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## **COMBATTING SEXUAL HARRASSMENT IN THE WORKPLACE: POLICY Vs LEGISLATIVE REFORM**

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### **ABSTRACT**

*Sexual harassment in the workplace has been prohibited since the implementation of the Sex Discrimination Act 1984 (Cth) (the SDA). Over the years the legislation has been amended time and time again as a result of parliamentary review and judicial decision-making. However sexual harassment still remains a prevalent issue in Australian workplaces, with just over one in five people in Australia in 2012 experiencing sexual harassment, as defined in the SDA.<sup>1</sup> As the SDA nears its 30<sup>th</sup> anniversary, it is timely to consider the history and evolution of the sexual harassment laws in Australia spanning the last three decades and analyse its effectiveness in deterring sexual harassment and providing sufficient recourse for victims. In recent cases, such as *Ewin v Vergara* in 2014, we have witnessed the amount of damages awarded to victims growing exponentially to six-figure sums, which may indicate the courts' rising recognition of the significance of the issue. This paper will consider the widening interpretation of the SDA by the courts, such as the expanding definition of the 'workplace', and ultimately consider whether the current legislative framework is sufficient to combat the prevalence of sexual harassment in the modern employment sphere, or whether future reform lies within policy.<sup>2</sup>*

## **I SEXUAL HARASSMENT IN AUSTRALIA: AN OVERVIEW OF THE ISSUES**

Despite thirty years of legislation proscribing sexual harassment, as at 2014 it remains widespread in Australian workplaces.<sup>3</sup> This phenomenon is claimed to still exist

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<sup>1</sup> Australian Human Rights Commission, *Working Without Fear: Results of the 2012 Sexual Harassment National Telephone Survey* (2012) 1 ('*Working Without Fear Report*').

<sup>2</sup> This paper coincides with the Australian Government's consideration of proposals to include a general prohibition against sexual harassment in *any* area of public life, not merely employment and education, and a greater consideration of a consolidation of federal discrimination laws.

<sup>3</sup> Paula McDonald et al, 'Developing a Framework of Effective Protection and Response Strategies in Workplace Sexual Harassment', *Asia Pacific Journal of Human Resources* (May

because people are unaware of their rights under the legislation and, further, because victims are afraid of further victimisation should they come forward. It was noted earlier in 2014 that ‘only 18 per cent of women who have been sexually harassed will bring any form of formal complaint’.<sup>4</sup> Another reason cited is the fear that complainants won’t be believed or will be deemed a ‘trouble-maker’ for raising the complaint.<sup>5</sup>

A general lack of understanding of individual rights was said to be a contributing factor, with a 2008 survey revealing that approximately one in five women had experienced conduct amounting to sexual harassment under the law, despite expressly stated that they did not understand it to be so.<sup>6</sup> Further recent research into the prevalence of sexual harassment has found that many people who experience sexual harassment identify that the conduct ‘is not right’, however cannot identify what about sexual harassment that is wrong, or that the conduct is unlawful.<sup>7</sup>

In general terms, the SDA expressly prohibits unwelcome sexual conduct in a ‘workplace’ that a reasonable person would anticipate would offend, humiliate or intimidate the person harassed.<sup>8</sup> While the subjective consideration of what is deemed ‘unwelcome’ and the often misunderstood concept of the ‘reasonable person’ allow for a broad interpretation of the law due to its ambiguity, this may also be a contributing factor to the lack of understanding. The major concern is that to redefine and narrow the scope of the legislation would lead to the restriction of its application, therefore running the risk of ‘blind spots’ that are not covered. It is my view that there is little to be gained from re-writing the legislation; the better solutions lies within workplace policy and social reform. Legislation works to prohibit areas of clear-cut right and wrong. Tortious acts such as discrimination have a subjective element that calls into play the need for social change, rather than legislative. Social awareness is the key to aid a predominately social issue. This paper will attempt to demonstrate the above issues through an examination of the current framework, its societal understanding and judicial application.

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2014) < [http://www.readcube.com/articles/10.1111%2F1744-7941.12046?r3\\_referer=wol&show\\_checkout=1](http://www.readcube.com/articles/10.1111%2F1744-7941.12046?r3_referer=wol&show_checkout=1)>.

<sup>4</sup> Madeleine Morris, Interview with Jemma Ewin (Australian Broadcasting Corporation, 14 August 2014) <<http://www.abc.net.au/7.30/content/2014/s4067437.htm>>.

<sup>5</sup> Ibid.

<sup>6</sup> Australian Human Rights Commission, *Sexual Harassment: Serious Business – Results of the 2008 Sexual Harassment National Telephone Survey* (2008) v (‘*Sexual Harassment: Serious Business Report*’).

<sup>7</sup> Australian Human Rights Commission, ‘Sexual Harassment: Know Where the Line Is’ (Media Release, 21 May 2014) <<https://www.humanrights.gov.au/news/media-releases/sexual-harassment-know-where-line>>.

<sup>8</sup> *Sex Discrimination Act 1984* (Cth) s 28A.

## II HISTORY OF AUSTRALIA'S FRAMEWORK

The SDA came into force in 1984, to give effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>9</sup> The Act's main objectives are to aid in the elimination of discrimination on the grounds of sex, sexual orientation, marital or relationship status or pregnancy as well as to eliminate, so far as possible, discrimination involving sexual harassment in the workplace, educational institutions and in other areas of public activity.<sup>10</sup>

In order to understand the significance of the SDA, it is necessary to provide an overview of CEDAW. CEDAW was adopted by the United Nations General Assembly in 1979, opening for signature in that year and entering into force on 3 September 1981. Often described as an 'international bill of rights for women',<sup>11</sup> CEDAW is predominately a human rights treaty for the purpose of equality; however it's focal point is in the elimination of gender inequality against women. Article 3 commits signatories to take 'all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'.<sup>12</sup> Article 11 relates specifically to achieving these objectives within the employment sphere.

