

Does Australia Have The Laws It Needs In The #MeToo Era?

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This article explores the adequacy of Australian laws for tackling complaints of sexual assault and harassment in relation to defamation. It discusses the positive and negative effects of #MeToo in Australia, arguing that although the *Sex Discrimination Act* (Cth) is able to deal with sexual harassment complaints and compensate victims, it does not encourage change in the behaviour of perpetrators. The current legal framework is insufficient for adequate justice, particularly in relation to Australia's defamation regime. This has resulted to victims being cautious about sharing their stories on digital platforms. In order to provide victims with the justice they deserve, further changes to defamation law and a uniform approach is needed.

In recent years, the #MeToo movement has made a global impact that has allowed many more voices to be raised. This study explored whether Australian laws are adequate in tackling complaints of sexual assault and harassment, especially given the protection of defamation laws. The positive and negative effects of the movement in Australia are discussed to understand the continuing problem and the adequacy of defamation laws in comparison to sexual harassment laws. Although, the Commonwealth *Sex Discrimination Act* is able to deal with sexual harassment complaints and compensate victims, it does not encourage change in the behaviours of perpetrators. The current legal framework is insufficient in providing victims with adequate justice whereas, the approach adopted by the stringent defamation laws of Australia is far stronger. This has resulted to victims being more cautious about sharing their stories on public platforms and being further discouraged to seek relief. In order to provide victims with the justice they deserve, defamation laws need to be eased when dealing with sensitive matters and sexual harassment laws need to be reformed to align with the #MeToo era.

I #METOO MOVEMENT

The #MeToo movement was founded by Tarana Burke in 2006 to recognise experiences of sexual assault and harassment suffered by women especially of colour in low-income communities.¹ The movement encourages survivors of sexual violence to voice out their experiences to hold perpetrators accountable for their abuse² and allows these women to heal through empathy by coming together and sharing their experiences. The movement gained publicity after film producer, Harvey Weinstein was publicly exposed for sexual assault carrying the hashtag #MeToo, which led other women to share their stories.³ The #MeToo movement has had a global impact by reaching to nearly every region of the world⁴ through the effect on those in the

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¹ Megan Murphy, 'Introduction to "#MeToo Movement"' (2019) 31(2) *Journal of Feminist Family Therapy* 63, 63.

² Ibid.

³ Emma Brockes, '#MeToo founder Tarana Bruke: "You have to use your privilege to serve other people"', *The Guardian* (online, 15 January 2018)

<<https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>>.

⁴ Meighan Stone and Rachel Vogelstein, 'Celebrating #MeToo's Global Impact' *Foreign Policy* (Web Page, 7 March 2019)

<<https://foreignpolicy.com/2019/03/07/metooglobalimpactinternationalwomens-day>>.

entertainment industry. Although, there have been many successful stories, Australia has a long way to go to achieve the full benefit from this movement due to its federal sex discrimination and defamation laws.

II POSITIVE IMPACTS OF THE MOVEMENT

The issue of sexual harassment and abuse has been prevalent within workplaces for many decades regardless of the illegality. A survey conducted by the Australian Human Rights Commission (AHRC) in 2018 confirmed that one in three people have experienced sexual harassment at work in the last five years.⁵ Although the statistics of people experiencing sexual harassment has been increasing rapidly through the #MeToo movement, a Harvard study showed that 74% of women were more willing to speak out against harassment while 77% of men anticipated being more careful about potential inappropriate behaviour.⁶ This global movement has had an extraordinary revelation that men are experiencing consequences for the first time ever.⁷ The main issue concerning sexual harassment remains to be the incomprehensibility of what constitutes sexual misconduct because a lot of victims once normalised and regarded the respective behaviour as 'boys being boys'⁸ and 'men being men',⁹ which are now less tolerated.

