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Sexual Harassment in Employment

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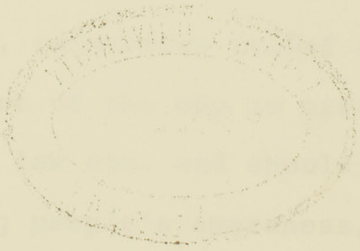

I INTRODUCTION

"Sexual harassment in the workplace is not a new phenomenon: legal recourse for its victims is new".[1] This paper endeavours to canvass some of the legal problems raised by sexual harassment, particularly as the subject relates to the Human Rights Commission Act 1977 in the civil sphere, and the criminal law generally. The main focus is on sexual harassment in employment, because this is the area which has commanded the attention of the judiciary, however recognition must be given to the fact that it infiltrates other areas of society as well. The paper attempts to provide some insight in to the solutions provided by the legal system to the sexual harassment problem, and raise some of the possibilities for law reform.

Sadly, as prevention is always better than cure, the law often steps in only when the problem has arisen, and the damage has been done. The inevitable legal remedies of damages, injunctive relief or criminal sanction can only go part of the way to treating the deepest effects. Whilst the law can, and should, play a role in educating and raising people's awareness, the emphasis of the paper is on dealing with the problem once it has occurred. Hopefully, raising the issue by writing on it has, in itself, some beneficial effect.

II THE PROBLEM

One commentator has described sexual harassment as "the most intimate manifestation of employment discrimination faced by women".[2] Men may be harassed by women, however, "the historically inferior position of women in a male dominated workforce has resulted in the disproportionate exposure of women to heterosexual harassment".[3] The reality is that invariably sexual harassment is going to involve a male as the perpetrator and a female as the victim.

Inherently it is a topic which carries with it a great amount of emotion; the very intimacy of the behaviour can and does carry with it some deep and damaging effects both to the victim, and to the perpetrator. Harassment in a general sense involves repeatedly angering or irritating by annoying a person, in either a minor or petty, or perhaps more substantial way. By adding to it a sexual element, a harasser can strike at the very heart of someones personal being. Most women wish, as most men would, to choose whether, when, where and with whom to have sexual relations. Sexual harassment can deny this choice, at the same time as denying the right to work or study, or carry out one's daily life without being subjected to sexual demands.

> Objection to sexual harassment at work is not a neopuritan moral protest against signs of attraction, displays of affection, compliments, flirtation, or touching on the job. Instead, women are rattled and often angry about sex that is one-sided, unwelcome or comes with strings attached. When its something a women wants to turn off but can not . . . or when it's coming from someone with economic power to hire or fire, help or hinder, reward or punish . . . thats when women say its a problem.[4]

The sexual because of its intimacy, is by definition sensitive and private. Sexual harassment thus results in embarassment, intimidation, and an absolute feeling of being demeaned. Its victims are afraid, despairing, alone and complicit. Even saying that women are oversensitive cannot overwhelm, and would be irrelevant to the fact that sexual harassment can make women feel violated for good reason. "Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarassed and cheap as well as angry".[5] One survey resulted in the following comments from women who had been sexually harassed:

> As I remember all the sexual abuse and negative work experiences I am left feeling sick and helpless and upset instead of angry . . . Reinforced feelings of no control - sense of doom . . . I have difficulty dropping the emotion barrier I work behind when I come home from work. My husband turns into just another man . . . kept me in a constant state of emotional agitation and frustration; I drank a lot . . . soured the essential delight in the work . . . stomach migraines, cried every night, no appetite.[6]

Someone, perhaps especially a male, who is not a victim can only have a limited appreciation of the painful

effects of the power game of sexual harassment, which results in sexual traps. I can do no more than avert to some of the sad emotions it raises, quite apart from any economic effects. Whilst it may not evaporate the effects, a legalistic response is imperative. The fact is that being at the mercy of male supervisors adds direct economic clout to male sexual demands. It can in effect amount to forced prostitution or selling of oneself in return for economic survival.

The extent of sexual harassment is not an issue with which I propose to deal. However American surveys have resulted in the conclusion that it is both endemic[7] and pandemic.[8] It would be naive to think there is not some problem here.[9] The fact that the first case did not reach the courts until 1985,[10] based on legislation passed in 1977,[11] is no more than a reflection of a lack of awareness.

It is not necessary to show sexual harassment is commonplace to argue that is severe for the victim or that it is sex discrimination. Analysed as a problem that almost invariably effects only women, suggests sexual harassment to be structural, and for that reason capable of being regarded as discrimination, which should be

illegal per se, without regard to damage caused to the victim. Of course, remedies for the victim should be available where appropriate. This underlying discrimination theme is reflected in the judicial approach to the subject.

III THE CHARACTERISTICS

There are three essential points to be considered when looking at a potential case of sexual harassment in employment. The advance by the employer, or person in the position of power; the response by the employee and the employment consequence. Thus a line must be drawn between friendly gestures and illegal sexual advances. Some cases will be clear, however there will always be the grey area. There is the question of to what extent the issue must be forced, and if a victim complies should the legal consequences be different than if the victim refuses? Given the risks, how explicitly must a victim reject; and might quitting a job be treated as firing under certain circumstances?

Sexual harassment in employment essentially takes two forms. First there is "Quid pro quo harassment"[12] which describes an incident in which compliance with a sexual request is or is expected to be exchanged for an employment opportunity, or for the retention of an

employment opportunity. The second is the 'hostile environment'[13] type of sexual harassment, when it is a persistent condition of work life. In this latter type there may be no loss, or threat of loss of a tangible work benefit. Thus is the situation on injury in itself? In the quid pro quo situation the coercion behind the employer's sexual advances is clarified by the reprisals that follow a refusal to comply. However, where the employer has just created a hostile work environment the problem is less clear in materialistic terms, though undoubtedly more pervasive. Short of self-defence by physical assault on the part of the victim, there is often very little the person can do to stop their employer who engages in visual and verbal molestation, because of the fact that the power lies with the employer. As MacKinnon says,[14] it is hardly an "arms-length" transaction.

Readers with a legal mind will be asking for sexual harassment to be defined. As already averted to sexual harassment is largely a discrimination issue, because it occurs by reason of the sex of the victim. As will become apparent, the linking of sexual harassment by legislation and judicial interpretation to discrimination does not require a legal definition to be made. Sexual harassment is a label, which has been given to a type of

discriminatory behaviour. However, it is only when legislation specifically deals with sexual harassment rather than discrimination in general that it need be defined. Generally, it will be easily identified as harassment, which is carried out by using sex as a tool. The analysis of the case law which follows will put the uninitiated in touch with the scenario of sexual harassment; for others it will be all too familiar.

Until recently it was not certain whether sexual harassment was actionable as discrimination under New Zealand law, and as averted to there is no statutory definition of sexual harassment. However, by way of introduction it should be noted that in June 1985 the Human Rights Commission issued a policy statement which defined sexual harassment in employment as:-

> Verbal or physical conduct of a sexual nature by one person toward another and:
> (i) the conduct is unwelcome and offensive, and might reasonably be perceived as unwelcome and offensive; and
> (ii) the conduct is of a serious nature, or is persistent to the extent that it has a detrimental effect on the conditions of an individual's employment, job performance or opportunities.

Although this statement is in no way binding, it is illustrative of the behaviour and at least to some extent

a reflection of the law. The statement is issued for informative and administrative purposes, so the commission can properly carry out its functions.[15]

It should be noted that the conduct can be both verbal and physical. It can be distinguished from desirable romantic approaches from one to another by the fact that it is unwelcome and offensive. The statement envisages that it is not enough that an offender says in their defence that they did not think their behaviour was not welcomed; an objective standard is imported by saying that if the reasonable person would have perceived it as unwelcome and offensive then it is sexual harassment. This I submit is the proper approach, people must be deterred from, when in a position of power, engaging in conduct which is unwelcome and offensive to the reasonable person. if in the particular case the conduct was not unwelcome to the person receiving it, it will not come within the statement by virtue of the first limb of (i). If the conduct does fall within this first limb of (i) but only because of the over sensitivity of the recipient it will be excluded by the reasonableness standard in the second limb.

Secondly, the statement requires that the conduct is of a serious nature. It will be seen that this is reflected in the cases, and suffices by itself without need for further reference to any effects to the victim. The statement goes on to say that otherwise it suffices that it is persistent to the extent that it has a detrimental effect on the conditions of an individual's employment, job performance or opportunities. Invariably it would be serious also. This would however prevent a perpetrator from saying no individual act was serious, therefore it is not sexual harassment, where it is so insidious and persistent as to be detrimental to a person's employment.

With this background in mind, I now go on to look at sexual harassment as a concept developed by the courts based on anti-discrimination legislation. Before doing so it is necessary to point out that some jurisdications[16] have enacted legislation specifically identifying sexual harassment and dealing with it as such. The following discussion is not concerned with such legislation.

IV SEXUAL HARASSMENT AS DISCRIMINATION

For many years sexual harassment victims were unable to specify what was happening to themselves; it was an experience without a name. Likewise as a term of art it

has only fairly recently been identified, and been developed as a concept in common law legal systems.

Sexual harassment is now readily equated with sex discrimination overseas, and to some extent in New Zealand. The first indications that sexual harassment might be treated as discrimination on the grounds of sex contrary to human rights legislation came from North American cases. In the United States, Title VII of the Civil Rights Act 1964 provides:-

> It shall be an unlawful employment practice for an employer - (1) to . . . discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals sex.

There is no specific reference to sexual harassment and at first United States court's ruled that sexual harassment was not discrimination under Title VII. They were unwilling to define sexual harassment as unlawful sex discrimination even in quid pro quo cases, where tangible employment retaliation followed the victim's rejection of the employer's advances In Corne v Bausch and Lomb Inc,[17] where the male supervisor persistently took unsolicited and unwelcome sexual liberties with the female plaintiffs, the District Court of Arizona held the supervisor's conduct to be "nothing more than a personal proclivity, peculiarity or mannerism", and that by his alleged sexual

advances "was satisfying a personal urge".[18] The action was brought against the complainant's employers. Whilst recognising the aim of the legislation was to provide equal access to the job market for both men and women, something that sexual harassment must restrict, the court distinguished the case from other unlawful employment practices by employers cases. They said in all other cases the discriminatory conduct arose out of company policies in which there was some apparent advantage to the employer and they were employer designed and oriented. The court said that rather than the company being benefitted in any way by the supervisor's conduct it can only be damaged by the very nature of the acts complained of, and that there is nothing in the act which could reasonably be construed to have it apply to "verbal and physical sexual advances".[19] In reaching this decision the court failed to take account of the employment context within which the advances took place.

The court went on to say that it would be ludicrous to hold that sexual harassment was contemplated by the Act because to do so would mean that if the conduct was directed at both male and female employees equally, no breach would have occurred. Whilst it is undoubtedly the case that whilst sexual harassment is viewed solely as a

discrimination problem by the law, the extremely unlikely case of the sexually harassing bi-sexual employer, who treated her or his employees "equally" escapes the section. The answer is not to say therefore that no sexual harassment case is covered, but to reform the law.

The court was concerned that to hold other than they did would mean "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another", and that "the only sure way an employer could avoid such charges would be to have employees who were asexual".[20] What the court failed to recognise was that counsel for the plaintiffs were not disputing the maxim, "there is no harm in asking". The conduct went far beyond acceptable romantic or even sexual overtures, and failed to recongise that "no" means no. "Clearly underlying these early decisions was the fear that sexual harassment was a Pandora's box to be opened by the judiciary at its peril".[21] In a similar vein in Tomkins v Public Service Electric & Gas Co,[22] Stern D.J., held because the intent of Title VII,

> is to make careers open to talents irrespective of sex or race, [and not] to provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor, and which happened to occur in a corporate corridor rather than a back alley,

the complainant's allegation against her employer and supervisor based on such an attack is outside the scope of Title VII.

In Barnes v Train[23] the court refused Barnes relief, after losing her job following a refusal to have a sexual relationship with her supervisor. The court reached the conclusion that, "this is a controversy underpinned by the subtleties of an inharmonious personal relationship".[24] It was on appeal from this case that the United States Court of Appeals[25] first accepted that sexual harassment was illegal under Title VII. Prior to this though the District Court in Williams v Saxbe[26] had held where a male supervisor had taken retaliatory action against a female employee who refused his sexual advances a claim of sex discrimination could be stated.

A. Barnes v Costle - The Gender-Plus Concept

In Barnes v Costle, Spottswood J. held that under Title VII discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination.[27] The argument that a woman who is sexually harassed has not suffered sex discrimination because her job was terminated not because she was a woman, but because she refused sexual advances was soundly rejected. But for her womanhood the woman's participation in sexual activity would not be solicited.

> To say, then, that she was victimised in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordnate to the inviter in the hierachy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman and was asked to bow to his demands as the price for holding her job. The circumstances imparting high visibility to the role of gender in the affair is that no male employer was susceptible to such an approach by the appellant's supervisor.[28]

Thus the "gender-plus" approach to sexual harassment was born; that is to say that the detriment to, or the dismissal of the victim, need only be substantially because of the person's sex, not solely.

The court rejected the argument that sexual harassment could not be gender discrimination simply because a women could also harass a man, or because any homosexual supervisor could harass an employee of the same gender. They said in each instance the question is one of but - for causation; would the complainant have suffered the harassment had he or she been of a different gender? Only by what was described as a "reductio ad absurdum" could the court imagine a case of harassment that is not sex discrimination, where a bisexual supervisor harasses men and women alike.[29]

The process of judicial evolution was allowed to run its course, and it is, as stated in Holren v Sears Roebuck & Co now "well settled that [sexual harassment] can amount

to discrimination on the basis of sex under Title VII.[30] United States decisions have acknowledged that the "stereotype of the sexually accommodating secretary is well documented in popular novels, magazines, cartoons and the theatre",[31] and that often this stereotype is reflected by the harassment of woman which amounts to unlawful discrimination on the grounds of sex.

The leading Canadian authority on the subject is Zarankin v Wessex Inn.[32] In that case the complainant a chambermaid was subjected to touching and patting by her employer. The Board held she had been sexually harassed, then discussed the question of jurisdiction. The judgment noted that some jurisdictions have legislation specifying sexual harassment as illegal, but said it was dealing only with cases which prohibit discrimination "because of" or based on" sex.[33] The board held that it is fallacious to think that for sexual harassment to amount to discrimination all employees of the same gender had to be equal recipients of it. The gender-plus approach was applied, by holding that as long as gender provides a basis for differentiation it matters not that further differentiation on another basis is made. The board held that there is no requirement that there be special provision for sexual harassment before it can amount to

discrimination and further said that ". . . numerous Canadian human rights tribunals have so found. No tribunal or court to my knowledge has found to the contrary".[34] The judgment finished by saying,

> I think a fair summary of the reasoning in the Canadian tribunal decisions is that sexual harassment is discrimination based on sex when it puts up an obstacle to achievement in a job because of gender. An employee should not have to bear the extra burden of gratifying or tolerating her (or his) employer's need for sexual titillation as a term or condition of employment. I conclude that sexual harassment is discrimination because of sex whenever it comes within the definition I have adopted and is not imposed upon both equally.[35]

The landmark New South Wales decision of O'Callaghan v Loder,[36] was the first Australian case to deal directly with the question of sexual harassment as discrimination on the grounds of sex. Section 24(1) of the Anti-Discrimination Act (N.S.W) provides:-

> A person discriminates against another person on the ground of his sex if, on the ground of
> (A) his sex; . . .
> he treats him less favourably than in the same circumstances or in circumstances which are not materially different, he treats or would treat a person of the opposite sex.

Section 25(2) further provides that it is unlawful for an employer to discriminate against an employee on the ground of his sex by dismissing him or subjecting him to any other detriment, or in the terms or conditions of employment which he affords him. O'Callaghan, the lift attendant, alleged she had been sexually harassed by the

department's commissioner and it was held that this amounted to discrimination on the ground of sex within the meaning of the Act. In applying the gender-plus principle the court held that it is irrelevant that factors other than the employee's gender might have contributed to the employer's conduct so long as gender was a substantial contributing factor. It was noted that if an employee were to be sexually harassed by an employer of the same sex, then that employee would have precisely the same rights under the Act as the complainant did in this case. Similarly in Victoria, the Supreme Court in R v Equal Opportunity Board & Anor; ex parte Burns & Anor[37] held that sexual harassment was covered by general provisions prohibiting sex discrimination, and that such conduct would fall within the ambit of a discriminatory act by one person against another on the basis of that person's sex.

V H v E - THE LANDMARK IN NEW ZEALAND

Until recently it was not certain whether sexual harassment was at all actionable as discrimination under New Zealand law, and it remains the case that there is no legislation dealing specifically with sexual harassment. However, in 1985 the Equal Opportunities Tribunal in deciding the case of H v E,[38] made it clear that in some cases there could be recourse against sexual harassment in New Zealand. The tribunal held that,

> Parliament must be presumed to have intended that the unlawful discrimination sections of the Human Rights Commission Act 1977, as they relate to employment should be in conformity with New Zealand's international obligations. As we see it only if section 15 [of the Human Rights Commission Act] outlaws sexual harassment along with other discriminatory practices based on sex, will women in the workforce be afforded "just and favourable conditions of work" and otherwise be "guaranteed conditions of work not inferior to those enjoyed by men".

