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Sexual Harassment Losing Sight of Sex Discrimination

Introduction: Embodiment at work

Legal proscriptions against sexual harassment in the workplace, accompanied by avenues of redress, have existed in Australia for almost four decades. The legal and popular discourses about sexual harassment have caused women to think about the way the phenomenon detracts from their personhood. They have the right not only to say 'no' to a boss or a colleague, but also to complain formally, either inhouse or to a human rights agency, if they are sexually harassed. The evidence suggests corporations are paying much more attention to internal grievance mechanisms than was once the case, although the incidence of sexual harassment continues to be high.[1]

While the recognition of sexual harassment as a legal wrong is an important step in securing human rights for women and non-dominant men, my support for the action is by no means unequivocal. I suggest that, while important, the disproportionate attention paid to the sexual

1 A large national survey conducted in Australia in 2018 established that 33 per cent of those surveyed (39 per cent women and 26 per cent men) had experienced workplace harassment in the previous five years. See, Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (AHRC, 2020) 17.

in sexual harassment, as illustrated by recurring high-profile media cases,[2] has deflected attention from the sex-based discrimination that informs it.[3] The erection of a line of demarcation between sexual harassment and sex discrimination has been legitimated in Australia through legislation, despite the fact that the proscriptions against harassing and discriminatory conduct are contained in the same legislative instruments.[4] The construction of women workers as sexualised can have the effect of affirming the misogynistic subtext of the social script that the feminine is a dangerous and disorderly force within a sphere of rationality. It allows women to continue to be constituted as 'Others' to 'benchmark men'—that is, those who are Anglo-Celtic, heterosexual, able-bodied and middle-class and who are the normative inhabitants of the world of paid work. The corporealisation of women in positions where they are expected to display deference to senior men is a very effective mechanism for impugning the authority of the feminine.

Typically, men are the respondents in sexual harassment complaints and women are the targets.[5] This accentuates a heterosexed paradigm with its connotations of sexual desire that lies at the base of popular understandings of sexual harassment. However, in accordance with the glass ceiling theory, harassment is frequently perpetrated against women, irrespective of their sexual orientation, because they are not wanted in certain sectors of the

2 Many cases have involved prominent public figures, such as judges, including Justice Clarence Thomas of the District of Columbia Circuit Court of Appeals, now on the US Supreme Court. See Anita Hill and Emma Jordan (eds), *Race, Gender and Power in America: The Legacy of the Hill–Thomas Hearings* (Oxford University Press, 1995). Former justice Dyson Heydon was found in 2020 to have harassed six women who worked as associates when he was on the Australian High Court. See Naomi Neilson, '"We Must Do More": Legal Profession Responds to Dyson Heydon Findings', *Lawyers Weekly*, 24 June 2020, available from: www.lawyersweekly.com.au/biglaw/28674-we-must-do-more-legal-profession-responds-to-dyson-heydon-findings. One of the most notorious cases in recent years involved movie mogul Harvey Weinstein, who was found to have sexually harassed dozens of women, including prominent movie stars. The publicity resulted in the '#MeToo' movement, the global ramifications of which were profound, leading to a plethora of studies exposing the extent of sexual harassment in multiple workplaces—for example, AHRC (n. 1); Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (International Bar Association, 2019).

3 Cf. Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107(6) *Yale Law Journal* 1683, 1687, doi.org/10.2307/797337.

4 See, for example, *Sex Discrimination Act 1984* (Cth).

5 AHRC (n. 1); Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (AHRC, 2021); Paula McDonald, 'Workplace Sexual Harassment 30 Years On: A Review of the Literature' (2012) 14(1) *International Journal of Management Reviews* 1, doi.org/10.1111/j.1468-2370.2011.00300.x.

workplace.[6] This harassment may be more appropriately characterised as discrimination at work; it is unlikely to have anything to do with desire. Similarly, non-dominant men may be the targets of harassment at work because they do not fit into prevailing masculinist cultures.[7]

The dominant heterosexed understanding of sexual harassment also needs to be placed in its broader sociopolitical context. Workplaces have generally become much less secure as conditions of work have been eroded at the expense of profitmaking. Short-term contracts, casualisation and precarious work underscore the culture of uncertainty that characterises the contemporary workplace.[8] Within this environment, workers learn to be docile, since those who complain about workplace conditions may soon find themselves dispensable. Those subjected to discrimination face a dilemma: complain and risk losing your job or keep quiet and retain it. However, by keeping quiet one may become complicit in the maintenance of a sexual regime in the workplace.

The privileging of the sexual in sexual harassment means the focus is on the aberrant behaviour of individuals rather than the structural and systemic manifestations of discrimination. It must be acknowledged, however, that the latter remains perennially elusive. How do we tell the difference between 'managing' and 'harassing' when workers have to be constantly cajoled into working harder and being more productive to increase profit margins? The emphasis on employer prerogative and the correlative de-emphasis on employee rights in an insecure environment mean it has become increasingly difficult for the targets of harassment to make out complaints. I suggest that the corporatised workplace operates to legitimise sex-based harassment of women and non-dominant workers, many incarnations of which are not tractable to remediation under antidiscrimination law.

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6 Harassment has been a major concern for lesbians, at work and elsewhere. Chapman and Mason found in their study of discrimination and vilification complaints lodged on sexuality grounds that 46 per cent related to the area of employment. Anna Chapman & Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21(4) *Sydney Law Review* 525, 531.

7 See, for example, *Daniels v Hunter Water Board* [1994] EOC ¶92–626 (NSW EOT). In this case, the complainant was able to rely on the ground of perceived homosexuality in s. 49ZG of the *Anti-Discrimination Act 1977* (NSW). Even more provocatively, in a claim of same-sex 'hostile environment' sexual harassment, the US Supreme Court found that actions by the heterosexual male harassers constituted sex discrimination: *Oncale v Sundowner Offshore Services*, 523 US 75 (1998).

8 Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (W.W. Norton, 1998) 22–7.

Sexual harassment was not initially included in antidiscrimination legislation in Australia, but when it was, the proscription was accepted more readily than in the United States,[9] where sexual harassment was a judicial rather than a legislative creation.[10] The Australian legislatures adopted a more pragmatic approach because it was accepted at the outset that sexual harassment impacted adversely on productivity in the workplace, as I suggested in Chapter 3. Despite the proscription, articulating a complaint and obtaining a remedy are always fraught, particularly in a context where employer prerogative endows managers with considerable discretion. Furthermore, it is a flaw of the prevailing individual complaint-based model of antidiscrimination legislation that the individual act of sex discrimination is separated from sexism, just as racial discrimination is separated from racism, same-sex discrimination from homophobia, and so on.[11] While the class-wide factor is recognised in the lodgement of complaints, the probative burden, which includes connecting the impugned conduct with an identifiable respondent, is the responsibility of the individual complainant. The burden is one confronting all discrimination complainants. The sexual activity within sexual harassment complaints is often so overt that it takes centre-stage and overwhelms the discriminatory impact on the complainant class. I suggest, therefore, that the favoured reading of sexual harassment serves a significant ideological and political role in safeguarding the conventional gendering of workplaces.