For many years, perpetrators have been excused for their sexual misbehaviour but with victims sharing their stories on a public platform with #MeToo, at least 200 prominent men in America have lost their jobs.¹⁰ Additionally, nearly half of the men (43%) who have been replaced were succeeded by women.¹¹ This portrays women's advancement and power within organisations. Through the change in an organisation's hierarchy, women are able to create societal changes by reducing discrimination against women especially in aspects of their maternity leave and family responsibilities. Moreover, this has given employers the opportunity to redefine the boundaries of acceptable workplace conduct and to expand the channels of communication with their employees with the potential to an increased job satisfaction.¹² American workplaces are encouraged to implement policies and trainings for anti-harassment and anti-discrimination, govern employee conduct in and out of the office, expand reporting procedures for inappropriate behaviour and review protocols for responding to complaints of inappropriate conduct.¹³

In Australia, the movement has led the Government to ensure Australian workplaces are safe and free from sexual harassment by improving support and advocacy systems

⁵ Australian Human Rights Commission, 'Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces' *Australian Human Rights Commission* (Web Page, 12 September 2018) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>>.

⁶ Tim Bower, 'The #MeToo Backlash' *Harvard Business Review* (Web Page, 1 September 2019) <<https://hbr.org/2019/09/the-metoo-backlash>>.

⁷ Shannon Carlin, 'Amber Tamblyn: Inside a #MeToo Advocate's Novel About Male Sexual Assault' *Rolling Stone* (Web Page, 13 July 2018) <<https://www.rollingstone.com/culture/culture-features/amber-tamblyn-metoo-advocate-novel-male-sexual-assault-697549>>.

⁸ Skye Saunders and Patricia Easteal, "'Fit in or F#\$@ off!": The (non) disclosure of sexual harassment in rural workplaces" (2012) *International Journal of Rural Law and Policy* 1, 12.

⁹ Ibid.

¹⁰ Audrey Carlsen et al, '#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.' *The New York Times* (online, 29 October 2019) <<https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>>.

¹¹ Ibid.

¹² Kramer Levin, 'The MeToo movement: An opportunity for positive change' *Kramer Levin* (Web Page, 28 April 2020) <<https://www.kramerlevin.com/en/perspectives-search/the-metoo-movement-an-opportunity-for-positive-change.html>>.

¹³ Ibid.

for victims as well as, clarifying existing laws for more consistency between jurisdictions.¹⁴

III NEGATIVE IMPACTS OF THE MOVEMENT

The #MeToo movement has stimulated a wide range of changes within workplaces in America. However, a blind eye cannot be turned to the challenges that have sparked since the movement took effect. Terry Crews shared his thoughts after the first report about Harvey Weinstein reached the media using #MeToo, where men responded to the shared tales with scepticism and suggested that women were only speaking up because they wanted to be famous.¹⁵ His response to that was ‘That’s not what this is about at all! This is not how it works!’.

This has shed light on a bigger problem. The motive of the #MeToo movement was to encourage men to stand up and support women but the reality was rather contradictory. However, the allegations against Harvey Weinstein encouraged Terry Crews to speak up about his encounter with sexual assault, which also resulted negatively with celebrities mocking him. The reality of Terry Crews’ story is how toxic masculinity permeates culture.¹⁶ It is important to take into account that men are also survivors of sexual harassment with one in four men (26%) experiencing sexual harassment at work in the last five years.¹⁷

Given the gendered nature of the harm, the Australian literature tends to focus on ‘men as perpetrators’, but there are a lot of men that are victims as well¹⁸ who are discouraged to speak up because their experiences are not taken seriously. This depicts a different expectation between men and women in regards to tackling sexual harassment incidents and the need to de-gender violence. Tarana Burke stated that her vision of this global movement is to see a world free of sexual violence and we are the ones that can build that world¹⁹ by supporting and standing up for the victims.

