Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation

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Introduction

Anti-discrimination legislation in federal and state jurisdictions within Australia attempts to institutionalise public rights to equality and non-discrimination through private law models of compensation.[1] Some feminist critics argue these public rights are confined too much by private processes of conciliation,[2] while public lawyers sometimes argue that equality rights will not be recognised fully until they have been institutionalised in constitutional rights reform.[3] Yet in at least one area of sex discrimination law, sexual harassment, existing models appear to have achieved some modest success in maximising the impact of public rights on private corporate governments.[4] The recent

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1 See Devereux A 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280.

2 For example, Scutt J 'The Privatisation of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation' (1988) 11 *Women's Studies International Forum* 503; Thornton M 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1987) 52 *Modern Law Review* 733, Thornton M 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law & Society* 448. See also Astor H and Chinkin C *Dispute Resolution in Australia*, Butterworths, Sydney (1992) 12-16, 272-4.

3 For example, Kirby M 'A Bill of Rights for Australia — But Do We Need It?' (1995) *Commonwealth Law Bulletin* 276; O'Neill N and Handley R *Retreat from Injustice: Human Rights in Australian Law* Federation Press, Illinois (1994) and Wilcox M *An Australian Charter of Rights?* Law Book Company, Sydney (1993).

4 On the notion of a corporation as a 'private government' see Lakoff, S and Rich D *Private Government* (1973), Miller A 'Corporations and Our Two Constitutions' in Samuels W and Miller A (eds), *Corporations and Society: Power and Responsibility* Greenwood Press, New York (1987) and Dan-Cohen M *Rights, Persons and Organisations: A Legal Theory for Bureaucratic Society* University of California Press, Berkeley (1986) 173-6.

significance of corporate sexual harassment policies in discrimination law and practice highlights the possibility of using a mix of private liability and public regulation to achieve social change in attitudes and behaviour.

Liability under sex discrimination law is sometimes likened to tortious liability because it gives an individual complainant a right to compensation for damage suffered.[5] This paper uses public law models of the social and economic regulation of business to seek new insights into the potential for eliminating discrimination.[6] It argues that anti-discrimination agencies such as the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) and the New South Wales Anti-Discrimination Board (ADB) should be recognised as having public regulatory functions in ensuring less discriminatory companies and businesses as well as private functions in resolving individual disputes.[7] Regulatory regimes as varied as occupational health and safety, environmental regulation, consumer protection, securities regulation and trade practices now provide liability and sentencing incentives for the voluntary adoption of preventive corporate compliance programs and even mandate them through regulatory standards in some cases.[8] It is an approach supported by normative regulatory theories that see strategic value in

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5 This has been particularly true of sexual harassment law. See Mackinnon C *Sexual Harassment of Working Women: A Case of Sex Discrimination* Yale University Press, New Haven (1979) pp 164-74 for the classic discussion of this. See also Morgan J 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Thornton M (ed) *Public and Private: Feminist Legal Debates* Oxford University Press, New York (1995) 89, 103-105.

6 See Morgan *ibid* for another perspective on the need to break down simplistic public/private distinctions in sexual harassment law.

7 As I shall argue below, such functions have already been well recognised in the area of disability discrimination in the Commonwealth jurisdiction. However sex discrimination lags behind.

8 For example, the US Sentencing Commission's *Sentencing Guidelines* provide for lesser penalties for convicted companies that have an 'effective' compliance program; Brown L and Kandel A *The Legal Audit: Corporate Internal Investigation* Clark Boardman Callaghan, Illinois (1995) pp 7-29; environmental regulation requires corporations to take responsibility for the effects of their activities on the environment by making environmental impact statements and audits: Fischer K and Schot J (eds) *Environmental Strategies for Industry: International Perspectives on Research Needs and Policy Implications* Island Press, Washington DC (1993) 5; enforced compliance programs are common in occupational health and safety; Smith I, Goddard C and Randall N *Health and Safety: The New Legal Framework* Butterworths, London (1993). See generally Sigler J and Murphy J *Interactive Corporate Compliance: An Alternative to Regulatory Compulsion* Quarom Books, New York (1988) and Stone C *Where the Law Ends: The Social Control of Corporate Behaviour* Harpers and Row, New York (1975).

addressing problems of institutional power by requiring institutions to regulate themselves in a way that is responsive to social and community concerns. For example, Ayres and Braithwaite's theory of 'responsive regulation' is designed to maximise self-regulatory possibilities within organisations by the strategic use of legal sanctions and Selznick sees the 'moral institution' as one that enhances its integrity by governing itself within standards established by the legislature and courts.[9] These regulatory strategies can be applied equally to public and private organisations, blurring the distinction between them, and their use has been variously characterised as the rise of the 'new regulatory state' or the 'new economy'.[10]

This paper examines how overlapping public and private tools of sexual harassment regulation have already been utilised by anti-discrimination agencies to encourage corporate governments to take self-regulated responsibility for (1) making norms of non-discrimination more commonly accepted and (2) quite often providing quick, satisfactory remedies when these norms are disregarded. It goes on to discuss how anti-discrimination agencies might become more effective at ensuring the implementation of public rights in private governments through corporate adoption of appropriate sexual harassment compliance policies. Section I discusses the evidence that corporate management has adjusted to accommodate legal norms against sexual harassment within corporate government and culture. Section II sets out how anti-discrimination law and practice have interacted with industrial law to facilitate, encourage and authorise large organisations to deal with their own discriminatory practices through the implementation of sexual harassment policies. Section III discusses criticisms of devolving responsibility for matters of sex discrimination to private corporate governments, and argues that such an approach is necessary and desirable with proper safeguards. Section IV examines how law and regulatory practice might be developed to further encourage the private implementation of public rights against sexual harassment. The paper concludes with a discussion of what the lessons of sexual harassment can teach us about how public rights under the rule of law can interact with corporate self-regulation to achieve social change in the area of sex discrimination.

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9 Ayres I and Braithwaite J *Responsive Regulation* Oxford University Press, New York (1992); Selznick P *The Moral Commonwealth* University of California Press, Berkeley (1992).

10 See Braithwaite J 'The New Regulatory State and the Future of Criminology' (forthcoming) *British Journal of Criminology*; Majone G 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77 for the notion of a new regulatory state in Britain and Europe and also Hood C and Scott C 'Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-image Developments?' (1996) 23(3) *Journal of Law and Society*, 321. See Arthurs H and Kreklewich R 'Law, Legal Institutions, and the New Economy' (1996) 34 *Osgoode Hall Law Journal* 1 for a description of the new economy.

I. Sexual harassment and social change in corporate cultures

Of all its potential coverage, Australian sex discrimination legislation appears to have been most successful in facilitating remedies and social change in the area of sexual harassment. In 1984-1985, 14.7 percent of complaints lodged in the Human Rights and Equal Opportunity Commission (HREOC) under the Commonwealth's *Sex Discrimination Act 1984* (*SDA*) were of sexual harassment. By 1989-90 the figure was almost 38 percent while, by 1993-1994 and 1994-1995, the figures were 50.5 percent and 46 percent respectively.[11] Clearly people find sexual harassment a concrete and relatively easy concept to understand and are familiar enough with the law to use it as the basis for complaints more often than other (more abstract) forms of sex discrimination such as indirect discrimination in recruitment or promotion policies.

The fact that sex discrimination legislation in most Australian jurisdictions specifically defines sexual harassment as unlawful may have helped establish its availability as a ground of complaint in the public mind.[12] More likely its clear unlawfulness combines with media willingness to sell salacious tales of breast-squeezing, bottom-prodding and vulgar requests to create a high public profile for legal liability for sexual harassment. A combination of clear legislative prohibition, media publicity and feminist action can lead to increased public

11 Sex Discrimination Commissioner, *Sexual Harassment and Educational Institutions: A Guide to the Federal Sex Discrimination Act* (1996).

12 Previously, sexual harassment had to be proved to amount to sexual discrimination to be unlawful. In Australia ss 28A-28L of the Commonwealth *SDA* specifically define sexual harassment and make it unlawful. Similarly, various pieces of state legislation specifically define sexual harassment as unlawful: *Anti-Discrimination Act 1977* (NSW) Pt 2A, s 87(11) *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA) ss 24(3), 25(2), 26(2), *Anti-Discrimination Act 1991* (Qld) ss 118-120; s 22(2), *Equal Opportunity Act 1995* (Vic) s 20 *Anti-Discrimination Act 1992* (NT); s 17 *Sex Discrimination Act* (Tas). Australia was the first country to include specific provisions relating to and defining sexual harassment in its sex discrimination legislation. Contrast the US where sexual harassment was first held to be unlawful discriminatory treatment under Title VII of the *Civil Rights Act* of 1964 by a district court in 1976 in *Williams v Saxbe* 413 F. Supp. 654 (DDC 1976), and was only unequivocally accepted as such when the Equal Employment Opportunity Commission issued guidelines (non-binding administrative interpretations of the *Civil Rights Act*) setting out employers' liability for acts of sexual harassment in the workplace: see Conte A, *Sexual Harassment in the Workplace: Law and Practice: Vol One* John Wiley and Sons, New York (1994) pp 14-15.

understanding of issues and rights surrounding sexual harassment.[13] As one US study found, women were more likely to spontaneously label behaviour as sexual harassment after the Thomas-Hill hearings which received saturation media coverage, than before.[14] In Australia, the divisive and heavily reported debate over Helen Garner's *The First Stone* may also have raised awareness of potential legal liability for sexual harassment and discussion of how problems might be solved.[15]

The most promising evidence of (modest) success in remedying and possibly preventing sexual harassment comes from large private corporations. An indicator of corporate commitment to legal norms against sexual harassment are the number of large corporations seeking to put in place policies to deal with complaints of sexual harassment internally, and to train employees about their rights and responsibilities. Both HREOC and the ADB regularly receive numerous requests for assistance from companies wishing to set up anti-discrimination policies. According to HREOC the majority of inquiries concern sexual harassment policies.[16] In response to the demand, HREOC has promulgated a general sexual harassment code of practice, and also a specific guide for educational institutions.[17] The ADB has provided a slimmer set of guidelines for the internal handling of sexual harassment complaints, and is considering whether further guidance should be given in a more formal way.[18] The CCH looseleaf publication, *Australian and New Zealand Equal Opportunity Law and Practice,* also contains a whole section on compliance policies and programmes aimed at corporate legal and equal opportunity advisers.

