Refining the regulation of sexual harassment

Virginia Grainer

Sexual harassment is no longer the novelty it was in the 1970s and early 1980s. It is now recognized for what it is - an abuse of power most often perpetuated by men against women.[1] Anita Hill's experience has confirmed for the world that allegations of sexual harassment are to be taken seriously.[2] Hopefully, considerable progress has been made in this jurisdiction since 1985 when the Equal Opportunities Tribunal virtually apologised to a defendant for finding him guilty of sexual harassment.[3] It is time to stop congratulating ourselves that the problem is now acknowledged and that procedures exist to cope with it.[4] These procedures must be refined so that they are no longer the blunt instruments they once were. Refining the regulation of sexual harassment must be placed high on the agenda of legal change.

Over the last twenty years sexual harassment has been labelled and analysed. The development of its regulation is well chronicled. In this article, I am concerned with only three of the areas in which problems arise in the regulation of sexual harassment: definition of sexual harassment, privacy and the use of alternative dispute resolution methods. I will focus on the New Zealand legislation for the regulation of sexual harassment: the Human Rights Commission Act 1977; the Employment Contracts Act 1991, the Human Rights Bill 1992 which is at present before Parliament and the Victoria University of Wellington Statute on Sexual Harassment, an example of sexual harassment legislation tailor-made for a specific institutional setting. Scrutiny of this legislation reveals a number of problems inherent in the areas of identification of sexual harassment and the effectiveness of procedures and remedies.

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1 It is rare for an allegation of sexual harassment to be made by a man. For convenience I refer to survivors/alleged survivors as female and harassers/alleged harassers as male, though these two roles can be filled by people of either sex.

2 See generally A Hill "Sexual Harassment: The Nature of the Beast" (1992) 65 S Cal LR 1445 and the other articles in that journal; EC Jordan (1992) 15 Harvard Women's LJ 1.

3 *H* v *E* (1985) 3 NZAR 435, 349-350. The Tribunal expressed its "great sympathy" inter alia for the defendant, adding: "All we can say is that once the plaintiff decided to exercise her right to proceed with her claim (despite the conclusion of the Commission that it did not have substance); then she was entitled to a full hearing and pursuant to the Act, the reasoned decision of this Tribunal."

4 The Equal Opportunities Tribunal first held that sexual harassment was covered by s 15(1)(c) of the Human Rights Commission Act 1977 in the case of *H* v *E* (1985) 5 NZAR 333. See also *Proceedings Comissioner* v *S* [1990] NZAR 233, 236 where the Equal Opportunities Tribunal, in finding that sexual harassment was covered by s 15(1)(c) of the Human Rights Commission Act 1977, adopted the approach in *H* v *E* that "[a]ny other approach would ... be entirely 'out of step with modern society'".

I DEFINING SEXUAL HARASSMENT

Defining sexual harassment is difficult. Over the past twenty years, survivors of sexual harassment have learnt that the behaviour directed at them specifically because of their sex, and which causes them unease or distress, is "sexual harassment". As yet, this conduct is only actionable in certain contexts, such as the workplace and educational institutions. Wolf-whistles from a construction site are recognised by most women as a blatant form of sexual harassment but generally the law does not attempt to control this behaviour. A woman who is wolf-whistled can do little more than berate the people concerned or whistle back.[5] Neither does the law in New Zealand provide any recourse for a woman who is sexually harassed by her partner, although rape and sexual assault within marriage are now actionable.[6]

Part of the problem is that behaviour that is considered objectionable by one person may be considered to be socially acceptable "normal banter" or "just lighthearted fun" by another. Alleged harassers have frequently claimed to be surprised that complainants have found their behaviour offensive.[7] Internationally, debate continues over whose perspective should prevail. The appropriateness in this context of an objective test, whether a reasonable person, reasonable woman or reasonable man test, has been queried.[8]

Scrutiny of the legal definitions of sexual harassment in New Zealand law shows that none of the definitions is perfect.

A *Human Rights Commission Act 1977*

There is no specific provision in the Human Rights Commission Act 1977 addressing sexual harassment. It is therefore dealt with under section 15(1)(c) of that Act, which requires, inter alia, that the Commissioner show that the complainant suffered detriment which occurred by reason of that person's sex. In the absence of a definition of sexual harassment in the Act, some indication of the meaning of sexual harassment can be gleaned from the policy statement on sexual harassment in

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5 Under cl 76 of the Human Rights Bill such behaviour may be actionable if, for example, it is unwelcome or offensive to the person who is the subject of the behaviour and if it has a detrimental effect on that person's access to a place, vehicle or facility.

