CONCEPTS OF 'REASONABLENESS' IN SEXUAL HARASSMENT LEGISLATION: DID QUEENSLAND GET IT RIGHT?

FIONA PACE*

I INTRODUCTION

Sexual harassment is undoubtedly a pervasive and serious problem for women[1] in our society. Legislative responses to sexual harassment have now been implemented in many jurisdictions around the world, including Australia at both state and federal levels. Sexual harassment is proscribed in Australia by the federal *Sex Discrimination Act 1984* (Cth) (*SDA*)[2] and anti-discrimination laws in all States and Territories.[3]

Determining the boundaries of sexual harassment is an extremely difficult exercise. Which behaviours constitute sexual harassment and which do not? Legislatures have found that defining sexual harassment is not an easy task and there have been various legislative attempts to grapple with the relevant issues.

Legislative definitions of sexual harassment prescribe a number of elements that a complainant must prove in order to establish the occurrence of unlawful sexual harassment. 'Reasonableness' has regularly been included as an element of the legal definition of sexual harassment. In the context of sexual harassment law, the reasonable

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1 The female gender is referred to throughout this paper. Sexual harassment can be perpetrated by either sex against the same or opposite sex and consequently although the protection against sexual harassment applies equally to men and women, it is predominantly women who are the victims of sexual harassment: *Human Rights and Equal Opportunity Commission Annual Report* 1995-1996, AGPS (1996) 90; *Sexual Harassment and Educational Institutions: A Guide to the Federal Sex Discrimination* Act (1996) 15; K Eastman, 'What is Sexual Harassment?', *Sexual Harassment: 1998 Seminar Papers* (1998) 12; CCH *Australian & New Zealand Equal Opportunity Law and Practice Reporter* (2001) 58-525; C Ronalds, *Discrimination Law and Practice* (1998) 73; Sex Discrimination Commissioner, *Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade: Inquiry Into Sexual Harassment in the Australian Defence Force* (November 1993) 1.

2 Sections 28A-28L.

3 *Anti-Discrimination Act 1991* (Qld) ss 118-120; *Anti-Discrimination Act 1992* (NT) s 22; *Anti-Discrimination Act 1977* (NSW) ss 22A-22J; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act* 1991 (ACT) ss 58-64; *Equal Opportunity Act 1995* (Vic) ss 85-89; *Equal Opportunity Act 1984* (SA) s 87; *Equal Opportunity Act 1984* (WA) ss 24-26.

person standard serves as a mechanism for identifying behaviour that constitutes sexual harassment and which is therefore unlawful.

All anti-discrimination legislation within the various Australian jurisdictions utilises the concept of reasonableness as a component of the test for unlawful sexual harassment.[4] Overseas jurisdictions such as the United States also apply a reasonableness test in defining sexual harassment.[5] As between the different jurisdictions, there are variations in the content and application of the notion of reasonableness.

This paper examines the role that these various legislative standards of reasonableness play in sexual harassment cases. It identifies problems with the concept and application of reasonableness, particularly as it applies to women, and examines the position in the United States and federal Australian jurisdictions to illustrate such problems.

In light of the potential problems with the use of the concept of 'reasonableness', the issue as to how Queensland uses reasonableness in defining and identifying which behaviours do or do not constitute sexual harassment is then explored. The Queensland approach to the issue of reasonableness appears to have avoided the problems that have plagued the various legislative attempts in other jurisdictions.

II PROBLEMS WITH DEFINING SEXUAL HARASSMENT

The term 'sexual harassment' is notoriously difficult to define. There is no universally accepted definition of sexual harassment and there are different views about where the boundaries lie. What one person considers sexual harassment may not be considered to be harassment by another and the matter is further complicated by the fact that men and women tend to have very different perspectives on the issue.

There have been various legislative attempts in both Australian and overseas jurisdictions to address these challenges and define what behaviours constitute unlawful sexual harassment. Unfortunately, most of these legislative attempts have been plagued with difficulties and have instead served to impose unnecessary hurdles for women who wish to prove a sexual harassment claim.

III CRITIQUE OF REASONABLENESS TESTS

It is evident that there is no standardised, across-the-board definition of what constitutes sexual harassment. The concept of 'reasonableness' as a test for unlawful sexual harassment, however, is a common legislative theme found in all Australian jurisdictions[6] as well as overseas jurisdictions such as the United States.[7] The various

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4 *Anti-Discrimination Act 1991* (Qld) s 119; *Anti-Discrimination Act 1992* (NT) s 22(2); *Anti-Discrimination Act 1977* (NSW) s 22A; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act* 1991 (ACT) s 58; *Equal Opportunity Act 1995* (Vic) s 85; *Equal Opportunity Act 1984* (SA) s 87(11); *Equal Opportunity Act 1984* (WA) ss 24-26.

5 Title VII *Civil Rights Act 1964* 42 USC 2000e (1988); Equal Employment Opportunity Commission Guidelines on Sexual Harassment (1991) 29 CFR 1604.11.

6 *Anti-Discrimination Act 1991* (Qld) s 119; *Sex Discrimination Act 1984* (Cth) s 28A; *Anti-Discrimination Act 1992* (NT) s 22(2); *Anti-Discrimination Act 1977* (NSW) s 22A; *Anti-Discrimination Act 1998* (Tas) s 17; *Discrimination Act* 1991 (ACT) s 58; *Equal Opportunity Act 1995* (Vic) s 85; *Equal Opportunity Act 1984* (SA) s 87(11); *Equal Opportunity Act 1984* (WA) ss 24-26.

reasonableness tests generally require either that a reasonable person would be offended by the respondent's conduct, or that the victim had reasonable grounds for believing she would be disadvantaged by objecting to the harassment, or that a reasonable person would anticipate that the victim would be offended.

This notion of reasonableness is one that has long been the subject of substantial criticism.[8]

A *The objectively 'reasonable person'*

A substantive criticism of the 'reasonable person' standard is its questionable claim to universal objectivity. The reasonable person standard applied by judicial decision-makers is assumed to provide a code of conduct that is commonly understood. The reasonable person is said to be neutral: devoid of gender, class, race, sexuality or other immutable characteristics. What this approach fails to recognise, however, is that there is in fact no self-evident, commonsense, consensus view about what is reasonable. The judgment as to what is reasonable is clearly going to depend upon the position and perspective from which the question is viewed.[9]

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7 Title VII *Civil Rights Act 1964* 42 USC 2000e (1988); Equal Employment Opportunity Commission Guidelines on Sexual Harassment (1991) 29 CFR 1604.11.

