INTERPRETING VICARIOUS LIABILITY WITH A BROAD BRUSH IN SEXUAL HARASSMENT CASES

PATRICIA EASTEAL and SKYE SAUNDERS

In keeping with employers' common law duty of care to their employees, sexual harassment legislation, such as s 106 of the *Sex Discrimination Act 1984* (Cth) ('SDA'), provides that employers are directly responsible for any incidents of sexual harassment by their employees or agents in the course of their employment. Consequently, employers must strive to provide working environments that:

> discourage harassment from occurring in the first place, that have a just way of dealing with the harassment that does occur, and that are open to the scrutiny of the public justice system when they fail.[1]

Aside from the employer, other entities, such as an employment agency as in the case of *Elliott v Nanda*,[2] have been held liable under s 105 of the SDA. Since there are inherent difficulties in establishing a 'positive, causal link' between the employer and the employment agency under s 105, Ronalds and Pepper assert that the broader coverage of s 106 makes it 'an easier route to follow for a complainant seeking to extend the range of persons or organisations against whom they seek recovery'.[3]

Under s 106 of the SDA, the complainant must prove that there is an employment or agency relationship in existence[4] and that the alleged act of sexual harassment occurred 'in connection with the employment of the employee or with the duties of the agency of the agent'. If it can be established that the sexual harassment took place 'in connection with' the perpetrator's employment, then the onus of proof shifts to the employer who must prove that 'all reasonable steps'[5] were taken to prevent the harassment from occurring.

In this study, we examine the frequency with which vicarious liability is raised in sexual harassment cases. When a complaint does include the employer as respondent, the study examines how these two legal tests have been interpreted. We found that the circumstances under which an employer will be liable for the harassing behaviours of its employees are increasingly wide-ranging and that 'reasonable steps' have been strictly defined. Both of these interpretations are made especially clear in *Lee v Smith*[6] (*'Lee's case'*). We also identify the outcomes of the cases to highlight the number of findings in the complainants' favour.

Table 1: Outcomes in sexual harassment cases heard under the SDA, 2000–2007, individual respondents' and employers' vicarious liability

	Individual Respondent	Employer Respondent
Aleksovski v AAA Pty Ltd [2002] FMCA 81	No individual	$7500
Beamish v Zheng [2004] FMCA 60	$1000	No individual
Bishop v Takla [2004] FMCA 74	$24 386.40	Settled
Cooke v Plauen Holdings [2001] FMCA 91	No individual	SH dismissed
Cross v Hughes (2006) 233 ALR 108	$10 275.09*	
Daley v Barrington [2003] FMCA 93	Dismissed	Dismissed
Elliott v Nanda (2001) 111 FCR 240	$15 100	$5000
Font v Paspaley Pearls [2002] FMCA 142	$17 500*	
Frith v Glen Straits Pty Ltd (2005) 191 FLR 18	$15 769.28*	
Gauci v Kennedy [2005] FMCA 1505	Dismissed	Dismissed
Gilroy v Angelov (2000) 181 ALR 57	Unable to find	$24 000
Horman v Distribution Group Ltd [2001] FMCA 52	No individual	$12 500
Ho v Regulator Australia Pty Ltd [2004] FMCA 62	Dismissed	Dismissed
Huang v University of NSW [2005] FMCA 463	Dismissed	Dismissed
Hughes v Car Buyers Pty Ltd (2004) 210 ALR 645	$24 623.50*	
Ingram-Nader v Brinks Australia Pty Ltd (2006) 151 FCR 524	No individual	Remitted
Johanson v Michael Blackledge Meats (2001) 163 FLR 58	No individual	$4500
Kennedy v ADI Ltd [2001] FCA 614	No individual	Not liable
Lee v Smith [2007] FMCA 59	$387 422.32*	
Leslie v Graham [2002] FCA 32	$16 000*	
McAlister v SEQ Aboriginal Corporation [2002] FMCA 109	$5100	Not liable
Phillis v Mandic [2005] FMCA 330	$4000	No individual
San v Dirluck Pty Ltd [2005] FMCA 750	$2000*	
Shiels v James [2000] FMCA 2	$17 000*	
Trainor v South Pacific Resort Hotels Pty Ltd (2004) 186 FLR 132	No individual	$17 536.80
Treacy v Williams [2006] FMCA 1336	Dismissed	No individual
Wattle v Kirkland [2001] FMCA 66	$24 200	Not liable
Wong v Su [2001] FMCA 108	Dismissed	Dismissed
Zhang v Kanellos [2005] FMCA 111	Dismissed	Dismissed

