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Précis Paper

Sexual Harassment in the Workplace

A discussion about recent developments in the area of sexual discrimination and harassment

Discussion Includes

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Sexual Harassment in the Workplace

1. In this edition of BenchTV, Ian Latham (Barrister, Denman Chambers, Sydney) and Kylie Nomchong SC (Barrister, Denman Chambers, Sydney) discuss the recent developments that have taken place in the area of sexual discrimination and harassment, particularly in the workplace.

Introduction

2. In the last year or two, we have witnessed an explosion of interest both nationally and internationally in the area of sexual harassment.

3. Commonwealth and NSW legislation relating to sexual harassment has been around now for four decades – which begs the question: why is this behaviour still so pervasive? It seems that it is a product of our culture - and the fact that there is still widespread acceptance of the objectification of women.

What is sexual harassment? How is 'workplace' defined?

4. Sexual harassment is defined in s 28A of the *Sex Discrimination Act* as an unwelcome sexual advance, an unwelcome request for sexual favours, or unwelcome conduct of a sexual nature, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

5. There appears to be both an objective and subjective element to this definition. The subjective element will come down to context. In looking at context, a court will also take into account the personal circumstances of the person alleging the sexual harassment.

6. The jurisdiction of courts to regulate conduct is only in relation to certain areas, like, for example, employment. The areas that are regulated by the legislation must be looked at in order to determine whether the conduct in question might fall under any one of those areas, and as a consequence be found to be unlawful. One of these areas is the workplace.

7. The definition of workplace has been expanded, as the nature of the modern workplace has changed. With the relatively recent advent of the internet, the definition of workplace in certain circumstances can almost be said to be capable of encompassing the entire world.

8. Difficulty arises over the fact that different jurisdictions and different pieces of legislation have different definitions of what connection is necessary. The Fair Work Commission has

now adopted the position that if conduct is likely to have an effect on the employer and the workplace, then the conduct will be sufficiently connected.

9. Determining sufficient connection, and defining what a workplace is or is not, is not clear-cut. There is a continuum that exists between what can be said to be a workplace, and what cannot. The dividing line is very difficult to pinpoint. There is no doubt that people are now at much greater risk at functions/events etc. that were previously not seen as forming part of the workplace, if there is some sort of connection that can be made.

10. Take the following example scenario:
    - drinks are held at (and sponsored by) work
    - then everyone heads to the local bar/pub to continue drinking
    - it is the same group of people who were drinking at work who then head to the bar/pub
    - at the bar/pub, sexually harassing comments are made by a member of that group towards another member of the same group

11. Whether or not it can be said that the conduct took place in the workplace is difficult to determine in this scenario, and a number of factors need to be taken into consideration, including:
    - the fact that there is a temporal connection with the original workplace function
    - whether or not management was still present at the bar/pub
    - whether a booking was made at the bar/pub, and under whose name it was made

12. Of course, every step more removed from the workplace makes it ever more unlikely that the conduct will be found to be connected to the workplace, which is how it should be.

13. Employers have no contractual right to regulate the private lives of their employees. It is in the employer's interests to maintain an appropriate distance from the private lives of their employees, so that they may protect themselves from any possibility of being held vicariously liable; but what constitutes an appropriate distance is still not capable of being clearly measured or defined.

14. Another difficult issue is figuring out where the employer's right to take disciplinary action in the workplace begins and ends. The relatively recent proliferation of employer policies which relate to the regulation of employee conduct outside of work hours is owing in large part to this difficulty. Employees protect themselves by use of these policies.

15. A policy (which necessarily forms part of the employment contract) is the basis upon which an employer can:
    - find that a breach has occurred by an employee, and then
    - take disciplinary action against that employee

16. The legislation is frustrating in circumstances whereby a victim of sexual harassment has no knowledge of the harassment, but is nonetheless the subject of it. That is, a person who is unaware of the fact that they are the subject of any sexual harassment, will not come within the definition provided for in the legislation.

Accessorial liability

17. Employees are also open to be found liable as an accessory for another employee's conduct under the relevant legislation. So how can a person protect themselves from becoming an accessory to actions for sexual harassment/discrimination?

18. The accessorial liability provisions of the legislation are very wide. Many employers, even those in supervisory positions, mistakenly believe that if they do not engage with a situation whereby sexual harassment is occurring, despite their knowledge of it, they cannot be found liable as an accessory. This is, however, not the case, because the relevant provisions state that accessorial liability can be found in circumstances where a person 'condones' or 'permits' the conduct.

19. 'Permit' is a word with a very wide ambit. Liability of managers will arise over wilful blindness. So do managers have an obligation to report or take action even in the absence of a complaint?