Australia became a signatory to CEDAW on 17 July 1980 and ratified the Convention on 28 July 1983, with the SDA subsequently coming into force on 1 August 1984. The Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) were given the responsibility of administering and overseeing the SDA. In keeping with the requirements under CEDAW, Australia regularly sends representatives to the international committee and, as will be discussed further in the paper, prepares independent reviews into the effectiveness of the measures taken to give effect to the treaty.

### A *Function of the Sexual Harassment Provisions of the Sex Discrimination Act 1984 (Cth)*

Sexual harassment is considered a form of 'discrimination' under the SDA and is covered in Division 3 of the Act. This section of the paper will provide an overview of the general provisions of the Act relating to sexual harassment, however it is

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<sup>9</sup> *Sex Discrimination Act 1984* (Cth) s 3(a).

<sup>10</sup> *Sex Discrimination Act 1984* (Cth) s 3(b) and s 3(c).

<sup>11</sup> United Nations Entity for Gender Equality and the Empowerment of Women, *Convention on the Elimination of All Forms of Discrimination Against Women* <<http://www.un.org/womenwatch/daw/cedaw/>>.

<sup>12</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, New York City, A/RES/34/180 (entered into force signed 18 December 1979) art 11.

important to add the caveat that the provisions are broad, non-exhaustive, and require judicial interpretation in their application, therefore this section aids as a mere overview of the technical aspects of the law.

Section 28A of the SDA provides that a person sexually harasses another person if that person makes unwelcome sexual advances, or an unwelcome request for sexual favours, or 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 the possibility that the person harassed would be offended, humiliated or intimidated'.<sup>13</sup> Circumstances such as sex, age, gender identity, religious beliefs and the relationship between the person harassed and the person engaging in the conduct are taken into account.<sup>14</sup>

While courts have recognised that sexual harassment is a form of sex 'discrimination' against women, the SDA applies to both women and men. This is made clear in the objects of the SDA at section 3(b) which states that the object is eliminate discrimination against 'persons'. However, tying sexual harassment to the notion of discrimination against women in particular was outlined in the case of *Aldridge v Booth*, in which Spender J noted that:

...when a woman is subjected to sexual harassment ...she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the discrimination is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman.<sup>15</sup>

Under section 28B of the SDA, sexual harassment by an employer of an employee (or person seeking to become an employee) is made unlawful, as is sexual harassment by an employee of a *fellow* employee (or person seeking employment) with the same employer.<sup>16</sup> This extends to a commission agent or a contract worker reciprocally,<sup>17</sup> a partner in a partnership,<sup>18</sup> as well as a 'workplace participant'.<sup>19</sup> Geographically, section 28B defines workplace as 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace'.<sup>20</sup>

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<sup>13</sup> *Sex Discrimination Act 1984* (Cth) s 28A.

<sup>14</sup> *Sex Discrimination Act 1984* (Cth) s 28A(1A); Further, the common law has found that the conduct in question need not be 'persistent', conduct that results in sexual harassment may be a single occurrence; see *Hall v Sheiban* (1989) 20 FCR 217.

<sup>15</sup> *Aldridge v Booth* (1988) 80 ALR 1, 16-17 (Spender J).

<sup>16</sup> *Sex Discrimination Act 1984* (Cth) s 28B(1) and s 28B(2).

<sup>17</sup> *Sex Discrimination Act 1984* (Cth) s 28B(3) and s 28B(4).

<sup>18</sup> *Sex Discrimination Act 1984* (Cth) s 28B(5).

<sup>19</sup> *Sex Discrimination Act 1984* (Cth) s 28B(6); 'workplace participant' is further defined as any of the following: an employer of an employee; a commission agent or contract worker; a partner in a partnership: *Sex Discrimination Act 1984* (Cth) s 28B(7)(a), s 28B(7)(b) and s 28B(7)(c).

<sup>20</sup> *Sex Discrimination Act 1984* (Cth) s 28B(7).

Arguably one of the most important aspects of the test for sexual harassment is the requirement that the conduct be 'unwelcome'. This requirement is a subjective consideration, based on the recipient's perception and experience of the conduct.<sup>21</sup> In contrast, the requirement that the conduct be 'offensive, humiliating or intimidating' is objective and is based on the reasonable person standard.<sup>22</sup>

It is important to note that the sexual harassment provisions in the SDA only prohibit sexual harassment within particular spheres of public activity, such as work, educational institutions, the provision of goods, services, facilities and accommodation, dealings with land, clubs and the administration of Commonwealth laws and programs.<sup>23</sup> While this paper focuses on how the SDA affects those in the employment sphere, it is important to be aware of the additional coverage of the Act.

The SDA provides for the appointment of a Sex Discrimination Commissioner,<sup>24</sup> whose role is to oversee the operation of the Act. The current Commissioner, Elizabeth Broderick, was appointed in 2007 and has played a pivotal role in assessing the breadth of the issue in Australian workplaces and assessing how best to ensure Australians are aware of their rights.

## **B Corresponding State and Territory Laws**

While each state and territory in Australia has enacted its own discrimination laws, the definition of what constitutes 'sexual harassment' varies among the jurisdictions. The Australian Capital Territory, New South Wales, South Australia, Victoria and Tasmania define the term similarly with that of the SDA,<sup>25</sup> however the Western Australia and the Northern Territory acts differ.

