The Need for a Tort of Harassment

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Introduction

Harassment is not a new concept in law. The question as to whether there should be a tort of harassment is debatable and has been argued for a long time. Although there is disagreement over the need for a tort of harassment, there are a number of factors which indicate that Australia should adopt such a tort. These include:

- history and development of this tort in other countries;
- limitations of presently recognised torts;
- limitations of existing statutes;
- harassment as a growing social problem.

Any analysis of a potential tort of harassment must include a definition of the term 'harassment'. In the ordinary sense, to harass means "to disturb persistently; torment, as with troubles, cares, etc.",[1] or "to trouble and annoy continually or repeatedly".[2] In legal terms, harassment is more specific and can mean "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".[3] More specifically, the concept of harassment covers a wide range of activity including: unwanted sexual advances; attempts to persuade tenants to leave property; intrusive journalistic practices; molestation and other forms of assault and battery; and annoying activities such as nuisance telephone calls. It presents circumstances similar to the related issue of the protection of privacy,[4] and can be classified into sexual harassment, racial

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1 Belbridge A, et al, *The Macquarie Dictionary*, 3rd ed, The Macquarie Library, Macquarie University,
1997.

2 Moore B, *The Australian Concise Oxford Dictionary of Current English*, 3rd ed, Oxford University Press, Melbourne, 1997.

3 Dukelow DA, *The Dictionary of Canadian Law*, Carswell Thomson Publishing, Ontario, 1995.

4 Stanton K, "Harassment: an emerging tort?" (1993) *Tort Law Review* 179.

harassment, physical harassment, religious harassment, disability harassment, and general harassment.[5]

History

Development in England

The tort of harassment under English law has undergone a century of struggled development. As early as in 1897,[6] the English court recognised liability based on the principle that it is a tort to intentionally cause *physical* injury to a person irrespective of whether there is a technical assault or battery.[7] In *Wilkinson v Downton*,[8] the defendant falsely made a joke to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock rendering her ill. Wright J. stated in his judgement that wilfully doing an act calculated to cause physical harm is to infringe the plaintiff's legal right to personal safety. The act caused physical harm to her and was in law malicious, although there was no malicious purpose to cause the harm. However, to create an actionable tort, a plaintiff was required to produce evidence of actual physical harm or impairment to health.

This decision was followed by *Janvier v Sweeney* in 1919.[9] The defendant was a private detective at the time, and had previously been a Scotland Yard detective. He informed the plaintiff that she had been in correspondence with a person who was a German spy. His aim of the informing was to terrify her and thereby make her reveal private letters of her employer. The plaintiff claimed that she suffered nervous shock as a result of being falsely informed. The evidence of resulting physical illness seemed clear. Duke LJ thought that this case was stronger than *Wilkinson* on the intention point as there "the defendant merely intended to play a practical joke upon the plaintiff", whereas in *Janvier* "there was an intention to terrify the plaintiff".

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5 (a) Townshend-Smith R, "Harassment as a tort in English and American law: the boundaries of *Wilkinson v. Downton*" (1995) 24 (3) *Anglo-American Law Review* 299. (b) Conaghan J, "Harassment and the law of torts: *Khorasandjian v. Bush*" (1993) 1 (2) *Feminist Legal Studies* 189.

6 *Wilkinson v Downton* [1897] 2 QB 57.

7 *Wilkinson v Downton*, note 7.

8 *Wilkinson v Downton*, note 7. For a recent Australian application of this decision, see *Carnier v Bonham* [2001] QCA 234.

9 *Janvier v Sweeney* [1919] 2 KB 316.

These two cases were rare instances at that time and were not sufficient in themselves to establish a tort of harassment. Accordingly, it was not surprising that, in 1988, the English Court of Appeal declared in *Patel v Patel*[10] that "there is no tort of harassment". It was there alleged that the defendant had broken the terms of an injunction by harassment, which took the form of approaching the plaintiff's house and making nuisance telephone calls. Waterhouse J was clear that the essence of the plaintiff's complaint was that the defendant had conducted a campaign of repeated harassment but that no injunction could be granted as no tort of harassment is recognised by English law. May LJ achieved the same result by means of a slightly more circumspect approach which was to the effect that no allegations of actual trespass had been made.

