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Précis Paper

Sexual Harassment after #Metoo

A discussion on the history of the law in relation to sexual harassment in Australia, together with the current position of the law and the impact of the #MeToo movement on sexual harassment and sexual harassment complaints.

Discussion Includes

- History of sexual harassment laws in Australia
- Gender differences in response to unwelcome conduct
- Reporting
- Third parties and sexual harassment
- Complaints and the #metoo movement
- Sexual harassment in the workplace
- Changes in damages
- Changes to the *Australian Human Rights Commission Act* 1986 (Cth)

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Sexual Harassment after #Metoo

1. In this edition of BenchTV, Kylie Nomchong SC (Barrister – Denman Chambers, NSW) and Kellie Edwards (Barrister – Denman Chambers, NSW) discuss the history of the law in relation to sexual harassment in Australia, together with the current position of the law and the impact of the #MeToo movement on sexual harassment and sexual harassment complaints.

History of sexual harassment laws in Australia

2. The #metoo movement started with an activist and youth worker named Tarana Burke, who coined the term in response to a young woman who was disclosing sexual assault which she had been subjected to.
3. It was then turned into the hashtag in October 2017 by actress, Alyssa Milano where it gained traction.
4. There is no law in Australia which relates to sexual harassment solely. In NSW, claims of sexual harassment may be brought under the *Anti-discrimination Act* 1977 (NSW) and at a federal level, under the *Sex Discrimination Act* 1984 (Cth).
5. When the *Sex Discrimination Act* 1984 (Cth) came into force there were no identifiable particular provisions for sexual harassment until it was amended in 1992.
6. Therefore, between 1984 and 1992 in order to run a sexual harassment claim, the case had to be run as a sex discrimination claim.
7. In 1992 Parliament recognised that harassment was a different kind of cause of action and amendments incorporating sexual harassment as a separate cause of action were enacted.
8. The current provisions both at a state and federal level require certain criteria to be met to establish a sexual harassment claim.
9. The first is that there has to be an unwelcome sexual advance, comment or request for sexual favours which is directed to the individual *or* unwelcome conduct of a sexual nature in relation to the person harassed.
10. That conduct must then prove that a reasonable person, having regard to all of the circumstances would have anticipated that the conduct would have the possibility that the person harassed would be offended, humiliated or insulted.
11. The threshold to establishing sexual harassment is therefore relatively low, using an objective test whereby motive or intention on the part of the perpetrator does not need to be proved.
12. Section 29A(1A) of the *Sex Discrimination Act* 1984 (NSW) provides mandatory considerations that the court has to take into consideration when determining at a sexual harassment claim.
13. These are characteristics of the victim such as their age, their sex, their sexual orientation, their gender identity, their marital or relationship status, religious beliefs, race, colour,

national or ethnic origin and the relationship between the person harassed and the perpetrator.

14. The case of *Elliott v Nanda & Commonwealth* [2001] FCA 418 involved a much older man who was a doctor who employed a younger woman and engaged in conduct which was unwelcomed by her. At no stage, did the woman ask him to stop, however she did not participate.
15. The judge found that the power differential between the older doctor and the younger receptionist, together with the fact that her behaviour in relation to the attempts to touch her or talk to her in particular ways, showed that the advances were not welcomed by her.

Gender differences in response to unwelcome conduct

16. It is more likely that women will adopt strategies such as excusing themselves to go to the bathroom to get away from the environment but leaving the situation intact. It is rare that women will actually stand up and diffuse the situation in a confrontational manner.
17. Research shows significant differences in the ways in which men and women interact and shows that women are far more likely to avoid a confrontation of any kind than men are.
18. Further, if women do engage in confrontation in professional situations, they are labelled as angry or aggressive whereas a man is labelled assertive and in control
19. There is also research about the responses of women when they are subjected to very serious forms of sexual assault. One of the most common reactions is the 'freeze' reaction.
20. The 'freeze' reaction is part of the flight/fight response and refers to a very basic neuro-biological working of the body in which when people feel as though they do not have the power or control to flee the situation, they will 'freeze.'
21. It is a physiological shutting down of the neocortex which means they are unable to reason their way out of a situation.
22. In a court situation, it can be very important to have good medical evidence available for judges who do not understand the physiological response in this context.
23. Research has also shown that women have learned over time what happens when a man's advances are rebuffed and that is usually an adverse reaction towards the woman who are then ostracised in the workplace.

Reporting

24. The Human Rights Commission has recently released (August 2018) a report entitled 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces.'
25. The report shows that there are around 20 complaints a month dealing with sexual harassment, which make up about a quarter of the sex discrimination complaints under the *Australian Human Rights Commission Act* 1986 (Cth).