I turn to a consideration of what might be imagined as a continuum of sexual harassment that bedevils mainly women workers, particularly within masculinist enclaves. I do not wish to suggest that the continuum is rigid or unchanging but that there is a discernible pattern, underpinned by the essentialised understanding of sexual harassment that prevails in legal and popular culture. I start with overtly sexual conduct at one end of the spectrum and argue that the more the harassing conduct is like heterosexed activity (conceptualised in terms of an active male harasser and a passive female 'victim'), the more likely it is to be accepted as sexual

9 USC§2000-e (1994) based on Title VII of the *Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 241.

10 The Supreme Court first determined that sexual harassment was a form of illegal discrimination in *Meritor Savings Bank v Vinson* 477 US 57 (1986).

11 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 8.

harassment. The less sexualised, albeit sexed, the harassing conduct is, the more likely it is to be normalised within the workplace and the more difficult it is for a complainant to obtain a remedy.

I acknowledge that the language I am working with—especially 'sex' and 'sexuality'—is slippery, as these terms merge with one another and take their colouration from the context in which they operate.[12] After all, we are all sexed, as well as sexual, beings. While 'sex' may refer to a biological category, it is also a socially constructed term that incorporates gendered understandings of masculinity and femininity. This broad view of sex has selectively been incorporated into sex discrimination jurisprudence, although the linguistic leeway accommodates a biological reductionism when it suits. The legislation itself does not define 'sex', thereby investing tribunals and courts with considerable power to tell us what it means. The *Sex Discrimination Act 1984* (Cth) (*SDA*) (s. 5[1]) does no more than refer to the 'opposite sex', which suggests a clear binarism.[13] 'Sexual', like sex, however, can refer to both biological and political classifications of identity, as well as to the desires, appetites and practices associated with sexual expression. 'Sexual' is also undefined in the sexual harassment provisions of the *SDA* (s. 28[1]), although the references to 'an unwelcome sexual advance', a 'request for sexual favours' and 'conduct of a sexual nature' clearly signify sexualised conduct. Given the political and ideological quicksand surrounding the semiotics of sex, I recognise that my task is a daunting one.

Sexual harassment as heterosex

The sociolegal recognition of sexual harassment is of very recent origin, although the phenomenon itself has an ancient lineage. The term 'sexual harassment' emerged in the mid 1970s in the United States[14] and quickly

12 For a critique of the sex/gender distinction, see Moira Gatens, 'A Critique of the Sex/Gender Distinction' in Sneja Gunew (ed.), *A Reader in Feminist Knowledge* (Routledge, 1991) 139; Michelle Boivin, 'The Category of "Woman/Women" in Discrimination Based on Sex' (1999) 14(2) *Canadian Journal of Law and Society* 203, doi.org/10.1017/s0829320100006116.

13 More recent legislation tends to favour the term 'gender'—for example, the *Gender Equality Act 2020* (Vic.).

14 The term 'sexual harassment' is associated preeminently with the work of Catherine MacKinnon in the United States. Catherine MacKinnon, *The Sexual Harassment of Working Women* (Yale University Press, 1979), xi, 25–55. Schultz points out that several US authors used the term before MacKinnon from the mid 1970s. In particular, she notes that Carroll Brodsky used the term in a broader, less specifically sexualised manner than MacKinnon. Schultz (n. 3) 1696–705.

entered feminist and EEO discourses throughout the Western world.[15] The understanding of sexual harassment as conduct that is overwhelmingly perpetrated by men against women is reflective of the heterosexed nature of the typical workplace. That is, managerial positions are more likely to be masculinised, while those that are managed are feminised. Nevertheless, the principle of sex neutrality is favoured by federal and state legislation, which permit the lodgement of a complaint by a person regardless of gender or sexual orientation against another without regard to that person's gender or sexual orientation, but the same sexualised understanding of sexual harassment tends to colour the conduct.

The interpretative gloss on the legislative proscription of sexual harassment encompasses a broad range of conduct, including acts of masturbation and exposure,[16] the recounting of sexual exploits,[17] the interrogation of the complainants concerning their sexual practices[18] and remarks of a sexual nature.[19] As these sexualised instances of harassment invariably involve male actors and female targets—mirroring heterosex—it is perhaps not surprising that the paradigm of sexually harassing conduct involves importuning another for sexual favours.[20] At its most extreme, this may include criminally actionable sexual assault, although most workplace harassment falls short of criminality.[21] However, there are manifold heterosexed variations apart from soliciting favours, such as the case of the employer who stole sexually explicit photographs of the complainant from her home, enlarged them and carried them around in his briefcase[22] or the case involving a middle-aged man who stood in front of the desk of a young woman in her first job and stared at her all day.[23] While sexual obsession may underpin harassment of this kind, harassment may also be animated by a desire to intimidate. The general concern of the Australian

15 Rosemary Pringle, *Secretaries Talk: Sexuality, Power and Work* (Allen & Unwin, 1988) 93.

16 For example, *Greenhalgh v National Australia Bank Ltd* [1997] EOC ¶92–884 (HREOC).

17 This was one of the allegations from the Anita Hill–Clarence Thomas case (n. 2).

18 For example, *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.

19 For example, *Fornaro v Strachan* [1998] EOC ¶92–955 (NTADC).

20 For example, *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020).

21 A major scandal erupted in Australia in 2021 when it was revealed that political staffer Brittany Higgins had been allegedly raped in Parliament House two years earlier by another staffer. See, for example, James Massola, 'Brittany Higgins on How the Last Three Months Have Transformed Her Life', *Sydney Morning Herald*, 2 May 2021, available from: www.smh.com.au/politics/federal/brittany-higgins-on-how-the-last-three-months-have-transformed-her-life-20210429-p57nkc.html.

22 *Lallard v Tweed Art Framing Co.* [1999] EOC ¶93–036 (NSWADT).

23 Inhouse inquiry conducted by the author.

legislation is that the actions of the respondent have created a hostile environment for the complainant.[24] Hence, the focus is directed towards the effect on the complainant; intent is of no legal relevance.