Thus they concluded that sexual harassment is covered by section 15(1)(c) of the Human Rights Commission Act 1977. Section 15(1)(c) provides:-

> (1) It shall be unlawful for any person who is an employer, or any person acting or purporting to act on behalf of any person who is an employer . . .
> (c) to dismiss any person, or subject any person to any detriment in circumstances in which other persons employed by that employer or work of that description are not or would not be dismissed or are not or would not be subjected to such detriment -
> by reason of the sex . . . of that person.

The tribunal adopted the "gender-plus" approach to sexual harassment, and said that such dismissal or detriment need only be substantially because of the person's sex.

It was found tht the plaintiff after being sexually harassed with "increasing intensity" over a period of seven months, eventually resigned from her job. In making the finding that the plaintiff had been "sexually harassed" the tribunal made no attempt to define sexual harassment. It can therefore be said that the question of

whether a person has been sexually harassed is a question of fact, rather than law. Once the conduct has been found for a fact to have occurred, a nexus must be established between that conduct and the dismissal or detriment. If the harassment is sexual it may afford the finding that the dismissal or detriment was "by reason of the sex . . . of that person". Thus as long as the conduct, whatever it may be, results in the dismissal of, or a detriment to the employee, and the same conduct would not have been forthcoming towards a member of the opposite sex and resulted in a detriment to that person, or their dismissal, then the victim has been unlawfully discriminated against. For the tribunal to have attempted to define sexual harassment would have been unnecessary and dangerously limiting. Sexual harassment rather than being a strictly legal concept in New Zealand, can be viewed as a label to be attached to a particular type of conduct which some people, probably almost invariably males, indulge in and which in some circumstances is illegal discrimination on the grounds of sex. An important point arises from this, that just because it is sexual harassment, will not necessarily mean it is illegal.

Prior to H v E other cases came before the Equal Opportunities Tribunal but none called for a definitive ruling as to the correct interpretation of Section 15.

In Crockett v Canterbury Clerical Workers Union[39] the plaintiff had had a sexual liason with his supervisor Mrs S. for about a year, when it was terminated. The plaintiff alleged that Mrs S. had subsequently sought against his will to revive it, and that when after a serious row in the office he proffered her an undated resignation signed by him and she dated and accepted it she was actuated by ill-will arising from his rejection of her advances and that this behaviour was covered under Section 15(1). The Plaintiff argued a broad view of Section 15(1) should be taken, referring to the North American decisions. While sympathetic to these arguments the tribunal found it unnecessary to express a considered opinion as to the scope of section 15(1) as it held that sex was not at all a factor in Mrs S. accepting the plaintiff's resignation. The plaintiff failed to establish that Mrs S's motive in accepting his resignation had been resentment at his alleged refusal to resume cohabitation, rather it was accepted because it was the appropriate response in order to terminate the stresses and strains on the office resulting from the plaintiff's behaviour.

In S v E & Ors[40] the plaintiff's claim was dismissed under section 55 of the Human Rights Commission Act, as being one of a trivial nature. The tribunal said the

extent to which sexual harassment is covered by the Act is uncertain and it is for the tribunal to decide finally in the appropriate case whether or not sexual harassment comes within section 15(1)(c).

The behavour which was held to be sexual harassment in H v E was varied and carried out over a lengthy period. The defendant propositioned the plaintiff on a number of occasions, and the plaintiff frequently complained to him, and made it clear that his attentions were unwelcome. There were many comments, suggestions and invitations of a sexual nature, accompanied by unwanted physical contacts, as well as what was described by the tribunal as the "peeping Tom" incident at the plaintiffs house. The defendant's behaviour culminated with an episode of indecent exposure, and an attempt by the defendant to physically force his attentions on the plaintiff. It was this final incident which resulted in the plaintiff's resignation.

The tribunal held that for the plaintiff to succeed, she had to establish that the defendant was her employer; that she was dismissed or subjected to detriment; that the dismissal or detriment occurred in circumstances in which other persons employed by the defendant in the shop would not have been dismissed or subjected to such detriment;

and finally that the dismissal or detriment occurred by reasons of her sex.

There was no difficulty with the first point as the defendant was clearly the plaintiff's employer. This requirement is just asserted by the tribunal without explanation. The section provides that an employer has to dismiss or subject to detriment "any person", and does not expressly say "any employee". However by implication the person must be their employee. An employer can only dismiss their employee, and although could conceivably subject someone other than their employee to a detriment it would be most odd indeed if the first "any person" as referred to in section 15(1) had to be their employee, while the second could be anyone.

The plaintiff's case on the second point was initially based on constructive dismissal, but in the alternative argued on the basis that she had been subjected to "detriment". The tribunal held the treatment she received from the defendant left her with no alternative but to resign, and that in the circumstances the plaintiff's resignation was in substance a dismissal. Once having reached that conclusion the tribunal did not consider the detriment issue.

In The Auckland and Gisborne Amalgamated Society of Shop Employees and Related Trades Industrial Union of Workers v Woolworths (New Zealand) Limited,[41] Cooke J. held that the concept of dismissal is certainly capable of including cases where a breach of duty by the employer leads a worker to resign. He said that just as a servant must be good and faithful, so must an employer be good and considerate, thus an employer can be guilty of misconduct justifying the employee in leaving at once without notice. However, he recognised that as the circumstances in which this may occur are so infinitely various, it is impossible to have a rule of law prescribing the circumstances in which an employee will be justified, and those in which an employee will not be. It is a question of fact, not law. Cooke J. said,

> It may be that in New Zealand a term recognising that there ought to be a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee. It would be a corollary of the employee's duty of fidelity[42] . . . And the seriousness of any breach of an employer's duties will often be important in deciding whether a resignation was in substance a dismissal.[43]

Following this lead the tribunal in H v E held it to be an implied term of any employment contract that both parties, "will so conduct themselves that the necessary relationship of confidence and trust between them will not be disrupted or destroyed".[44] Applying this principle to the facts of the case they held that the defendant

destroyed that relationship, and that the breach of the agreement was so fundamental that it brought the relationship to an end. Further applying the Woolworths[45] case, which was concerned with the Industrial Relations Act 1973, to the Human Rights Commission Act, the tribunal held that what occurred can be correctly described as a constructive dismissal.

> In the context of an Act aimed at good industrial relations (cf. the Human Rights Commission Act aimed at eliminating discrimination) it is right to assume that Parliament would have meant 'dismissal' (cf. dismiss) to cover cases where in substance the employer had dismissed a worker although technically there has been a resignation.[46]

This assumption because of the remedial nature of the Human Rights Commission Act would apply a fortiori.

The last two points that the plaintiff needed to establish are inextricably linked, and hence the tribunal dealt with them together. Counsel for the defendant argued, as had been argued in the United States, and successfully in the earlier cases, that the sexual harassment occurred because the plaintiff appealed sexually to the defendant and the fact that they were in a work situation is irrelevant. Therefore it was not the sex of the plaintiff but the fact that she appealed sexually to the defendant that resulted in her dismissal. This argument failed, because as already stated, the

tribunal adopted the gender-plus criteria recognised in the United States, Canadian and Australian jurisdictions.

In reaching this conclusion the tribunal saw their task in the absence of binding authority as one of statutory interpretation. In noting Section 5(j) of the Acts Interpretation Act 1924[47] they observed that if any act ever called for a liberal and enabling interpretation the Human Rights Commission Act must be it. Furthermore the Act is designed to promote human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.[48] New Zealand has ratifed the "Universal Declaration of Human Rights", Article 23 of which reads:

> "1 Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

Article 7 of the "International Covenant on Economic, Social and Cultural Rights" which has also been ratified begins:

> "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
> (a) Remuneration which provides all workers, as a minimum, with:
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men . . .".

The tribunal held Parliament must be presumed to have intended that section 15 should be in conformity with New Zealand's international obligations.[49] Only if the section outlaws sexual harassment, along with other sex based discriminatory practices can women in the workforce be said to be afforded "just and favourable conditions of work" and be "guaranteed conditions of work not inferior to those enjoyed by men". Although men can be sexually harassed and discriminated against because they are males, the generally disadvantaged position of women in the workforce makes it more likely, as is the case, that they will be sexually harassed and discriminated against. The tribunal held that a purposive approach is the only appropriate method for statutory interpretation of legislation enacted to promote the advancement of human rights.

Applying the "gender-plus" approach to the subject, which is just as valid here as in the overseas jurisdictions, it can be said that the substantial cause of the plaintiff's dismissal was her sex, as but for her sex she would not have been subjected to the treatment she was, by the defendant. In reaching this conclusion the tribunal did not require the plaintiff to positively prove the defendant was heterosexual, and not bi-sexual, and

therefore would not have treated male employees, had he had any in the same manner. The tribunal did not raise the issue, and appears to have presumed heterosexuality. Support for this approach can be drawn from the Loder case where the Court said that it was an appropriate matter for the taking of judicial notice that heterosexual people substantially outnumber bi-sexual people in the community and that therefore heterosexual activities are much more likely to be undertaken by heterosexual persons than sexual harassment of both sexes by a bi-sexual person. Therefore assuming the factual basis of the complaint, it is likely to indicate heterosexual tendencies on the part of the defendant, unless there is evidence to the contrary.

Section 15(1)(c) requires that it be shown that other persons employed by the defendant employer on work of that description are not, or would not be dismissed or subjected to the same detriment. To satisfy this requirement it is not necessary to show that there are other persons employed by the defendant on work of that description, who were not dismissed or subjected to the same detriment. The "are not, or would not be" as used in Section 15(1)(c) makes it clear that it is only necessary to show that had there been other employees employed by the defendant on work of that description that they would

not have been dismissed or subjected to the same detriment. Those "other employees", or notional other employees are necessarily of the opposite sex to the plaintiff, in a case of sexual harassment, which is dealing with discrimination on the grounds of sex. Therefore because in H v E it can be presumed that the defendant was heterosexual, any males the defendant might have employed to do the same work as the plaintiff would not have been dismissed by reasons of their sex.

A. The Remedy

In making an award in favour of the plaintiff, the tribunal made a declaration pursuant to Section 38(6)(a) of the Human Rights Commission Act that the defendant had committed a breach of the Act. The plaintiff was denied an order pursuant to Section 38(6)(b) of the Act restraining the defendant from repeating the breach or from engaging in conduct of the same kind, or of a similar kind. It was though that the salutary experience of the ruling against the defendant was sufficient restraint. The plaintiff sought damages to the maximum allowable under the Act, namely, $2,000 for humiliation, loss of dignity and injury to feelings, pursuant to Section 40(1)(c) of the Act. However, the award was for only $750 as it was though that the maximum allowable should be kept for the most serious of cases. The tribunal took into account the fact that the plaintiff was a mature, sexually

experienced woman who handled much of the harassment she was subjected to in a level headed and even tolerant way. The plaintiff also recovered the monetary loss she suffered prior to finding alternative employment, and $500 costs.

VI UNITED KINGDOM

Subsequent to H v E, the case of Strathclyde Regional Council v Porcelli[50] was decided on appeal in England. In having to decide whether sexual harassment amounted to discrimination in contravention of the Sex Discrimination Act 1975 (U.K.), the court suprisingly said there is no assistance whatever to be found in any decided case in the United Kingdom or elsewhere. Nevertheless the court held that the sexual harassment to which the plaintiff was subjected was less favourable treatment on the ground of her sex.

The perpetrators[51] of the harassment pursued a policy of vindictive unpleasantness towards the plaintiff for the deliberate purpose of making her apply for a transfer to another school. It was clear that the perpetrators would have treated a male colleague whom they disliked as much as they disliked Porcelli just as unpleasantly. However, their behaviour included treatment which could be labelled as sexual harassment, though was not exclusively sexual harassment.

On the question of whether Porcelli was discriminated against on the grounds of sex the appellants submitted that as the episodes of "sexual harassment" were merely part of a single campaign founded on their dislike for her, therefore such treatment was not to be seen as having been meted out to her because she was a woman but because she was heartily disliked as a person and a colleague. Therefore, it was argued, there was no discrimination on the grounds of sex.

Section 1(1) of the United Kingdom Act provides that -

> "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if -
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man . . ."

The court held that the section is concerned with "treatment" and not with the motive or objective of the person responsible for it.[52] Although in some cases it will be obvious the perpetrator of the harassment has a sex related purpose in mind, the court said that it does not follow that because the campaign pursued against Porcelli as a whole had no sex-related motive or objective, treatment which was of the nature of sexual harassment can not be regarded as having been "on the ground of her sex". The sexual harassment part of the campaign was clearly pursued only because Porcelli was a woman. It was a particular kind of weapon which would not have been used against an equally disliked man. The

sexual harassment was a particularly degrading and unacceptable form of treatment which the court said it must be taken to have been the intention of Parliament to restrain. This is so because it would not have figured in a campaign by the perpetrators directed against a man, because of that person's sex.

I submit the same principles must apply to section 15(1)(c) of the Human Rights Commission Act. If a male employer took a dislike to a female employee, and undertook a successful campaign designed to get that employee to resign, and that campaign consisted substantially or wholly of sexual harassment, then that constructive dismissal would be in circumstances in which male employees would not be dismissed by reason of their sex. The section is not concerned with the employer's purpose, rather the method used to obtain that purpose. The male employer, assuming heterosexuality, would not have used sexual harassment in such a campaign against a male employee. In most cases however, the method and the purpose will coincide.

VII FROM DISMISSAL TO DETRIMENT

Should a victim of sexual harassment have to wait until the employer's behaviour has intensified to such an extent that the victim is forced into the position, like

Mrs H in H V E of having to resign? Furthermore should not a victim have legal recourse the moment any sexual harassment manifests itself, thus being actionable per se without a requirement of further damage, because sexual harassment is intrinsically bad and therefore damaging.

As I have said, section 15(1)(c) provides as an alternative to the requirement of dismissal, the subjecting of any person to any "detriment". The question therefore is what will amount to "detriment"? Detriment will clearly cover demotion, or not being promoted or employed, but will it also cover the general problem of creating a hostile or uncomfortable work environment where there is not a clearly quantifiable loss? There is no New Zealand case to date which has had to consider the meaning of detriment under Section 15(1)(c). However in England in the case of Ministry of Defence v Jeremiah[53] Brandon L.J. said "detriment" simply means "disadvantage" when considering the meaning of the word for the purposes of section 6(2)(b) of the Sex Discrimination Act (U.K) 1975. This section provides it is unlawful discrimination if an employer treats an employee less favourably on the ground of their sex by "subjecting [that employee] . . . to any other detriment". The court held that to require the male employees to work at times in an area of the factory which was extremely dirty, whilst never requiring female

employees to do the same, was discrimination against the male plaintiff as it subjected him to a detriment.

In Porcelli[54] the appellants conceded that the respondent was subject to a "detriment", and the court without considering the matter noted that they were well advised to make that concession, because of the Ministry of Defence v Jeremiah decision. The question therefore is can "detriment" be construed as disadvantage under section 15(1)(c) and if so how wide does it go? The New Zealand Arbitration Court have consistently construed "disadvantage" as only economic disadvantages,[55] however the court in Jeremiah when equating detriment with disadvantage clearly did not intend it to have this narrower meaning, because of the conlusion they reached on the facts. Furthermore, the Arbitration Court were dealing with "disadvantage" in a different context, namely the personal grievance procedures of the Industrial Relations Act, for which different considerations apply. The word used in Section 15(1)(c) is "detriment" and to say that it means "disadvantage" is not to limit it in any way, rather to point out its breadth in that it may be anything which is not a benefit. Arguably there is inherent in any sexual harassment some detriment to the victim in the broadest sense of the word, such as the loss of job satisfaction because of a less comfortable working

environment. To the 'weaker victim' the mental stresses and personal strain would cause quite severe detriment. Even to the 'strong victim', there would at least be the minimal detriment of nuisance value caused by being sexually discriminated against. Ideally in such a case the sexual harassment should still be actionable, because of the value of having legal recourse against sexual harassment per se. Whilst damages in such a case might be minimal, reflecting the minimal amount of detriment, the fact of bringing a successful action against the perpetrator should have the desired educational and punitive effects. Although in Jeremiah,[56] Brightman L.J. (as he then was) was prepared to equate detriment or disadvantage with less favourable treatment, he thought it possible to imagine a case where there is differentiation between the sexes, but no detriment to one party, and said that to fall within the section the differentiation must be associated with detriment. Is sexual harassment always associated with detriment, or are there cases where it is just differentiation and therefore not actionable?

VIII BUNDY v JACKSON - A HOSTILE ENVIRONMENT

The first case in the United States where an employer was held to have violated Title VII of the Civil Rights Act 1964 merely by subjecting an employee to sexual harassment, even though the employee's resistance to that

harassment did not cause the employer to deprive her of any tangible job benefits was Bundy v Jackson.[57] In all previous cases where sexual harassment had been found to amount to discriminatory behaviour, adverse employment consequences had followed the complainant's rejections of the employer's advances.

