Sexual Harassment and the Sex Discrimination Act 1984

Gabriël Moens

Australia's Sex Discrimination Act 1984 contains provisions prohibiting sexual harassment. ***Gabriël Moens****, Senior Lecturer in Law at the University of Queensland, examines the underlying rationale of these provisions and shows how their definition of sexual harassment has given rise to uncertainty about what constitutes lawful sexual conduct.*

DURING the last two decades, increasing numbers of academics have undertaken research into the alleged subordination of women to men. A recurrent theme in this research is sexual harassment, which is usually identified as an important factor contributing to this subordination. The relevant literature suggests that sexual harassment is a frequent occurrence. For example, Catherine MacKinnon, in her book *Sexual Harassment of Working Women* contends that sexual harassment 'is pervasive, affecting in some form perhaps as many as seven out of ten women at some time in their work lives' (MacKinnon, 1979:3). Similarly, Mary Benet tells us that 'the first thing that comes into a man's mind when he thinks about secretaries is sex' and that men in offices 'speculate endlessly about the girls, comparing them, picking favourites, teasing them' (Benet, 1972:2). Lucinda Finley remarks that 'sexual harassment, rape, unwanted sex and the struggle to say no and be believed, battering, unwanted pregnancy, incest, childhood sexual abuse, violent pornography and the chilling cases in which it is acted out against women' are **common** experiences among women (Finley, 1988).

Feminist writers also argue that sexual harassment and sex-related crimes are the consequence of unequal power-relationships between men and women. Sexual harassment is often described as a reprehensible product of male domination, and an instance of sexual discrimination. For example, Finley (1988) argues that 'traditional equality law fails to take power differentials into account' and that 'it fails to see that many pervasive and fundamental ways the sexes are not socially equal, despite the removal of overt barriers'. Similarly, MacKinnon opines that sexual harassment 'most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power' and that 'the use of power derived from one social sphere to lever benefits or impose deprivations in another' is central to the concept of sexual harassment (1979:1). These commentators argue that sexual harassment is a fundamental impediment to the social advancement of women, and can be removed or neutralised only by anti-discriminatory laws aimed at rectifying power differentials between men and women.

In this article I examine the approaches adopted by Australia's anti-discrimination laws and argue that the provisions of the Sexual Discrimination Act of 1984 that deal with sexual harassment embody a different approach from some other crucial parts of the Act. I go on to show that this approach requires sexual harassment to be defined in a way that disregards the intention of the alleged harasser, and that this has resulted both in a considerable degree of uncertainty as to the kind of conduct that constitutes sexual harassment and in a neglect of traditional legal remedies for conduct nowadays defined as 'sexual harassment'.

The Two Approaches of Anti-Discrimination Legislation

Anti-discrimination legislation adopts two approaches to the problem of sexual subordination. The first approach is often referred to in the literature as the 'differences approach'. This holds that men and women are biologically and socially distinct, and that legal rules and practices that treat men and women in accordance with the real, objective differences between them are acceptable. Examples abound. As it can be easily shown that women are, by and large, physically weaker than men, legislatures have in the past prohibited women from lifting heavy weights. Other instances of such 'paternalistic' legislation include bans on voluntary overtime and the exemption of women from military service.

The second approach may be conveniently called the 'inequalities' approach. Advocates of this approach view all paternalistic legislation as a device

for maintaining male domination and perceive 'women's situation as a structural problem of enforced inferiority that needs to be radically altered' (MacKinnon, 1979:5).

Some proponents of the differences approach argue that sexual harassment should be prohibited because the practice cannot be justified by reference to any true differences between men and women. However, if there are any differences in the **natures** of male and female sexuality and the way in which they are expressed, a different conclusion may follow. Men may have a natural tendency to pursue women, whereas women may have a natural tendency to welcome 'adventurous' male behaviour. Any such differences between male and female sexuality may explain, but would not of course justify, at least some practices that, according to feminist jurisprudence, may have the effect of subordinating women to men. If such differences were real and objective ones, certain kinds of sexual harassment which are usually regarded as reprehensible would not constitute deviant behaviour but would amount to conformity to the male stereotype.

The Commonwealth Sex Discrimination Act 1984 outlaws sex discrimination. Section 5(1) stipulates that 'a person ... discriminates against another person ... on the ground of the sex of the aggrieved person if ... the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex'. This definition of discrimination embodies the 'differences' approach, according to which discrimination involves the unequal treatment of persons who are similarly situated (i.e. it may not involve the unequal treatment of persons who are **differently** situated). But the differences approach, insofar as it implicitly condones certain forms of harassment if real differences between the natures of men and women can be established, represents a radical departure from the present feminist faith because it entrenches rather than redresses the unequal power relationship between men and women.