6 Crimes Act 1961, s 128(4).

7 EF Paul "Sexual Harassment as Sex Discrimination: a Defective Paradigm" (1990) 8 Yale L and Policy R 333, 358; W Pollack "Sexual Harassment: Women's Experience vs. Legal Definitions" (1990) 13 Harvard Women's LJ 35, 52.

8 NS Ehrenreich "Pluralist Myths and Powerless Men: the Ideology of Reasonableness in Sexual Harassment Law" (1990) 99 Yale LJ 1177; EM Blackwood "The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity " (1992) 16 Vermont LR 1005; BB Westman "The Reasonable Woman Standard: Preventing Sexual Harrasment in the Workplace" (1992) 18 William Mitchell LR 795; TB Adams "Universalism and Sexual Harassment" (1991) 44 Okla LR 683.

employment issued by the Human Rights Commission in 1987.[9] It defined sexual harassment as:-

> ...verbal or physical conduct, including the misuse of visual or written material, of a sexual nature by one person against another and:
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> 1 The conduct is unwelcome and offensive and might reasonably be perceived as being offensive and
> 2 The conduct is of a serious nature or is persistent, to the extent that it has a detrimental effect on the conditions of an individual's employment, job performance or opportunity.

While this definition appears objective, the Equal Opportunities Tribunal, in a 1990 case[10] applied a subjective test. The Tribunal was satisfied that the 15 year old complainant in question "found it quite repulsive that this 'old man' [her employer] should make sexual advances to her".[11] The Equal Opportunities Tribunal ordered that the defendant be restrained from unsolicited or unwelcome and offensive behaviour of a sexual nature. The Tribunal then, however, qualified this order with the seemingly objective requirement that this behaviour also must "... reasonably be perceived as unsolicited or unwelcome". The question remains: reasonable from whose standpoint?

B The Definition in the Employment Contracts Act 1991

Sexual harassment complaints can also be made under the Employment Contracts Act 1991 which provides in section 29(1) that:-

> an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer-
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> (a) Makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity which contains-
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> (i) An implied or overt promise of preferential treatment in that employee's employment; or
> (ii) An implied or overt threat of detrimental treatment in that employee's employment; or
> (iii) An implied or overt threat about the present or future employment status of that employee; or
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> (b) By-
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> (i) The use of words (whether written or spoken) of a sexual nature; or
> (ii) Physical behaviour of a sexual nature,-
> subjects the employee to behaviour which is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative)

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9 Policy Statement on Sexual Harassment HRC (1987) 1, (on file with author).
10 *Proceedings Commissioner* v *S* above n 4.
11 Above n 5, 236.

> and which is either repeated or of such a significant nature that it has a detrimental effect on that employee's employment, job performance, or job satisfaction.

The same definition of sexual harassment applies to behaviour by an employee or customer or client of the employee's employer.[12] However, an employee must have complained once to her employer about a client's or co-worker's behaviour before a repeat of the behaviour is actionable under personal grievance procedures. By contrast sexual harassment by an employer is actionable in the first instance. Presumably, this distinction reflects a policy consideration that the employer should bear the brunt of the responsibility for sexual harassment in the workplace. The provision allows an unsuspecting employer the chance to intervene to stop the offensive conduct of employees or clients before grievance procedures come into operation. Giving employers this chance, however, exposes employees to greater risk of repeated harassment.

The use of an objective standpoint within the definition of sexual harassment remains an issue in the Employment Contracts Act 1991. This Act identifies two forms of sexual harassment. Section 29(1)(a) covers what has been called *quid pro quo* harassment,[13] that is, the extraction of sexual favours in return for a benefit, or conversely a detriment, if the person will not oblige. Section 29(1)(b) covers another form of sexual harassment - the creation of "a hostile environment".[14]

Presumably, whether section 29(1)(a) has been satisfied is to be ascertained according to an objective test. However, difficulties may arise identifying just what behaviour is caught by this section: neither "sexual contact" or "sexual activity" are defined in the Act. Section 29(1)(b) contains a subjective test qualified by an objectively ascertainable requirement that the behaviour be repeated or be of such a significant nature that it has the prescribed detrimental effects. Therefore, no action can be taken under section 29(1)(b) until the behaviour in question is repeated or until the prescribed detrimental effects occur, even if it is obvious that the behaviour is likely to be repeated or, if left unaddressed, will eventually have detrimental effects. The fact that the behaviour in section 29(1)(a) is actionable whether or not it is repeated or has actually had a detrimental effect seems to indicate that *quid pro quo* harassment is viewed more seriously by the legislature than the creation of a hostile environment.