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26. The amount of formal reports to the Human Rights Commission has largely been unchanged in response to the #MeToo movement.
27. Another statistic shown by the report is that 17% of people who made a formal complaint resigned from their place of work.
28. Further, the report shows that around 71% of people have been harassed in their lives and of that, only around 1 in 5 have made any type of formal complaint.
29. Since the sexual harassment provisions have been in place since 1992, such low reporting statistics seems to indicate that the educative value of the legislation appears very small.
30. The report seems to indicate that it is young people who are most likely to be victims of sexual harassment and it is these people who are the lease knowledgeable about their rights in this area.
31. The Human Rights Commission report provided the legal definition of sexual harassment and asked whether people had been victims of such behaviour and found that there were low levels of reporting.
32. However, the report subsequently provided a list of detailing sexually harassing behaviours and asked if any of those had taken place. The reporting rates rose markedly.
33. This shows that there is a gap between legislation and how people understand it and whether they can identify whether they have been the subject of some type of sexual harassment.

<u>Third parties and sexual harassment</u>

34. A third person is unable to make a complaint about the sexual harassment they have observed in relation to one person by another as they must be the subject of the harassment.
35. However, they can make complaints to human resources or higher management.
36. Section 105 of the *Sex Discrimination Act* 1984 (Cth) dictates that if a person permits conduct of a discriminating nature occur, or if they aid or abet it, then they can be held liable also.
37. Whilst section 105 explicitly does not apply to conduct that is sexual harassment, a harassment claim can be plead as a discrimination claim and therefore, section 105 may still apply.
38. Therefore, if a colleague or a supervisor observes or hears about sexual harassment in the workplace, it is incumbent upon them to do something because if they do not, they may be found liable to acquiescing to it and condoning it.
39. The case of *Elliott v Nanda & Commonwealth* [2001] FCA 418 is an authority for how people other than the perpetrator could be held liable for damage to the victim.
40. The Commonwealth Employment Service, who referred the applicant to the doctor, was aware that he had been the subject of sexual harassment complaints on numerous other occasions.
41. The applicant brought her complain both against the doctor and against the Commonwealth Employment Service and was successful.

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42. The case provides authority for unlawful conduct by rendering liable a person who could have prevented the conduct from occurring, or who continues the conduct or who assists directly or indirectly in its performance.

Complaints and the #metoo movement

43. Part of the dominant paradigm is that women have always been placed in the position of responsibility about dressing appropriately and not inviting attention and therefore their credibility is called into question when they make these types of complaints.
44. Further, women are reluctant to make complaints because of the embedded culture that somehow the woman is responsible. They also tend to not want to engage in confrontational behaviour as they think it will escalate and make the workplace even more difficult.
45. Another reason may be that many organisations have developed internal procedures that deal with anti-discrimination, bullying and sexual harassment policies. Therefore, if complaints of sexual harassment are effectively dealt with in an internal basis, this may be a reason why less formal complaints are being brought before the Commission.
46. A difficulty in making a formal complaint and subsequently bringing a case in discrimination is that if a person is not successful, they may be liable for the other side's legal costs.
47. Therefore, there are significant personal and financial risks associated with bringing a discrimination case.

Sexual harassment in the workplace

48. The *Sex Discrimination Act* 1984 (Cth) explicitly prohibits sexual harassment in the workplace, however what constitutes a workplace is changing over time.
49. Section 28B(6) of the *Sex Discrimination Act* 1984 (Cth) provides that it is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons.
50. However, sexual harassment can go beyond the walls of an office.
51. A case which shows this is *Vergara v Ewin* [2014] FCAFC 100. The case concerned a male, Mr Vergara who was an employee who made sexual propositions to Ms Ewin. The evidence showed that Ms Ewin suggested that they go across the road to the pub as she thought it would be safer there with other people around. The sexual harassment continued at the pub where he made further sexual advances. She rebuffed them, came to work the next day and they continued.

52. In his decision, which was subsequently upheld at the Full Court level, Justice Bromberg held that the events that happened at the pub were part of the workplace harassment as it was a continuation of the harassment that had occurred in the workplace.
53. This case shows that if the conduct is seen as part and parcel with conduct at work, it could very well be workplace conduct for which the employer is vicariously liable.
54. This is further evidenced by recent cases which have come out of the Fair Work Commission, such as *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174.
55. This case involved an employee who, on his RDO distributed some pornographic videos to his Facebook friends including some people from work. One of the colleagues subsequently reported and he was fired. The termination was upheld by the Fair Work Commission.
56. When people are subjected to conduct which makes them feel uncomfortable in a socially authorised environment such as the workplace, it is imperative to remember that all workplaces have their own culture and this tends to mean that people switch of their radar, grow comfortable in the culture and stop looking at people for signs of appropriate conduct.
57. There are cases of people engaging in sexual harassment conduct without questioning or being aware of it and part of that is that there is a layer of social acceptability about certain conduct based on where we are as a society in Australia at this given point in time, as well as the particular workplace.
58. The Human Rights Commission has noted that there is certain sectors of the community have a greater problem with this than others.