The appellant in Bundy claimed that she had been subjected to unwanted sexual advances from a number of her supervisors, and the District Court found that sexual intimidation was a normal condition of Sandra Bundy's employment, and further that it was "a standard operating procedure"[58] in the department as Bundy was not the only woman subjected to sexual intimidation by her male supervisors.

Her experiences began, when she received and rejected sexual propositions from Jackson, then a fellow employee but at the time of the action the director. Jackson was the named defendant in the action in his offical capacity, as an employer under the United States legislation is liable for discriminatory acts committed by supervisory personnel.[59]

Two years later the sexual intimidation began to intertwine directly with her employment, when Bundy

received propositions from two of her supervisors. One of them, Burton, began sexually harassing Bundy by continually calling her into his office, asking her about her weekend activities, and questioning her about her sexual proclivities. He told her he had books and pictures at home to support his theory that Bundy's horse riding was to obtain sexual relief, and suggested she come to his apartment to see them during the workday afternoon instead of performing her job related activities. He repeated his requests by telephoning her at home on her unlisted telephone number.

The other supervisor Gainey also began making sexual advances to Bundy, asking her to join him at a motel and on a trip to the Bahamas. Bundy complained to their supervisor Swain who just said to her that "any man in his right mind would want to rape you" and then requested that she begin a sexual relationship with him in his apartment, which Bundy rejected.

The District Court when denying relief found that Bundy's supervisors did not take the "game" of sexually propositioning female employees "seriously" and that Bundy's rejection of their advances did not evoke in them any motive to take any action against her.[60] However, as the appeal court noted, there was evidence directly

contrary to this as after complaints were made by Bundy her work suddenly began to be criticised and her supervisors at least created the impression that they were impeding her promotion and did nothing to help her pursue her harassment claims through established channels.

The District Court declined Bundy relief on the ground that when she rejected her employer's advances she had not lost any tangible job benefits. It held that sexual harassment not leading to loss or denial of tangible employment benefits for the harassed employee fell outside the scope of discrimination with respect to "terms, conditions, or privileges of employment" as referred to in Title VII.

The Court of Appeals had to decide whether what it termed "sexual harassment in itself" was covered by Title VII. On the basis of the earlier case of Barnes[61] there was no difficulty in inferring that Bundy suffered discrimination, or different treatment, on the basis of sex.

The court then answered in the affirmative the question of whether sexual harassment of the sort suffered by Bundy amounted by itself to sex discrimination with respect to her "terms, conditions or privileges of

employment". The court looked at other United States cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefit as a result of the job discrimination.

Bundy's claim was that "conditions of employment" include the psychological and emotional work environment, and that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation illegally poisoned that environment.

The Court of Appeals followed the Title VII principle stated by Goldberg J. in Rogers v Equal Employment Opportunity Commission.[62] The plaintiff in that case had not suffered any loss of tangible job benefits but had had to work in an environment which was discriminatory and offensive on the grounds of race. Goldberg J. recognised that the express language of Title VII did not mention the situation, however he went on to say:-

> "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the paramaters of such nefarious activities. Rather it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of the day and that the seemingly reasonable practices of the present can easily become the

> injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employers practices of hiring, firing and promoting. But today employment discrimination is a for more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no long confined to bread and butter issues".[63]

The reality is that sexual harassment is an example of discrimination going further than the question of whether or not a person gets or keeps the job. As Goldberg J. said in Rogers, "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers".[64] This equally applies to women, the sex most likely to be sexually harassed because of, inter alia, institutional inequalities in the work force. Whilst there may be no question of the employee losing their "bread and butter", particularly if they are an employee who cannot stand up to the sexual advances of the employer, the discrimination can be extremely debilitating.

Goldberg J. concluded that "'terms, conditions or privileges of employment' is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination".[65] Similarly Skelly Wright J. in Bundy held the principle to apply to sex

discrimination.[66] As I said earlier, the Court of Appeals considered itself to be deciding the question of whether sexual harassment in itself was illegal, however whether or not they affirmatively decided this question is not clear from the judgment. The District Court in Bundy appeared to find that even the plaintiff had a casual attitude toward the pattern of unsolicited sexual advances thereby implying that these advances by themselves did no harm to female employees. However, the appellate court found no basis for this finding since Bundy's testimony that the sexual harassment she endured did her serious emotional harm with essentially unrefuted. The court went on to say that the essential basis for the District Court's refusal to hold that sexual harassment was "in itself" a violation of Title VII was not this factual finding but the District Court's construction of Title VII.[67] The implication which could follow from this is that the Court of Appeals was prepared to find sexual harassment "in itself" illegal.

The court cites various other discriminatory environment cases and says their relevance to sexual harassment is beyond serious dispute. In Rogers[68] the plaintiff claimed that by giving discriminatory service to its Hispanic clients the firm created a discriminatory and offensive work environment for its Hispanic employees.

Racial or ethnic discrimination against the clients reflects no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. One court went even further in Waters v Heublien Inc.,[69] and held that a white plaintiff had standing to sue her employer who discriminated against blacks, since she has a statutory right to work in an environment free of racial prejudice. Against this background Skelly Wright C.J. said:[70]

> Sexual sterotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII.[71] Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?

This statement can be interpreted as saying that sexual harassment is in itself illegal under Title VII without having to prove any additional harm. However as Sandra Bundy did suffer additional harm, in the form of psychological and emotional upset, such a conclusion can only be obiter, and is perhaps why this was not spelt out in more explicit terms.

A. Supreme Court Approval

Subsequent to the decision in Bundy v Jackson the United States Supreme Court handed down the decision of Meritor Savings Banks, FSB v Vinson[72] which at least to a

certain extent supports the Bundy approach. Bundy itself did not go the Supreme Court.

In Vinson the respondent alleged that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor her supervisor, in violation of Title VII.[73] The allegations of sexual harassment included Taylor suggesting the two of them go to a motel to have sexual relations, which although at first refused was agreed to by the respondent, out of fear of losing her job. Thereafter Taylor was alleged to have repeatedly made demands upon her for sexual favours, usually at the bank, both during and after business hours. Taylor was also alleged to have fondled the respondent in front of other employees, followed her into the women's restroom, exposed himself, and forcibly raped her on several occasions. Taylor denied all these allegations, and the respondent was at first instance denied relief, without the court resolving the conflicting testimony about the existence of a sexual relationship. The District Court held:

> If Respondent and Taylor did engage in an intimate or sexual relationship during the time of respondents employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotion at that institution.[74]

The Court of Appeals reversed the District Court

decision, and then the bank appealed to the Supreme Court. Vinson had not suffered any tangible or economic loss, and the appellants agreed that without question when a supervisor sexually harasses a subordinate because of the subordinates sex that supervisor "discriminate(s)" on the basis of sex. However, they argued that "compensation, terms, conditions or privileges" of employment are concerned with tangible loss of an economic character not purely psychological aspects of the workplace environment.

The Supreme Court rejected this argument as the phrase "terms, conditions or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment between men and women in employment"[75] Rehnquist J. (as he then was) referred to the Roger's line of cases and said nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.[76] Rehnquist J. cited Henson v Dundee where it was held:

> Sexual harassment creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the work place that racial harassment is to racial equality. Surely, a requirement that a man or women run a guantlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[77]

Thus Bundy v Jackson was supported at least to the extent

of saying that not just sexual harassment which causes tangible or economic loss will violate Title VII. However was the Supreme Court prepared to hold that sexual harassment was in itself illegal?

Rehnquist J. held that not all work place conduct that may be described as "harassment" affects a "term, condition or privilege of employment" within the meaning of Title VII. For sexual harassment to be actionable it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment".[78] In support he cited Rogers v Equal Opportunity Commission where it was held that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII".[79]

Is the apporach in Vinson still consistent with syaing that sexual harassment is in itself illegal under Title VII? I submit the answer is yes, and that the 'strong victim' who is not psychologically or emotionally damaged, or otherwise could still bring a successful action under Title VII. When Rehnquist J. said the sexual harassment must be "sufficiently severe or pervasive" he was not concerned with the effect on the complainant, but the conduct itself. This is supported by the fact that he

held that the respondent's allegations in Vinson included not only pervasive harassment but also criminal conduct of the most serious nature and were plainly sufficient to state a claim for "hostile environment" sexual harassment, without making reference in the judgment to any ill effects the respondent might, or might not have suffered.[80] Rehnquist J. rather than saying that sexual harassment did not in itself violate Title VII, was to some extent defining what will amount to sexual harassment for the purposes of Title VII by requiring that the conduct, not its effects, be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. It would only be natural though, that in the more borderline cases the effects might be taken into account in deciding whether the conduct itself was sufficiently severe or pervasive. The statement in Rogers that a single epithet would not be sufficient, is just I suggest, a reflection of the fact, as was held in the Australian case of O'Callagahn v Loder,[81] that a single approach by an employer is unlikely to amount to sexual harassment. This is because it is unlikely to be, though not necessarily so, sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment.

A further, relevant matter was raised in Vinson, by the District Court's finding that the respondent was not the victim of sexual harassment, as any sex related conduct was voluntary. Ths was held to have probably been based on one or both of two erroneous views of law. The first, which has been dealt with, is the belief that a claim for sexual harassment will not lie absent on economic effect. The second was the finding of voluntariness on the part of the respondent. The court held the fact that the sex related conduct was "voluntary" in the sense that the complainant was not forced to participate against her will is not a defence to a sexual harassment suit brought under Title VII. Rehnquist J. held that "the gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome".[82]

The Court of Appeal in holding that voluntariness on the part of the respondent was immaterial to her sexual harrassment claim, said that it followed from this that testimony about the respondent's dress and personal fantasies had no place in this litigation. The Supreme Court held otherwise because while "voluntariness" in the sense of consent is not a defence to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether or not the sexual advances were

unwelcome. The court held that to the contrary it is obviously relevant, as the record of the whole affair must be considered.[83] Whilst the relevance can not be disputed, the weight it should be accorded may not be so great depending on the facts. Thus the court said whilst there is no per se rule against its admissibility, any marginal relevance of the evidence may be outweighed by the potential for unfair prejudice.

B. Other Jurisdictions

The next jurisdiction to recognize "hostile environment" sexual harassment was Northern Ireland. In Mortiboys v Crescent Garage Ltd[84] the tribunal recognised that if a work atmosphere is contaminated by sexual harassment then there is a term or condition of sex discrimination which breaches section 3 of the Employment Equality Act 1977 (Nth. Ir). This provides that a person discriminates against an employee if he or she does not afford that employee the same terms of employment and the same working conditions as afforded to another employee by reason of sex. The work conditions were held to extend beyond the work rules and economic fringes to include "psychological fringes" such as work environment.[85]

Similarly in O'Callaghan v Loder[86] where the plaintiff did not suffer any tangible employment losses

from being sexually harassed, the court held that hostile environment sexual harassment amounted to discrimination because it is a "detriment". This conclusion was reached by following the judgment of Brandon L.J. in Ministry of Defence v Jeremiah,[87] that a complainant has suffered a "detriment" when that person has been placed under a disadvantage in comparison with employees of the opposite sex. The court said that although disadvantage must be a matter of substance it is difficult to define limits and that it is essentially a matter of fact to be determined in each individual case. However, it was said that in the context of sexual harassment the type of conduct which creates an "unwelcome feature of the employment" and which falls under section 25(2)(a) of the Anti-Discrimination Act 1977 (N.S.W.), would also lead to a detriment under section 25(2)(c) of that act. Section 25(2) provides:

> "It is unlawful for an employer to discriminate against an employee on the ground of his sex -
> (a) in the terms or conditions of employment which he affords him, . . .
> (c) by dismissing him or subjecting him to any other detriment".

The respondent in Loder argued that the words "terms or conditions of employment" should be construed narrowly so as to include only the terms or conditions of the original contract employment as varied by statute, regulation or award. Thus it was argued that the terms or conditions of the complainant's employment could not be

altered unilaterally once employment had begun, so that except in the inconceivable event that one of the original terms or conditions of a contract of employment related to the submission to sexual advances, a complainant alleging sexual harassment could have no recourse under that section.

The court had to decide whether to construe "terms or conditions of employment" narrowly or broadly so as to include those decisions which an employer may make from time to time relating to an individual employee. It was said that there are innumerable decisions relating to the working conditions of the individual employee and to the condition of the workplace which must be left to the discretion of the individual employer. Therefore a wider interpretation allows room for situations in which submission to an employer's sexual advance might fall within those terms. The court held that because the legislation was designed, "as far as legislation could, to end intolerance, prejudice and discrimination in the community upon the grounds specified in the act, a broad liberal approach should be adopted for its interpretation rather than a narrow technical one".[88] Given the wide meaning ascribed to "compensation, terms, conditions or privileges of employment" in the United States sexual harassment cases, and even without those, section 25(2)(a) was attributed with the broader meaning. The section provides that the terms or conditions are those "which the employer affords the employee" and as such was held to

clearly relate to the day to day decisions which an employer must make in relation to the workplace and to an individual employee. The court was also led to this decision because section 25(1) of the New South Wales Act only applies to certain discriminatory actions of a prospective employer before a contract of employment is entered into, section 25(2) must deal with situations which occur during employment. Furthermore sections 25(2)(b) and 25(2)(c) only deal with events which can occur during employment, promotion, traning, dismissal and detriment, therefore it was held that section 25(2)(a) must be similarly construed.

The court noted that American courts taking the Rogers, Bundy, and Henson approaches had extended the meaning of the words 'term or condition of employment' to cover sexual harassment in the workplace regardless of whether it led to a loss of tangible job benefits, therefore section 25(2)(a) should be interpreted to include any substantial matter imposed by an employer during the course of employment.[89]

The court said that even without the benefit of the American cases it would have held section 25(2)(a) to cover sexual harassment when an employer indulges in

sexual conduct in such a way as to create an unwelcome feature of the employment.[90] This was said to be a different way of describing the situations referred to in American cases where the pattern of sexual harassment inflicted on the employee resulted in his or her being subjected to a hostile or demeaning work environment. In such circumstances either the unwelcome sexual conduct itself, or the hostile or demenaing atmosphere created by it, can become such a feature of the employment that it can constitute a term or condition of it. To this point there is nothing which precludes one from saying, as I have suggested it is possible to draw from the United States cases, that the unwelcome conduct or sexual harassment may be actionable per se, or illegal in itself. However, the judgment then went on to say that in such a situation an employee need not prove that there were any tangible employment consequences as the intangible effects are sufficient to invoke the section. What is not clear is whether the fact that there is discrimination as to the conditions of employment on the ground of sex is sufficient "effect", or whether there need be further effects to the person discriminated against.

The court said that the sexual conduct of the employer can vary from the whole range of sexual contact, to purely verbal approaches such as sexual propositions or

gender based insults or taunting, but that it is usually persistence which would render it unlawful under this section. Before it can be invoked the employer must create an unwelcome feature of the employment in a continuing rather than an isolated sense.[91] These requirements are arguably no more than just a variety of the sufficiently severe or pervasive requirement in the United States, and as such requires no further damage than the inherent damage that such discrimination creates.

IX THE NEW ZEALAND POTENTIAL

How far can or is it likely that the New Zealand legislation will be taken? In common with the jurisdictions from which the overseas cases cited have come, the New Zealand parliament has not spelt out the various discriminatory practices nor sought to define these many practices such as sexual harassment. The dangers of such a course were observed by Judge Goldberg in the Rogers[92] case, and equally apply in New Zealand. Ten years ago when the legislation was passed through parliament sexual harassment as a term was non existent, as was the awareness of its being a discriminatory practice. However, this is not to say that it did not exist or was not as prevalent, if not more so, than it is today. Whilst the legislature when considering the Human Rights Commission Bill may not have had sexual harassment

specifically in mind, had it been brought to the attention of parliament as one of the multifarious forms of sex discrimination, it is unlikely that it would have been the intention that it not be covered.

Thus in the H v E decision, the Equal Opportunities Tribunal adopted the gender-plus approach from overseas, and held sexual harassment resulting in dismissal to be illegal except in the unlikely equally treating bi-sexual employer situation. Dismissal is however only a tangible employment loss. "Detriment" as used in section 15(1)(c) will clearly cover other tangible employment losses resulting from sexual harassment. Will it, and other parts of section 15 go further?

In considering this question one must consider the statutory interpretation approach of the Equal Opportunities Tribunal in H v E[93] noted earlier, which required a liberal and enabling interpretation. On the persuasive authority of the overseas cases, and apart from them, I submit that "detriment" in section 15(1)(c) must outlaw an environment poisoned by sexual harassment, thus not requiring any tangible employment loss. Unless this is the case all sexually harassing employers need do is to ensure that they stop short of dismissing the employee, or taking away from that employee, or preventing that

employee from gaining, any tangible job benefits which might otherwise have been forthcoming. As said in Bundy,[94]

> The law may allow a woman to prove that her resistence to the harassment cost her her job or some economic benefit, but this will do her no good if the employer never takes such tangible actions against her.

A coercive, or subtle employer may not be affected by a victim's refusla, and such a refusal may simply be ignored. Thus while the employment in traditional terms is left intact, the victim would otherwise not have been sexually harassed or at least have no legal recourse against that sexual harassment.