*Joint and several

The cases: vicarious liability and outcomes

The study sample consists of 29 sexual harassment judgments that were delivered from 2000 to 2007 with respect to the SDA[7] and 45 complaints received by the ACT Human Rights Office (HRO) from 2001 to 2005.[8] The average total compensation in ACT harassment cases was almost $10 000 as compared to $500 in age discrimination and $6750 in 'motherhood conciliations'.[9]

The Commonwealth cases are listed, with outcomes, in Table 1.

As Table 1 illustrates, the amounts awarded in the Commonwealth cases vary with a range of $2000 to the significant amount of $387 422.32 awarded in *Lee's case*. The general damages alone in that case were assessed at the significant sum of $100 000, with special damages of $232 163.22.

In 26 of the 29 sexual harassment cases (about 90 per cent) in the Federal Magistrates Court and the Federal Court, the employer was named as a respondent. A similar high proportion of cases filed at the ACT HRO[10] named the employer as respondent: 35 of the 39 complainants did so. In 46 per cent of the HRO sample, the employer was the only respondent whilst in seven of the 29 Commonwealth cases, there was no individual respondent cited. Indeed, at the Commonwealth level, in *Ingram-Nader v Brinks Australia Pty Ltd*[11] Cowdroy J explored the notion of 'joint and several' responsibility, holding that despite the fact that an employee who had been responsible for sexually harassing another employee was not jointly entered as a respondent the employer could still be vicariously liable for the harassment. Justice Cowdroy found that the words of s 106(1) of the SDA that 'this Act applies in relation to that person as if that person had also done the act' indicate that an employer is to be severally liable for the discriminatory conduct of its employee.[12]

The three Commonwealth cases in which vicarious liability was not an issue were *Beamish v Zheng*,[13] *Phillis v Mandic*[14] and *Treacy v Williams*.[15] It is noteworthy that in *Beamish v Zheng*, the employer, Pioneer Poultry, had a sexual harassment policy. Further, the fact that the employee respondent, Zheng, was suspended and later dismissed from employment as a result of the complaint suggests that the employer understood the seriousness of the incidents. In *Phillis v Mandic*, the employer also sacked the respondent after a complaint had been lodged internally.

Clocking off for the day: where does the workplace end?

As noted earlier, the complainant must show that 'on the balance of probabilities' the alleged act of discrimination occurred 'in connection with employment'. What constitutes 'connection with employment' for the purposes of these provisions?

In *Johanson v Michael Blackledge Meats*,[16] Ms Johanson complained of sexual harassment when the employees of a butcher's shop sold her a bone shaped like a penis complete with ejaculant (fat). The question in this case was whether the employer was vicariously liable for this act of harassment. Driver FM found that, although the bone was apparently made for the private purposes of the employees, the preparation of the offensive bone 'took place at the workplace' and that 'they made it in connection with their employment because it was made with the employer's equipment on his premises during the period of their employment' and 'using a bone that was part of the respondents' stock in trade'.[17] Driver FM therefore concluded that the proprietors were vicariously liable for their employees' conduct. In *McAlister v SEQ Aboriginal Corporation*,[18] Rimmer FM considered the reasoning in *Johanson v Michael Blackledge Meats* and agreed that the term 'in connection with' should be interpreted generously, and that 'the clear intention of s 106(1) in using the word "connection" means it is intended to catch those acts that are properly connected with the duties of an employee'.[19]

The late night visitors

Does the scope of 'in connection with the employment' include interaction away from the workplace? In *McAlister v SEQ Aboriginal Corporation*, Rimmer FM observed that:

> The phrase 'in connection with' has been held to have a more expansive meaning than that given to expressions used in other general law contexts such as 'in the course of' or 'in the scope of'.[20]

In referring one of the ACT harassment cases to conciliation, the Discrimination Commissioner noted that the fact that something took place after hours did not place it outside of the *Discrimination Act 1991* (ACT) given that liability extends to work social functions, regardless of where these functions are held.

