

CHAPTER 1

SEXUAL HARASSMENT

1.1 Sexual harassment captures headlines. It is written about in the daily press. It appears in court reports and mass distribution women's magazines as well as feminist publications.

1.2 It mesmerised television viewers in the United States when Anita Hill brought charges against judge Clarence Thomas. It brought about the discharge and the early resignation of several of the most senior officers in the United States Navy in the wake of the *Tailhook* affair.

1.3 It has been explicitly addressed in Australian law since 1984. In the ten years that have passed since the passage of the Sex Discrimination Act in that year, sexual harassment has come to be recognised as a matter that can adversely affect work performance, and is therefore of legitimate and necessary concern to managers in the workplace. The Public Service Board first developed guidelines for public service managers and employers in 1986.

1.4 The issue again hit the headlines in September of 1993 with sensational allegations about sexual harassment aboard one of the Royal Australian Navy warships, HMAS SWAN, during the preceding year.

1.5 The term itself has now become part of our daily vocabulary. At first glance, sexual harassment appears to be a straightforward issue. It would be easy to assume that everyone knows what is meant when something is described or referred to as sexual harassment. The Committee's investigation of the issues raised by the terms of reference set for it by the Senate on 29 September 1993 makes it clear that it would be wrong to make such an assumption.

1.6 Everyone agrees that there is no room for sexual harassment in the workplace. But not everyone agrees on what constitutes sexual harassment. On the basis of the extensive evidence before it, the Committee concluded that the issue is far more complex than the headlines suggest. The following section looks at some of these complexities.

What is sexual harassment?

1.7 There is no doubt that there is a wide consensus in the Australian community today that certain kinds of sexual behaviour are unacceptable and are not to be tolerated. The difficulty arises when agreement is sought on a precise definition or description of the type of behaviour that is unacceptable.

1.8 Most commonly, it is said that any sexual behaviour that is unwelcome constitutes sexual harassment.

1.9 There is a beguiling simplicity about this view of sexual harassment. On closer examination, however, it quickly becomes evident that such a view of sexual harassment ignores many very important considerations.

Sexual assault

1.10 It is outside the terms of reference of this inquiry to enter into a detailed consideration of the way in which the criminal law defines and deals with the most serious sexual offences such as sexual assault. It is instructive, however, to note that even at this extreme end of the scale of sexually abusive behaviour there are difficulties and complexities with which our society is still grappling. For example, the definition of what constitutes a sexual offence in criminal law has undergone change over the last decade.

1.11 Many aspects of the law relating to sexual assault generate heated debate in the community. In recent times there has been considerable community questioning of the comments by judges in some cases of sexual assault. There is also much public discussion about the concept of consent. The nature of consent and the responsibilities of both partners in relation to consent have become central issues in what has come to be called "*date-rape*".

1.12 With regard to this inquiry, the important point to make is that sexual assault is a criminal matter. Any allegations of sexual assault within Australia are, therefore, a matter for the police authorities. This applies in the case of members of the Australian

Defence Force in the same way as it applies to any other persons in Australia.¹

1.13 A jurisdictional complication arises in the case of allegations of sexual assault on board an Australian naval vessel outside Australia's territorial waters. The handling of such instances is dealt with in Chapter 8 of this report.

Sexual harassment

1.14 If there are some grey areas around the question of sexual assault, it is not surprising that the grey areas around the notion of sexual harassment are substantially greater.

1.15 The concept of sexual harassment itself is relatively recent. That is not to say that the reality of sexual harassment has not been around for a long time. There is no doubt that what we now broadly refer to as sexual harassment has existed in many societies in some shape or form over the centuries.

1.16 However, in its modern manifestation it first came into focus in the United States in the early 1970s. The identification of the phenomenon of sexual harassment coincided with the blossoming of the feminist movement and the increasing assertion by women of equal rights in the workplace, in the home and in society in general. Sexual harassment was recognised as one form of discrimination.

1.17 In Australia, sexual harassment was first codified in the *Sex Discrimination Act 1984*. Amendments with important implications for the meaning of sexual harassment in law were adopted by the Australian Parliament in December 1992.

1.18 As noted previously, while most mature men and women agree there are some sexual behaviours that are undesirable in the workplace, problems arise as soon as

1 The Committee notes, however, the observation by the Federal Sex Discrimination Commissioner, Ms S. Walpole, in her submission to the inquiry that the *'system of redress introduced by the SD Act [Sex Discrimination Act] is now used increasingly to obtain a remedy for a range of behaviours and actions which would constitute criminal conduct. Although complainants are aware that they can take criminal action, some choose the less intimidating conciliated approach which avoids the negative experience associated with an adversarial system and can provide access to a range of benefits such as monetary compensation'*. Committee Hansard, p. 49.

one attempts to define what constitutes undesirable sexual behaviour in a way that will be unambiguously identified and agreed by the individuals involved and by society at large.

1.19 In her evidence to the Committee, Ms Cane, representing the Public Service Commission confirmed, for example, that people working in the field of sexual harassment in the Australian Public Service believe that:

*"there are some difficulties with definition of sexual harassment, that people's views differ, especially at the lesser end of the scale of incidents, as to what it should or might cover."*²

Impact of change - women in the Services

1.20 Triulzi Collins Solutions, consultants to the Navy on sexual harassment, point to a common strain that has increasingly emerged in public discussions:

*" Women are upset. Men don't understand why."*³

1.21 It should come as no surprise that the push for equality of opportunity for women in the armed forces has met with resistance in some quarters. Indeed, it would be most surprising if there were no such resistance.⁴

1.22 In the first place, the integration of women on a large scale is a major change. As in any major change there is a sense of loss for existing members of the organisation. It has been said by organisational change experts that:

*"making employees feel good about change is a challenge for today's managers."*⁵

2 Ms M. Cane, Committee Hansard, p. 1040.

3 Triulzi Collins Solutions, submission, Committee Hansard, p. 616.

4 Ms S. Triulzi, Committee Hansard, p. 733.

5 Rosabeth Moss Kanter, quoted in Triulzi Collins Solutions, submission, Committee Hansard, p. 623.

But as Ms Triulzi says:

*"the simplicity of the above statement ... hides the 'real' fears and grieving which employees experience when faced with workplace changes."*⁶

1.23 There are both real and imagined differences between men and women that create both real and perceived problems of fairness and equity.

1.24 It is probably equally fair to say that:

Men feel resentment. Women don't understand why.

One way in which this resentment manifests itself is in sexual harassment.⁷

1.25 Putting it this way by no means implies that sexual harassment is justifiable or excusable or should be tolerated. It does however provide some pointers to issues that must be dealt with if a lasting and mutually satisfactory solution to the problem of sexual harassment is to be found. First amongst these is the definition of sexual harassment.

Sexual harassment - different perceptions

1.26 From 1984 to the end of 1992, sexual harassment under the Sex Discrimination Act was defined as:

"A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and -

(a) *the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other*

6 Triulzi Collins Solutions, submission, Committee Hansard, p.623.

7 See also para. 2.53 of this Report.

person's employment or work or possible employment or possible work; or

- (b) *as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work."*⁸

1.27 In December 1992, the definition was amended to the following:

"a person sexually harasses another person ("the person harassed") if:

- (a) *the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed;*
or
- (b) *engages in other unwelcome conduct of a sexual nature in relation to the person harassed;*

*in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated."*⁹

1.28 In contrast to the earlier definition, it is now no longer necessary for the complainant to demonstrate disadvantage as a result of sexual harassment. The crux of the difficulty with this definition lies in the very subjective nature of the criterion itself. What is felt as unwelcome by a woman, for example, may be perceived by a man in an entirely different light. In the literature on sexual harassment there are frequent references to the differences between men and women in how a particular situation is perceived. A comment genuinely regarded by the man as a friendly compliment may be perceived by a woman as sexual harassment.