Because of the unwillingness of the English courts to develop the tort of harassment, most cases that *could* be classified as harassment have been dealt with in alternative ways, for example through statute and actions in private nuisance. Despite this, a number of commentators have been arguing for the recognition of the tort of harassment by English law.[11]

The opportunity for such recognition presented itself in 1992. A differently constituted Court of Appeal in *Burnett v George* [12] made a distinct change. It seized on evidence to the effect that the plaintiff's health had been affected by the defendant's conduct, which involved molestation, unwanted visits and telephone calls. It further established that where such conduct *does* produce that kind of result, it *is* tortious and the authorities laid down by *Wilkinson v Downton* and *Janvier v Sweeney* should be followed.

Then followed the ruling of the Court of Appeal in *Khorasandjian v Bush* in 1993.[13] The plaintiff, a girl at 18 years of age, had formed a friendship with the defendant, a man of 23. After a time, the friendship broke down and the plaintiff decided that she would have no more to do with the defendant. This was difficult for the defendant to accept. There followed a catalogue of complaints against the defendant, including assaults, threats of violence and pestering the plaintiff at her parents' home where she lived. As a result of the defendant's threats and abusive behaviour he was convicted of assault. The court decided

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10 *Patel v Patel* [1988] 2 FLR 179 per Waterhouse J.

11 For example, FA Trindate, "The Intentional Infliction of Purely Emotional Distress" (1986) 6 *Oxford Journal of Legal Studies* 219; also Conaghan, note 5(b), p194.

12 *Burnett v George* (1992) 1 FLR 525.

13 (a) *Khorasandjian v Bush* (1993) 3 All ER 669. (b) Murphy J, "The emergence of harassment as a recognised tort", (1993) 25 June, *New Law Journal* 926.

that an injunction can be granted *before* physical harm occurs, where the stress created by harassment creates a risk to health if the conduct is allowed to continue. The injunction granted subsequently was to restrain the defendant from various forms of activity directed at the plaintiff, including an order restraining him from "harassing, pestering or communicating with" the plaintiff.

The above-mentioned cases trace the evolution of the law of harassment - from the recognition that harassment may be a tort with the requirement that there is physical damage; to an injunction which can be granted before the physical injury has eventuated. This evolution can be seen as progressive, satisfying the need in a civilized community to recognise human rights, of which the protection of personal integrity is an important component; and identifying that there is greater need for a civil legal mechanism with which to deal with harassment in today's social climate.

Regrettably, it seems that the 'fate' of the newborn tort of harassment is its inability to grow up. The Court of Appeal decision in *Khorasandjian v Bush* was overruled by House of Lords in 1997 in *Hunter v Canary Wharf*.[14] There it was declared that it is unnecessary to consider how the common law of harassment might have developed because the law of harassment has now been put on a statutory basis – under the *Protection from Harassment Act* 1997 (UK).

Development in the United States

The successful development of a tort of harassment is exemplified in the United States. The judicial development of the tort has occurred for nearly a century, and may be divided into three stages.

In the first stage, the courts were concerned with the scope of unlawful harassment.[15] In the 1903 case of *Reed v Maley*,[16] the Kentucky Court of Appeal accepted the opinion that no damages should be awarded for distress falling short of actual physical injury. This reflected the difficulty for the courts to affix an appropriate sum by way of compensation for the distress caused by harassing conduct. This position was reinforced in 1961 by *Samms v Eccles*.[17]

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14 *Hunter v Canary Wharf* [1997] 2 All ER 426.

15 Townshend-Smith, R., note 5(a), p313.

16 *Reed v Maley* (1903) 74 SW Ct App Kentucky 1079.

17 *Samms v Eccles* (1961) 358 P.2d Sup Ct Utah 344.

The courts also took the stance that the harassment acts must be sufficiently outrageous in order to be regarded as tortious. For example, in the Utah Supreme Court case of *Samms v Eccles*[18], the complaint was that the defendant persistently telephoned the plaintiff in an effort to persuade her to have sexual relations with him. Some of the calls were made late at night and on one occasion the defendant came to her house to back up his proposal and while there indecently exposed himself. The court held that *that* conduct was sufficiently outrageous to be actionable. In *Alcorn v Anbro Engineering Inc*,[19] the gist of the complaint was that the defendant had intentionally disparaged the plaintiff's race in a rude, violent and insolent manner. There, the California Supreme Court accepted that, in the factual situation, the insulting language used was capable of giving rise to a cause of action.