Such a broad interpretation is highlighted in a series of cases between 2001 and 2007, in which the alleged incidents of sexual harassment took place away from the usual place of work.

One of the first of these cases was *Leslie v Graham*[21] in which Ms Leslie gave evidence that whilst on a business trip a colleague, Mr Graham, entered her bedroom and verbally and physically sexually abused her. Amongst other issues, the court considered whether the harassment was sufficiently 'in connection with' Mr Graham's employment to trigger the employer's vicarious liability. Justice Branson found that this was so, stating that although the employees were away from their workplace when the harassment took place, they were still operating in a relationship as fellow employees. She noted that they were sharing accommodation in the course of their common employment and that their employer provided the apartment so that they could attend a conference. Similar reasoning was applied in *Frith v Glen Straits Pty Ltd*.[22] Whilst driving to Cairns on a business trip, Ms Frith's boss asked her personal questions and discussed his sex life. Having tricked her into sharing a hotel room, he tried to coerce her into engaging in sexual activity. Rimmer FM held that the respondent's position as the sole director of the Exchange Hotel rendered the business vicariously liable for his acts of sexual harassment.

REFERENCES

1. Christine Parker, 'Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation' [1999] *Australian Journal of Human Rights* 6 <www.austlii.edu.au/au/journals/AJHR/1999/9.html> at 13 June 2008.

2. *Elliott v Nanda* (2001) 111 FCR 240 (Moore J). In this case, a woman was placed in employment with a doctor against whom numerous complaints of sexual harassment had been made.

3. Chris Ronalds and Rachel Pepper, *Discrimination Law and Practice* (2nd ed, 2004) 151.

4. In *Huang v University of NSW* [2005] FMCA 463, Driver FM dismissed the claim of vicarious liability, highlighting that the alleged offender was a PhD student at the university at the time of the alleged harassment and 'the fact that he was at some time in receipt of a scholarship does not make him an employee or agent'.

5. SDA s 106(2). See also Brook Hely, 'Open all Hours: The Reach of Vicarious Liability in Off-Duty Sexual Harassment Complaints' (2008) *Federal Law Review*, in press, for discussion of nexus with employment in Australian and UK discrimination legislation.

6. [2007] FMCA 59.

7. Thanks to Keziah Judd for research assistance. Under s 28A of the SDA: (1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if: (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated. (2) In this section: *'conduct of a sexual nature'* includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

Effective implementation of a harassment policy also includes translation for employees from non-English speaking backgrounds, ensuring that it can be viewed and understood by those with disabilities and re-distributed to employees on a regular basis

Trainor v South Pacific Resort Hotels Pty Ltd[23] *was* another case of a late night visitor where a hotel employee crept, uninvited, into a fellow employee's private bedroom in the staff quarters of the hotel where he then made unwelcome sexual advances towards the complainant. South Pacific Resort Hotels argued that it was not vicariously liable for acts of harassment that took place outside of working hours and in employees' place of residence. However, it was held, consistent with the above cases, that the respondent employer had control over employees even when they were not working. This was confirmed on appeal by Black CJ and Tamberlin J:

> The conduct in question occurred between two employees in accommodation provided by the employer as an incident of employment. The employees' rooms were in close proximity to each other and they were accessible. These conditions in part created an opportunity in which the conduct could occur.[24]

The fact that the harassment had occurred during the night did not break the employment connection because the accommodation conditions provided by the employer 'allowed for it to occur at any time' and the second incident of harassment took place following a staff function.[25]

On appeal, the Court in *South Pacific Resort Hotels Pty Ltd v Trainor* referred to the New Zealand decision of *Smith v Christchurch Press Company Ltd*[26] in which sexual harassment had taken place at lunch time away from the office but was nonetheless 'in the course of employment' because 'it was between two present employees, arose out of a work situation and had the potential to adversely affect the working environment'.[27] The full Federal Court in *South Pacific Resort Hotels Pty Ltd v Trainor* noted that underpinning logic, concurring that where sexual harassment could be seen to have the potential to adversely affect the working environment 'the necessary connection was present'.[28] A similar interpretation was applied in *Cross v Hughes*[29] a case with similar facts: inappropriate sexual comments such as asking her to attend a live sex show; being in her room clad only in his underwear; and other advances by an employer, Mr Hughes, whilst away on business with his employee, Ms Cross. Lindsay FM affirmed in that case that, because Mr Hughes was the sole shareholder of Oakbank Insurance Services, the business was, in effect, the alter ego of the first respondent and was accordingly vicariously liable.