⁸ Section 28 (3), *Sex Discrimination Act 1984*. This was the definition in force at the time of the incidents on the SWAN.

⁹ Section 28, *Sex Discrimination Act 1984*. The amendment was introduced following a recommendation in the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Equal Opportunity and Equal Status, tabled in April 1992.

1.29 Moreover, not only is there very often a difference in the way in which men and women perceive and react to different sexual behaviours, there can be equally wide variations in the way different women react to exactly the same objective set of circumstances. Where one woman may feel offended another may rejoice. A wolf whistle may be perceived by one woman as a sign that she is being crudely treated as a sex object. Another may just as easily receive it as a compliment and a welcome boost to her self-esteem.

1.30 To complicate matters further, the same woman might well subjectively react differently to the same objective set of circumstances at different times. The young woman who, at the age of seventeen or eighteen, might feel discomfited by the wolf-whistle might react very differently if she manages to attract the same kind of attention some twenty or thirty years down the track.

1.31 Conversely, a fifty year old conservative matron might find herself blushing with embarrassment at comments that today's seventeen year old regards as perfectly natural and normal having been, in all probability, exposed to a diet of sexually explicit articles and photographs in some of the magazines that fill the stands of the local newsagent every month.

1.32 It can even be said that what is acceptable to someone one day, may prove unwelcome on another day when other pressures and stresses in that person's life have combined to lower the tolerance level or increased sensitivity to the world around them.

1.33 In reviewing the evidence before it, the Committee has noted a tendency for some observers, witnesses and interest groups to place a heavy emphasis on the complainant's perception of behaviour as unwelcome as the defining characteristic of sexual harassment. In other words, there appears to be an increasing tendency to rely on the subjective reaction of an individual as the sole criterion for determining whether or not a complaint of sexual harassment should be upheld.¹⁰

10 In this context it is relevant to note that there has not been any judicial consideration of the effect of the '*reasonable person*' element of section 28A of the Sex Discrimination Act on the operation of the section. See also paras 1.65 - 1.70 of this Chapter.

1.34 For example, the International Labour Office (ILO) publication "*Conditions of Work Digest: Combating sexual harassment at work*"¹¹ states unequivocally that:

"However sexual harassment is described and whatever the scope of the prohibition, there is one defining characteristic: sexual harassment refers to conduct which is unwanted by the recipient. It is behaviour which is unwelcome, unreciprocated, imposed."

*"Because sexual harassment refers to behaviour which is unwanted by the recipient, it follows that it is for each person to determine what behaviour they welcome or tolerate, and from whom."*¹²

1.35 According to the ILO publication:

*"That one woman tolerates or even enjoys sexual teasing or risqué jokes does not somehow deter every other woman from regarding such conduct as unacceptable behaviour."*¹³

1.36 The ILO publication concedes that:

*"On the other hand, a person's reaction to behaviour cannot be entirely unreasonable. But within those broad objective parameters, sexual harassment is essentially a subjective concept: It is for each individual to decide what does and what does not offend them. Any other standard would amount to an intolerable infringement of individual autonomy."*¹⁴

1.37 Professor Bryson points out that:

*"The law is intended to deal with the results of the behaviour and these must be seen through the eyes of the woman who experienced it."*¹⁵

11 "*Conditions of Work Digest: Combating sexual harassment at work*", International Labour Office, Geneva, Number 1 1992, p. 10.

12 *ibid.*

13 *ibid.*

14 *ibid.*, pp.10-11 (emphasis added).

15 HQADF Supplementary submission, Committee Hansard, p. 1503.

1.38 The Committee has some difficulty with the emphasis that is sometimes being given to the subjective reaction of the complainant.

1.39 Ms Susan Walpole, the Federal Sex Discrimination Commissioner appeared not to find any problem of definition. Ms Walpole stated:

*"The Sex Discrimination Act is clear. Unlawful sexual harassment covered by the Act is unwelcome, unwanted and unreciprocated. There is no doubt about community standards. There is no general misunderstanding about the parameters of acceptable behaviour whether supposedly in public or in private."*¹⁶

1.40 The evidence before the Committee indicates that the Sex Discrimination Commissioner's view that the matter is clear-cut is not shared by everyone. Ms Triulzi, who has worked extensively in private enterprise and now with the Navy, after listening to what the members of focus groups have to say, said to the Committee that:

*"...what we need to understand is that there are lots of elements of grey in understanding what sexual harassment is and is not, and how we distinguish and differentiate those levels of grey."*¹⁷

1.41 The reality is that there is some confusion and uncertainty in society about what constitutes sexual harassment.

1.42 One benchmark sometimes suggested is whether or not the individual would treat his daughter that way. Another approach suggested is to consider whether the behaviour would be acceptable in that person's own lounge-room. Courtesy and commonsense are also advocated.¹⁸

1.43 The Committee accepts the good intentions of such rules of thumb but has serious reservations about their adequacy. For example, there is much evidence emerging of serious sexual aberrations and misconduct in some apparently respectable families. While useful for many, there is little guarantee that the yardstick

16 Ms S. Walpole, Committee Hansard, p. 140.

17 Ms Triulzi, Committee Hansard, p. 740.

18 Parliamentary Departments Guidelines, Policy for the Elimination of Sexual Harassment in the Workplace.

of how one treats family members will be an adequate guide for behaviour for all in the workplace.

1.44 The question can be looked at in another way. If, as the ILO says, what one woman tolerates or even enjoys should not deter other women from regarding as unacceptable behaviour, and presumably also from taking a complaint to the Sex Discrimination Commissioner if she wishes to do so, then a legitimate and necessary question to pose is whether all possible forms of behaviour in the workplace that might be regarded as unacceptable sexual behaviour by anyone in the community must therefore be avoided or even proscribed.

1.45 As in the case of the community debate about sexual assault and "date rape" in the United States, there are strong pressures from some quarters to broaden as much as possible the meaning of terms such as sexual assault and sexual harassment. Those who wish to broaden the concepts argue, for instance, that unless a woman explicitly states that she is a willing participant in an act of sexual intercourse, she has the ability to claim rape.¹⁹ In this view of the world, in the absence of an explicit yes, the man who contrives to seduce a woman to the point of sexual intercourse does so at his peril. He runs the risk that, should she regret her wordless compliance the following morning, she would have the right to claim "date-rape".²⁰

1.46 As part of this same trend, there are pressures evident in some quarters to make the concept of sexual harassment as broad as possible. Those favouring this approach hold that, no matter if the great majority of people might regard a particular comment as harmless banter, the objection by anyone that it is offensive to him or her should be enough to make it unlawful in the workplace.²¹ This approach has a number of consequences that have not been adequately recognised. Their full impact has not been evaluated.²²

19 See for example s. 38 of the Victorian Crimes Act.

20 For a recent commentary on the developments in law in regard to rape and the issue of consent see Chapter 2 of the report by the Senate Standing Committee on Legal and Constitutional Affairs on "Gender Bias and the Judiciary" published on 13 May 1994.

21 See sub-section 28B of the Sex Discrimination Act for definition of 'workplace' and situations where the Act applies. See also footnote 31 in Chapter 2 of this Report.

22 In this context it is relevant to note the Sex Discrimination Commissioner's comments with regard to damages: *"There has been no leading decision or consideration of the issue in relation to the assessment of damages in harassment cases, but general principles would mean that the "egg-shell skull rule" would apply... The victim must be taken as they were*

1.47 There is broad consensus that certain sexual behaviours are unacceptable in the workplace. The elimination of such behaviours is a cultural change to be warmly welcomed. However, the emphasis now given to the complainant's subjective reaction as the defining characteristic of sexual harassment suggests that the only safe course for every member of the workforce to follow is to desist from all possible forms of behaviour that might be regarded as unacceptable sexual behaviour by anyone at all in the community. If this is indeed the case, then a more revolutionary cultural change still is being proposed. The Committee notes that the practical effect of seeking to anticipate possibly adverse reactions to such a wide variety of behaviours could lead to a substantial change in the inter-personal relationships in the workplace that may not be welcomed by many people.