20. The answer, in short, is yes. Obligation arises out of a combination of both common law and legislation. Employers are obliged by common law to provide a safe workplace. A safe workplace is one that is free of risk to health and safety of any kind, physical or psychological. So if a manager witnesses sexual harassment (physical or psychological) - harassment which of course has the potential to create an unsafe work environment - and does not report it, they may be found liable.

21. There are some more serious aspects to accessorial liability too. If serious sexual assault occurs, which is capable of amounting to an indictable offence, there are reporting obligations under the s 316 of the *Crimes Act 1900* (NSW).

22. If a person believes that a serious indictable offence has been committed by another person, they have a duty to report it to the police under s 316. The bar in relation to the level of knowledge that is required to be possessed by a person in order for an obligation on their part to report to arise is very low. For example, the person in possession of the information may not even be required to believe that it is credible.

23. There are difficulties with the word 'permit', insofar as it suggests some degree of ability to change the behaviour of others. But there is no doubt that the accessorial provisions are very broad.

24. At what point flirtation becomes an unwelcome sexual advance, especially under circumstances whereby alcohol is being consumed, is another grey area. Employers still have an obligation to ensure that unwelcome sexual conduct is not occurring between their employees - and alcohol is no excuse. It is important that employers have policies in relation to provision of alcohol to and consumption of alcohol by its employees.

Choice of jurisdiction

25. Claimants and practitioners alike should be familiar with the different jurisdictions under which it is possible to run a sexual harassment claim. There are three main jurisdictions under which such a claim can be run:
    - under the *Anti-Discrimination Act 1977* (NSW)
    - under the *Sex Discrimination Act 1984* (Cth)
    - under the *Fair Work Act 2009* (Cth)

26. **Under the *Anti-Discrimination Act 1977* (NSW)** - a person makes a claim to the anti-discrimination board of NSW, which then involves a compulsory conciliation - if the matter does not resolve at conciliation, the person can then make an application to NCAT, and litigate the matter there.

27. **Under the *Sex Discrimination Act 1984* (Cth)** - a person lodges a complaint with the Human Rights Commission, which also involves mandatory conciliation - if the matter does not resolve at conciliation, the person has a 60 day period during which it can decide to commence proceedings either in the Federal Circuit Court, or in the Federal Court.

28. **Under the *Fair Work Act 2009* (Cth) –** there are a raft of discriminatory provisions, including those for anti-harassment claims (but of course these claims are restricted to the workplace, adverse actions, etc.) There is a real difference between the first two jurisdictions - both in a jurisprudential sense, and in terms of outcomes that may be achieved.

29. NCAT is (generally) a no costs jurisdiction, which means that even if an applicant is successful in their claim, whatever damages that are ultimately rewarded (and historically, they are never very much in NCAT) will almost certainly be overborne by the quantum of costs that the applicant has expended to succeed in the first place.

30. So any win for an applicant is almost always going to be a Pyrrhic victory in that although an applicant may obtain a finding of sexual harassment in his/her favour, the monetary compensation that will realistically be awarded as a result will never be quite enough to meet legal costs. But in the Federal jurisdiction - which is a costs jurisdiction - there seems to be more parity in terms of damages (more in line with community standards).

31. In the Federal Circuit Court there are scheduled costs, which limit the amount of costs. In the Federal Court, there is no limit on costs (costs follow the event). The amount of damages being awarded both in the Federal and Federal Circuit Courts are more in line with the amount of damages being awarded in tortious/civil claims, and therefore a better expression of the growing community admonition of this sort of behaviour.

<u>The trouble with having multiple jurisdictions under which to run a claim for sexual harassment</u>

32. So there are a range of jurisdictions under which sexual harassment cases may be run, including workers' compensation, intentional tort under common law, criminal law, etc. The different jurisdictions seem to each have different processes and remedies available. It is not so desirable a thing to have so many different jurisdictions dealing with the same sort of conduct.

33. Having multiple jurisdictions is undesirable for many reasons, key ones being:
    - it is costly
    - different results are achieved in relation to the same alleged conduct

    The latter in particular does not lead to great faith in the legal system.

34. The decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] has at least changed the way that compensation is determined in the federal jurisdiction. Its effect has been to broaden the range of outcomes available for compensation, and to steer the court towards looking at more general notions of compensation. This approach has not appeared to have had a knock-on effect to the state jurisdictions.

35. We will most likely see a pick-up of psychological damage having the effect of increasing the awards of damages. It seems entirely incongruous that we would view the psychological injury suffered in a case of sexual harassment differently to the psychological injury suffered in a case of personal injury or workers' compensation. In time, we will hopefully see the courts try to equalise the way in which these amounts of compensation are determined.