The significance of *Lee's case*

Perhaps the most significant development in the definition of 'in connection with' appears from the decision in *Lee's case*. In a workplace redolent with pornography, Ms Lee, an administrative officer at the Navy's Patrol Boat Landing Class Logistics Office in Cairns, was subject to repeated acts of verbal and physical sexual harassment by the first respondent, Mr Smith. These forms of harassment upon the applicant included writing offensive notes, discussion of sexually explicit topics and indecently touching. Mr Smith's behaviour culminated in the rape of Ms Lee at another colleague's home, after a social gathering. That incident was followed by more harassment and victimisation.

Given the location and also the time of the day that the rape occurred, the issue of whether s 106(1) of the SDA was satisfied was contentious. Connolly FM confirmed that, 'the approach to human rights legislation should be given a broad interpretation'.[30] He referred to *South Pacific Resort Hotels Pty Ltd v Trainor* on this issue, and ultimately drew a comparison between the facts in the case of *Smith v Christchurch Press Company Ltd*[31] finding that the sexual assault was the culmination of a series of sexual harassment incidents that had occurred in the workplace. Connolly FM found that the respondent employer was vicariously liable for the acts of rape, sexual discrimination, sexual harassment and victimisation even though the most serious of the behaviours took place at a private function, because the employer 'not only had the potential to adversely affect the working environment but it did so'.[32] The Court said that:

> the First Respondent's conduct was an extension or continuation of his pattern of behaviour that had started and continued to develop in the workplace he shared with the Applicant. The nexus with the workplace was not broken.[33]

Thus, the Human Rights and Equal Opportunity Commission (HREOC) believes that:

> *Lee* demonstrates that the vicarious liability provisions under the *Sex Discrimination Act 1984* (Cth) ('SDA') are much wider than those at common law. Accordingly, in cases of sexual harassment and discrimination, a lower standard will apply to establish a connection between an employee's actions and their employment.[34]

Skirting around vicarious liability: reasonable steps

As noted above, an employer's defence to the allegation of vicarious liability, under s 106(2) of the SDA, is to show that they took 'reasonable steps' to prevent the harassment from occurring. The 'reasonable steps' defence will not be available simply because the employer had no knowledge of

8. The vicarious liability section was s 108I in the *Discrimination Act 1991* (ACT). Following the introduction of the *Human Rights Commission Act 2005* (ACT) in 2006 the vicarious liability provision disappeared but it is anticipated by the Human Rights Commission that the provision will be (re)inserted soon. The authors thank ACT Discrimination Commissioner Dr Helen Watchirs for archived files and discussions. The views presented though are those of the authors who accept responsibility.

9. Patricia Easteal and Susan Priest, 'Employment Discrimination Complaints at the ACT Human Rights Office: Players, Process, Legal Principles and Outcome' (2006/2007) 8(1) *Contemporary Issues in Law* 71, 68. The proportion of harassment complaints declined by the Commissioner (19%) was significantly lower than for 'motherhood' (38%) and age cases (50%).

10. In 2007, the HRO was merged with two other Commissions and now is a part of the ACT Human Rights Commission.

11. (2006) 151 FCR 524.

12. Ibid 532.

13. [2004] FMCA 60.

14. [2005] FMCA 330.

15. [2006] FMCA 1336 (Connolly FM). Treacy was part of a work for the dole program placed at Mission Australia, which had a three-stage complaints process.

16. (2001) 163 FLR 58.

17. Ibid 80.

18. [2002] FMCA 109.

19. Ibid [135].

20. Ibid.

21. [2002] FCA 32.

22. (2005) 191 FLR 18.

23. (2004) 186 FLR 132.

24. *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, 416.