IV DEFAMATION LAW

The positive impact of the #MeToo movement in the United States has not been mirrored in Australia due to its strong defamation laws, leading to people or publications making allegations and facing threats of legal action.²⁰ The movement has

¹⁴ Stephanie Dalzell, ‘Workplace sexual harassment ‘prevalent and pervasive’ because laws have not kept up, report finds’, *ABC News* (online, 5 March 2020) <<https://www.abc.net.au/news/2020-03-05/sexual-harassment-in-the-workplace-kate-jenkins/12027968>>.

¹⁵ Taylor Jewell, ‘“I Was Terrified, and I Was Humiliated”: #MeToo’s Male Accusers, One Year Later’ *Vanity Fair* (Web Page, 4 October 2018) <<https://www.vanityfair.com/hollywood/2018/10/metoo-male-accusers-terry-crews-alex-winter-michael-gaston-interview>>.

¹⁶ Christina Dugan and Aurelie Corinthios, ‘Terry Crews on His ‘Summer of Freedom’ in Wake of #MeToo Movement: “This Is Just the Beginning”’ *People* (Web Page, 8 August 2018) <<https://people.com/tv/terry-crews-me-too-experience>>.

¹⁷ Australia Government, ‘Family, domestic and sexual violence in Australia: continuing the national story 2019’ *Australian Institute of Health and Welfare* (Web Page, 29 April 2020) <https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-FDSV-in-Australia-2019_in-brief.pdf.aspx?inline=true>.

¹⁸ Neil Lyndon, ‘My #metoo story shows that men are the victims as well as the culprits’ *The Telegraph* (online, 23 October 2017) <<https://www.telegraph.co.uk/men/thinking-man/metoo-story-shows-men-victims-culprits/>>.

¹⁹ Patrick Greenfield, ‘#MeToo has been misrepresented as plot against men, says founder’ *The Guardian* (online, 30 November 2018) <<https://www.theguardian.com/world/2018/nov/30/metoo-has-been-misrepresented-as-plot-against-men-says-founder>>.

²⁰ Frances Mao, ‘The ‘wary’ #MeToo conversation in Australia’ *BBC News* (online, 18 December 2018) <<https://www.bbc.com/news/world-australia-46600396>>.

encouraged victims to speak up, portraying their freedom of speech. However, it is vital to take into account the lack of constitutional protection for freedom of speech in Australia. Thus, the pervasive application of defamation law to all communication creates real risks of liability and poses threats for publishers,²¹ which includes the victims using #MeToo to share their stories of sexual harassment. Defamation law in Australia protect a person against published statements contributing to harm in their personal or professional life through the lowering of their reputation, in essence how they are regarded by right minded people.²² An allegedly victim of defamation has the onus of proving that the communication that clearly identifies the victim and that the speech was impermissibly disparaging of that person's reputation.²³ Defamation is significant for #MeToo because it might be used to silence someone who had been harassed or assaulted, in other words prevent the exposure of wrongdoing. Defamation might however be a mechanism for exposure, given that it requires a lower standard of proof than in criminal law and that wrongdoing might be ventilated when someone who has been wronged defends claims when sued for defamation by a perpetrator.

The high-profile case of *Rush v Nationwide News*²⁴ was the first legal determination of a case associated with #MeToo in Australia.²⁵ Geoffrey Rush, an Australian actor, was accused of his inappropriate behaviour by a fellow actor, Eryn Jean Norvill who informally complained to the Sydney Theatre Company.²⁶ She was required to become a witness in his defamation case against Nationwide's newspaper.²⁷ The court decided the case in favour of Rush, as the Nationwide News was incapable of proving the truth of the defamatory meaning that they sought to be justified.²⁸ This depicts the difficulty victims face in providing evidence to support the truth within the occurred incident whereas, it is easier for the defamed person to provide evidence through the use of #MeToo. Therefore, the sensitive matters including, sexual assault and harassment cannot be dealt with in the same way other defamation claims occurring in everyday business are tackled with.