C Human Rights Bill 1992

Sexual harassment is specifically addressed in the Human Rights Bill 1992.[15] Clause 76 of the bill provides that:-

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12 Employment Contracts Act 1991, s 36.

13 C MacKinnon *Sexual Harassment of Working Women: A Case Study of Sex Discrimination* (Yale University Press, New Haven, 1979) 32.

14 Above n 13, 40; Mackinnon describes this as "a condition of work" harassment.

15 It is proposed that the Human Rights Amendment Bill will come into force on 1 November 1993.

(1) It shall be unlawful for any person to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment contrary to the provisions of sections 35, 50, 51, 52, 54, 58, 67, and 71 of this Act.

(2) It shall be unlawful for any person, by the use of words (whether written or spoken) of a sexual nature or of visual material of a sexual nature or by physical behaviour of a sexual nature, to subject any other person to behaviour that-
(a) Is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); b) Is either repeated, or of a significant nature, and has a detrimental effect on that person's-
(i) Employment; or
(ii) Participation in a partnership; or
(iii) Participation in an industrial union or professional or trade association; or
(iv) Access to an approval, authorisation, or qualification; or
(v) Participation in vocational training; or
(vi) Access to places, vehicles, and facilities;or
(vii) Access to or use of goods, and services; or
(viii) Access to or use of land, housing, or other accommodation; or
(ix) Participation in education.

Clause 76(1) closely resembles section 29(1) of the Employment Contracts Act 1991 without addressing its drawbacks, but thankfully introducing some consistency into this area. There does remain an important inconsistency between the two Acts in that section 29(1) of the Employment Contracts Act 1991 requires the behaviour be either repeated *or* be of such a significant nature that it has a detrimental effect. Clause 76(2) of the Human Rights Bill, however, requires the behaviour to be either repeated or of a significant nature *and* cause a detrimental effect. The meaning of "significant" is clear in the Employment Contracts Act 1991. In that Act the definition creates a causal connection between the behaviour being significant and the detrimental effect. In the Human Rights Bill 1992 the behaviour must be both significant *and* cause a detrimental effect. Significant from whose point of view? The actual alleged victim or the actual alleged harasser? A reasonable person? A reasonable woman? A reasonable man? Inevitably, if this clause remains unchanged, the Human Rights Commission will eventually be called upon to clarify the meaning of the word "significant". This could be avoided by adopting the wording in the Employment Contracts Act 1991.

D VUW Statute on Sexual Harassment

Sexual harassment thrives where power is unequal.[16] A university community, largely made-up of young, ambitious students, vulnerable in their eagerness to get good grades, and academics, who ultimately decide their students' academic fate, provides an ideal environment for sexual harassment. Accordingly a university must have efficient

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16 Above n 14, 9.

mechanisms for dealing effectively with any cases of alleged sexual harassment that may occur.

The Victoria University Statute on Sexual Harrassment deals with complaints of alleged sexual harassment specifically within the Victoria University environment.[17] The Statute has a two step definition of sexual harassment.

Sexual harassment is defined as:-

... any form of sexual attention which

(a) is unwelcomed or unwanted by the member of the University community to whom it is directed, and
(b) interferes with, or is likely to interfere with
(i) the pursuit of study or work at the University by the member of the University community to whom it is directed, or
(ii) the proper enjoyment by the member of the University community to whom it is directed of the University's amenities, or social or recreational opportunities.

Sexual attention is defined as:-

(a) attention of a gender- or sexually oriented nature;
(b) includes
(i) where it is of a gender- or sexually - oriented nature, conduct such as spoken or written denigration or abuse (including jibes, innuendo, and offensive jokes), unnecessary physical contact (including touching, patting, and pinching), offensive gestures,
(ii) leering at or ogling a person's body,
(iii) the demand for sexual favours, and
(iv) physical sexual assault:

Under this definition sexual harassment is subjective. The sexual attention must be unwelcome or unwanted by the alleged victim. This is qualified by the requirement that the sexual attention must interfere with or be likely to interfere with the person's study or work, or enjoyment of the university's amenities. Unlike the Human Rights Commission Act 1977, the Employment Contracts Act 1991 and the Human Rights Bill 1992, the VUW Statute does not require a detriment to have already occurred. It is enough that it is likely that interference to work, study or enjoyment of University facilities will occur.