8 See, eg, W Parker, 'The Reasonable Person: A Gendered Concept?' (1993) 23(2) *VUWLR* 105; A Thacker (ed), *Women and the Law: Judicial Attitudes as they Impact on Women: Proceedings of a conference held on 9-10 June at Melbourne*, 1988; T Adams, 'Universalism and Sexual Harassment' (1991) 44 *Oklahoma Law Review* 683; S Oskamp & M Costanzo (eds), *Gender Issues in Contemporary Society* (1993) 205-213; M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990); M Weiss and C Young, *Feminist Jurisprudence: Equal Rights or Neo-Paternalism?*, Cato Policy Analysis No 256, June 19 1996; P Johnson, 'The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?' (1993) 28 *Wake Forest Law Review* 619; V Grainer, 'Refining the Regulation of Sexual Harassment' (1993) 23(2) *VUWLR* 127; M Einfeld, 'Sexual Harassment' (Dec 1988/March 1989) 21 *Australian Journal of Forensic Sciences* 43; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177; B Gaze & M Jones, *Law, Liberty and Australian Democracy* (1990); E Glidden, 'The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment' [1992] *Iowa Law Review* 1825; A Juliano, 'Did She Ask For It?: The "Unwelcome" Requirement in Sexual Harassment Cases' (1992) 77(6) *Cornell Law Review* 1558; E Wall, *Sexual Harassment: Confrontations and Decisions* (1992); M Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) Chapter 5; N Harvey and A Twomey, *Sexual Harassment in the Workplace: A Practical Guide for Employers and Employees in Ireland* (1995); D Rhode, *Justice and Gender: Sex Discrimination and the Law* (1989); P Smith (ed), *Feminist Jurisprudence* (1993); C MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979); A Resnick, 'The Reasonable Woman Standard' (1992) 19 *Ohio Northern University Law Review* 17; D Brenneman, 'From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases' (1992) 60 *Cincinnati Law Review* 1281; C Smart, *Law, Crime and Sexuality: Essays in Feminism* (1995) 186-202; C Forell, 'Reasonable Woman Standard of Care' (1992) 11 *University of Tasmania Law Review* 1; P Almony, '*Ellison v Brady*: A Legal Compromise With Reality in Cases of Sexual Harassment' (1992) 37 *Villanova Law Review* 195; D Weisberg, *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work and Reproduction* (1996) 725-825; D Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (1995) Chapter 4; C Dragel, 'Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted? (1991) 11 *Journal of Law and Commerce* 237; W Pollack, 'Sexual Harassment: Women's Experiences. Legal Definitions' (1990) 13 *Harvard Women's Law Journal* 35.

9 See, eg, W Parker, 'The Reasonable Person: A Gendered Concept?' (1993) 23(2) *VUWLR* 105, 106; A Thacker (ed), *Women and the Law: Judicial Attitudes as they Impact on Women: Proceedings of a conference held on 9-10 June at Melbourne* (1988) 74-75; T Adams,

B *The 'reasonable person' is gendered*

Many commentators also argue that the reasonableness standard is itself gendered; that it is male experiences, views and perspectives that are embodied in the notion of reasonableness and how it is applied.[10] Gender differences dictate that a reasonable woman and a reasonable man are likely to differ in their judgments of what is offensive yet it is assumed that women's experiences are part of everyone's commonsense knowledge.[11] In actual fact, 'common knowledge' about women and the reasonableness of conduct is based on male knowledge.[12] According to Thornton,[13] decision-makers in sexual harassment cases derive as much of their 'knowledge' about what a woman is, what a woman can do and what is reasonable, from "stereotypes, ideology, folklore, prejudice, and intractable misconceptions"[14] as they do from efforts to understand the complex realities of women's experiences. The conduct of both victims and perpetrators of sexual harassment are measured against male standards and as a result, incidents of sexual harassment are trivialised and stereotypes reinforced by decision-makers.

Legal commentators have identified a number of ways in which this 'male view' of sexual harassment influences sexual harassment decisions and interpretations of reasonableness. The following is a list of the typical 'male views' found in sexual harassment decisions which illustrate how decision makers fail to understand the reality of women's experiences as sexual harassment victims or acknowledge the seriousness of the harm:

1 *'She's just too sensitive and was only offended because of her emotional problems'*

'Universalism and Sexual Harassment' (1991) 44 *Oklahoma Law Review* 683, 683; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177, 1213.

10 See, eg, W Parker, 'The Reasonable Person: A Gendered Concept?' (1993) 23(2) *VUWLR* 105; A Thacker (ed), *Women and the Law: Judicial Attitudes as they Impact on Women: Proceedings of a conference held on 9-10 June at Melbourne* (1988) 74; A Juliano, 'Did She Ask For It?: The "Unwelcome" Requirement in Sexual harassment Cases' (1992) 77(6) *Cornell Law Review* 1558, 1559; E Wall, *Sexual Harassment: Confrontations and Decisions* (1992) 199-202; M Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) Chapter 5; N Harvey and A Twomey, *Sexual Harassment in the Workplace: A Practical Guide for Employers and Employees in Ireland* (1995) 22; E Glidden, 'The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment' [1992] *Iowa Law Review* 1825, 1837-1839; D Brenneman, 'From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases' (1992) 60 *Cincinnati Law Review* 1281; C Smart, *Law, Crime and Sexuality: Essays in Feminism* (1995) 186-202; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177; C Forell, 'Reasonable Woman Standard of Care' (1992) 11 *University of Tasmania Law Review* 1; P Almony, '*Ellison v Brady*: A Legal Compromise With Reality in Cases of Sexual Harassment' (1992) 37 *Villanova Law Review* 195; W Pollack, 'Sexual Harassment: Women's Experiences. Legal Definitions' (1990) 13 *Harvard Women's Law Journal* 35.