The second stage of development was the judicial recognition that, where the violation is intentional rather than negligent, proof of actual physical injury was not required.[20] In the California Supreme Court case of *State Rubbish Collectors Association v Siliznoff*,[21] the complaint was of emotional distress caused by threats. While the plaintiff testified that he vomited several times and had to stay away from work for a few days, the *real* issue of the complaint was ongoing emotional distress. The court concluded that where the defendant's conduct is deliberate and outrageous, there is no social utility in granting an exemption from liability based on an absence of physical injury.

The third stage was the judicial ruling that the relevant conduct may be inferred as intentional or reckless from the very outrageousness of the conduct.[22] In the District Court of Columbia case of *Rogers v Loews L'Enfant Plaza Hotel*,[23] the defendant habitually made sexual advances towards the plaintiff who was assistant manager of a hotel restaurant. He pressed notes and letters into her hand when she was busy, or slipped them inside menus or into her handbag. In addition, he telephoned her at home and work, making sarcastic leering comments about her personal and sexual life. The court recognised

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18 *Samms v Eccles*, note 17.

19 *Alcorn v Anbro Engineering Inc* (1970) 468 P. 2d Sup Ct California 261.

20 *Samms v Eccles* (1961) note 17.

21 *State Rubbish Collectors Association v Siliznoff* (1952) 240 P. 2d Sup Ct California 282.

22 Townshend-Smith, note 5(a), p319.

23 *Rogers v Loews L'Enfant Plaza Hotel* (1981) 526 F.Supp. US District Ct Columbia 523.

that subjective intent to injure can rarely be proved directly, even where the facts are indeed outrageous. It held that the very outrageousness of the conduct was sufficient to support a conclusion that the defendant *intended* to harm the plaintiff. This maxim was followed and proved later in *Howard University v Best*.[24]

In sum, the common law of harassment has been well developed in the United States. The tort is defined there as the actions of "one who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another, is subject to liability for such emotional distress".[25]

Development in Australia

Australian law does not recognise a tort of harassment. Rather, complaints with respect to sexual and racial harassment are undertaken under the relevant statutes, namely the *Sex Discrimination Act* 1984 (Cth) and *Racial Discrimination Act* 1975 (Cth). In the next part, it will be shown that this is an inadequate way of dealing with harassment and that presently recognised torts are likewise ineffectual. The successful development of the tort of harassment in the United States lends support to the argument that such a tort should also have its place in Australian tort law.

Limitations of Presently Recognised Torts

The courts have stretched established legal principles of presently recognised torts in order to find an effective remedy against harassment. However, an examination of these principles reveals certain limitations.

The Tort of Battery

A battery is any act of the defendant directly and either intentionally or negligently causing contact with the body of the plaintiff without the latter's consent.[26] The tort of battery is aimed at protecting an individual's physical integrity and the most trivial physical contact may be actionable whether or not it causes actual bodily harm. The tort

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[24] *Howard University v Best* (1984) 484 A. 2d Columbia Ct App 958.

[25] *Second Restatement of Torts* (1966), s 46, The American Law Institute.

[26] Trindade F, Cane P, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Melbourne, 1999, p 27.

of battery is inadequate to deal with harassment conduct since it only applies where there has been actual physical contact[27] between the harasser and the victim and cannot apply to verbal harassment. Also, in no sense is battery geared to the specific problem of sexual or other forms of harassment, including such instances as repeated telephoning.

Another major stumbling block for harassment cases to be dealt with by the tort of battery is establishing a lack of consent. Particularly in sexual harassment claims, women are often precluded from openly voicing their lack of consent by the canons of sexual politeness, the fear of being considered exceedingly sensitive and the threat of losing a job even where the threat is implied or potential.[28] This is illustrated in the Australian Federal Court case of *Hall v A. & A. Sheiban*[29] where one of the acts alleged to be harassment involved the defendant, an employer, placing his arm around the plaintiff's waist and guiding her down the hallway. The plaintiff did not refuse because of the fear of losing her job. The action was taken under the *Sex Discrimination Act* 1984 (Cth). Nonetheless, the difficulty of proving lack of consent would have been the *same* had the action been one of battery.

The Tort of Assault

The tort of assault comprises direct threat by the defendant which places the plaintiff in reasonable apprehension of an imminent contact with his or her person either by the defendant, or by some person or thing within the defendant's control.[30] Succinctly stated, an assault is the expectation of an imminent battery.