Similarly, actress Yael Stone alleged Rush misbehaved with her during a theatre production previously but feared to speak up about it because she could face legal consequences under the defamation laws.²⁹ The defamation laws in Australia are the core reason to why the #MeToo movement has not been successful in comparison to other cities such as, America. There have been many other high-profile cases involving perpetrators from the entertainment industry that have faded from public view.³⁰ The reality of this is that, neither have the victims achieved the justice they sought from speaking up nor, have they claimed or received any remedy³¹ due to the fear of being sued for defaming the perpetrators. If the cases have gone to court, they have been

²¹ David Rolph, 'Social media and defamation law pose threats to free speech, and it's time for reform' *The Conversation* (online, 15 September 2016) <<https://theconversation.com/social-media-and-defamation-law-pose-threats-to-free-speech-and-its-time-for-reform-64864>>.

²² Slater Gordon, 'Defamation' *Slater Gordon* (Web Page, 29 April 2020) <<https://www.slatergordon.com.au/dispute-resolution/defamation>>.

²³ *Ibid.*

²⁴ (*No 7*) [2019] FCA 496.

²⁵ Karen O'Connell, 'Geoffrey Rush's victory in his defamation case could have a chilling effect on the #MeToo movement' *The Conversation* (online, 29 April 2020) <<https://theconversation.com/geoffrey-rushs-victory-in-his-defamation-case-could-have-a-chilling-effect-on-the-metoo-movement-115127>>.

²⁶ David Marin-Guzman, 'Lawyers weigh in on #MeToo post Rush' *The Australian Financial Review* (Web Page, 15 April 2019) <<https://www.afr.com/work-and-careers/workplace/rush-judgment-could-see-metoo-remain-behind-closed-doors-20190414-p51e0r>>.

²⁷ *Ibid.*

²⁸ *Rush v Nationwide News* (*No 7*) [2019] FCA 496.

²⁹ Mao (n 19).

³⁰ O'Connell (n 24).

³¹ *Ibid.*

heard under defamation laws not sexual harassment laws,³² as no prominent cases of sexual harassment have been brought to attention. The most difficult challenge within a defamation claim is, the onus is upon the person who made the statement to defend their actions usually by proving the truth of the statement while, in the United States, the onus is on the defamed person to prove that the statement is false and was published with malice.³³ Since, the decision of *Rush*, silence around sexual harassment has increased.

Following the *Rush* case, in *Johnson v Ramsden*³⁴ the issue was whether pinching a woman's buttock constituted an indecent assault.³⁵ The Magistrate found that in the modern era of twerking and grinding, simulated sex and easy access to pornography, the thought of a pinch on the bottom is almost a reference to a more genteel time thus, the act that had capability of being indecent was not inherently indecent.³⁶ This portrays a backlash in the little momentum victims in Australia had gained through the #MeToo movement.

Although, through this movement, employees in organisations have a better understanding of what constitutes sexual harassment,³⁷ community standards remain unchanged. The decision of both the cases illustrate the ineffectiveness of the #MeToo movement. Additionally, it leads the victims of sexual harassment to believe that these perpetrators can continue acts of sexual assault and harassment because their reputation as dominant authorities within organisations may be protected under the defamation laws. While, there are no adequate protections available to victims under the sexual harassment laws.

V SEXUAL HARASSMENT LAWS

After the implementation of the *Sex Discrimination Act (SDA)*³⁸ in 1984, sexual harassment in the workplace is prohibited.³⁹ Sexual harassment remains prevalent because people are unaware of their rights under the *SDA* and because victims are afraid of further victimisation once cases are reported.⁴⁰ The #MeToo movement has reflected silencing of Australian victims, as only 17% of women have lodged a formal *SDA* complaint in the past five years.⁴¹

One reason to remain silent is due to the fear of being labelled as a troublemaker or a liar, dismissal or promotion opportunities and psychological distress.⁴² Another reason for a low rate in reporting incidents of sexual harassments is due to the cost and risks involved in pursuing the claims.⁴³ However, in the instance that the complaint is reported to the AHRC, it is mandatory for the victim and the perpetrator to attend a

³² *Ibid.*

³³ UTS, '#MeToo exposes problems with Australia's defamation laws' *UTS* (Web Page, 15 November 2018) <<https://www.uts.edu.au/partners-and-community/initiatives/social-justice-uts/news/metoo-exposes-problems-australias-defamation-laws>>.