Dissatisfaction among feminists with the differences approach may explain why the Sex Discrimination Act contains separate provisions dealing with discrimination involving sexual harassment. Sections 28 and 29 deal with sexual harassment in employment and in education respectively. Here, the legislation adopts the 'inequalities' approach: certain practices, even if they can be explained by reference to real differences between men and women, are impermissible because they have the undesired effect of subordinating women to men. It is thus fair to suggest that the separate provisions dealing with sexual harassment aim to eliminate the unequal power relationship between men and women.

... a male university lecturer romantically linked to one of his female students could be in very real danger of eventually being accused of sexual harassment, since he could be accused of having used his position of power and authority to inveigle the student into an amorous or even a sexual relationship.

Defining Sexual Harassment: The Irrelevance of Intent

Section 28(3) of the Sex Discrimination Act states:

> 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 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.

In addition, section 28(4) stipulates that 'conduct of a sexual nature in relation to a person includes a reference to the making to, or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing'.

By referring to '**an** unwelcome sexual advance, or **an** unwelcome request for sexual favours', the legislation implies that a single action (as opposed to

continuing or persistent sexual conduct) may constitute sexual harassment. This interpretation is reinforced by a recent decision of the Human Rights and Equal Opportunity Commission. In *Bennett and Anor* v. *Everitt and Anor* ([1988] EOC 92-244, pp. 77, 278) Einfeld, J. decided that, whereas the concept of 'harassment' has in the past referred to **repeated** behaviour, 'there are circumstances where a single action or statement ought to and may amount to unwelcome conduct'.

Justice Einfeld's decision implies that the intention of the alleged harasser is irrelevant. If a single act constitutes harassment, it is not logically possible for a female complainant to try to prevent the offence being committed by warning the potential harasser that his conduct is unacceptable and unwanted. Instead, the legislation embraces a subjective test in that sexual harassment is deemed to be proven if the complainant reasonably **believes** that the rejection of the unwelcome sexual advance would disadvantage her employment prospects. As it is difficult to measure just how harassing a man's behaviour is, sexual 'harassment is in the mind of the receiver, not the beholder' (Wallace, 1985:27).

Some American universities have even developed detailed rules on consensual sexual relationships between faculty members and students. The argument is that these rules are necessary to protect staff and students who voluntarily enter sexual relations based on mutual attraction.

In disregarding the intention of the alleged harasser, the legislation has removed an important yardstick by which to measure the validity of a sexual harassment complaint. An examination of the intention of the alleged harasser might disclose that his conduct is compatible with the nature of male sexuality and, therefore, could not properly be described as involving an intention to harm the complainant. Alternatively, the conduct's non-conformity or over-conformity with male sexual norms may indicate an intention to violate the integrity of a woman's body. Of course, an examination of the intention of the alleged harasser would involve a disguised resurrection of the impugned 'differences' approach which, as indicated above, is inconsistent with the legislation's unstated goal of reducing the impact upon women of the unequal power-relationship between men and women.

Some Consequences of Disregarding Intent

Uncertainty and abuse. The absence of legal mechanisms requiring consideration of the alleged harasser's intentions may facilitate the adoption of objective rules or regulations that enable people to measure the lawfulness or propriety of their behaviour. However, these rules, whilst designed to obviate the need to rely on the complainant's subjective interpretation of an incident, may have some undesirable, and possibly unintended, consequences. For example, a male university lecturer romantically linked to one of his female students could be in very real danger of eventually being accused of sexual harassment, since he could be accused of having used his position of power and authority to inveigle the student into an amorous or even a sexual relationship. Of course, such a relationship need not involve sexual harassment at all since it could be based on mutual attraction.

It is not surprising, then, that most Australian government departments and higher education institutions have adopted sexual harassment guidelines and have instituted complaint procedures. Some American universities have even developed detailed rules on consensual sexual relationships between faculty members and students. The argument is that these rules are necessary to protect staff and students who voluntarily enter sexual relations based on mutual attraction. The authors of these guidelines often give examples of behaviour that does **not** involve sexual harassment. For example, the guidelines issued by the Sexual Harassment Committee of the University of Queensland state that sexual harassment 'is **not** mutual attraction between people — such friendships (sexual or otherwise) are a private concern'.