Sexual harassment as heterosex is rife against women in subordinate positions where a male boss exercises 'power over' them. A common scenario is that of a small business, such as a shop or restaurant, in which a young woman, often in her first job, is employed as a shop assistant, waiter, secretary or cleaner. The manager or sole proprietor is typically a middle-aged man who assumes that an unsophisticated young woman is fair game. He regards her personhood and autonomy as inferior and, in paying for her labour, he seems to assume that he can assert a right over her body. When she exercises her free will and rejects him, she may be victimised, downgraded or dismissed.[25] Of course, respondents in such cases know they do not have possessory rights in the person of the employee and, if challenged, will endeavour to rationalise their treatment in terms of incompetence.[26] Nevertheless, respondents in such cases are frequently serial harassers.[27]

With *O'Callaghan v Loder*,[28] New South Wales became the first Australian jurisdiction to accept that sexual harassment was a form of sex discrimination.[29] The NSW Equal Opportunity Tribunal (EOT) held that a person is sexually harassed if he or she is subjected to unsolicited and unwelcome conduct by a person who stands in a position of power over him or her.[30] In this case, the heterosexed nature of organisational power, or what Catharine MacKinnon has referred to aphoristically as 'dominance eroticised',[31] was clearly in evidence. The male respondent, the Commissioner of Main Roads (appointed by parliament), was the

24 *Whitlock v Bunnings, DP and DF* (2009) QADT 14; *Rail Corporation New South Wales v Hunt* [2009] NSWWCCPD 114.

25 See, for example, *Kalich v Es* [1999] EOC ¶92–961 (NTADC); *Q v John Defelice* [1999] EOC ¶93–051 (HREOC); *D v Berkeley Challenge Pty Ltd* [2001] EOC ¶93–l50 (NSWADT).

26 A study of the US cases suggests that, in such instances, the burden on the employee is such that she must show she was virtually a perfect employee to succeed. However, such perfection can also work against the complainant, supporting an implication that the harassment was inconsequential. Susan Estrich, 'Sex at Work' (1991) 43 *Stanford Law Review* 813, 834–39, 846.

27 See, for example, *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.

28 [1984] EOC ¶92–024 (NSWEOT) [hereinafter *O'Callaghan*].

29 In the United States, lower federal courts had recognised a cause of action since 1976. MacKinnon (n. 14) 59–77. The Supreme Court recognised the cause of action in 1986 in the case of *Meritor Savings Bank v Vinson* 477 US 57 (1986).

30 *O'Callaghan* [1984] EOC ¶92–024, 75516.

31 MacKinnon (n. 14) 162.

most senior person in the organisation, while the female complainant, a lift driver, was one of the lowliest. The commissioner was in the habit of inviting the complainant into his office with the explicit intention of soliciting sexual favours. Despite Mathews J's initial courage in acknowledging the discriminatory harm of sexual harassment, she faltered in applying the test to the crucial element of power. The harassing conduct was found not to amount to unlawful sex discrimination because the complainant had failed to make known to the respondent that his attentions were unwelcome. The implications of 'power over' were thereby undermined. Was the complainant to slap the commissioner's face and tell him to 'get lost'? She knew perfectly well that any intimation of rejection could have adverse repercussions, as she indicated at the hearing. Despite the unsuccessful outcome for the complainant, this was a trailblazing decision that laid the groundwork for new ways of thinking about gendered harms in the workplace.[32] Indeed, it led to the express proscription of sexual harassment within antidiscrimination legislation.[33]

Antidiscrimination legislation does not proscribe all sexual behaviour in the workplace, much of which may be pleasurable.[34] It is the unwanted character of the behaviour that transmutes ostensibly neutral behaviour into unlawful behaviour in the eyes of the law. The impact on the targeted person must be evaluated in the light of community norms, which is then filtered through the fictional standard of the reasonable person. This well-known albeit contested standard purports to bring a quasi-objective test to bear on the subjective reception of the conduct by the complainant—supposedly to foreclose the concern that employers might be held responsible for injury to hypersensitive employees.[35]

32 For example, Jenny Morgan, 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 89–92.

33 As a matter of constitutional law, sexual harassment was found to constitute sex discrimination for the purposes of the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). *Aldridge v Booth* (1988) 80 ALR 1, 14–16.

34 For example, Pringle (n. 15) 90–92.

35 In *Hall v Sheiban* [1988] EOC ¶92–227 (HREOC), Einfeld J referred to a 'reasonable woman' who was seemingly expected to tolerate unwanted sexual overtures and touching (at 77144)—a standard that was rejected by the Federal Court on appeal as an error of law, in *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.

All Australian antidiscrimination legislation now includes a provision requiring the behaviour to be such that 'a reasonable person … would have anticipated that the person harassed would be offended, humiliated or intimidated'. As Jenny Morgan points out, however, the moralistic overtones of this formulation, particularly the word 'offended', detract from the inequality that sexual harassment creates in the workplace.[36] I concur with this assertion but, as foreshadowed, I wish to go further. I suggest that it is not only the moralistic and trivialising formulation that is the problem, but the emphasis on sexual in sexual harassment. This emphasis essentially camouflages the systemic discrimination that fosters the harassment. Hence, only the most overtly heterosexed and individualised examples of sexual harassment tend to be comprehensible within the terms of the legislation:

> This sexual desire–dominance paradigm governs our understanding of harassment. Its influence is reflected in the very fact that the category is referred to as 'sexual' harassment rather than, for example, 'gender-based' or 'sex-based' harassment. The most publicized harassment cases have accentuated this understanding.[37]

Harassment that is sexed, rather than sexualised, is theoretically covered by the general proscription against sex discrimination—less favourable treatment on the ground of sex—but the *expressio unius* principle of legal interpretation[38] renders this more difficult to bring within the ambit of the legislation, as I will demonstrate.

Thus, while feminists and progressive lawyers thought the inclusion of a proscription of sexual harassment was a significant development,[39] as indeed it was in many ways, insufficient cognisance has been accorded to the 'offended, humiliated or intimidated' formulation. In fact, the original wording of the *SDA*, which focused on unwelcome conduct that would disadvantage the complainant, took greater account of the discriminatory effect. The parliamentary debates relating to the amendment stress the move away from the need to prove disadvantage

36 Morgan (n. 32) 92–93.
37 Schultz (n. 3) 1692.
38 The Latin phrase in full is *expressio unius personae vel rei, est exclusio alterius* ('the express mention of one person or thing is the exclusion of another'). R.S. Vasan (ed.), *Latin Words & Phrases for Lawyers* (Godwin, 1980) 85. Applying the maxim here, the express proscription of sexual harassment in one part of the legislation implies those other unspecified forms of harassment may not be covered.
39 For example, Morgan (n. 32) 91.

as a positive step, as disadvantage is not always relevant, but the substitution of the new wording was not given further explication.[40] I am not suggesting that the previous wording was unproblematic as it also focused on sexual conduct, as distinct from sex discrimination, but the 'offended, humiliated or intimidated' requirement undermines the significance of the discriminatory effect of that conduct. Cordoning off sexual harassment and treating it as the aberrant conduct of individuals also encourage superficial and trivialising views, such as those equating sexual harassment with a breach of manners or sexual etiquette.[41]

Sexually permeated workplaces

When women endeavour to move into what is predominantly thought of as 'men's work' for the first time, the character of the harassment frequently shifts from the actions of a single harasser to the conduct of several co-workers or the members of an entire work unit. Their aim seems to be to create a hostile work environment in the hope that the interloper will leave. Harassment of this nature seems to be motivated by a fear that men's masculinity will be impugned if women are able to do the same job as well as them.