1.48 Take, for example, a situation where someone suffers a personal loss. As Professor Kirsner says in his submission to the Committee:

"many people come from cultures or families where touching is a routine and supportive activity." ²³

1.49 For many members of the Australian community it is very natural and normal to extend and receive sympathy by a hug or an arm around the shoulder. This is a very individual matter. []Not to be consoled in this way could well be perceived by some as a sign that their colleagues do not care about their grief and misfortune. Yet a behavioural consequence of the approach outlined above to sexual harassment could well be a hesitation and reluctance, by men in particular, to offer sympathy by any physical gesture for fear of being accused of sexual harassment. In effect, the rights of individuals who wish to continue to have friendly, asexual physical contact are bound to be affected by the current approach to defining sexual harassment. The rights of one group in society are, in effect, pitted against the rights of another group.

1.50 Most surveys in this field tend to concentrate solely on attitudes to unwelcome physical contact. Very little if any research appears to have been conducted on

found, and hence if they were especially susceptible to psychological damage from the harassment, then that must be compensated. There is no commonly accepted "reaction" which can be used as a litmus test by a respondent to argue that this individual complainant has over reacted to the situation and that no "normal" woman would have had such a "reaction". Ms S. Walpole, submission, Committee Hansard, p. 61.

23 Professor Kim Kirsner, submission, para 5. Professor Kirsner nevertheless concludes that these behaviours should be eliminated in the workplace.

attitudes in the community to regulations that have the effect of eliminating all physical contact in the workplace.

1.51 There is also the contentious matter of regulating standards of dress. Although most complaints about sexually offensive behaviour come from women, there are instances where men may see themselves as victims. Can any person who feels unsettled and offended by the revealing outfits of those around them legitimately claim sexual harassment? Many people would object to being constrained in how they dress just because someone in their working environment complained in this way. However, the present definition of sexual harassment seems to allow for the possibility that such a complaint could be made out. Moreover if a complaint of this kind were to be upheld, the vicarious liability of the employer raises the question of the extent to which employers need to take responsibility for regulating standards of dress.

1.52 Australian society, perhaps more than most, is made up of a mosaic of cultural backgrounds and experiences. What is acceptable to one person may be unacceptable to another.

1.53 The infinite variety that is possible in the moods, the perceptions and the vulnerabilities, the diverse cultural backgrounds and personal experiences of our people creates a very real challenge when dealing with an issue as sensitive and personal as sexual harassment.

1.54 The lack of understanding of the definition of sexual harassment, particularly for the perpetrator, is a major issue confronting the armed forces in integrating women fully into their structures.

1.55 The entry of women in substantial numbers in workforces previously dominated or even exclusively occupied by men is a relatively recent phenomenon. There are few if any identifiably successful role models to provide signposts.

1.56 It is the Committee's view that a serious effort must be made to increase understanding of sexual harassment amongst personnel in all the Services.

1.57 In the absence of a clear understanding on the part of some of the term "*sexual harassment*", there is scope for confusion and misunderstanding. It is not a trivial matter. Circumstances could arise where uncertainty that a person might be liable to accusations of sexual harassment could in fact endanger the life of another person.

1.58 Given the nature of the activities and exercises in which the Armed Services regularly engage in, the possibility of such a situation arising in the Services environment is probably higher than in society at large.

1.59 Take for example a situation where a person may have been hurt and appear to be in need of emergency medical attention, such as mouth to mouth resuscitation, and loosening of constrictive clothing. Under the present definition of sexual harassment, it may arise that a soldier or sailor hesitates to extend the necessary assistance, particularly if there are no witnesses around.

1.60 This is by no means a fanciful scenario. The Committee was given a concrete illustration of similar circumstances. A woman being "jack stayed" from one naval vessel to another encountered hesitation on the part of an all male crew on an Australian naval vessel to grab hold of her as she landed on board the receiving ship, when she needed assistance to regain her balance.²⁴ The Navy's "no touch" rule, which has for some time been the Navy's way of seeking to apply the Sex Discrimination Act's provisions on sexual harassment, could have put the woman at risk of going overboard. While in this instance the necessary assistance was, after the initial hesitation, extended, the potential for a tragic outcome remains. The irony is that while a man cannot be sure, under the law as it now stands, whether his actions in such circumstances might attract a complaint of sexual harassment, he knows that he cannot be charged with a criminal offence (nor is he likely to find himself subject of a complaint of sexual harassment) for not extending assistance when a person's life may be at risk. Military personnel should be clearly instructed that safety of life and limb and duty of care must be the priority consideration in circumstances such as these.

1.61 It is of interest to note that the Navy Board of Inquiry into Sexual Harassment on the HMAS SWAN adopted a broad interpretation of its terms of reference. The Board did not seek to determine whether sexual harassment as defined in the Sex Discrimination Act had occurred. The Board set out its approach as follows:

"[268].In LEUT WHEAT's letter to the Minister she alleges that she and the other females onboard SWAN during the deployment were subjected to

24 Ms Sonia Humphrey, *Committee Hansard*, pp. 780-781. It is to be expected that the Sex Discrimination Commissioner would take into account and carefully examine all the circumstances in deciding whether a complaint has been made out in a case such as this. However, the crux of the difficulty remains that the average person who finds himself or herself in that situation at the time the events are occurring cannot know whether his or her actions might constitute unlawful behaviour.

sexual harassment. In considering this allegation, the Board has not used a strict definition of the words 'sexual harassment', rather it has interpreted the Terms of Reference to mean that the Board was to enquire into all matters relating to problems experienced by females onboard SWAN during the time in question, and which were the result of their gender.

[269]. Most of the issues that came out in evidence are better described as unacceptable sexual behaviour as defined in DI (N) PERS 16 - 5. Whilst this Defence Instruction had not been promulgated at the time of SWAN's deployment, the Board considers that the attitude to behaviour towards women onboard warranted close examination. It has not felt tightly constrained by strict definition of sexual harassment or unacceptable sexual behaviour, rather it has attempted to have due regard to the spirit of the instructions and guidance on gender related issues which have been promulgated. Throughout this section, unless stated otherwise, the term 'harassment' is used to cover any form of unsavoury behaviour or action towards, or in the presence of, females." ²⁵

1.62 That some people are uncertain as to the precise meaning of sexual harassment should not be read to mean that those people are not concerned about improving the work environment. There are many members of society, both men and women, who would wish to contribute to raising the standards of behaviour in the workplace. The uncertainty that flows from the subjective definition of sexual harassment creates problems of its own that can act as a hindrance rather than a help to improving those standards.

The "reasonable person" test

1.63 As noted previously, the following amendment to the Sex Discrimination Act was adopted in December 1992, thereby extending the areas where sexual behaviour is unlawful within the terms of the Act. Under this amendment:

"If the complainant feels offended, humiliated or intimidated by the conduct, and a reasonable person, having regard to all the circumstances, would have

25 BOI Report, p. 77. It should also be noted that there was a change in the definition of sexual harassment under the Sex Discrimination Act in the interval between the events under investigation on HMAS SWAN and the Board's Inquiry into those events. See paras 1.26-1.28.