11 E Wall, *Sexual Harassment: Confrontations and Decisions* (1992) 200.

12 M Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 276.

13 Ibid 267-268, 273.

14 Ibid 268.

The view is often taken that women who resent sexual harassment are oversensitive or have pre-existing emotional problems; that even if the acts did occur, it is unreasonable for women to experience them as harmful.[15]

2 *'Her sexual history and willingness to swear or discuss sexual matters means she could not have been offended'*

A complainant's non-victimised sexual behaviour, language and conversation are often scrutinised and used to legitimise sexual harassment by providing the harasser with an excuse for his behaviour.[16]

3 *'It was an isolated incident so why worry?'*

Some decision-makers believe that harassing behaviour is isolated and idiosyncratic and therefore not harmful and inappropriate for legal intervention.[17]

4 *'It's natural behaviour'*

Legal intervention may be seen as unwarranted because the conduct complained of is natural, trivial, mere flirtation, or a normal and expected consequence of the attraction between men and women. The victim should have been flattered, not insulted.[18]

5 *'I'm sorry I have to uphold the complaint'*

The use of apologetic tones and language in finding complaints substantiated can be found in some decisions. For instance, language has been used by decision-makers that

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15 P Smith (ed), *Feminist Jurisprudence* (1993) 148; D Rhode, *Justice and Gender: Sex Discrimination and the Law* (1989) 235; For case illustrations see *Bowden v Waldock & Anor* 1 QADR 118, 120-12; QADT No H2 of 1995, 5; *Rutherford v Wilson & Anor* [2001] QADT 7 (21 May 2001) 12, 13, 14, 22-24, 26; *V v Australian Red Cross (WA)* HREOCA Nos H97/264 & H97/265, 7.

16 P Smith (ed), *Feminist Jurisprudence* (1993) 152; W Pollack, 'Sexual Harassment: Women's Experiences. Legal Definitions' (1990) 13 *Harvard Women's Law Journal* 35, 57; K Bartlett and A Harris, *Gender and Law: Theory, Doctrine, Commentary* (1998) 515.

17 D Rhode, *Justice and Gender: Sex Discrimination and the Law* (1989) 233; For a case illustration see *Hall & Ors v Sheiban* [1988] HREOCA 5 (28 July 1988) 18; (1988) EOC 92-227, 77,146; reversed on appeal: *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250.

18 E Wall, *Sexual Harassment: Confrontations and Decisions* (1992) 201; W Pollack, 'Sexual Harassment: Women's Experiences. Legal Definitions' (1990) 13 *Harvard Women's Law Journal* 35, 64-65, 68, 77; D Rhode, *Justice and Gender: Sex Discrimination and the Law* (1989) 233, 235; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177, 1207; C Sanger, 'The Reasonable Woman and the Ordinary Man' (1992) 65 *Southern California Law Review* 1411, 1462; C Littleton, 'Dispelling Myths About Sexual Harassment: How the Senate Failed Twice' (1992) 65 *Southern California Law Review* 1419, 1425-1426; For case illustrations see *Hall & Ors v Sheiban* [1988] HREOCA 5 (28 July 1988) 7, 15, 18; (1988) EOC 92-227, 77,146-77,147; reversed on appeal: *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250; *A v B & Anor* (1991) EOC 92-367, 78,533; [1991] HREOCA 6 (31 May 1991) 8; *Davidson v Murphy* [1997] HREOCA 62 (24 November 1997) 8; *J v D Pty Ltd & Anor* [1997] HREOCA 17 (9 April 1997) 18; *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 73 (1986); Miller *v Bank of America*, 418 FSupp 233 (ND Cal, 1976); *Barnes v Costle*, 561 F2d 983, 1001 (DC Cir, 1977).

implies reluctance in upholding the complaint because the perpetrator only behaved as he did because of personal problems in his life.[19]

6 *'She was detached and cool when she gave evidence so she mustn't have been offended'*

The complainant's detached and calm manner of giving oral testimony may be perceived as indicating that she is not an emotional person and therefore could not have been upset by the sexual harassment.[20]

7 *'She tolerated the behaviour and did not complain immediately so she couldn't have been too bothered by it'*

Victims are punished for their tolerance. By tolerating the harassment and not objecting to or complaining about it immediately, the victim is perceived to have accepted the conduct, possibly even encouraged it but definitely not have been offended by it.[21] Such views ignore the realities of women's experiences as victims of sexual harassment and of what they must do to make life in the workplace bearable. Decision-makers discount or ignore the following factors which influence the different, yet nonetheless legitimate ways in which a victim of sexual harassment may respond to the harassment:[22]

- Fears that objecting/complaining will result in disadvantage (for example ridicule, demotion or dismissal);
- Fear that objecting/complaining would be futile;
- Feelings of shame, embarrassment, vulnerability and intimidation experienced by the victim;
- Ongoing nature of the harassment (rather than a discrete event);
- Power relationships and gender hierarchy between harasser and victim.

Rather than ignoring these important factors, decision-makers should view the conduct complained of through a global lens whereby all factors at play in circumstances of alleged harassment, including those listed above, are considered. By doing so, decision-makers would gain a greater understanding of the true impact of sexual harassment on victims and could judge the appropriateness of their reactions accordingly.

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19 D Rhode, *Justice and Gender: Sex Discrimination and the Law* (1989) 235; For case illustrations see *Rutherford v Wilson & Anor* [2001] QADT 7 (21 May 2001) 17, 28; *Vinson v Taylor*, 760 F2d 1330 (DC Cir, 1985); *Bundy v Jackson*, 641 F2d 934 (DC Cir, 1981); *Zabkowicz v West Bend Co*, 585 FSupp 635 (ED Wisc, 1984).

20 For case illustrations see, eg, *Hodson v Nanni & Ors* [1996] HREOCA 10 (15 May 1996) 6; *Clifford v SBS* [1998] HREOCA 25 (22 July 1998).

21 C MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 48; K Bartlett and A Harris, *Gender and Law: Theory, Doctrine, Commentary* (1998) 516, 529; For case illustrations see *Hodson v Nanni & Ors* [1996] HREOCA 10 (15 May 1996) 6; *Hall & Ors v Sheiban* [1988] HREOCA 5 (28 July 1988) 15; (1988) EOC 92-227, 77,144; reversed on appeal: *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250; *A v B & Anor* [1991] HREOCA 6 (31 May 1991) 6, 7; (1991) EOC 92-367, 78,531, 78,532; *Wu & Anor v Cohen & Anor* HREOCA No 99/43, 31, 38; *Correia v Juergin & Anor* HREOCA 19 (31 July 1995) 9; *Davidson v Murphy* [1997] HREOCA 62 (24 November 1997) 8, 9.