As we move away from individualised sexual overtures and sexual desire, the conduct tends to be less direct, albeit sexualised, as it consists of imagery that mimics heterosex with masculine actors and objectified women. Such conduct commonly includes pornographic displays, obscene language and crude, sexist jokes.[42] The display of pornographic images has served to mark certain workplaces as masculinised spaces—a practice that has been conventionally tolerated by management. Blue-collar workplaces, such as building sites and mines, are paradigmatic examples of workplaces where the entry of women has generated a high degree of resentment.[43]

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40 See, for example, the discussion of the Sex Discrimination and Other Legislation Amendment Bill 1992 (Cth) in Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2396 (Paul Keating, Prime Minister); Commonwealth, *Parliamentary Debates*, Senate, 8 December 1992, 4366 (Michael Tate, Minister for Justice).

41 For example, Jeffrey Minson, 'Second Principles of Social Justice' (1992) 10 *Law in Context* 1, 12–17. For a critique, see Morgan (n. 32) 108–9.

42 See, for example, *Horne v Press Clough Joint Venture* [1994] EOC ¶92–591 (WAEOT); *Carroll v Zielke* [2002] EOC ¶93–177 (NSWADT).

43 For example, Cynthia Cockburn & Susan Ormrod, *Gender and Technology in the Making* (Sage, 1993); Cynthia Cockburn, *Machinery of Dominance: Women, Men and Technical Know-How* (Pluto, 1986); Ann Game & Rosemary Pringle, *Gender at Work* (Allen & Unwin, 1983) 16.

The often-gross nature of the harassment enables the complainant to succeed in making out a complaint successfully, albeit that her career may be ruined by the time she lodges a complaint.

In *Hopper v Mt Isa Mines Ltd*,[44] the complainant was one of the first women to be selected as an apprentice diesel fitter. However, during her employment, she was subjected to persistent sexual harassment, including having gross comments made about her body and being surrounded by pornographic material. The sexualisation of the complainant was effective in constructing her as a figure of abjection,[45] rather than a competent worker. Her apprenticeship was also deleteriously affected, as she was assigned inappropriate and menial tasks, such as washing bolts. She broke out in a rash, suffered depression and had to abandon her apprenticeship after two years.

Harassment that involves inappropriate assignments is not sexual according to the legislative formulation, but sexed, because it constitutes less favourable treatment than would have been accorded a comparable male apprentice. In *Hopper*, the discriminatory activity was not disaggregated from the more overtly sexualised activity, so it did not prove to be a problem. It is when the harassment occurs in the absence of sexualised conduct that it is more difficult for the complainant to prove that it was sex-based. In any case, the sexualised conduct itself may be probatively problematic because a woman in a non-traditional workplace may not necessarily be 'offended, humiliated or intimidated' by the harassing acts—a point made by Quinn in discussing an interview in a North American study: 'In her job in construction, Judy was not offended per se by the male employees' crude remarks or the pornography in the construction trailer; in contrast, she found it childish and unprofessional.'[46] Because she was not 'offended, humiliated or intimidated', Judy would also encounter difficulty in making out her complaint successfully under the Australian sexual harassment provisions. This category of complaints underscores Morgan's point about the inappropriateness of the moralistic formulation at the expense of a focus on inequality.

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44 [1997] EOC ¶92–879 (QADT).

45 Julia Kristeva, *Powers of Horror: An Essay on Abjection*, translated by Leon Roudiez (Columbia University Press, 1982). Kristeva posits the 'abject' as an otherness that cannot be assimilated, 'the jettisoned object' that is 'radically excluded' (at 1–2).

46 Beth A. Quinn, 'The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World' (2000) 25(4) *Law and Social Inquiry* 1151, 1177, doi.org/10.1111/j.1747-4469.2000.tb00319.x.

The sexual harassment of women who encroach on and disturb masculinist workplaces is by no means confined to blue-collar work. The police force and the armed services are also well-known examples, despite conscious efforts at official levels to change the forces' image and clamp down on 'bastardisation' practices.[47] However, the existence of a non-discrimination policy does not automatically translate into civility and acceptance throughout the organisation. In *McKenna v Victoria*,[48] the complainant was a police officer who was subjected to unwelcome sexual advances, excessive criticism and derogatory remarks about her private life. After two years of abuse, she complained, at first within the force and then externally, but was victimised as a result, which culminated in successive breakdowns. In the eyes of the old-guard police officers, reporting the harassment to an outside body was a wrong that far outweighed the wrongful conduct itself, for it violated the cherished code that one should never 'dob'.

Williams v Robinson,[49] in which the complainant was a member of the Royal Australian Air Force (RAAF), evinces similar facts. Williams had been subjected to several instances of sexual harassment. The failure of superior officers to deal appropriately with the behaviour influenced the complainant's decision to leave when life in the RAAF became intolerable and she had to have psychotherapy. As with the closed culture of the police force, complaining about one's treatment to an outside body carried the risk of being branded a 'dobber'.

This 'whistleblower' mentality provides a powerful disincentive for a targeted person to complain because they know they are unlikely ever to win more than a Pyrrhic victory against a powerful institution. That is, complainants might have the satisfaction of eventually being told they are in the right, but their careers will have been reduced to tatters in the process. While 'dobbing' may be the language of both the police force and the RAAF, the same sentiment often prevails in private corporate cultures, as my research on the legal profession has shown.[50]

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47 See Submission to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Sexual Harassment in the Australian Defence Force*, November 1993, 54 (Sue Walpole, Sex Discrimination Commissioner).

48 [1998] EOC ¶92–927 (VADT). The respondent's appeal to the Supreme Court of Victoria was denied. [2000] EOC ¶93–080.

49 [2000] EOC ¶93–112 (HREOC).

50 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 259–60.

Men who resist the dominant norms of the workplace may also be the targets of sexualised harassment by other men, even when non-dominant men are not gay. In *Daniels v Hunter Water Board*,[51] the complainant, an electrician, was subjected to a campaign of harassment because his co-workers thought he was gay. In addition to taking up jazz ballet, drama classes and modelling, he adopted a 'trendy' haircut and wore an earring. He was ridiculed and taunted with epithets such as 'weirdo', 'poofter' and 'gay boy'. He was also spat on and physically assaulted. Within the masculinist culture of the workplace, the co-workers made it known that the complainant was 'not one of the boys'.