The Western Australian *Equal Opportunity Act 1984* makes sexual harassment unlawful, however requires that the person harassed be disadvantaged in any way connected with their employment as a result of their rejection of the person harassing, or has reasonable grounds for believing that a rejection of an advance would result in such a disadvantage.<sup>26</sup>

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<sup>21</sup> Australian Human Rights Commission, *Sexual Harassment (A Code in Practice) – What is Sexual Harassment?* (2004) 1.1 <<https://www.humanrights.gov.au/publications/sexual-harassment-code-practice-what-sexual-harassment>>

<sup>22</sup> Ibid.

<sup>23</sup> Respectively, *Sex Discrimination Act 1984* (Cth) s 28B to 28E; s 28F; s 28G to 28H; s 28J; s 28K; and s 28L.

<sup>24</sup> *Sex Discrimination Act 1984* (Cth) s 96.

<sup>25</sup> *Discrimination Act 1991* (ACT) s 81(1); *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1984* (SA) s 87(9); *Anti-Discrimination Act 1998* (Tas) s 17(3); *Equal Opportunity Act* (Vic) s 92(1).

<sup>26</sup> *Equal Opportunity Act 1984* (WA) s 24(3)(a) and s 24(3)(b); as will be discussed below, this requirement was removed from the Commonwealth Act following a 1992 review.

The Northern Territory *Anti-Discrimination Act 1996* actually extends the federal definition, by requiring that the person harassing either has the intention of offending, humiliating or intimidating *or* the reasonable person would foresee that the person harassed would feel that way.<sup>27</sup> The Act further includes the ‘detriment’ for rejection provision in line with the Western Australian Act as noted above.

While state and territory discrimination legislation existed prior to the enactment of the SDA – the earliest being the *Sex Discrimination Act 1975* in South Australia – sexual harassment was not expressly defined until the commencement of the SDA.<sup>28</sup>

### III VICARIOUS LIABILITY OF AN EMPLOYER

As with other workplace legislative provisions, there is scope for an employer of an employee who is sexually harassed to be held vicariously liable under the SDA. As an overview, an employer will be held vicariously liable *unless* the employer can demonstrate that they ‘took all reasonable steps’ to prevent the doing of the act.<sup>29</sup>

This is demonstrated in the case of *Lee v Smith* [2007] FMCA 59, in which an employer (in this case the Commonwealth of Australia as represented by the Department of Defence) was held vicariously liable for the rape of a civilian administrator at a Cairns naval base. In that case, Ms Lee was subjected to sexual harassment by Mr Smith over a period of time in the workplace; however the rape occurred at Mr Smith’s house following an after-work dinner party.<sup>30</sup> The Federal Magistrate found that ‘the rape was a culmination of the earlier incidents of sexual harassment directly in the workplace’.<sup>31</sup> The Department of Defence was found vicariously liable as they had not taken all reasonable steps to prevent the doing of the act. In this instance, pornographic images were located in the workplace. Interestingly, in that case, the Court considered whether the rape would not have occurred had Ms Lee been given training in sexual harassment. This will be discussed further below when considering policy implementation.

### IV THE EVOLUTION OF THE SEX DISCRIMINATION ACT 1984 (CTH)

Since the enactment of the SDA, sexual harassment in the workplace has been one of the most common complaints received by the Commission.<sup>32</sup> This section will provide an overview of the 1992 House of Representatives Standing Committee

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<sup>27</sup> *Anti-Discrimination Act 1996* (NT) s22(2)(e).

<sup>28</sup> Anna Chapman and Gail Mason, ‘Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques’ (2003) 31 *Federal Law Review* 195, 199.

<sup>29</sup> *Sex Discrimination Act 1984* (Cth) s 106(2).

<sup>30</sup> *Lee v Smith* [2007] FMCA 59.

<sup>31</sup> *Ibid.*

<sup>32</sup> Australian Human Rights Commission, *Sexual Harassment* <<https://www.humanrights.gov.au/our-work/sex-discrimination/guides/sexual-harassment>>.

report that provided the basis for the 1992 reforms, as well as the 2008 enquiry by the Senate Standing Committee leading to the 2011 amendments. A consideration of the evolution of the Act is important in analysing its current applicability.

### **A     *The 1992 Inquiry***

The first inquiry into the progress of the SDA began in 1989 by the House of Representatives Standing Committee, with the report published in 1992.<sup>33</sup> The report stated that, during 1990 and 1991 complaints of sexual harassment had increased by over 100%, resulting in sexual harassment being the largest complaint dealt with under the SDA.<sup>34</sup>

The Committee noted that previous campaigns on sexual harassment ‘had focussed on informing women of their rights’.<sup>35</sup> However, they were ‘impressed’ by a Victorian Federal Clerks Union Branch campaign aimed at men to raise awareness of the effects of sexual harassment, noting the loss of self-esteem and reduction of productivity suffered by women who had experienced sexual harassment.<sup>36</sup> The note preceded Recommendation 40 of the report, that certain trade union and employer organisations in conjunction with the Human Rights and Equal Opportunity Commission (the HREOC) run ‘ongoing campaigns amongst men to raise their awareness of the effects of sexual harassment’.<sup>37</sup>

The 1992 report further recognised that unwanted sexual advances were serious offences in their own right, causing significant harm in the public sphere and workplace. In light of this, the report recommended the removal of the requirement that a complainant demonstrate disadvantage, as was required under sections 28(3) and 29(2) of the SDA at that time.

The report resulted in the *Sex Discrimination and other Legislation Amendment Act 1992* which repealed the existing definition of sexual harassment found under section 28 of the SDA and inserted a new definition under section 28A. Further, sections 28B and 28L were introduced to expand the field of operation of the sexual harassment provisions, to include students, partners of a partnership and include the ‘workplace participant’ as we now find under the section 28B.<sup>38</sup>

### **B     *The 2008 Inquiry***

In a 2008 Senate Standing Committee on Legal and Constitutional Affairs inquiry, overwhelming submissions to the report claimed that the sexual harassment

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<sup>33</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) (‘*Halfway to Equal Report*’).