³⁴ [2019] WASC 84.

³⁵ *Johnson v Ramsden* [2019] WASC 84.

³⁶ *Ibid.*

³⁷ Bower (n 6).

³⁸ 1984 (Cth).

³⁹ Catherine Van Der Winden, 'Combating Sexual Harassment in the Workplace: Policy vs Legislative Reform' (2014) 12(1) *Canberra Law Review* 204, 204.

⁴⁰ *Ibid* 205.

⁴¹ Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *UNSW Law Journal* 155, 158.

⁴² Robyn Kiesekar and Teresa Marchant, 'Workplace Bulling in Australia: A review of current conceptualisations and existing research' 1999 2(5) *Australian Journal of Management and Organisational Behaviour* 61, 67.

⁴³ Shi (n 40) 159.

conciliation conference, which has an impact on the complainant's mental health⁴⁴ by being forced to live through the trauma again. Thus, victims prefer remaining silent, which results in many perpetrators not having to face consequences of their acts.⁴⁵

The first case of sexual harassment that was decided concurrently with the *SDA* was *O'Callaghan v Loder*⁴⁶ where Ms O'Callaghan brought a claim against Mr Loder under the *Anti-Discrimination Act*⁴⁷ containing sex discrimination provisions.⁴⁸ The Court held that the requirement for Ms O'Callaghan to prove that Mr Loder was aware that his behaviour was unwelcome was not fulfilled.⁴⁹ However, this case determined the need to redraft the definition of sexual harassment, which was completed in 1992.⁵⁰ A problem that arises is some jurisdictions in Australia have a different definition of what constitutes sexual harassment. The statutes equivalent to the *SDA* in the Australian Capital Territory,⁵¹ New South Wales,⁵² South Australia,⁵³ Victoria⁵⁴ and Tasmania⁵⁵ include the same definition of sexual harassment but the statutes of Western Australia⁵⁶ and the Northern Territory⁵⁷ have a different meaning.⁵⁸

The current approach to sexual harassment regulation reflects a conceptual framing of sexual harassment as a private, individual issue rather than as a result of systemic causes or problems.⁵⁹ The focus lies on the aberrant behaviour of the individual rather than the structural and systemic manifestations of discrimination.⁶⁰ Division 3 of the *SDA* consisting of sexual harassment is inconsistent with the object to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity⁶¹ because it embodies the principle of corrective justice.⁶²

By comparing the corrective justice approach of the *SDA* mentioned above and the defamation claims sought through the *Civil Law (Wrongs) Act*,⁶³ it is evident that defamation law aims to correct wrongs by depriving the wrongdoer of any gain made through the wrong and restoring the wronged party to his or her initial position.⁶⁴ Therefore, the approach adopted by the defamation laws is far stronger than the *SDA*, which further discourages victims to seek relief. The *SDA* has not been able to alter the behaviour of individuals who commit sexual harassment⁶⁵ due to the failure in recognising or responding to important harms such as, undermining of individual autonomy and the entrenchment of some aspects of gender inequality caused by sexual

⁴⁴ Australian Human Rights Commission (n 5).

⁴⁵ Shi (n 40) 159.

⁴⁶ (1983) NSWLR 89.

⁴⁷ 1977 (NSW).

⁴⁸ Winden (n 38) 213.

⁴⁹ Ibid.

⁵⁰ Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' [2003] 31(1) 195, 195.

⁵¹ *Discrimination Act 1991* (ACT) s 58(1).

⁵² *Anti-Discrimination Act 1977* (NSW) s 22A.