22 E Wall, *Sexual Harassment: Confrontations and Decisions* (1992) 201; C MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 48, 51-52; W Pollack, 'Sexual Harassment: Women's Experiences. Legal Definitions' (1990) 13 *Harvard Women's Law Journal* 35, 60-61, 76.

IV 'REASONABLENESS' IN THE UNITED STATES

Given the problems identified with application of the notion of reasonableness in sexual harassment cases, it is useful to briefly examine how the United States has attempted to grapple with these problems.

Sexual harassment claims are actionable in the United States under Title VII of the *Civil Rights Act 1964*.[23] The Equal Employment Opportunity Commission (EEOC) Guidelines[24] outline the interpretation of Title VII and although EEOC Guidelines do not have the force of law, federal courts in the United States have relied heavily on them. The EEOC Guidelines define sexual harassment as:[25]

> Unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting the individual; or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, or hostile working environment [labelled "hostile environment" sexual harassment].

To establish a hostile environment sexual harassment claim, the victim must not only demonstrate that she was offended by the behaviour, but that an objective third party – a *reasonable* person – would also have been offended.

The problem with this definition is that its ambiguity has allowed United States' courts considerable discretion in their choice of criteria used to identify sexual harassment. Courts have made it clear that the focus is on the victim's reaction to the behaviour rather than the intention of the harasser,[26] but debate continues as to whether the 'reasonableness' of the victim's response should be judged from the perspective of a gender neutral 'reasonable person' or a 'reasonable woman'. The result is a position in the United States that is unsatisfactory in at least two respects:

(1) the need for clear and consistent definitions is not fulfilled; and
(2) scrutiny of the cases and commentaries shows that both the 'reasonable person' and the 'reasonable woman' standards are problematic.

The 'reasonable person' standard attracts the criticism discussed above, that is the standard is not in fact gender neutral but embodies an exclusively 'male view' that ignores the experiences of women who endure sexual harassment.[27]

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23 42 USC 2000e (1988); Held to be actionable under Title VII in *Meritor Savings Bank v Vinson* (1986) 477 US 57, 63-69.

24 Equal Employment Opportunity Commission Guidelines on Sexual Harassment (1991) 29 CFR 1604.11.

25 Ibid; EEOC definition adopted by the court in *Meritor Savings Bank v Vinson* (1986) 477 US 57, 57.

26 E Glidden, 'The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment' (1992) *Iowa Law Review* 1825, 1840; See, eg, *Paroline v Unisys Corp*, 879 F2d 100, 105 (4th Cir, 1989).

27 For commentaries on the 'reasonable person' test and cases cited in support, see n 8.

Claims that the 'reasonable person' standard is male biased and ignores the experiences of women were expressly acknowledged and accepted by the court in *Ellison v Brady*.[28] In this case, the court rejected the gender-blind 'reasonable person' standard and held that the reasonableness of the harasser's behaviour is to be judged according to whether a 'reasonable *woman*' would consider the conduct to be offensive and hostile. In the court's view, this standard focused on women's experiences and thus best addressed the concerns of women who wish to work in a harassment free environment while still providing employers with adequate protection against idiosyncratic claims by those who wish to cry wolf.[29] Many other courts in the United States have used the 'reasonable woman' standard both prior to and after the decision in *Ellison v Brady*.[30]

Many commentators and judges argue that the 'reasonable woman' standard has its own problems.[31] One problem with this standard is that it tends to view all women as similarly situated in relation to sexual harassment simply because of their gender. It ignores the reality that women's experiences are diverse and that there are differences between women in terms of race, age, religion, class or sexuality.[32] By doing so, it thereby perpetuates the same wrongs inherent in the 'reasonable person' standard. It is also argued that even when decision-makers use the reasonable woman's perspective, it is often constructed from a male viewpoint.[33] Furthermore, many believe that adoption of a 'reasonable woman' standard may imply that women's experiences and reactions are something for women only, rather than normal human responses; that it will reinforce the notion that by being different to men, women are therefore weaker and need special treatment in the workplace.[34]

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28 924 F2d 872 (9th Cir, 1991) 878-879.

29 Ibid 879.

30 See, eg, *Andrews v City of Philadelphia* 895 F2d 1469 (3d Cir, 1990); *Harris v International Paper Co* 765 FSupp 1509 (D Me 1991); *Garvey v Dickinson* 761 FSupp 1175 (M D Pa 1991); *Robinson v Jacksonville Shipyards* 760 FSupp 1486 (M D Fla 1991); *Austen v State* 759 FSupp 612 (D Haw 1991); *Yates v Avco* 819 F2d 630 (6th Cir, 1987) 637; dissenting opinion in *Rabidue v Osceola Refining Co* 805 F2d 611 (6th Cir, 1986) 626.

31 See, eg, K Bartlett and A Harris, *Gender and Law: Theory, Doctrine, Commentary* (1998) 51-511; C Dragel, 'Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted?' (1991) 11 *Journal of Law and Commerce* 237, 253-255; D Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (1995) 201-207; D Rhode, 'Sexual Harassment' [1991] 65 *Southern California Law Review* 1459, 1464; D Weisberg (ed), *Applications of Feminist Legal Theory to Women's Lives* (1996) 730; T Adams, 'Universalism and Sexual Harassment' (1991) 44 *Oklahoma Law Review* 683; N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177, 1220; L Finley 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Law Journal of Law and Feminism* 41, 64; C Smart, *Law, Crime and Sexuality: Essays in Feminism* (1995) 190; P Johnson, 'The Reasonable Woman in Sexual Harassment Law: Progress or Illusion?' (1993) 28 *Wake Forest Law Review* 619; S French et al (eds), *Violence Against Women* (1998) 107-122; For criticisms of reasonable woman test in judicial decisions see for example *Radtke v Everett* 501 NW 2d 210 (7th Cir, 1986); *DeAngelis v El Paso Municipal Police Officers Association* 51 F3d 591 (5th Cir, 1995) 593.

32 N Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99(6) *Yale Law Journal* 1177, 1220.

33 D Rhode, 'Sexual Harassment' [1991] 65 *Southern California Law Review* 1459, 1464; D Weisberg (ed), *Applications of Feminist Legal Theory to Women's Lives* (1996) 770.