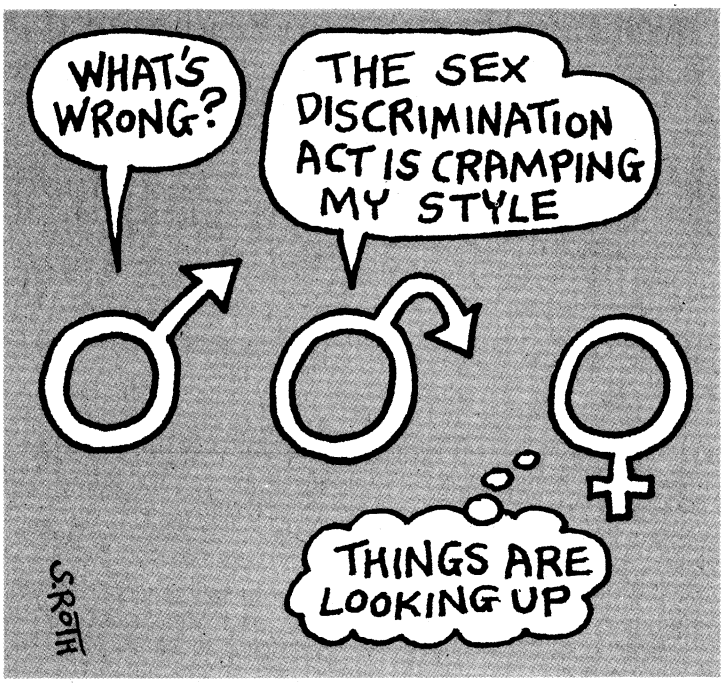
25. Ibid.

26. [2001] 1 NZLR 407.

27. Ibid.

28. *South Pacific Resort Hotels Pty Ltd v Trainor*, above n 24, 415–416.

29. (2006) 233 ALR 108.



an employee's unlawful behaviour.[35] Accordingly, the ACT Discrimination Commissioner observed that, an organisation's 'lack of awareness that conduct is happening is not a defence'.

What are these 'reasonable steps'? The courts have generally held that active measures include employers being able to demonstrate that they have done two things. First, they must have established a written policy dealing with the unacceptable nature of sexual harassment and emphasising that the employer will not tolerate these behaviours under any circumstances. Second, employers must have effectively implemented the harassment policy by making available appropriate training and education on its content to all employees on a regular basis. It is also important to note that an employer must be able to demonstrate that any act of harassment which does take place (regardless of any 'reasonable steps' undertaken to avoid it) has been dealt with in an appropriate and expedient manner.

The exact details of compliance with s 106(2) are not defined in the SDA (or relevant state legislation); instead, the courts examine the circumstances surrounding acts of sexual harassment on a case by case basis. The nature of 'reasonable steps' may be different according to the attributes of the workplace. The courts have been inclined not to require the same extent of prophylactic actions in consideration of the limited resources available to small businesses. Accordingly, in *Gilroy v Angelov*,[36] which involved a small contract cleaner firm, Wilcox J agreed with the submission by the applicant's counsel that, if the employer had distributed a document that described what sexual harassment is, what the consequences are for harassers and the process for complainants, then such a pamphlet would probably constitute 'reasonable steps' for a workplace with just a few employees.

As Driver FM reflected on the code of practice in *Johanson v Michael Blackledge Meats*, a case involving a very small enterprise with the employer on site, aside from providing written brochures, orally indicating to staff that 'sexual harassment will not be tolerated under any circumstances and that disciplinary action will be taken against an employee who sexually harasses a co-worker, client or customer' could be adequate to invoke s 106(2).[37] He considered these to be important measures, along with other steps outlined by HREOC, such as noting in a diary when staff are informed of the employers' policy on sexual harassment, having a procedure for handling complaints and attending relevant seminars or training sessions on sexual harassment issues.

Large or small though, as Christine Parker asserts, 'active preventive measures must be in place for an employer to avoid liability'.[38] An example of an organisation that was found to have fulfilled these criteria adequately was the Aboriginal Legal Service in *McAlister v SEQ Aboriginal Corporation*. In that case, although the harassment was seen as connected to the employment and was found to have taken place, the Legal Service was not held to be liable. The Service had a complaint handling process that was discussed by senior staff and in training workshops. Also, as the individual respondent had been the subject of an earlier complaint, he had been warned; another nominated female was required to be present in all his interviews with women; Ms McAlister's complaint had been promptly investigated through the establishment of a Grievance Board; and ultimately, the alleged offender was dismissed. In contrast, in *Leslie v Graham* when one of the directors of the employer became aware that her son had allegedly engaged in sexually harassing behaviours she viewed it as a personal matter and took no action. Justice Branson, in finding the company to be vicariously liable, held that sexual harassment is not to be regarded by an employer as a private issue to be resolved between the harasser and the victim.