The anecdotal evidence of lawyers and regulators is that private lawyers are also regularly hired to review policies, and that large corporations rarely go to court or to

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13 See Weeks E, Boles J, Garbin A and Blount J 'The Transformation of Sexual Harassment From a Private Trouble Into a Public Issue' (1986) 56 *Sociological Inquiry* 432 for an analysis of how media attention, litigation and agitation by interest groups converged to transform sexual harassment from a trouble affecting many individual women into a public issue in the US during the 1970s and 1980s.

14 Jaschik-Herman M and Fisk A 'Women's Perceptions and Labelling of Sexual Harassment in Academia Before and After the Hill–Thomas Hearings' (1995) 33 *Sex Roles* 439.

15 Garner H *The First Stone: Some Questions About Sex and Power* Pan MacMillan, Sydney (1995). See Parker C 'Some Questions about Sex and Justice and Power' (1997) 22 *Alternative Law Journal* 122.

16 Osborne M *Sexual Harassment: A Code of Practice* HREOC, Sydney (1996) p 6.

17 *Ibid* and Sex Discrimination Commissioner *Sexual Harassment and Educational Institutions: A Guide to the Federal Sex Discrimination Act* HREOC, Sydney (1996).

18 See CCH *Australian and New Zealand Equal Opportunity Law and Practice* (1997) para 59-400.

tribunal hearings on sexual harassment matters; they will prefer to deal with the matter internally or to settle with a payout if the internal grievance system is exhausted. Most complaints in the federal jurisdiction that fail to be settled by HREOC's conciliation processes and go on to public hearings involve employers with a small workforce. Sexual harassment complaints made against employers with medium or large sized workplaces are more likely to be conciliated successfully either by HREOC or before a formal complaint is lodged.[19] Chris Ronalds, a leading discrimination law barrister, suggests that while in earlier cases the recipients of unwanted sexual attention and harassment were often forced to resign, now the person found to have done an act of sexual harassment by a corporate internal discipline system is likely to be dismissed.[20]

A recent HREOC sponsored study of gender discrimination in the finance industry (one of the major employers of women in Australia) provides further evidence that corporate Australia is more committed to eliminating sexual harassment than other forms of sex discrimination.[21] Analysis of the affirmative action reports of the top 75 Australian financial institutions showed that their affirmative action performance on personnel policies relating to conditions of service was strongest in relation to sexual harassment. It was reported by 87 percent of respondents that management actively promoted a work environment free of harassment and 81 percent self-reported that formal procedures were in place to deal with complaints of sexual harassment in their firms. These were two of the three strongest affirmative action performance areas.[22]

The study also suggested that paper policies had translated into some real change in corporate culture as judged by women employees, at least within the leading banks. An attitudinal questionnaire found that only 26 percent of women employees in three major banks thought that 'sexual harassment occurs at pre-executive and

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19 See Ronalds C *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* Pluto Press, Sydney (1991) pp 145-6.

20 Ronalds C 'Sexual Harassment and Unfair Dismissal' unpublished paper, Sydney. This opinion is consistent with the author's own 1997 interviews with equal opportunity officers and lawyers in some of Australia's leading financial institutions. Each institution had dismissed people for sexual harassment in the last few years. Other respondents to complaints had resigned when a formal investigation was commenced because they knew dismissal was a likely outcome. See Parker C 'How to Win Hearts and Minds: Corporate Compliance Policies for Sexual Harassment' (1990) *Law and Policy*, forthcoming.

21 Still L *Glass Floors and Sticky Ceilings: Barriers to the Careers of Women in the Australian Finance Industry* HREOC, Sydney (1997).

22 *Ibid* p 29.

executive level' in their firm, while 71 percent agreed that 'managers promote an harassment free workplace'. This compared with much higher perceptions of more general sex discrimination problems: 58 percent of women believed that 'affirmative action is needed in this company, because there is still some discrimination against women', and 41 percent of women thought that sexual discrimination occurred at pre-executive and executive level in their firms.[23]

While HREOC's finance industry study found that women's career opportunities were still limited by 'glass ceilings and sticky floors', the relatively positive findings on sexual harassment show some potential for corporate cultures to adapt to anti-discrimination norms. A distinctive feature of Australian sexual harassment law and practice has been the way that potential vicarious liability for acts of sexual harassment under anti-discrimination legislation has interacted with industrial decisions relating to dismissal of individual perpetrators to both encourage and authorise strong corporate policies against sexual harassment. The high level of self-reported formal complaints procedures for sexual harassment in the finance industry and the large number of requests for help in the development of sexual harassment polices generally reported by the anti-discrimination agencies suggests that sexual harassment policies may represent an axis of change in which public rights can be made effective through corporate training and discipline to help change employee attitudes and behaviours. The extent to which this window of opportunity is exploited depends upon the extent to which the anti-discrimination agencies are given the power and resources to hold corporate sexual harassment policies accountable to external standards.

II. Legal and regulatory basis for corporate sexual harassment policies

A rudimentary duty to implement a sexual harassment policy has developed in Australian discrimination law through (1) the possibility of employers' vicarious or direct liability for sexual harassment that occurs in the workplace; and has been reinforced by (2) industrial law decisions on unfair dismissals that authorise the development of strong policies that allow for a wide range of disciplinary actions including dismissal of a perpetrator and (3) the conciliation and educational activities of the anti-discrimination 'regulators' (HREOC and the state anti-discrimination boards and tribunals) in encouraging workplace sexual harassment policies.

23 Still L *Glass Floors and Sticky Ceilings: Barriers to the Careers of Women in the Australian Fiance Industry*, HREOC, Sydney (1997) 41-42, 44.

1. Liability for Sexual Harassment

Vicarious Liability

The most important basis of potential corporate liability for sexual harassment in both State and Federal jurisdictions is the possibility of vicarious liability for acts of discrimination and harassment by employees or agents. Since most formal complaints of sexual harassment do concern workplace harassment, the potential vicarious liability of employers looms large.[24] Indeed under the Federal *SDA*, liability for sexual harassment was at first confined to harassment occurring in employment or education.[25] Under s 106 of the Federal *SDA* employers (and other persons) are vicariously liable for unlawful acts of sexual harassment and other forms of sex discrimination by employees or agents done in connection with their employment or agency. Liability can only be avoided (under s 106(2)) if the employer establishes that they 'took all reasonable steps to prevent the employee or agent' from doing those acts. The State Acts have similar provisions.[26]

However, although federal and state legislation make sex discrimination, including sexual harassment, unlawful, no *penalties* (either civil or criminal) can be imposed for breach. Remedies are available only at the suit of a complainant who has suffered

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24 Around 90 percent of complaints under the SDA concern discrimination or sexual harassment in employment: Sex Discrimination Commissioner *Sexual Harassment and Educational Institutions: A Guide to the Federal Sex Discrimination Act* HREOC, Sydney (1996) p 14.

25 Since 1992, when the original provisions were repealed and replaced by ss 28A-28L, liability extends to sexual harassment in employment, unions, employment agencies, and the provision of goods, services and facilities. The State Acts all prohibit harassment (and discrimination) in employment, and vary in their coverage of other situations. For an overview of their coverage, see CCH *Australian and New Zealand Equal Opportunity Law and Practice* (1997) para 59-500.