34 C Dragel, 'Hostile Environment Sexual Harassment: Should the Ninth Circuit's "Reasonable Woman" Standard be Adopted?' (1991) 11 *Journal of Law and Commerce* 237, 254; T Adams, 'Universalism and Sexual Harassment' (1991) 44 *Oklahoma Law Review* 683, 686; L Finley 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Law Journal of Law and Feminism* 41, 64.

V REASONABLENESS UNDER THE *SEX DISCRIMINATION ACT 1984* (CTH)

The Commonwealth *Sex Discrimination Act 1984* (Cth) ('SDA') makes sexual harassment unlawful.[35]

Since the *SDA*'s enactment in 1984, it has contained two markedly different definitions of sexual harassment. The current definition of sexual harassment is found in s 28A *SDA* whereas the former definition was found in s 28(3) *SDA*.

A *Original Definition of Sexual harassment under the SDA*

Prior to its amendment,[36] the initial definition of sexual harassment in s 28(3) of the *SDA*[37] read as follows:

> A person shall, for the purposes of this section, be taken to sexually harass 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 other person; and
>
> (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 the other person in any way in connection with the other person's employment or work or possible employment or possible work; or
>
> (b) As a result of the other person's rejection of the advance, refusal of the request or taking 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.

Sexual harassment per se was not actionable under s 28(3). Even where a complainant proved that the sexual conduct was unwelcome, she was also required to prove that she suffered additional detriment; that she actually suffered a disadvantage in her employment (such as dismissal or demotion) by objecting to the conduct or, alternatively, that she reasonably (objectively[38]) believed such disadvantage would occur if she did object. As a result, employees harassed by other employees not in a position to disadvantage the harassed employee in connection with their work, or where no tangible disadvantage followed, had no avenue for redress.

The following are incidents of sexual harassment found to have occurred but which were dismissed because the requirements of s 28(3)(a) or (b) of the *SDA* were not satisfied, that is despite finding that the conduct was unwelcome, the Commission was either not satisfied that detriment had been suffered or, not satisfied that reasonable grounds existed for believing that such detriment would be suffered if the complainant objected to the harassment:

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35 Sections 28A-28L.

36 *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) passed on 8 December 1992 and in force on 13 January 1993.

37 Section 28(3).

38 *Hall & Others v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250, 77, 431; *Westwood v Lachlan & Others* [1990] HREOCA 9 (26 September 1990) 7.

- Inappropriate sexual comments about the complainant's body and appearance;[39]
- Grabbing of the complainant's breasts by a manager;[40]
- Presentation of an obscene cartoon to the complainant;[41]
- Questions about whether the complainant had any boyfriends;[42]
- Comment made to the complainant "I just haven't been able to stop thinking about you";[43]
- Comment made to the complainant "Well I don't suppose that turns you on either?" as the respondent showed her a part of his leg'[44]
- Comment that the complainant must endear herself to those who pay her;[45]
- Making of allegations concerning the sexual preferences of another staff member in the presence of the complainant;[46]
- Intimate touching of the complainant as she sat down on the passenger seat of the respondent's car;[47]
- Lying on top of the complainant and simulating the sex act and moaning;[48]
- Comment made in the complainant's presence that a woman working in the premises next door was a "cock tease";[49]
- Comments that the respondent had feelings for the complainant and asking her for sexual favours;[50]
- Asking questions during a pre-employment interview that related to such matters as whether the complainants had boyfriends and intended to marry, whether they were pregnant, whether they engaged in sexual intercourse with their boyfriends and if so, how often, what sexual positions they used and whether they used contraception.[51]

B *Replacement of Section 28(3) with Section 28A of the SDA*

In 1992, the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs conducted an inquiry into equal opportunity and equal status for women in Australia and subsequently produced a report on its findings entitled 'Half Way to Equal'.

'Half Way to Equal' contained a recommendation[52] that s 28(3) of the *SDA* be repealed and replaced with a new definition. Rather than having to prove actual detriment in addition to unwelcome sexual conduct, the new definition was to provide that a

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39 *Tracey Lee Thompson v Nissan Motor Co (Australia) Ltd* [1997] HREOCA 65 (18 December 1997); [1998] 359 FCA (9 April 1998).
40 Ibid.
41 Ibid.
42 *Liddle v Morley* (1994) EOC 92-583; [1994] HREOCA 7 (23 March 1994).
43 Ibid.
44 Ibid.
45 Ibid.
46 *A v B & Anor* (1991) EOC 92-367, 78,531; [1991] HREOCA 6 (31 May 1991) 6.
47 Ibid.
48 *A v B & Anor* (1991) EOC 92-367, 78,533; [1991] HREOCA 6 (31 May 1991) 8.
49 *Dobrovsak v AR Jamieson Investments Pty Ltd & Anor* (1996) EOC 92-794; [1995] HREOCA 32 (15 December 1995).
50 *Flewell Smith v Rolson Street Pty Ltd & Fiorelli* [1995] HREOCA 13 (9 May 1995).
51 *Hall & Ors v Sheiban & Anor* [1988] HREOCA 5 (28 July 1988) 4; (1988) EOC 92-227, 77,135; Reversed on appeal to the full Federal Court in *Hall & Ors v Sheiban & Anor* (1989) EOC 92-250.
52 Recommendation 65.

complainant need only establish that a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated by the unwelcome sexual conduct.

Following the Committee's recommendation,[53] the *SDA* was amended by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth)[54] (*SDOLAA*) to broaden the definition of sexual harassment. The *SDOLAA* repealed s 28(3) and replaced it with a new definition contained in s 28A.

Section 28A remains as the current definition of sexual harassment under the *SDA*. It provides that a person sexually harasses another person if:

> (a) The person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
> (b) Engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a *reasonable person*, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Amendment of the definition of sexual harassment was a significant change which set the bar for establishing sexual harassment at a markedly lower level than under the previous s 28(3). A complainant no longer had to demonstrate detriment or a reasonable belief that detriment would occur in addition to the unwelcome harassment itself. Under s 28A, the incidents of sexual harassment that failed for perceived lack of detriment in *Tracey Lee Thompson v Nissan Motor Co (Australia) Ltd*[55], *Liddle v Morley*[56], *A v B & Anor*[57], *Dobrovsak v AR Jamieson Investments Pty Ltd & Anor*[58] and *Flewell Smith v Rolson Street Pty Ltd & Fiorelli*[59] (discussed above) would arguably have succeeded.

