the criminalisation of underreported crimes such as acquaintance rape. Regardless of the possibility of reporting problems, the criminalisation of sexual harassment would send a strong message that it is publicly and legally unacceptable, and at least provide an avenue for victims to seek vindication.

There may be difficulties in enforcing sexual harassment as both a criminal and a civil offence, as the identity of the perpetrator may not be known. This would be most likely to occur in a case of one public act of sexual harassment. It could be troublesome to obtain the identity of an abusive public bar patron, for example. However, as this can occur with most offences, it is an insufficient reason for denying the option of criminal sanctions.

One can also anticipate difficulties with the police enforcement of sexual harassment as a crime. The education of the police on gender issues is arguably even more deficient than that of the judiciary. It is foreseeable that members of police will not consider sexual harassment as a sufficiently serious offence to necessitate the laying of charges. However, as police training must be more frequent and extensive than judicial training, guidelines and protocols could readily be introduced to enable police officers to sympathetically deal with sexual harassment complaints under the Act.

The fact that criminalisation can restrict personal autonomy means that a balancing of rights is required. The difference in the perceptions of men and women regarding sexual harassment means that criminalisation could lead men to fear making advances in case they are unwanted and seen as intimidating.

However, a man's "right to ask" does not extend to a right to perform unwanted harassment. This is not freedom; it is the power of intimidation, and it cannot prevail against a woman's right to be free from this unwanted domination:[62]

> [W]hile the elimination of inequality in society inevitably makes some people feel wronged - entailing, as it does, a reduction in the social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them - that fact does not justify its perpetration.

I believe that it is just as appropriate to criminalise sexual harassment as harassment such as stalking. With all types of harassment, a victim is subjected to unreasonable intimidation and can suffer serious harm. It is not sufficient to merely protect victims from sexual harassment. The tangible punishment of perpetrators is required to demonstrate the unacceptability of this sexual crime.

II. Proposed Criminal Sexual Harassment Provision

The existing mens rea requirement for criminal harassment under section 8 is intention to cause or recklessness towards causing the victim to reasonably fear for her or his safety. This is problematic where the gender differences in perceptions of a situation involving sexual harassment mean that the same view is not taken of the meaning of "safety". In many cases, the effect of the intimidation of sexual harassment is that victims perceive a real risk of sexual assault when, objectively and statistically, no such risk actually exists. Therefore, there are conceivable problems in consistently finding that victims in such situations *reasonably* feared for their safety under this provision.

For sexual harassment cases, the threshold requirement of a fear for personal safety should be replaced by a substantial restriction of freedom due to the victim's undermined personal dignity or humiliation. The mens rea requirement for criminal sexual

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[62] Wall, above n 32, 235.

harassment should be satisfied if the offender intends to cause, or is reckless about causing, such a restriction of freedom by way of their sexual harassment. The recklessness limb should retain an element of reasonableness in regard to the victim's reaction to the harassment. While this may limit the judiciary's ability to recognise a victim's subjective response, an objective basis for punishment is desirable when a criminal record and attendant social stigma are at stake.

This criminal sexual harassment could be implemented as follows:

> Every person commits an offence who sexually harasses another person in any case where -
>
> a) The first-mentioned person intends that sexual harassment to cause a substantial restriction of that other person's freedom by -
>
> i) Humiliating that other person; or
>
> ii) Undermining that other person's dignity; or
>
> b) The first-mentioned person knows that the sexual harassment is likely, given the particular circumstances of that other person, to cause a substantial restriction of that other person's freedom by -
>
> i) Humiliating that other person; or
>
> ii) Undermining that other person's dignity.

This criminal sexual harassment provision could apply in cases where a victim is constructively dismissed from employment or develops a mental illness from the sexual harassment. In such cases, major life decisions or disabilities are great restrictions on a victim's freedom, and criminal, public censure is required to demonstrate that this is totally unacceptable.

There may still be problems when the male-dominated judiciary applies the concept of reasonableness to this gendered harm. "[T]he goal of employing an 'objective' test that is unaffected by the judge's (or any other) worldview and that is sufficiently general to apply to all people is simply an illusory one."[63] However, as our legal system is heavily

[63] Wall, above n 32, 247.

based on such objective standards, it is probably best to work within this scheme to gradually attain feminist progress. There are risks that radical changes would not be implemented or would provoke a public backlash.