<sup>34</sup> *Ibid*, 266.

<sup>35</sup> *Ibid* [63].

<sup>36</sup> *Ibid* [63].

<sup>37</sup> *Ibid*, Recommendation 40.

<sup>38</sup> *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).

provisions of the SDA were 'deficient in several respects' and overly restrictive.<sup>39</sup> In response, bold recommendations were made to widen that application of the SDA and focus on funding and implementing positive duties on public organisations and employers to eliminate sexual harassment.<sup>40</sup>

A recommendation was made to insert the word 'possibility' into the definition of sexual harassment to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.<sup>41</sup> This amendment was brought in by the *Sex and Age Discrimination Legislation Act 2011*.<sup>42</sup>

Further, the 2008 Committee recommended that the SDA be amended to protect employees from sexual harassment 'by customers, clients and other persons with whom they came into contact, in connection with their employment.'<sup>43</sup> The Committee also raised a concern for protection of volunteer workers,<sup>44</sup> who were not protected under the Commonwealth legislation.<sup>45</sup>

Prior to 2011, some occurrences of sexual harassment were not unlawful as, under section 28B(6) of the SDA, it was a requirement that the harassment occur by one workplace participant of another workplace participant at a place that is a workplace of *both* of the workplace participants.<sup>46</sup> This requirement was amended to read 'workplace of either or both' by the *Sex and Age Discrimination Legislation Amendment Act 2011 (Cth)*.<sup>47</sup>

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* proposed to amend the list of circumstances in section 28A(1A)(a) to be taken into account as part of the test for sexual harassment. The Bill proposed replacing 'marital status' and 'sexual preference' with 'marital or relationship status' and 'sexual orientation', and inserting 'gender identity' and 'intersex status' as further circumstances to be taken into account. The Bill stated that the amendment

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<sup>39</sup> The Senate, Standing Committee on Legal and Constitutional Affairs, The Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) 58 [5.50] ('*Effectiveness of the Sex Discrimination Act 1984 Report*').

<sup>40</sup> *Ibid* 104 [11.102].

<sup>41</sup> *Ibid* [11.43].

<sup>42</sup> *Sex and Age Discrimination Legislation Amendment Act 2011 (Cth)* s 53.

<sup>43</sup> *Ibid*, Recommendation 18, XV.

<sup>44</sup> *Ibid*, 28.

<sup>45</sup> However may be under the definition of 'workplace participant' in state and territory anti-discrimination legislation; Uniting Justice Australia, *Comments to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws* (2011) 4 [2.4].

<sup>46</sup> As noted at [73] in *Vergara v Ewin* [2014] FCAFC 100.

<sup>47</sup> *Sex and Age Discrimination Legislation Amendment Act 2011 (Cth)*.

‘recognises that a person's gender identity or intersex status may increase their vulnerability to sexual harassment’.<sup>48</sup>

Reviewing the history of the key amendments to the SDA, reveals that the both the definition of sexual harassment and the scope of the application have broadened significantly since the Act's commencement.

### **C *Independent Reporting***

As noted earlier in the paper, in accordance with CEDAW, Australia is required to prepare independent reports into the status and effectiveness of Australia's domestic enabling legislation. This is generally undertaken by the Australian Human Rights Commission as well as non-governmental interested groups.

In 2010, the Australian Human Rights Commission released an independent report titled ‘Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)’.<sup>49</sup> The report was submitted to the Committee of the Convention for the purpose of outlining both the achievements and failures of Australia's attempts to give effect to the Convention. The report recognised that the ‘proliferation of new technologies – such as mobile phones and social networking websites – is creating new mediums where sexual harassment can occur’.<sup>50</sup>

A further ‘Inquiry in the effectiveness of the Sex Discrimination Act Collaborative Submission from leading women's organisations and women's equality specialists’ claimed that, despite many compliance mechanisms in the workplace since the implementation of the SDA, sexual harassment is a continuing problem and processes are ‘failing to serve as a sufficient deterrent’.<sup>51</sup>

## **V CASE LAW**

Court decisions have played a pivotal role in interpreting – and, more importantly broadening – the application of the sexual harassment provisions of the SDA. The following section of the paper will outline key cases involving sexual harassment in the workplace, exploring the vicarious liability of employers and the widened scope of the ‘workplace’.

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<sup>48</sup> *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, Item 46.

<sup>49</sup> Australian Human Rights Commission, *Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (2010).

<sup>50</sup> *Ibid*, 21.

<sup>51</sup> Inquiry in the effectiveness of the Sex Discrimination Act Collaborative Submission from leading women's organisations and women's equality specialists, 34.

The first Australian case to consider sexual harassment was the case of *O'Callaghan v Loder* in 1983, which was heard almost concurrently with the implementation of the SDA.<sup>52</sup> In that case, Mr Loder, the then New South Wales Commissioner of Main Roads, was accused of sexual harassment by an employee lift operator, Ms O'Callaghan. The claim was brought against Mr Loder under the then *Anti-Discrimination Act 1977* (NSW), which contained 'sex discrimination' provisions. Ms O'Callaghan's case failed at the final hearing, as the Court found that there was a requirement that the complainant prove that the harassing employer was aware that his or her behaviour was unwelcome.<sup>53</sup> The Court found that Ms O'Callaghan had failed to satisfy this requirement. This case had an important effect on the implementation of the SDA and the final hearing occurred concurrently with the introduction of the *Sex Discrimination Bill 1983* (Cth).