There are several advantages of bringing an action in assault instead of battery. Its scope is wider than that of battery since the plaintiff can sue for mere apprehension, anguish, shock and humiliation produced by a threat with or without physical contact. Once an assault is established, the plaintiff may recover compensatory damages solely for the apprehension induced by the threat, with additional compensatory damages being awarded for any physical injury caused if battery follows. Moreover, an action in assault could cover the circumstances that the legislation does not. For example, in a sexual harassment situation, because assault incorporates conditional threats, it enables a

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27 *Collins v Wilcock* [1984] 1 WLR 1172.

28 Sinha, S, "Sexual Harassment and the Common Law" (1993) 18 (2) *Alternative Law Journal* 58.

29 *Hall v A. & A. Sheiban* (1989) 85 ALR 503, 20 FCR 217.

30 *Hall v Fonceca* [1983] WAR 309.

woman to bring an action against an employer who threatens to molest her if she refuses to do him a favour outside the scope of her employment, such an action may be difficult to succeed under the *Sex Discrimination Act* 1984 (Cth), Division 3 – Sexual Harassment.[31]

However, the tort of assault is not apt to cover many situations. It requires the victim to have been in *fear* of undesired physical contact. In many instances, proof that the harasser intended or foresaw such fear may be problematic. Moreover, where the gist of the complaint is the unpleasantness or intolerability of the defendant's behaviour, there may be no expectation of actual physical contact. In this sense, words alone are unlikely to amount to assault, although it is repeated or prolonged.[32]

The Tort of Private Nuisance

The tort of private nuisance cannot deal with all harassment issues either, since it focuses on the plaintiff's *enjoyment of land*. Thus, a plaintiff must have some kind of proprietary interest in the land affected by the nuisance in order to bring a claim.[33] The authorities in this area reveal considerable confusion as to the nature of the interest required. In many situations, the victims are unable to sue because of lack of title. This is particularly the case in family situations. A Victorian case, *Oldham v Lawson*,[34] is a good example. There the plaintiffs, a husband and wife, who resided in a house owned solely by the wife, claimed damages for nuisance by noise from the adjoining house. Harris J ruled that the husband was only a licensee and could not sue in nuisance in the absence of some particular circumstances altering his status.[35] In English common law, the position is the same. Lord Goff reaffirmed the position of the House of Lords in *Hunter v Canary Wharf*:[36]

> "If under the relevant legislation a spouse becomes entitled to possession of the matrimonial home or part of it, there is no

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31 It appears that the Act only applies to the workplace. See section entitled 'Statutory Approach vs. Harassment Tort Approach' in this paper.

32 Townshend-Smith R, note 5(a), p311.

33 Stanton, note 4, p182.

34 *Oldham v Lawson* [1976] VR 654.

35 Circumstances such as the payment of money due by the owner of the house and the payment of rates would be insufficient to alter that status. *Oldham v Lawson*, note 34, p657 per Harris J.

36 *Hunter v Canary Wharf*, note 15, p440.

> reason why he or she should not be able to sue in private nuisance in the ordinary way. But I do not see how a spouse who has no interest in the matrimonial home has, simply by virtue of his or her cohabiting in the matrimonial home with his or her wife or husband whose freehold or leasehold property it is, a right to sue. No distinction can sensibly be drawn between such spouses and other cohabitees in the home, such as children, or grandparents."

Consequently, the plaintiffs in *Khorasandjian*'s case (as a daughter) and in a Canadian case *Motherwell v Motherwell*[37] (as a wife with no interest in the property) would *not* be able to sue in private nuisance for harassment if these cases were to be redecided. The same result would apply in respect of unwanted and persistent telephone calls to the work place. Since the tort of private nuisance is restricted to ownership of land, many persons who seek injunctions preventing harassment are unlikely to satisfy the condition of having title to land.

The Tort of Negligence

In contrast to the tort of private nuisance, the right to sue under the tort of negligence extends to many situations having nothing to do with ownership or occupation of property. Mere presence on the land, in circumstances where a duty in law to those present is owed by the wrongdoer, is enough to enable the victim to sue in negligence.[38] In *Jaensch v Coffey*,[39] a collision of the plaintiff's husband's motorcycle with a car negligently driven by the defendant caused a severe injury to her husband. That event and the subsequent critical condition of her husband resulted in her severe anxiety, depression and gynaecological problems. Although she had no proprietary interests in the accident spot, or the hospital where she saw her husband, she was awarded damages on the grounds of negligence. One commentator has suggested that *Wilkinson v Downton* (where the facts were similar to *Jaensch v Coffey* except that the wife's illness resulted from calculated misrepresentation) could be reclassified as a case of negligence involving nervous shock.[40]

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37 *Motherwell v Motherwell* (1976) 73 DLR (3d) 62.