Laying down the law: having an appropriate written policy

In relation to the requirement to put in place a written policy, the case of *Cooke v Plauen Holdings*[39] is an example of where the employer failed to adequately describe and discourage sexual harassment since there was no effective policy for employees. Plauen Holdings tried to demonstrate that 'reasonable steps' had been taken to prevent the harassment, with a witness confirming that although there had been no formal sexual harassment policy in place, all staff at the onset of employment received a letter of employment, which contained a sentence that encouraged collegial courtesy. Driver FM decided that, 'the respondent took few steps of any consequence' and that 'a vague single sentence in a letter of engagement hardly counts'.[40] Similarly, in *Font v Paspaley Pearls*[41] Raphael FM found the business to be liable because 'there was no sufficient publication of any sexual discrimination/harassment policies, there was no education and no responsibility was taken by senior members of staff'.[42]

30. *Lee's case* [207].

31. *Smith v Christchurch Press Company Ltd*, above n 26, stating that it had persuasive value although it was not jurisdictionally binding.

32. *Lee's case* [203].

33. Ibid [206].

34. Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005: Supplement 1 March 2005–1 July 2007*, <www.hreoc.gov.au/legal/FDL/fed_discrimination_law_05/PDF/fdl_supplement07.pdf>.

35. Established in *Boyle v Ishan Ozden* (1986) EOC ¶92-165 and upheld in *Johanson v Michael Blackledge Meats*, above n 16.

36. (2000) 181 ALR 57.

37. *Johanson v Michael Blackledge Meats*, above n 16, 82.

38. Parker, above n 1.

39. [2001] FMCA 91.

40. Ibid [38].

41. [2002] FMCA 142.

42. Ibid [155].

Simply having a written policy in place is not necessarily adequate. It needs to be constructed according to the HREOC Sexual Harassment Code's guidelines

Simply having a written policy in place is not necessarily adequate. It needs to be constructed according to the HREOC Sexual Harassment Code's guidelines:

> The Code sets a standard for employers, and it's unlikely that an employer who fell below the levels of actions set out in the Code would be able to avoid liability for the actions of an individual employee in harassing a co-worker, even if the employer considered there was some policy in operation.[43]

The courts have indicated that the Code 'is not evidence and neither does it have any binding legal authority' but acknowledge that it contains 'guidance offered by the Commonwealth authority having relevant functions under the *HREOC Act*'.[44]

Post pen to paper: implementing the policy effectively

In the sample of ACT cases, it is apparent that an organisation has to have more than its own policies, guidelines and procedures. Their existence is not necessarily enough to absolve the employer of responsibility. For instance, in a number of cases, the ACT Discrimination Commissioner queried whether all appropriate steps were taken in the first place to prevent harassment: 'The employer must show that reasonable precautions were taken and due diligence was exercised to avoid the conduct'. Lack of appropriate steps mentioned in the HRO correspondence include: advising complainants and respondents about results of the HRO's investigation stage; no practical steps; no training for all staff or specifically for managers; steps not taken to monitor effectiveness of any training; policies not promoted; the head office's conflict resolution procedures not followed. This is supported by a line of Commonwealth cases.

Effective implementation of a harassment policy also includes translation for employees from non-English speaking backgrounds, ensuring that it can be viewed and understood by those with disabilities and re-distributed to employees on a regular basis as a 'reminder'.[45] This was evident in *Aleksovski v AAA Pty Ltd* [46] when the business was found to be vicariously liable for the sexual harassment of an employee because its harassment policies were not known to the individual respondent. It failed to effectively maintain the education of its employees on sexual harassment issues.