26 The *Anti-Discrimination Act* (NSW) s 53 provides that employers are liable for the acts of employees unless they did not authorise the employees to do the acts expressly or by implication. The case law shows that employers can be vicariously liable for sexual harassment if they fail to take action to stop the conduct occurring: *Hill v Water Resources Commission* (1985) EOC 92-127. The *Anti-Discrimination Act* (Qld) s 133 states that persons are liable for the acts of their workers or agents except if they can prove 'on the balance of probabilities that the respondent took reasonable steps to prevent the worker or agent contravening the Act'. The other State Acts also provide that employers will be liable for the acts of employees unless they can show that they took reasonable precautions to ensure employees would not breach the Act: *Equal Opportunity Act* (Vic), s 34 , *Equal Opportunity Act* (SA) ss 90, 91(1), *Equal Opportunity Act* (WA) ss 160, 161.

discrimination or harassment and must relate to that complainant: Complaints can be lodged with HREOC or the relevant state tribunal, who will attempt to conciliate the matter before referring it to a hearing if conciliation fails. Vicarious liability will relate only to the remedies and orders that can be made by the hearing tribunal if the complaint is justified. These generally include an order for compensation, a declaration that a complainant should be hired, re-hired or promoted, and declarations that unlawful conduct has occurred and that it should not be repeated.[27]

It is clear that active preventive measures must be in place for an employer to avoid liability. In the leading Federal Court decision of *Aldridge v Booth*, Justice Spender noted that the onus under s 106 *SDA* falls on the employer or principal to establish that all reasonable steps have been taken to prevent sexual harassment.[28] Lack of awareness that harassment was occurring will not be a defence. Thus in *Boil v Ishan Ozden*,[29] the owner employers were overseas when the manager of their shop harassed an employee and were completely unaware of it. They were still found vicariously liable by the Human Rights Commission because there was no evidence that they had done anything to prevent such conduct.[30]

Although the courts and tribunals have decided liability on a case by case basis, usually medium or large sized organisational employers will only escape liability if they can give evidence that they have taken active measures to prevent sexual harassment by issuing a policy, effectively communicating management disapproval of such practices, and training staff about their responsibilities. For example, in the recent case of *Dippert v Luxford*, HREOC stated in finding an employer vicariously liable for acts of sexual harassment that:

> While there is no legal requirement under the Act that in order to establish a defence under s 106(2) there must be a sexual harassment policy as such, the existence of such a policy would go some way toward demonstrating that the second respondent had perceived the issue as a relevant workplace problem and had taken steps towards addressing that problem.[31]

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27 See *Sex Discrimination Act* (Cth) s 81, *Anti-Discrimination Act* (NSW) s 113, *Equal Opportunity Act* (Vic) s 136, *Anti-Discrimination Act* (Qld) s 209, *Equal Opportunity Act* (SA) s 96, *Equal Opportunity Act* (WA) s127, *Sex Discrimination Act* (Tas) s 59, *Discrimination Act* (ACT) s 102, *Anti-Discrimination Act* (NT) s 88.

28 (1988) EOC 92-222 at 77, 091. See also *Hill v Water Resources Commission*(1985) EOC 92-127 for a similar decision under the NSW legislation.

29 (1986) EOC 92-165.

30 The Human Rights Commission later became HREOC.

31 (1996) EOC 92-828 at 79, 114.

As *Moore v Brown*[32] (a decision of the Queensland Anti-Discrimination Tribunal) shows, courts and tribunals will also accept evidence that an employer had no articulated policy on sexual harassment to hold them vicariously liable.

The cases show that the tribunals will not be satisfied with evidence that there was a paper policy, but will examine both the terms of any policy and whether it was effectively implemented in deciding whether reasonable precautions have been taken. Thus in *Evans v Lee*[33] Mrs Evans sought to hold the Commonwealth Bank vicariously liable for acts of sexual harassment and discrimination by one of its branch managers (Mr Lee) in the Whitsundays. The bank showed that it had an extensive policy aimed at preventing discrimination and particularly sexual harassment which included distribution of a code of conduct, a video and circular letters. The bank also showed that it required branch managers to discuss sexual harassment with their staff on a half yearly basis and that failure to do so was supposed to be brought up in regular audits of managers' performance. However the HREOC Inquiry Commissioner also accepted evidence that Mr Lee had never fulfilled his responsibilities by initiating discussion about sexual harassment at his branch; nor had any sexual harassment training been conducted at the branch and only one session on the code of conduct some time before. The Commissioner held that the bank was vicariously liable because it had failed in its duty to 'ensure that its policies are communicated effectively to its executive officers, and that they accept the responsibility for promulgating the policies and for advising of the remedial action when breached'.[34] Furthermore, the policy was only directed at preventing harassment of staff, and did not expressly cover customers and other members of the public.

Similarly, in a 1997 decision of the Queensland Anti-Discrimination Tribunal, *Hopper v MIM, Kirvesniemi, Jameson, Ahern, Elliott*,[35] the employer, MIM, was not able to escape vicarious liability on the basis of a policy that had not been implemented comprehensively enough. Ms Hopper's complaints of sexual harassment and discrimination against various MIM employees were found to be justified. In order to decide whether MIM was vicariously liable, the tribunal examined the implementation of MIM's anti-discrimination policies in some detail. While training sessions and seminars for managers had been held and circulars distributed, the Tribunal held that MIM had not done enough to ensure that its policies were actually

32 (1995) EOC 92-749.

33 (1996) EOC 92-822.

34 *Ibid* at 79, 156.

35 Unreported, before Atkinson R G, President of the Queensland Anti-Discrimination Tribunal, 29 January 1997.

communicated to the employees in the mine with whom Ms Hopper had to work. The material distributed during a training seminar gave a list of supervisors' duties but:

> [u]nfortunately, the education of employees in anti-discrimination and sexual harassment is not specifically included in the list. No formal follow-up was done to ensure that these supervisors had passed on to employees their rights and responsibilities under the *Anti-Discrimination Act* and it emerged from the evidence that had not occurred. [36]

Nor had MIM monitored the high attrition rate of female apprentices recruited to the mine or followed up the reasons for it. The Tribunal noted that a new and more effective policy and practices were promulgated in late 1994 and early 1995 well after Ms Hopper had left. The Tribunal referred to the decision in *Evans v Lee* and found that:

> MIM failed to ensure that its policies were communicated effectively to employees on the ground, particularly to those employees where, as MIM well knew, there would be problems in changing their attitudes, and their attitudes would have to change if they were going to be able to work with female apprentices rather than only with male apprentices as had been the case in the past. While the employer is not an insurer of its employees' behaviour, there was much more that could and should have been done.[37]

Thus training of line managers will not be enough if the company has not also ensured that its policies are actually communicated to staff.

Personal Liability of Employers

Employers' liability for sexual harassment may also extend beyond vicarious liability for individual acts of sexual harassment performed by employees to personal liability for specific acts of harassment directed at a particular employee. An employer (including a corporate employer) may be personally liable for acts of sexual harassment (i) where the relevant act is performed personally by the employer, (ii) where it is performed by an official who represents the mind and will of the corporate entity or (iii) if the act is performed by an employee and the conduct is known to the employer and the employers takes no prompt or adequate steps to rectify the adverse working conditions.[38] In the third and perhaps the second

36 *Ibid* 30-31.

37 *Ibid* 35.

38 New South Wales Anti-Discrimination Tribunal, *M v R* (1988) EOC 92-229, 77 and 173. See also Macdermott T 'The Duty to Provide a Harassment-Free Work Environment' (1995) 37 *Journal of Industrial Relations* 495, 501.

situation, evidence of implementation of an effective sexual harassment policy might avoid liability by showing either that the relevant actions did not represent the mind and will of the company (in the case of (ii)) or that prompt and adequate steps were taken (in the case of (iii)).

An employer may also be held directly liable for either harassment or discrimination where a person is required to work in an 'unsought sexually permeated environment' because of, for example, the display of obscene and pornographic material, or a predominance of sexual banter and offensive jokes and innuendo.[39] This amounts to denying an employee an employment benefit or subjecting the employee to a detriment for the purposes of defining discrimination. Sexual harassment can also be a breach of an employer's common law duty in tort or contract to take reasonable care for the health and safety of their employees. A successful tort action relating to acts of sexual harassment in the unreported Tasmanian case of *Barker v Hobart City Council* (1993) resulted in an award of $120,000 in both compensatory and exemplary damages.[40] In that case the employer was not only found personally liable for breach of the duty to provide a safe workplace, but also vicariously liable for the tortious acts of employees. Evidence of an effective sexual harassment policy including a commitment to taking down offensive material and disciplining inappropriate conduct might be evidence that an employer did take reasonable care and did not breach its duty.

The absence of a sexual harassment grievance procedure in itself may also amount to discrimination. In *Kolavo v Ainsworth Nominees*,[41] the New South Wales Equal Opportunity Tribunal held that an employer's failure to adequately and promptly investigate a complaint of racial and sexual harassment caused the complainant to believe that her complaint was not taken seriously and amounted to unlawful discrimination under the *Anti-Discrimination Act* (NSW) (1977). Thus the failure to have and follow an adequate grievance procedure may be enough in itself to make an employer liable for discrimination when an employee's complaint is not adequately handled.

Compliance Programs

Corporate sexual harassment policies have emerged as a prudent mechanism for controlling the possibility of liability in three ways. First, such policies may prevent

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39 See *Bennett v Everitt* (1988) EOC 92-244; *Horne & anor v Press Clough Joint Venture & anor* (1994) EOC 92-556. See also Macdermott T 'The Duty to Provide a Harassment Free Work Environment' *(1995) 37 Journal of Industrial Relations* 500.

40 See Macdermott as above 38, 507.

41 (1994) EOC 92-576.

sexual harassment occurring in the first place if they include adequate training and potential sanctions. Secondly, policies that include complaint procedures will allow grievances to be remedied internally by compensation, changes in work arrangements or even by discipline of the perpetrator if necessary, before complainants expose their employers to liability in the public justice system. Thirdly, if a complaint does end up in the public justice system, the existence of a policy may help the employer escape liability. However the cases cited above show that the courts and tribunals will look closely at the effectiveness of any policy before granting employers a defence to liability. Indeed in none of the cases cited above was a policy actually found effective enough to ground a defence to vicarious liability. It seems more likely that a policy might protect an employer at the conciliation stage in HREOC or state tribunals where the conciliator is advising a complainant on whether they are likely to succeed against their employer in a formal hearing.