38 *Hunter v Canary Wharf* note 15, p 467 per Lord Hope.

39 *Jaensch v Coffey* (1984) 155 CLR 549.

40 Noble M, "Harassment – a Recognised Tort?" (1993) Nov 26 *New Law Journal* 1685. See also McPherson JA in *Carrier v Bonham* [2001] QCA 234.

However, the tort of negligence does not compensate for mere grief or sorrow, which is no more than an immediate emotional response to a distressing experience, no matter how severe it is.[41] Harassment more often occurs where the victim suffers mere emotional distress or discomfort, which is distinguishable from recognisable and severe physical damage to the human body and system caused by the impact of external events on the mind.[42] Consequently, most claims cannot satisfy the required type of damage under the tort of negligence.

The conclusion from this brief evaluation of presently recognised torts is that they are ill equipped to handle situations of harassment. A tort of harassment is therefore required for such situations.

Statutory Approach vs. Harassment Tort Approach

The legislative answer to harassment has many limitations. First, the legislation has been shown in practice to have failed to protect personal integrity. Although the *Sex Discrimination Act* (Cth) was enacted in 1984, a 1986 survey showed 31 percent of Australian women reported serious harassment incidents.[43] This failure is partly blamed on the limitations of the Act itself. While focusing on structural workplace discrimination, the Act fails to adequately deal with harassment as a violation of personal integrity analogous to, or indeed constituting, an assault or battery. It has therefore not assuaged the demands of the victim that justice be meted out to the harasser. In contrast, it is the common law that emphasises individual rights and has the potential to supplement the insufficiency in statute law.[44]

Another limitation with respect to statute law is the location of harassment. Although section 9 of the *Racial Discrimination Act* 1975 (Cth) widely extends its application to all fields of public life,[45] the *Sex Discrimination Act* 1984 (Cth) appears restricted to the workplace

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41 *Mount Isa Mines v Pusey*, note 44, p 394; *Coates v GIO of NSW* (1995) 36 NSWLR 1.

42 *Khorasandjian v Bush*, note 14(a), p 676 per Dillon LJ.

43 Watch Tower Bible and Tract Society of Pennsylvania," Sexual Harassment-A Global Problem", *Awake!* May 22, 1996, http://www.watchtower.org/library/g/1996/5/22/sexual_harassment_global.htm (17 October 1999).

44 Townshend-Smith R, note 5(a), p301.

45 *Racial Discrimination Act* 1975 (Cth) s9 (1) reads: 'It is unlawful… to do any act involving a distinction, … based on race, colour,… which has the purpose … of nullifying … the recognition, … on an equal footing, of any human right … in the political, economic, social, cultural or any other field of public life.'

insofar as section 28B relates to unlawful sexual harassment in different work-relationships (see subsections 1–5) and harassment "at a place that is a workplace" (see subsection 6). This proposition finds support in the holding of Finn J in a Federal Court case *McManus v Scott-Charlton*[46] that:

> "…notwithstanding such individual view …of the need to proscribe an employee's private, sexually harassing conduct of a co-worker and no matter how powerfully that view may be held, the *Sex Discrimination Act* alone does not provide justification for the use of binding employment directions to the end."

Although the issue in that case was whether an employer may exercise the power to stop an employee's sexual harassment of a co-employee outside the workplace, the holding suggests that, when outside the workplace, the work-relationship is invalidated. Therefore, arguably, his ruling that the *Sex Discrimination Act* 1984 (Cth) "does not provide justification for the use of binding employment directions to the end" implies that section 28B (1)-(5) does not extend to outside the workplace. Consequently it is difficult for a complainant to argue to the contrary.[47]

A similar example is found in British statutes. The *Sex Discrimination Act* 1975 (UK) - the model on which Australian jurisdictions have relied[48] - and *Race Relations Act* 1976 (UK) focus on sexual and racial harassment in the workplace.[49] In other contexts, victims of such harassment are left to the traditional torts, supplemented by the very narrowly circumscribed offence of incitement to racial hatred. Thus legislation is unlikely to assist the victim of racial harassment on the streets. Furthermore, trivial offences are not actionable. Where behaviour is covered by anti-discrimination legislation, the statutory requirement that conduct be to the victim's 'detriment' in effect

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46 *McManus v Scott-Charlton* (1996) 70 FCR 16, per Finn J at 27.