*anticipated that the complainant would be offended, humiliated or intimidated by the conduct, then the complaint will be made out."*²⁶

1.64 The Sex Discrimination Commissioner states that this new definition has both "a subjective and objective element."²⁷

1.65 The application of the "reasonable person" concept in the new definition is interesting. However, it also raises a number of difficult issues. The extent to which it provides an objective balance to the subjective nature of the definition of sexual harassment is a matter of debate.²⁸

1.66 First, what attributes can this "reasonable person" be expected to have? Is that

26 Ms S. Walpole, Committee Hansard, p. 28.

27 Letter dated 14 April 1994 from Ms S. Walpole to Committee Secretary.

28 The Committee notes that the concept of a reasonable person has existed in tort law for a long time. The man on the Clapham omnibus was invented to represent the reasonable man, who, according to standard tort law texts, embodies all the qualities expected of a good citizen and probably better than anyone actually happens to be. (Fleming John G. The Law of Torts, Seventh edition, 1987, p.97.). It is intended to provide a vehicle for an objective test to be applied based upon standards of conduct expected of the community. It "eliminates the personal equation and is independent of the idiosyncracies of the particular person whose conduct is in question."Glasgow Corp v Muir [1943] AC 448 per Lord MacMillan.). Negligence is considered to be failure to do what the reasonable person would have done under the same or similar circumstances. Fleming explains the latitude of the expression makes allowances for external facts as well as personal characteristics of the actor. Of assistance in the present context is the following extract from Fleming:

"The objective community ideal alone determines whether the defendant's conduct attained the point of proper balance between self-interest and altruism. The individual's moral notions and qualities, like courage, self-control and will power, are irrelevant, be they higher or lower. 'Some persons are by nature unduly timorous and imagine every path is beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from over apprehension and from over confidence.'Glasgow Corp v Muir [1943] AC 448 at 457 per Lord Macmillan.).

"Closely allied is the quality of being able to perceive and appreciate what risks are involved in a particular activity. Perception of risk is the correlation of past experience with the specific facts in a situation, which depends to a large extent on knowledge as the basis for judging the harmful potentialities of contemplated conduct. The defendant is credited with such perception of the surrounding circumstances and such knowledge of other pertinent matters as a reasonable man with the actor's own superior perception and knowledge, if any, would possess."

Translating these concepts into the context of sexual harassment is not easy.

reasonable person male or female? It is acknowledged by many experts that there can be significant and genuine differences in the way men and women may react to the same set of sexual behaviours. Is the "*reasonable person*" assumed to be a colleague? Or is it a person who has no knowledge of any of the people involved?

1.67 Add to these complexities the different cultural backgrounds, educational levels and work experiences present in our community, and the problem of identifying the "*reasonable person*" for these purposes quickly multiplies. How familiar is the "*reasonable person*" expected to be with the group norms of the workplace in question? Can the "*reasonable person*" be a member of the group in question? To what extent can a "*reasonable person*" be expected to understand the norms of the many different cultures from which today's Australians have been drawn, let alone hazard a guess about the personal experiences that have shaped the complainant's view of himself or herself and the world?

1.68 It is important to note that the legislation requires an assessment of whether the "*reasonable person*" could have anticipated that something would be offensive, humiliating or intimidating to the complainant, not whether the reasonable person would have felt offended, humiliated or intimidated. In effect it requires the "*reasonable person*" to climb inside the skin of the complainant and see the situation from the complainant's point of view.

1.69 Commentators frequently interpret this to mean that it is:

*"sufficient that the complainant felt offended, humiliated or intimidated by the behaviour in question and that it was reasonable to have felt that way."*²⁹

The Sex Discrimination Commissioner also seems to interpret the amendment in that way.³⁰ It seems to the Committee that this is not what the amendment actually states.

1.70 The point at issue as the Committee understands it, is not how the "*reasonable person*" would define offensive behaviour but whether a "*reasonable person*" would anticipate that the complainant would consider the behaviour offensive. The Committee

29 OSWOMAN, December 1992, No 15, p. 4, quoted in HQADF supplementary submission, Committee Hansard, p. 1503.

30 Ms S. Walpole, submission, Committee Hansard, p. 43., states that "*what a 'reasonable person' would define as being offensive, humiliating or intimidatory behaviour is yet to be tested under federal jurisdiction*" (emphasis added).

would find a definition of sexual harassment which specifies that conduct amounts to sexual harassment where a "reasonable person" would have found the conduct offensive, humiliating or intimidating, more satisfactory.³¹ The Committee notes with interest that the "reasonable person" element of the Sex Discrimination Act as it now stands "is yet to be tested under federal jurisdiction".³²

Community standards

1.71 An important aspect of the sexual harassment debate that attracts less attention and less discussion than it deserves is the tension in society today between attempts to regulate or change behaviour by means of laws such as the Sex Discrimination Act and the increasingly explicit and graphic depictions of sexual relationships of all kinds in film, on television, and in literature of every kind, from the daily press to novels and academic treatises.

1.72 The limits of what is acceptable and what is not to the community at large are becoming more and more difficult to define.

1.73 Contemporary examples are the commercial television screening of films such as "Basic Instinct" or the screening by the ABC of a program such as "Sex, Guys and Videotape" with its explicit references to male and female sexuality. Unquestionably some members of the Australian community find such programs offensive. In the setting of a private home, it is clearly a decision for each family whether or not the material screened is unwelcome and whether or not a particular family chooses to watch the program.

1.74 In the case of a ship's wardroom the situation is not at all clear-cut.³³ If one member of the wardroom were to find the program offensive, does it follow that every member of the wardroom should be denied the right to view the program? Could those who insist on viewing the program be accused of sexual harassment of the wardroom member who objects? Should a single individual in those circumstances

31 The Committee accepts that this approach does not overcome all the difficulties inherent in the present definition. It does, however, reduce the degree of uncertainty in the present approach.

32 Ms S. Walpole, submission, Committee Hansard, p. 43.

33 For a discussion of the concept of workplace in the Navy context see paras 2.37 - 2.45 of this Report.

be able, in effect, to exercise censorship over programs that, by all accounts, attract record ratings? Is that not an unwanted interference with the civil liberties of those who would normally view such programs for relaxation? ³⁴

1.75 The above example highlights just one of the complexities inherent in applying the Sex Discrimination Act as it now stands in the sea-going environment.

Types of behaviours

1.76 In an attempt to clarify the meaning of sexual harassment, the guidelines of many organisations list the kinds of behaviours that might constitute sexual harassment. So for example, the 1987 guidelines promulgated by the Public Service Commission identified the following as some of the forms sexual harassment can take at work:

- . personally offensive verbal comments;*
- . sexual or smutty jokes;*
- . repeated comments or teasing about a person's alleged sexual activities or private life;*
- . persistent unwelcome social invitations or telephone calls from workmates at work or at home;*
- . being followed home from work;*
- . unsolicited letters;*
- . obscene telephone calls;*
- . stares and leers;*
- . offensive hand or body gestures;*
- . physical contact such as patting, pinching, touching or putting an arm around another person's body at work;*
- . provocative posters with sexual connotation. Even works of art may be inappropriate on occasions..."*

34 It is of interest to note that the sensitivities of those who may be offended by Penthouse magazines were accommodated on the SWAN by keeping the magazine either locked away, or at least out of sight. It is interesting to speculate whether the same rule would be applied to what are regarded as women's magazines, such as Cleo, particularly when they contain graphic photographs and explicit articles on the male as well as female anatomy.

The Guidelines add that:

"Sexual harassment can range from subtle requests to explicit demands for sexual activity or even criminal assault."