Unlike other areas where compliance programs have become significant such as trade practices, securities regulation and occupational health and safety, corporations and their managers are not exposed to any civil or criminal penalties for sexual harassment.[42] The implementation of policies is apparently based solely on avoidance of vicarious liability for compensatory damages. Indeed the payouts for sexual harassment in court have not been large. In the majority of cases in the federal jurisdiction, the complainant receives less than $8,000 and the highest award to date was $35,000 in 1994.[43] While the awards have been higher in the state jurisdictions (for example, the Queensland Anti-Discrimination tribunal recently awarded $50,000),[44] potential liability for sexual harassment does not even approach the amount of penalties in the hundreds of thousands and millions that may be awarded in other areas of corporate regulation. It may be more the fear of the effects on their reputations of publicity for alleged incidents of sexual harassment and of findings of liability than fear of financial consequences that has motivated large corporations to conciliate claims early, to put in place preventive programs of education and training for sexual harassment and to implement internal justice systems to deal with grievances when they do arise.[45] In a context where sexual

42 Sexual harassment may however amount to criminal conduct such as assault on the part of the individual perpetrator. See Sharpe B *Making Legal Compliance Work*, CCH Australia, Sydney (1996) for a general discussion of corporate compliance programs.

43 Osborne M *Sexual Harassment: A Code of Practice* HREOC, Sydney (1996) p 54.

44 *MIM v Hopper*, Unreported, before Atkinson R G, President of the Queensland Anti-Discrimination Tribunal, 29 January 1997. Note that the *Anti-Discrimination Act*, (NSW) s 113(1)(b)(i) limits damages to $40 000.

45 See Fisse B and Braithwaite J *The Impact of Publicity on Corporate Offenders* State University of New York Press, Albany (1983) for a discussion the effects publicity can have on corporate compliance.

harassment makes particularly good newspaper copy, it may assume a higher priority in management thinking about preventing liability than other areas of discrimination.

2. Authorisation of internal justice systems for sexual harassment in industrial law

The prevalence of corporate sexual harassment policies raises the question of whether a company can discipline and even dismiss an employee for acts of sexual harassment. A significant recent development in the law relating to sexual harassment policies has been their crossover into industrial law unfair dismissal cases. The courts have been willing to see sexual harassment as a suitable ground for dismissal provided the requirements of procedural fairness and any rules under the relevant industrial legislation and award are satisfied. The cases show that the court will decide for itself whether the allegations are substantiated and then consider the fairness of the investigation process and the decision to dismiss.

The leading case is *Thomas v Westpac*[46] which was heard before Justice Wilcox of the Industrial Relations Court of Australia. Westpac had dismissed Thomas for squeezing the crotch of another employee at an office lunch. The court took evidence from the complainant and others as to whether the incident took place. Having decided that a serious act of sexual harassment had occurred, Justice Wilcox effectively authorised the use of an internal sexual harassment grievance process for the purposes of unfair dismissal law by stating that, 'it is important that employers take a strong attitude about sexual harassment of employees'[47] and held that in the circumstances it was appropriate to dismiss the perpetrator of the act. Sexual harassment was substantively not a harsh, unjust or unreasonable grounds for dismissal as required by the terms of the relevant award. Nor had the investigation, which had been conducted by an investigator hired by the bank, been procedurally unfair. The investigator had interviewed all the relevant witnesses, informed Thomas of the nature of the charge and given him a chance to defend himself before the decision to dismiss.

Similarly the Industrial Relations Commission of New South Wales in *Nguyen v Vietnamese Community of Australia*[48] found that a social welfare worker had sexually

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46 (1995) 62 IR 28 (also summarised at (1995) EOC 92-742).

47 *Ibid* 33.

48 (1994) EOC 92-644. The Industrial Commission of South Australia made a similar decision in *Gryn v Civil and Civic Pty Ltd* (1994) EOC 92-581 and the Employment Tribunal of New Zealand in Wellington has also found that a dismissal for sexual harassment was justified using similar reasoning: *A v R* (1994) EOC 92-628.

harassed female staff and that his dismissal for those acts was not unfair. In this case the Court thought that they were not confined to looking at sexual harassment that would be unlawful under the NSW Act (ie sexual harassment that amounted to unlawful sex discrimination); it might be fair for an employer to dismiss an employee for sexual harassment even where it did not fall strictly into the terms of anti-discrimination legislation.

The courts will closely scrutinise the process followed and hold the dismissal unfair in appropriate circumstances. In *Chambers v JCU of North Qld*[49] the Federal Industrial Relations Court found that the dismissal of a lecturer for sexual harassment was unfair because the misconduct committee did not adequately relate its findings of sexual harassment to the definition of serious misconduct in the award and because they did not inform the lecturer of precisely with what he was charged.

In *Andrew v Linfox Transport (Aust) Pty Ltd*[50] the court held that the dismissal of a truck driver for harassing a woman shop assistant on one of his deliveries was harsh and unjust. The company had started a sexual harassment education program for its employees, but the campaign had not yet reached this driver. The court held that the fact the company had not adequately brought its new policies to his attention meant that the dismissal was unfair:

> The broadening of the concept of sexual harassment, as discussed above, has cast a very wide net over conduct that heretofore was not unlawful. The failure of the respondent to bring to the applicant's attention, within its own workplace, his new obligations to avoid engaging in conduct that constitutes sexual harassment makes it harsh, in the context of his good service record, to terminate him for a single incident of this type.[51]

The court quoted as authority from *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* where Sheppard and Heerey JJ said:

> Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.[52]

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49 (1995) 61 IR 145. Also summarised at (1995) EOC 92-682.

50 (1996) EOC 92-807.

51 *Ibid* at 78, 968.

52 (1992) 36 FCR 20 at 29.

This statement appears to be authority for a slightly different proposition, namely that a court reviewing the dismissal of an employee for unfairness retains the ability to decide for itself whether something is an adequate grounds for dismissal and that the existence of some internal prevention system which is backed up by internal discipline does not foreclose the issue. It appears that the rationale for the decision in *Andrew v Linfox* was that the sexual harassment was not sufficiently serious to warrant dismissal without more notice of the possibility of disciplinary action being given to the driver. The court held that the incident amounted to only 'lower to middle' range harassment.[53] Furthermore the dismissal in this case did not follow the procedure outlined in a particular sexual harassment grievance handling policy, but seemed to follow a more ad hoc decision making process unrelated to the sexual harassment education program undertaken in other parts of the company.

Andrew v Linfox therefore fits into the cases in which the court has found procedural fairness to be lacking, and shows that employers who do implement anti-discrimination/sexual harassment policies must be careful to communicate them effectively, not only to ensure that they do act as a liability control against vicarious liability but also as a matter of fairness to employees. It ought not be taken to mean that an employer can only dismiss an employee for sexual harassment when there is an effective policy in place.[54] As long as procedural justice is satisfied, dismissal for a sufficiently serious episode of sexual harassment (which after all is clearly unlawful under the general law and may even amount to criminal assault) should be legitimate. The requirements of procedural fairness and of discrimination law in this case dovetailed on the fact that a more effective sexual harassment policy was necessary. Presumably if the harassment had been subject to complaint under anti-discrimination legislation, the employer might also have been found vicariously liable for failure of implementation of an effective policy to prevent the harassment.

The cases show that a comprehensive and well-implemented policy will not only protect against liability but will also be authorised by industrial law as a basis for dismissal if the actual investigation is also procedurally fair in a particular case.[55]

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53 See (1996) EOC 92-807 at 78, 967.

54 In the South Australian case of *Gryn v Civil and Civic* (1994) EOC 92-581, the Industrial Commission held that an employee had not been unfairly dismissed for sexual harassment when procedural justice had been followed even though the dismissal did not appear to have been dealt with according to any specific sexual harassment policy.

55 Under the new *Workplace Relations Act* 1996 (Cth), s 170CE lack of procedural fairness will only be one factor to consider in deciding whether a dismissal was 'harsh, unjust or unreasonable'. See Chapman A 'Termination of Employment Under the Workplace

This grant of legitimacy to dismissal as an outcome of internal sexual harassment policies gives corporate management more ability to demonstrate credible commitment to preventing sexual harassment and to require employees to take education and training aimed at prevention seriously.

3. Regulators' practices

While sexual harassment policies perform evidentiary functions in deciding employers' liability for sexual harassment, and in determining whether the dismissal of a perpetrator was unfair, they presently have no formal legal status. They are simply advisable. Their present prevalence can be attributed as much to the policies and practices of HREOC, the ADB and other state agencies as to the development of the law. Firstly, the anti-discrimination agencies have creatively used their conciliation functions to persuade corporate respondents to make settlements that require them to move beyond resolving the individual dispute at issue to introduce policies to prevent discrimination in the future. Secondly, the anti-discrimination agencies have issued guidelines and model policies that set out standards for corporate sexual harassment policies and agency staff actively help companies to develop their compliance programs in accordance with the guidelines. In this area regulatory practice is ahead of legislative design, and the fact that the legislation gives anti-discrimination agencies few official powers in developing standards for compliance policies may now be inhibiting them from further generating change within workplaces.

Under the federal legislation the Sex Discrimination Commissioner is required to attempt to conciliate complaints and can call a compulsory conference of the parties to do so.[56] If conciliation is unsuccessful the matter will be decided in a public hearing and the Commission's decision is enforceable through an action in the Federal Court.[57] It appears that the primacy of conciliation has been an important mechanism used by the anti-discrimination agencies to encourage employers to

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Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89. As a result of this reduced role for procedural fairness it may be even easier for employers to legitimately dismiss an employee for sexual harassment.

56 Section 55 *SDA*. Under proposed amendments to the *SDA* before the Senate, this would be the responsibility of the President of HREOC: see Leon R 'Human Rights Legislation Amendment Bill' (1997) 22 *Alternative Law Journal* 42. Similar processes that give primacy to conciliation are mandated under the State Acts.