Furthermore New Zealand's obligations under the international covenants referred to in H v E would not otherwise be satisfied as "just and favourable conditions of work" must surely include a work environment free from the "detriment" based on sex, of sexual harassment.

There is no reason why a narrower interpretation of "detriment" should be taken here, than in Jeremiah,[95] nor why the approach taken in Loder[96] to "detriment" and, following the United States, the wider hostile environment question should not be followed. Both the English and Australian legislation provides for "dismissing . . . or subjecting . . . to any other detriment". In Jeremiah the

argument that detriment is limited to tangible employment losses because "detriment" should be read eujsdem generis with "dismissing" was rejected.[97] The rejection of such an argument follows a fortiori under the New Zealand legislation because it reads "dismiss . . . or subject . . . to any detriment" and thus does not link detriment to dismiss by the use of the word "other".

Although the approaches of the United States courts are not binding here, it would be pointless to take a restrictive approach so that the lengthy process of judicial evolution which occurred in the United States has to be repeated here, or so that victims of such discrimination have to either get fired or wait for legislation intervention.

Therefore a person subjected to sexual harassment by an employer may say that the sexual harassment affected and was detrimental to their psychological and emotional work environment. If it can be said to have occurred in circumstances in which other persons of the opposite sex employed by that employer were not, or would not have been subjected to such a detriment then the work environment was illegally poisoned, contrary to section 15(1)(c) of the Human Rights Commission Act.

A. Is Sexual Harassment Actionable Per Se

The next question is then, insofar as this follows the United States approach in Bundy and Vinson on the hostile environment question, can it be taken a step further and be said that as long as there is sexual harassment which is sufficiently severe or pervasive so as to alter the working conditions and create a hostile environment there is a breach of the act; bi-sexual harassment excepted? In saying this one is in effect limiting the boundaries of sexual harassment for the purposes of the act.

As far as section 15(1)(c) goes it might be argued that "detriment" must be construed more narrowly than ". . . terms, conditions or privileges of employment", in that there has to be some proven loss to the harassed person, such as emotional effects, before the harassment is actionable under the section. If this is the case then that loss need not be any more than minor, or perhaps other than trivial.[98] However, it can further be argued that when sexual harassment is severe or pervasive, or persistent unwelcome sexual conduct, it is inherently detrimental for the purposes of the section, and it is only necessary to look to the conduct of the perpetrator, not the effect on the victim. It is more likely than not that such sufficiently severe or pervasive sexual

harassment will cause lasting psychological and emotional effects to the victim. However, even if it does not, the fact that it is sufficiently severe or pervasive discriminatory behaviour so as to alter the victim's working conditions and create a hostile environment means, it is argued, that it falls within section 15(1)(c) as subjecting that person to a detriment. Thus the behaviour of such a reprehensible discriminatory nature is actionable per se. The legislation's initial, and I believe primary purpose, is to prevent the creation of work environments heavily charged with discrimination, in this case on the ground of sex. Discrimination is a self perpetuating species, and as such should be actionable perse when in such a severe form.

B. Intention and Welcomeness - Are they Relevant?

The argument so far can be summarised as follows: If the sexual conduct is sufficiently severe or pervasive so as to alter the conditions of work and thereby subject the employee to the detriment of having to work in a discriminatory hostile environment, the damage is inherent in that fact and no reference need be made to any ill effects suffered by the victim except for the purposes of assessing damages. In the quid pro quo situation where an employer has caused the employee to suffer some tangible employment loss because the employee has refused to comply

with sexual demands, actionable sexual harassment has occurred even if the action is not sufficiently severe or pervasive to be automatically discriminatory.

It is no defence to a breach of the Human Rights Commission Act that the breach was unintentional or without negligence.[99] Thus for the harasser to say that he or she did not intend to dismiss the person or subject them to a detriment is irrelevant. In H v E[100] the tribunal held that it is an implied term of any contract between an employer and employee that, the employer will so conduct her or himself that the necessary relationship of confidence and trust between them will not be disrupted or destroyed. Repudiation of that contract does not have to be an intention of the harasser for sexual harassment to occur.

In Loder the court said that a pre-condition of liability is that the complainant show both that the conduct was unwelcome in fact and that the employer either knew or ought to have known of this.[101] This is a relfection of the fact that sexual harassment is predicated on unwelcomeness and that an employer cannot be said to be discriminating if the sexual conduct is welcome. If it is welcome it can properly be said to be outside the employment and not discrimination or sexual harassment.

However, what if the conduct is unwelcome but the defendant says in defence that he or she believed it to be welcome and that belief was reasonable? This of itself would afford no defence. Nevertheless the conduct would not be caught because to be able to say that the reasonable person would not have perceived it as unwelcome would require the behaviour not to be sufficiently severe or pervasive. There are two possibilities: first, either the behaviour is sufficiently severe or pervasive to begin with, or secondly the behaviour is not sufficiently severe or pervasive but becomes so when the victim makes it clear it is unwelcome, and the perpetrator persists with it. In both cases the reasonable person could not perceive it as welcome.

The following examples illustrate the situations in which sexual harassment falls within section 15(1)(c). First there is the case where an employer dismisses an employee who refuses some sexual relationship with the employer. Second there is the H v E situation where an employer seriously and pervasively sexually harasses their employee until the employee resigns. A constructive dismissal has occurred and the employer is liable. Next is the case where an employer makes a sexual proposition to the employee, and upon refusal subjects the employee to a tangible employment detriment. In these three cases there has been a tangible loss to the employee, by reason of their sex and for this reason are actionable.

Now to the hostile environment situations. If an employer subjects an employee to unwelcome sexual conduct which is sufficiently severe or pervasive so as to create a hostile working environment it will be sexual harassment which is illegal because it inherently subjects the employee to a detriment contrary to section 15(1)(c). If the behaviour does not create a hostile working environment, then of itself it would not fall within section 15(1)(c), and the reasonable person would not perceive it as unwelcome. However, if the receiver makes it clear that it is unwelcome then persistence with the conduct will make it sufficiently severe so as to bring the perpetrator within section 15(1)(c). Similarly, there is no harm in asking but persistence with overtures after their unwelcomeness has been made clear brings the perpetrator within the sufficiently severe sexual harassment range.

In S v E & Ors[102] where the Equal Opportunities Tribunal did not have to consider the circumstances in which sexual harassment falls within section 15, it nevertheless treated favourably the argument that behviour which is alleged to be sexual harassment "must be of a serious nature, must be . . . unreasonable in all the circumstances". On this basis the tribunal held that the following alleged acts would not amount to sexual

harassment: the fact that a school inspector embarassed a teacher by staring at her; the headmaster seeking her company in preference to other staff; an accidental or innocent touching; a single incident of the headmaster standing behind the teacher while she was writing on the blackboard; for the headmaster to come close to the teacher and smell her hair. The tribunal accepted that the last two incidents might have amounted to sexual harassment if they were persistent conduct. The tribunal's attitude is consistent with the approach I have drawn from the overseas cases; none of the individual incidents can be described as sufficiently severe or pervasive, however persistence might alter this.

C. Another Possibility - Section 15(1)(b)

Section 15(1)(b), to some extent at least provides a further avenue for victims of sexual harassment. Section 15 provides:

> It shall be unlawful for any person who is an employer, or any person acting or purporting to act on behalf of any person who is an employer, . . .
> (a) To refuse or omit to employ any person on work of any description which is available and for which that person is qualified, or
> (b) To refuse or omit to afford any person the same terms of employment, conditions of work, fringe benefits, and opportunities for traning, promotion and transfer as are made available for persons of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description . . . by reason of the sex . . . of that person.

Section 15(1)(a) is apt to cover the situation where an employer makes an offer of work conditional on sexual favours, and when the employee refuses to engage in sexual conduct, the job offer is withdrawn.

Section 15(1)(b) may be breached when an employer secures compliance with her or his sexual demands by threatening adverse employment consequences. For example the refusal of a fringe benefit which an employee would otherwise be entitled to because a request for sexual favours made by the employer is denied could be an infringement of the section. It would, as already established, be a breach of section 15(1)(c) and this may be the best avenue. Section 15(1)(b) requires that the fringe benefit be one that "[is] made available for" certain specified people employed by that employer, thus it appears on a literal reading of the section it is not sufficient that the fringe benefit "would" be made available for those other employees if they existed. This is in comparison with the wording of section 15(1)(c) which, as mentioned and dealt with earlier, provides that "other persons employed . . . are not or would not be dismissed . . .", thus they are not actually required to exist. Therefore section 15(1)(b) appears to require that a person is being discriminated against, by reason of one of the grounds provided, when compared with certain people

whom that employer actually employs. If this is so then the facts of H v E would not fall within the section, prior to dismissal, as the plaintiff was the only employee of the defendant and there was no one with whom she may be compared to say she is getting different treatment. Section 15(1)(b) is not mentioned in the judgment in H v E, though the plaintiffs made the poisoned environment argument, and that may be because of the reason just mentioned. It would seem that section 15(1)(b) is designed to deal with differentiation by reason of the prohibited grounds on certain specified matters between employees of the same employer, whereas section 15(1)(c) deals with the abstract discrimination situations. This appears to be the only explanation for having the words "are made" in one subsection and "are not or would not" in the other.

In the situation where it can be shown that one employee has been sexually harassed, and another employee "of the same or substantially similar qualifications employed in the same or substantially similar circumstances on work of that description", who is of the opposite sex was not, the employer may have breached section 15(1)(b). This would depend on how "terms of employment" and "conditions of work" were to be construed. They would clearly cover any tangible

differences, and I submit that they must also cover other differences, such as a hostile work environment created by the sexual harassment. There is no significant difference between the words of the United States statute, "terms, conditions or privileges of employment", or the New South Wales statute, "compensation, terms, conditions or privileges of employment", which would justify a contrary approach to that taken in those jurisdictions. Thus where there has been unwanted sexual conduct by an employer which is sufficiently severe or pervasive to create different conditions of work to those of another employee as described by the section, or so as to become a term of the persons employment, then it may be said the employer has either refused or omitted, depending on the facts, to afford that person the same terms and conditions. There would be no requirement that the employee has actually suffered any ill effects or loss just, as required in Vinson, that the sexual harassment is of the required severity. However, invariably it will be easier to bring an action under section 15(1)(c).

D. Locus Standi and Procedure

Given the conclusion I have reached that sexual harassment is in itself actionable, and requires no further damage who can bring an action under section 15? Does it have to be the person discriminated against, or

can it be someone who just objects to working in a discriminatory environment? Section 34 of the Human Rights Commission Act requires the commission to investigate, and conciliate where a breach has occurred, and this may be done either on complaint or of its own motion. There is nothing in the Act which would prevent a person from complaining that someone else in their work environment was sexually harassed. Then it is at the commission's discretion as to whether it investigates the complaint, according to section 35 of the act. Should the commission investigate the complaint, it will then advise the parties of the outcome of its investigations. If the commission is of the opinion that the complaint has substance it will, according to Section 37 of the act, mediate between the parties, and attempt to secure a settlement. If it is unsure whether the complaint has substance but is of the opinion that it should be proceeded with it shall follow the same mediation process. If no settlement is reached, or if it is breached, the matter is referred to the Proceedings Commissioner who decides whether proceedings should be instituted against the person about whom the complaint was made. That person is given an opportunity to be heard before the commissioner. If the Proceedings Commissioner decides to pursue the matter then the Commissioner may according to section 38 of the act bring civil proceedings

before the Equal Opportunities Tribunal, otherwise the Commissioner may let the matter rest. The same procedure would follow if the Commission decided to investigate a particular matter of its own accord.

Section 38(4) of the act provides that:-

> ". . . the aggrieved person (if any) may himself bring proceedings before the Equal Opportunities Tribunal if he wishes to do so, and -
> (a) The Commission or the Proceedings Commissioner is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or
> (b) In a case where the Proceedings Commissioner would be entitled to bring proceedings, the Proceedings Commissioner -
> (i) Agrees to the aggrieved person bringing proceedings; or
> (ii) Declines to take proceedings".

It is clear that anyone can make a complaint but should the Proceedings Commissioner, or the Commission not find substance to the claim not just anyone can take it further. Only an "aggrieved person" may bring proceedings themselves. The question then, is who is an "aggrieved person"?

In New Zealand Freedom From Discrimination Group v New Zealand Grand Lodge of Freemasons,[103] the tribunal had to consider the point. The plaintiff argued that the defendant was unlawfully discriminating because by reasons of undertakings and obligations Freemasons grant preference in employment to fellow Masons and undertake to espouse the cause of fellow Masons when called upon to do

so whether the cause be just or unjust. The plaintiff's agreed that no single member of the group could point to any breach specifically committed against him or her. Nor could they point to any breach against the group as a whole. Their complaint was that there was discrimination against all non-Masons. The plaintiffs accepted that neither the group nor any member of it could say they were any more aggrieved than any other group or person and that they had no evidence to show a specific breach of the Act against the group or any individual member.

The question was whether the plaintiff was an "aggrieved person". The term is susceptible to both a wide and narrow interpretation. In some cases it may be desirable to allow proceedings to be taken by persons who have suffered no direct or provable personal grievance, but believe there is discrimination affecting the public generally. However, there are also cases where "people who would generally be regarded as busybodies or as pursuing warped or groundless allegations" wish to take proceedings, thus requiring some restriction.

Section 38(2) of the Act gives the Commission the right to bring proceedings on behalf of a class of persons, therefore the legislation has provided for the protection of a class of persons where appropriate. The

tribunal said "aggrieved person" must be interpreted in light of the provisions of the Act as applied to the facts of the individual case, and did not wish to make a ruling which covers every case.

The plaintiffs submitted that the words "(if any)" in section 38(4) indicate that there is no need for a person proceeding under that subsection to have suffered any personal grievance or to be in any way connected with those who suffer from the discriminatory practice, apart from such interest as any member of the public might have.

The tribunal, and I submit quite properly, held that the only possible interpretation is that it entitles the aggrieved person, if there is such a person, to bring the proceedings. It held, that the term should not be defined or interpreted in an unduly restrictive manner, such as a strict legal, financial or other direct grievance, but does mean more than "any person". The aggrieved person must be in some way differentiated from the generality of people or the public, and each case must be decided on its facts. The plaintiffs in the case were held to be too remote and not sufficiently connected with any alleged discrimination on the part of the defendant.

What then of the situation where an employer seriously sexually harasses an employee thereby breaching section 15 of the Act, but the employee does not her or himself wish to take any action, or is not even offended by it? The latter scenario is unlikely, but in both cases I would suggest that another employee, possibly even the same sex as the harasser, could be one of the people aggrieved by the discrimination, and fall within section 38(2). The other person may object to having to work in a discriminatory environment and thus could be differentiated from the generality of people as being connected with the person against whom the discrimination was directed.

The advantage of having sexual harassment actionable per se is that while this severe and pervasive discriminatory conduct might have little effect on one very strong victim, it could have devastating effects on a weaker, or even average victim. Therefore to allow the behaviour to go unchecked is dangerous. Where there is little or no actual damage to the victim, damages would be appropriately reduced. The effects on the perpetator of having a sexual harassment action brought against them should be enough to discourage further such conduct.

X SEXIST HARASSMENT

The emphasis to date has been on sexual harassment, however the terms of the Human Rights Commission Act do not require the conduct to be sexual, but by reason of sex. It has been held that where it is sexual, it is substantially by reason of sex. In Hill v Water Resources Commission[104] where the harassment was not sexual, the court held that harassment based on the sex of the victim amounted to discrimination on the ground of sex. Hill, a woman was subjected to a series of acts and comments at work, instigated by male employees, which increased in intensity and unpleasantness over time. The behaviour included sexist remarks, offensive literature arriving in the mail, similarly offensive literature aimed at her being placed on notice boards, offensive phone calls, throwing objects to her with unnecessary force, and threats to kill fish she kept in a bowl on her desk.

The plaintiff was the first woman in her branch as a graded clerical officer and the men resented her intrusion, and for that reason subjected her to the harassment. The court noted that "sexual harassment" is a term which does not appear in the New South Wales Act; and nor does it appear in the New Zealand Act. The court held that the test is whether a comparable man would have been similarly harassed. As this was answered in the

negative, it was held that the treatment was on the ground of sex, and amounted to discriminatory sex based harassment.

A similar case in New Zealand would fall within the terms of section 15. If it can be shown that the harassment was sexist, or harassment which could be, or was, perpetrated on the victim only because of the victim's gender, then it may be said that the dismissal or detriment, or different terms of employment or conditions of work occurred by reason of sex.

XI SUPERVISOR LIABILITY

Section 15 provides that it is not only the employer who is liable, but also "any person acting or purporting to act on behalf of any person who is an employer". Where the dismissal, or subjection to detriment, or refusal to afford the same terms of employment is carried out by someone who has been delegated the authority to stand in the position of the employer, then it will fall within the section. If the person purports to act on behalf of the employer, and notwithstanding they do not have the actual authority to do so, dismisses a person or subjects a person to any detriment within the term of section 15, then the person so purporting to act will be liable.