This trend is not based just on a desire to reassure the male population but is, in my opinion, an immediate and inevitable consequence of defining sexual harassment in terms of the subjective views of the complainants, thereby creating uncertainty as to what conduct is covered by the legislation. The constant reminders that the Commonwealth's Sexual Discrimination Act of 1984 does not reach intimate relationships based on mutual affection succeeds only in suggesting that the legislation very well might, on the face of it, be interpreted as including these 'innocent' liaisons. It also raises the interesting question as to whether a claim of sexual harassment could ever succeed in the case of a woman who severed a relationship that was originally based on mutual attraction.

Evidence from America of the extent and consequences of this kind of legal uncertainty is provided

by Peter DeChiara, who argues that universities should 'respond to these problems by adopting written rules which would ban all consensual faculty-student relationships which infringe on the interests of the student involved or on the interests of others' (1988:139). In defence of this sweeping recommendation, he points out that a consensual relationship can easily degenerate into sexual harassment because 'the teacher is in a position to evaluate the student, since in those situations the teacher's power over the student is direct' (1988:143). Alternatively, the lecturer's amorous involvement with a female student may cloud his professional judgement and 'may lead him to give the student more attention and rewards than the student deserves' (1988:144). Even if the lecturer is not favouring the student, his intimate relationship with her could result in other students believing, rightly or wrongly, that the female student **is** being favoured, thereby violating the students' legitimate expectation that academic rewards should be distributed by merit only.

The development of rules governing consensual sexual relationships is, I believe, a direct consequence of our deeply-felt need to be able to predict how our conduct will be viewed by the law. Such rules raise several important issues that cannot be pursued here, including interference by the universities in the private lives of their staff and students and the preservation of academic and personal freedom.

Neglect of traditional remedies. The 'irrelevance' of intention and the reliance of the legislation on how an incident is viewed by the complainant have undoubtedly contributed to the present number of sexual harassment cases. They also increase the likelihood that female litigants will couch their complaints in terms of a violation of the Sex Discrimination Act rather than utilising traditional legal remedies. Traditional tort remedies for a violation of the integrity of one's body include the torts of battery, assault, and the intentional infliction of emotional distress. The tort of battery applies when the offensive contact is **intentionally** caused, but 'intent to cause all the damages that resulted from the contact, is not necessary' (MacKinnon, 1979:165). Although battery requires an intention on the part of the alleged harasser, men would do well be exercise restraint, since battery apparently includes instances in which a compliment is intended, 'as where an unappreciative woman is kissed without her consent' (Prosser, 1971:36n).

Conclusions

Sexual harassment legislation should be seen as part of a wider movement aimed at increasing the participation of women in the workforce and at distributing them among positions of influence and power in accordance with their total numerical strength in the workforce. Indeed, in concentrating on unequal power-relationships, and thus adopting the inequalities approach, the legislation implicitly suggests that an increase in the participation of women will result in a corresponding decrease in the incidence of sexual harassment.

It is worth speculating on whether such a decrease would occur. If there were a substantial increase in the employment of women in powerful positions, these women would find it more difficult to maintain that certain incidents disadvantaged them in connection with their employment or possible employment. It is not altogether preposterous, therefore, to suggest that in these circumstances an unwelcome sexual advance that would otherwise have been judged a case of sexual harassment could be made with impunity. If this interpretation is correct, then sexual harassment ceases to be the evil that the legislation tries to remedy; rather, the sexual harassment legislation would be a means of increasing women's participation in the workforce and the power that is deemed to go with it.

References

Benet, M. (1972), *The Secretarial Ghetto*, McGraw-Hill, New York.

DeChiara, P. (1988), 'The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students', 21 *Columbia Journal of Law and Social Problems* 137.

Finley, L. (1988), 'The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified', 82 *Northwestern University Law Review* 352, p. 358.

MacKinnon, C. (1979), *Sexual Harassment of Working Women*, Yale University Press, New Haven.

Prosser, W. (1971), *The Law of Torts*, West Publishing Co., St. Paul.

Wallace, M. (1985), 'The Legal Approach to Sex Discrimination', in M. Sawer (ed.), *Program for Change*, Allen & Unwin, Sydney.

Gabriël Moens is the author of ***Affirmative Action: The New Discrimination****, CIS, 1985, and of 'Affirmative Action: Success or Failure?',* ***Policy****, Autumn 1989.*