### A *Fraser-Kirk v David Jones*

Arguably one of the more infamous cases in Australian history regarding sexual harassment allegations was the case of *Fraser-Kirk v David Jones Limited* [2010].<sup>54</sup> Ms Fraser-Kirk alleged unwelcome sexual advances by the former Director and CEO of David Jones.. The alleged conduct included sexual comments and inappropriate touching occurring at work functions, and sexually explicit text messages. Ms Fraser-Kirk further alleged that senior management were aware of the conduct towards herself and other employees and, instead of responding to her concerns raised, deliberately placed her in situations where the conduct could occur. Ms Fraser-Kirk accordingly claimed vicarious liability on the part of David Jones.

While it is arguable that this case gained public attention due to the \$37 million dollar amount claimed in damages by Ms Fraser-Kirk and, further, the public status of the Defendant, there were significant issues raised that roused public interest. The case demonstrated the real possibility of vicarious liability claims where an employer fails to take reasonable steps to prevent or deal effectively with sexual harassment (as well as other forms of discrimination).<sup>55</sup> Despite the media attention and lengthy court process, the matter was eventually resolved out of court with Ms Fraser-Kirk accepting a settlement sum of approximately \$850,000.<sup>56</sup>

### B *Extending the 'Workplace'*

In a 2005 case *South Pacific Resort Hotels Pty Ltd v Trainor*, the Full Court of the Federal Court of Brisbane (on appeal) confirmed that the conduct of a hotel worker

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<sup>52</sup> *O'Callaghan v Loder* (1983) NSWLR 89.

<sup>53</sup> *O'Callaghan v Loder* (1984) EOC 92-023.

<sup>54</sup> *Fraser-Kirk v David Jones Limited* [2010] FCA 1060.

<sup>55</sup> 'Equal Time', Newsletter of the Anti-Discrimination Board of NSW (No 81, Autumn 2011), 5.

<sup>56</sup> 'Fraser-Kirk v David Jones: Is Your Business Protected From Sexual Harassment Claims?' (Eastern Commercial Lawyers, 22 May 2011)

<http://www.eclawyers.com.au/newslist/kristy-fraser-kirk-v-david-jones-have-you-implemented-policies-and-procedures-concerning-sexual-harr>.

constituted sexual harassment under section 28B, despite the conduct occurring after hours.<sup>57</sup> The case involved island hotel workers, residing at accommodation provided by the employer, at which no visitors were permitted to enter. A co-worker entered a colleague's bedroom uninvited on two occasions, while both employees were off-duty. The co-worker, Mr Anderson, entered Ms Trainor's room on the first occasion and began making sexual comments towards her and, on the second occasion, Ms Trainor woke to find Mr Anderson lying beside her in her bed. The Court rendered Mr Anderson's conduct unlawful under section 28B of the SDA, despite the conduct occurring while both employees were off-duty, as it was found that there was a sufficient nexus between the conduct and the employment, noting that the second incident occurred following a staff function at which Mr Anderson consumed alcohol.<sup>58</sup> The Full Court held that the sexual harassment took place because of their common employment and subsequent accommodation and that it could not be said that the common employment was 'unrelated or merely incidental to the sexual harassment of one by the other'.<sup>59</sup> The employer was held vicariously liable under section 106(1) of the SDA, with Keiffel J noting that 'no narrow approach to the operation of s 106(1) is warranted'.<sup>60</sup> Ms Trainor was awarded \$5,000 in general damages and \$7,500 in past and future economic loss.

Further in the case of *Cross v Hughes* in 2006, an office administrator, Ms Cross, travelled to Sydney with her employer, Mr Hughes, under the impression that he had given that the trip was for business. During the course of the trip (as well as prior incidences during her employment), Mr Hughes made sexually suggestive comments and suggested to her that she and the employer attend a live sex show. He had also arranged for himself and Ms Cross to share a single hotel suite with two bedrooms. Ms Cross refused the suggestions, however Mr Hughes continued to make unwelcome sexual advances over the course of the weekend and further entered Ms Cross's bedroom uninvited, only leaving when she made it clear that she would not have intercourse with him.<sup>61</sup> The case was heard in the Federal Magistrates Court and the proceedings were undefended. Lindsay J concluded that, 'the weekend in Sydney was, in truth, unrelated to any business activities by the first respondent. The weekend was planned and implemented to provide him with an opportunity to seduce the applicant.'<sup>62</sup> The Court found that Mr Hughes had unlawfully sexually harassed Ms Cross contrary to section 28A and 28B of the SDA and Mr Hughes and the employer, found to be vicariously liable under section 106(1), were ordered to pay to Ms Cross the amount of \$11,822 in damages, \$3,822 of which were for economic loss.

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<sup>57</sup> [2005] FCAFC 130.

<sup>58</sup> *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 [70].

<sup>59</sup> *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130; citing *Leslie v Graham* [2002] FCA 32.

<sup>60</sup> *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 [70].

<sup>61</sup> *Cross v Hughes* (2006) 233 ALR 108.

<sup>62</sup> *Cross v Hughes* (2006) 233 ALR 108 [27].

## C *Ewin v Vergara*

More recently, a high profile case heard in the Federal Court of Australia awarded a record damages award of approximately \$476,000 to a woman found to have been sexually harassed under section 28B of the SDA. More importantly, the Federal Court extended the scope of the 'workplace'. In *Ewin v Vergara* (No. 3)[2013] FCA 1311, an accountant (Ms Ewin) claimed that she had been sexually harassed by a fellow accountant (Mr Vergara) who was hired by an external labour hire firm with Ms Ewin's employer, Living and Leisure Australia Limited (LLA).