In pursuing a remedy, the complainant was able to rely successfully on a provision in the NSW Act proscribing discrimination on the ground of 'perceived homosexuality'.[52] In US jurisdictions where proscriptions on the grounds of sexual preference are not available, male complainants have sought to rely on sex discrimination provisions. The Supreme Court has upheld a same-sex complaint by a heterosexual complainant whose harassers were also heterosexual men.[53] Extrapolating from this case to *Daniels*, the argument would be that but for his sex, the complainant would not have been harassed. In other words, had Daniels been a woman who took up jazz ballet, drama and modelling, his conduct would not have given rise to hostile environment sexual harassment in the workplace. The argument is a provocative one, as it confounds the biological binarism of sex that underpins antidiscrimination law, as discussed earlier.

Cases such as *Daniels* underscore the animosity towards the feminine as well as LGBTIQ+ in masculinist workplace cultures, no less than in *Hopper*, *McKenna* and *Williams*. The aggressive conduct often found in such cases clearly has more to do with resentment than desire. These cases illustrate how masculinist cultures of homosociality and heterosexism are effectively sustained.[54]

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51 [1994] EOC ¶92–626 (NSW EOT).

52 *Anti-Discrimination Act 1977* (NSW) s. 49ZG.

53 *Oncale v Sundowner Offshore Services* 523 US 75 (1998). Cf. *Quick v Donaldson Co Inc.* 90 F 3d 1372 (8th Cir, 1996). See also Marianne C. DelPo, 'The Thin Line between Love and Hate: Same Sex Hostile Environment Sexual Harassment' (2000) 51(1) *Labor Law Journal* 15.

54 Richard Collier, *Masculinities, Crime and Criminology* (Sage, 1998); R.W. Connell, *Masculinities* (Allen & Unwin, 1995); Cynthia Cockburn, *In the Way of Women: Men's Resistance to Sex Equality in Organizations* (Macmillan, 1991).

The gender of authority

In the face of the ostensible imperative to modernise corporate workplaces by appointing women to authoritative positions, there has been a strong rearguard action to maintain the hierarchical status quo. The metaphor of the glass ceiling captures the way that well-qualified and competent women often reach a point in organisations beyond which they are not promoted. Whether one looks at private corporations, the professions, universities or public entities, the same gendered pyramidal structure is clearly discernible. Masculinist cultures of authority may implicitly condone the scapegoating and harassment of individual women who have been promoted to the higher echelons as a strategy for impugning their ability.[55] The vestiges of fraternity—still prominent in blue-collar employment, the police force and the armed services—are also discernible in professional and authoritative enclaves. The difference is that the harassing conduct is usually more insidious, in both its character and its effects, so it is difficult to make out a complaint. In other words, it may be less overtly heterosexed.

This category of behaviour includes a panoply of harassing acts, often of a petty and repetitive kind. It includes verbal putdowns, patronising or abusive remarks and excessive criticism of work performed.[56] It may also include marginalising conduct, such as failing to consult the complainant on matters over which she has responsibility,[57] or making it difficult for her to access resources and obtain the necessary approvals to carry out her job properly.[58] Any failures then appear to be her fault. As Schultz points out, 'characterizing women as incompetent … is a central component of the harassment'.[59] I suggest this behaviour is pervasive within the pyramidal apex of many organisations, long preserved as a masculinist domain of power and authority, albeit increasingly under challenge.

55 Julie Hare, 'The Paradox of Power: Why Men Target Women Leaders', *BroadAgenda*, 3 August 2020, available from: www.broadagenda.com.au/2020/the-paradox-of-power-why-women-in-leadership-are-targets-for-harassers/.

56 Judith Wyatt & Chauncey Hare, *Work Abuse: How to Recognize and Survive It* (Schenkman, 1997) 4–10.

57 Valerie Sutherland & Cary Cooper, *Strategic Stress Management: An Organizational Approach* (Palgrave Macmillan, 2000) 171.

58 Emily Bassman, *Abuse in the Workplace: Management Remedies and Bottom Line Impact* (Praeger, 1992) 43–50.

59 Schultz (n. 3) 1754.

The problem is that while harassing conduct is undoubtedly unwelcome, it may not constitute 'conduct of a sexual nature' for the purposes of a sexual harassment proscription, such as that of the *SDA* (s. 28A[2]). In the absence of a specifically sexual dimension, a complainant would have to rely on general sex discrimination provisions, such as denial of access to a benefit in employment (*SDA* s. 14[2][b]) or subjection 'to any other detriment' (s. 14[2][d]). The complainant then has the burden of proving that the discrimination occurred by virtue of sex (or marital status, pregnancy, sexual orientation or other ground under the *SDA*). While the burden of proof is onerous at any formal antidiscrimination hearing, harassment of this kind is even less tractable to remediation because it represents a manifestation of systemic discrimination that is ever-present at a subliminal level, constituting and reconstituting authority at work in masculinist terms. The complainant has the burden of proving that the unwelcome conduct was directed at her by virtue of her sex, rather than, say, because the harasser just happened to be an inept manager or an unpleasant person. Repeated micro-inequities also lack the dramatic impact of salacious heterosexed behaviour of the Harvey Weinstein kind that attracted worldwide attention and resulted in the #MeToo movement. The tendency of tribunals and courts to disaggregate and dissect a string of incidents separately can have the effect of detracting from the overall discriminatory effect of a complaint. A single heterosexualised act, marked by lasciviousness and lust, invariably trumps a succession of seemingly trivial putdowns, even though the latter may reveal more about structural discrimination on the ground of sex than the former.

This more insidious manifestation of harassment was recognised in New South Wales within a general proscription against sex discrimination, where the term 'sex-based harassment' was first used to distinguish it from the sexual variety. In *Hill v Water Resources Commission*,[60] the complainant had been appointed as the first clerical graded officer in her department where most of her co-workers were men. They said she would not fit in and ensured that she did not. There were no sexual overtures as such, although some sexually explicit material was displayed on noticeboards. For the most part, the harassment comprised an endless succession of petty acts, including nuisance telephone calls, threatening letters and heavy-handed 'jokes', such as pretending to have killed the complainant's goldfish. The NSW EOT held that the cumulative effect of the harassment contributed

60 [1985] EOC ¶92–127 (NSWEOT). The US Supreme Court recognised hostile workplace harassment as sex discrimination in *Meritor Savings Bank v Vinson* 477 US 57 (1986).

to the creation of a hostile working environment. The recognition that the petty vindictiveness and harassment, to which women pioneers in male-dominated workplaces are all too often subjected, constituted sex discrimination was an important step forward.