36. Historically, there had been an arbitrary limit imposed on the award of compensation. It was never quite clear why it was imposed, but it was used to artificially suppress orders of compensation. It is odd that although NCAT has always had the same monetary jurisdictional limit as the District Court has had ($750,000), Kylie has never seen anything even close to such an award for damages.

37. Given the different types of remedies available to victims under the different jurisdictions, claimants face difficult tactical choices about which jurisdiction to commence their claim in, because choice of jurisdiction will greatly impact upon the way in which the case will be proven, and what remedies will ultimately be awarded. In choosing an appropriate jurisdiction, the risks involved in each must also be taken into account.

38. The policy reason behind NCAT being a no costs jurisdiction was so that people could bring claims without fear of a costs order being made against them. s 570 of the *Fair Work Act* 2009 precludes any orders for costs from being made, except for in certain exceptional circumstances.

39. Another difficulty with having multiple jurisdictions is that a person can end up precluding themselves from more desirable remedies by settling part of their case. Estoppels and statutory prohibitions may apply in relation to running multiple actions. For example, the *Workers Compensation Act* has express prohibitions on damages that can be obtained in relation to injury matters, which in fact cut off a person's rights to further workers' compensation, and require payback of monies already paid.

40. There have been situations where people have settled dismissal cases, for example, for very small amounts of money, and in so doing, have given up very valuable personal injury rights. It is a danger of which both clients and practitioners ought to be aware. It is also a good argument as to why there should be a consolidation of jurisdictions in relation to these types of matters. Practitioners have to toe a very fine line when choosing how to run a case, either for:

    - compensatory damages for sexual harassment under the *Sex Discrimination Act 1984* (Cth)
    - compensatory damages for personal injury under the *Workers Compensation Act 1987* (NSW)

    because as soon as a practitioner starts describing or delineating the compensatory damages as for an injury, rather than for hurt, humiliation and distress, he or she has crossed the line, such that any workers' compensation rights (which can be very valuable) a client may have might be cut off.

41. A frustrating thing for complainants about all these processes is that they are very lengthy. The recent explosion of allegations made in the media against big personalities, and the resulting normalisation of the phenomenon of trial by media, has been entirely unhelpful in the search for truth, and to the exercise of fairness. There is a huge problem with the current trend whereby the allegations that are being made are being treated as substantiated. Reputational damage is also a big factor to be considered by both clients and practitioners.

42. Legal practitioners are starting to see within their own profession regulation of behaviour that may be deemed as sexual harassment or bullying, as reflected in the relevant updates to the Solicitors Rules and Barristers Rules.

43. This type of conduct is now specifically delineated in both the Rules – conduct which, if proven, can amount to either unsatisfactory professional conduct or professional misconduct. So we are starting to see the movement of these concepts into professional

regulation. It is a positive step not only because regulation catches perpetrators, but also because it carries an important deterrent/educative purpose.

44. Looking back over the last four decades of jurisprudence in this area, although it is clear that this sort of conduct is still prevalent, it is also clear that the courts, tribunals, and professional organisations are taking allegations in relation to such conduct far more seriously.

45. Progress in this regard is certainly being made. But there still exists a big problem with how commonplace it is that these polices, which are supposed to regulate such conduct, are simply being paid lip service.

Statutory definition of 'workplace': interpretation by the courts

46. In *Ewin v Vergara (No 3)* [2013], the Federal Court held at [38] that:

> 'A 'workplace' is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant.'

47. In *Rose v Telstra Corporation Limited* [1998], the Court held at [27] that:

> 'If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee then a breach of the implied obligation may arise.'

48. In *Colwell v Sydney International Container Terminals P/L* [2018] FWC 174, the Commissioner considered that:

> 'Material sent to employees by the applicant through the use of Messenger as out-of-hours conduct had the likely effect of presenting spillage or potential spillage into the workplace – where the employees would then work cheek-by-jowl together.'

49. These three cases demonstrate the more general expansion in a number of different jurisdictions of the notion of the workplace, and what sort of conduct is and is not prohibited.

BIOGRAPHY

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Ian is a barrister specializing in industrial and employment law at Denman Chambers. He graduated from the Australian National University with a Bachelor of Arts and Bachelor of Laws. Ian has been featured in Doyles Recommended Leading Employment Barristers numerous times since 2012.

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Kylie graduated with a Bachelor of Laws and Bachelor of Economics (Honours) from the University of Sydney. She was admitted to the Bar in 1997 and appointed Senior Counsel in 2012. Kylie was also elected to the Council of the Bar Association in 2011 and also 2017. Prior to this, Kylie was also the President of NSW Young Lawyers and Chair of the Law Society's Equal Opportunity Committee.

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