1.77 A subtle shift to a greater emphasis on sexist material or activities in addition to sexual behaviours can be seen in the guidelines put out by the Parliamentary Departments in 1991. In those guidelines, forms that sexual harassment can take at work include:

- ". display of offensive sexist or sexually oriented material (such as provocative posters);*
- . sexually oriented and sexist jokes;*
- . offensive hand or body gestures;*
- . gender based derogatory remarks;*
- . repeated comments or teasing about a person's alleged sexual activities or private life;*
- . sexually oriented kidding or verbal abuse;*
- . exertion of pressure - subtle or otherwise - for sexual activities;*
- . obscene telephone calls;*
- . requests for sexual favours accompanied by overt promises or preferential treatment or threats concerning an individual's employment status;*
- . physical contact such as patting, pinching, touching or putting an arm around another person;*
- . being followed around the workplace or home from work; and*
- . sexual assault or rape."*

1.78 There are further variations to the list of behaviours provided by the Navy:

- ". fondling, pinching, patting, touching, embracing, hugging, grabbing, kissing,*
- . repeated requests for dates, especially after prior refusal*
- . gestures or body movements of a sexual or intimidating nature*
- . requests for sexual favours, smutty jokes and comments, sexually provocative remarks, displays of sexually graphic or offensive materials including posters, pictures graffiti messages in areas publicly visible*
- . sex-based insults or taunting*
- . leering and staring*
- . tales of sexual performance*

- . sexually oriented verbal or written remarks, jokes
- . physical contact, such as purposely brushing up against or touching another person
- . suggestive comments or innuendos about a person's physical appearance or sexual preferences
- . inferences of sexual morality, eg prude, tart.
- . persistent questions about a person's private life
- . sexist jokes."

1.79 The Federal Sex Discrimination Commissioner advises that:

"Behaviours held by the Human Rights and Equal Opportunity Commission (HR&EO Commission") and other tribunals and courts to constitute sexual harassment have included:

- . intrusive questions asked at interviews and at work,
- . unwanted touching,
- . sexually explicit conversations,
- . unfastening clothing,
- . comments on appearance, demands that certain sexually suggestive clothing be worn, for example, short skirts,
- . kissing,
- . grabbing,
- . sexual intercourse under threat of loss of employment,
- . persistent requests for dates."

1.80 The important points about these lists are that:

- they are not regarded as exhaustive, merely illustrative;
- no two are exactly the same; and
- they all stress that whether the behaviours constitute sexual harassment depends on the circumstances in which it occurs.

1.81 The onus is still on each person to judge whether, "*having regard to all the circumstances*", a reasonable person would have anticipated "*that the person harassed would be offended, humiliated or intimidated.*"³⁵

³⁵ Section 28A, Sex Discrimination Act. The ILO also concedes that "*it is impossible to compile an accurate list of harassing conduct that should be prohibited. We can give examples of the forms of behaviour that are likely to be regarded as sexual harassment, but whether they*

Intent

1.82 It is also important to note that the intent of the perpetrator is regarded as irrelevant. The Sex Discrimination Commissioner stated in her evidence that *"innocent intention is no defence in sexual harassment cases"*.³⁶ This sets sexual harassment apart from most other legislation.³⁷

1.83 The question of intent is related to the question of whether the misunderstanding as to what is meant by sexual harassment that is apparently often claimed by those accused of sexual harassment is genuine or a shabby attempt to evade responsibility.³⁸

1.84 It is a distressing fact of life that there are some individuals who believe that violence is a legitimate means of imposing their will on another person.³⁹ From its examination of the evidence before it, the Committee is of the view that there are also individuals in all walks of life, who believe that sexual harassment is a legitimate tactic

*have been so regarded depends on the facts of the case i.e. whether they are welcome or unwelcome to the particular recipient.** ILO Convention of Work Digest: Combating sexual harassment at Work Vol 11 1/1992 p.11.

36 Ms S. Walpole, submission, Committee Hansard, p. 15.

37 It should be noted, however, that if behaviour which crosses the line into criminal offences is also sexual harassment, then the matter of intent (*mens rea*) would be relevant in criminal proceedings. Should the same behaviour be complained of to the Sex Discrimination Commissioner, intent would not be relevant.

38 Ms S. Walpole, submission, Committee Hansard, p.60.

39 A national survey conducted by the Public Policy Research Centre under the auspices of the Office of the Status on community attitudes towards domestic violence in Australia in February 1988, concluded that: *"One in five people (19%) consider that the use of physical force by a man against his wife is acceptable under some circumstances. This view is held by 17% of women and 22% of men. Up to 15% regarded acts such as pushing, shoving or smashing objects near the wife as acceptable. Actions such as kicking, biting, punching, beating up choking and threatening or using a weapon on the wife were regarded as acceptable by 6% of the 1504 men and women surveyed."*

for achieving their ends and who deliberately and intentionally sexually harass other employees.

1.85 There is little doubt that there are people who, when accused of harassing, feign innocence and claim they were just being friendly or funny, when in truth they were fully aware that they were offending the complainant. While the difficulty of precisely defining sexual harassment allows such people to claim misunderstanding and confusion, the Act's distinctive approach to intent makes it difficult for the accused in such a case to avoid being held accountable.

1.86 At the same time, there are individuals who can find that language and behaviour to which no one openly objected to in the past can now, in some circumstances, constitute unlawful behaviour. The efforts at educating all members of the community fall far short of what is required to feel confident that there is adequate understanding of the law on sexual harassment.⁴⁰ Added to this ignorance are the difficulties created by the current definition of sexual harassment, already discussed in this Chapter. It is therefore to be expected that in some instances, the person engaging in sexual harassment does so unwittingly. Prima facie it is also to be expected that those who find themselves liable for something that is perceived differently from the way it was intended are likely to feel resentment.

1.87 The means chosen to deal with the different kinds and levels of harassment will have important consequences. Clearly it is important that unambiguously serious incidents should attract, and be seen to attract, a heavy penalty. But the severity of disciplinary action must be carefully considered on a case by case basis. A strong conviction that harsh disciplinary action could in some circumstances be counter-productive was expressed to the Committee by a female naval officer, Lieutenant Sly:

"I believe that in some areas when they have been required to deal with sexual harassment the immediate solution has been to take disciplinary action against the perpetrators, and I firmly believe that this only makes the problem

40 The Sex Discrimination Commissioner's submission states that *"Often there is a real misunderstanding or unwillingness to accept the legal definition of sexual harassment"*. Committee Hansard, p. 60. The Committee notes the Human Rights and Equal Opportunity Commission published a training package for managers and supervisors on Eliminating Sexual Harassment from the Workplace only in 1993. There appears to be a great deal of variation in the steps employers in the community at large have taken to educate both managers and all staff about sexual harassment. Ms Walpole's view that the private sector was well ahead of the Defence Force in this regard was not shared by Professor Bryson and Ms Triulzi.

worse, both in the short term for the victim and in the long term for the navy and for females in the navy." ⁴¹

Lieutenant Sly elaborated her view thus:

"When, without any guidance, they made a mistake and when they were harshly disciplined for having made that mistake, it would cause resentment. I think that initially, within themselves they would naturally, in many cases, feel hard done by. But secondary to that, it caused backlash indirectly against the females, because there was very much this attitude of, 'You've arrived. We don't know how to deal with you. When we get it wrong, we are the ones who are suffering. I believe that is a fairly understandable reaction. What I would have preferred to have seen when things went wrong, as at times they are bound to, was a better education process introduced to help both the men and the females in how to deal with this new environment.'" ⁴²

1.88 Women's feelings of resentment are in effect acknowledged by measures such as those embodied in the Sex Discrimination Act. In righting the wrongs against one group in society care must be taken not to inadvertently create new causes for legitimate resentment by another.

1.89 It must also be acknowledged that the broad and largely subjective definition of sexual harassment provides scope for a complainant to abuse the process. Behaviours that appeared to cause no offense at the time may be portrayed by a complainant in a very different light when other factors come into play later and lead to dissatisfaction of one kind or another on the part of the complainant. It is difficult to dismiss the possibility that, in some instances, the prospect of monetary gain through compensation may play a part in coming forward with a dubious complaint. ⁴³

1.90 There is, at the present time, a widespread perception that there is much scope for abuse of the complaints process. That perception is acting as an impediment to the full acceptance and integration of women into the armed services. The Committee

41 LEUT Sly, Committee Hansard, p. 932.

42 *ibid.*, p. 933.