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17 The Victoria University of Wellington's Statute on Sexual Harassment came into force in 1991. The Statute closely resembles the 1986 Victoria University of Wellington's Regulations on Sexual Harassment but incorporates changes necessary following the passing of the Education Act 1990 and the State Sector Act 1988.

II SAFEGUARDING PRIVACY

Traditionally matters concerning the bearing and rearing of children have been considered to be private. Enforcement of what regulation there has been in this area has been carried out behind closed doors. Perhaps because sex has been associated with the family sphere and because sexual harassment is characterised as a sexual activity, harassment proceedings have often been dealt with in private with the minimum of public disclosure. It seems that its perpetrators have been afforded the same sacrosanct privacy that has surrounded legitimate sexual activity.

At present there is minimal public exposure of cases dealt with under the Human Rights Commission Act 1977. Procedures under the Human Rights Commission Act 1977 involve investigation of a complaint by the Commission. Matters may be resolved at this point without the parties having had to confront each other face to face or without there being any public disclosure of the complaint or the outcome of the investigation. If there is no resolution the complaint may be heard by the Equal Opportunities Tribunal. Some Equal Opportunities Tribunal cases are reported in the New Zealand Administrative Reports. However, none of the three sexual harassment cases that were brought before the Equal Opportunities Tribunal in 1991 and 1992 has yet been reported. Where cases are reported, orders are often made under section 54(3)(b) of the Human Rights Commission Act 1977 prohibiting the the publication of the whole of the evidence, or any part of the decision, that would lead to the identification of the parties involved.

The frequent use of section 54(3)(b) supports the argument that sexual harassment is caught up in the aura of intimacy that surrounds sexual activity. Hence in *Crockett* v *Canterbury Clerical Workers Union*[18] the Equal Opportunity Tribunal initially prohibited publication of of any report or account of the evidence "[b]ecause of indications in the pleadings that matters of a sensitive nature might be raised". The Equal Opportunity Tribunal has acknowledged that there is a public interest in the identity of an harasser, but has often granted name suppression in order to protect the interest of other people involved.[19] Name supression is laudable when the survivor benefits. But name suppression may be less appropriate when it only benefits the partner and family of the offender. Maybe if more recognition were given to the misuse of power, and the violence against bodily integrity that is involved in sexual harassment, harassers would not so frequently be allowed to shelter behind anonimity.

The paramount object of the publicity principle that is inherent in our justice system[20] is to ensure that justice is done.[21] It is based on the belief that the public has an interest in the administration of justice. It assists the administration of justice by

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18 (1983) 3 NZAR 435, 436.

19 *Proceedings Comissioner* v *S* above n 4; *Proceedings Comissioner* v *L* Unreported, 31 October 1991, EPT 1/19.

20 See generally C Bayliss "Justice Done and Justice Seen to be Done - the Public Administration of Justice" (1991) 21 VUWLR 177.

21 *Scott* v *Scott* [1913] AC 417, 437.

encouraging accuracy and accountability. Public knowledge of proceedings can act as a punishment, a deterrent and as an educative tool. The consciousness-raising aspect of such publicity should not be overlooked. However, the publicity principle is only a means to an end and if justice is better served by privacy, the principle must yield.[22] The question remains whether justice is better served in sexual harassment matters by allowing publicity or protecting privacy.

While confidentiality is important to survivors who otherwise may be hesitant about coming forward with their complaints, there must be as much exposure of the matters surrounding sexual harassment as the survivors' desire for privacy will allow. The rationale for the publicity principle applies as much, if not more, in sexual harassment proceedings as elsewhere in our legal system. Sexual harassment flourishes in private. Exposing the problem is part of the cure. Sexual harassment procedures should not readily provide anonimity for the harasser. The right to privacy for consenting adults engaged in sexual activity may not be an issue,[23] but once a person misuses his power and subjects another person to sexual conduct that causes them unease or distress it is then appropriate for the public to be aware of the situation. Exposing the problem can facilitate both the victim and the harasser getting the assistance they require. Therefore, it is appropriate to allow name suppression only in cases where it is necessary to protect the survivor.