Ms Ewin alleged that Mr Vergara had sexually harassed her for a month, culminating into four occasions spanning over four days in early 2009, in the form of sexually explicit comments as well as physical acts. The Court held that three of the four acts constituted sexual harassment under the SDA, as they were found to be unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.<sup>63</sup>

The key issues in this case were that Mr Vergara was a contractor rather than an employee of LLA and, further, the conduct occurred not only in the office of Living and Leisure, but also a hotel and a taxi. Ms Ewin brought action against Mr Vergara, as well as her employer and Mr Vergara's employer, however both of the claims against the employers were settled by way of mediation and therefore the case against them was not brought before the Court.

Mr Vergara challenged the allegations, on the grounds that he was not an 'employee' as defined in the SDA. Further, he claimed that the hotel and taxi did not constitute the 'workplace' and therefore was not covered by the scope of the SDA. However, Ms Ewin brought the claim under section 26B(6) of the SDA, which makes it unlawful for a 'workplace participant' to sexually harass another 'workplace participant' at a place which is a workplace for either or both people.<sup>64</sup> It was not contended that Mr Vergara was a 'workplace participant' and it was noted at the trial that Mr Vergara fell under the definition of 'contractor' as defined in section 4(1) of the SDA.<sup>65</sup>

Mr Vergara contested the argument that the hotel and taxi constituted 'workplace' under section 28B(6). The Court noted that 'workplace' was defined under section 28B(7) to be a 'place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant'.<sup>66</sup> This issue was considered in an earlier hearing of the matter and, in response, Justice Bromberg held at [43]:

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<sup>63</sup> *Ewin v Vergara* (No. 3) [2013] FCA 1311.

<sup>64</sup> *Sex Discrimination Act 1984* (Cth) s 28B(6).

<sup>65</sup> As noted at paragraph 8 of the decision in *Vergara v Ewin* [2014] FCAFC 100.

<sup>66</sup> *Vergara v Ewin* [2014] FCAFC 100 paragraph 74; *Sex Discrimination Act 1984* (Cth) s 28B(7).

What makes a workplace animate are the people who work in it and the relations between them. The object of eliminating sexual harassment in the workplace is thus to be understood as directed at the elimination of sexual harassment from the work based relationships and the workplace environment of persons who work together for or in a common enterprise, or in other words a common workforce.<sup>67</sup>

While the appellate court agreed with the court in the first instance that the hotel was considered a 'workplace' under section 28B(6), they differed in their reasoning, finding that it is not an issue of the construction of the word 'workplace', but an issue of the parties carrying out a function 'in connection with' their being workplace participants.<sup>68</sup> The appellate court concluded that the parties moving from the workplace to the hotel was not to continue their relationship, but a continuation of Mr Vergara's unwanted sexual advances that commenced at the workplace.<sup>69</sup> This reasoning was also applied in relation to conduct that occurred while travelling in a taxi between the workplace and the office of a client of LLA. Therefore the street, hotel and taxi were all found to be classified as the 'workplace' and hence the provisions of the SDA were applied accordingly.

This case upheld the objectives of the SDA, with the Court finding that 'the objective of the eliminating sexual harassment in the workplace would be significantly undermined if associated common areas such as entrances, lifts, corridors, kitchens and toilets were construed as falling beyond the geographical scope intended by s 28B(6).'<sup>70</sup>

## VI COURT ORDERED DAMAGES: THE COURT'S SHIFT TO SIX-FIGURE AWARDS

Raising a claim of sexual harassment under the SDA is a civil matter - much like an allegation of negligence - therefore the remedy available to a claimant against a person found guilty of sexual harassment is an award of monetary damages. However, in a relatively short period of time, court ordered damages for victims of sexual harassment have increased exponentially, from an average of \$20,000 for 'non-economic loss' a decade ago to over \$100,000 in recent years.<sup>71</sup>

To date, there is no clear ratio as to the assessment of damages under the SDA. This may be because the law is relatively new in context, or perhaps that it is difficult to quantify damages for discrimination.

In the case of *Hall v Sheiban*, Lockhart J stated:

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<sup>67</sup> *Ewin v Vergara (No 3)*[2013] FCA 1311 at 43.

<sup>68</sup> *Vergara v Ewin* [2014] FCAFC 100 paragraph 124.

<sup>69</sup> *Vergara v Ewin* [2014] FCAFC 100 paragraph 128.

<sup>70</sup> *Ewin v Vergara (No 3)*[2013] FCA 1311 [43].

<sup>71</sup> Nick Toscano, 'Sexual Harassment Damages Payouts Soar', *Sydney Morning Herald* (online) 14 August 2014 <<http://www.smh.com.au/national/sexual-harassment-damages-payouts-soar-20140813-103k8j.html>>.

As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.<sup>72</sup>

While the recourse of monetary damages for a victim of sexual harassment has stayed static over the years since the enactment of the SDA, the amount awarded by a court has risen significantly in the past ten years. This is evidenced most significantly in the case of *Ewin v Vergara* and may be evident of the Court's growing awareness of the significant impact that the conduct may have of a victim's future, both mentally and economically.

In the case of *Richardson v Oracle* in 2014, the Federal Court of Australia raised the monetary damages from \$18,000 in the first instance, to \$130,000 on appeal. Kenny J stated that the \$18,000 was 'manifestly inadequate' and awarded the higher amount stating that it was reflective of 'prevailing community standards'.<sup>73</sup> He further stated that community standards now 'accord a higher value to pain and suffering and loss of enjoyment of life than before.'<sup>74</sup>

## VII ANALYSIS OF THE CURRENT SEXUAL HARASSMENT PROVISIONS OF THE SDA: ARE THEY EFFECTIVE?

The wider use of technology such as email, mobile phones and social networking has increased the likelihood of incidences of sexual harassment in the workplace, as well as the potential for the vicarious liability of the employer.<sup>75</sup> With the recent 30th anniversary of the SDA, there has been public concern that the Act does not capture the scope of sexual harassment in contemporary times and, as such, requires review. This section of the paper considers current opinions of the federal sexual harassment laws and their perceived success, as well as policy considerations and recommendations for further reform.