43 The protection afforded to complainants under the Act reinforces such suspicions. See paras 6.182 - 6.191.

accepts that the intent of the present approach is to seek to protect every member of the community, and particularly those who are least able to defend themselves.⁴⁴ It is important that this protection be available. It is also important that a person who is not powerless to remedy a situation that is not to his or her liking should have at least some responsibility to seek a resolution at the informal level. This is particularly the case where the behaviour in question falls in the grey areas of behaviour that many people would perhaps regard as tasteless, but not necessarily as offensive.

1.91 If we are looking for a solution to the problem of sexual harassment, and for ways to repair the damage that the widespread apprehension that the complaint process can be abused is causing, then a better balance between protecting the weak and promoting confidence in the complaint process must be found.

1.92 Several avenues for achieving a better balance should be explored, including fine tuning the definition of sexual harassment and better community access to and understanding of the actual operation of the Sex Discrimination Act in relation to sexual harassment. A central difficulty arises from the very limited knowledge in the community at large - and in the armed forces - about the kinds of sexual harassment complaints that are taken to the Sex Discrimination Commissioner and the way in which those complaints are being resolved. The Committee accepts that the privacy of individuals needs to be protected. Nevertheless a much greater transparency and visibility of the nature and resolution of cases would go a long way to educating all members of the community. If access to such information were more open, and the resolution of the cases was widely seen to be fair and reasonable, then unnecessary apprehension could be allayed.⁴⁵

1.93 A third avenue for achieving a better balance relates to specifying, in greater detail, the employer's responsibility to take "*reasonable steps*" to prevent the act constituting unlawful behaviour.⁴⁶ A more specific reference to a requirement that

44 The Sex Discrimination Commissioner's submission points out that "*The profile of women who complain of sexual harassment highlights their powerlessness. Most are young (15-24 years of age). Most work in low pay, low status jobs which are dead end. Many come from small business.*" Committee Hansard, p. 59.

45 At present, information about cases that go to public hearings at HREOC is available. Not surprisingly the media tend to give publicity to the more salacious instances. However, very little is known about the more than 300 cases that were conciliated and mediated by the Sex Discrimination Commissioner. A useful innovation in keeping the public informed is the newsletter "*Agender*". The first edition was published in April 1994.

46 Section 106, *Sex Discrimination Act 1984*.

employers provide suitable support (whether internal or external) for all employees to be able to inform the harasser, (directly or indirectly) that his or her behaviour is offensive, would assist in resolving those instances where there is genuine misunderstanding on the part of the respondent. Such an approach might also achieve the objective that the Sex Discrimination Commissioner says underlies most complaints, that is, the unacceptable behaviour ceases.

1.94 As presently defined, sexual harassment clearly spans a very wide spectrum of possible behaviours. The consequences for the victim of behaviour at one end of the spectrum can be very much more severe than the consequences of behaviour at the other end of the spectrum.

1.95 The Committee considers that a clearer distinction can and should be drawn between sexual assault, sexual harassment and unacceptable sexual behaviour.

1.96 Sexual harassment as defined under the Sex Discrimination Act is an unlawful activity. Unacceptable sexual behaviour is not necessarily unlawful. It may be boorish and vulgar, or simply infantile and silly. It is common in our society at every level. It is not unlawful, but it is behaviour which organisations such as the Navy have the right to declare as unacceptable in certain circumstances, to seek by various means to curb it and, in certain circumstances, to take disciplinary action to curtail it.

1.97 While disciplinary measures can be taken, it should also be recognised that fully effective and lasting impact can probably only be achieved through raising awareness of the consequences of such unacceptable sexual behaviour for the productivity and morale of the individuals and the organisations they work in. There has to be genuine understanding and acceptance, if genuine change in attitude is to be achieved. Without a genuine change in attitude, an environment of constant policing and punishment of offenders is unlikely to produce a healthy and productive workplace.

1.98 In recognition of the difficulties surrounding the precise definition of sexual harassment, the Navy has not attempted to define a precise code of acceptable and unacceptable behaviour. In its Good Working Relationships seminars, the issues are discussed and attention is drawn to the consequences for the individual and for the organisation if a judgement were to be made that sexual harassment as defined in the Sex Discrimination Act has occurred.

1.99 It is the Committee's view that further work needs to be done to increase the understanding of what constitutes sexual harassment under the Sex Discrimination Act.⁴⁷ Without this, the present subjective definition creates too many uncertainties and hence scope for confusion. Under the present definition, there is no real distinction between behaviours that would be regarded as offensive by most mature individuals in the broad Australian community today and behaviours that most would regard as being of no consequence but which could nevertheless be claimed as unwelcome by anyone with a mind to do so.

1.100 It is the legislative definition of the behaviours that fall into this grey area, at what might be regarded as the least serious end of the spectrum, that needs most attention.

1.101 In this context, it is of interest to note the results of a survey conducted by Major Quinn of women's experience of various levels of sexual harassment in the ADF in 1987.⁴⁸

1.102 The variation in response rates to the different questions used by Major Quinn are important. As Professor Bryson points out *"the stronger you make the definition, the fewer women have experienced it"*.

1.103 Professor Bryson adds that:

*"Nonetheless, one has to say that the lower levels on the scale are serious and should be taken seriously."*⁴⁹

1.104 The Committee agrees that is important to take action with regard to sexual harassment across a broad spectrum of behaviour from the less serious to the extremely serious. The Committee is concerned however, that the present approach tends to encourage the sensationalization of anything to do with sexual harassment,

47 The Committee notes with interest that several recent writers who approach gender issues from very different standpoints nevertheless agree on the need for clearer definition of sexual harassment. For example, Naomi Wolf, argues that *"We are not well served by generalising all inappropriate behaviour as harassment...People in power, as women can begin to be now, should claim the luxury of drawing careful distinctions."* Naomi Wolf: *Fire with Fire*, Random House Australia Pty Ltd, 1993, p. 211.

48 Further details are in Chapter 11 of this Report.

49 Prof. L. Bryson, Committee Hansard, p. 1558.

from the trivial to the most gross manifestations. This tends to trivialise all sexual harassment in the eyes of many;⁵⁰ it also camouflages the importance of responding to and dealing with sexual harassment in different ways, depending in large part on the level of seriousness of the offending behaviour.

1.105 Having identified a concern about the wording of the present legislation the Committee emphasises and states unequivocally that there are certain sexual behaviours which quite clearly are unacceptable in any workplace. It is quite clear that not all inappropriate sexual behaviour in the workforce is an innocent misunderstanding and all sexual harassment is purely in the eye of the beholder. It is self-evident that some sexual behaviour is intended to embarrass, insult, intimidate, humiliate, offend and sometimes drive the person harassed from the workplace. In some cases it is intended as a means of gaining sexual favours that are not being willingly offered.

1.106 All managers have a responsibility to take reasonable steps, as stated in the Sex Discrimination Act, to ensure that such behaviours are eliminated from the work environment. This applies to the Navy, Army and Airforce just as much as it applies to every other workplace in Australia.

1.107 In drawing attention to difficulties with the present definition, the Committee is in no way suggesting that rulings by the Sex Discrimination Commissioner have been inappropriate or that complaints have been accepted that most mature adults would regard as trivial. The Committee is in no position and has no desire or standing to assess independently the handling of cases by the Commissioner. The summaries of cases heard in public hearing suggest that the cases resolved in favour of the complainant have been of sufficient severity to justify the outcome.

