Sexual Harassment in the Workplace: The Loophole Exposing Western Australia's Parliament

JACINTA WRIGHT*

Sexual harassment remains a serious problem in Australian workplaces. Recent statistics gathered by the Australian Human Rights Commission indicate that workplace sexual harassment is rarely a one-off incident and can have a significant impact on an employee's productivity and emotional wellbeing. Employees can also feel as though they are being victimized and deserted by their friends and colleagues.

Despite awareness of the negative impacts caused by sexual harassment, Australia's Federal, State and Territory legislation concerning sexual harassment remains largely inadequate. At best, sexual harassment is prohibited between certain workplace participants and in certain employment situations. At worst, in some employment situations it is not regulated at all. For example, an alleged incident of sexual harassment involving a Western Australian Member of Parliament helped expose a significant loophole in Western Australia's Equal Opportunity Act 1984. This loophole omits parliamentary staff from the operation and protection of workplace sexual harassment legislation. This is a serious legislative oversight.

The introduction of the Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) has again brought this issue into the public spotlight. This paper argues that while the Equal Opportunity (Members of Parliament) Amendment Bill 2010 goes some way toward addressing the issue of sexual harassment in Parliament, it fails to take into account proposals which have been put forward which appear to substantially advance and strengthen the definition of sexual harassment and enhance its coverage. These proposals include: extending the prohibition to other persons with whom a worker 'comes into contact during their employment'; ensuring the State of Western Australia can be made vicariously liable for sexual harassment in government employment; and removing from Members of Parliament, the ability to invoke parliamentary privilege as a defence to sexual harassment. This paper discusses various other general recommendations for reform which would be more effective in preventing sexual harassment and concludes by arguing that sexual harassment should be outlawed in its entirety in employment relationships

I INTRODUCTION

Initially, claims of sexual harassment were treated as 'trivial complaints about inharmonious working relationships, gripes about the personal proclivities of male workers that were unrelated to employers' responsibility, or whining about what was the inevitable sexual attractions that result from men and women working together'.[1] However, the acceptance of sexual harassment as a form of sex discrimination in America in the 1970s had a profound influence on Australia. By the mid to late 1980s Australian courts had also become more receptive to the notion that there was a connection between unwanted sexual advances and sex discrimination.[2] And upon

*Jacinta Wright, LLB (Hons), Murdoch University.
Dedicated in loving memory to my dad, Terrence Wright.

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[1] Catharine MacKinnon and Reva Siegel, *Directions in Sexual Harassment Law* (Yale University Press, 2004) 170.

[2] Ibid.

the enactment of the *Sex Discrimination Act 1984* (Cth) ('**SDA**'), sexual harassment became a legally recognized form of sex discrimination in Australia.[3]

Despite sexual harassment being unlawful for more than 25 years, it is still a persistent problem in Australian workplaces.[4] In 2008 the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission) conducted a national telephone survey of 2005 randomly selected people aged between 18 and 64. The survey found that 65% of those surveyed had experienced sexual harassment in the workplace compared with 28% (the next highest percentage) who had experienced sexual harassment elsewhere in public life.[5] Despite this, in Western Australia the legislative prohibition against sexual harassment in employment only covers *certain* workplace participants and employment situations. Employees working within the judicial, legislative and executive arms of the State Government are among those excluded from this protection.

The prevalence of sexual harassment as an issue in Australian workplaces is illustrated by the following case. As recently as 2 August 2010 it was reported by the *Sydney Morning Herald* that a junior publicist had lodged a claim in the Federal Court against David Jones and the company's former chief executive, Mark McInnes, alleging sexual harassment. Ms Kristy Fraser-Kirk alleged Mr McInnes made unwelcome comments of a sexual nature and unwelcome sexual advances towards her at a work related lunch function and had repeatedly requested her to accompany him to his residence.[6] This case attracted significant public interest because Ms Fraser-Kirk sued for damages based upon 5% of the profits made by David Jones and 5% of Mr McInnes' salary while he worked for the company, which cumulatively amounted to $37 million dollars.[7] This remains the largest amount of damages claimed in any sexual harassment case in Australia. This case was brought to an end on 15 October 2010 when the parties reached a confidential settlement expected to be in the region of a six figure sum, in full and final satisfaction of all outstanding claims between them.[8]

Numerous incidents have occurred over the years and again this illustrates that sexual harassment remains an ongoing issue. Sexual harassment also occurs in government employment and is often perpetrated by the people who are expected to set an example for others.[9] When a sexual harassment issue arises in government employment it is often made public due to the nature of the perpetrator's employment position and their public profile.

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[3] Human Rights and Equal Opportunity Commission, *The Challenges Continue … Sexual Harassment in the Workplace* (March 2004) 6.

[4] Anita Mackay, 'Recent Developments in Sexual Harassment Law: Towards a New Model' (2009) 14 *Deakin Law Review* 189, 189.

[5] Human Rights and Equal Opportunity Commission, *Sexual Harassment: Serious Business* (2008) 12.

[6] Bellinda Kontominas, 'David Jones Sex Harassment Cases: Publicist Sues for $37m', *The Sydney Morning Herald* (online), 2 August 2010 <http://www.smh.com.au/business/david-jones-sex-harassment-case-publicist-sues-for-37m-20100802-112iw.html>.

[7] Ibid.

[8] Tim Vollmer, 'David Jones Sexual Harassment Case Settled - Kristy's smile is worth $850K', *The Daily Telegraph* (online), 15 October 2010 < http://www.dailytelegraph.com.au/news/nsw-act/david-jones-sexual-harassment-case-settled/story-e6freuzi-1225939386247>.

[9] For the purposes of this paper the term 'government employee' or a person employed in 'government employment' is taken to include people employed as Members of Parliament, people working under the supervision of Members of Parliament or officers or people employed in administrative capacities within the precincts of Parliament House.

To demonstrate this, in 2005 Mr Troy Buswell, a former Western Australian Opposition Leader, admitted to sniffing a chair upon which a parliamentary policy officer had earlier been sitting, whilst making sexually gratifying noises.[10] In 2007 Mr Richard Dalla-Riva, a former Victorian Member of Parliament, resigned from the shadow cabinet after sending inappropriate messages to a teenage party worker.[11] And in 2008, Mr Fran Logan, a former Western Australian Energy Minister, resigned after revelations he propositioned a government adviser to take part in a threesome.[12]

Subject to some statutory exceptions (which will be discussed in detail in this paper), a person wanting to lodge a complaint for workplace sexual harassment may do so under the SDA or the relevant legislation in their State or Territory.[13] For a complaint to be made, the sexual harassment must occur in an employment context and legislative protection will only be afforded subject to an employment relationship existing between the parties. However, the types of employment relationships covered by each State and Territory vary considerably. Therefore, unless the type of employment relationship between the perpetrator and complainant is expressly provided for in the Commonwealth or relevant State or Territory legislation, the complainant will be unable to bring a claim for sexual harassment against the perpetrator.

For example, Ms Fraser-Kirk was able to bring a claim against Mr McInnes and vicariously against his employer, David Jones, because both the SDA and *Anti-Discrimination Act 1977* (NSW) expressly prohibit sexual harassment between employers and employees, and between workplace participants at a place that is a workplace of both those persons.[14] However, the complainant of the alleged sexual harassment by Mr Buswell had no actionable claim because the *Equal Opportunity Act 1984* (WA), in the context of employment, only expressly prohibits sexual harassment between employers and employees, commission agents and contract workers.[15] It will become evident throughout this paper that Members of Parliament enjoy a special autonomous status. They are not the employers of the parliamentary staff members who work under their guidance or within the precincts of their offices. Thus, as there is no 'employee-employer' relationship the Western Australian Equal Opportunity Act has no application.[16] In addition, the protections provided by the SDA do not apply because State Government employees are considered within the statutory exception and are therefore exempt

[10] 'Emotional Buswell Admits to Chair Sniffing Incident', *ABC News* (online), 29 April 2008 <http://www. abc.net.au/news/stories/2008/04/29/2230492.htm>.

[11] Nick Lenaghan, 'Vic: Sex Talk Scandal Claims Liberal Scalp', *Australian Associated Press Pty Limited* (online), 5 February 2007 <http://0roquest.umi.com.prospero.murdoch.edu.au/pqdweb?did=1360 171341&sid=8&Fmt=3 &clientld=20829&RQT=309&VName=PQD>.

[12] Jessica Strutt and Gary Adshead, 'MP Accused Over Threesome', *The Age Company Limited* (online), 24 May 2008 <http://www.theage.com.au/news/national/mp-accused-over-threesome/2008/05/23/121118 3117114.html>.

[13] Michelle Evans, 'Pornography and Australia's Sex Discrimination Legislation: A Call For a More Effective Approach to the Regulation of Sexual Inequality (2006) 8 *University of Notre Dame Australia Law Review* 81, 92:
Sex Discrimination Act 1984 (Cth) s9(2) provides that subject to some exceptions, 'this Act applies throughout Australia'. Furthermore, s 9(3) provides that the Act also applies to 'acts done within a Territory'.

[14] *Sex Discrimination Act 1984* (Cth) s28B(1) and s28B(6); *Anti-Discrimination Act 1977* (NSW) s22B(1) and s22B(6).

[15] *Equal Opportunity Act 1984* (WA) s24.

[16] Robert Taylor, 'Staffer Tells of Chair-Sniffing Hell', *The West Australian* (online), 17 April 2010 <http:// au.news.yahoo.com/ thewest/a/-/breaking/7072866/inside-story-staffer-tells-of-chair-sniffing-hell/>.

from the application of this legislation with respect to sexual harassment in employment.[17] To summarise: in this instance the SDA is incapable of application and the provisions of the Western Australian Equal Opportunity Act do not cover this type of employment relationship. The complainant of the alleged sexual harassment by Mr Buswell was correct when she said, 'I see our [Western Australia's] Equal Opportunity Act as discriminatory now because I know what it means to be sexually harassed and not to have any provisions of legislation to offer any kind of protection'.[18]

All forms of sex discrimination in employment should be unlawful. Members of Parliament should not remain above the law. This loophole which exists in Western Australia's Equal Opportunity Act is a serious legislative oversight which must be corrected by legislative amendment. An Equal Opportunity (Members of Parliament) Amendment Bill 2010 has been introduced before the Western Australian State Parliament to address this issue but has yet to receive the approval of both Houses of Parliament. The proposal the Bill presents is adequate, but this paper argues that the resolution could be made even more comprehensive and robust.

Section one of this paper discusses the alleged incidents involving Mr Buswell. This case study will be referred to throughout the paper to show that although Mr Buswell's actions were likely to constitute sexual harassment, they were not unlawful, and hence the complainant was denied any type of remedy. More generally, this case study supports the argument that sexual harassment remains a significant problem in Australian workplaces even in its most blatant forms. To date, despite awareness of the nature and consequences of sexual harassment, Members of Parliament continue to remain outside the scope of the legislative provisions prohibiting sexual harassment in the workplace.[19] In the words of the Honourable Carolyn Pickles (a former Leader of the Opposition in the Legislative Council, South Australia), '[w]e [Members of Parliament] have rather an onerous task to set some standards, and if we cannot abide by the laws that are in place in every other workplace, it is a poor show indeed'.[20]

Section two examines the evolution (or lack thereof) of workplace sexual harassment legislation in the Commonwealth and Western Australian jurisdictions. The comparison aims to demonstrate how outdated the Western Australian Equal Opportunity Act has become since its enactment in 1984.

Section three details the nature of sexual harassment generally. 'Whilst everyone agrees that there is no room for sexual harassment in the workplace, not everyone agrees about what constitutes sexual harassment'.[21] The case study in relation to Mr Buswell is used to demonstrate the types of behaviour which may constitute sexual harassment.

Section four refers to common law legal principles in the context of employment, to illustrate when and in what types of environments a perpetrator or employer may find themselves liable

[17] Human Rights and Equal Opportunity Commission, *Sexual Harassment in the Workplace: A Code of Practice for Employers* (March 2004) 7.
[18] Taylor, above n 16.
[19] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008) 59.
[20] South Australia, *Parliamentary Debates*, Legislative Council, 8 July 1997, 1714 (The Honourable Carolyn Pickles, Leader of the Opposition).
[21] Senate Committee, Parliament of Australia, *Sexual Harassment in the Australian Defence Force* (1996) 21.

for workplace sexual harassment. This section also compares the ambit of the provisions of sexual harassment legislation in relation to employment in each Australian State and Territory and at the Federal level, and concludes by forming the opinion that Western Australia's legislative coverage is inferior to every other State and Territory.

Section five analyses the inadequacy of Western Australia's Equal Opportunity Act with respect to its lack of coverage against sexual harassment for State Government employees, such as State parliamentary workers. A comprehensive discussion is also had in relation to the statutory exemption, and the Supreme Court of Western Australia's decision in *An Electorate Officer v A Research Officer* is reviewed to demonstrate that no avenue exists for a State Government employee to action a claim for sexual harassment in the workplace.

Section six contains a detailed discussion about what legislative reforms have been proposed to date throughout Australia in response to incidents of alleged sexual harassment by Members of Parliament or State Government employees. This section references various speakers of the Upper and Lower Houses during parliamentary debates to illustrate the types of considerations taken into account during the law reform process. It also examines the Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) which is currently before the Western Australian Legislative Assembly for debate and consideration. In the meantime, there appears to be no sense of urgency, or timeline for ensuring the timely enactment of the Bill, so until this occurs the loophole continues to remain.