One situation that has been mentioned as falling outside the terms of section 15(1)(c) is the equally treating bi-sexual employer case. A similarly unlikely situation which it appears would not be covered is as follows: Assume there are two employees, one male and one female, who both do the same work. The employer who is male sexually harasses the female employee so as to subject her to a detriment and the supervisor who is female sexually harasses the male employee so as to subject him to a detriment. Neither of the employees could claim they had been subjected to a detriment, in circumstances in which other persons employed by that employer on work of that description are not subjected to such detriment by reason of their sex. This unlikely possibility points to some tension in applying section 15 to sexual harassment. This is because of the requirement that for sexual harassment to be actionable a comparison of treatment accorded to the different sexes must be undertaken, rather than simply saying sexual harassment which subjects the employee to a detriment is actionable.

XII VICARIOUS LIABILITY

Section 33 of the Act provides that anything done or omitted as the employee or agent of another person shall be treated as done or omitted by that other person, as well as by the first-mentioned person whether or not it

was done with that other person's knowledge. Therefore where a supervisor or other employee commits a breach within the terms of section 15 by sexually harassing another employee, the employer will be prima-facie liable also.

However section 33(3) provides a defence to the employer, if the employer can prove that he or she took steps that were reasonably practicable to prevent the employee from doing the act, or from doing as an employee of that person acts of that description. This defence does not apply in relation to agents. In Human Rights Commission v Eric Sides Motors Company Limited,[105] the tribunal held that the effect of this defence is to excuse an employer for any act of an employer, whether negligent, unintentional or otherwise as long as the employer took the appropriate steps.

The effect of section 33(3) will be to allow an employer who sets up an internal complaints procedure and sufficiently advises all employees of the illegality of sexual harassment, and what it is, to argue in any action brought against them that the employer took steps that were reasonably practicable to prevent the employee from doing the act. In its policy statement on sexual harassment,[106] the Human Rights Commission said that

employers have a responsibility to ensure that all employees are informed that sexual harassment in the workplace will not be tolerated, and further that employees should also be made aware of whom they can go to within an organisation if they are being subjected to such behaviour.

If on the facts it can be said that the employer had done everything reasonable to prevent the sexual harassment, then the employer will not be held liable. Often the sexual harassment will involve the perpetrator being in a position of power over the employee, however a hostile environment situation may be perpetrated by a fellow employee. If that is the case, that employee would not be liable under section 15 because they could not be said to be acting or purporting to act on behalf of any person who is an employer. Nevertheless, the employer may be liable for the employee's acts under section 15. This would be so if it could be shown that the employer knew about the harassment and took no steps to rectify the situation thereby subjecting the employee to a detriment, or constructively dismissing the employee within the terms of section 15(1)(c), or refusing or omitting to offer the employee the same terms of employment or conditions of work within the terms of section 15(1)(b). It could be taken even further, and said that an employer by not

setting up a complaints procedure had thereby subjected the employee to a detriment within the terms of section 15(1)(c).

In any reform it would not be desirable to extend the legislation so as to cover the fellow-employee situation. Where one employee (who is not employed in any type of supervisory capacity) sexually harasses another employee there is no power relationship. The harassed employee may complain to the employer who is required to take the appropriate action. This can be done before the conduct reaches serious proportions. Should the employer not act, then the employer will be liable for any hostile environment which ensues.

Similarly should an employee sexually harass an employer the employer does not need protection as the employer is in the position of power and would be perfectly justified in dismissing the employee.

XIII PROCEDURES UNDER THE INDUSTRIAL RELATIONS ACT 1973

Section 117 of the Industrial Relations Act 1973 sets up a procedure whereby an employee may bring an action against their employer if they have a personal grievance related to their employment. Section 117(1) provides:

> For the purposes of this section the expression "personal grievance" means any grievance that a

> worker may have against his employer because of a claim that he has been unjustifiably dismissed, or that other action by the employer (not being an action of a kind applicable generally to workers of the same class employed by the employer) affects his employment to his disadvantage.

As the grievance procedure is a model deemed to have been included in every collective instrument,[107] it operates as a clause of the instrument and its benefit can be claimed only by a worker whose employment is covered by an award or collective agreement.[108] There remains some doubt as to whether the employee actually needs to be a union member at the time of incurring the personal grievance.[109] What is clear is that any applicability the personal grievance procedure has to sexual harassment is limited to only some employees.

Where an employee considers they have a personal grievance against their employer, they must follow the procedure set out in their award, or if there is none the procedure implied by section 117(4). The initial complaint goes to the workers immediate supervisor under section 117(4)(6) or, where this is not appropriate, to a union representative who takes the matter up on their behalf. If at this stage the matter is not resolves, a grievance committee is formed to attempt to settled, it is referred to the Arbitration Court.

The Arbitration Court has consistently held that an apparent resignation can also amount to a dismissal,[110] the approach approved in the Woolworths[111] case referred to earlier. Thus in H v E the Equal Opportunities Tribunal accepted on the authority of Woolworths that the plaintiff had been constructively dismissed, where she had resigned following sexual harassment of increasing intensity by her employer.[112] Such behaviour would clearly amount to an unjustified dismissal under section 117(1). As the behaviour leading to the constructive dismissal is a breach of an implied term of the employment contract,[113] it may therefore be said to be unjustified. Furthermore Somers J. in Auckland City Council v Hennessey said,

> The word 'unjustifiably' in section 117(1) . . . is not confined to matters of legal justification . . . In the context of section 117 we think the word 'unjustified' should have its ordinary accepted meaning. Its integral feature is the word 'unjust' - that is to say not in accordance with justice or fairness. A cuase of action is unjustifiable when that which is done cannot be shown to be in accordance with justice or fairness.[114]

There can be no doubt that sexual harassment which causes someone to resign, amounts to an unjustifiable dismissal.

To what extent may sexual harassment be said to be a disadvantage under section 117(1)? It would have to be shown that it was the employer sexually harassing, or that the employer's action caused the sexual harassment.

Furthermore it must be shown that it was not an action of a kind applicable generally to workers of the same class employed by that employer. It would be difficult for employers to defend themselves by saying that generally all employees were sexually harassed, though may be easier in an all female work environment. Finally it is necessary to show that the sexual harassment affected the employment to the employees disadvantage.

The Arbitration Court has consistently construed disadvantage as tangible, or economic employment related disadvantage. Thus in New Zealand Shipping Officers I.U.W. v Union Steamship Co Ltd,[115] where a worker was relocated on the same salary in the service of the same employer, Jamieson J. held that notwithstanding the worker's pride had been hurt in his eyes by being given work which he regarded as reducing his status, there was no disadvantage because he suffered no reduction in salary, retirement rights or in any other material respects. Similarly in NZ Nurses I.U.W. v Royal NZ Plunket Society (Inc.)[116] Castle J. held a forced transfer did not affect employment to the worker's disadvantage as she had not suffered in any material respects because her rate of pay remained the same, the appropriate award entitlements were retained, and her continuity of employment was not affected.

On the authority of this line of cases a sexually harassed employee would only have been disadvantaged where they had lost pay, or some other tangible employment benefits, but not emotional and other effects from being sexually harassed. The Court of Appeal may be prepared to widen "disadvantage" if a case of sexual harassment was taken to that stage.

In any case the present Arbitration Court line does not prevent a worker from raising sexual harassment as a personal grievance and taking it to the grievance committee stage, where a settlement could be reached notwithstanding the wording of the act. Whilst this has been done, though never been taken to the Arbitration Court, it is not the most desirable method of dealing with the matter from the employee's point of view as it requires confronting the harasser. The grievance committee procedure is designed for tackling tangible employee employer disputes, not personal violations of this type.

Should a sexual harassment case be dealt with under this procedure, either the parties may settle on such remedies as they wish, or the court under section 117(4)(i) may make a decision or award by way of final settlement. If the case involves an unjustifiable

dismissal, then section 117(7) applies and the employee may be reimbursed for lost wages, reinstated, and/or compensated. An employee who was constructively dismissed following sexual harassment by their employer is unlikely to want to be reinstated. However as to compensation, in McHardy v St. John Ambulance Association[117] the Arbitration Court said "the act lays down no guidelines . . . as to the manner in which compensation should be assessed". On this ground Arbitration Court decisions have taken account of hurt feelings, humiliation,[118] loss of dignity and like grounds which the common law under the rule in Addis v Gramaphone Co. Ltd[119] does not recognise as proper heads for damages in an action for breach of contract by wrongfully dismissing an employee. Such matters would be prevalent in a case of sexual harassment, however awards have been for relatively small amounts.

XIV BREACH OF CONTRACT

In Woolworths[120] the Court of Appeal held that in New Zealand a term recognising that there ought to be a relationship of confidence and trust may be implied as a normal incidence of the relationship of employer and employee. On the strength of that the tribunal in H v E[121] held that it is an implied term of any employment contract, that both parties will so conduct themselves that the necessary relationship of confidence and trust

between them will not be disrupted and destroyed, and furthermore sexual harassment of an employee by an employer breaches that term. There is no reason why this approach should not be upheld in a contract action by an employee against their employer.

Thus there are two possibilities for an employee, an action for wrongful dismissal after the employee has resigned, and an action for breach of this implied term at either stage. Wrongful dismissal at common law, is dismissal without proper notice, where peremptorily and without justification, an employer dismisses an employee. Although in a sexual harassment case the employee may not have actually been dismissed, there may be a constructive dismissal by the employee because a breach of duty by the employer lead the worker to resign,[122] and will clearly be wrongful. Where an employer has actually dismissed the employee because the employee has refused a sexual relationship, there is no doubt that the dismissal is wrongful for want of justification, and that a contract action may follow.

The difficulty the employee faces is in the damages that are recoverable. The remedies for breach of an employment contract are similar to but not exactly the same as the remedies available for breach of an ordinary

contract. In Radford v De Froberville the court said:

> As to principle, I take my starting point from what, I think, is the universal statement of Parke B in Robinson v Harman[123] . . . which is in these terms: "The rule of common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.[124]

Therefore in an action for wrongful dismissal the prima facie measure of damages will be a sum equivalent to wages which would have been earned between the time of actual termination and the time at which the contract might lawfully have been terminated by proper notice, and including the value of any fringe benefits which the employee would have received during the same period. This is qualified by a duty on the employee to mitigate the losses suffered by attempting to find new employment.

The difficulty is that where dismissal arises out of sexual harassment by the employer, the employee is likely to have suffered emotional and psychological effects, or at the least anxiety, frustration and worry. However in Addis v Gramaphone Co Ltd[125] the House of Lords held that the employee is not entitled to additional compensation for loss arising from the manner of dismissal, thus damages can not be given for shock, worry, anxiety, embarrassment, humiliation or mental and emotional pain. In Addis a company manager was wrongfully dismissed in a

way that was harsh and humiliating, but could not recover damages for injury to his feelings. Subsequently many cases have qualified the Addis ruling and Treitel[126] says in view of all these qualifications, the continued existence of the rule may be in doubt. However, in Vivian v Coca-Cola Export Corporation,[127] Prichard J. held the cases which qualify Addis were distinguishable from the instant case and do not derogate from the Addis principle in its application to service contracts, and so the plaintiff could not recover for shock, worry, anxiety, upset and disappointment following wrongful dismissal. Therefore a sexually harassed employee who brings an action in contract against their employer for wrongful dismissal will not, on the authority of Vivian, be able to recover damages for any emotional effects caused by the manner of dismissal.

However, is this the case if the action is for breach of the implied term referred to earlier? Prichard J. in Vivian[128] said the rule in Addis excluding damages for intangible injuries is stated in terms which suggest that the rule is absolute and unqualified and that it applies to all claims for breach of contract. However as Prichard J. also recongised the rule is subject to qualifications or exceptions.[129]

Princhard J. identified three categories.[130] Where the plaintiff can show that actual pecuniary loss has resulted from loss of reputation; where the plaintiff has suffered pain or real physical inconvenience; and finally a specific contractual undertaking to protect or enhance the plaintiff's reputation or provide the plaintiff with some amenity or source of enjoyment. As to this last category, it was said tht this is on a different footing from the type of case dealt with in Vivian, where the only specific undertakings broken are promises to pay a salary for services to be rendered and not to terminate the employment without proper notice. An action for a breach of the implied term of the contract employment held to exist in H v E, because of the sexual harassment of the employer, is far removed from those specific undertakings, but rather can be viewed as an undertaking by the employer to provide the employee with some amenity, namely a work environment free of sexual harassment by the employer, thereby maintaining the relationship of confidence and trust. The direct result of a breach of this term would be injury to feelings, and emotional effects as compared with wrongful dismissal where the direct and immediate effect is lost wages.

All the cases cited in Vivian from New Zealand courts which applied Addis dealt with contract actions for

wrongful dismissal.[131] Also cited was Cox v Phillips Industries Ltd,[132] where the plaintiff in an action for breach of contract was permitted to recover damages because the breach exposed him to a good deal of depression, vexation, frustration and ill health. Although it was made clear that because of Addis the plaintiff could not have recovered damges in an action for wrongful dismissal for those intangible effects, the plaintiff was not so precluded because the promise broken by the employer was a promise to give the plaintiff a position of greater responsibility which went beyond a mere obligation to pay wages. The court held that there is no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress, frustration, and general disappointment the person who suffers from the contractual breach should not be compensated in damages for that breach.[133] The court, by reference to the Hadley v Baxendale[134] test of remoteness, held it to be a case where it was in the contemplation of the parties in all the circumstances that, if that promise of a position of better responsibility without reasonable notice was breached then, the effect of that breach would be to expose the plaintiff to the degree of vexation, frustration, and distress which he in fact underwent.

In Vivian the plaintiff argued, that because the injured feelings and the like came within the Hadley v Baxendale test of remoteness, they were recoverable. Prichard J.[135] rejected this saying that whilst Hadley v Baxendale is one limitation on damages, Addis is another limitation altogether. He said:

> In essence, it is a statement of the legal policy "preventing" as Lord Shaw of Dunfermline said in Addis v Gramophone Co Ltd: . . . the intrusion of not a few matters of prejudice hither to introduced for the inflation of damages in cases of wrongful dismissal [which are] now definitely declared to be irrelevant and inadmissible on that issue.[136]

In my submission, however, none of the foregoing would preclude and may rather support a court saying that in a contract action against an employer, who had sexually harassed their employee, for breach of the implied term referred to in Woolworths[137] and H v E,[138] the employee may recover damages for injured feelings and similarly intangible effects caused by the breach as long as the case comes within the Hadley v Baxendale[139] test for remoteness. As such effects are those which would normally flow from a breach of this implied term, and be in the reasonable contemplation of the parties as a consquence of breach, the remoteness test should present no obstacle. It may be said, I submit, that the Addis rule will only prevent a sexually harassed employee from recovering such damages, if they ground their action on wrongful dismissal.

XV A TORT ACTION?

The common law provices a further avenue of action for some victims of sexual harassment. Trespass to the person, or more particularly a battery or assault, will give the victim the right of bringing a tort action against the perpetrator. This is of course not restricted to the employment situation and will cover harassment in all areas.

A. Battery

A battery involves one person intentionally touching another without consent and no physical injury need result. The insult of the violation will suffice. Thus in Cole v Turner it was said that "The least touching of another in anger is a battery"[140] as would be fondling or kissing another person without their consent. Contacts associated with every day life in the office would not amount to a battery, however continually brushing ones body against another persons after it has been made known that this is resented may do. As battery is an intentional tort it would be necessary to show that such brushing was intended, rather than being part of the necessary contact in a crowded workplace.

B. Assault

As for the tort of assault no contact is required. Rather it is necessary that one person intentionally causes another person to apprehend imminent unwanted contact. One can readily imagine the manager moving towards his secretary, who is backing away into the corner, as he suggests that she might like to comply with is sexual demands. In such a case the secretary would have due cause to apprehend such contact. Should the contact then actually occur, both an assault and battery would have been committed. Where the weak victim has apprehended a physical violation which the reasonable victim would not have, then usually there will be no assault.[141] However, where a strong victim does not apprehend an imminent violation, which the reasonable victim would have, then an actionable assault will still have occurred.

C. The Effect of Accident Compensation

Section 27(1) of the Accident Compensation Act 1982 provides that where any person suffers a personal injury by accident in New Zealand no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court independently of that Act. For the purposes of the Act an accident has occurred notwithstanding that the perpetrator intentionally injured the victim.

The question therefore arises as to what extent may a victim of sexual harassment rely on the torts of assault and battery. In an assault as there has been no physical contact there is no question of physical injury. Potentially there may be mental injury, for which no compensatory claim may be made by way of an action for assault. However, an action may be brought because of the fact of being assaulted as it is actionable per se, though damages may not compensate for any personal injury.

In the case of a battery no tort action may be brought to recover compensation for any physical injury suffered, however this will not prevent an action. In Fogg v McKnight[142] the respondent was suspected of shop lifting and the appellant a store detective stopped him, placed his hands on the respondent and asked him for a receipt. The respondent who was completed innocent sued the appellant. At first instance it was held that there was a technical offence. On appeal the court further held that in respect of an assault and battery damages can be awarded not only for physical injury but also in respect of insult which may arise from interefence with the person and the injury to his feelings, that is the indignity, mental suffering, disgrace and humiliation that may be caused. Thus while compensation may no longer be given for physical injury, compensation for injury to feelings

is not necessarily precluded. Section 2 of the Accident Compensation Act provides that personal injury by accident includes the physical and mental consequences of the accident. Whilst this catches mental suffering, emotional effects such as indignity, disgrace, humiliation and the like are not precluded and may be compensated for in a trespass action. Such effects are likely where assault and or battery have occurred in the context of sexual harassment.