1.108 The Committee's concern is that the public perception of what may end up being judged to be sexual harassment is not clear. It is the lack of clarity, the uncertainty, that creates problems. The uncertainty is directly linked to:

- the extremely wide range of behaviours that could fall under the present definition;

50 Grave concern about trivialisation of violence against women by not distinguishing between serious and minor incidents (for example by the level of compensation) are expressed by the founder of the Women's Electoral Lobby, Beatrice Faust in *"Backlash Balderdash"* ... University of New South Wales Press, Sydney 1994.

- the absence of any indication that some forms of sexual harassment are more serious than others;
- the wide variation in the cultural customs, standards and norms of behaviour, in a multicultural society;
- the resulting difficulties associated with the concept of a "*reasonable person*"; and
- the absence of any obligation by the person claiming harassment to indicate where possible that certain behaviours are unwelcome before a formal complaint can be lodged.

1.109 That confusion and uncertainty is clearly also present amongst personnel in the Navy, and in the other Services. The effort that the Navy has made, particularly since the events on the SWAN in mid - 1992, has gone a long way to assisting its personnel to be aware that there are sexual behaviours that are unacceptable. But a clear line between acceptable and unacceptable sexual behaviours has yet to be drawn.

1.110 The draft DI(G) PERS 35-3 makes reference to these difficulties, both in relation to sexual harassment and unacceptable sexual behaviour. It states, for example, that:

*"It is, however, recognised that individual perceptions will alter and there may be a fine line requiring the exercise of common sense, maturity and clear judgement."*⁵¹

Unacceptable sexual behaviour, the instruction states is "*not subject to rigid definition*".

1.111 The Committee does not dispute that it is very difficult to arrive at a definition and approach that ensures that serious cases are dealt with seriously while more minor misdemeanours are dealt with as such. But the consequences of not making greater efforts to do so are too serious to ignore.

51 Draft DI(G) PERS 35-3, para 36, p. 8.

1.112 In her evidence Ms Triulzi said to the Committee:

*" It does concern me that the current legislation under which we are operating and the definition of sexual harassment as it is currently contained in that legislation, with the long lists of hierarchy of incidences it has ranging from touching in an offensive way to rape, creates confusion. It creates conflicts. It leaves itself open to perhaps negative, destructive debate..."*⁵²

1.113 Ms Triulzi made the further observation that:

*"... as we currently have it structured in legislation it causes great confusion and lots of reasons for people to walk away and not really address it seriously."*⁵³

1.114 The Committee shares this concern about the damaging consequences of the present approach to the definition of sexual harassment. The Committee is conscious of the difficulty faced by some particularly vulnerable people and the Committee accepts that the intent of the present approach is to seek to ensure maximum protection for all potential victims. However, one consequence of the present approach is an impediment to the wholehearted acceptance of women as full equals. One of the by-products of uncertainty about what constitutes sexual harassment is uncertainty whether legitimate orders or disciplinary action by male supervisors might attract allegations of sexual harassment from female personnel.

1.115 The Impact Study conducted by Triulzi Collins on HMAS SYDNEY clearly illustrates some of the consequences. A significant number of male personnel felt that women on board the SYDNEY were getting away with more than they should because their male supervisors were concerned that if they disciplined the women in the way they discipline the men, they would find themselves accused of sexual harassment. This concern was evident in many of the comments by crew members in response to a questionnaire on the impact of women serving on the ships:

"Morale low when troops see females getting away with things that the guys get stamped on for";

52 Ms S. Triulzi, Committee Hansard, p. 740.

53 *ibid.*, p. 741.

"Many people feel threatened ... unsure of where they stand in relation to harassment issue";

"they think they get treated poorly because of their gender not because of their rank! It happens to all of us, our bosses have an off day and we get "boned" in;

"You yell, they cry harassment."

"Prevent good management of high workloads in stressful situations without fear of reprisal".⁵⁴

1.116 There are also other undesirable consequences. The junior female officers on the SWAN told the Committee, for example, that the reaction of many of the crew after the unfavourable publicity it received in September 1993, was to withdraw from the normal interaction that had been developing, as the men came to accept the women's professionalism during the course of the deployment. A mixture of resentment and uncertainty among the male personnel over where the line on unacceptable behaviour was to be drawn had the effect of isolating the women. A service like the Navy that depends so heavily on teamwork cannot afford to allow these kinds of resentments to fester and divisions between the sexes to develop.

1.117 Up to a point, the Services have it within their power to draw a clearer line between acceptable and unacceptable behaviour than in the Sex Discrimination Act. The draft Defence Instruction on sexual harassment attempts to do so and the Good Working Relationships seminars are of great assistance to Navy personnel in recognising where to draw that line. Ultimately, however, no matter what efforts the Services make to clarify their own standards, all personnel are still subject to the vagaries of the definition under the Sex Discrimination Act. The present situation,

54 Triulzi Collins Solutions - Impact Study. For further discussion of appropriate management style and general harassment see Chapters 6 and 12. It may be argued that in some instances it is not only the treatment of women subordinates but also male subordinates that needs attention; and that there should, for example, be less *"yelling"* all around. However the Committee accepts that in some situations the same *"yelling"* at both males and females may be the key to survival and unquestionably appropriate. The difficulty seems to be in agreeing where and when to draw the line.

whereby an individual may be engaging in unlawful conduct without knowing that he or she is doing so until a complaint is lodged is unsatisfactory.⁵⁵

1.118 Recommendation One: The Committee recommends that the definition of sexual harassment under the Sex Discrimination Act be refined to reflect more clearly

- the hierarchy of complaints;
- the advantage, where possible, of the complainant informing the alleged harasser that his or her behaviour is offensive;
- the appropriate mechanisms and legal sanctions for the different degrees of seriousness of the unlawful behaviour.

1.119 There is much evidence to support the conclusion that many workers tolerate low levels of harassment for long periods before they do anything about it. When they do finally take action it is something serious - either a formal complaint or resigning from the job. It may be the cumulative effect of unremitting low-level sexual harassment or escalation in its severity that leads to such action being taken. By the time this happens, the stress for all those involved is severe.

1.120 The Committee believes more effort needs to be put into nipping harassment in the bud, well before it has blown out and traumatised those involved. It is essential to devote more thought and more effort to the means whereby the sexual harassment can be arrested before serious damage is done. Education is one necessary element. The other area requiring attention is the support provided to the person being harassed who does not wish to make a formal complaint but does want the offending behaviour to cease.

1.121 Recommendation Two: The Committee recommends that the Human Rights and Equal Opportunity Commission should investigate the proposal that the requirement under the Sex Discrimination Act for employers to take all "*reasonable steps*" to prevent an employee or agent from engaging in unlawful acts of sexual harassment should specify that, as one such "*reasonable step*", the employer should provide support, through an appropriate off-line, internal unit in the organisation (such as

55 The Committee's Recommendation Two is aimed at identifying offensive behaviour at an early stage, thereby alerting the alleged offender that he or she may be in breach of the law.

Sexual Harassment Contact officers) or, facilitate access to an external agency (such as the Sex Discrimination Commissioner, for the person who feels harassed to bring to the attention of an alleged harasser (directly or indirectly) that the person's behaviour is offensive, intimidating or humiliating.⁵⁶

Such action should be seen as different from a formal complaint alleging sexual harassment and provide an opportunity for both parties to clarify the situation and be made aware of the possible consequences if offensive behaviour continues. The purpose of the measure is to assist in resolving genuine misunderstandings before they become a major difficulty in the work relationship, particularly in situations where the person who feels harassed feels unable to prevent the offending behaviour by his or her own action alone. The measure would also simplify the resolution of a subsequent complaint, should such a complaint be formally lodged.

Possible consequences of Sexual Harassment

1.122 Notwithstanding the difficulties associated with the precise definition of sexual harassment, there is no question that sexual harassment is now recognised as a real problem.