Employers need to be sure too that the content of sexual harassment policies can be practically implemented by employees. This is especially important in situations such as that which arose in *Shiels v James*,[47] which dealt with the ineffectiveness of a sexual harassment policy for those rural employees who were subject to it. Although the company had a sexual harassment policy, Raphael FM determined that it was not applied effectively. First, the policy was not available at the rural location until six weeks after the complainant, Ms Shiels, began working there. Additionally, it was not practical for her to take the steps contained within it because the officers specified to deal with harassment complaints were based in the employer's head office in Sydney, whereas Ms Shiels was based in the company's regional office. There were also privacy issues since she would have had to telephone the harassment officer during working hours.

Similarly, in *Gilroy v Angelov* the Court again decided that the employer had failed to take any real or tangible steps to prevent acts of sexual harassment. Ms Gilroy, a casual cleaner had complained (without resolution of the issue) to her boss that another worker was touching her indecently and exposing himself. The employer's defence was that he occasionally worked at the same premises. However, Wilcox J stated that since the owner was never there when the harassment took place, his presence could not possibly be construed as a 'reasonable step'.[48] Further, in *Trainor v South Pacific Resort Hotels Pty Ltd*,[49] Coker FM concluded that South Pacific Resort Hotels also failed to take all 'reasonable steps' to prevent sexual harassment from occurring since Ms Trainor's door in the hotel's employee accommodation area could not be locked and room keys were not given to staff, unless they requested them.

Conclusion: raising the barrier

In *Lee's case*, Connolly FM found that although the Department of Defence had particular policies stipulating that employees undertake training in equity and diversity, Ms Lee had not been provided with any such training that could have made reporting a more feasible option for her. She was therefore ill-prepared to deal with the incidents of harassment. If the earlier episodes had been reported and dealt with then, Connolly FM believed that the sexual assault possibly could have been averted. Further, the complainant's belief in the efficacy of the complaint procedures and policies may have been eroded by the blatant display of pornographic images in the workplace which, Connolly FM felt, were reflective of the Department of Defence's 'lack of commitment' to discouraging unacceptable acts of harassment in the workplace.[50] This was also shown

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43. Ronalds and Pepper, above n 3, 96. The 2004 HREOC Sexual Harassment Code is the third edition; the first was published in 1997. Human Rights and Equal Opportunity Commission, *Sexual Harassment (A Code in Practice)*, 4.2.2 'Writing A Sexual Harassment Policy', <www.humanrights.gov.au/sex_discrimination/workplace/code_practice/data/4_preventing.html#31>.

44. *Johanson v Michael Blackledge Meats*, above n 16, 81.

45. Human Rights and Equal Opportunity Commission, *Sexual Harassment (A Code in Practice)*, above n 43, 4.2.2.

46. [2002] FMCA 81.

47. [2000] FMCA 2.

48. (2000) 181 ALR 57.

49. *Trainor v South Pacific Resort Hotels Pty Ltd, above n 23.*

50. *Lee's case* [198].

Family Violence Laws[3] was published in March 2006, and focused on the intervention order system. The report made over 150 recommendations about the safety of victims, court orders, safe and accessible courts and improved responses and outcomes for victims.

In 2007, in response to the VLRC report, the Victorian government released a draft Family Violence Bill 2007 (Vic) (over 150 pages) and an accompanying Discussion Paper (98 pages).[4] There was, unfortunately, little time for responses.[5] The final (12th) draft, called the Family Violence Bill 2008 (Vic) (of 188 pages), was released in April 2008 and contains 284 sections. This compares with the current *Crimes (Family Violence) Act 1987* (Vic) with 29 sections. Another shorter Discussion Paper accompanies the revised draft.[6] The Bill is expected to be passed by Parliament in the next few months and take effect, perhaps, from November 2008. Introduced in the last week of June 2008 and second read, it has been re-named the Family Violence Protection Bill and is now publicly available on the Parliamentary website. There are numerous changes including:

- that the 'intervention order' will be replaced by the 'family violence intervention order';
- a preamble stating that family violence is mainly perpetrated by men against women;
- stated purpose and principles underlying the new statute;
- broader definitions of 'family member' and 'family violence' (and examples of such behaviour);
- expanded conditions and restrictions including specific 'exclusion from residence' orders;
- new provisions regarding counselling for respondents/perpetrators;
- procedures preventing self-represented respondents from personally cross-examining their alleged victims in court;
- new sections on vexatious litigants; and
- new police-issued 'family violence safety notices' pending court-ordered intervention orders.