D. Intentional Infliction of Nervous Shock

At common law recognition is given to the tort of intentional infliction of nervous shock. In Wilkinson v Downton[143] the court held the defendant was liable where he had wilfully done an act calculated to cause harm to the plaintiff and caused her physical harm through nervous shock which rendered her ill. Similarly in New Zealand Herdman J. in Stevenson v Basham[144] held the defendant liable where he intended to frighten the plaintiff into giving up possession of a house and in trying to do so caused the plaintiff nervous shock. In Wilkinson there was much evidence that the act was done as a practical joke, and in Stevenson the aim was to obtain possession of the house. Nevertheless in both cases the courts were prepared to impute to the defendants an intention to cause nervous shock to the plaintiffs, because it was suffered.

In a harassment situation it would not usually be the case that the perpetrator intended nervous shock. This would be so in most actions for this tort. The usual intention is to cause "purely mental distress in the form of fright, fear, horror, grief, shame, anger, embarassment, disappointment, humiliation, injured pride or wounded feelings".[145] Nevertheless in circumstances where the actual effect has been nervous shock or physical illness the courts have imputed to the defendant an intention to cause that shock or injury.

In the "sexist harassment" case of Hill v Water Resources Commission[146] the plaintiff was subjected for a lengthy period to a hostile and offensive work environment. A particular episode was identified as being a significant factor in the development of a psychological condition suffered by the plaintiff. The episode described in the case as "a form of mental cruelty" involved constant threats of feeding the complainants fish to bigger fish in a tank at the office, or to eat her fish themselves. On one particular day, Hill was told her fish had been fed to the bigger ones. The plaintiff became very upset and eventually left in tears. It was not until her arrival at work the following week that she found her fish were alive and the whole thing had been a cruel hoax. The court was in no doubt that, placed in the

background of all the other harassment incidents Hill was subjected to, the nature of this act was calculated to, and did, subject Hill to alarm, distress and humiliation. This incident placed in the context of a string of incidents, and other harassment, resulted in stress caused psychological disability, manifested in nervous and physical symptoms requiring ongoing medical and counselling treatment.

Such a situation has the potential for forming the basis of an action for the tort of intentional infliction of nervous shock. However in New Zealand there would be a problem with accident compensation. From the victim's point of view the suffering was a result of an accident. In Hill's case there was a serious of specific and ascertainable "accidents" which were followed by an injury which may have been the consequence of any or all of them. The precise injury need not be located. It matters not that the injury was caused by the deliberate act of another person.

As to the injury itself, it would fall wtihin the "mental consequences" of the accident as provided in section 2 of the Accident Compensation Act. Nervous shock is "any recognizable psychiatric illness"[147] and therefore part of the "mental consequences" of the accident. Thus

section 27 of the Accident Compensation Act is a bar to any action for compensatory damages for the intentional infliction of nervous shock.

E. Intentional Infliction of Emotional Distress

If a victim of sexual harassment does not suffer from "any recognizable psychiatriatric illness" as a result of the harassment, nor is assaulted, but nevertheless suffers some emotional distress, can this be the subject of an action against the perpetrator?

Fleming says there must be "objective and substantially harmful physical or psychopathological consequences, such as an actual illness".[148] This is just a statement of the need for a recognised psychiatric illness before an action for the intentional infliction of nervous shock can be brought. However, Fleming goes on to say that the common law is "not yet prepared to protect emotional security as such except in the . . . case of assault.[149] On this basis fright or hurt feelings would not suffice.

Certainly there is no clear authority that an action for damages may be brought for the intentional infliction of emotional distress by itself, but also there is no

authoritative decision, binding on the New Zealand courts, which holds that damages are not available for the intentional infliction of purely emotional distress.

As discussed, in Fogg v McKnight[150] where the plaintiff was assaulted damages were awarded for the infliction of emotional distress, because of insult and injury to feelings suffered.[151] But in the sexual harassment case where there is no direct threat of bodily contact this action would not be available. Yet it would seem incongruous that damages for intentionally inflicted emotional distress be only available where their infliction has occurred in conjunction with an assault, or other tort. Perhaps it may sometimes be easier to show or impute such an intention when coupled with an assault. However, where a person is severely sexually harassed, though not assaulted, and suffers severe emotional distress an intention to inflict that distress may be readily imputed to the harasser.

As has also been mentioned the courts prior to Accident Compensation were prepared to give damages for intentionally inflicted nervous shock.[152] Should not the plaintiff be able to succeed if the only effect suffered was severe emotional distress rather than physical injury or nervous shock?

Trindade and Cane[153] suggests that the courts should grant an action on the case for damages for the intentional infliction of purely emotional distress by drawing an analogy with Wilkinson v Downton,[154] which was followed in New Zealand by Stevenson v Basham.[155] If a defendant intentionally inflicts emotional distress, damages should be recoverable for the same reasons they were for intentional infliction of nervous shock.

There should be no difficulty in establishing and quantifying loss where injured feelings, humiliation and other forms of emotional distress have been inflicted. If this can be done where there is an assault, it can be done where there is not.

If such an action is allowable the plaintiff would have to prove that the defendant did the act(s) or made the statement(s) with the intention of causing the emotional distress to the plaintiff. Thus the defendant must have meant to do it and possibly have known that the distress was certain or substantially certain to follow from the defendant's conduct.[156] This intention may be imputed in the same way as it was in Stevenson v Basham.[157]

Furthermore there must be emotional distress. Trinade and Cane says there "must be serious mental

distress, substantial and enduring rather than transient, [though] it should not be necessary that the mental distress produce physical harm or nervous shock in order to be labelled 'serious'".[158] In the United States it was said that "Serious mental distress may be found where a reasonable [person] normally constituted would be unable to adequately cope with the mental distress engendered by the circumstances of the case".[159] Furthermore the act or statement may need to be of a kind reasonably capable of causing emotional distress to the reasonable person, unless the defendant is aware of the plaintiffs peculiarities.[160]

One can readily imagine the hostile environment situation where a person is continually and insidiously verbally sexually harassed to the extent that the reasonable person would be unable to cope. The behaviour may also include acts of a sexual nature, though there is no assault. The effects may be anxiety, sleeplessness, sexual inhibitions and other enduring forms of distress, though in fact there is no identifiable psychiatric consequence. Such a victim should be able to bring an action for intentional infliction of mental distress against the perpetrator, as the intention can be readily imputed. Another potential situation for such an action is where the employer dismisses the employee who refuses a

sexual relationship. In some such circumstances the intention to cause emotional distress, and the suffering of that, can be readily imagined.

F. Exemplary Damages

While the fact that an assault or battery resulted in the injury to the victim is generally irrelevant for compensation purposes, the Court of Appeal in Donselaar v Donselaar[161] considered that a possible exception to the general rule may be if the injury is inflicted in the nature of a "high handed trespass to person".[162] The court said a right to exemplary damages as compared with compensatory damages may arise when a defendant has acted in contempt of the rights of another person and when it can be found that an award of compensatory damages is insufficient.[163] "[In] determining liability for exemplary damages it is the quality of the defendant's conduct which is in question, not whether the plaintiff has suffered a particular type of harm".[164]

However, it would be the unusual sexual harassment case indeed, before it could be said that the trespass to the person was so high handed that the court would give exemplary damages.

G. Accident Compensation

Where the victim of sexual harassment has suffered a personal injury by accident, although he or she may be precluded from bringing an action in tort against the perpetrator, compensation may be recoverable under the Accident Compensation Act 1982.

XVI AREAS OTHER THAN EMPLOYMENT

Whilst a tort action is not restricted to any particular area, the Human Rights Commission Act also deals with discrimination in areas other than employment. The Human Rights Commission policy statement recognised that the legislation also makes illegal sexual harassment occurring in the areas of education, provision of goods and services, access to public places and accommodation.[165]

Although these areas are outside the scope of this paper, a few points may be noted. Section 22 of the Act provides that it is unlawful for a vocational training body to provide training on less favourable terms and conditions than would otherwise be made available by reason of sex. Applying the approach of the sexual harassment in employment cases the section has scope for covering both the quid pro quo and hostile environment situations. Where a teacher requires a student to comply with a sexual request before the student will be allowed

to pass the course, it may be said that the training body has provided the training on less favourable terms to that student by reason of the student's sex. The act of the individual teacher may be attributed to the training body. It can be said that the terms were less favourable because a student, of that teacher, of the opposite sex would not have been required to comply with a sexual request before passing the course. This is assuming the teacher is not an equally treating bi-sexual teacher.

Less favourable conditions may occur without the teacher making it a term of passing, or the like, that the student complies with a sexual request. If a teacher subjects a student to sexual harassment which is sufficiently severe or pervasive to be able to say that that student's facilities for training are less favourable than a fellow student's of the opposite sex then, I submit, a breach of section 22 would have occurred.

Sections 23-25 of the Act which deal with access by the public to places, vehicles and facilities; the provision of goods and services; and the provision of accommodation are concerned with the quid pro quo situations. Thus under section 24 it is unlawful for any person who supplies goods, facilities, or services to the public or any section of the public to refuse to provide

them by reason of sex. The shop owner who refused a credit facility unless the purchaser complies with a sexual demand may be said, assuming no bi-sexuality, to be discriminating by reason of sex if the gender-plus criteria is applied. Similar arguments apply to the other areas provided for in the sections.

XVII REFORM

The emphasis of the paper has been on the statutory law as it now stands, and the developments case law may take in the future based on the direction of overseas authorities. However, a matter which in the future may be given consideration is the enactment of legislation dealing specifically with sexual harassment and identifying it as a statutory legal concept.

In some overseas jurisdictions the law has been reformed and legislation dealing with sexual harassment has been passed,[166] rather than leaving the matter to be dealt with under the general anti-discrimination laws.

A move such as this in New Zealand would recognize that, whilst present anti-discrimination laws under the Human Rights Commission Act do provide scope for dealing with sexual harassment, there are benefits in having legislation which enacts it as a specific legal concept.

In New Zealand, as we have seen, the Equal Opportunities Tribunal in H v E[167] used the general provisions for giving some redress to a victim of sexual harassment, and by following overseas precedents the law can be extended further. However, sexual harassment does not fit as neatly into the present anti-discrimination laws as it might do.

Where the illegality of sexual harassment is dependent on the behaviour being by reason of sex, then the behaviour of an equally treating bi-sexual employer who sexually harasses staff of both sexes is not illegal. Although an unlikely situation it does display an anomaly in using the present legislation for dealing with sexual harassment. Furthermore the illegality of sexual harassment should not depend on a comparison of the treatment which is accorded a staff member of one sex as compared with that which is or would be accorded a staff member of the opposite sex.[168] The behaviour is reprehensible because of its nature, and not just because it was accorded to one person of one sex, yet not to a person of the opposite sex. This is in comparison with the situation where an employer disadvantages some employees by reason of their sex, and the act of creating a disadvantage to those employees is only wrongful because it is by reason of their sex. One example of this is an

employer refusing to give a staff discount to his female employees but giving one to his male employees because they are male. The act of refusing a staff discount is the employer's right, but when it is done by reason of sex it becomes reprehensible. Although sexual harassment can invariably be said to be substantially by reason of sex and therefore a sex discrimination problem, the behaviour does not require this element to make it reprehensible. Thus section 24(1) of the Equal Opportunity Act 1984 (Western Australia) makes it "unlawful for a person to harass sexually" an employee.

In any attempt to reform the law it would not be desirable to narrowly define the type of behaviour which can amount to sexual harassment. Thus in Loder the tribunal said:

> It would be wrong . . . to attempt an exhaustive list as human inventiveness would almost certainly find other activities or approaches equally unwelcome and unpleasant which might then be denied the label of harassment.[169]

Any legislative reform could encapsulate the ideas brought out by the cases, without having to list the type of behaviour which would be caught. One criteria would be that the conduct is unwelcome, as it is only then that it can in any sense be considered harassment. Secondly the quid pro quo situation would be provided for. Where it

can be said that the employee has reasonable grounds for believing that rejection of the employer's sexual advance, or a refusal of the employer's request for sexual favours, or the taking of objection to the employer's sexual conduct would disadvantage the employee in any way in connection with the employment then the employer would have committed an unlawful act.[170] Similarly where the employee has taken such action and suffered some disadvantage in any way in connection with the employment, then the employer would have committed an unlawful act.[171] The section would have to be worded so as to deal with the situation where a person's possible employment is made conditional on complying with sexual requests.[172] Finally, any legislation should be worded so that, if it can be said that the sexual harassment is so serious or pervasive that it results in the employee suffering the intangible disadvantage of a hostile work environment then, a breach has occurred. Recognition should be given to the fact that such conduct can include statements, both written and oral, of a sexual nature.[173]

Any reform would of course have to go beyond the employment context and deal with the other areas presently dealt with by the Human Rights Commission Act. The provision of goods and services, access to public places and accommodation are all areas in which a power

relationship can develop so as to make them susceptible to a prevalence of sexual harassment. In education the problem can be even more acute. The position of power accorded to the "lecherous professor",[174] or lecturer, or tutor allows that person to suggest that a lower grade or a fail might be forthcoming unless the student consents to a sexual relationship. The problem is often exacerbated in educational institutes because of the age differential between the harasser and the harassed. Although some institutions have their own internal regulations[175] which provide a complaints procedure, legislation dealing with the matter is still desirable to cater for cases where there is no interal procedure, or where it fails. Legislation would primarily be concerned with dealing with the person who is in the position of power and sexually harasses the student, as compared with the student who harasses another student. Student harassment of each other is ideally left to be dealt with by internal procedures as the harasser has no institutional position of power. However, legislation could require educational institutes to take reasonable steps so as to provide a sexual harassment free environment. Such a requirement could be met by setting up a suitable complaints procedure.

One benefit of a statutory reform is the educative effect and raised awareness created by the legislation passing through the law making process. Furthermore once specifically identified in the statute books as unlawful, sexual harassment becomes more than just one of the many illegal discriminatory practices covered by the general anti-discrimination regime.

As has been the approach overseas,[176] any reform should not enact sexual harassment as a statutory wrong which is actionable in the ordinary courts. Instead, the Human Rights Commission mediation procedure is particularly suitable for dealing with the problem. Civil actions in the ordinary courts are lengthy, costly and lack the flexibility available under the Human Rights Commission process. The costs to the victim are less, and the procedure is more easily accessible to the victim than the ordinary court system.

As a discrimination problem it is one for which the community should continue to take some responsibility rather than leaving the individual to bring an action against the perpetrator.

The Commission provides an easily accessible and approachable structure with sympathetic people used to

dealing with such problems. They are in a position to sift out trivial complaints, hopefully reach a settlement by mediation, and if necessary bring an action before the Equal Opportunities Tribunal against the perpetrator, or assist the victim in so doing. A case before the tribunal has a better chance of success than one before the ordinary courts as the tribunal is not bound by the ordinary rules as to the admissibility of evidence.[177] This can be especially crucial in cases involving sexual harassment, where the unlawful acts will often have no witnesses, and proof will largely consist of hearsay evidence.

The opportunity to sue in the ordinary courts in tort or contract, where appropriate, would still be available, though the practicalities of this will often limit its usefulness.

One matter in urgent need of reform, I submit, is the maximum amount recoverable by the victim by way of damages. As has been seen, the emotional effects to the victim of being sexually harassed can be quite severe, and for which $2,000 would have great difficulty in compensating. Where there are no such effects suffered, nominal damages, a declaration and/or an injunction will continue to be available.[178]

A further practical approach to the sexual harassment problem could be an amendment to the Industrial Relations Act 1973 so as to imply into every award an anti-sexual harassment clause. Although some awards already included such clauses[179] a standard implied clause can only be beneficial.

XVIII THE CRIMINAL LAW

Some consideration must be given to the criminal law because of the fact that in some more serious cases sexual harassment will involve a criminal act. This, though, will not always be the case. For example, in the poisoned environment case, where the employer has directed a barrage of lewd comments and suggestive remarks, as well as perhaps subtle and insidious acts, against an employee over a prolonged period. Although the behaviour has been such that it has made the employment environment unbearable and offensive for the employee, the chances are that there has been no breach of the criminal law.

The situation will be different where the harasser has physically forced him or herself on the victim. Where there has been no consent to sexual intercourse or some other sexual contact, and the perpetrator carries on regardless, then the victim will clearly have recourse to

the criminal law. "No" is clearly no. The offences of indecent assault and sexual violation will be the most likely canditates.