C *Meaning of Reasonableness Test under Section 28A SDA*

The issue of reasonableness under s 28A requires an objective assessment as to whether a hypothetical, reasonable bystander would fairly conclude that the person harassed would be offended, humiliated or intimidated by the unwelcome sexual conduct. Reasonableness is therefore addressed by reference to the harasser's conduct rather than the complainant's reaction to the conduct.[60]

The term 'reasonable' is not defined in the *SDA*. Although the *SDA* provides that all the circumstances of the case must be taken into account when deciding what is

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53 Senator Keating: Second Reading Speech in the House of Representatives of the Commonwealth *Sex Discrimination and Other Legislation Amendment Bill 1992*, 3 November 1992.

54 Act passed on 8 December 1992 and amendment to definition in force on 13 January 1993.

55 [1997] HREOCA 65 (18 December 1997); [1998] 359 FCA (9 April 1998).

56 (1994) EOC 92-583; [1994] HREOCA 7 (23 March 1994).

57 (1991) EOC 92-367; [1991] HREOCA 6 (31 May 1991).

58 (1996) EOC 92-794; [1995] HREOCA 32 (15 December 1995).

59 [1995] HREOCA 13 (9 May 1995).

60 *Kiel v Weeks* (1989) EOC 92-245; [1987] HREOCA 3 (27 November 1987); *Sarah Johanson v Michael Blackledge Meats* [2001] FMC 6.

reasonable,[61] it does not provide definitions or examples of circumstances that may be relevant. Decisions under s 28A that address the issue of reasonableness have examined a range of different fact circumstances including:

- What is expected in an employer/employee relationship;[62]
- Whether particular comments are made as part of an overall "course of [sexual] conduct";[63]
- The amount of social contact between the parties;[64]
- Response to the conduct by the complainant;[65]
- Upset exhibited by the complainant;[66]
- Objection to the respondent's visits;[67]
- Refusals of the respondent's invitations;[68]
- Complainant's maturity[69] or youth;[70]
- Age difference between the parties;[71]
- Nature of the working environment;[72]
- Marital status of the complainant;[73]
- Work experience of the complainant;[74]
- Unwelcomeness of the conduct;[75]
- Timing of the complaint;[76]
- Familiar relationship between the parties;[77]
- Voiced disapproval of the conduct;[78]
- Complainant's strong personality;[79]
- Emotional state of the complainant;[80]

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61 *Sexual Discrimination Act 1984* (Cth) s 28A(1)

62 *B, C & D v Stratton* (1997) EOC 92-883, 77,178; [1997] HREOCA 8 (17 March 1997) 17; *Rohan v Thomas* [1995] HREOCA 29 (27 November 1995) 5; EOC 92-784, 78, 812; *Q v John Defelice* (2000) EOC 93-051, 74,131; HREOC No H98/121, 14.

63 *Dippert v Luxford & Anor* (1996) EOC 92-828, 79,113-79,114; [1996] HREOCA 19 (18 July 1996) 11-12; *F v L, S, R & D* [1999] HREOC No H98/77, 9; (1999) EOC 93-033, 79,504.

64 *Evans v Lee & Anor* (1996) EOC 92-822, 79,055; [1996] HREOCA 8 (3 May 1996) 12.

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid.

69 Ibid; *J v D Pty Ltd & W* [1997] HREOCA 17 (9 April 1997) 18; *Davidson v Murphy* [1997] HREOCA 62 (24 November 1997) 8.

70 *Jackson v Ilievski* [1996] HREOCA 18 (17 July 1996) 9; *Ross v Australia's Pizza House Pty Ltd & Anor* [1998] HREOCA 11 (7 April 1998) 26; *Duckitt v Zheng & Anor* [1997] HREOCA 57 (7 October 1997) 8.

71 *Rohan v Thomas* [1995] HREOCA 29 (27 November 1995) 5; *Ross v Australia's Pizza House Pty Ltd & Anor* [1998] HREOCA 11 (7 April 1998) 26.

72 *Jackson v Ilievski* [1996] HREOCA 18 (17 July 1996) 9; *J v D Pty Ltd & W* [1997] HREOCA 17 (9 April 1997) 18.

73 *Q v John Defelice* (2000) EOC 93-051, 74,131; HREOC No H98/121, 14; *Davidson v Murphy* [1997] HREOCA 62 (24 November 1997) 8.

74 *J v D Pty Ltd & W* [1997] HREOCA 17 (9 April 1997) 18.

75 *Iturbe v Yuen & Anor* [2000] HREOC No H98/61, 15.

76 *Davidson v Murphy* [1997] HREOCA 62 (24 November 1997); *Wu & Anor v Cohen & Anor* [2000] HREOC No H99/43, 36.

77 Ibid.

78 Ibid; *V v Australian Red Cross* [1999] HREOC Nos H97/264 and H97/265, 7.

79 Ibid.

80 *V v Australian Red Cross* [1999] HREOC Nos H97/264 and H97/265, 7.

- Recent employment of complainant;[81]
- Complainant's shyness;[82]
- Complainant's special vulnerability due to her recent arrival in a new country;[83]
- Complainant's language difficulties and harasser's awareness of these;[84] and
- Harasser's likely knowledge of the complainant's particular need of employment and her separation from her husband.[85]

D *Application of Reasonableness Test under Section 28A SDA*

The reasonable person test under s 28A of the *SDA* set the threshold for establishing sexual harassment significantly lower than the previous test under section 28(3). Under s 28A, once the unwelcome sexual conduct is found to have occurred, the complainant is not required to jump a further hurdle of proving detriment.

The lowering of the bar is reflected in the decisions in the majority of sexual harassment cases decided under s 28A. The main focus in these cases is on whether the conduct in fact occurred and whether it was unwelcome. Once unwelcome sexual behaviour is found to have occurred, the issue of reasonableness is rarely in dispute and decision makers appear to have little difficulty in finding that in all the circumstances, a reasonable person would have anticipated that the complainant would be offended, humiliated or intimidated by the conduct.[86]

In *Filas v Fourtounas and Ors,*[87] a young woman employed at a service station complained that her boss talked to her about sex, touched her on the buttocks and breasts, rubbed his genitals against her and offered her money for sex over a twelve

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81 *Duckitt v Zheng & Anor* [1997] HREOCA 57 (7 October 1997) 8.