47 (a) Watts N, " Sexual harassment outside the workplace: may an employer regulate his workers' private lives?" *The Australian Legal Monthly Digest*, CD-ROM, Thomson Professional Information Asia Pacific Pty Ltd t/a LBC Information Services, 8 July 1998.
(b) Zweighaft R, "What's the harm? The legal accommodation of hostile environment sexual harassment" (1997) *Comparative Labor Law Journal* 434, fn 236.

48 Human Rights Australia, *Sex Discrimination Act 1984 – A Review of Exemptions*, Australian Government Publishing Service, Canberra, 1992, p38.

49 Townshend-Smith R, note 5(a), p301.

provides *a threshold of seriousness*. Thus, a Tribunal may decline to hear relatively trivial cases.[50]

Another problem encountered by the statutory approach to harassment is delay. Two Australian sexual harassment cases[51] took two and a half, and three and a half years, of mediation and conciliation before being heard by the court. Not only did this waste public money (since these complaints are dealt with by government agencies[52]) but it was also frustrating for the victims, leading to their impatience and their forgetting of important details. In contrast, the tort of harassment enables the victims to be represented by private solicitors, and to bring an action to the court without delay.

Moreover, compensation for harassment under statute is *lower* than under a tort of harassment. British Industrial Tribunals (where sexual harassment cases are proceeded under statute) are restricted by statutory limits on the total amount of compensation awardable.[53] The fact that compensation for sexual harassment has been towards the top end of the range under the *Sex Discrimination Act* 1975 (UK) only emphasises the relatively low level of compensation under that Act. In racial harassment cases, the situation is the same. Compensation for racial harassment is not higher than other awards under the *Race Relations Act* 1976 (UK). [54]

Additionally, only complainants that have been forced to resign from their position of employment may obtain high compensation handouts. The Industrial Tribunals strong emphasis on providing compensation for financial loss, and their consequent underplaying of non-pecuniary loss, means that it is difficult to obtain high compensation without quitting a job. It is also clear that successful claimants in harassment

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50 Townshend-Smith R, note 5(a), p301-2.

51 (a) *Hall v A & A. Sheiban* (1989) 85 ALR 503, 20 FCR 217.
(b) *Bennett & Anor v Everitt & Anor* (1988) EOC ¶92-244.

52 Under the *Sex Discrimination Act* 1984 (Cth), *Racial Discrimination Act* 1975 (Cth) and the *Human Rights and Equal Opportunity Commission Act* 1986, the Human Rights and Equal Opportunity Commission administers these Acts. For example: the *Human Rights and Equal Opportunity Commission Act* 1986 at section 11, subsection (1) states that the functions of the Commission are conferred by *the Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth), and others. See also: Dearden IFM, "Sexual harassment and Racial Discrimination – A Practitioner's Guide to the Legislation" (1990) June, Queensland Law Society Journal 189.

53 By the *Unfair Dismissal (Increase of Compensation Limit) Order* 1993, the maximum compensation in discrimination cases not also comprising unfair dismissal (where a basic award may in addition be payable) was set at £11,000, and there was no increase in 1994. See: Townshend-Smith R, note 5(a), p306, fn 31.

54 Townshend-Smith R, note 5(a), p306, fn 32.

and other discrimination cases may experience consequential difficulties at their place of employment causing them to leave their work. From a legal perspective, the ideal is for victims to be in a position to obtain substantial compensation, while retaining their employment status. From a practical perspective, the ideal for victims is that the harassment ceases. However, both of these scenarios are unlikely to be achieved by statute. The solution should be left to the common law.[55]

Sexual and racial harassment are not the only factors which cause people to be treated intolerably. Once harassment without actual or threatened physical contact is accepted as potentially within the statute law, it is illogical to restrict the law to matters of sex and race. Disability, appearance, religion and other personal factors may also lead to highly unpleasant and distressing treatment. These may occur both within and outside the workplace, so if the focus switches to a personal remedy against the harasser, the law would reflect a wider and more consistent approach. In this regard, a tort of harassment is suitable.[56]