Section seven identifies a number of proposals which aim firstly to strengthen the legislation relating to workplace sexual harassment generally and secondly, assist in rectifying the legislative deficiency which omits Western Australian Members of Parliament and parliamentary staff from protection against workplace sexual harassment. The paper concludes by forming the opinion that the Bill does not go far enough to address the issue of sexual harassment in Parliament, and makes recommendations for further legislative reform to significantly improve upon the model currently proposed by the Amendment Bill.

II CASE STUDY: BEHIND THE SCENES IN WESTERN AUSTRALIA'S STATE PARLIAMENT

This section looks at the incidents involving Mr Buswell which led to the exposure of the loophole in Western Australia's Equal Opportunity Act. It also provides an example of how the complainant in this example of workplace sexual harassment was not taken seriously. This suggests that adequate legislation could have an educative effect in changing the attitudes of those who dismiss workplace sexual harassment as trivial. Fortunately, instead of being silenced by these attitudes the complainant was motivated to be proactive in seeking legislative change.

In 2008, Mr Buswell (a Western Australian Member of Parliament) resigned as Liberal leader in light of revelations of a chair-sniffing incident which was said to have occurred in 2005. Mr Buswell admitted the allegation was true, despite initially dismissing it as an unsubstantiated rumour.[22] This indiscretion is not an isolated incident for Mr Buswell who was previously embroiled in what has come to be known as the 'bra-snapping affair'.[23]

[22] 'Emotional Buswell Admits to Chair Sniffing Incident', above n 10.
[23] Taylor, above n 16.

A myriad of media reports in 2008 about the two incidents suggested that one incident occurred in October 2007, when Mr Buswell is said to have 'snapped' the bra strap of a Labour staffer during a drunken episode at Parliament House. Months later a second allegation emerged relating to an incident which was said to have occurred years earlier, accusing Mr Buswell of sniffing the chair a fellow State Government parliamentary worker in order to 'get a laugh'. When interviewed about that particular incident, the complainant claimed 'Mr Buswell performed the act not once but twice, the first time in the presence of a fellow staffer'.[24] As to the details of the incident the complainant recalled,

> As I entered the room, Buswell made remarks about the seats around the table, commenting that he was going to smell them to see which one I had sat in. I was shocked. He commenced picking up the seat that he had earlier seen me sitting in and started making loud noises as he inhaled near the seat. I pleaded with him to stop it but unfortunately he continued, at times lifting the seat above his head and sniffing it while at the same time making sexually gratifying noises.[25]

Almost immediately, rumours of other incidents began to circulate including one where Mr Buswell chased the complainant around a parliamentary office on his hands and knees while pretending to be the complainant's husband.[26] The complainant confirmed there were numerous incidents which other colleagues were also aware of. She said she had confronted Mr Buswell in the presence of others on a number of occasions about the need to change his behaviour so as to be reflective of a responsible public figure.[27]

In January 2008 Mr Buswell was installed as Opposition Leader. At that time, there was some knowledge of the incident amongst Liberal party members but it was not until a month later that specific details emerged in the media.[28] At the time the media broadcast the incident the complainant had changed employment positions and was working as a policy research officer for former Attorney-General, Peter Foss. And despite Mr Buswell's indiscretions he was later named as Treasurer in Premier Colin Barnett's Cabinet and was also provided with the opportunity to oversee the Commerce; Housing; Works; and Science and Innovation portfolios.[29]

In 2009 the complainant wrote to Mr Buswell giving her version of events and asking a series of questions of him. When no response was received the complainant wrote to the Premier, Mr Barnett, about what the complainant considered was Mr Buswell's refusal to take responsibility for his actions. Mr Barnett was dismissive and responded by saying 'what happens in the workplace usually remains a matter between the people involved. As you stated, this is what you would have wished for'.[30] The distress of reliving the incident and of it becoming public led

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Interview with Martin Whitely, Member for Bassendean, Australian Labor Party (Telephone interview, 15 October 2010). As noted later in this paper, the victim of the 'chair sniffing incident' approached Mr Whitely for support and assistance after the incident. This resulted in Mr Whitely introducing the Equal Opportunity (Members of Parliament) Amendment Bill 2010.
[29] Government of Western Australia, 'Premier of Western Australia and Cabinet Members: Troy Buswell Biography', (undated) <http://www.premier.wa.gov.au/Ministers/Troy-Buswell/Pages/Biography.aspx> 16 October 2010.
[30] Taylor, above n 16.

the complainant to later quit parliamentary employment. She stated that 'not having respect from certain Members of Parliament certainly influenced that decision'.[31]

In April 2010 another indiscretion of Mr Buswell's was reported whereby he was alleged to have misused taxpayers' funds to 'set up secret liaisons with MP Adele Carles'.[32] Mr Barnett was left with little choice at the time but to demand and obtain Mr Buswell's resignation, although Mr Buswell continued as the Member for Vasse.[33] Despite initially admitting to the use of taxpayer's funds to set up the secret liaisons, which Mr Buswell later retracted, a report prepared by the Public Sector Commissioner cleared Mr Buswell of any wrongdoing.

In order to ensure that no other parliamentary staff be subjected to sexual harassment in the future, the complainant approached Mr Whitely, Member for Bassendean for the Australian Labor Party, and worked collaboratively with him to introduce the Equal Opportunity (Members of Parliament) Amendment Bill 2010. The Bill aims to extend the coverage of sexual harassment under Western Australia's Equal Opportunity Act to people who are employed to work or carry out duties at Parliament House.

The next section will provide some background information on the interpretation of both the Commonwealth and Western Australian sexual harassment laws.

III THE EVOLUTION OF SEXUAL HARASSMENT LEGISLATION

In order to properly understand how the loophole exists in Western Australia's Equal Opportunity Act it is important to consider the history of the legislation which outlaws sexual harassment. This will be done by reviewing both case law and the legislation. It will become evident that while the Commonwealth legislation has been evolving, Western Australia's legislation has remained static.

In Australia, the Federal Parliament was the first to enact legislation which explicitly named sexual harassment as an actionable wrong under anti-discrimination legislation.[34] The SDA is written in plain English but in quite general terms. This has meant that the precise interpretation of sexual harassment laws has been left to the courts.[35]

O'Callaghan v Loder[36] was the first Australian case concerning sexual harassment in the workplace. Justice Matthews' decision was hailed as a landmark for being the first Australian attempt at a legal definition of sexual harassment.[37] He defined sexual harassment as occurring where a person is 'subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her'.[38] Justice Matthews also classified sexual

[31] Ibid.
[32] Chalpat Sonti, Liam Phillips and Joseph Sapienza, 'Troy Buswell Resigns Over Secret Sex Sessions on Taxpayers' Tab', *WAtoday.com.au* (online), 24 April 2010 <http://www.watoday.com.au/wa-news/buswell-resigns-over-secret-sex-sessions-on-taxpayers-tab-20100425-tksk.html>.
[33] Ibid.
[34] Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) *Federal Law Review* 6, 2.
[35] Kate Jenkins and Craig Lawrie, *Women in the Workplace: Sexual Harassment and Discrimination* (Prospect Media Pty Ltd, 2000) 1.
[36] *O'Callaghan v Loader* [1984] EOC 92-023.
[37] Mason and Chapman, above n 34.
[38] *O'Callaghan v Loader* [1984] EOC 92-023, 75, 497.

harassment as a form of direct discrimination as it amounted to less favourable treatment of a person on the ground of their gender when compared to a person of the opposite sex, in similar circumstances. Therefore, in order to come within the proscription of direct discrimination on the basis of gender the sexual harassment must have either constituted an unwelcome feature of the employment (such as a hostile working environment) or must have been accompanied by adverse consequences to the complainant, and further, the employer must have known or ought to have known that his or her conduct was unwelcome.[39] This definition caused controversy because it placed a heavy onus on the complainant to speak out against his or her more powerful harasser in order to make known their advances to be unwelcome.[40]

In accordance with the recommendations contained within a report commissioned by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the Equal Opportunity and Equal Status for Women ('**Lavarch Report**'), the original definition of sexual harassment and various other provisions of the SDA were reviewed and strengthened in 1992.[41] Recommendation 64 of the Lavarch Report reflected the Committee's and the wider public's acknowledgement that sexual harassment in itself caused detriment and/or was adverse, by stating:

> It is now widely understood that sexual harassment is not a trivial matter and that unwanted sexual harassment advances are serious offences in themselves and need not be linked to some sort of disadvantage or detriment to an individual's employment or education prospects.[42]

The changes were part of a legislative package which was introduced by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth). They simplified the test for sexual harassment by removing the need for the complainant to demonstrate actual or reasonably anticipated employment disadvantage in a claim of sexual harassment. [43]

Until the changes proposed by the *Sex Discrimination and Other Legislation Amendment Act 1992* came into force on 13 January 1993, the provisions under Western Australia's Equal Opportunity Act dealing with sexual harassment were identical to those in the SDA. The SDA was enacted a year before Western Australia's Equal Opportunity Act and served as one of the models for the Western Australian legislation.

Section 24(3) of the *Equal Opportunity Act 1984* (WA) states:

> A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the first person, *and*
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> (a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct *would disadvantage*

[39] Mason and Chapman, above n 34.
[40] Ibid.
[41] Commonwealth, *Sex Discrimination and Other Legislation Amendment Bill 1992*, Parl Paper No 36 (1992) 1.
[42] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) 262.
[43] Human Rights and Equal Opportunity Commission, *A Guide to the 1992 Amendments to the Sex Discrimination Act 1984* (September 1993) 37.

> the other person in any way *in connection with the other person's employment or work or possible employment or work*; or
>
> (b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the *other person is disadvantaged* in any way **in** *connection with the other person's employment or work or possible employment or possible work.*[44]

It can be seen from this definition that the significant flaw (that is, requiring the complainant of sexual harassment to establish why they were put at a 'disadvantage' as a result) contained in the original definition of sexual harassment in the SDA still remains in Western Australia's Equal Opportunity Act.[45] Specifically, 'Western Australia's current test for sexual harassment reflects a mentality from more than 25 years ago, when the push to eradicate sexual harassment in the workplace was still in its early days and resistance to change was strong'.[46]

The following section will use case law to expand more specifically on the definition of sexual harassment.

IV SEXUAL HARASSMENT

This section examines what constitutes sexual harassment and seeks to demonstrate the likelihood that Mr Buswell's conduct would have constituted sexual harassment had it occurred in a different employment setting such that the complainant would have had recourse to legislative protection, and consequently the ability to seek a remedy for this conduct.

The definition of sexual harassment in the Federal jurisdiction is proscribed by s28A of the SDA. It states:

> A person sexually harasses another person if:
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> (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.[47]

'Unwelcome' is taken to mean the 'advance, request or conduct was not solicited or invited by the complainant, and the complainant regarded the conduct as undesirable or offensive'.[48]

The second element, 'conduct of a sexual nature' includes oral or written statements and images, physical gestures, sexually explicit material, and the like.[49] The courts have interpreted 'conduct of a sexual nature' broadly. Conduct which may not in isolation appear to be sexual in nature, may become so because of the surrounding circumstances. For example, in *Shiels v*

[44] *Equal Opportunity Act 1984* (WA) s24(3) (emphasis added).
[45] Western Australia Equal Opportunity Commission, *Review of Equal Opportunity Act 1984*, Report (14 May 2007) 27.
[46] Ibid.
[47] *Sex Discrimination Act 1984* (Cth), s28A.
[48] *Aldridge v Booth* (1986) EOC 92-177.
[49] Chris Ronalds, *Discrimination Law and Practice* (The Federation Press, 3rd ed, 2008) 98.

James and Lipman Pty Ltd[50] the Federal Magistrates Court found that flicking rubber bands at a co-worker's legs was conduct of a sexual nature because it was part of a pattern of sexual behaviour'.[51] Similarly, in *Djokic v Sinclair*[52], the Tribunal also took an expansive approach as to what can amount to 'conduct of a sexual nature'. In that case, the complainant complained of aggressive treatment by her supervisor including obscene language and gestures, and a comment in which she was told 'she would be brought to her knees'. It was held the supervisor's behaviour reflected a sex-based hostility which was oppressive and such behaviour was a serious abuse of power which could be characterised as sexual harassment.[53]

The definition of sexual harassment contains an objective test, namely whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated by the harassment. However, 'sexual harassment also focuses on how the conduct in question was perceived and experienced by the recipient rather than the intention behind it'.[54] This is what sets apart sexual harassment laws from most other legislation - the fact that innocent intention is no defence in sexual harassment cases.[55] This avoids those accused escaping accountability by feigning their innocence when in truth they were fully aware their conduct was offending the complainant.[56]

The International Labour Office has released a publication stating,

> Because sexual harassment refers to behaviour which is unwanted by the recipient, it follows that it is for each person to determine what behaviour they welcome or tolerate, and from whom. However, it stands to reason that a person's reaction to such behaviour cannot be entirely unreasonable. Within those broad objective parameters, sexual harassment is essentially a subjective concept. Any other standard would amount to an intolerable infringement of individual autonomy.[57]

The reality is that there is some confusion and uncertainty in society about what constitutes sexual harassment. Many situations cannot be classified categorically one way or the other. Sexual harassment can take various forms. It can involve unwelcome touching, hugging or kissing; suggestive comments or jokes; unwanted invitations to go out on dates or requests for sex; insults or taunts of a sexual nature, sexually explicit emails or SMS messages, staring or leering and even sexually explicit posters, pictures or screensavers displayed within a workplace environment (this list is not exhaustive).[58] Whether or not someone's conduct constitutes sexual harassment will depend upon the individual circumstances of each case.