A. Indecent Assault

Indecent assault will not necessarily involve a battery, so it may be no more than an attempt to apply force or a threat by an act or gesture to do so. Similarly gentle, unwanted, touching may be enough. All that is required is an assault accompanied with the circumstances of indecency. Thus in Leeson[180] acts of kissing and other familiarties were enough because they were accompanied by suggestions of sexual intercourse or sexual acts. Therefore an employer who threatens to fondle an employee, or actually does so, will commit an indecent assault. The employer who threatens to fire the employee, unless the employee consents to such activity will not commit on indecent assault, as there is no threat to apply force. In practical terms there is little distinction between the situations, because if the employee consents it is only under the threat of losing a job benefit. However, notwithstanding that threat, there will still have been consent and therefore no assault.

If there is no indecent or sexual element, but there is force, or a threat to apply such force, then an offence of common assault may have been committed.

B. Sexual Violation

Some sexual harassment cases may involve forced sexual intercourse or some other act of penetration for which there is no consent, in which case the harasser will be criminally liable.

Section 2 of the Crimes Amendment Act (No. 3) 1985 repeals the old rape provision[181] and creates a broader offence called "sexual violation". Section 128B of the Crimes Act provides that it is an offence to commit sexual violation. Sexual violation occurs when a male rapes a female or when a person has unlawful sexual connection with another person.

The effect of section 128(2) is that a male rapes a female if he has sexual connection with that female occasioned by the penetration of her vagina by his penis without her consent.[182]

Unlawful sexual connection, the second way sexual violation can occur, is so defined that it covers all rape cases as well as other acts.[183] Sexual connection occurs when the vagina or the anus of any person is penetrated by any part of the body of any other person or any object held or manipulated by any other person,[184] or when the mouth or tongue of any person connects with any part of

the genitalia of any other person, or when such sexual connection is continued.[185] The sexual connection is unlawful if a person has sexual connection with another without their consent.[186] As the definition is sexless either a male or a female may be the principal offender, and either a male or a female may be the victim.

The important in deciding whether sexual connection was unlawful so as to consistute sexual violation is whether or not there was consent. There is no consent if a person submits to or acquiesces in sexual connection by reason of: the actual or threatened application of force to that person or some other person; the fear of such force; a mistake as to the identity of the offender; a mistake as to the nature and quality of the act.[187]

In what other circumstances will there be a lack of consent? If after an employment related threat made by the employer, an employee passively allows sexual connection to take place, can it be said there is no consent? Section 128A provides that "the fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent . . .", without giving any hint as to what might be required for consent in such circumstances. Orchard says that "[a]t present the law is excessively uncertain.[188] In Holman[189] where the legislation provided that the

offence occurred in the absence of consent, or where in some cases acquiescence was obtained by force, threats, fear or fraud, Jackson C.J. said the trial judge was in error in directing that an absence of "completely willing consent" would result in liability. He said:

> A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously permits it (providing her permission is not obtained by force, threats, fear or fraud) it is not rape.[190]

Orchard concludes that in practice it seems probable that a similar principle will apply in New Zealand, and that conscious submission by a sane adult will be equated with consent unless force, fear or mistake within the terms of section 128A(2) applies. From this it follows that where consent to sexual connection has been obtained by the use of employment related threats, and sexual connection has followed there will have been no breach of section 128.

This approach is necessarily correct when one considers the terms of section 129A of the Crimes Act.[191] Section 129A provides that it is an offence to have

> sexual connection with another person knowing that the other person has been induced to consent to sexual connection by -
> (a) An express or implied threat that the person having sexual connection or some other person will commit an offence which is punishable by imprisonment but which does not involve the actual or threatened application of force to any person; or
> (b) An express or implied threat that the person having sexual connection or some other person will make an accusation (whether true or false) about misconduct by any person (whether living or dead)

> that is likely to damage seriously the reputation of the person against or about whom the accusation or disclosure is made.
> (c) An express or implied threat by the person having sexual connection to make improper use, to the detriment of the other person, of any power of authority arising out of any occupational or vocational position held by the person having sexual connection or any commercial relationship existing between that person and the other person.

It follows from this section that agreement to sexual connection obtained by threats of the kind described in section 129A must amount to "consent" for the purposes of section 128. Furthermore, unlike section 128A (which provides that certain matters will not constitute consent), there is nothing in section 129A which provides that the terms of this section do not limit the circumstances in which there is no consent for the purposes of section 128. Orchard suggests because of that,

> There seems to be a strong argument that, given that section 129A threats do not exclude consent, there will be consent if a sane adult acquiesces as a result of threats or pressures which do not involve force to a person and which are not within section 129A.[192]

Thus although sexual harassment may often involve the obtaining of agreement to sexual connection by the making of threats, unless those threats fall within section 128A(2), that agreement will amount to "consent".

C. Inducing Sexual Connection by Coercion

Following the enactment of section 129A, there are some circumstances in which a person who has consensual

sexual connection will have committed a crime because the consent was induced by reason of certain threats. If the person knows that the person with whom they have sexual connection was induced to consent by an express or implied threat which falls within paragraphs (a)-(c), then an offence will have been committed. Thus there would be no offence committed by A under section 129A if A has sexual connection with B who has been induced to consent by a threat made by C,[193] and A is unaware of the inducement. There may also be circumstances where although a person made the threat they were unaware it induced consent. Orchard says "[p]resumably a person will have the requisite knowledge only if he or she is virtually certain of the reason for consent, or "knew what the answer was going to be 'if inquiry was made".[194]

Sexual harassment in employment and elsewhere, may often involve the harasser having sexual connection knowing that consent to that act was induced by a threat of some description. What sort of threats will make that sexual connection criminal?

1. Sections 129A(1)(a) and (b)

Paragraph (a) is straightforward. The reason cases involving the actual or threatened application of force are excepted is because they are caught by section 128.

Likewise paragraph (b) presents little difficulty except perhaps for the question of what sort of accusation or disclosure is likely to seriously damage a person's reputation.

In some cases an offence against these two paragraphs will also be an offence against the extortion provisions of the Crimes Act, or what is in common parlance known as blackmail. Section 238(1) makes it an offence to, with intent to extort or gain anything from any person, make certain threats relating to accusations or disclosures of any offence, or of sexual misconduct, or publishing criminal libel or slander. Section 238(3)(a) further provides that it is an offence to make any such threat with intent to induce any person to do any act against their will.

In Police v Johnston[195] Beattie J. held that "anything" is generally limited to things capable of being stolen and other forms of property. In that case the appellant had induced consent to sexual intercourse by threatening to make disclosures as to sexual misconduct by the complainant. Beattie J. held that it was not the intent of the legislation to include intercourse as "anything", therefore the prosecution was wrong in suggesting that having sexual intercourse would be a gain

to the appellant.[196] However, he held that the wording of section 238(3) was apposite to the facts of the case as the appellant made the threat with the intent that the woman do an act against her will.[197] There is authority for the view that the threat for the purposes of section 238 must be such as would deprive a reasonable person of their free volition and put a compulsion on them, though this should be liberally construed, since victims of such offences are not as a rule of average firmness.[198] The offence is complete on the threat being made, so the act does not have to occur.

Where a person makes a threat within the limited terms of section 238(1) intending to induce consent to a sexual act then an offence will have been committed under that section. Where a person has then had sexual connection with the person threatened, knowing that their consent was induced by the threat an offence is also likely to have been committed under section 129A(a) or (b). If the threat was a threat to publish criminal libel then it would be a threat for the purposes of section 129A(a) and probably (b). If as on the facts of Johnston[199] it was a threat to disclose sexual misconduct, or the commission of an offence, it would fall within section 129A(b).

The person who makes a threat which leads to an offence under section 129A will not necessarily have committed an offence under section 238, even though the threat was one of the sort described in that section, because under section 129A it is not necessary that the threat was made with sexual connection in mind.

2. Section 129A(c)

Paragraph (c) presents somewhat more difficlty. It has been described as effectively elevating "sexual harassment leading to sexual connection to the status of a major crime"[200] and thus one might expect it to cover many of the successful, from the perpetrator's point of view, quid pro quo cases of sexual harassment. However, a closer examination reveals that this is not always so and that there are many situations where what might be called "sexual harassment leading to sexual connection" is not caught. The wording of the provision limits the cases which will be caught; the problem is defining what those limits are.

An aid in establishing this is to ask, what is the offence aimed at? Is it the threatened abuse of power or the act of having sexual connection with a person who has consented only by reason of being threatened with some detriment? The incorporation of the provision into the

Act followed many submissions condemning the obtaining of sexual relations by coercion; that is by threats of abuse of position of authority.[201] One speaker saw the importance of the provision as being that "the use of authority relationships, which lies at the very heart of the meaning of power, should not be misused to gain sexual favours or sexual satisfaction".[202] The offence may therefore be better viewed as an abuse of authority offence rather than a sexual offence. The wrong lies in the first instance with the threatened abuse of power, though it is the connection which is illegal.

The fact that it is an abuse of authority offence, rather than a sexual offence, explains why 129A(c) is only concerned with threats made by, and to be carried out by, the offender, while under 129A(a) and (b) the threat may be made by another person and the threat can be that someone other than the offender will take action.

One further requirement is that the threatened action must be one which would be to the "detriment" of the victim. A fine line may be drawn between the case where a person is receiving a benefit in return for their consent to sexual connection and the case where the person is not suffering any detriment, by receiving the promotion which was due to the victim anyway. If it is clear that the

victim would have been entitled to the "benefit" anyway, it must be a case where the person has been induced to consent by the threat of otherwise suffering some detriment. However, is there an element of detriment where there is a promise of a benefit, which is not otherwise merited, in return for consent to sexual connection?

The Minister of Justice in a speech to Parliament said paragraph (c) is

> directed against coercive behaviour. It does not apply to the circumstances when a person in a position of authority offers a reward in exchange for sexual favours . . . An employer who threatens dismissal without cause, for example will clearly be caught. On the other hand an employer who offers an inducement for example a promotion that is not merited and would not otherwise be granted - is not caught. In that position the employee does not stand to suffer detriment through the improper exercise of a power. That is not to say that such behaviour is commendable but it is not in the nature of the type of coercive threat with which this offence is concerned.[203]

The Minister has intended a narrow approach to be taken when interpreting the section and assumed that "detriment" is restricted to a threat to take away something the victim has or is entitled to, or at least might become entitled to, and will therefore not cover a threat not to confer a benefit to which the victim has no automatic entitlement.

However, is it necessarily so that an employer who offers a promotion on condition that consent to sexual connection is forthcoming, or says to a prospective employee that he or she will only get the job in return for such consent, is not making a threat involving a "detriment". Whether it is framed as a promise to perform the action only if . . ., or a threat not to do it unless . . ., seems to be of no consequence. From the victim's point of view he or she will suffer a detriment unless consent is forthcoming. The employer can be said to be making a threat to use the power not to employ, or not to grant a promotion, which will be to the detriment of the victim.

The approach the courts take remains to be seen. They may follow the intended meaning and draw a line between what the victim had or was entitled to anyway, and something that is a discretionary benefit, and say only in the first case is there any detriment. Alternatively they may take a wider view of detriment, which is open on the wording of the provision. In any case both situations involve the use of power to coerce consent, the evil the section is aimed at.

A further requirement of the provision is that the threat be one to make "improper" use of a power. The

Minister of Justice indicated that this means the use of a power without cause.[204] Therefore section 129A(c) appears to be excluded if there was a legitimate ground for the threatened action, even though the threat was intended to and did induce consent to sexual connection. Thus an employee who is caught stealing at work may be induced to consent to sexual connection by a threat of dismissal, and there will be no breach of section 129A(c) as the use of power threatened was proper give that the dismissal would have been justified. Although the employer is abusing her or his power in an attempt to induce consent, the behaviour is not caught. Arguably this puts serious and unnecessary limits on the whole provision. Nevertheless as improper is defined in terms of us, if the use threatened is not improper it falls outside the provision. This is unfortunate as the power is abused just as much whether the use threatened is a proper one or an improper one.

One situation which would not fall within the provision is a supervisor purporting to have the authority to fire their charge unless that person has sexual connection with the supervisor, and that worker in the belief that the supervisor does have the power, being induced to consent by the threat. As an abuse of authority offence the terms of the section require that the power or authority must actually arise; it must

actually exist. It is unfortunate that such a situation is not caught, as it can be seen as being analagous to "a mistake as to the identity of the other person", a fact which prevents there being any consent for the purposes of section 128.

The threat made must be one to improperly use any power or authority. However, that power or authority must arise out of an occupational or vocational position, or a commercial relationship between the offender and the victim. If it is something that could be done apart from that position or relationship, then it has not arisen out of it.

An occupational or vocational position is clearly a position pertaining to any employment, trade or profession. Thus it will not only cover actions relating to employees, or their charges in the capacity of supervisor, but also the use of powers in relation to the general public. For example, an employee of a quango threatening to use their discretionary power, which arises out of their employment, to revoke a licence unless the victim has sexual connection. If, though, there were justifiable grounds on which to revoke the licence, then it would not be caught as the use threatened would not be improper.

One question which may fall to be decided on the facts of particular cases is how broadly "occupational or vocational position" will be defined. Whilst it clearly covers paid employment, it does not seem apt to cover positions arising out of leisure time voluntary pursuits such as in clubs and societies. This, though, may depend on the extent of a person's involvement. However, it is unlikely, for example, that a person who is the president of a stamp club, for which members attend monthly meetings can be said to have power arising out of an occupational or vocational position. Whilst a priest's position in the Catholic church is clearly occupational and vocational, the position would become less clear with the leader of small religious sect.

One major area of the sexual harassment problem is educational institutes. Lecturers and teachers clearly have power arising out of occupational or vocational positions, and one who suggests to a passing student that a fail will be forthcoming unless there is consent to sexual connection will have made a threat for the purposes of the section.

Finally the power may arise out of an existing commercial relationship with the victim. A threat to breach a contract for the delivery of goods by not delivering them will be caught, but many threats will not

involve improper uses. For example a creditor who threatens to repossess goods, or take bankruptcy proceedings, or enforce their right of sale as a mortgagee unless the debtor consents to sexual connection, may be threatening something they are entitled to do and therefore it would not be an improper use.

D. Is the Criminal Law an Answer?

The criminal law as an answer to the sexual harassment problem has its limitations. From the victim's point of view reliving the experience of having been sexually violated, throughout a long enquiry, and during the criminal trial, especially where giving evidence in chief and being cross-examined, can present great difficulties.

Sexual harassment occurs because the offender thinks the situation can be safely exploited. Often the crime is thought of as just a misplacement by the offender of otherwise natural feelings of attraction, when in fact it is a crime of abuse of power. Nevertheless, an inquiry in to whether or not the victim consented or was wrongfully coerced into consenting, extends into what the victim did to arouse this desire, and whether the victim found the sexual attack gratifying. Thus it may be the victim not the offender who is made to stand trial.

Some new amendments to the law, do however provide increased protection for the victim.[205] For instance there is some restriction on the evidence which may be adduced in relation to the complainants past sexual experiences with people other than the accused.[205] The Summary Proceedings Amendment Act (No. 4) 1985 reflects to some extent the difficulties from a complainant's point of view of pursuing a prosecution for sexual violation. It provides that at any preliminary hearing of sexual violation or section 129A offences a complainants evidence will be given by written statement and the complainant will not be subject to examination or cross-examination, except by their own election to give oral evidence, or if it is ordered by the judge in the interests of justice. This section gives some protection against a prosecution being thwarted at the outset by a victim's inability to give oral evidence becuase of the emotional trauma, and prevents the victim from having to go through it twice in court. However, the real "trial" for the victim will still be giving oral evidence at the main hearing, especially during cross-examination. Section 375A(2), a new provision of the Crimes Act, reflects this by limiting the people who may be present in the court room whilst the complainant in a case involving sexual violation gives oral evidence. As well, where the interests of the victim require it, the court may make an order forbidding publication of the details of the alleged sexual acts.

The reality is that prosecution of sexual harassment cases under the Crimes Act provisions will be very difficult, especially under the new section 129A provision. The very intimacy of such sexual crimes means that there will rarely be witnesses, and evidence will largely consist of the complainant's and accused's testimonies, and any inferences which can be drawn from circumstantial evidence. A new section of the Evidence Act 1908, section 23A, inserted by the 1985 amendment (No. 2), provides that no corroboration of a complainant's evidence is necessary in sexual cases. This does not bring about a change in the law. However the section also provides that in such a case the judge is no longer required to give a warning to the jury as to the dangers of relying on such uncorroborated evidence, though this may be done at the judge's discretion. Even without a warning a jury may still tend to treat such uncorroborated evidence with suspicion and accord it less weight. This may be especially so where the accused is a "respectable" member of the community and the complainant a mere secretary of some powerful corporate manager.

"Privacy sanctifies the sphere of the sexual, with the crimes being committed in the absence of

non-participant witnesses. Thus proof in these sexual harassment cases will be extremely difficult. The effectiveness of a criminal action as an avenue for dealing with the attacks, as compared with a civil action, is reduced by the fact that a higher standard of proof is required to convict a person of a criminal offence. In a civil action the case must be proved to the standard of the balance of probabilities, though in many sexual harassment cases the gravity of the allegations will dictate that the balance be satisfied to a high degree,[207] however it would never reach the very high standard required by the criminal law of beyond reasonable doubt. To prove there is no doubt that the threat was made with the necessary intention and that the sexual act occurred with knowledge that the consent was induced by the threat will in many cases be impossible, or from the victim's point of view not be worth the torment.