⁵³ *Equal Opportunity Act 1984* (SA) s 87(9).

⁵⁴ *Equal Opportunity Act 2010* (Vic) s 92(1).

⁵⁵ *Anti-Discrimination Act 1998* (Tas) s 17(3).

⁵⁶ *Equal Opportunity Act 1984* (WA) s 24(3)(a), (b).

⁵⁷ *Anti-Discrimination Act 1992* (NT) s 22(2)(e).

⁵⁸ Winden (n 38) 208.

⁵⁹ Shi (n 40) 156.

⁶⁰ Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422, 424.

⁶¹ *Sex Discrimination Act 1984* (Cth) s 3(c).

⁶² Shi (n 40) 160.

⁶³ 2002 (ACT).

⁶⁴ Shi (n 40) 160.

⁶⁵ Ibid 162.

harassment.⁶⁶ The undermining of individual autonomy is serious when the victims feel pressure to tolerate the perpetrator's conduct⁶⁷ hence, making it difficult to prove the occurrence of the act due to the unwelcomeness element of sexual harassment⁶⁸ as depicted in *O'Callaghan v Loder*. In the present, the element of unwelcomeness is established through the surrounding circumstances such as, if the sexual conduct was uninvited or unwanted by the complainant.⁶⁹

However, sexual harassment and assault are still not eliminated because the complainant's conduct will be scrutinised by courts to determine the act of the complainant and if pressure is indeed involved, the conclusion leads to the conduct being classified as not unwelcomed.⁷⁰ Furthermore, there are problems around gender inequality caused by sexual harassment, as women experience unwanted physical touching, rude jokes, sexual banter and exposure to various types of pornography within male-dominated workplaces because of the excuse that, that is just how men are.⁷¹ Thus, such behaviour undermines a woman's image and confidence as a capable worker⁷² thereby contributing to gender inequality.⁷³

VI CONCLUSION

The #MeToo movement has gained momentum across the globe with prominent changes within organisations in the United States. However, there have been obstacles for the Australian legal system to mirror these positive changes. Due to the stringent defamation laws, victims are more cautious about sharing their stories on a public platform⁷⁴ thus, many incidents go unheard. Australia has laws to deal with sexual harassment under the *Sex Discrimination Act*⁷⁵ but its current design is fit for the purpose of compensating victims of sexual harassment rather than changing the behaviours of perpetrators to prevent sexual harassment from occurring.⁷⁶ Therefore, in the #MeToo era, the current legal framework surrounding the *SDA* is insufficient in providing victims with adequate justice.

The laws of Australia are in need of reform in order to align with the #MeToo era. There is a heavy burden on victims to make complaints,⁷⁷ which depicts the need of the onus of proof for sexual harassment to be lessened. Through the reform, victims will be encouraged to seek appropriate relief. Additionally, defamation laws need to be eased when dealing with such sensitive matters, to provide victims with some immunity when they publish their stories on a public platform. In order to effect a cultural paradigm shift, it is of utmost importance that members of all people unite and ensure that their voices against any inappropriate sexual behaviours are heard.

⁶⁶ Ibid 163.

⁶⁷ Ibid 165.

⁶⁸ Ibid 166.

⁶⁹ Ibid 167.

⁷⁰ Ibid.

⁷¹ Saunders (n 8) 11.

⁷² Vicki Schultz, 'Reconceptualising Sexual Harassment' (1998) 107(6) *Yale Law Journal* 1683, 1687.

⁷³ Shi (n 40) 169.

⁷⁴ Kate Sullivan, 'Has #MeToo failed in Australia? It's complicated, says the woman who started it' *SBS News* (online, 14 November 2019) <<https://www.sbs.com.au/news/has-metoo-failed-in-australia-it-s-complicated-says-the-woman-who-started-it>>.

⁷⁵ 1984 (Cth).

⁷⁶ Shi (n 40) 156.

⁷⁷ Dalzell (n 14).