The legal definition of sexual harassment in the SDA makes it a requirement for the particular circumstances of each case to be taken into account when applying the reasonable person test.[59] Although it does not specify the sort of circumstances that may be relevant, case law has

[50] *Shiels v James and Lipman Pty Ltd* [2000] FMCA 2.
[51] Human Rights and Equal Opportunity Commission, *A Code of Practice for Employers* (2008) 7.
[52] *Djokic v Sinclair* (1994) EOC 92-643.
[53] Human Rights and Equal Opportunity Commission, above n 17, 12.
[54] Patricia Easteal, *Less Than Equal: Women and the Australian Legal System* (Butterworths, 2001) 166.
[55] Senate Committee, Parliament of Australia, above n 21.
[56] Ibid.
[57] International Labour Office, *Conditions of Work Digest: Combating Sexual Harassment at Work* (1992) 10.
[58] Human Rights and Equal Opportunity Commission, above n 51, 3.
[59] Jenkins and Lawrie, above n 35, 64.

provided some reasonable guidance. In *Aldridge v Booth & Ors* the Federal Court indicated the type of factors which may be relevant include, the youth and inexperience of the complainant, fear of reprisals, and the nature of the power relationship between the parties.[60] In *Rohan v Thomas*, the age difference between the accused and complainant was also deemed a relevant consideration.[61] Further, 'consent or participation which is obtained through fear, intimidation, threats or force will not rule out a complaint of sexual harassment'.[62] In the words of the Australian Human Rights Commission:

> Sexual harassment is not behaviour which is based on mutual attraction, friendship and respect. If the interaction is consensual, welcome and reciprocated it is not sexual harassment.[63]

The SDA appears to be clear in its intent from the phrase '*an* unwelcome sexual advance or *an* unwelcome request for sexual favours', that a single incident may constitute sexual harassment. This position was first proposed in *O'Callaghan v Loder*[64] and has subsequently been confirmed by succeeding case authority. Justice Lockhart in *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* confirmed this approach by saying, 'the definition of sexual harassment clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct'.[65]

'Sexual harassment is not socially acceptable conduct'.[66] The Senate Committee of the Parliament of Australia notes, '[t]here is no doubt that there is a wide consensus in the Australian community that certain kinds of sexual behaviour are unacceptable and are not to be tolerated'.[67] However people's views can differ, especially at the lesser end of the scale as to what conduct the definition of sexual harassment may cover.[68] Unacceptable behaviour may not necessarily be unlawful, it may simply be infantile, silly or inappropriate.[69] Mr Buswell's conduct and actions were clearly irresponsible, immature and unbefitting of a Member of Parliament. For the purpose of sexual harassment it is irrelevant whether Mr Buswell and the complainant had a good friendship or working relationship.[70]

The complaint against Mr Buswell relates to conduct and behaviour which may *prima facie* fall within the definition of sexual harassment. This paper will now look at various cases with similarities to Mr Buswell's conduct in order to decide if Mr Buswell's conduct may have at any time constituted sexual harassment.

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[60] *Aldridge v Booth & Ors* (1988) 80 ALR 1, 5.
[61] *Rohan v Thomas* [1995] Equal Opportunity Commission (unreported, Inquiry Commissioner Crennan, 27 November 1995).
[62] Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008) 3.
[63] Ibid 25.
[64] *O'Callaghan v Loader* [1984] EOC 92-023.
[65] *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) EOC 92-250, 77,389.
[66] Regina Graycar and Jenny Morgan, 'The Hidden Gender of Law' (The Federation Press, 1990) 358.
[67] Senate Committee, Parliament of Australia, above n 21, 2.
[68] Ibid 4.
[69] Ibid 25.
[70] Anti-Discrimination Commission Queensland, *Sexual Harassment* (12 May 2010) < http://www.adcq.qld.gov.au/Brochures07/sex_harass.html> 5 November 2010.

In *Horman v Distribution Group Limited*[71], the complainant complained of 'horseplay' in the workplace in which she was subjected to amongst other things, inappropriate language, comments from fellow workers and the pulling of her bra straps. Federal Magistrate Raphael found that these activities were of a sexual nature and the conduct complained of amounted to sexual harassment.

In *San v Dirluck Pty Ltd*[72], an assistant was subjected to sexual banter such as being asked how her love life was, and other offensive comments including derogatory references to her boyfriend. This was held by the Federal Magistrates Court to constitute sexual harassment. A parallel can be made here to Mr Buswell's conduct whereby he chased the complainant around on his hands and knees whilst pretending to be her husband.

In *Gray v State of Victoria and Pettman*[73] the Victorian Civil and Administrative Tribunal awarded $55,000 compensation to the complainant where the behaviour complained of was not clearly sexual harassment (such as groping or physical contact) but behaviour which came down to a matter of perception (jokes, innuendo, standing too close).[74] It is the writer's opinion that the chair sniffing incident may be characterised in the same way considering the conduct complained of was done for a 'laugh' yet contained sexual innuendo as a result of the making of sexually gratifying noises.

Therefore the conclusion drawn from these comparisons is that it is likely Mr Buswell's conduct would have been categorised as 'engaging in other unwelcome conduct of a sexual nature' for the purposes of establishing that he did in fact sexually harass the complainant.

In response to the combination of embarrassing allegations, denials and admissions of misbehaviour by senior Western Australian politicians, the then Premier, Mr Alan Carpenter, made a strong speech about standards of behaviour in political life. He expressed extreme disappointment at the nature of the behaviour which had been allowed to occur in the Parliament of Western Australia and placed particular emphasis on the fact that 'something was dramatically wrong'.[75]

It is inappropriate for Members of Parliament to remain outside the scope of workplace sexual harassment legislation given that their employment positions entrust them with power and responsibility. Excluding parliamentarians from liability under equal opportunity legislation sends the message that sexual harassment is not being taken seriously. It is inappropriate to disempower complainants by denying them a remedy when the behaviour in question would constitute sexual harassment in most other workplaces.

The next section specifically addresses how sexual harassment can occur in a workplace context by using case examples to demonstrate this.

[71] *Horman v Distribution Group Limited* [2001] FMCA 52.
[72] *San v Dirluck Pty Ltd* (2005) 222 ALR 91.
[73] *Gray v State of Victoria and Pettman* (1999) VCAT 33.
[74] Jenkins and Lawrie, above n 35, vii.
[75] Strutt and Adshead, above n 12.

V SEXUAL HARASSMENT IN THE WORKPLACE

This section directs the reader's attention to the fact that not all employment relationships are afforded protection against sexual harassment under Western Australia's Equal Opportunity Act. Mr Buswell's alleged sexual harassment occurred while he was carrying out employment duties within the precincts of Parliament House. This section will argue that it is inappropriate that the law is not applicable to Parliament as a workplace.

What may be acceptable socially or in private life could well be inappropriate in a work context.[76] This is due to the potential detriment suffered by complainants of workplace harassment. This was noted by the Senate Committee of the Parliament of Australia when it stated, 'sexual harassment has come to be recognised as a matter that can adversely affect work performance, and is therefore of legitimate and necessary concern to managers in the workplace'.[77]

The Human Rights and Equal Opportunity Commission's Guide to the 1992 Amendments to the *Sex Discrimination Act 1984* states, '[s]exual harassment has now been made unlawful *in all* employment areas … and, this broader coverage will ensure … sexual harassment at work is made unlawful *no matter what* particular employment or professional relationship exists between people'.[78] This statement conflicts with the Commonwealth of Australia Senate Committee Report into the Effectiveness of the *Sex Discrimination Act 1984*. Submissions were made in the interests of that report by the Law Council who asserted that the Act does not provide comprehensive protection against sexual harassment. In relation to the legal profession the Law Council noted, 'the Act [SDA] does not apply to sexual harassment that occurs between witnesses and lawyers, lawyers and judicial officers or court staff, and solicitors and barristers'.[79] The Sex Discrimination Commissioner also noted deficiencies in the existing legislative protection from sexual harassment and recommended the Act be amended to 'protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment'.[80] It therefore appears more accurate to say that sexual harassment is 'unlawful between *almost* all workplace participants'.[81] The key for determining who is covered by sexual harassment legislation lies with the relationship between the harasser and the person being harassed'.[82]

'Sexual harassment is also unlawful in almost every employment situation'.[83] For example, sexual harassment is prohibited at the workplace, during work hours, at work related activities such as training courses, conferences, field trips, work functions and office Christmas parties. In *Q v Defeice*[84] it was held that 'sexual harassment may also be covered by the legislation if it occurs away from the workplace but is the culmination or extension of events occurring in the workplace'.[85]

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[76] Human Rights and Equal Opportunity Commission, above n 17, 12.
[77] Senate Committee, Parliament of Australia, above n 21, 1.
[78] Human Rights and Equal Opportunity Commission, above n 43, 39-40 (emphasis added).
[79] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, above n 19, 62.
[80] Ibid 61.
[81] Australian Human Rights Commission, above n 62, 3 (emphasis added).
[82] Ibid 13.
[83] Ibid.
[84] *Q v Defelice* (2000) EOC 93-501.
[85] Australian Human Rights Commission, above n 62, 13.

Justice Lockhart in *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* made the point that it is irrelevant that the behaviour may not offend others or has been an accepted feature of the work environment in the past, by stating:

> In principle, advances made by an employer, particularly if there is a series of them, all of which may have been tolerated by an employee out of sympathy or out of lack of choice, and each of which or all of which may have been tolerated by the majority of women, may nevertheless contravene s28 (at the time the section of the Sex Discrimination Act prohibiting sexual harassment) if they otherwise 'vex and annoy' so as to amount to sexual harassment.[86]

In *Bennett v Everitt*, Einfeld J, a former President of the Australian Human Rights and Equal Opportunity Commission (as it was then known) confirmed that 'all employees have a right to employment without sexuality or attempts at the introduction of sexuality, either directly or indirectly'.[87] Workplace cultures that are sexually charged or hostile may in themselves amount to sexual harassment. This was noted by the Equal Opportunity Commission who stated that, 'the permeation of a hostile work environment can be imposed or created by many means other than physical acts, including sexual suggestion or embarrassment by unwanted public displays of sexuality'.[88] In *McLaren v Zucco*, an argument that sexual conversations and general sexual banter were part of the culture or atmosphere of a particular industry and hence was not sexual harassment in the particular circumstances of the complainant, was rejected.[89] In *Horne v Press Clough Joint Venture*, two female cleaners were subjected to a hostile male dominant working environment where they were expected to 'turn a blind eye' to a prolific and constant display of pornography in their workplace.[90] In that case the Equal Opportunity Tribunal of Western Australia stated,

> It is now well established that one of the conditions of employment is quiet enjoyment of it. That concept includes not only freedom from physical intrusion or from being harassed, physically molested or approached in an unwelcome manner, but extends to not having to work in an unsought sexually permeated work environment.[91]

With respect to the issue of vicarious liability of employers, the Australian Human Rights Commission stated that, '[i]t is a general legal principle that an individual is personally liable for his or her own unlawful acts. However in the area of employment, employers can also be held liable for wrongs committed by their employees or agents in connection with their employment (known as vicarious liability)'.[92] The Commission went on to say that, 'this means that if an employee or agent sexually harasses a co-worker, client, customer or other protected person the employer can be held legally responsible and may be liable for damages unless they took all reasonable steps to prevent the harassment from occurring'.[93] Taking 'all reasonable steps' may include conducting training sessions or implementing policies, procedures or rules within the workplace to actively minimize the risk of unlawful behaviour occurring.[94] In *Horne v Press Clough Joint Venture*, both the employer and union were found vicariously liable because they

[86] *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) 85 ALR 503, 526.
[87] *Bennett v Everitt* (1998) EOC 92-244,77,280.
[88] *Freestone v Kozma* (1989) EOC 92-249, 77,377.
[89] *McLaren v Zucco* (1992) EOC 92-650.
[90] *Horne v Press Clough Joint Venture* (1994) EOC 92-591.
[91] Ibid, 77,175.
[92] Australian Human Rights Commission, above n 62, 19.
[93] Ibid.
[94] Ibid 20.

both ignored numerous complaints made by both women, including requests by the women for their employer to organise equal opportunity training.[95] Employers may also find themselves vicariously liable if they fail in their duty to ensure that their policies are communicated effectively to their executive officers or those responsible for promulgating and enforcing the policies.[96]

As previously discussed, Western Australia's Equal Opportunity Act omits legislative protection against sexual harassment for Members of Parliament and parliamentary staff. As a result of this legislative oversight, the common law principle of vicarious liability also has no application in this instance. With respect to the situation involving Mr Buswell, because there was no cause of action available for the complainant to make a complaint, it subsequently transpired that there could not be any attribution of vicarious liability against Mr Buswell's employer. The principle of vicarious liability for sexual harassment only exists where the employment relationship falls within one of the groups protected by the relevant Federal, State or Territory legislation.

The writer has prepared the following table as an illustrative summary of the workplace relationships covered by the provisions of sexual harassment legislation in each Australian State and Territory and at the Federal level. This table is a visual aid which is designed to assist the reader to formulate a comparison throughout Australia between the provisions of sexual harassment legislation concerning employment. It aims to help the reader to realise that presently Western Australia's Equal Opportunity Act is grossly inadequate in protecting a large number of its workforce against sexual harassment. Furthermore, its coverage is inferior to every other State and Territory in Australia. The next section will discuss in detail why not all State Government employees can rely on the additional protection provided by the Commonwealth legislation. This essentially means they are afforded no protection at all.