The *Cunningham*[64] subjective recklessness standard is usually applied to recklessness provisions in New Zealand. The subjective recklessness test requires that an offender "has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it".[65] This test is not satisfied when the accused does not foresee a real possibility of harm before acting. This poses difficulties for sexual harassment cases in which the accused fails to consider, or considers but completely discounts, the possibility of a consequential restriction of the victim's freedom. As sexual access and power are the primary motives for sexual harassment, a perpetrator is unlikely to consider anyone's feelings but her or his own. Therefore, without an appreciation of at least *some* risk, the subjective recklessness standard will fail to catch sexual harassers.

I believe that the *Caldwell*[66] objective recklessness standard would be more appropriate for this provision. This standard extends the test to include an offender who "has not given any thought to the possibility of there being any such risk".[67] However, a perpetrator who considered but discounted such a possibility would still not be caught unless any action was taken to minimise a perceived risk.[68] However, New Zealand courts have declined to embrace the objective standard, and even in England "the

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[64] *R v Cunningham* [1957] 2 QB 396.

[65] *R v Cunningham* above n 64, 399 per Byrne J.

[66] *Metropolitan Police Commissioner v Caldwell* [1982] AC 341.

[67] *Metropolitan Police Commissioner v Caldwell* above n 66, 354 per Diplock LJ.

[68] This situation may qualify as recklessness under *Chief Constable of Avon and Somerset Constabulary v Shimmen* (1986) 84 Cr App R 7.

importance of *Caldwell* is now diminishing." [69] Therefore, it is unrealistic to expect our courts to apply anything more extensive than the subjective recklessness standard.[70]

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[69] Simester & Brookbanks, above n 58, 96.

[70] However, in section 128 of the Crimes Act 1961, the *legislature* has imposed the *objective* recklessness standard as to the lack of consent in the offence of sexual violation. See above, n 53.

E) CONCLUSION

The traditional patriarchy inherent in our culture means that the legal system has been slow to recognise harms against women. That women were seen as the "other" sex is evidenced by "the 1918 utterance of industrial psychologist Ordway Tead … that the presence of women in the workplace was a sexual fringe benefit for male coworkers and supervisors."[71]

The legal claim of sexual harassment is relatively new, although the act itself is prevalent in daily life. Both the seriousness of sexual harassment and the reality of our patriarchal culture are generally not understood by society. This makes the adjudication of sexual harassment, a gendered harm, particularly problematic.

The Harassment Act aims to adequately protect all victims of harassment and provide effective sanctions for breaches of harassment law. However, the Act fails to name sexual harassment as a distinct offence, and identifies specified acts of harassment which relate more to stalking than sexual harassment. While much stalking *is* sexually motivated, the Act neglects to characterise sexual harassment as an offence in its own right. A restraining order is the sole civil remedy for harassment, and the mens rea requirement for criminal harassment is unlikely to be applicable to most sexual harassment cases.

I believe that the Act both fails to demonstrate that sexual harassment is a distinct, serious offence, and fails to provide effective sanctions by basically limiting sexual harassment remedies to restraining orders.

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[71] K Segrave, *The Sexual Harassment of Women in the Workplace, 1600 to 1993* (McFarland & Co Inc, North Carolina, 1994) 1.

I propose separate provisions to apply to sexual harassment claims under the Act, in the areas of specified acts, criminal harassment, and compensatory damages.

Specified acts of sexual harassment must be identified to help focus an inquiry and reduce the possibility of judicial discretion. The substantive punishment of offenders is warranted because of the necessity of public denunciation and retribution for this "invisible" harm. Compensatory damages are required to adequately sanction perpetrators of civil harassment and empower victims.

The criminalisation of sexual harassment is necessary because it causes real harm to both victims and society. The mens rea requirement for sexual harassment should be an intention to cause, or recklessness towards causing, a substantial restriction of the victim's freedom due to her or his humiliation or undermined dignity.

Until societal attitudes change, and judicial education is guaranteed, victims of sexual harassment must fight an uphill battle in order to get their claims heard and rights enforced. I believe that the Harassment Act, in its sole focus on harassment, could have been the perfect means to recognise and publicly signal the seriousness of sexual harassment outside of the workplace. However, the failure to name sexual harassment as a distinct offence means that sexual harassment claims under the Act must fit within the provisions which were principally proposed for stalking offences. In this age of reputed equality, a public legislative statement is required to evince the unacceptability of sexual harassment, despite its current prevalence.

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