82 Ibid.

83 *Lin v Kirlappos* (1995) EOC 92-711, 78, 352.

84 Ibid.

85 Ibid.

86 See, eg, *Q v John Defelice* (2000) EOC 93-051, 74,131; HREOC No H98/121, 14; *Dippert v Luxford & Anor* (1996) EOC 92-828, 79,113-79,114; [1996] HREOCA 19 (18 July 1996) 11-12; *Evans v Lee & Anor* (1996) EOC 92-822, 79,046, 79,055; [1996] HREOCA 8 (3 May 1996) 12; *B, C & D v Stratton* (1997) EOC 92-883, 77, 178; [1997] HREOCA 8 (17 March 1997) 17; *Filas v Fourtounis & Anor* (1996) EOC 92-780, 78,798; [1995] HREOCA 28 (21 November 1995) 7; *Sarah Johanson v Michael Blackledge Meats* [2001] FMC 6, 19; *Gilroy v Angelov* [2000] FCA 1775 (8 December 2000); (2001) EOC 93-118; *Shields v James* [2000] FMCA 2 (13 September 2000) 14; *Kneuppel v Wirries & Wirries* [1997] HREOCA 14 (31 March 1997) 13; *Rohan v Thomas* (1996) EOC 92-784, 78,812; [1995] HREOCA 29 (27 November 1995), 5; *Jackson v Ilievski* [1996] HREOCA 18 (17 July 1996) 9; *Leslie v Graham & Anor* [2000] HREOC No H99/31, 20; *Iturbe v Yuen & Anor* [2000] HREOC No H98/61, 15-16; *Rice v Nolan & Anor* [2000] HREOC No H97/105, 6; (2001) EOC 93-128; *Harwin v Pateluch* [1995] HREOCA 23 (21 August 1995), 9; (1995) EOC 92-770; *Ross v Australia's Pizza House Pty Ltd & Anor* [1998] HREOCA 11 (7 April 1998), 26; *Phillips v Leisure Coast Removals Pty Ltd & Anor* [1997] HREOCA 21 (9 May 1997) 12; (1997) EOC 92-889, 77,392; *Elliot v Nanda & Commonwealth* (1999) EOC 92-988, 79,262; [2001] FCA 418 (11 April 2001) para 109; (2001) EOC 93-135; *Duckitt v Zheng & Anor* [1997] HREOCA 57 (7 October 1997) at 8; *Rees v Lemeki & Anor* [1997] HREOCA 27 (27 May 1997) 15; *Morrison v Delaney & Anor* [1996] HREOCA 24 (19 August 1996) 10; *Woods, Murphy & Martin v Thomas & Thomas* [1998] HREOCA 28 (21 August 1998) 9; *Brown v Lemeki & Anor* [1997] HREOCA 25 (27 May 1997) 11; *Biedermann v Moss & Ors* [1998] HREOCA 7 (20 February 1998) 14; *F v L, S, R & D* [1999] HREOC No H98/77 9; (1999) EOC 93-033, 79,504; *Williams v Robinson & Anor* [2000] HREOC No H99/67, 26; (2000) 93-112; *Horman v Distribution Group* [2001] FMCA 52 (15 August 2001) para 56.

87 (1996) EOC 92-780, 92-780-92-781; [1995] HREOCA 28 (21 November 1995).

month period. The complainant gave evidence that although she did not like the behaviour and wanted it to stop, she was not distressed by it because she thought that it was normal male behaviour. The Commission found that although the complainant was not in fact intimidated by the behaviour, she was humiliated and a *reasonable* person would find that she was humiliated and offended by it.[88]

A number of other cases under s 28A have not succeeded because of a failure to establish the relevant facts rather than a failure to establish the reasonableness test. Had the events been found to have occurred as described by the complainant, the reasonableness test would not necessarily have failed.[89]

The question remains as to whether s 28A goes far enough in providing a remedy for victims of sexual harassment. Despite the lowering of the bar for proving sexual harassment through the enactment of s 28A, complaints have still been dismissed in a number of instances because the complainant failed to satisfy the reasonableness test. These decisions are problematic and in the author's view, the problem lies in the application of the test by decision-makers rather than with the test itself.

In *J & D Pty Ltd and W*,[90] a complaint by a sales representative that her employer made remarks to her about being a "dumb blonde", a "blonde bombshell" and commented that "they're all whores if the price is right", was dismissed. The Commission's decision that the comments were not made in circumstances in which a reasonable person would anticipate the complainant being humiliated, offended or intimidated was based in part, on its view that the comments were "trivial" and that since the complainant was a "mature and professional woman of considerable experience", they should not have bothered her. The Commission also considered it relevant that the respondent had not intended the comments to be offensive or sexist,[91] thereby ignoring the objective nature of the reasonableness test and unnecessarily exploring the subjective mind of the respondent.[92]

In *Wu & Anor v Cohen & Anor*,[93] the complainant alleged that her employer invited her out to dinner on three occasions, squeezed her bottom on two occasions, constantly made sexually loaded comments and jokes to her, hugged her from behind with his arms at her breast level and said "I'm crazy about you", and in her hearing, pointed to his crotch and said "Look, you want me to open it?". The complaint was dismissed on the basis that even if these incidents did occur, because the complainant had not objected at the time, continued in her employment and delayed in making a complaint, a reasonable person would not anticipate that the conduct would cause offence, humiliation or intimidation. The complainant's explanation that her reason for not complaining earlier

88 (1996) EOC 92-780, 78,797, 78,798; [1995] HREOCA 28 (21 November 1995) 7.

89 *D v E* [1998] HREOCA 15 (26 May 1998) 8; *Youssef v Beshay* [1998] HREOCA 21 (29 June 1998); *Bell v Jones & Ors* [1997] HREOCA 55 (22 September 1997); *Hodson v Nanni &Orsr* [1996] HREOCA 10 (15 May 1996); *Hartnett v Wong & Anor* [1997] HREOCA 16 (9 April 1997); *Clifford v SBS* [1998] HREOCA 25 (22 July 1998); *Correia v Grundig & Anor* [1995] HREOCA 19 (31 July 1995).