[95] *Horne v Press Clough Joint Venture* (1994) EOC 92-591.
[96] *Evans v Lee* (1996) EOC 92-822.

A Summary of Workplace Relationships Covered by Equal Opportunity Legislation

This table depicts the employment relationships covered by the provisions of sexual harassment legislation in each Australian State, Territory and at the Federal level.

	Cth	WA	NSW	Vic	SA	QLD	TAS	ACT	NT
Employers	✓	✓	✓	✓	✓	Blanket provision covering all areas of public life, including employment	Blanket provision that covers employment	✓	Blanket provision that covers work
Employees	✓	✓	✓	✓	✓			✓	
Common Workplace	✓		✓	✓	✓			✓	
Partners	✓		✓	✓				✓	
Commission Agents	✓	✓	✓					✓	
Contract Workers	✓	✓	✓					✓	
Unpaid Trainees			✓						
Volunteer			✓	✓					
Self - Employed			✓						
Public Sector Workers					✓				
Industrial Organization Workers				✓					
Members of Parliament			✓		✓				
Ministerial Office			✓		✓				
Electoral Office			✓		✓				
Local Government				✓	✓				
Judicial Officer					✓				

VI WESTERN AUSTRALIAN STATE GOVERNMENT EMPLOYMENT

This section expands on Parliament as a workplace, in which parliamentarians are in positions of power over those who work within the precincts of their offices. This power imbalance highlights the seriousness of sexual harassment and the need to hold parliamentarians accountable if they engage in this conduct. In addition, parliamentarians are respected public figures and should be subjected to the same, if not higher, standards of conduct and accountability than the community members they represent.

This section will also examine the provisions of the Equal Opportunity Act which limit its jurisdiction, and will also examine a case where a complainant unsuccessfully tried to overcome these jurisdictional limitations. It will then discuss the possibility of complainants of sexual harassment in Parliament pursuing a claim in tort, and the limitations of such a claim.

Had sufficient sexual harassment legislation been in place in Western Australia at the time, it is likely Mr Buswell's conduct would have constituted sexual harassment. The reason why there was no right of action for the complainant against Mr Buswell was that 'under Western Australia's current Equal Opportunity Act's sexual harassment laws, it is necessary to show that a staff member is concerned that refusing or objecting to the other person's behaviour would have a negative impact on their career. In other words, the sexual harassment must occur in an employment context such that the staff member must have an employment connection to the person they are being harassed by'.[97] Because Parliament is not the employer of Members of Parliament and because Members of Parliament are not the employers of Government provided staff who work within their electorate offices or who work within the precincts of Parliament House, and therefore no direct employment relationships exist, the legislative provision dealing with sexual harassment in employment is incapable of applying to Members of Parliament or parliamentary staff.[98] Similarly, judges and magistrates are not the employers of staff who work for them specifically within the courts.[99] These workers are all within the category of what we might describe as statutory office holders and at no time have they been covered by the workplace sexual harassment provisions of Western Australia's Equal Opportunity Act.[100]

The Western Australian State Parliament is not a public service agency.[101] The official webpage of the Parliament of Western Australia states that, '[t]he staff who work at Parliament House are employed in accordance with the conditions of the Parliamentary Employees General Agreement 2008'.[102] The Parliamentary Employees General Agreement defines the 'employer' for the Department of the Legislative Council, the Department of the Legislative Assembly and the Parliamentary Services Department as:

> 'Employer' means
>
> > The President, acting on the recommendation of the Clerk of the Legislative Council, is, subject to s35 of the Constitution Act 1889, the Employer of each member of the

[97] Attorney General's Office, Ministerial Media Statement, Government of Western Australia, *Sexual Harassment Protection for Workers at Parliament* (2008) (Jim McGinty).
[98] Ibid.
[99] South Australia, *Parliamentary Debates*, Legislative Council, 24 July 1997, 2000 (The Honourable K.T Griffin).
[100] Ibid.
[101] Parliament of Western Australia, *Employment at Parliament* (undated) <http://www.parliament.wa.gov.au/index/htm> 5 September 2010.
[102] Ibid.

> Department of the Legislative Council other than the Clerk of the Legislative Council and the Deputy Clerk of the Legislative Council;
>
> The Speaker, acting on the recommendation of the Clerk of the Legislative Assembly, is, subject to s35 of the Constitution Act 1889, the Employer of each member of the Department of the Legislative Assembly other than the Clerk of the Legislative Assembly and the Deputy Clerk of the Legislative Assembly;
>
> The President and the Speaker, acting jointly, are the Employer of the Executive Manager, Parliamentary Services, and on the recommendation of the Executive Manager, Parliament Services, are the Employer of each member of the Parliamentary Services Department other than the Executive Manager, Parliamentary Services. [103]

The employer is named in the Parliamentary Employees General Agreement for the purpose of creating a binding employment contract. However, for the purpose of making a workplace sexual harassment complaint under Western Australia's Equal Opportunity Act the Parliamentary Employees General Agreement is evidence of the fact that there is no commonality of employer, nor is it possible to establish any 'employer/employee' relationship, between Members of Parliament and parliamentary staff. Furthermore, the sexual harassment provisions of Western Australia's Equal Opportunity Act *do not* extend to workers employed by different employers who are carrying out work related functions at a mutual place of work.

A *Jurisdiction*

All State and Territory jurisdictions have general anti-discrimination legislation that includes provisions prohibiting different forms of sex discrimination, including sexual harassment.[104] Section 10(3) of the SDA provides that 'this Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act'. Section 11(3) further states 'this Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act'. This statement appears to address the issue of inconsistency in s109 of the Commonwealth Constitution which provides that 'a State law will be invalid to the extent that it is inconsistent with Federal law'.[105] Section 10(5) expands on the co-existence of the State and Federal legislation, providing that if a person commits an offence that contravenes both State and Federal sex discrimination legislation, the person may be prosecuted and convicted under either Act, but not both.[106]

B *The Statutory Exception*

As noted by the Australian Human Rights Commission, 'unless an exception applies, employers and employees must comply with both the SDA and the relevant State or Territory laws'.[107] Notably however, State Government instrumentalities and State Government employees are considered within the exception to be exempt from the discrimination and sexual harassment provisions of the SDA *in relation to employment* if a complaint is brought against them.[108] The

[103] Parliament of Western Australia, *Parliamentary Employees General Agreement 2008 < http:// www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Employment>* 5 September 2010.
[104] Commonwealth, *Sex Discrimination in the States and Territories*, Research Paper 17 (1999) 1.
[105] Evans, above n 13.
[106] Ibid.
[107] Australian Human Rights Commission, above n 62, 1.
[108] Human Rights and Equal Opportunity Commission, above n 17 (emphasis added).

breadth of the State exemption has not been fully tested but would seem to include State Government departments, statutory corporations, public authorities, local councils, State schools and State vocational education and training institutions'.[109] 'Consequently, a complainant can only lodge a complaint under the sexual harassment provisions of the SDA if the perpetrator of the harassment is a Commonwealth body, authority or employee.[110] Evans noted that 'if the perpetrator is *not* a Commonwealth body, authority or employee, they must bring their complaint under their relevant State or Territory discrimination legislation'.[111] Therefore, even if the Commonwealth had legislation protecting, for example, staff employed in all judicial, legislative and executive arms of Government the exemption would exclude those people employed in those positions at the State and Territory levels. In essence this means a loophole currently exists to which no legislative protection from sexual harassment is afforded to State Government employees. This is the case in Western Australia, Victoria and the Australian Capital Territory because these States and Territories do not have legislative protection against sexual harassment for State Government employees in their own Equal Opportunity and Discrimination Acts.

To illustrate the deficiency of Western Australia's equal opportunity laws in comparison with other States, this paper will now hypothetically assume the incidents involving Mr Buswell occurred in New South Wales, and each element of sexual harassment could be established sufficient enough to satisfy Mr Buswell had in fact sexually harassed the complainant. Section 22B of the *Anti-Discrimination Act 1977* (NSW) is the legislative provision which prohibits sexual harassment in the area of employment. This provision is the most comprehensive in its coverage of the various existing employment relationships of any other legislation in Australia. Under s22B sexual harassment is expressly prohibited between employers and employees, fellow workers, partners, commission agents, contract workers (or people seeking employment in any of these positions), workplace participants at a common workplace, members of either Houses of the New South Wales State Parliament and any workplace participant at a place that is a workplace of both the Member of Parliament and the workplace participant.[112] A workplace of a Member of Parliament is taken to include the entirety of the State's Parliament House, any

[109] Ibid:
The exemption coincides with the constitutional principles established in *Melbourne Corporation v Cth* (1947) 74 CLR 31 and by the Doctrine of Implied Intergovernmental Immunities. The Doctrine of Implied Intergovernmental Immunities prohibited the Commonwealth and the States imposing upon each others' agents and instrumentalities burdens that fetter the free exercise of legislative or executive power unless expressly authorised by the Constitution. Although the Doctrine of Implied Intergovernmental Immunities was rejected in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('Engineer's case'), it was revived in part in the case of *Melbourne Corporation v Cth*. The Engineer's case favoured the literal and expansive reading of Commonwealth legislative powers subject only to express limitations found in the constitutional text. As the Melbourne Corporation principle currently stands, there is an implied limit on Commonwealth legislative power with respect to interference with State power. Any Commonwealth legislation that affects the existence of a State or any operation by the states and/or their agencies, may be deemed unconstitutional.

[110] Evans, above n 13:
Section 9(5) of the *Sex Discrimination Act* 1984 (Cth) states that s28B ('sexual harassment in employment') has effect in relation to Commonwealth employees or persons seeking to become Commonwealth employees. This is expanded on in s9(8) and s9(9) which restricts the operation of the sexual harassment provisions contained in Division 3 Part II, to sexual harassment by persons exercising power on behalf of the Commonwealth or a Commonwealth body or authority – s9(8); or 'by a person who is a Commonwealth employee … or … a member of the staff of an educational institution established by a law of the Commonwealth – s9(9).

[111] Ibid (emphasis added).

[112] *Anti-Discrimination Act 1977* (NSW) s22B.

ministerial office, electoral office, or any other place that the Member attends in connection with his or her ministerial, parliamentary or electoral duties.

Therefore, the nature of the employment positions held by Mr Buswell and the complainant would have meant that they would have fallen within the classification of either a 'Member' or 'workplace participant' of a House of Parliament. Under s22B (7) it is unlawful for Members or workplace participants of either House of Parliament to sexually harass other Members, workplace participants or one another at a workplace of both the Members or workplace participants.
In summary, under this legislation the complainant would have legally had a right to lodge a complaint against Mr Buswell and have the complaint dealt with through the appropriate equal opportunity dispute resolution mechanisms in that jurisdiction.

C *An Attempt to Avoid the Statutory Exception*

Despite Western Australia's Equal Opportunity Act failing to recognise sexual harassment as being prohibited between staff employed in any arm of Government, the Appellant in the case, *An Electorate Officer (name suppressed) v A Research Officer (name suppressed)*[113], sought to get around this by bringing a claim of sexual harassment based on s24(1)(b). This section declares it unlawful for a person to harass sexually an employee of a person by whom the first-mentioned person is employed.

In that case, the Plaintiff made a complaint to the Commissioner for Equal Opportunity alleging sexual harassment at her place of employment which was an office space shared by two Members of Parliament and effectively run as a unified office. In order for the Plaintiff to be successful with her claim she needed to establish that both she and the defendant were employed by the same employer. After investigating the claim, the Commissioner found that the plaintiff was employed by the Joint House Committee of Parliament under the *Electorate Officers' Award 1986* as an electorate officer appointed to assist a the Honourable K Hallahan, and the defendant was employed by the Public Service Commissioner under the *Public Service Act 1978* as a research officer for the Honourable R Pearce. The Commissioner dismissed the plaintiff's argument that the proper employer of both her and the defendant was the State of Western Australia, and thus found there was no commonality of employer.

The plaintiff subsequently referred her complaint to the Equal Opportunity Tribunal. After days of deliberation, the Tribunal found in favour of the plaintiff. The Tribunal held that the Commissioner had erred in finding the Joint House Committee of Parliament 'a corporate entity capable of acting as employer in substitution for the State of Western Australia'. The Tribunal considered that the parties were both 'State employees' within the meaning of the Act:

> They have a common employer because ultimately the Government is in a position to control their activities and their remuneration, even though, pursuant to well established conventions, it is unlikely that the Government would interfere with an electorate officer's employment having regard to the special place that Parliament occupies with the constitutional structure.[114]

[113] *An Electorate Officer (name suppressed) v A Research Officer (name suppressed)* (Unreported, Supreme Court of Western Australia, Pidgeon, Rowland and Murray JJ, 28 May 1992).
[114] Ibid.