In 2008, Australian Sex Discrimination Commissioner Elizabeth Broderick undertook a listening tour of Australia and found that approximately one in five respondents had

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<sup>72</sup> *Hall v Sheiban* (1989) 20 FCR 217, 239 (Lockhart J).

<sup>73</sup> *Richardson v Oracle Australia Pty Ltd*[2014] FCAFC 82 at [81].

<sup>74</sup> *Richardson v Oracle Australia Pty Ltd*[2014] FCAFC 82 at [96].

<sup>75</sup> Australian Human Rights Commission, 'Sexual Harassment,' <<https://www.humanrights.gov.au/our-work/sex-discrimination/guides/sexual-harassment>>.

experienced sexual harassment according to the provisions of the SDA, however the respondents were unaware that the conduct was unlawful.<sup>76</sup> This finding makes it apparent that there is an alarming lack of understanding across Australia as to what, in fact, constitutes sexual harassment.

The survey results lead to the questions whether the onus should be on employers to educate their staff of the law and for employers to ensure that there is sufficient policy in place to encourage compliance. This is a view strongly expressed by Commissioner Broderick, who, in the foreword to the report of the listening tour, stated:

Employers need to ensure that their employees have a solid understanding of what sexual harassment is. This involves comprehensive training on the types of behaviours that may amount to sexual harassment. Employers need to create a workplace where people feel supported to make complaints.<sup>77</sup>

A follow-up telephone survey was conducted in 2012 and, once again, results revealed that one in five people over the age of 15 experienced sexual harassment in the workplace in the previous five years.<sup>78</sup>

### A Policy Considerations

As with many other legislative instruments that affect the working sphere, there is an assumption (and at times, a requirement) that a workplace should implement policy in order to ensure compliance with their legal responsibilities.<sup>79</sup> This is also the case with the sexual harassment provisions under the SDA and an employer's failure to implement sufficient policy has often led to a finding of vicarious liability in cases of sexual harassment under section 28A.

The requirement to implement a compliance mechanism is a common condition found in mediation and arbitration settlements where employer vicarious liability has been found. Interestingly, cases involving the vicarious liability of an employer for an employee's sexual harassment contain a majority of the judicial consideration of the issue of due diligence and compliance.<sup>80</sup> However, there has been no definitive rule for the level of compliance required as the courts have tended to decide vicarious liability on a case-by-case basis.

In case law to date, it is well settled that a 'paper policy' is insufficient to meet the 'all reasonable steps' requirement under the SDA. Sexual harassment cases have tended to follow the rule set out by Justice Goldberg in the case of *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1998) (also known as the 'Tip Top Case'), that:

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<sup>76</sup> *Sexual Harassment: Serious Business Report*, above n 6.

<sup>77</sup> *Sexual Harassment: Serious Business*, above n 6.

<sup>78</sup> *Working Without Fear Report*, above n 1, v.

<sup>79</sup> Christine Parker and Olivia Conolly, 'Is there a Duty to Implement a Corporate Compliance System in Australian Law?' *Australian Business Law Review* (Vol 30, 2002) 273.

<sup>80</sup> *Ibid* 287.

One needs to look at the compliance program in two respects. Firstly one must ask whether there was a substantial compliance program in place which was actively implemented by [the defendant]... Secondly, one must ask whether the implementation of the compliance program was successful.<sup>81</sup>

Succinctly, this means that where there is a paper policy in place, it will not prove sufficient to show that an employer has taken all reasonable steps; however, a consideration of the terms of the policy coupled with whether it was effectively implemented may be factors that a Court will consider in determining vicarious liability.<sup>82</sup>

In the recent case of *Richardson v Oracle*, the employer (Oracle) had in place an online sexual harassment training course, requiring employees to complete the course every two years. When considering whether this was sufficient to find that Oracle had taken 'all reasonable steps' to prevent the sexual harassment of one employee of another, Buchanan J stated that (with respect to workplace policy):

In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated.<sup>83</sup>

## B Positive Duties

One of the key issues with the SDA is that it is not a 'proactive' piece of legislation, as it requires a victim of discrimination or harassment to make a complaint in order to bring about action.<sup>84</sup> This is so across the majority of anti-discrimination laws in Australia; they are similar to civil common law rights as they are enforceable by the victim, not by a prosecutor or other agency. An issue raised in Commissioner Broderick's 2008 report was that, as at that time, the number of people reporting incidences of sexual harassment had *decreased* from 32% in 2003 to 16%.<sup>85</sup> This finding supports the view that while there may be several options open to a victim in order to voice their grievances, many are not seen as viable options due to fears such as further victimisation.<sup>86</sup> This gives rise to the possibility of implementing positive duties on employers and external bodies, to step in where clear cases of sexual harassment are evident, but where the victim is afraid to report the conduct.

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<sup>81</sup> *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1998) ATPR 41-562.

<sup>82</sup> Parker and Conolly, above n 80, 287.

<sup>83</sup> *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 at [163].

<sup>84</sup> Caroline Brentnall, 'Women: Their Rights in Australia Over the Past 40 Years (1972 – 2012)' <11[http://www.fitzroylegal.org.au/cb\\_pages/files/Women\\_Their%20rights%20in%20Australia%20over%20the%20past%2040%20Years.pdf](http://www.fitzroylegal.org.au/cb_pages/files/Women_Their%20rights%20in%20Australia%20over%20the%20past%2040%20Years.pdf)>.

<sup>85</sup> *Sexual Harassment: Serious Business Report*, above n 6.