Part 22 of the Bill incorporates a separate Act providing for stalking intervention orders.[7]

Most recently, in April 2008 the Attorney-General wrote to the Sentencing Advisory Council (SAC) asking for independent, expert advice on the appropriate penalties for three offences contained in the Family Violence Bill 2008 (Vic) — breach of a family violence intervention order, breach of a stalking intervention order and breach of a family violence safety notice. The SAC released a consultation paper, and called for responses; their final report was due to be published in late June 2008.

As stated at the outset, there have been numerous changes in family violence over the past few years at state level. Changes at federal level move far more slowly.

RENATA ALEXANDER teaches law at Monash University.

3. Victorian Law Reform Commission, *Review of Family Violence Laws*, Report (2006), <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb920d475ed43ad/Review%20of%20Family%20Violence%20Laws%20Report.pdf> at 1 June 2008.

4. Victoria, *Family Violence Bill 2007: Discussion Paper* (September, 2007).

5. A detailed collaborative response was submitted by the Victorian Family Justice Reform Campaign which comprised the Federation of Community Legal Centres and Domestic Violence Victoria as well as other human rights, welfare and women's agencies and networks, established in 2006.

6. Victoria, *Family Violence Bill 2008: Revised Draft Discussion Paper* (April, 2008).

7. See *Stalking Intervention Order Act 2008* (Vic).

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by the way in which the investigation into her complaints showed 'an indifference and even a disinclination on the part of all those involved'.[51]

The interpretation in *Lee's case* is indicative of an increasingly broad approach by the Federal Court and Federal Magistrates Court in assigning vicarious liability. As Table 1 shows, of the 26 Commonwealth cases which included vicarious liability, the complaint against the employer was upheld in 16. In seven of the 10 in which the employer was not found liable, it was held that sexual harassment had not taken place. In only two of the 26 vicarious liability cases were there findings that there was no liability by an employer for harassment that had taken place (*McAlister v SEQ Aboriginal Corporation* and *Wattle v Kirkland*[52]). Thus, although the Department of Defence may appeal in *Lee's case*, that decision seems to be a solid application of a series of decisions made in this country and overseas. It is therefore apparent that, for the purpose of s 106(1) of the SDA, the connection between the act of harassment and the employee's employment will be evaluated widely and in a common sense way.[53]

It is also clear from this survey that despite some variation in interpretation of 'reasonable steps', the case law does show that employers should have a comprehensive sexual harassment policy with a complaints process in place. Employees need to be made aware of the procedure and which behaviours in the workplace are not acceptable and will be considered sexual harassment. It is clear that in the absence of such steps, the courts will be more likely to make substantial awards in favour of complainants. As Ronalds and Pepper observe:

> Usually it is in the complainant's interests to pursue their complaint against the employer instead of, or as well as, an individual employee as the employer is more likely to have funds available to meet any damages award made.[54]

Aside from broadening 'in connection with employment', *Lee's case* also sets a new benchmark for compensation. This case may act as a catalyst for employers to work towards promoting harassment-free workplaces. Through the judgment in that case and in others discussed above, the courts have recognised that whether in the workplace, on a business trip or socialising with colleagues, the victims of harassment and other sexual abuse were simply not 'asking for it'. It is time for employers to take heed and recognise this too. It is likely that the decisions made by our state and territory discrimination commissions and appropriate Commonwealth courts, culminating in *Lee's case*, will serve as a strong warning to employers that they must be vigilant in taking all 'reasonable steps' to discourage acts of sexual harassment in the workplace.

PATRICIA EASTEAL teaches law at the University of Canberra.

SKYE SAUNDERS is a PhD student in law at the University of Canberra.

email: patricia.easteal@canberra.edu.au
email: skye.saunders@canberra.edu.au

51. Ibid [158].

52. [2001] FMCA 66.

53. In *March v Stramare* (1991) 171 CLR 506, 515 (Mason CJ) it was held that in most cases the issue of whether one event caused another to happen is 'one of fact and, as such, to be resolved by the application of commonsense'.

54. Ronalds and Pepper, above n 3, 146.