From that decision the defendant appealed to the Supreme Court of Western Australia. Anderson J upheld the initial decision reached by the Commissioner because he was of the view that, despite the fact that civil servants of all grades employed in departments of the public service might properly be regarded as 'servants of the Crown', within parliamentary employment different employers exist for different departments, therefore the Plaintiff and Defendant did not share a common employer. To clarify, and for the purposes of applying the Equal Opportunity Act to the public service, his honour said:

> Each permanent head is to be regarded as the employer of subordinate officers within his department. It would follow that to invoke a complaint of sexual harassment by a fellow employee, it would be necessary for the complainant to show that both the complainant and the respondent were employed in the same department of the public service, or otherwise had the same Chief Executive Officer.[115]

Therefore, in light of both the exemption mentioned above and the Supreme Court's ruling in *An Electorate Officer v A Research Officer*, it appears the only recourse a State Government employee may have where he or she has been harassed by a person employed at a common workplace, is by bringing an action in either contract and/or tort, as failure by the employer to take reasonable care for the health and safety of their employees can amount to a breach of the employment contract as well as negligence.[116]

Husbands noted that, 'tort law has been found to provide a measure of protection to victims of sexual harassment'.[117] For example, in *Waltman v International Paper Co*, the tort of invasion of privacy was relied upon to action a claim against the complainant's colleague who had placed a high-pressure hose between the complainant's legs.[118] However, it is more detrimental to the complainant to pursue an action in tort as opposing to making a complaint through the Equal Opportunity Commission, because of the cost, the time involved in bringing a claim and the requirement of lawyers.

Catharine MacKinnon, a well known feminist academic, is of the opinion that while tort law can address the individual injury aspect, discrimination law is a better response because it addresses the societal injury aspect and thus is better for change:

> Tort law compensates individuals for injuries while spreading their costs and perhaps setting examples for foresightful perpetrators; the purpose of discrimination law is to change the society so that this kind need not and does not occur.[119]

Liability for damages is just one of the costs an employer will incur in relation to an equal opportunity complaint, where recourse through that legislation is available to the complainant. 'Once a complaint has been made, the costs include not only damages and potential legal fees but also staff time spent on the matter, investigations and internal enquiries, absences, disruption and tension in the workplace, and adverse publicity'.[120] In most cases the complainant would be dealt with by the Equal Opportunity Commissioner, who could refer the matter to the State

[115] Ibid.
[116] Easteal, above n 54, 163.
[117] Robert Husbands, 'Sexual Harassment Law in Employment: An International Perspective' (1992) 131 *International Labour Review* 535, 548.
[118] *Waltman v International Paper Co*, 47 FEP Cases 671 (W.D. La. 1988) (American case).
[119] Catharine MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979) 172.
[120] Jenkins and Lawrie, above n 35, 27.

Administrative Tribunal.[121] The State Administrative Tribunal is able to award a complainant compensation of up to $40,000.00.[122] Jenkins and Lawrie said of this limited amount of damages, '[d]amages in Federal sexual harassment cases have generally been quite moderate, lagging behind compensation awarded under some of the State anti-discrimination laws'.[123]

In summary, given the immunity that parliamentarians currently enjoy from sexual harassment claims being made against them by their co-workers and subordinates, urgent reform is required. Although tort law may provide complainants with a remedy, where equal opportunity law also allows this the process is often easier and more readily accessible. The following section will outline two previous attempts at reform both of which have fallen short of adequately addressing the issue in a parliamentary context.

VII LEGISLATIVE REFORMS

Details of the incidents concerning Mr Buswell were brought back into the spotlight last year when on 21 April 2010 a private member's Bill entitled 'Equal Opportunity (Members of Parliament) Amendment Bill 2010' was introduced by Mr Martin Whitely MLA seeking to amend the *Equal Opportunity Act 1984* (WA). The complainant of Mr Buswell's conduct walked into Mr Whitely's electorate office in August 2009 out of desperation and because she felt she had nowhere else to turn.[124] After a number of fruitless attempts to reach a resolution, including writing to Mr Barnett (Premier), the complainant and Mr Whitely decided to advocate change to ensure that parliamentary staffers have the same opportunity as workers elsewhere to address sexual harassment in the workplace.[125] However, this is not the first time a Bill has been introduced to the Western Australian State Parliament in an attempt to amend and rectify the loophole which was identified as a result of Mr Buswell's conduct.

This section will provide a detailed outline in chronological order of the history of legislative reform in equal opportunity legislation with respect to Members of Parliament. Firstly it will outline Western Australia's attempt to amend the Equal Opportunity Act to include parliamentarians. Then it will look at reforms in South Australia and New South Wales. The section will then conclude by examining the most recent Western Australian attempt at reform through the Equal Opportunity (Members of Parliament) Amendment Bill 2010.

A *Western Australia: First Attempt*

In response to the 'bra-snapping' affair in October 2007 where Mr Buswell allegedly 'snapped' the bra strap of a labor staffer at a workplace function, in 2008 Mr Jim McGinty (a former Attorney-General) introduced an amendment Bill after commissioning a report from the Commissioner for Equal Opportunity (the '**Report**'). The Report investigated whether the *Equal Opportunity Act 1984* (WA) was operating in the most effective way possible, taking into account trends and developments in equal opportunity law and changes in community

[121] Attorney-General's Office, Ministerial Media Statement, Government of Western Australia, above n 97.
[122] Ibid.
[123] Jenkins and Lawrie, above n 35, 89.
[124] Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 April 2010, 1968b-1970a (Mr Martin Whitely, Member for Bassendean).
[125] Ibid.

attitudes.[126] The Report recommended that the definition of sexual harassment be repealed and replaced with that found in the SDA.[127] Furthermore, it recommended that the definition of 'employment' be extended to include unpaid and voluntary workers, and people working under education, vocational or training arrangements, and the definition of 'services' should incorporate the regulatory and compliance functions of government.[128]

During the second reading of the Equal Opportunity Amendment Bill 2008, Mr McGinty said:

> Parliament should be a place in which not only are laws made, but also examples are set for the rest of the community. This Parliament should not be cast as a boys' club where the behaviour of sexist yobbos is not just tolerated but is rewarded. These new amendments will establish that sexist behaviour by Members of Parliament is not just unacceptable, but also unlawful.[129]

Mr McGinty's Amendment Bill sought to extend coverage of the *Equal Opportunity Act 1984* (WA) to Members of Parliament. The proposals put forward in that Bill were largely modelled on the *Equal Opportunity 1984* (SA), which had itself undergone amendments in previous years in response to similar arising issues. The outcome for South Australia was as follows:

> Section 87(6c):
> It is unlawful for a Member of Parliament to subject to sexual harassment –
> (a) a member of his or her staff; or
> (b) a member of the staff of another member of Parliament; or
> (c) an officer or member of the staff of the Parliament;
> (d) any other person who in the course of employment performs duties at Parliament House.

In contrast, Mr McGinty's Bill made it unlawful for a Member of Parliament to sexually harass an officer appointed to assist the Member of the Parliament; an officer appointed to assist another Member of Parliament; an officer or member of the staff of Parliament; or any other person who in the course of employment performs duties at the Parliament or at a place where either House, or a committee of either or both Houses, meets. Officers appointed to assist Members of Parliament were to include electorate officers and research officers.[130] The only difference between Mr McGinty's Bill and s87(6c) of the *Equal Opportunity Act 1984* (SA) was a slight difference with the wording and an extension of the protection of the identified group to locations which are separate from Parliament, but which are used in association with Parliament and parliamentary duties.

Mr McGinty's Bill sought to remove the stringent 'employment connection' element between the harasser and the person harassed in cases involving Members of Parliament. This was substituted with a broader employment connection, namely one between Parliament House and a workplace participant and/or Member of Parliament.[131] Despite the amendments being a substantial improvement, they still omitted to protect every parliamentary working relationship from sexual harassment. The proposed amendments did not explicitly protect Members of

[126] Western Australia Equal Opportunity Commission, above n 45, 1.
[127] Ibid 5.
[128] Ibid 6.
[129] Western Australia, *Parliamentary* Debates, Legislative Assembly, 9 April 2008, p2054c-2056a (Mr McGinty, Attorney-General).
[130] Ibid.
[131] 'MPs on Notice After Bra-Snapping', *News.com.au* (online), 8 April 2008 <http://www.news.com.au /mps-on-notice-after-bra-snapping/story-e6frfkp9-1111116006838>.

Parliament from sexual harassment by other Members of Parliament. Mr McGinty was of the opinion that Parliament has enough power to deal internally with this type of misconduct committed between Members of Parliament and therefore omitted to address this issue in his Amendment Bill.

Despite the Bill substantially improving the *Equal Opportunity Act* 1984 (WA), it never came to fruition. When the writer spoke with Mr Whitely about this, Mr Whitely thought the Bill may have just simply fallen away with the passage of time.[132] Further research revealed the Bill actually lapsed on 7 August 2008, the same day the 37th Western Australian Parliament was prorogued and the Legislative Assembly dissolved.[133]

B *South Australia*

The *Equal Opportunity Act 1984* (SA) was amended to include s87(6c) after the introduction of the Equal Opportunity (Sexual Harassment) Amendment Bill in 1997. The Bill was drafted after Mr Brian Martin QC reviewed the Equal Opportunity Act and presented his findings to the Attorney-General ('**Martin Report**'). The Martin Report highlighted a widespread disparity of equal opportunity, sexual harassment and anti-discrimination law in various States and Territories and in the Federal legislation.[134]

There was strong support in South Australia for the introduction of legislation protecting Members of Parliament from sexual harassment. It was considered important that the 'same standards which apply to the rest of the community should also apply to judges and Members of Parliament when it comes to sexual harassment'.[135] Furthermore, whilst it was acknowledged that Members of Parliament have a very privileged position in society, it was agreed that this should not absolve them from the responsibility of their positions. They should be setting an appropriate standard and should not be above the law.[136]

Before the amendments were accepted and incorporated into the South Australian Equal Opportunity Act ample discussions and debates were had on the topic. In particular, the Martin Report helped raised some relevant points. The Martin Report noted the Act was deficient in not covering a number of relationships including harassment of[137]:

- parliamentary and other staff by Members Parliament;
- staff by members of the judiciary;
- employees of local government corporations by elected members;
- incorporated association employees by members of the management committee;
- hospital staff by medical consultants; and
- individuals on work experience, trainees and students on work placements at work sites.

[132] Interview with Martin Whitely, above n 28.
[133] Parliament of Western Australia, *Equal Opportunity Amendment Bill 2008 (Bill No. 271)* (2008) <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Bills+-+All> 4 November 2010.
[134] South Australia, *Parliamentary Debates*, Legislative Council, 4 June 1997, 1536 (The Honourable RD Lawson).
[135] Ibid 1535 (The Honourable Sandra Kanck).
[136] South Australia, *Parliamentary Debates*, Legislative Council, 29 May 1997, 1458 (The Honourable Carolyn Pickles).
[137] Attorney General's Department South Australia, *Legislative Review of Equal Opportunity Act 1984 (SA)* (October 1994) ('Martin Report') 16.

However like Mr McGinty's Bill, the Martin Report itself did not include sexual harassment of Members of Parliament by other Members of Parliament. If we look at the relationships that are cited, it is noticeable that these relationships traditionally depict relationships of power inequality. The Martin Report therefore seemed to base its recommendations on the traditionally held perception that sexual harassment was imposed by superiors on subordinates at work. Mr Martin held this view because he believed Members of Parliament 'were in a different position from the normal workplace participant. They were adversaries in the public eye. Other means of coping with offensive behaviour were readily available and there were dangers associated with an attempt to intrude into these relationships'.[138] Therefore, he believed the South Australian legislation should concentrate on covering those areas of public life where power inequality was likely to exist and to result in unfairness to the person harassed. The current South Australian legislation also reflects this viewpoint. It was believed that any extension of the Act to cover sexual harassment by a Member of Parliament against another Member of Parliament would likely result in issues of parliamentary privilege being raised in the context of dealing with complaints.[139] During the debate in which this issue arose, the Honourable Carolyn Pickles (a former Leader of the Opposition in the Legislative Council) opposed this view point. She maintained there should be equality within the workplace and a single message should be sent that behaviour of this kind is simply not tolerated, and should be unlawful. She recognized that issues of this nature have arisen in the past and will continue to arise unless Members of Parliament abide by the same laws and standards as citizens of the State.[140]

Carolyn Pickles believed the Martin Report had fallen into error by assuming Members of Parliament were people of equal status. She noted that while we are dealing with two elected representatives of the people, 'we [Members of Parliament] are aware that the ability of one member to confront another about offensive behaviour depends to a great extent on political matters such as whether one is in Opposition or in Government and the relative position each person has within their own Party'.[141] The Honourable Anne Levy in support, drew the Legislative Council's attention to an incident in which a Member of Parliament was harassed in the parliamentary bar by another Member of Parliament.[142] The point being made was despite having 'equal status' and a different power relationship to that of a quasi-employer relationship, anybody regardless of their status can be subjected to sexual harassment. This demonstrates the importance of adequate legislative protection for everybody in all areas of employment. Carolyn Pickles was of the opinion that Members of Parliament who have experienced forms of sexual harassment should, like any other worker, be afforded recourse to the Equal Opportunity Commission and Tribunal. This would ensure an objective and transparent process for the resolution of sexual harassment complaints with justice not only being done, but being seen to be done.

There is however a foreseeable problem with this approach: there still exists an ancient right of the Parliament known as parliamentary privilege. It is a sovereign right of the Parliament to

[138] South Australia, *Parliamentary Debates*, Legislative Council, 8 July 1997, 1708 (The Honourable KT Kriffin, Attorney-General).
[139] Ibid 1709 (The Honourable KT Kriffin, Attorney-General).
[140] Ibid 1714 (The Honourable Carolyn Pickles).
[141] Ibid 1710 (The Honourable Carolyn Pickles).
[142] South Australia, *Parliamentary Debates*, Legislative Council, 24 July 1997, 2003 (The Honourable Anne Levy).

regulate its capacity to function and *the conduct of its members.*[143] Parliamentary privilege is a basic constitutional principle that ensures Members of Parliament are not inhibited by Executive Government from raising issues and taking action in the interests of the people.[144] Parliamentary privilege only attaches to anything said or done during the course of parliamentary proceedings. Therefore, privilege for Members of Parliament exists in the Chambers of the Houses and in parliamentary committee hearings so that they are able to carry out their duties and speak freely without fear or restriction. But it does not exist when Members of Parliament are involved in other aspects of their job – for example, on conferences or in their electorate offices.[145] Therefore, parliamentary privilege only operates in a limited capacity and should not inhibit sexual harassment law from applying to parliamentarians.