<sup>86</sup> Paula McDonald and Sara Charlesworth, 'Settlement Outcomes in Sexual Harassment Complaints' (2013) 24 *Australian Dispute Resolution Journal*, 260.

Employees, notably in larger organisations, may seek redress for grievances internally through their workplace prior to approaching external bodies. However, as noted by Paula McDonald and Sara Charlesworth in a 2013 report, 'there is clear empirical evidence that employees often perceive these procedures as adversarial, delayed, risky in terms of isolation or victimisation from the workgroup, and likely to be met with inaction.'<sup>87</sup>

This aspect has come under significant scrutiny in recent reports; with recommendation arising that there should be a positive duty placed on employers as well as greater powers provided the Sex Discrimination Commissioner under the SDA, to enable the Commissioner to initiate workplace investigations without the requirement for an individual complaint.<sup>88</sup>

However, this proposal has been countered with the concern that positive duties imposed on public and/or private sector employers to eliminate sex discrimination and sexual harassment 'would place unnecessary regulatory burden on duty holders and might not achieve their aims.'<sup>89</sup>

### **C     *Legislative Reform***

As we have seen throughout this paper, the provisions of the SDA relating to sexual harassment have been amended time and time again, to incorporate (as well as on occasion overcome) interpretation by the courts and public enquiry. In a paper released by academics of the University of Sydney over a decade ago, that outlined the history and critique of the sexual harassment provisions of the SDA, it was noted that 'the drafting of the "perfect" definition of sexual harassment is endless',<sup>90</sup> and that each change brought about positive and negative interpretations. The author supports the view that each time legislatures attempt to amend the legislation and refine the definition of sexual harassment, they 'run the risk of trivialising or excluding experiences that do not fit the new model'.<sup>91</sup>

Given the current call for uniform discrimination laws in the form of a single piece of legislation, there is speculation as to the effectiveness of further amendments to the SDA. In a critical review of the SDA in 2009, Beth Gaze, Associate Professor of the University of Melbourne, stated that 'more than cosmetic reform is necessary'; however cosmetic change is what we have witnessed to date, with the reworking of similar provisions as noted

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<sup>87</sup> Ibid.

<sup>88</sup> Australian Human Rights Commission, *Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (2010) 22.

<sup>89</sup> Attorney-General's Department, Parliament of Australia, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (2011) 18 [64].

<sup>90</sup> Chapman and Mason, above n 28, 223.

<sup>91</sup> Chapman and Mason, above n 28, 223.

## VIII WHAT LIES AHEAD FOR SEXUAL HARASSMENT LAWS IN AUSTRALIA?

As this paper has attempted to demonstrate, more than legislative reform is required in order to combat the alarming prevalence of sexual harassment in Australian workplaces. Further, the courts' tendency to widen the application of the sexual harassment provisions of the SDA, as well as the increasing amount of damages awarded to victims, is evidence of the judicial system's awareness of the severity of the issue and the need to permit unfettered operation of the law. The decision in *Vergara v Ewin* (on appeal) provides authority for the rationale that, for the purposes of sexual harassment under the SDA, a workplace can extend beyond the immediate setting of the office or place of business. In theory, the 'workplace' could include public transport, a public park or a private residence, so long as there is a sufficient nexus to the parties' employment.<sup>92</sup> However in determining what is and is not considered the workplace will require an analysis of the chain of events leading to the parties being in that particular location.<sup>93</sup>

Stringent workplace policy must play a vital role in ensuring that employers lessen their risk of being found vicariously liable for incidences of sexual harassment, however what more can be done to deter offenders? As research suggests, a number of people still do not understand sexual harassment as defined under the SDA. This indicates that education by way of policy reform may play a more vital role in deterring incidences of sexual harassment, with the law simply aiding as an avenue for which a victim can find recourse.

The results of the 2012 telephone survey suggest a need for workplace prevention strategies and ongoing employee education about sexual harassment in the workplace and avenues for redress.<sup>94</sup> In looking to the future, the report states that it is evident from the findings of the survey, that:

Real and meaningful change resulting in workplaces that are safe and free from harassment requires more than legislative change. It also requires leadership and a genuine commitment from government, unions and all sectors of the Australian workforce to put an end to sexual harassment and ensure the safety and security of all employees while at work.<sup>95</sup>

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<sup>92</sup> Janine Young et al, 'Full Federal Court Adopts a Broad Approach to the Concept of a "Workplace" Under Anti-Discrimination Legislation', (Corrs Chambers Westgarth, 16 September 2014) <<http://www.corrs.com.au/publications/corrs-in-brief/full-federal-court-adopts-a-broad-approach-to-the-concept-of-a-workplace/>>.

<sup>93</sup> Michael Byrnes, 'Workplace' Clarified By Sexual Harassment Case' (2014) 52(1) *Law Society Journal* 48, 49.

<sup>94</sup> *Working Without Fear Report*, above n 1, 6.

<sup>95</sup> *Working Without Fear Report*, above n 1, 5.

## **IX CONCLUSION**

The objective determination of what constitutes sexual harassment makes it, by nature, a challenging area to legislate. Coupling this with the rapid changes in communications technology, has resulted in a widening of the scope of the 'workplace' has led to an array of relevant case law, with outcomes determined on a case-by-case basis. The amendments to the SDA since its implementation in 1984 reflect responses to judicial decision-making, however the courts have continued to broaden the scope of the SDA.

The recent review into the treatment of women in the defence force in 2014 has, in the Writer's opinion, demonstrated that workplace policy can play the key role in effective deterrence of sexual harassment. The current consideration of a shift from the SDA to a uniform discrimination act is a positive step, however it is ultimately through education and policy improvements that we will see the greatest improvements. The SDA has created a strong platform under which claims may be brought, however the SDA can only act as a deterrent, once policy and education have fallen short and the judicial system must step in.