57 Under proposed amendments, matters would go straight from conciliation to the Federal Court with the Sex Discrimination Commissioner able to appear as *amicus curiae*: see Leon R *ibid.*

introduce compliance policies. Since conciliations are private and confidential, publicly available knowledge of how they are conducted is sparse. Devereux's study of 40 HREOC conciliation files suggested that the existence of the hearing mechanism had been used to advantage in ensuring that respondents acceded to proposed conciliated settlements, especially in *SDA* cases. In employment cases Commission staff often encouraged settlements that included not only remedies for the individuals involved but also undertakings to implement Equal Employment Opportunity or sexual harassment training programs which might engender wider cultural change within the organisation.[58] Thus an important outcome of the conciliation approach has been employer agreements to implement policies to prevent discrimination/sexual harassment in the future.[59] This illustrates the way that conciliation can be used to achieve lasting settlements which improve the future relationship between the parties and encourage thought about improving human rights in the future rather than taking an adversarial approach to individual disputes.[60]

HREOC and the ADB have also used their educational and training functions to help prevent discrimination and assist employers develop policies that comply with anti-discrimination legislation.[61] In response to corporate demand HREOC and the ADB have created respectively a sexual harassment *Code of Practice* and guidelines.[62] The ADB is also considering options for improving guidance for employers about complying with the anti-discrimination legislation generally.[63] My own interviews with equal opportunity officers in four of Australia's major financial institutions have shown that they regularly consult with the anti-discrimination agencies as to

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58 Devereux A 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280, 294 and 296. Private communication to the author by Commission staff suggests that this is usually HREOC policy. See also Thornton M 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733-758 for evidence that this is also the approach taken by the ADB.

59 However, as we shall see below, there are presently no mechanisms available for monitoring or enforcing compliance with these agreements.

60 Devereux A, see above 283.

61 Sections 48 and 49 *Sex Discrimination Act* (Cth), s 119 *Anti-Discrimination Act* (NSW).

62 Osborne M *Sexual Harassment: A Code of Practice* HREOC, Sydney (1996); Anti-Discrimination Board of NSW *Anti-Discrimination and Equal Employment Opportunity Guidelines* Anti-Discrimination Board of NSW, Sydney (1997).

63 Anti-Discrimination Board of NSW *Options Paper: Improved Guidance for Employers about Complying with the Anti-Discrimination Act 1977 (NSW)* Anti-Discrimination Board of NSW, Sydney (1996).

the adequacy of their sexual harassment equal employment opportunity programs and seek informal (and completely unenforceable) advice as to whether their policies and procedures are adequate to avoid full corporate liability for any discrimination that does occur. Under current legislation the guidelines and model policies issued have no official status as standards by which the tribunals could judge corporate sexual harassment policies for the purposes of deciding vicarious liability. Nor do the anti-discrimination agencies have any power to enforce a conciliated settlement that includes a requirement to introduce a sexual harassment policy nor to require it to accord with standards and guidelines issued.

The Federal Sex Discrimination Commissioner has stated that HREOC's *Code of Practice* can be taken into account by HREOC when making its determinations in public hearings.[64] It seems clear that it will also be used in conciliations. However it was only issued late in 1996, therefore it is too early to say what its impact is or will be and what use the Federal Court or HREOC Commissioners in public hearings might make of it. Nevertheless, it seems that it will be difficult for courts and tribunals to use corporate sexual harassment policies or model codes much more pro-actively than they already do without legislative change. There is little scope for a tribunal to hold that the adoption of a model code or development of a corporate policy will reduce damages since the Commission and court only have power to order compensatory damages.[65] There is no punitive or exemplary component to the damages awarded as there is, for example, in trade practices, where a company's bona fide adoption of a compliance program can reduce the penalty paid.[66]

Similarly, the tribunals do not have power to make what would effectively be a mandatory injunction to implement a policy or to adopt the HREOC *Code of Practice* (or any state guidelines), nor have they the power to enforce or monitor compliance with agreements to implement training programs or policies made as part of a conciliation process. Attempts have been made to get orders from tribunals that employers develop and implement policies and practices to eliminate discrimination within the workplace. In one such case, *Kolavo v Ainsworth,* the Tribunal considered

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64 Osborne M *Sexual Harassment: A Code of Practice* HREOC, Sydney (1996) 7.

65 Section 81(1)(b)(iv) of the *SDA* expressly uses the word 'compensation'. See also *Hall v Sheiban* (1989) EOC 92-250 where it was held that damages under the legislation are remedial and not punitive. See also Ronalds C *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* Pluto Press, Sydney (1991) p 213.

66 *Trade Practices Commission v CSR* (1991) ATPR 41-076; *Trade Practices Commission v TNT* (1995) ATPR 41-375. See Fisse B 'Corporate Compliance Programmes: The Trade Practices Act and Beyond' (1989) 17 *Australian Business Law Review* 356.

such an order inappropriate but 'urged' the respondent to address the issues.[67] The New Zealand Equal Opportunities Tribunal had been making a practice of granting orders to implement anti-sexual harassment policies in the workplace before 1994. However the High Court of New Zealand held that such orders were beyond the Tribunal's jurisdiction in *New Zealand Van Lines Limited v Proceedings Commissioner*.[68] The reasoning in that case would also apply to the Australian legislation: the court held that since the complainant had left the workplace, an order that the employer implement a policy would not be a remedy for her, and since the Tribunal only had power to make remedial orders it could not make such an order. This does leave open the possibility of such an order being made if the complainant has remained in the workplace.

While it is clear that both HREOC and state agencies such as the ADB are keen to promote the adoption of standards for policies and codes of practice as much as possible in sex discrimination and particularly sexual harassment law, it appears that the present legislative arrangements offer few opportunities to make more productive use of compliance policies. In contrast a small step forward has been made in federal disability discrimination law. Under the Federal *Disability Discrimination Act 1992* (Cth) (*DDA*) the Attorney General is able to make enforceable standards to eliminate disability discrimination in relation to employment, education, accommodation, public transport and Commonwealth administration.[69] Once a set of standards takes effect, it will have the force of law and violation of a standard will give rise to the ability to make a complaint and receive compensation under the Act.[70] The Act also provides incentives for the adoption by organisations of voluntary action plans to eliminate discrimination: a plan that has been submitted to HREOC may be considered in determining whether that organisation can invoke a defence of 'unjustifiable hardship' when a

67 (1994) EOC 92-576.

68 (1994) EOC 92-620.

69 Section 31 *Disability Discrimination Act* 1992 (Cth). The standards are to be approved by Cabinet and then laid before both Houses of Parliament and take effect after fifteen sitting days unless they are disallowed by the Parliament. See Tyler M 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) *Melbourne University Law Review* 211, for an overview of the Act and the policies behind it. The Australian Law Reform Commission has recommended that the *SDA* should be amended to contain provisions similar to those under the *DDA*; Australian Law Reform Commission *Equality Before the Law: Justice for Women, Report No 69 Pt 1* Australian Law Reform Commission, Sydney (1994).

70 Section 69(1) *Disability Discrimination Act* 1992 (Cth).

complaint is made against it.[71] However this is still a largely reactive model of discrimination regulation as external scrutiny of organisations occurs only where an individual (or representative) complaint of breach of the standards is made.[72] Section IV below considers and evaluates the various possibilities for reform in the area of sex discrimination regulation including those discussed in the 1996 NSW ADB *Options Paper*. Before considering the technical possibilities for reform, however, Section III asks whether and under what conditions further use of private justice systems to deal with public rights is desirable.

III. Privatised adjudication of public rights: should human rights be entrusted to corporate justice systems?

While law and regulatory practice have moved into the encouragement, authorisation and reward of corporate justice systems that deal with sexual harassment, feminist critics question the devolution of anti-discrimination to internal corporate procedures. They advance two linked arguments against heavy reliance on giving corporate governments responsibility for preventing and remedying discrimination. Firstly, it encourages privatised, individualised conciliatory responses to complaints of discrimination that should be seen as instances of structural inequalities and culturally entrenched discriminatory practices. Secondly, it subordinates human rights and anti-discrimination to management priorities and discourses, running the risk of not addressing complainants' concerns or discriminatory practices at all.

The conciliatory approach to human rights institutionalised in Australian anti-discrimination legislation has already been heavily criticised. Sceptics point to its potential failure to deal with power imbalances between complainants and respondents; complainants' vulnerability to accepting lesser remedies than they might deserve; and the essential privacy, individualism and lack of public accountability of the process.[73]

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71 Section 11, ss 59-65 *Disability Discrimination Act 1992 (Cth)*. Each of the prohibitions of disability discrimination in the *DDA* also provides for a defence that the provision of facilities or services to eliminate the discriminatory act complained of would have placed 'unjustifiable hardship' on the respondent.

72 Sections 89-92 *Disability Discrimination Act 1992 (Cth)* make provision for representative complaints to be made.

73 For example, Scutt J 'The Privatisation of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation' (1988) 11 *Women's Studies International Forum* 503; Thornton M 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733 and Thornton M 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law & Society* 448. See Devereux A

The strongest criticisms relate to the fact that the privacy of conciliation prevents women developing a collective consciousness and dealing with the structural inequalities and communal norms that cause sexual harassment in the first place.[74] As Jocelynne Scutt writes:

> 'Settling' discrimination cases through conciliation, carried out in private, detracts from recognition of the pervasive problem which is discrimination. It turns a structural matter into a question of individual or personal harm. Sex-based, racial, and ethnic discrimination have a political base. They arise out of patterns and practices unfavourable to women and racial and ethnic minorities. These patterns and practices require public airing and public resolution.[75]

The encouragement of internal corporate justice systems for sexual harassment would presumably make conciliation all the more pervasive, and all the less accountable.