At the time of considering the amendments to the Equal Opportunity Act the South Australian Government took the notion of parliamentary privilege into account and did not think it appropriate to have the Commissioner, a part of the Executive arm of Government, making decisions on parliamentary privilege, or for that matter, judicial independence.[146] Similarly, as parliamentary privilege is enforced by each House through its officers, it was also considered inappropriate for the courts to interfere with a decision of a House of Parliament where privilege is claimed to have been infringed.

Ultimately, the South Australian Government through its current Equal Opportunity Act sought to achieve a balance between laws which protect workplace participants and Members of Parliament from sexual harassment yet preserve the constitutional role of Parliament by restricting any influence by the Executive Government.[147]

The current Western Australian Amendment Bill largely reflects the South Australian model. Despite providing an 'adequate' solution, as has been pointed out, the legislation will still contain a loophole omitting legislative protection for Members of Parliament who are sexually harassed in the workplace by other Members of Parliament. It takes a great deal of effort and resource for a Bill to pass through Parliament so it stands to reason that the new proposed Western Australian legislation should again be amended so as to provide protection for *every* type of employment relationship.

C *New South Wales*

In June 1994, the New South Wales Minister for Police resigned from his cabinet position and later his position in his party due to allegations of sexual harassment against two staff members.[148] In response to that incident, in 1997 an Anti-Discrimination Amendment Bill was put before the New South Wales State Parliament. The main purpose of the Bill was to introduce sexual harassment as a separate ground of unlawful conduct under the *Anti-Discrimination Act 1977* (NSW).[149]

[143] South Australia, *Parliamentary Debates*, House of Assembly, 22 July 1997, 1934 (Mr Brindal) (emphasis added).
[144] South Australia, *Parliamentary Debates*, House of Assembly, 9 July 1997, 1846 (The Honourable SJ Baker, Treasurer).
[145] South Australia, *Parliamentary Debates*, above n 143, 1931 (Ms Elizabeth Stevens).
[146] South Australia, *Parliamentary Debates*, above n 138.
[147] Ibid 1711 (The Honourable Carolyn Pickles).
[148] Western Australia, *Parliamentary Debates*, above n 124.
[149] New South Wales, *Parliamentary Debates*, Legislative Council, 20 November 1996, 6264 (The Honourable JW Shaw).

During the second reading of the Anti-Discrimination Amendment Bill the Honourable Elisabeth Kirkby stated,

> [t]he position in relation to the coverage of a New South Wales Member of Parliament and his or her legal responsibilities under New South Wales' Anti-Discrimination Act seemed to be unclear. Nothing in the Act seemed to indicate that the Legislature intended to preclude Members of Parliament from the operation of the Act.[150]

Indeed, there were strong public policy and community expectations that Members of Parliament should be covered by the legislation.[151] However, this was not the case at the time of application of the legislation.

There was also recognition of the conceptual difficulties about the way in which Members of Parliament, who occupy public office and who are usually neither employees nor employers, fit into the scheme of the anti-discrimination legislation. Members of Parliament do not have the discretion to hire, fire or discipline those who work within the Parliament or within their parliamentary offices because they are not the employers of those workers.[152] The workers' terms of appointment are laid down by the Legislature and their salaries, superannuation and entitlements are paid by the Legislature.[153] The difficulty with extending the legislative provision which prohibits sexual harassment in employment to cover parliamentary workers or Members of Parliament from sexual harassment, exists because of the fact that different staff have different employers. For example, staff of the Legislative Assembly are employed by the Speaker, staff of the Legislative Counsel are employed by the President, yet staff of ministerial offices are neither employed by the Parliament, nor by the Speaker or President, but by the Office of the Premier.[154]

To address this difficulty an approach which was proposed was to '*deem* all those who work for Members of Parliament to be employees of the Members of Parliament'.[155] This proposition itself was problematic. 'Under these proposed changes, if deemed employees were involved in sexual harassment, Members of Parliament would be made personally liable despite having no involvement in the sexual harassment'.[156] Liability would rest with the 'deemed employer' because that person would be responsible for enforcing appropriate standards of behaviour and accountability, yet those 'employers' would have no power to discipline people, dictate their terms of appointment or terminate their employment. Further, it would be impossible to monitor the movements of, and to know what happens to each and every staff member as they travel around Parliament House or to other parts of the building. And it is very unlikely it was the intent of Government to make Members of Parliament the minders of staff such that they should essentially be with 'their staff' at all times in order to protect them should such a situation arise.[157]

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[150] New South Wales, *Parliamentary Debates*, Legislative Council, 28 November 1996, 6797 (The Honourable Elisabeth Kirkby).
[151] Ibid.
[152] Ibid 6794 (The Honourable JP Hannaford).
[153] Ibid 6797 (The Honourable Elisabeth Kirkby).
[154] New South Wales, *Parliamentary Debates*, Legislative Council, 5 December 1996, 7031 (The Honourable RTM Bull).
[155] New South Wales, *Parliamentary Debates*, above n 150, 6794 (The Honourable JP Hannaford) (emphasis added).
[156] Ibid.
[157] Ibid 6797 (The Honourable Elisabeth Kirkby).

After much debate and constructive thought, the Houses of Parliament reached agreement concerning the amendments to s22B of the Act. It was decided that the following sub-sections should read:

> (7) It is unlawful for a Member of either House of Parliament to sexually harass:
> (a) a workplace participant at a place that is a workplace of both the Member and the workplace participant; or
> (b) another Member of Parliament at a place that is a workplace of both Members.
> (8) It is unlawful for a workplace participant to sexually harass a Member of either House of Parliament at a place that is the workplace of both the Member and the workplace participant.

These amendments put Members of Parliament in the same position as other workplace participants – 'the law will apply equally to ordinary citizens, to Members of Parliament, to Ministers, to members of the legal profession and to others – no cover-ups and no privileges for anybody'.[158] The amendments also avoid the legal fictions of deeming Members of Parliament to be either employees or employers. This means that Members of Parliament will be liable for their own acts of sexual harassment but not for any acts of discrimination conducted by persons employed within their offices.

The writer is of the opinion that the New South Wales model is more comprehensive than the South Australian model however, for the avoidance of doubt, suggests that judicial officers and local government employees also specifically be categorised as types of employment relationships which are protected by sexual harassment legislation.

D *Western Australia: Second Attempt*

Mr Whitely's private member's Bill (Equal Opportunity (Members of Parliament) Amendment Bill 2010) seeks to 'amend the *Equal Opportunity Act 1984* (WA) by extending the coverage of that Act to people who are employed to work at Parliament House and to people who are carrying out duties at Parliament House, so that they will be given protection under the Equal Opportunity Act if they are subjected to sexual harassment'.[159] Initially Western Australia's Equal Opportunity Act did not offer protection to people employed by different employers but who worked at a common workplace. Mr Whitely in his second reading speech mentioned that the *Equal Opportunity Amendment Act 1992* (WA) ('**Amending Act**') sought to rectify this deficiency however it was also *intended at that time, that the Act would apply to Members of Parliament* such that they would not be exempt from sexual harassment provisions.[160]

To clarify the accuracy of this stated intention and/or belief, this paper will now review the relevant provisions of the Amending Act. Sections 9(1) and 9(2) read[161]:

> 9(1) It is unlawful for a person to harass sexually –
> (a) An employee of that or any other person; or
> (b) A person who is seeking employment by that or any other person.

[158] Ibid 6795-6796 (The Honourable Franca Arena).
[159] Western Australia, *Parliamentary Debates*, above n 124.
[160] Ibid (emphasis added).
[161] *Equal Opportunity Amendment Act 1992* (WA) s 9(1) and 9(2) (emphasis added).

> 9(2) To the extent that it affects the application of the '**Principal Act**' [Equal Opportunity Act 1984 (WA)] to conduct by a person who was, at the time of the conduct, a Member of Parliament, subsection (1) is deemed to have come into operation immediately after the commencement of the principal Act.

Prima facie, s9(2) reads as though s9(1) was intended to commence retrospectively from the commencement of the Principal Act, as well as make it unlawful for Members of Parliament to engage in workplace sexual harassment. The aim of s9(1) of the Amending Act was to amend s24(1)(a) and s24(1)(b) of the Principal Act. However upon a closer examination of these provisions, it was discovered that these provisions were actually identical so the amendments that have come into force. The purpose of s9(2) of the Amending Act was to detail when s9(1) was to come into force. In this regard it says that s9(1) comes into operation immediately after the commencement of the Principal Act where the conduct of a Member of Parliament contravenes s24(1) of the Principal Act. When reference to the Member of Parliament in s9(2) of the Amending Act is read in conjunction with s24(1) of the Principal Act (and thus s9(1) of the Amending Act), the Member of Parliament becomes the 'person'. Therefore the interpretation reads, it is unlawful for a 'person' [Member of Parliament] to harass sexually an employee of that person or any other person, or a person seeking employment by that or any other person. It has therefore become apparent that the interpretation of these provisions has led to a mistaken belief that workplace sexual harassment laws apply to Members of Parliament by reason of the *Equal Opportunity Amendment Act 1992*. The reason why this belief is mistaken is because Members of Parliament are not classified as employers (as discussed in detail earlier in this paper). Therefore the Amending Act makes no difference to the status of workplace sexual harassment provisions applying to Members of Parliament. Additionally, the introduction of both Mr McGinty and Mr Whitely's Amendment Bills seem to rebut the belief. Had the workplace sexual harassment laws been applicable to Members of Parliament there would have been no need for these Bills to have been introduced to Parliament and further, the complainant of Mr Buswell's conduct would have been able to seek a remedy for his conduct.

Presently, Western Australia's Equal Opportunity Act remains flawed with respect to its workplace sexual harassment provisions by omitting protection for Members of Parliament and parliamentary staff. At the second reading of his Bill, Mr Whitely said,

> It is simply not good enough for us [Members of Parliament] to say that we find sexual harassment in the workplace unacceptable while we ourselves are not subject to the very legislation that this Parliament imposed on the rest of the State.[162]

The content of the Equal Opportunity (Members of Parliament) Amendment Bill 2010 is expressed in substantially similar terms to the Amendment Bill which was proposed years earlier by Mr McGinty. Mr Whitely advised that the reason for this was because the Labor caucus had previously approved Mr McGinty's Bill and this meant it would have been a quicker process to re-introduce a Bill in similar terms to McGinty's and seek amendments to that Bill at a later date, rather than to propose a completely new model.[163] Mr Whitely added that it can take a substantial amount of time to bring about legislative change unless there is an urgent need or the issue is 'red hot'.[164] In light of the considerable amount of research on this topic indentifying the harmful effects sexual harassment can have on complainants, the writer is of the opinion that it is not reasonable to consider the need for this legislative change as anything less than a 'red hot'

[162] Western Australia, *Parliamentary Debates*, above n 124.
[163] Interview with Martin Whitely, above n 28.
[164] Ibid.

issue. It is therefore of legitimate concern that two years have elapsed since the issue arose and yet the legislation has still not passed. Unless the Bill starts to 'move' through both Houses of Parliament it is possible it could suffer the same fate (by lapsing) as Mr McGinty's Amendment Bill.

Mr Whitely's Bill proposes to amend s24 of the *Equal Opportunity Act 1984* (WA) which is entitled 'Sexual Harassment in Employment'. The proposed amendments will provide that:

> It is unlawful for a Member of Parliament to sexually harass an officer appointed to assist the Member of Parliament or minister of the Crown; an officer appointed to assist another Member of Parliament or minister of the Crown; an officer or member of the staff of Parliament; or any other person who in the course of employment performs duties at Parliament or a place whether either House, or a committee of either or both Houses, meets. Officers appointed to assist Members of Parliament would include electorate officers and research officers.[165]

Further, while extending the Act to cover sexual harassment by Members of Parliament, the amendments will also seek to protect parliamentary privilege. An additional provision is proposed which will provide that the abovementioned amendments do not apply to anything said or done by a Member of Parliament in the course of parliamentary proceedings.[166] In essence, these amendments together with the mechanism for dealing with complaints against Members of Parliament, are in similar terms to those which have been adopted by the South Australian Act.

Where the investigation of a complaint might raise issues that could impinge upon parliamentary privilege, they will be dealt with the Speaker or President rather than the Commissioner for Equal Opportunity.[167] This is because when a Member of Parliament sexually harasses a person, there is almost certainly a greater public interest. This can often prevent the complainant from being able to consider their options without the intrusion of the media, and the media exposure and scrutiny can subsequently increase the damage caused. The resolution provisions proposed by this Bill provide an opportunity for a private conciliation process. This will provide some protection for both people who are sexually harassed by Members of Parliament, and for Members of Parliament who are wrongly accused.[168] There will also be legislative protections that prevent official complaints making their way into the public sphere.[169]

This Bill is still currently before the Western Australian Parliament for debate and consideration. As at today's date, the loophole that exempts parliamentarians from sexual harassment claims remains. This legislative oversight as we have seen has had, and will continue to have, devastating consequences for complainants of sexual harassment by Members of Parliament. By allowing this to continue, a mockery is being made of Western Australia's Equal Opportunity Act by the same arm of Government responsible for designing, creating and implementing it. It is the settled opinion of the public that there is no good reason for Members of Parliament to continue to remain outside the law.[170] Therefore this Amendment Bill may well be the 'push' the Western Australian State Government needs to action change.