The second significant development in *Hill* related to the fact that the perpetrators of the harassment were not men in structural positions of 'power over' the complainant, as per the test articulated in *O'Callaghan*, but they were Ms Hill's co-workers. The senior men to whom she complained nevertheless condoned the harassment by failing to take action to stop it, thereby underscoring the fraternal bonds between the men in the organisation, regardless of their position in the hierarchy. Their inaction sufficed to make the statutory employer vicariously liable for the conduct of its employees. However, when the supervisors finally did act, their response was to transfer and demote the complainant, rather than the perpetrators—a resolution that would no longer be automatically accepted.[61]

Now that sexual harassment has been generally separated from sex discrimination in most legislation, it is doubtful whether Ms Hill would succeed if she were to lodge a complaint of sexual harassment under the current provisions. The decision established that a pattern of harassment arising from the sex of the complainant violates the proscription against sex discrimination; the conduct does not have to be sexual. In the case of women entering male-dominated areas of employment, the language of being 'offended, humiliated or intimidated' falls short of accurately capturing the discriminatory effect of the conduct to which Ms Hill was subjected. Under the NSW legislation, she would have to rely on the general prohibition of sex discrimination as 'less favourable treatment'. This is not only more difficult from a probative perspective, as the harassing conduct becomes entwined with the historical exclusion of women from positions of authority generally (which cannot be sheeted home to a particular respondent); it also becomes enmeshed with bona fide acts of management. It is notable, however, that the *SDA* was amended in 2021 to proscribe sex-based harassment (s. 28AA).

The masculinist nature of authority at the senior level of organisations, together with the countervailing antipathy towards the feminine, is clearly illustrated by *Dunn-Dyer v ANZ Banking Group Ltd*.[62] The complainant

61 For example, *Sharma v Bibby Financial Services Australia Pty Ltd* [2012] NSWSC 1157 (appeal dismissed: *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37).
62 [1997] EOC ¶92–897 (HREOC).

was appointed to a senior position in the banking industry—a domain where there are still comparatively few senior women.[63] Ms Dunn-Dyer complained of both sexual harassment and sex discrimination. The sexual harassment claim failed, although the dealing-room atmosphere was a masculinist and bawdy one that included posters of nude women and soft-porn magazines. At a 'Kris Kringle' Christmas Eve function, Ms Dunn-Dyer received a plastic jumping penis, although she had herself once donated a gift representing male genitalia. The inquiry commissioner was of the view that the onus of proof had not been satisfied to distinguish between 'consensual and harmless bawdiness' and a hostile workplace. The subtext here would seem to be that to succeed on the sexual harassment count, Ms Dunn-Dyer was expected to step into the subject position of woman as 'fragile flower' and demonstrate how she was personally offended, rather than demonstrate how such conduct created an environment that discriminated against women.

In the separate sex discrimination claim, the evidence revealed the complainant had been subjected to a constant barrage of disparaging remarks, including being referred to as 'mother hen' and her department as 'the kindergarten nursery' and the 'mothers' club'. The evidence of one senior manager denied that the term 'mother hen' was derogatory: 'I didn't introduce you as the mother hen. I introduced you, then described your role as a mother hen.' The commission disagreed with the witness, finding that the remarks were not only derogatory but also had influenced the assessment of the managerial qualities of the complainant, including the amalgamation of her department with that of another.[64] The decision to restructure and dispense with her position was found to be a calculated decision to get rid of her.

Nevertheless, the disparagement and construction of the complainant as someone unfit to hold a managerial position were held to be inadequate to establish why she was not appointed to the position of state treasurer with the bank. The long experience and seniority of the successful male appointee were accepted as foreclosing a finding of sex discrimination on this point. This aspect of the complaint underscores the difficulty of meeting the burden of proof in a context where the bona fide but elusive

63 Sara Charlesworth, 'Working Mums: The Construction of Women Workers in the Banking Industry' (1999) 4(2) *Journal of Interdisciplinary Gender Studies* 12, 14, 18–19.

64 Charlesworth has argued that even though Susan Dunn-Dyer did not have children, the disparaging references to motherhood were designed to suggest that she belonged to a category of workers who were not serious about their careers (ibid., 20).

concept of merit (discussed in Chapters 11 and 15) is all-important. The reasons for the restructuring and the redundancy were more obviously pretextual; they were extreme acts for which no credible rationale could be adduced.

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

Work rage

My next stop on the harassment continuum is bullying, which is reported to have increased as a corollary of increased managerialism.[65] Harassment is bullying by another name, which, in the case of repeated and unreasonable behaviour, is now proscribed in Australia under the *Fair Work Act 2009* (Cth), Part 6, although some workers who have experienced bullying and suffered significant psychiatric effects have secured substantial damages by recourse to tort law.[66] However, if the complainant can establish that the bullying behaviour occurred on the ground of sex (or other proscribed ground), they may have recourse to a remedy under antidiscrimination legislation. Petty acts of harassment may be successfully subsumed within the rubric of sex discrimination in the context of an attempt to expel the complainant from a masculinist workplace, as in *Hill*, but harassment and management are not otherwise easily disentangled. As Finn J points out, 'it is not workplace harassment for managers to manage'.[67] But where does management end and harassment begin? The neoliberal presumption in favour of employer prerogative has served to heighten the burden of

65 Lesley Wright & Marti Smye, *Corporate Abuse: How 'Lean and Mean' Robs People and Profits* (Macmillan, 1996) 50–54.

66 For example, *Swan v Monash Law Book Co-Operative* [2013] VSC 326; *Keegan v Sussan Corporation (Aust) Pty Ltd* [2014] QSC 64.

67 *Kelson v Forward* (1995) 60 FCR 39, 56.

proof for complainants. Unless a complainant can support an allegation of sex discrimination with persuasive evidence, such as being the first and only woman in a particular position (as with *Hill* or *Dunn-Dyer*), a presumption in favour of management prevails. Even if the harassment is conceptualised as the aberrant act of an inept manager, it is nonetheless deemed to be 'managing'.

In *Malone v Pike*,[68] the main allegation of sexual harassment was that the respondent poked the complainant in the chest and told her to do what she was told. The Human Rights and Equal Opportunity Commission (HREOC), while conceding that such behaviour was 'unwelcome, and reasonably likely to offend', held that it was not conduct of a sexual nature for the purposes of the *SDA*. In *Hosemans v Crea's Glenara Motel Pty Ltd*,[69] the HREOC held that calling the complainant a 'stupid bitch' and telling her that she had a 'fat arse' were personal abuse rather than sexual harassment. In contrast, the conduct in *Gray v Victoria*,[70] where the school principal shook a packet of Ratsak in the complainant's face and said that 'he would "get a rat"', was accepted as an element of victimisation waged against the complainant because she lodged a complaint alleging both sexual harassment and sex discrimination. The tribunal was of the view that a male teacher would not have been intimidated in the same manner.