1.123 Sexual harassment can lead to adverse consequences for the individual, for fellow workers and for the organisation as a whole. The Public Service Commission lists the following possible consequences:

- actual or potential disadvantages to individual's opportunities in appointment, promotion or transfer
- lack of self-esteem or confidence in carrying out tasks
- adverse effects on productivity
- the creation of an intimidating, hostile environment where people other than the victim may suffer.⁵⁷

56 The Committee's Recommendation Thirty Nine proposes that avenues of complaint outside the Chain of Command be made available to all ADF personnel and that inappropriate behaviour be identified and dealt with before it escalates.

57 *Public Service Commission Guidelines*, p. 3.

Impact of sexual harassment on the individual

1.124 The Human Rights Commissioner's guidelines also identify the impact that sexual harassment can have on the individual:

"People who experience sexual harassment often suffer fear, anxiety, tension, irritability and frustration. This may manifest itself in physical symptoms such as migraines, skin disorders and stomach upsets or psychological problems such as insomnia, nervousness, depression and lack of concentration. It can also lead to increased absenteeism, especially if a person is trying to avoid contact with the harasser.

*A person accused of harassment may also feel angry or distressed. This can result in problems which are similar to those outlined above."*⁵⁸

Impact of sexual harassment on the organisation

1.125 It is increasingly recognised that sexual harassment is a matter that all employers and managers need to address.

1.126 In relation to the public sector, the Public Service Commission states that:

*"Sexual harassment is inconsistent with the policy of equal employment opportunity in government employment, it is extremely difficult for the parties to discuss and resolve because of its sensitive and highly personal nature and, not least, it is unlawful under the Sex Discrimination Act."*⁵⁹

1.127 There are good reasons from an organisational point of view why all organisations, including the Services, should eliminate sexual harassment. As the HREOC points out:

"An organisation may lose talented and valued employees as a result of sexual

58 HREOC Guidelines, pp. 16-17.

59 Public Service Commission, *Personnel Management Guidelines, Eliminating Sexual Harassment - Guidelines for Sexual Harassment Contact Offers and Personnel Management Guidelines*, AGPS, Canberra, 1st ed 1986, reprinted 1991, p. 3.

*harassment. Resignations also mean that time and money spent on training and development have been unnecessarily wasted."*⁶⁰

1.128 Sexual harassment can prove costly in other ways. Section 106 of the *Sex Discrimination Act 1984* contains vicarious liability provisions which make an employer:

"liable for an unlawful act of sexual harassment by an employee or agent, unless the employer took all reasonable steps to prevent the unlawful act.

*To avoid liability, the onus is on employers to show that they have taken such steps, for example, they need to demonstrate that they have issued a policy statement on sexual harassment, formulated guidelines for its prevention and conducted staff awareness programs on the subject."*⁶¹

1.129 The employer can therefore become involved in expensive, protracted legal proceedings which can damage public image and credibility. A successful sexual harassment complaint can result in the payment of financial compensation.⁶² Then there are the less direct costs such as:

*"lost working time for everyone involved in a complaint - the complainant, the alleged harasser, witnesses and the manager or supervisor who is responsible for investigation and resolution. The cost of recruiting and training the replacement of anyone who resigns as a result of harassment must also be considered."*⁶³

60 *HREOC Guidelines*, p. 19.

61 Ms S. Walpole, submission, Committee Hansard, p. 29.

62 Note: As at 20 May 1994, the ADF had paid the following amounts in compensation to individuals who had suffered sexual harassment in the Services:

ARMY: \$243,115.73 (4 Claims)

NAVY: \$117,536.61 (4 Claims)

RAAF: Nil

Letter dated 20 May 1994 from MAJGEN S. Gower to the Committee Chairman.

63 *HREOC Guidelines*, p. 19.

Who harasses whom?

1.130 It is widely reported, and confirmed by evidence before the Committee, that complaints of sexual harassment are mostly made by women against men. The Sex Discrimination Commissioner states that:

*"the vast majority of incidents of sexual harassment are of women by men, and those men are usually in a senior or similar position to the woman. There are an extremely small number of complaints of sexual harassment of men by women, and usually when the woman is the boss. There are some incidents of harassment of men by men, even when the harasser knows that the victim is not homosexual. There are virtually no reported incidents of women harassing women."*⁶⁴

1.131 According to HQADF:

*"instances have been reported of both male and female perpetrators, although by far the overwhelming majority have been male."*⁶⁵

Sexual harassment and management style

1.132 In some circumstances it is very difficult to disentangle harsh, rigid, authoritarian management practices from sexual harassment. Concerns have also been expressed in some submissions that senior personnel in the Services feel that their authority as managers will be undermined by women objecting to legitimate orders to do something they don't want to do by alleging that such an order constitutes sexual harassment.

1.133 It would be unacceptable if a style of management of women were to be declared unlawful while essentially the same treatment of men continued to be considered acceptable. It is vital to ensure equitable treatment of men and women in the workplace. Any preferential treatment, or even appearance of preferential treatment of women can only set back the cause of integration.

64 Ms S. Walpole, submission, Committee Hansard, p. 52.

65 HQADF submission, Committee Hansard, p. 1331.

1.134 The difficulty goes to the heart of the management style that has been practised in many organisations, not least in the armed services, for centuries. This aspect is examined further in Chapters 6 and 12 of this Report.

Sexual harassment and poor performance

1.135 Dissatisfaction with work performance appears to be frequently associated with complaints of sexual harassment. Difficult judgements may have to be made. Is one the cause of the other? Does sexual harassment lead to poor performance? Or are women who are poor performers more vulnerable to sexual harassment?

1.136 In all probability both of the above are possible. Each case must be assessed individually. It may be very difficult to disentangle cause and effect when performance is being appraised. In some cases it will be clear and straightforward. For example, if an individual has a consistent record of good performance and then is rated as poor in circumstances where the only significant change is a complaint by that individual of sexual harassment, then the probability that harassment has occurred is obviously high.

1.137 The situation becomes far more complex if other variables come into play. For example, a bad rating for someone for his or her performance at sea after a series of good ratings on shore may or may not be attributable to sexual harassment. There are so many other new factors - cramped living conditions, difficult working hours very little privacy, possibly sea-sickness and so on - that it may be very difficult to isolate sexual harassment as the sole or major cause for a drop in performance.

1.138 Another circumstance where it may well be difficult to reach an unequivocal conclusion would arise if the person claiming disadvantage because of sexual harassment is a new recruit with no record of performance that would enable a comparison to be made.

1.139 The Committee noted that during the Good Working Relationships seminar,⁶⁶ it was pointed out that complaints about poor performance often tend to be made after a subordinate makes a complaint about sexual harassment. As a general rule, it was suggested that investigators into allegations of sexual harassment, particularly if they are against the supervisor, would give greater credence to the supervisor's

66 For details about the Good Working Relationships seminars see Chapter 11 of this Report.

statements that the complainants are poor performers if the evidence of poor performance is submitted before any complaints of sexual harassment have been lodged.

1.140 The Human Rights and Equal Opportunity Commissioner's guidelines on sexual harassment state that:

" The stress associated with sexual harassment is likely to have a negative effect on job performance. The work of the person experiencing the harassment can suffer to such an extent that an employer may begin to question their ability. The harasser is also wasting time by behaving in a way which has nothing to do with the work they should be doing. Any member of a team working below capacity affects the productivity of the entire team." ⁶⁷

1.141 The arguments from the point of view of the welfare of the individual and from the point of view of the efficiency and productivity of the organisation for eliminating sexual harassment in the workplace are powerful.

1.142 The following chapters of the Report examine the extent to which sexual harassment is a problem in the Navy and the ADF generally, and what these organisations are doing about it.

67 *HREOC Guidelines*, p. 15.