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[165] Western Australia, *Parliamentary Debates*, above n 124.
[166] Ibid.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.

VIII PROPOSALS AND RECOMMENDATIONS: THE BEST APPROACH FORWARD

This paper has demonstrated that currently there is no harmonisation between Australia's Federal, State and Territory anti-discrimination legislation relating to sexual harassment in employment. Significant reforms are required to address the inconsistencies and various proposals and recommendations have been made. This paper will now address these proposals and will make general recommendations aimed at strengthening the definition of sexual harassment and enhancing its coverage, and will make specific recommendations in relation to sexual harassment in Parliament.

In summary, these recommendations are:

- Broadening the test for sexual harassment;
- Enacting legislation outlawing sexual harassment in its entirety;
- Implementing positive duties on employers to aid in the prevention of sexual harassment;
- Extending the coverage of sexual harassment to allow protection for all workers, including parliamentarians;
- Ensuring the State of Western Australia is able to be held vicariously liable for sexual harassment by State Government employees; and
- Restricting parliamentary privilege to avoid parliamentarians invoking it as a defence for engaging in conduct which may be classified as sexual harassment.

A *General Reforms of Sexual Harassment Legislation*

1 *Broadening the Sexual Harassment Test*

As part of a broader reform the Senate Standing Committee on Legal and Constitutional Affairs made a general recommendation to broaden the test for sexual harassment. It had been proposed that this could be done in a number of ways.

Firstly, it may be possible to broaden the test for sexual harassment by removing the requirement that a person harassed would be 'offended, humiliated or intimidated' and replacing it with a requirement that 'the person harassed would find the conduct unwelcome'.[171]

It has been argued that 'the requirement that the person harassed would be offended, humiliated or intimidated contains questionable moralistic overtones. While sexual harassment can contribute to inequality at work, the phrasing in the SDA currently requires the person harassed to present themselves as fragile and vulnerable'.[172]

In theory this proposal is a positive step. However, it is problematic in application because how does one determine if certain sexually oriented conduct is unwelcome? 'It is clear that some forms of conduct are unwelcome by their nature but the unwelcomeness of other conduct, such

[171] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, above n 19, 62-63.
[172] Ibid 63.

as a social invitation, is less obvious because the reaction can be ambiguous'.[173] Therefore in this instance, anything less than a clear rejection of sexual advances or a clear objection to offensive behaviour would cause a claim to fail by reason of a lack of persuasive evidence of proof on the issue of unwelcomeness.[174]

This leads to another key issue. From whose point of view should the question of unwelcomeness be viewed: the reasonable man, woman or person? While Australia uses the reasonable person test, many courts in other countries (namely the lower courts of the United States, the United Kingdom, Canada and Switzerland) have opposed the subjective standard of the individual complainant and favoured the reasonable woman test.[175] The first United States decision to adopt a 'reasonable woman' standard was in the case *Ellison v Brady*[176]. The reason for the court's approach was essentially that men and women often perceive sexual conduct very differently and research has proven that women are the ones who principally suffer from sexual harassment. This paper is of the view that a shift to the reasonable woman standard is unlikely to beneficially advance Australia's legislation because men and women often perceive situations in entirely different lights. For this reason a claim for sexual harassment could eventuate from what may be regarded by a man as a friendly and well-intentioned compliment, but which may be perceived by a woman as sexual harassment.[177] This particular issue was evident in the chair-sniffing incident involving Mr Buswell. While Mr Buswell genuinely considered his behaviour as 'playful' and 'for a laugh', the complainant found it 'offensive and humiliating'. Ashraf made the point, '[i]f male judges are forced to apply a reasonable woman standard, how can we be so sure that they are applying a reasonable woman's perspective rather than a male-biased view of what the reasonable woman's perspective is?'.[178] To illustrate this, Justice Einfeld in *Hall, Oliver and Reid v Sheiban* rather absurdly found that any 'sensible woman would not have been offended by an employer's behaviour which included asking women in an interview if they were sexually active and once they were employed, lowering the zips on their uniforms'.[179]

It is evident that there has to be a balance on one hand between lower scale incidents still being taken seriously, and on the other, strengthening the definition such that it may mean fewer women legally experience sexual harassment.

Secondly, it has been suggested that the definition could be amended to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the harassed person would be offended, humiliated or intimidated.[180] The Australian Human Rights Commission supports the broadening of the definition in this way because presently the definition in the SDA is limiting in that the reasonable person is required to anticipate that the

[173] Robert Husbands, above n 117, 542.
[174] Ibid.
[175] Ibid.
[176] *Ellison v Brady*, 924 F 2d 872 (9th Cir 1991).
[177] Senate Committee, Parliament of Australia, above n 21, 26.
[178] Saba Ashraf, 'The Reasonableness of the 'Reasonable Woman' Standard: An Evaluation of its use in Hostile Environment Sexual Harassment Claims under Title VII of the Civil Rights Act' (1992) 21 *Hofstra Law Review* 483, 500.
[179] *Hall, Oliver and Reid v Sheiban* (1988) EOC 92-227.
[180] Jan Dransfield and Clare Yazbeck, *Changes to Federal Sex Discrimination Act – First Phase of Broader Reform* (2010) Blake Dawson Lawyers <http://blakedawson.com/Templates/Publications/x_publication_ content_page.aspx?id=58641> 1 July 2010.

person would actually be offended.[181] It is proposed in the Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) that the definition in Western Australia's Equal Opportunity Act be amended to coincide with the definition in the SDA. The definition of sexual harassment in the SDA is a much stricter test than that contained in some State and Territory legislation. For example, s119 of the *Anti-Discrimination Act 1991* (QLD) provides that 'the person engaging in conduct … does so in circumstances where a reasonable person would have anticipated the *possibility* that the other person would be offended, humiliated or intimidated by the conduct'. In addition, the Australian Human Rights Commission argued that the Act should include a provision equivalent to s120 of the *Anti-Discrimination Act 1991* (QLD) which is essentially a statutory guide to the relevant circumstances for determining whether the broader sexual harassment test has been satisfied. Section 120 provides the relevant circumstances include[182]:

- the sex, age and race of the other person;
- any impairment the other person may have;
- the relationship between the other person and the person engaged in the conduct; and
- any other circumstances of the other person.

The advantage of incorporating a statutory guide is that it clearly directs the court to assess the reasonableness of the impugned conduct, having particular regard to the individual circumstances and characteristics of the complainant, in order to help explain why the individual complainant regarded the conduct as unwelcome.[183] By contrast, the SDA contains only a vague reference to 'having regard to all the circumstances'.[184]

There is an advantage of broadening the test for sexual harassment in this way. The legislation would then allow a complainant to make a complaint before the perpetrator's conduct actually causes them offense, intimidation or humiliation. It would assist in preventing sexual harassment from occurring as opposed to taking action after the sexual harassment has taken place. Imposing this test improves upon the current individual complaint-based system because it is forward looking, rather than backward looking. The Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) does not propose this amendment. The Western Australian State Parliament should not be content to merely copy the sexual harassment legislation of the Commonwealth without considerable thought. It should aim to improve upon and strengthen the definition of sexual harassment.

2 *Implementing a 'Blanket' Provision Against Sexual Harassment*

Rather than seeking to 'plug the gaps' the Western Australian Equal Opportunity Commission has suggested an alternative whereby Western Australia's Equal Opportunity Act could be amended to make sexual harassment unlawful in all areas.[185] Essentially this provision would be a 'blanket' provision making sexual harassment unlawful per se in particular areas of public

[181] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, above n 19, 63.
[182] *Anti-Discrimination Act 1991* (QLD) s120.
[183] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, above n 19, 64.
[184] *Sex Discrimination Act 1984* (Cth), s28A.
[185] Western Australia Equal Opportunity Commission, above n 45, 28.

life.[186] The Commission further recommended this prohibition extend to access to places and vehicles.[187] This provision could be drafted in similar terms to s118 of the *Anti-Discrimination Act 1991* (QLD) which simply provides, '[a] person must not sexually harass another person'.[188] Because the setting against which sexual harassment is prohibited is not mentioned at all in the *Anti-Discrimination Act 1991* (QLD) this seems to indicate the prohibition is across all areas of public life.

The following States have also taken a similar approach. When read in conjunction with one another, s17 and s22 of the *Anti-Discrimination Act 1998* (TAS) create a 'blanket' provision prohibiting a person from sexually harassing another whilst either, or both people are engaged in, or undertaking, any activity in connection with employment. Similarly, s22 of the *Anti-Discrimination Act* (NT)(as in force from 1 July 2010) states that sexual harassment is prohibited in any area of activity referred to in Part 4 of the Act, which includes 'work'.

When the States were initially enacting legislation to deal with discrimination in the workforce, including sexual harassment, some States enacted legislation that outlawed sexual harassment in its entirety, whereas other States including Western Australia chose to enact equal opportunity legislation that was proscriptive on employment relationships.[189] As the dynamics, structures and technology within workplaces continually change, there is a need for the laws governing them to evolve concurrently. Western Australia's Equal Opportunity Act has failed to do this and as a result, a large percentage of its workforce is exposed to sexual harassment without adequate legislative protection. Take for example, Members of Parliament or any State Government employee employed in any judicial, legislative or executive arm of the Western Australian State Government. It is simply unacceptable that five years have elapsed since Mr Buswell engaged in conduct that would constitute sexual harassment and yet, there is still no legislative protection for Members of Parliament or parliamentary workers against sexual harassment in the workplace. This paper agrees with Pace's opinion that 'Queensland has formulated, applied and continues to apply a definition of sexual harassment that does not seem to attract the problems identified in other jurisdictions'.[190] Furthermore, the Queensland Anti-Discrimination Act provides an unrestricted and comprehensive coverage against sexual harassment. The simplicity of this legislative framework is attractive. This paper is of the opinion it is a better solution than the framework Western Australia currently has implemented.

3 *Implementation of Positive Duties*

Another proposal which has been put forward has been the imposition of positive duties. A recent survey has found that 40% of Australian organisations do not provide any training about sexual harassment.[191] This has been allowed to happen because Australia's current laws do nothing to regulate the responsibility of employers to educate employees on the issue of sexual harassment in the workplace.[192] To address this, Australia may benefit from implementing a

[186] Legislative and General Purpose Standing Committee, Department of the Senate of the Commonwealth of Australia, above n 19, 62.
[187] Western Australia Equal Opportunity Commission, above n 45, 28.
[188] *Anti-Discrimination Act 1991* (QLD) s118.
[189] Western Australia, *Parliamentary Debates*, above n 124.
[190] Fiona Pace, 'Concepts of Reasonableness in Sexual Harassment Legislation: Did Queensland Get it Right?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 21.
[191] Australian Government Equal Opportunity for Women in the Workplace Agency, *Survey into Paid Maternity Leave, Sex-based Harassment Initiatives and the Gender Pay Gap* (2009) 10.
[192] Mackay, above n 4, 205.

model similar to that which exists in New Zealand. Under New Zealand legislation sexual harassment is described as a personal grievance that can be taken up with the employer.[193] This concept is founded in New Zealand's labour law framework in relation to employment contracts rather than in anti-discrimination legislation.[194] Australia could introduce a similar model whereby if a person is sexually harassed in the workplace the onus of responsibility lies with the employer as the employer has a positive duty to prevent sexual harassment from occurring. It would therefore be in the employer's best interest to update workplace policies regarding sexual harassment and to organise regular staff meetings or workshops which reiterate company policy that sexual harassment is prohibited. The Australian Human Rights Commission has released a sexual harassment *Code of Practice* which is designed to assist employers in developing workplace policies and procedures that comply with anti-discrimination and equal opportunity legislation.[195] Should an incident then occur which is in breach of the workplace policy, an employee could expect to be disciplined by his or her employer (including a reprimand, a transfer, a demotion, suspension of services or even dismissal) however the employee's sanction must be proportionate to the severity of the harassment. There is no doubt that positive duties like this might be seen to impose a heavy burden on employers, especially small businesses, however the advantages of a harassment-free workplace should far outweigh the burdens imposed by this model.[196] This model has been successful in New Zealand however the writer is aware that a legislative change of this magnitude would require extensive consultation and consideration of the impact on Australia's current legislation.