III THE USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES IN SEXUAL HARASSMENT PROCEEDINGS

Sexual harassment complaints made under the Human Rights Commission Act 1977, the Employment Contracts Act 1991 and the Victoria University Statute on Sexual Harassment all utilise alternative dispute resolution techniques. Alternative dispute resolution methods are used in sexual harassment proceedings because of the sensitivity of the surrounding issues. There may well be advantages for both parties in the use of alternative dispute resolution techniques. Such methods can be less stressful and threatening than adversarial methods; they can allow matters to be dealt with free of the restrictions of rules of evidence and court proceedure; they can allow the survivor to have considerable input into the process (which in itself may be cathartic); and, they can help the parties reach a resolution acceptable to both of them which may be very important if it is necessary for them to have a continuing association.

Despite these advantages, there are serious problems with the use of alternative dispute resolution techniques in an area where the problem has arisen through the abuse of power. Being required to confront one's harasser may be a painful and difficult experience for a survivor. Unless the mediator or other third party involved is very skillful the original power imbalance may produce an "agreed" settlement that is

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22 Above n 21, 437-438.

23 C MacKinnon asserts that it is a problem. She maintains that the privacy that restricts intrusions into intimacy in the bedroom protects men's rights to oppress women one at a time. See "Abortion: On Public and Private" in *Towards a Feminist Theory of the State* (Havard University Press Cambridge, Massachusetts, 1988).

weighed too heavily in favour of the interests of the stronger party.[24] Frequently agreements require steps to be taken by both parties. The harasser is to refrain from the offensive behaviour that has been the problem and in return the victim will agree to the whole matter being kept confidential. For the "privilege" of being able to go around her everyday activities without the fear of continued harassment, the survivor has had to agree to remain silent about her ordeal. Why should she have to do this? In other areas of law survivors are compensated for their suffering rather than required to carry a share of the responsibility for the resolution of the problem. In requiring survivors of sexual harassment to supply the remedy, the belief in victim responsibility is not challenged.

The Victoria University of Wellington Statute on Sexual Harassment also provides for mediation of sexual harassment complaints. The Statute raises other procedural issues in the use of mediation. Although fairness to all parties is essential for the integrity of the regulation process, the Statute may operate in a way that is unfair to the alleged harasser. There is no requirement in the Statute that the alleged harasser be advised that a complaint has been made unless the matter proceeds to a formal hearing.[25] Therefore, if the intention is that the complaint be dealt with by mediation, the selection of an appropriate mediator may take place before the alleged harasser is even aware a complaint has been made.The proceedure also does not allow for any input by the alleged harasser in the selection of a suitable mediator. As the success of the mediation is likely to be enhanced if the mediator is acceptable to both the alleged victim and the alleged harasser, consultation with both parties about the appointment of a mediator should be mandatory.

IV CONCLUSION

Sexual harassment is unacceptable. Every effort must be made to ensure that inappropriate behaviour is dealt with appropriately. Already much progress has been made to ensure that it is. But this progress must continue by addressing the areas where problems remain. Sexual harassment needs to be easily identified if it is to be eliminated. There is a need for clear and consistent definitions of sexual harassment to be used in all the relevant legislation.[26] Although the problem of sexual harassment is

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24 T Grillo "The Mediation Alternative: Process Dangers For Women" (1991) 100 Yale LJ 1545-1610.

25 Section 5(4) then requires the panel to advise the complainant and the person complained about of the hearing "as soon as possible and in any case not less than 28 days before the date of the hearing...".

26 Covert behaviour that does not fit in with current definitions of sexual harassment can be experienced by some people as being sexual harassment. At present sexual harassment has to be expressed in certain ways, reach a certain threshold and be offensive to a specific individual before it can be actioned. But sexual harassment is not just about sexist jokes and offensive overtures. It is also about societal attitudes; the sort of attitudes that create the environment where sexist advertising is a sure way to sell a product. While overt forms of sexual harassment are now generally recognised as such and are dealt with by the legislation, more covert forms are yet to gain recognition. Refining the present definitions will undoubtedly increase the effectiveness of the legislation to deal with covert sexual harassment. However,

now largely recognised for what it is, there is a need for even greater openess. Procedures for dealing with sexual harassment must also operate fairly for all. Greater public awareness of sexual harassment and the refinement of the relevant legislation and procedures are necessary steps towards its elimination.

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alongside such legislative tinkering, it is now also time for some fundamental reconsideration of concepts of sexual harassment. It is not however, within the scope of this paper to discuss this aspect further.