One could come to a similar conclusion about being poked in the chest, especially as a woman's chest may be indistinguishable from her breasts—an undeniably erogenous zone. Furthermore, the 'stupid bitch' and 'fat arse' remarks also carry with them sexual overtones. Their rejection as sexual harassment by the inquiry commissioner reveals how sexual abuse has come to be normalised within everyday speech. It also underscores my point that sexual harassment is more likely to be legally cognisable if it involves heterosexed conduct. Verbal abuse may be found to constitute sexual harassment, provided it can be shown to have given rise to the requisite humiliation, loss of dignity or injury to feelings. However, it is not sexed or sex-based abuse, but sexual abuse that is necessary. Thus, it is the element of 'recurrent sexual innuendo' associated with the abuse that locates it within the terms of the legislative proscription.[71] Generally speaking, to succeed, the abuse needs to be combined with other instances of discrimination arising from specified grounds, as in *Hopper*.

68 [1996] EOC ¶92–868.
69 [2000] EOC ¶93–062.
70 [1999] EOC ¶92–996 (VCAT).
71 *Hall v Naismith* [1994] EOC ¶92–587(1) (HREOC).

The point is illustrated by *Djokic v Sinclair*,[72] in which the complainant's superior and co-workers at a meatworks regularly referred to her as a 'stupid wog bitch' and a 'fucking wog bitch'. In this case, the racist element was intermingled with incidents of sexual harassment and sex discrimination. The complainant succeeded in respect of all grounds, but there was some question about her ability to satisfy the burden of proof had the various incidents been disaggregated. The HREOC acknowledged that the threatening words constituted a serious abuse of power, which could be characterised as sexual harassment, but it questioned whether flicking the complainant's bra strap and touching the top of her trousers constituted deliberate touching of a sexual nature. While the HREOC accepted that the sustained hostility towards Ms Djokic amounted to sexual harassment in its broad sense, establishing the sexual in sexual harassment is not straightforward, even when it involves touching, unless it is unequivocally (hetero)sexualised.

In the absence of other manifestations of discrimination, sexualised verbal harassment—a common form of bullying—seems to fall into the space that has been created by the artificial line of demarcation between sexual harassment and sex discrimination. Abusive, infantilising and demeaning language directed towards women is woven into the social script. A study of women lawyers in the United States revealed that almost all women aged under 35 working in the private sector were vulnerable to gender disparagement, although being an older woman in a private law firm also afforded little protection.[73] Such conduct does not clearly meet the legislative test for sexual harassment and it is unlikely to satisfy the test for sex discrimination either. It is all too easy to aver that verbal taunts, physical assaults and other manifestations of hatred and dislike are perpetrated by rude, insensitive and mean-spirited bullies, rather than sex discriminators. However, the application of a simple 'but for' test rebuts a finding of sex neutrality: but for the fact the target was a woman, one might postulate she would not have been subjected to the demeaning conduct. Not only is it unlikely that benchmark man would be called 'a stupid bitch'; there is also no comparable phrase in common usage that encapsulates quite the same degree of sexualised contempt for men.

72 [1994] EOC ¶92–643.

73 Janet Rosenberg, Harry Perlstadt & William R.F. Phillips, 'Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers' (1993) 7(3) *Gender and Society* 415, 429, doi.org/10.1177/089124393007003006.

Probative and psychic burdens

Conciliation remains the primary mode of dispute resolution in antidiscrimination legislation.[74] The confidentiality associated with the process, which normally extends to nondisclosure agreements, means few details are made public.[75] While 48 per cent of finalised sex discrimination complaints were conciliated successfully in 2019–20, a high proportion are withdrawn, lapse or are terminated.[76] A minuscule percentage of complaints lodged proceed to hearing, representing only the most dedicated of complainants and the most obdurate of respondents. The corporate respondents who hold out are determined to win at all costs, as discussed in Chapter 9, because a complaint to an outside body represents a threat to both managerial authority and fraternal integrity—hence, the strong disapprobation of 'dobbing'.

As a public lesson to any other employee thinking of complaining, respondents often set out to destroy a complainant's credibility by arguing that (she) improperly eroticised the workplace, displayed incompetence or otherwise transgressed professional norms. They are prepared to devote substantial resources to defending the action, which few complainants can match—particularly if they are unemployed at the time of a hearing, as is frequently the case. The case of *Dunn-Dyer*, discussed above, is exemplary. Ms Dunn-Dyer lodged her complaint in 1992, but a decision was not handed down until five years later. The case involved weeks of hearing, spanning 14 months. The transcript amounted to more than 4,000 pages. Although the complainant 'won' at the inquiry level, and the respondent bank chose not to appeal, few women have the fortitude, tenacity or resources to withstand such a gruelling experience if conciliation fails. There is not only a gross financial inequality between a large corporation and an unemployed individual (often lacking union support),[77] but also the corporate employer has a monopoly over the evidence and access to employee witnesses who may be fearful of being scapegoated and placing

74 Thornton (n. 11) Ch. 5.

75 Dominique Allen & Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384.

76 AHRC, *2019–20 Complaint Statistics* (AHRC, 2021), available from: humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf.

77 A union cannot always be relied on. In *Horne v Press Clough Joint Venture* [1994) EOC ¶92–591, the union was held jointly liable for participating in the campaign of harassment and intimidation of the complainants.

their jobs in jeopardy if they decline to testify. There is no recompense for the additional trauma incurred by a complainant who withstands the years it may take to reach a settlement. Susan Dunn-Dyer received a mere A$10,000 for emotional harm calculated to the time of lodgement of her complaint. Although she received A$125,000 for economic loss,[78] no allowance was made for her legal costs—a sum that may have exceeded the damages award. In no way did the damages compensate her for the loss of her career. She had lost her job five years previously and the public nature of the hearing ensured she was unlikely ever to be employed by a bank again. Misogynistic images of 'the troublemaking and complaining woman' are difficult to dislodge for professional and high-status women who pursue justice through formal avenues.