In Australia some employers choose to incorporate sexual harassment clauses in the employment contracts they offer to potential employees. For example, the Western Australian State Parliament's Parliamentary Employees General Agreement 2008 annexes a schedule entitled 'Code of Conduct for Employees of the Parliament of Western Australia'.[197] This Code of Conduct outlines the standard of behaviour expected of all employees of the Parliament. With respect to harassment the Agreement confirms:

> The Employers consider it the right of every individual to be treated fairly and with respect and to carry out their job in an environment which promotes job satisfaction, maximizes productivity, and provides economic security. Such an environment is dependent on Employees being free from all forms of harassment and victimisation. You *must not* harass anyone (*sexually* or otherwise) or discriminate on the grounds of, for instance, sex; sexual preference; age; marital status; pregnancy; the state of being a parent; childless or a de facto spouse; race; colour; national extraction; lawful religious or political belief or activity; or mental or physical impairment. *The principles of the Western Australian and the Commonwealth equal employment opportunity and anti-discrimination legislation are fully supported.*[198]

It must be noted that this direction contains a fundamental error. This paper has demonstrated that neither the Western Australian or Commonwealth anti-discrimination legislation prohibits sexual harassment in parliamentary employment, yet *prima facie* this employment contract appears to reference the equal opportunity legislation with the implication that it does actually

[193] Husbands, above n 117.
[194] Ibid.
[195] Human Rights and Equal Opportunity Commission, above n 17.
[196] Mackay, above n 4, 207.
[197] Parliament of Western Australia, *Parliamentary Employees General Agreement 2008 < http:// www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Employment>* 5 September 2010.
[198] Ibid (emphasis added).

prohibits this. The imposition of a contractual clause like this allows the head of the relevant department under which the parliamentarian or parliamentary worker is employed, to discipline or terminate a person's employment should they engage in any form of harassment. It does not empower a complainant to seek a remedy for having to endure a perpetrator's conduct. Furthermore, it is evident from the case study involving Mr Buswell that in some situations employers fail to address the situation adequately, or at all. This illustrates the need for Western Australia to remedy its current legislative framework in relation to sexual harassment in employment. This will ensure the imposition of positive duties through employment contracts coincide with, and actually have the support of, legislation.

The United Kingdom and more recently, the State of Victoria, have framed their legislation so as to impose a positive duty on employers. Part 3, s14 of the *Equal Opportunity Act 2010* (Vic) (which received Royal Assent on 27 April 2010 but will not commence operation until 1 August 2011)[199] states, '[t]he purpose of this Part is to provide for the taking of positive action to eliminate discrimination, sexual harassment and victimisation'.[200] The new provisions introduce a duty on employers to proactively comply with the Act's equal opportunity obligations which include taking all reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.[201] 'For a large employer to meet this duty it would be required to undertake an assessment of its compliance with the Equal Opportunity Act and develop a compliance strategy which includes regular monitoring and provides for continuous improvement of the strategy'.[202] However this duty is not enforceable through individual complaints, nor is there a statutory enforcement authority. The assessments are only used to form the basis upon which the Commission may investigate allegations of sexual harassment.[203]

In the United Kingdom, the UK Parliamentary Committee thought that the imposition of positive duties under the *Equality Act 2006* (UK) might provide a useful model which could be adopted and applied either to public sector organizations or to both the public and private sector through the *Sex Discrimination Act 1975* (UK).[204] Accordingly, s76A was amended to impose the following statutory duty on public authorities[205]:

> A public authority shall in carrying out its function have due regard to the need –
> (a) to eliminate unlawful discrimination and harassment; and
> (b) to promote equality of opportunity between men and women.

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[199] Maansi Gupta and Steven Amendola, *New Equal Opportunity Legislation for Victoria* (27 April 2010) Blake Dawson Lawyers <http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=58423> 20 August 2010.

[200] *Equal Opportunity Act 2010* (Vic) s14.

[201] Gupta and Amendola, above n 199.

[202] Ibid.

A similar affirmative action plan is required by the Equal Opportunity law in Sweden. Employers (with more than ten employees) are required to submit annually a plan which should indicate, *inter alia*, what positive steps are to be taken to prevent sexual harassment in the workplace: Robert Husbands, 'Sexual Harassment Law in Employment: An International Perspective' (1992) 131 *International Labour Review* 535, 549.

[203] Ibid.

[204] Mackay, above n 4, 202.

[205] *The Equality Act 2006 (Commencement No. 1) Order 2006* (UK).

However there were limits placed on the application of this duty.[206] The positive duties were held not to apply to all public authorities. Among those exempted include the Church of England, the Secret Intelligence Service, the House of Commons and the House of Lords.[207] In accordance with the principle of parliamentary privilege, the duties also do not apply to the exercise of judicial and parliamentary functions'.[208]

This paper recommends the implementation of positive duties but notes that consideration will need to be given as to their interaction with Australia's national and State employment standards. The introduction of legally binding standards and positive duties for employers is a positive step forward. To an extent it encourages self-regulation to achieve social change in the workplace. In order for positive duties to effectively assist in preventing sexual harassment in the workplace, the implementing framework (whether it is contract based or legislative) needs to be comprehensive in its application and should not be limited to certain employment relationships. The duties must be written in clear and unambiguous terms, and they should be governed, and their compliance controlled, by an appropriate enforcement mechanism or authority. This will ensure employers do not fail in their obligation to prevent sexual harassment in the workplace.

B *Specific Reforms of Sexual Harassment Legislation in Relation to Parliament*

1 *Extending the Coverage of Sexual Harassment to include Parliamentarians*

To rectify the legislative deficiency which exempts Members of Parliament and parliamentary workers from the application of the sexual harassment provisions in relation to employment, it has been suggested that there be a much broader extension of the ambit of sexual harassment provisions with respect to employment.[209]

To address inconsistent approaches and gaps across anti-discrimination legislation it has been proposed that the protection from sexual harassment should extend to workers who have been harassed by customers, clients and *other persons with whom they come into contact in connection with their employment*.[210] This would include but would not be limited to, fellow workers, employers and people sharing common workplaces but having no commonality of employer. This would simply ensure protection for anyone who is undertaking some form of employment. It would remove the need for the legislation to group all the different types of employment relationships and would cover those employment relationships such as those involving parliamentary employees, which the current legislation omits.

This paper recommends this approach rather than the approach taken by the Equal Opportunity (Members of Parliament) Amendment Bill 2010 which is to define yet another employment relationship.

[206] Mackay, above n 4, 202.
[207] Ibid.
[208] Ibid.
[209] Commonwealth, *Sex Discrimination and Other Legislation Amendment Bill 1992*, above n 41, 3.
[210] Dransfield and Yazbeck, above n 180.

2 *Vicarious Liability*

Parker has noted that, 'the most important basis of potential corporate liability for sexual harassment in State, Territory and Federal jurisdictions is the possibility of vicarious liability for acts of sexual harassment by employees or agents'.[211] However, vicarious liability cannot be attributed to the State of Western Australia as an employer of State Government employees because Western Australia's Equal Opportunity Act lacks provisions protecting State Government employees from sexual harassment.

This issue was debated in New South Wales in 1997 at the time their Anti-Discrimination Amendment Bill was put before the State Parliament. It was resolved that their Bill would ensure that the law which was applicable to private enterprise would also be applicable to the State Government.[212] Similarly, in 2001 in the case *Rutherford v Wilson & State of Queensland*[213], the Queensland Anti-Discrimination Tribunal held that Mr Wilson, a senior ministerial advisor, had sexually harassed the complainant, a former government administrative officer. Both Mr Wilson and the State of Queensland vicariously were ordered to pay the complainant damages.

In Western Australia, Members of Parliament are not public servants, they enjoy a special autonomous status.[214] A Member of Parliament enjoys a position resembling a supervisor. A Member of Parliament is for all intents and purposes, the 'boss' of government provided staff.[215] However, from a legal view point this is not their formal legal status. This consequently means that no vicarious liability exists in this instance. Therefore when the complainant about Mr Buswell's conduct made numerous complaints, one of which was to the Premier, there was no legal duty requiring Mr Buswell or his employer to address the incident.

This paper recommends that amendments be made to ensure that the State Government or relevant State instrumentality is also comprehensively bound by the Western Australian Equal Opportunity Act, as is provided by other State anti-discrimination legislation. Mr Whitely agreed with this view as evidenced by his statement, 'all State Government employees deserve protection in their workplace' so he could see no reason why 'the State Government should not asssume some sort of responsibility'.[216]

3 *Parliamentary Privilege*

Section 24(2B) of the Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) still permits parliamentary privilege to be used to escape liability for sexual harassment. While extending the Act to cover sexual harassment by Members of Parliament, the amendments also seek to protect parliamentary privilege. Section 24(2B) provides that sexual harassment does not apply in relation to anything said or done by a Member of Parliament in the course of parliamentary proceedings. While the Bill includes a definition of parliamentary proceedings it is not intended to limit the scope of parliamentary privilege. Some issues which may fall outside

[211] Christine Parker, 'Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation' (1999) 5(1) *Australian Journal of Human Rights* 159, 163.
[212] New South Wales, *Parliamentary Debates*, above n 149, 6265 (The Honourable JW Shaw).
[213] *Rutherford v Wilson & State of Queensland* [2001] QADT 7 (21 May 2001).
[214] Interview with Martin Whitely, above n 28.
[215] Ibid.
[216] Ibid.

the definition of parliamentary proceedings in the Bill may still fall within parliamentary privilege and so would be subject to the procedures set out in the Bill.[217]

Unfortunately the word 'privilege' can convey a false impression that Members of Parliament are, and desire to be, in a privileged class.[218] In some respects, *prima facie*, this appears true especially in light of their autonomous status and exemption from workplace sexual harassment legislation. The 'privilege' a Member of Parliament enjoys as a result of his or her employment position should be restricted. There is no good reason for a person to engage in sexual harassment during the course of parliamentary proceedings or otherwise. The writer is of the opinion that only the most important aspect of parliamentary privilege should be retained. That is, the right to attend parliament and speak freely in debates. In any other circumstance sexual harassment should be treated no differently than if it occurred in any other workplace. In the words of The Honourable Elizabeth Stevens,

> [c]itizens who believe they have been a victim of unlawful behaviour by Members of Parliament, judicial officers or members of a council need to be confident that they will get fair treatment and the same treatment as if the perpetrator was any other citizen'.[219]

Any complaints should be referred to the Presiding Officer as opposed to the Equal Opportunity Commissioner. This will ensure there is no interference with the constitutional role of Parliament by the Executive arm of Government.

It is regrettable that laws such as this which are aimed at the behaviour of Members of Parliament have to be passed. From an employer's point of view, management plays a particularly important role in combating sexual harassment in the workplace. People in management positions must accept as part of their management status and responsibility, the need to set a good example by ensuring that they behave professionally at all times.[220] As public officers, Members of Parliament have a privileged position in society but this should not absolve them from the responsibility of their positions to set and abide by higher standards of behaviour than the average person.[221] As public figures this is what society expects of them, but as this paper has shown, this higher standard is not always evident in their behaviour.

IX CONCLUSION

Prior to the 1970s there was no real recognition of the problem of sexual harassment. As Catharine MacKinnon states of that era, 'sexual harassment was something that just happened to you … the facts amounting to the harm did not socially 'exist', had no shape, no cognitive coherence; far less did they state a legal claim'.[222] The notion of sexual harassment and legislative support thereof has evolved substantially since that time. Nonetheless, Western Australia's Equal Opportunity Act relating to sexual harassment with particular reference to employment is limited in its application. It fails to cover some of the most fundamental types of employment relations. There is currently no recourse against sexual harassment for Members of Parliament and parliamentary staff. However, Western Australia is moving in the right

[217] South Australia, *Parliamentary Debates*, above n 138.
[218] Ibid.
[219] South Australia, *Parliamentary Debates*, above n 143, 1931 (Ms Elizabeth Stevens).
[220] Ian Curlewis, 'Sexual Harassment: Discrimination and Stress in the Workplace' (undated) 58 *Australian Construction law Newsletter* 40, 42.
[221] South Australia, *Parliamentary Debates*, above n 138, 1714 (The Honourable Carolyn Pickles, Leader of the Opposition).
[222] Catharine MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987) 106.

direction towards a situation where, in the future, Members of Parliament and parliamentary staff will be subject to the laws relating to sexual harassment.[223]

The Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) which is currently before Parliament provides adequate coverage of this type of employment relationship. However, the writer is of the opinion that Western Australia should not simply settle to resolve the loophole with a resolution that is adequate. There are numerous ways in which our legislation could be amended so that it would be as good, or if not better, than the legislation in place in the other Australian States and Territories.

In summary, this paper recommends that the test for sexual harassment be amended to include the *possibility* that someone may be offended, humiliated or intimidated. This would help to prevent sexual harassment rather than allowing recourse only after a complainant has experienced sexual harassment. An extension of the ambit of sexual harassment to other persons a worker 'comes into contact with in connection with their employment' would remove the need to identify and categorise every type of employment relationship and ensure that everybody in the workforce has adequate legislative protection against sexual harassment. Employers should be doing more to make their workplaces free from harassment. Imposing legally binding positive duties on them is onerous but is worthwhile as a prevention mechanism. It will also help create healthy and safe working environments which may in turn result in increased employee well-being and productivity, and a decrease in staff turnover rates.

This paper also recommends that the State of Western Australia be forced take responsibility vicariously for acts of sexual harassment that occur in public sector employment positions which are under the State's control. There is no good reason why State Government employees should not have sexual harassment prohibition policies and procedures brought to their attention, or receive adequate training on the issue of sexual harassment in the workplace. This has been allowed to occur because currently there are no rules or regulations which govern State Government employment in this regard. Because Members of Parliament are public figures they should be held to a higher standard of responsibility for their actions. And furthermore, they should not be able to avoid responsibility on the basis of parliamentary privilege. After all, the loophole was brought to light because one Member of Parliament was behaving in a manner unbefitting to his public stature.

Rather than extending our legislative provision to yet another type of employment relationship it seems that the simplest legislative provision devised in relation to this topic has been the most successful and comprehensive in providing protection against sexual harassment. Western Australia should follow suit. The Equal Opportunity (Members of Parliament) Amendment Bill 2010 (WA) should simply outlaw sexual harassment in its entirety by stating '[a] person must not sexually harass another person'.[224]

[223] South Australia, *Parliamentary Debates*, above n 138, 1711 (The Honourable KT Griffin).
[224] *Anti-Discrimination Act 1991* (QLD) s118.