Another factor is that prosecution will largely be at the discretion of the police. The extent to which police will take seriously an offence under section 129A(c), where the victim has "consented" to the connection, must be in some doubt when at the same time resources are stretched in an attempt to catch 'real' violent offenders. This is especially so considering the difficulties which a prosecution under that section will

present. Evidential problems may be compounded by the fact that the "offender" may be a company director or some other "respectable" member of the community and the victim a "mere" employee, with much less status in the community.

Although a private prosectuion is possible, the financial cost to the victim does not really make this a viable alternative.

Finally, the sanctions on the perpetrator will more than likely be imprisonment or in a more minor case, of say assault, a fine. Thus although a successful conviction will serve the purpose from the victim's point of view of removing the problem, and possibly having some retributive effect, it will not provide any compensation for the emotional and psychological damage done, nor for any tangible losses suffered because of any detriment caused by the offender's power over the victim. There will be no reinstatement for any employment lost, nor will any merited promotion be granted.

Whilst the criminal law as a response to sexual harassment has many practical limitations, after the offensive behaviour has occurred, it hopefully in some cases prevents that stage from being reached. Section 129A itself was passed in light of an increasing awareness

of the use of power to obtain sexual favours. By legislating against such behaviour in certain circumstances the necessary educative process required to tackle the problem of sexual harassment is continued. An awareness that there is now a criminal sanction available, which makes inducing consent by threats of harm in some circumstances culpable behaviour, may deter people from behaviour in which some previously saw no wrong. MacKinnon says "men who sexually harass women are commonly dumbfounded that the women resent it, even when the women have declined flatly from the beginning and resisted explicitly throughout".[208] The legislation has stamped society's disapproval on sexual harassment, in its more serious forms, involving actual bodily harm, or the application or threat of application of force, and abuses of power.

E. Section 21 Summary Offences Act 1981

Section 21 of the Summary Offences Act potentially covers some sexual harassment cases which do not involve any physical contact, or a threat or application of force. Section 21 provides:

> (1) Every person is liable . . . who, with intent to frighten or intimidate any other person - . . .
> (b) Follows that other person about from place to place, or . . .
> (d) Watches or besets the house or other place where that person resides, or works, or carries on business, or happens to be . . .

In Police v Brown & Ors,[209] the judge was critical of the fact that the section was couched in terms which would not normally be in common usage in New Zealand today. He therefore adhered to the Shorter Oxford Dictionary Definition of besetting as being to hem in; occupy and make impassable". An employer, or anyone who is insistent on sexually harassing a person, and who follows that person around, or perhaps hems them in at work, may be caught by the section. However, the difficulty is going to be proving an intention to fringten or intimidate. It will be difficult to show such an intention where the accused followed the person only because he or she was attracted to that person. Hemming a person in, in an attempt to convince the person to agree to a sexual relationship does not reflect an intention to frighten or intimidate, though it may be harassment.

F. Harassment as a Criminal Offence

Is there any potential for further criminal legislation which is aimed not at cases where a sexual act occurs, or at the making of threats in an attempt to obtain sexual favours, rather at the act of persistently harassing another person? Such a section might provide that it is an offence to harass another person by making demands, or requests, or comments, or by performing acts, which by reason of their nature, or frequency, or manner

of making are calculated to subject that person to alarm, distress or humiliation.[210]

Whilst an offence of unlawful harassment would catch many of the more serious hostile environment sexual harassment cases, such behaviour is better left to be dealt with by the civil law. First, it is debatable whether such behaviour which does not actually involve a physical violation, or a threat of such violation should carry the stigma of being a criminal offence. Whilst it may be anti-social, civil remedies should suffice. In any case for reasons mentioned earlier in relation to section 129A(c) of the Crimes Act, it is unlikely that such an offence would be taken seriously by the authorities. Furthermore the difficulties of proving an offence, especially the intention, to the criminal standard creates doubts as to the workability of such an offence.

XIX CONCLUSION

MacKinnon said that,

> Working women are defined and survive by defining themselves as sexually accessible and economically exploitable. Because they are economically vulnerable, they are sexually exposed; because they must be sexually accessible, they are always economically at risk.[211]

Although sexual harassment is not only a problem for women, structural inequalities and sterotyping will ensure

that in most cases a woman is the victim. In employment the causes may be economic, in that economics provides the power, but the effects are much more. A tangible loss may or may not be suffered, but it is the intangible effects which cause the pain.

Furthermore, leaving aside the pain suffered by the victim, the discriminatory environment also introduces an impurity into society that needs to be eradicated. Discrimination and inequality should be met by the legal system with an attempt to break them down. No one should have to survive by defining themselves as sexually accessible. Society should not have to suffer unwarranted discrimination.

The Equal Opportunities Tribunal in H v E[212] developed the law in New Zealand so as to define sexual harassment as unlawful discrimination in certain cases. It is the responsibility of the law to ensure that it continues to develop to meet new situations. Although the law is only part of the solution, it is the starting point, and therefore a legal response to sexual harassment must be maintained.

FOOTNOTES

1. Zarankin v Wessex Inn (1984) 5 Canadian Human Rights Reporter Decision 387.

2. D. Curtin "Sexual Harassment in Employment - Developing a Standard of Employer Liability" (1984) 6 D.U.L.J. 75.

3. Idem.

4. C.A. MacKinnon Sexual Harassment of Working Women (Yale University Press, New Haven and London, 1979) 25.

5. Ibid. 47.

6. Idem.

7. Ibid. 55.

8. Ibid. 27, 249.

9. See the Report of the Human Rights Commission for the year ended 31 March 1985 New Zealand. Parliament, House of Representatives. Appendix to the journals, E.6: 21.

10. H v E (1985) 5 N.Z.A.R. 333.

11. Human Rights Commission Act 1977.

12. This phrase was coined by MacKinnon, supra n.4, 32.

13. See Bundy v Jackson (1981) 641 F.2d 934.

14. MacKinnon, supra, n.4, 35.

15. Such statements incorporate the guidelines used by the commission when carrying out its investigative and mediation functions, infra p. 65.

16. For example section 24 of the Equal Opportunity Act 1984 (Western Australia).

17. (1975) 9 E.P.D. para. 10, 093.

18. Idem.

19. Idem.

20. Idem.

21. M. Rubenstein "The Law of Sexual Harassment at Work" (1983) 12 I.L.J. 3.

22. (1976) 12 E.P.D. para. 11, 267, see also Miller v Bank of America (1976) 13 F.E.P. Cases 439 for a similar analysis.

23. (1974) 13 F.E.P. Cases 123.

24. Idem.

25. Barnes v Costle (1977) 561 F.2d 983.

26. (1976) 12 F.E.P. Cases 1093.

27. Supra, n. 25.

28. Ibid. 990.

29. Supra, n. 13, 942.

30. (1984) 35 E.P.D. para. 35, 467, 35, 471.

31. Heelan v Johns-Manville Corp (1978) 451 F.Supp 1362, 1390.

32. Supra, n.1.

33. Ibid. para. 19, 178.

34. Ibid. para. 19, 184.

35. Ibid. para. 19, 185.

36. (1983) 3 N.S.W.L.R. 89.

37. (1984) E.O.C. para. 92, 112.

38. Supra, n. 10.

39. (1983) 3 N.Z.A.R. 435.

40. (1984) E.O.C. para 92, 111.

41. [1985] 2 N.Z.L.R. 372.

42. See Schilling v Kidd Garrett Ltd [1977] 1 N.Z.L.R. 243.

43. Supra, n. 41, 376.

44. Supra, n. 10, 336.

45. Supra, n. 41.

46. Supra, n. 10, 336.

47. Section 5(j) provides, "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purpose is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit".

48. The long title to the Act provides it is "An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants of Human Rights".

49. In support the tribunal relied on J.F. Burrows "Statutory Interpretation in New Zealand" (1984) 11 N.Z.U.L.R. 1, 12.

50. [1968] I.R.L.R. 134.

51. The perpetrators were employees of the defendant, for whose actions the defendant was vicariously liable under the United Kingdom legislation.

52. Supra, n. 50.

53. [1980] 1 Q.B. 87, 103.

54. Supra, n. 50.

55. See N.Z. Shipping Officers I.U.W. v Union Steamship Co. Ltd. [1978] A.C.J. 19, and N.Z. Nurses I.U.O.W. v Plunket Society [1984] A.C.J. 441.

56. Supra, n. 53, 99.

57. Supra, n. 13.

58. Ibid. 939.

59. Supra, n. 25, 993.

60. Supra, n. 13, 940.

61. Supra, n. 25.

62. (1972) 454 F.2d 234.

63. Ibid. 238.

64. Idem.

65. Idem.

66. Supra, n. 13, 945.

67. Ibid. 942.

68. Supra, n. 62.

69. (1977) 547 F.2d 466.

70. Supra, n. 13, 945.

71. This was held to be so in Carroll v Talman Federal Savings & Loan Association (1979) 604 F.2d 1028 where the bank forced female employees to wear uniforms, whilst allowing the men to wear their own clothes.

72. 19 June 1986, unreported, U.S. Supreme Court, Docket No. 84-1979; see Labour Law Reports, Employment Practices (C.C.H. Inc., Chicago), Extra Edition, report 275, 1.

73. C.C.H., supra n. 72, 1.

74. Ibid. 3.

75. Ibid. 6.

76. Ibid. 8.

77. (1982) 682 F.2d 897, 902.

78. C.C.H., supra, n. 72, 9.

79. Supra, n. 62, 238.

80. Supra, n. 72.

81. Supra, n. 36, 103.

82. C.C.H., supra, n. 72, 10.

83. Idem.

84. February 1984, unreported, Northern Irish Industrial Tribunal, 34/83 SD.

85. Idem.

86. Supra, n. 36, 105.

87. Supra, n. 53, 99.

88. Supra, n. 36, 97.

89. Ibid. 103.

90. Idem.

91. Idem.

92. Supra, n. 62, 238.

93. Supra p. 25.

94. Supra, n. 13, 945.

95. Supra, n. 53.

96. Supra, n. 36.

97. Supra, n. 53.

98. Section 55 of the Human Rights Commission Act 1977 provides: "The Tribunal may at any time dismiss any proceedings . . . if it is satisfied that they are trivial frivilous or vexatious, or are not made in good faith".

99. Section 38(8) Human Rights Commission Act 1977.

100. Supra, n. 10, 336.

101. Supra, n. 36, 105.

102. Supra, n. 40.

103. (1981) 2 N.Z.A.R. 401.

104. (1985) E.O.C. para 92, 127.

105. (1981) 2 N.Z.A.R. 407.

106. Australian & New Zealand Equal Opportunity Law & Practice (C.C.H. Australia Ltd., Sydney, 1984) para 59, 450.

107. Section 117(3) Industrial Relations Act 1973.

108. Auckland Freezing Works and Abbatoir Employees I.U.W. v Te Kuiti Borough [1977] 1 N.Z.L.R. 211.

109. Madden v Peake Roger & Co [1981] A.C.J. 129.

110. Wellington Clerical Workers I.U.W. v Barraud and Abraham Ltd [1970] B.A. 347.

111. Supra, n. 41, 375.

112. Supra, n. 10, 339.

113. Ibid. 336.

114. [1982] A.C.J. 699.

115. [1978] A.C.J. 19.

116. [1984] A.C.J. 441; see also Wellington Amalgamated Society of Shop Assistants and Related Trades I.U.W. v Armed Forces Canteen Council [1979] A.C.J. 307.

117. [1976] I.C.J. 217.

118. McDonald v Hubber [1976] I.C.J. 161; Begumanya v Night Security Services [1977] I.C.J. 119.

119. [1909] A.C. 488.

120. Supra, n. 41, 376.

121. Supra, n. 10, 336.

122. Idem.

123. (1848) 1 Exch. 850, 855.

124. [1977] 1 W.L.R. 1262, 1268.

125. Supra, n. 119.

126. G.H. Trietel The Law of Contract (6 ed., Stevens, London, 1983) 743.

127. [1984] 2 N.Z.L.R. 290, 295.

128. Ibid. 293.

129. Idem.

130. Idem.

131. Cutler v Dimdore (1913) 16 G.L.R. 130; Cowles v Prudential Assurance Co. Ltd. [1957] N.Z.L.R. 124; Bertram v Bechtel Pacific Corporation Ltd. 3 August 1978, unreported, Whangarei Registry, A6/78; Blake v LWR Gent Ltd. 18 February 1980, unreported, Christchurch Registry, A46/79.

132. [1976] 1 W.L.R. 638, 643.

133. Ibid. 644.

134. (1854) 9 Exch. 341.

135. Supra n. 127, 292.

136. Idem.

137. Supra, n. 41, 375.

138. Supra, n. 10, 336.

139. Supra, n. 134.

140. (1704) 6 Mod. 149.

141. If the perpetrator was aware of the victim's sensitivity then an assault may have occurred; see Bunyan v Jordan (1937) 57 C.L.R.1.

142. [1968] N.Z.L.R. 330.

143. [1897] 2 Q.B. 57.

144. [1922] N.Z.L.R. 225.

145. F.A. Trindade & P. Cane The Law of Torts in Australia (Oxford University Press, Melbourne, 1985) 67.

146. Supra, n. 104.

147. Trindade & Cane, supra, n. 145.

148. J.G. Fleming The Law of Torts (6 ed., The Law Book Co. Ltd., Sydney, 1983) 30.

149. Ibid. 32.

150. Supra, n. 142.

151. Damages have also been awarded for emotional distress inflicted in the course of commission of other torts such as: false imprisonment in Hook v Cunard Steamship Co. [1953] 1 All E.R. 1021; trespass to land in Greig v Greig [1966] V.R. 376; defamation in Uren v John Fairfax & Son Pty. Ltd (1966) 117 C.L.R. 118.

152. Supra, n. 144.

153. Trindade & Cane, Supra, n. 145, 73.

154. Supra, n. 143.

155. Supra, n. 144.

156. Trindade & Cane, supra, n. 145, 75.

157. Supra, n. 144.

158. Trindade & Cane, supra, n. 145.

159. Rodrigues v State (1970) 472 F.2d 509, 520.

160. Trindade & Cane, supra, n. 145, 75.

161. [1982] 1 N.Z.L.R. 97.

162. Ibid. 104.

163. Idem.

164. Ibid. 109.

165. Supra, n. 106.

166. S.28 Sex Discrimination Act 1984 (Aust.); s.20 Equal Opportunity Act 1984 (Vic.); s.24 Equal Opportunity Act 1984 (W.A.).

167. Supra, n. 10.

168. Supra, p. 72.

169. Supra, n. 36, 103.

170. See s.28(3)(a) Sex Discrimination Act 1984 (Aust.).

171. See s.28(3)(b) Sex Discrimination Act 1984 (Aust.).

172. See s.28(3) Sex Discrimination Act 1984 (Aust.).

173. See s.28(4) Sex Discrimination Act 1984 (Aust.).

174. See B.W. Dzeich & L. Weiner The Lecherous Professor (Beacon Press, Boston, 1984).

175. For example Victoria University of Wellington regulations on sexual harassment as approved by V.U.W. Council, 24 August 1986.

176. Supra n. 166.

177. Section 52(1) Human Rights Commission Act 1977.

178. Section 36(6) Human Rights Commission Act 1977.

179. For example see the Wellington Clerical Workers Union Award.

180. (1968) 52 Cr. App.R. 185. 187.

181. See s.128 Crimes Act 1961 as repealed by s.2 Crimes Amendment Act (No.3) 1985.

182. And without a reasonable belief that the female consents.

183. For an explanation of the structure of the provision see G. Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 N.Z.U.L.R. 97.

184. Unless it is for bona fide medical purposes; see s.128(5) Crimes Act 1961.

185. See s.128(5).

186. See s.128(3); A reasonable belief that the other person consents is sufficient.

187. See s.128A(2).

188. Orchard, supra, n. 183, 99.

189. [1970] W.A.R. 2.

190. Ibid. 8.

191. Incorporated by s.2 of the Crimes Amendment Act (No. 3) 1985.

192. Orchard, supra, n. 183, 101.

193. Though C may be guilty of an offence under s.238(3) of the Crimes Act 1961.

194. Orchard, supra, n. 183, 105.

195. [1977] 1 N.Z.L.R. 529.

196. Ibid 531.

197. Idem.

198. Tomlinson [1895] 1 Q.B. 706, 709.

199. Supra, n. 195.

200. N.Z. Parliamentary debates vol. 465, 1985; 6053.

201. Ibid. 6268.

202. Ibid. 6057.

203. Ibid. 6268.

204. Idem.

205. See generally on these new provisions, Orchard, supra, n. 183.

206. S.23A Evidence Act 1908.

207. H v E, supra, n. 10; also see Hornal v Newberger Products Ltd. [1957] 1 Q.B. 247.

208. MacKinnon, supra, n. 4, 163.

209. (1981) 1 D.C.R. 145.

210. The wording is modelled on s.40 of the Administration of Justice Act 1970 (U.K.) which creates an offence of unlawful harassment of debtors.

211. MacKinnon, supra, n. 4, 55.

212. H v E, supra, n. 10.