Another significant advantage of permitting victims of harassment to claim in the civil courts rather than before an industrial tribunal is that legal aid may be available. In contrast, when heard in a tribunal under statute, victims usually have to represent themselves.[57]

The change of litigation in the United States illustrates the need to combine the relevant statute with the tort of harassment. After the civil rights movement of the fifties and early sixties, Title VII of the *Civil Rights Act* 1964 (US) was enacted as anti-discrimination legislation.[58] Title VII of *Civil Rights Act* 1964 (US) prohibits employment discrimination based on race, colour, religion, sex and national origin.[59] The statute was enacted before sexual harassment had been clearly identified. The courts innovatively created a cause of action for sexual harassment under the existing anti-discrimination legislation,

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55 Townshend-Smith, note 5(a), p307-8.

56 Townshend-Smith, note 5(a), at 302.

57 Townshend-Smith, note 5(a), at 306.

58 Freeman J, "How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy", March 1991, <http://www.inform.umd.edu/EdRes/Topic/WomensStudies/ReadingRoom/AcademicPapers/sex-in-title-vii>, (29 August 1999).

59 The U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964", January 15, 1997, <http://www.eeoc.gov/laws/vii.html> (29 August 99).

seen for example in the case of *Williams v Saxbe*.[60] In spite of this, Title VII of the *Civil Rights Act* 1964 (US) applied only to businesses with at least fifteen employees and exempted private clubs and religious organisations.

Similar to Australia, under the *Civil Rights Act* 1964 (US), a condition precedent to litigation was that a claim under the statute must go to the Equal Employment Opportunity Commission first.[61] A complainant would wait the required 180 days, and received a letter of 'right to sue' which allowed them to litigate. Not only was this seen as waste of time,[62] but the fact that the Equal Employment Opportunity Commission rarely took any action (for instance, it rejected 73% of the sex harassment cases for insufficient cause over six years prior to 1995[63]) frustrated social justice against wrong doers.

Now, as result of the *Civil Rights Act* 1991 (US), a plaintiff not only may sue for sexual harassment, but may also file common law causes of action for intentional torts or simultaneously a cause of action pursuant to a state human rights legislation.[64] The United States experience therefore shows that a tort of harassment is necessary as an alternative or supplement to statutory measures in the fight against harassment.

With regard to Australian legislation, apart from limitations based on workingplace and confinement to sexual and racial harassments as discussed above, a further problem is lack of corrective justice. For example, the *Sex Discrimination Act* 1984 (Cth) is beset with compromise and consequently does not adequately empower the victim.[65] Dearden points out "the *Sex Discrimination Act* 1984 (Cth) … was a classic example of a committee setting out to create a horse and ending up creating a camel."[66] By opting for mediation and conciliation, the message carried by the legislation is essentially blunted. These solutions do not identify harassing conduct as *unequivocally wrong*. The plaintiff's autonomy and interest in physical and mental integrity are not unequivocally affirmed. In

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60 *Williams v Saxbe* (1976) 413 F.Sup D.D.C. 654.

61 Townshend-Smith R, note 56(a), p306, fn 31.

62 Kelly JM, Watt B, "Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law" (1996) 16 N.Y.L. Sch. J. Int'l & Com. L.79.

63 Kelly JM, Watt B, "Damages in Sex Harassment Cases: A Comparative Study of American, Canadian, and British Law" (1996) 16 N.Y.L. Sch. J. Int'l & Com. L.79.

64 *Taylor v Central Pa. Drug & Alcohol Service Corp* (1995) 890 M.D. Pa F.Supp. 360.

65 Dearden, note 58, p189.

66 Dearden, note 58, p189.

addition, unnecessarily complex enforcement procedures weakens the protection of victims.[67] A successful tort action before a court of law would achieve this goal.

A Suggested Australian Tort of Harassment and Potential Problems

The tort of harassment in the United States, defined in *Second Restatement of Torts* (1966)[68], could be the model for an Australian tort of harassment. In this way the tort can be extended outside the workplace and beyond the scope of simply sexual and racial harassments.