In addition, there is always a psychic difficulty faced by the survivor who complains about having been harassed by either a boss or co-workers. To complain formally means one has to step into the shoes of 'the victim', which can be just as humiliating and disempowering as enduring the harassment itself—sometimes more so, particularly for senior women: 'To conform to the image of the proper victim, women must comport themselves as sexually pure, even passive, beings who have been violated by their co-workers' sexual predation.'[79] As with any civil action, harm must be proven by survivors. If they have survived seemingly intact due to self-help measures, which may include resigning and securing another position, they can expect minimal damages—a problem that inheres within the compensatory model of civil remediation. The fact that costs are not awarded in all antidiscrimination jurisdictions may induce rational targets to cut their losses and not pursue a legal remedy at all, unless they are altruistically committed to calling the respondent to account publicly. Having to assume the trappings of the 'victim' is one of the paradoxes of a statutory scheme geared towards compensation.[80] It may be easier for

78 Kenny J sought to remedy the undervaluation of damages in sexual harassment cases in *Richardson v Oracle Corporation Australia Pty Limited (No. 2)* [2013] FCA 359. See Madeleine Castles, Tom Hvala & Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review*, doi.org/10.1177/0067205X21993146.

79 Schultz (n. 3) 1732.

80 The 'make whole' principle or restoring the injured person to the position he or she would have been in but for the wrongful act is the underlying principle of tort law—the closest analogy to antidiscrimination law. *Hall v A & A Sheiban* (1989) 20 FCR 217, 239 (Lockhart J). For a detailed discussion of remedies, see W. Covell, K. Lupton & L. Parsons, *Covell & Lupton Principles of Remedies* (LexisNexis, 7th edn, 2018).

the targets of heterosexed conduct to satisfy the probative burden than for those subjected to sex-based harassment. Indeed, the latter may agonise over whether to complain formally or not.

The experience of a woman lawyer whom I interviewed illustrates the point very well.[81] She was at lunch with a client and the senior (male) partner of her law firm when she said something that the partner did not like. He pretended to drop his napkin, bent down to pick it up and, in the process, slapped the woman on the thigh. She was outraged but felt that she could not do or say anything even though, technically, an assault had occurred. To whom could she speak? What words could she use? The indignity would have only been magnified were she to have recounted her experience to a person in authority. The effect of giving voice to the unwelcome behaviour would probably serve only to strengthen male solidarity, thereby confirming the outsider status of women in the legal workplace. The corporeal act remained ineffable because it demeaned the woman as an authoritative knower whether she complained or not. In formal terms, the conduct was also problematic. It was clearly sexed and discriminatory, in that it is doubtful whether the hypothetical benchmark man would ever be subjected to such treatment, but it was not clearly sexualised in terms of the legislative prescript. Thus, as I have argued, it is easier to pursue a complaint of sexual harassment than of sex-based harassment, but there are powerful psychic factors that inhibit the lodging of workplace discrimination complaints of any kind, either inhouse or externally. Complainants may then choose to ignore the harassment or deal with it in some other way—most commonly by leaving the workplace. Nevertheless, their silence may be interpreted as a form of complicity, for it lacks broader social impact. This is the paradox of sexual harassment.

Conclusion

The separation of sexual harassment from sex discrimination and sex-based discrimination reinforces the view that what is defined as 'sexual' is, like rape, based on a male perspective. That is, the paradigm involves a male subject who is the actor and an objectified woman or feminised man who is acted on. Thus, the conduct of a man importuning sexual favours or exposing himself is characterised as unproblematically

81 Thornton (n. 50) 248.

sexual. However, as soon as we move away from the paradigm, we begin to encounter problems. Abuse, taunts, insults and other everyday micro-inequities that are sexed are trivialised and dismissed because they are deemed to be insufficiently sexual. Over time, daily putdowns may exercise a more corrosive effect on the authority and sense of self of a targeted employee than a single unwanted sexual overture. The 'stupid bitch' remark denigrates all women, but is the 'reasonable person' likely to be 'offended, humiliated or intimidated' by it when such remarks have become normalised within everyday speech? As suggested, abusive epithets in common parlance are generally not regarded as sexual harassment, although words that suggest sexual intercourse and intimate body parts probably carry the requisite degree of sexualisation. The misogyny encapsulated by such language is a facet of systemic or society-wide discrimination that is not comprehensible within an individualised complaint-based regime. The propensity to adopt a 'biological' approach to sexual harassment and sex discrimination facilitates sloughing off the social to appear normal and even natural.

While it is a positive development that sexual harassment is now widely recognised as a compensable harm, it is a blunt instrument of remediation. The hegemony of the heterosexed paradigm has caused feminist, as well as legal and popular, discourses to lose sight of the ways that harassment at work is sexed, not just sexualised. Sexual harassment claims reify the liberal binarism that 'the mind', which biologically 'has no sex',[82] is masculine, while corporeality is marked as female or Other. While this gendered mind/sex binarism is under challenge every day, emphasising the sexual in sexual harassment simultaneously reproduces it. The normativity of the masculine body, especially when clothed in a dark suit, enables it to assume an aura of depersonalised authority within the workplace. A woman complaining about (heterosexed) sexual harassment to a male boss, male tribunal member or male judge in a hearing or courtroom invariably overflowing with male lawyers reifies that binarism. This is always the dilemma for complainants because there is a discursive power associated with naming that which was formerly suppressed.

82 Londa Schiebinger, *The Mind Has No Sex? Women in the Origins of Modern Science* (Harvard University Press, 1989) 1. The original quote, '*L'esprit n'a point de sexe*', is attributed to Francois Poullain de la Barre. See also Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (Macmillan, 1984).

Sexual harassment has entered public discourse only because individual women and non-dominant others have courageously spoken out. In the absence of challenge, all the hard work of the women's movement is quickly papered over. We see how dramatically this has occurred since the proscription was introduced—how a neoliberal social script rarely mentions women in public life, other than in subordinate positions or in sexualised subject positions.[83] The stressful bullying cultures legitimated by neoliberalism, in which workers are expected to work ever harder to increase profit margins, are not readily tractable to remediation through antidiscrimination avenues in which the complainant bears the burden of proof.

As systemic sex discrimination is entrenched within the culture of the workplace, more than a little tweaking of the present legislative model would be required to address widespread sexual harassment and effect substantive equality for women at work. The imposition of a positive duty on employers, as recommended by the AHRC in *Respect@Work*, would not necessarily eliminate sexual harassment as a manifestation of violence against women, but it could substantially minimise it. Lawyers' most powerful clients are corporations, as discussed in Chapter 9, and they will seek to define whatever words appear in legislation to their clients' advantage, which means there is comparatively little interest in the broader ramifications of social change.[84]

Perhaps the environment of neoliberalism has caused us all to be less vigilant in permitting a linguistic shift from discrimination to managerialism to occur, cloaking sex-based harassment in the workplace. Harassment not only demeans all women and non-dominant workers in respect of their professionalism and authority, but it also detracts from the idea that they are full citizens.

83 The scandal involving political staffer Brittany Higgins in Parliament House, Canberra, in 2021 is illustrative. See Massola (n. 21).

84 Cf. Beth Gaze, 'The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed.), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 124, doi.org/10.22459/SDUT.09.2010.05.

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