<u>Changes in the award of damages</u>

59. Damages in sexual harassment claims are assessed in the same way as personal injury/tort damages which means all necessary principles will be taken into account.
60. This includes the 'eggshell skull rule' that there may be sexual harassment or conduct which is seemingly minor in its kind but which delivers an effect upon the victim of a much more significant proportion.
61. To be successful in a sexual harassment claim, if there is any type of injury as a result of the treatment, good medical evidence is important in establishing a case.
62. Medical evidence may also be contemporaneous as the person may also be exhibiting symptoms such as of an anxiety disorder.
63. The case of *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 shows how the courts are recognising the impact of sexual harassment on victims.
64. In this case, a woman established a case of sexual harassment and the judge at first instance awarded $18,000 in general damages for her humiliation and distress.
65. On appeal, the Full Court of the Federal Court, Justices Kenny, Besanko and Perram said that $18,000 was manifestly inadequate and a large part of the judgement dealt with the need for awards of damages to indicate community attitudes towards this kind of conduct.

66. Mrs Richardson had medical evidence of anxiety which was permanent in nature but not likely to impede her daily life in a very significant way nor impede her ability to work. The Full Court of the Federal Court found that this enough for an award of $100,00 in general damages.

67. The lower end of the spectrum, that is people without any medical diagnosis or injury or evidence but have still suffered greatly by what has happened can still be awarded significant damages.

68. In the case of *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 ("Murugesu"), the applicant was awarded $40,000 in general damages. The Judge held that even though he did not believe that the racist remarks the applicant claimed to be the victim of took place on anywhere near the amount of occasions the applicant asserted, they were deeply distressing for the victim.

69. Whilst this case did not concern sexual harassment, the award of damages in discrimination cases is analogous to sexual harassment cases. The case of *Murugesu* shows that the courts are recognising that such conduct can be deeply distressing and which may have long term effects on the victim.

70. If someone has a mental illness or disability of some kind and the employer is aware of that and they then take action to exacerbate that injury, this will be held to be worthy of a significant award of damages up to $75,000 in a case as seen in the case of *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827.

71. In this case, the applicant had significant disabilities which resulted in the department giving her a job to accommodate these. They subsequently turned her back on this without reason which ultimately resulted in an exacerbation of her existing psychiatric conditions.

72. At the highest spectrum of an award of damages is the case of *Nationwide News Pty Ltd v Naidu and Anor ISS Security Pty Limited v Naidu and Anor* (2007) NSWCA 377 ("Naidu"), in which the applicant was awarded $380,000 in general damages and $100,000 in exemplary damages.

73. The case of *Naidu* had elements of sexual harassment in it although it was pleaded as a negligence case. It involved relentless harassment and degrading behaviour by a supervisor of a cleaner at Nationwide News which went on for many years.

74. Naidu was left with post-traumatic stress disorder and was never able to work again.

75. The *Naidu* case was subsequently referred to in the case of *Qantas Airways Limited v Gama* [2008] FCAFC 69 and used as justification to protect an award of general damages for Mr Gama who suffered 'lower level' discrimination and harassment and was awarded general damages in the sum of $40,000.

76. It was appealed to the Full Court of the Federal Court and *Naidu* was one of the cases which was used to argue that there was some jurisprudential parity needed between tort law and the discrimination jurisdiction.

Changes to the *Australian Human Rights Commission Act* 1986 (Cth)

77. Some changes to the *Human Rights Commission Act* 1986 (Cth) have significant implications for people who have some significant injuries as a result of what they have suffered.

78. In particular, people who have a very significant psychiatric injury such as post-traumatic stress disorder, major depression or anxiety that person is in a compromised position in relation to participating in litigation.

79. One of the significant changes to the *Australian Human Rights Commission Act* 1986 (Cth) is that discretion is now being given to the president to decline complaints which are more than 6 months old.

80. If the case is more than 6 months old an applicant must seek leave of the Full Federal Court of the Federal Circuit Court to try and say that it has reasonable prospects.

81. This time frame makes it difficult for people who are dealing with severe psychiatric injury.

BIOGRAPHY

Kylie Nomchong SC

Barrister – Denman Chambers, NSW

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 in 2017. Prior to this, Kylie was also the President of NSW Young Lawyers and Chair of the Law Society's Equal Opportunity Committee.

Kellie Edwards

Barrister – Denman Chambers, NSW

Kellie Edwards was admitted as a solicitor in 2001 and called to the NSW Bar in 2005. She specialises in the various employment and discrimination jurisdictions and is a qualified arbitrator and mediator. Kellie was previously a sitting member in the Equal Opportunity Division of the NSW Administrative Decisions Tribunal and prior to her legal career Kellie worked in private enterprise, the community sector and government. Kellie is also a guest lecturer at UTS and regularly presents legal seminars and papers. Outside of chambers, Kellie has a passion for painting and music.

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Legislation

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