Evidence supports the commonsense presumption that where human rights are left to corporate justice systems, rights are likely to be subverted to management goals and priorities. A study of officers within ten US corporations with responsibility for internal grievance processes highlights the inevitable tension between legal and organisational goals, even where companies are motivated to introduce compliance policies in response to anti-discrimination law.[76] The researchers found that companies introduced internal complaints handling mechanisms to avoid liability in anti-discrimination law, but that the main objective of corporate complaints handlers was to resolve complaints, restore good working relations and avoid legal intervention rather than to identify and eliminate practices of discrimination. Thus, complaints were consistently seen as examples of poor management or personality

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'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280, 283-4 for a summary of criticisms, and also Bacchi C and Jose J 'Dealing with Sexual Harassment: Persuade, Discipline, or Punish?' (1994) 10 *Australian Journal of Law & Society* 1.

74 These points are at the core of a well developed critical literature on informal justice and alternative dispute resolution more generally: see Fitzgerald J, 'Thinking About Law and its Alternatives: Abel et al and the Debate Over Informal Justice' (1985) *American Bar Foundation Research Journal* 637, 641.

75 See Scutt J 'The Privatisation of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation' (1988) 11 *Women's Studies International Forum* 503 at 508.

76 Edelman L Erlanger H and Lande J 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace' (1993) 27 *Law and Society Review* 497.

clashes and were rarely linked to public rights and standards of equal employment opportunity. The researchers concluded that 'symbolic attention to equal employment opportunity and affirmative action issues coexist with discriminatory treatment' actually making it potentially more difficult for employees to convince external agencies or courts that they have been victims of discrimination.[77] Furthermore, 'internal forums tend to reaffirm employer's authority over employees and autonomy from outside intervention' unlike legal procedures which vividly illustrate that employers are subject to democratic demands and the rule of law in their dealings with employees.[78] The authors conclude that attempts to introduce legal norms into the organisational realm will inevitably be reshaped by management ideology and discourse.

The ambiguities of law's appropriation by management norms does not mean that companies should not be required to develop sexual harassment and anti-discrimination policies. Many of the criticisms do not apply to all internal justice systems. For example, not all systems are aimed solely at resolution and management. The model code promulgated by HREOC requires companies to have processes aimed both at informal settlement and formal disciplinary processes.[79] As we have seen, the private sexual harassment justice system of Westpac resulted in the dismissal of one employee. My interviews with the equal employment officers of other large financial institutions suggest that such dismissals are now a regular occurrence. Legal legitimation of that outcome in a (very public) industrial relations hearing actually empowered employers to take internal actions that go beyond 'the palliative of conciliation'.[80] Indeed, dismissal of the perpetrator was a more severe remedy than HREOC or a court could have ordered if the initial sexual harassment complaint had been taken to the public justice system. The equal employment opportunity officers of Westpac continue to consult regularly with anti-discrimination agencies to ensure that their policies and programs comply with anti-discrimination norms in an effort to avoid the risk of vicarious liability.[81]

The inevitable tension between managerial and legal norms presents the challenge of

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77 *Ibid* 530.

78 Edelman L Erlanger H and Lande J 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace' (1993) 27 *Law and Society Review* 497.

79 See Osborne M, *Sexual Harassment: A Code of Practice* HREOC, Sydney (1996) 19-20.

80 See Scutt J 'The Privatisation of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation' (1988) 11 *Women's Studies International Forum* 503.

81 Interview by the author with Westpac EEO officers, July 1997.

designing laws and regulatory practices that make legal standards demanding enough to permeate private government. There is no choice but to seek to embed anti-discrimination in corporate cultures and to make corporate governments responsible for it. While critics such as Scutt celebrate the public justice of formal legal adjudication of complaints, the fact is that anti-discrimination norms cannot be championed through formal legal action in all the cases where they are necessary. Legal norms are ineffectual until they 'enter into the psychological economy of everyday life'.[82] 'Rights most often become active, not through litigation, but as part of the routines of everyday life'.[83] Management commitment to preventing and remedying sexual harassment can make a difference to the everyday lives of many women who would never invoke their rights in a public or legal forum: the empirical evidence is clear that more sexual harassment occurs in organisations in which management tolerates it, than in organisations where management is perceived to have made good faith efforts to stop it and provide good role models.[84] Corporate management systems have a much greater capacity to provide training and education and incentives and sanctions to change attitudes and behaviours among large groups of people than legal enactments. Yet, as the critics persuasively argue, corporate structures do not necessarily have the will to do so. The linkage of public justice to corporate government connects will to capacity by providing legal incentives and standards for private governments to implement anti-discrimination norms.[85]

Furthermore, women cannot practically go to court or even to HREOC every

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82 Krygier M 'Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society' (1997) 11 *East European Politics and Societies* 36, 51.

83 Engel D and Munger F 'Rights, Remembrance, and the Reconciliation of Difference' (1996) 30 *Law and Society Review* 7, 48.

84 See Hulin C Fitzgerald L and Drasgow F 'Organizational Influences on Sexual Harassment' in Stockdale M (ed), *Sexual Harassment in the Workplace: Perspectives, Frontiers and Response Strategies* Sage Publications, California (1996) p 127. Their study also found that women experience significant bystander stress in an organisation that tolerates sexual harassment even where they themselves are not personally and directly the victims of it. Indeed in their study bystander stress accounted for 'more variance in job withdrawal, life satisfaction, psychological well-being, anxiety and depression, physical health conditions, and health satisfaction than did reports of sexual harassment episodes': p 145.

85 See Fisse B and Braithwaite J *Corporations, Crime and Accountability* Cambridge University Press, Cambridge (1993) 15 who argue that corporate capacity to identify those responsible for corporate lawbreaking should be catalysed by the will of the public justice system to demand accountability.

time they experience an incident of sexual harassment, even if they wanted to.[86] As Thornton argues, informal conciliatory justice has many attractions for women who are dissatisfied with a 'hostile and alienating' litigation system.[87] A better solution is for women to work in organisations that discourage harassment from occurring in the first place, that have a just way of dealing with harassment that does occur, and that are open to the scrutiny of the public justice system where they fail.

The legal and regulatory use of corporate compliance policies recognises that corporate liability for sexual harassment should be aimed at catalysing internal corporate cultures and corporate justice systems to take responsibility for educating employees, and changing attitudes to overcome men's advantage and prevent harassment occurring. Nonetheless, private adjudication of public rights will only be effective if public anti-discrimination agencies have the power and capacity to hold corporate governments responsible to anti-discrimination standards when they fail, as they inevitably will. Ayres and Braithwaite's theory of 'responsive regulation' demonstrates empirically and theoretically how the careful integration of legal sanctions for failures in self-regulation and incentives for successful self-regulation can maximise internal corporate solutions to injustices.[88] Wherever abuse of power and injustice is possible via internal corporate handling of sexual harassment grievances, there should always be the possibility of invoking legal sanctions through recourse to an anti-discrimination

86 Empirical evidence suggests that people prefer to use formal legal processes as a last resort in their attempts to achieve justice: see Merry S E *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* University of Chicago Press, Chicago (1990) 172, National Consumer Council *Seeking Civil Justice* National Consumer Council, London (1995).

87 See Thornton M 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733 at 735.

88 Ayres I and Braithwaite J *Responsive Regulation* Oxford University Press, New York (1992). See also Fisse B and Braithwaite J, *Corporations, Crime and Accountability* Cambridge University Press, Cambridge (1993) for an application of this theory to internal corporate justice systems. For empirical demonstrations of the theory see Braithwaite J and Makkai T 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law and Society Review* 7, Braithwaite J and Makkai T 'Trust and compliance' (1994) 4 *Policing and Society* 1, Grabosky P and Braithwaite J *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* Oxford University Press, Melbourne (1986). See also Kagan R and Scholz J 'The Criminology of the Corporation and Regulatory Enforcement Strategies' in Hawkins K and Thomas J (eds), *Enforcing Regulation* Kluwer Nijhoff Publishing, Boston (1984) 67.

regulator that can enunciate standards, grant rights and remedies, and reveal the unlawfulness of a discriminatory practice. The fact that formal legal justice is used on one occasion means that it may not be necessary the next time. The EEO officer may have been able to use the threat of another HREOC case and the publicity that goes with it to sell a stronger anti-discrimination policy to the board.[89] Internal procedures may have been put in place so that complainants know they can have their grievances dealt with quickly and fairly without having to raise the stakes by going to law. The invocation of formal legal sanctions on one occasion can create the conditions in which internal corporate justice is possible on another. The background threat of an effective and powerful anti-discrimination regulator maximises the effectiveness of self-regulatory measures, but means that we do not have to rely on voluntary compliance to achieve justice.[90]

Like Minson's 'rhetoric of manners' approach to sexual harassment,[91] this is a pragmatic model for dealing with discrimination in the corporation. For Minson, however, equality is not the only issue at stake in addressing sexual harassment. Equality-based anti-discrimination law should be seen as just one means of redress among others and 'a broader infra-legal [ie self-regulatory] policing of manners' is likely to be a more strategic means of eliminating harassment.[92] Unlike Minson, the model outlined here does not posit corporate self-regulation of sexual harassment as one among a plurality of options in dealing with sexual harassment. With Minson I see industrial citizenship and workplace democracy as going hand in hand with democratic protections in the public political sphere.[93] However, I argue that

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89 Empirical research 'on the internal dynamics of corporate crime almost always identifies the existence of socially responsible individuals or groups within or around corporations' who can facilitate corporate change and law abiding behaviour when the threat of legal sanctions creates an opportunity for their voices to be heard: Pearce F and Tombs S 'Hazards, Law and Class: Contextualising the Regulation of Corporate Crime' (1997) 6 *Social and Legal Studies* 79, 95.