In so far as sexual harassment is concerned, the tort may define such harassment as any sexual advance, solicitation, request or demand for sexual compliance, after the complainant has asked the defendant to stop the behaviour.[69] With respect to racial harassment, the tort would cover individual acts of racism, recognising that the indignity of racist insults should be compensated like any other personal injury.[70] Similarly, the proposed tort of harassment could be developed to protect the personal integrity arising from one's disability, appearance, religion and other personal characteristics.

While a tort of harassment is necessary in Australia, there are some potential difficulties which such a tort may create in practice.

One practical problem is that a plaintiff's sensitivity may be abnormal.[71] When any remedy is raised in relation to emotional harm, there is always the argument that the victim is abnormally sensitive.[72]

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67 The complaint procedure includes lodgement of a complaint in writing within 12 months of the act complained (*Sex Discrimination Act* 1984 (Cth) s52 (2)(c); *Racial Discrimination Act* 1975 (Cth) s24 (2)(c); *HR&EOCA* s20 (2)(c)(i)); conciliation consisting of negotiations and conferences; a Commission hearing and then the Federal Court hearing. See Dearden, note 58, p189-92.

68 *Second Restatement of Torts*, note 6.

69 This stems from Californian law, and is restricted to instances where there is a business, service, or professional relationship between the harasser and the victim. This restriction is lifted in the suggested tort of sexual harassment in Australia for the reasons discussed above. See: Greenberg D.H., "Sexual Harassment Outside the Workplace", http://discriminationattorney.com/harassno.html> (17 October 1999).

70 Graycar R, and Morgan J, "Work and Violence Themes: Including Gender Issues in The Core Law Curriculum", *Torts*, 23 May 1999,
<http://www.anu.edu.au/law/pub/teaching_material/genderissues/>,
(19 October 1999).

71 Trindade and Cane, note 27, p70.

72 Trindade and Cane, note 27, p70.

In the High Court case of *Bunyan v Jordan*,[73] the plaintiff observed her intoxicated employer handling a loaded revolver and overheard that he was going to shoot himself or someone else, as a result of which she suffered nervous shock. The court held that the injury was *not* such as might reasonably have been expected by the defendant to result from his conduct and she failed in the claim. Although the grounds of action included negligence and other factors rather than harassment, this case illustrates that there is a danger that an apparently unusually nervous individual might be denied recovery on the basis that severe emotional distress is unforeseeable.

A Maryland Court of Appeal case, *Harris v Jones*,[74] exemplifies such a danger in harassment claims. The defendant had maliciously laughed at the complainant's stutter. The court noted that outrage "may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." This demonstrates the possibility that a claim may be defeated by the defendant's denial of any knowledge about such susceptibility. Furthermore, the more stoic might fail on the ground that no severe emotional distress has occurred, and even if they win, their compensation may be relatively low based on the way in which they have come to terms with the events.[75]

Another problem posed by the creation of a tort of harassment is that judges have to familiarise themselves with the degree of speech may cause to particular groups.[76] For example, Anglo-Saxon judges need to take account of the affront exacted by racist speech. Likewise, male judges need to do the same as regards sexually offensive behaviour towards women.[77] Judicial education of these matters is crucial for the effective use of the tort of harassment.

Conclusion

The current inadequacies in presently recognised torts and legislation in dealing with harassment issues highlight the need for a separate tort of harassment. In particular, the Australian legislation currently covers only racial and sexual harassment, and the latter is confined to the workplace. Even if there was comprehensive harassment legislation,

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73 *Bunyan v Jordan* (1937) 57 CLR 1.

74 *Harris v Jones* (1977) 380 A. 2d Ct App. Maryland 611.

75 Townshend-Smith, note 5(a), p324.

76 Townshend-Smith, note 5(a), p324.

77 Townshend-Smith, note 5(a), p324.

the tort of harassment should be established as an alternative and supplementary weapon to fight harassers.

Obviously, law is not static, but reflects changes in society.[78] Therefore, the law should not be fettered by outdated principles but should adopt new ideas when dealing with new issues, and consequently redevelop itself. Such a development at common law would provide the basis for amended legislation, which must continue to mature in order to allow for a more sophisticated and nuanced understanding of and remedy for harassment.[79] While there may be potential problems in the establishment of a tort of harassment, the mechanisms of such a tort will improve with time and experience. The fact that a tort of harassment has been successfully integrated into United States law provides a pioneer model, indicating the expediency of such a tort being introduced and developed in Australia.

78 Zweighaft, note 53(b), p434.

79 Zweighaft, note 53(b), p434.