90 See Parker C 'Some Questions about Sex and Justice and Power' (1997) 22 *Alternative Law Journal* 122.

91 Minson J 'Social Theory and legal Argument: Catharine MacKinnon on Sexual Harassment' (1991) 19 *International Journal of the Sociology of the Law* 355; 'Second Principles of Social Justice' (1992) 10 *Law in Context* 1.

92 See Minson (1991) *ibid*, 373.

93 See Minson (1992) see above 33 where he states that internal corporate regulation of sexual harassment is a minimal ethical and political condition for a democratic culture in the workplace. As Anne Phillips argues 'it is absurd to espouse democracy at the level of the state when there is subordination in our lives elsewhere': *Engendering Democracy* (1991) 39.

effective legal regulation is a precondition to effective internal corporate regulation of sexual harassment.[94] By connecting public anti-sex discrimination standards to internal corporate sexual harassment policies the model outlined here minimises the risk of subsuming an issue of sex discrimination to corporate morality and civility. It breaks down the public-private, morality-equality distinction by making public equality rights a matter of private corporate justice systems and making private governance a matter of public regulation. Unlike Minson, I argue that increased powers of public regulation will actually maximise the ability of corporate justice systems to adequately deal with sexual harassment as an issue of discrimination. The real possibility of championing equality rights through the invocation of legal sanctions outside the workplace might make possible the civil manners of non-harassment within the workplace.

In practice to ensure that public anti-discrimination rights are embedded in private sexual harassment policies and to ensure greater public scrutiny of private efforts to improve rights, anti-discrimination agencies and courts might need (1) a wider range of more flexible incentive and enforcement mechanisms as well as (2) the ability to formally promulgate more detailed standards for corporate policies. Further, (3) the linkage of liability for sex discrimination to affirmative action legislation may help in activating these changes. In these ways private justice might be more effectively connected to public justice with both structural and personal solutions to discrimination uncovered.[95] These possibilities are discussed in the next section.

IV. Taking corporate compliance and social change further

1. Wider range of more flexible incentive and enforcement mechanisms

HREOC's conciliation practice has been to maximise the opportunity of individual complaints within a workplace to bargain employers into changing workplace cultures by introducing or improving training programs and grievance policies. But the fact that there is no power for HREOC, the Federal Court, or any of the state tribunals to make an enforceable order to implement or improve a sexual harassment policy, limits regulators' and complainants' bargaining capacity and their ability to

94 See Morgan J 'Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners' in Thornton M (ed) *Public and Private: Feminist Legal Debates* Oxford University Press, New York (1995) 89, 109-110 for a similar commentary on Minson.

95 See Bacchi C and Jose J, 'Dealing with Sexual Harassment: Persuade, Discipline, or Punish?' (1994) 10 *Australian Journal of Law and Society* 1, for a discussion for the need for personal *and* structural solutions to sexual harassment.

bring corporate governments to public account when they renege on undertakings to implement a policy.

Instead of continuing to rely reactively on policies as a potential defence to liability, courts and tribunals should be given the productive power to make orders that employers implement policies as an outcome of public hearings, or as an enforceable undertaking negotiated in conciliation and then registered in the court or tribunal. Such orders have already been made in the trade practices jurisdiction as consent orders and enforceable undertakings in settlement of alleged breaches.[96] In a sexual harassment case it would mean that when a company was held liable for sexual harassment the relevant tribunal would be able to order it not only to pay compensation but to develop a new policy or thoroughly review and improve an inadequate policy, in accordance with or beyond set standards such as HREOC's *Code of Practice*.[97] For example, the court in *Evans v Lee* might have ordered the Commonwealth Bank to review its policies and come up with better ways of ensuring their effective implementation, or accepted an undertaking to that effect and issued a consent order making it enforceable. Rather than an expensive and intrusive system of enforcement of a blanket productive duty to implement a sexual harassment policy, under this proposal, an *enforceable* duty for a particular employer to implement a preventive program and grievance policy is triggered by liability, and avoidance of liability is an incentive for all employers to implement a preventive program beforehand.

The tribunals' power to order the implementation of a sexual harassment policy might extend to the capacity to make more punitive orders in particularly serious cases where discrimination appeared to be ingrained in corporate practices.[98] A court or tribunal might order the company to conduct a thorough inquiry to identify its discriminatory practices and structures, developing an action plan for eliminating

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96 See *Trade Practices Act* 1974 (Cth) s 87B; *ACCC v NW Frozen Foods Pty Ltd* (1996) ATPR 41-515; *ACCC v Pioneer Concrete (Qld) Pty Ltd* (1996) ATPR 41-457. See Dellit C and Fisse B 'Civil and Criminal Liability Under Australian Securities Regulation: The Possibility of Strategies Enforcement' in Walker G & Fisse B (eds) *Securities Regulation in Australia and New Zealand* Oxford University Press, Auckland (1994) 570, who show how the ACCC has used its powers to negotiate settlements that include undertakings to implement compliance programs to great effect.

97 Contrast this proposal with the DDA regime in which standards are set but there is no provision for the court or HREOC to order prospective compliance with the standards.

98 See Fisse B and Braithwaite J Corporations, *Crime and Accountability* Cambridge University Press, Cambridge (1993) 82-3 on punitive injunctions in the context of corporate criminal liability.

them. A company could also make an enforceable undertaking to that effect in the conciliation process. Such an order forces management to go beyond ordinary managerial discourse and engage with anti-discrimination norms. Thus in *MIM v Hopper*, MIM might have been ordered to go beyond implementing a sexual harassment policy, to monitor its attrition rates of females apprentices more closely, identify the underlying factors, and identify strategies for improving their performance in this area. Macdermott has argued that all employers should have such a duty to proactively implement a sexual harassment policy under occupational health and safety legislation.[99] Her argument subsumes sexual harassment within occupational health and safety but the model proposed here makes sexual discrimination law based on equality a more vigorous regime in its own terms. As we shall see below, such requirements would reinforce the obligations all companies of over 100 employees bear under the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth).

The introduction of the power to award exemplary damages on top of compensatory damages might give courts and tribunals more flexibility in rewarding good faith efforts to prevent discrimination while also recognising corporate responsibility where those efforts have failed. The possibility of exemplary damages means that where a policy was implemented in good faith but failed, the employer might be held liable for compensatory damages only, but where a policy was a bad policy or only a veneer or where there was no policy, exemplary damages could also be awarded.[100] In a case like *Andrew v Linfox*, the employer might be held vicariously liable, but no exemplary damages would be awarded because they had implemented a policy in good faith. However they might be ordered to improve their policy. As we have seen, in the *Barker* case, the award of exemplary damages for sexual harassment is already possible in tort.

2. Introducing (more detailed) standards for sexual harassment policies

An increased capacity for tribunals to issue injunctions and make damages awards that formally recognise corporate sexual harassment policies should be coupled with an increased capacity to hold corporate sexual harassment policies to appropriate standards. As we have seen in the discrimination and industrial decisions mentioned above, where complainants have taken grievances to the public justice system, courts

99 Macdermott T 'The Duty to Provide a Harassment-Free Work Environment' (1995) 37 *Journal of Industrial Relations* 495.

100 This is the approach taken in recent trade practices cases to encourage compliance policies: see the case cited in note 96.

and tribunals have already been willing to scrutinise internal policies and their implementation in some detail and to develop some broad public standards with which they must comply. Rather than relying on the case by case decision making of the courts, it would be better to issue more comprehensive standards that outline the demands of non-discrimination in higher relief. As mentioned above, enforceable standards can already be issued under the *Disability Discrimination Act 1992* (Cth) and the Australian Law Reform Commission has recommended that the *SDA* be reformed to allow the same thing.[101]

Under proposed reforms to the NSW legislation, the ADB would issue codes of practice in relation to general topics including sexual harassment and also recruitment, terms and conditions of employment and termination of employment. Employers would be able to present evidence of voluntary compliance with a particular code in a hearing or as a factor to be considered when the president decides whether to pursue a complaint. However there would be no automatic effect on liability. In practice because of the importance of sexual harassment policies in deciding liability, evidence of particular corporate sexual harassment policies is already important. However it may also be important to give the courts and tribunals the formal power to use a default set of well researched standards in judging corporate policies. If HREOC and the state authorities are going to issue codes of practice, then formal recognition of the admissibility of evidence relating to voluntary implementation of them is necessary to ensure they have an effect. This does not mean that the hearing authorities should not be able to decide their own standards for sexual harassment policies. Nevertheless, at least in the federal context where matters are likely to be heard by Federal Court judges with little experience of discrimination law, the admissibility of default standards prepared by a specialist anti-discrimination agency could improve the standard of decision-making.[102]

The ADB rejected suggestions that compliance with the general codes ought to be a complete defence to liability. However, they have proposed that companies or industries ought to be able to develop their own codes on particular topics in consultation with the ADB and other relevant stakeholders. Once these are approved by the ADB and the Attorney General, companies who are able to prove effective implementation, will have a complete defence to liability. An agreement to develop

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101 See discussion in note 69. Draft Disability Standards for public transport, education, employment, Commonwealth government information and communications and computerised information are already available.

102 Following the High Court decision in *Brandy v HREOC* (1995) 183 CLR 245, complaints must be determined by the Federal Court in order to be enforceable.

a code, or an action plan for improving discriminatory practices, could be an outcome of conciliation.[103]

It does seem correct that it is better for companies to bear the onus of developing detailed anti-discrimination standards if they are not to stultify into technical and easily outdated rules. The problem with HREOC or the ADB issuing detailed regulatory standards, apart from its expense, is that it multiplies rules that may not keep up with best management practice, with evolving understandings of what can amount to sex discrimination. Too often they only provide more loopholes for corporate lawyers to excuse corporate failures and escape real corporate change.[104] The model proposed by the ADB gives employers and industries the onus of developing their own codes of practice that must fall within the broad standards of the general codes developed by the ADB, but can be as creative and flexible as necessary within those broad bounds. Management creativity and internal democratic processes are not limited in how they choose to respond to anti-discrimination norms. Yet an anti-discrimination agency must approve their response and ensure that it appropriately substantiates anti-discrimination norms set out in the law and in general codes of practice. At the same time anti-discrimination agencies could reap the rewards of these companies research and development by using the corporate policies as a goad to keep their own general codes at the cutting edge.

However, it is a bad idea to make adoption of such a set of standards a complete defence to liability in every context. Contextually specific problems that managers ought to do something about, but are not contemplated by detailed codes and standards, will always occur. Companies should not be able to ignore such problems with impunity simply because they have in place a beautiful (but incomplete) anti-discrimination policy. The adoption of detailed standards should be accepted as prima facie evidence that an employer has taken reasonable care to prevent discrimination or harassment occurring, but should not foreclose the matter.

To actually avoid liability in a particular instance, the employer must also prove they have effectively implemented the policy, so there is also still scope for scrutiny of company practices. Indeed one of the most important meta-standards with which corporate discrimination policies always ought to comply is that complainants are always informed of their right to go beyond the internal justice system and invoke the scrutiny of the public justice system on internal justice systems, if they wish.

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103 Anti-Discrimination Board of New South Wales *Options Paper: Improved Guidance for Employers about Complying with the Anti-Discrimination Act 1977 (NSW)* Anti-Discrimination Board of NSW, Sydney (1996) 12-16.

3. Linking liability under sex discrimination legislation to compliance with affirmative action legislation

The proposals discussed above to require corporate governments to remedy and prevent sexual harassment still depend on the fundamentally private law mechanism of liability for a particular instance of sexual harassment to come into effect. However, employers are also under public law duties to identify, prevent and remedy sexual harassment and other forms of sexual discrimination. All companies with over 100 employees are already required to develop and submit an affirmative action plan to the Affirmative Action Agency each year under the Commonwealth *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth). These policies frequently include sexual harassment policies and certainly cover the same ground as the general provisions of sexual discrimination legislation. The Australian affirmative action legislation sets out a clear public duty for all employers to develop policies on sexual discrimination including sexual harassment. However, the regime has also been criticised as a toothless tiger enthralled to the discourse of human resource management and incapable of real social change.[105] It is said to be limited because it (i) specifies processes but not outcomes, (ii) limits social change by human resource management discourse and (iii) is too self-regulatory, lacking mechanisms to enforce effective implementation.[106]

In practice affirmative action policies and liability for sexual discrimination have the potential to reinforce one another in engendering social change. Affirmative action legislation sets out processes that companies should follow in developing and implementing affirmative action policies, but specifies no outcomes: anti-discrimination legislation makes outcomes such as sexual harassment, sexual discrimination in recruitment or promotions unlawful and makes companies liable when their processes fail to prevent such outcomes. The affirmative regime addresses the world in human resource management discourse, giving companies a positive reason to introduce affirmative action policies but limiting the attraction of affirmative action for employers who do not value best practice human resource

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104 See Braithwaite J and Braithwaite V 'The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation' (1995) 4 *Social and Legal Studies* 307.

105 For example Thornton M *The Liberal Promise: Anti-Discrimination Legislation in Australia* Oxford University Press, Melbourne (1990).

106 Braithwaite V 'The Australian Government's Affirmative Action Legislation: Achieving Social Change Through Human Resource Management' (1993) 15 *Law & Policy* 327, 331-333. Note that Braithwaite's analysis of the data shows that in practice these criticisms may not have been borne out to the extent expected.

management:[107] sex discrimination legislation speaks in terms of anti-discrimination norms and requires companies to implement policies to avoid liability even if they do not want to implement a policy for its management value.

The affirmative action regime only enforces the development of a policy, and only does that through the sanctions of naming those companies in Parliament who fail to do so and denying them Commonwealth Government contracts. Actual implementation of those policies is self-regulated under the affirmative action regime. The possibility of liability under sex discrimination law can motivate effective implementation. Under the reforms to sex discrimination law and practice proposed above, a finding of liability in a particular circumstance would lead to an order or enforceable undertaking for a company to develop and implement a new policy. Sex discrimination law already judges the effectiveness and implementation of policies in deciding whether employers will be liable. The reforms proposed above would link private law model liability mechanisms to public law duties to develop a policy by mandating the effective implementation of a proposal of a proper standard when liability is found. Improving the liability incentives and possible orders to implement discrimination policies can only make the affirmative action regime more effective. The latent capacity of the affirmative action regime lies waiting for appropriate liability provisions to enforce it.[108] The sexual harassment experience suggests that it need not be the introduction of a public law model of penalties for breach, but linkage to private law models of liability that may energise social change.

Links to affirmative action regimes can also benefit compliance with sex discrimination law. Sex discrimination law does not directly mandate the adoption of policies by all companies. Affirmative action legislation mandates more productive corporate action planning and of target setting than is possible using reactive mechanisms based on liability for particular instances of discrimination. The affirmative action regime also provides a framework in which sex discrimination regulators can sell the obligation to develop sex discrimination compliance policies. It has put in place an army of Equal Employment Opportunity officers across corporate Australia, professionalising the nurturance of non-discriminatory labour practices. Sex discrimination regulators might educate companies to see sex discrimination compliance programs as a way of capitalising on their affirmative action policies, rather than as an onerous extra requirement.

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107 *Ibid* at 350.

108 Thus there is potential for the linkage of sex discrimination liability to the affirmative action regime to go far beyond the DDA regime in which companies are encouraged to submit voluntary action plans for eliminating discrimination to HREOC although nothing mandates them to do so.

Conclusion: corporate culture and social change

Corporate sexual harassment policies are already of considerable significance in deciding liability under Australian sex discrimination law, influencing the educational and conciliation practices of Australian anti-discrimination agencies. It appears that the combination of potential liability and bad publicity for sexual harassment has given many companies sufficient incentive to mobilise private governance to promote public anti-sexual harassment rights. Industrial tribunals have even authorised dismissal of a perpetrator as a suitable private corporate response to acts of harassment. The gains already made show some potential for traditional models of private government centred purely around profit maximisation to be challenged and (partially) transformed by laws that require the recognition of anti-discrimination norms. This has not been achieved by an enforceable public regulatory regime requiring companies to eliminate harassment, but by liability provisions modelled on private law compensation actions combined with imaginative regulatory practice by anti-discrimination agencies that have used individual conciliation opportunities and their educational functions proactively to encourage the adoption of corporate sexual harassment policies. There is still much room for clever legislative reforms, such as those proposed by the ADB discussed above, and further creative engagement of regulatory policy with corporate management to improve corporate standards and corporate accountability in this area.

Sexual harassment has been a good litmus test of the possibilities for discrimination law generally to make a difference to values, attitudes and behaviour where it counts. The present regime, and even more so the changes proposed above, address one of the most pressing problems for the effectiveness of the rule of law and democratic accountability today, specifically, how to make the governance and culture of corporations and other large organisations permeable to a variety of social concerns beyond profit maximisation.[109] Anti-discrimination law that follows the models of sexual harassment control described above, utilising an alliance of public and private liability controls to mandate and render accountable corporate self-regulation, could make a huge difference in the lives of thousands of employees. Indeed, the strategic importance of transforming corporate cultures cannot be underestimated. Changes that occur in large corporations are frequently modelled in smaller companies and workplaces through industry associations, unions and training.[110] Codes of sexual

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109 See Stone C *Where the Law Ends: The Social Control of Corporate Behaviour* Harper and Row, New York (1975).

110 Small businesses that aspire one day to be taken over by a large company are prudent to model themselves on larger companies in their legal risk management strategies.

harassment practice developed first in the corporate context become models for smaller workplaces too. Thus the HREOC sexual harassment code of practice includes sections on how it might be applied to small workplaces of twenty or less. HREOC suggests that smaller employers might join industry associations that provide codes of practice and grievance processes.[111] An effective education and grievance process in a school or university will give many students and staff an intimate knowledge of appropriate values, behaviours, means of dispute resolution and rights that they will carry with them for the rest of their lives into large and small workplaces, into families and clubs. The test of legal reform is whether social change occurs as a result. Public rights that do not transform private hearts and minds are brittle levers of change. Persuading and enforcing private governments to take some responsibility for the transformation is one important way of making sure this happens. ●

111 HREOC suggests that even businesses with less than twenty employees ought to have a written sexual harassment policy. Where a written policy is impractical in very small businesses the employer might make a diary note when they personally inform staff that sexual harassment will not be tolerated to use in evidence if necessary: Osborne M, *Sexual Harassment: A Code of Practice* HREOC, Sydney(1996) pp 21-22.