90 [1997] HREOCA 17 (9 April 1997) 18.

91 Ibid 11, 18.

92 For confirmation of this principle see *Woods, Murphy & Martin v Thomas & Thomas* [1998] HREOCA 28 (21 August 1998) 3.

93 [2000] HREOC No H99/43, 36, 38.

was her ignorance of the unlawfulness of the respondent's actions, her embarrassment and her fear of losing her job was rejected.

In *Davidson v Murphy*,[94] incidents were found to have occurred which included physical contact while working and comments by an employer to an employee such as "What colour are your knickers?", "You can sit on my lap" and "Have you ever noticed how your bum moves when you're vacuuming, I like it when it does that". However, in deciding that the reasonableness test was not satisfied, the Commission considered the familiar relationship between the complainant and the respondent and the *perceived* ease with which she could have complained but did not do so. The Commission also found that because the complainant was 31 years old, married with a child and had a strong personality, a reasonable person would not consider her to be offended.[95]

The cases of *J & D Pty Ltd and W*,[96] *Wu & Anor v Cohen & Anor*[97] and *Davidson v Murphy*[98] clearly illustrate the proposition that despite progress being made for women with the introduction of s 28A of the *SDA*, unnecessary difficulties are still faced by complainants in satisfying the current reasonable person test.

The Second Reading Speech of the *SDOLAA* indicates that amendment of the s 28(3) definition was an attempt to bring the Commonwealth legislation into line with sexual harassment provisions in South Australia, the Australian Capital Territory and Queensland.[99] Although s 28A of the *SDA* did closely reflect the definition of sexual harassment contained in s 119 of the Queensland *Anti-Discrimination Act 1991* (*QADA*), the Queensland experience clearly illustrates that s 119 is an easier test to satisfy and in the author's view, justifiably so.

VI REASONABLENESS UNDER THE *ANTI-DISCRIMINATION ACT 1991* (QLD) (*QADA*)

In view of the problems identified with the concept and application of reasonableness in other jurisdictions, it is worthwhile to examine the issue of how the definition and application of sexual harassment in Queensland fares in comparison.

Section 119 of the *QADA* provides that sexual harassment happens if a person –

(a) subjects another person to an unsolicited act of physical intimacy; or
(b) makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
(c) makes a remark with sexual connotations relating to the other person; or
(d) engages in any other welcome conduct of a sexual nature in relation to the other person;

and the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so:

94 [1997] HREOCA 62 (24 November 1997), 7-9.
95 Ibid 8.
96 [1997] HREOCA 17 (9 April 1997).
97 [2000] HREOC No H99/43.
98 [1997] HREOCA 62 (24 November 1997).
99 Senator Crowley: Debate in the Senate of the Commonwealth *Sex Discrimination and Other Legislation Amendment Bill 1992*, 8 December 1992, 4350.

(e) with the intention of offending, humiliating or intimidating the other person; or
(f) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

When the *QADA* was enacted in 1991, the Queensland legislature had the benefit of hindsight. Definitions of sexual harassment and the concept of reasonableness were already in place in state[100] and federal[101] Australian jurisdictions as well as overseas.[102] The effectiveness of these definitions had been tested in courts and tribunals and critiqued by commentators. Problems with the various tests and their application had been identified and solutions suggested. Queensland was therefore able to formulate a definition of sexual harassment that appears to avoid the problems that have plagued definitions in other jurisdictions. This definition was broader than anywhere in Australia at the time and is still currently matched only by the Northern Territory.[103]

A *Meaning of the Reasonableness Test under Section 119 of the QADA*

1 *Shift of focus from the victim's behaviour*

A significant feature of the Queensland test that is also found in the *SDA* is its focus on the reasonableness of the harasser's conduct, rather than the conduct of the complainant. The harasser's conduct must be engaged in with an intention to offend, humiliate or intimidate the other person, or in circumstances where a *reasonable person* would have anticipated the possibility that *the other person* would be offended, humiliated or intimidated by the conduct.

2 *Objective/Subjective test*

The *QADA* differs from the *SDA* in that s 120 of the *QADA* further provides a non-exhaustive list of particular circumstances that are relevant to the determination.

Section 120 provides as follows:

> The circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:
> (a) the sex of the other person; and
> (b) the age of the other person; and
> (c) the race of the other person; and
> (d) any impairment that the other person has; and
> (e) the relationship between the other person and the person engaging in the conduct; and
> (f) any other circumstance of the other person.

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100 *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1984* (SA) s 87(11); *Equal Opportunity Act 1984* (WA) ss 24(3), 25(2), 26(2).

101 *Sex Discrimination Act 1984* (Cth) s 28(3).

102 Title VII *Civil Rights Act 1964* 42 USC 2000e (1988); Equal Employment Opportunity Commission Guidelines on Sexual Harassment (1991) 29 CFR 1604.11.

103 *Anti-Discrimination Act 1992* (NT) s 22(2) replicates the reasonableness element in *Anti-Discrimination Act 1991* (Qld) ss 119, 120.

Section 120 specifically adds a subjective element to the reasonable person test contained in s 119(f) that is not found in any other Australian jurisdiction other than the Northern Territory.[104] This subjective element means that the test is not whether an objectively reasonable person would have anticipated the possibility that *anyone* in the position of "the other person" would be offended, humiliated or intimidated by the conduct, but rather, whether an objectively reasonable person considering all the particular (subjective) circumstances of the complainant would anticipate that *that* person would be offended, humiliated or intimidated. This approach to the application of the reasonableness test has been confirmed by all Queensland sexual harassment decisions to date.[105]

3 *'Possibility'*

Importantly, a unique feature[106] of the reasonable person test in Queensland is the addition of the word *possibility* to the wording found in s 28A of the *SDA*. This broadens the definition of sexual harassment significantly and makes the *QADA* test relatively easy to satisfy.

B *Application of Reasonableness Test under Section 119 of the QADA*

There is very little case law as to how reasonableness in the context of s 119 of the *QADA* is to be interpreted. What is clear, however, is that application of the reasonableness test under s 119 does not seem to have troubled QADT members as illustrated by the noticeable lack of discussion of the test in Queensland sexual harassment decisions.

In almost every Queensland case to date, the Queensland Anti-Discrimination Tribunal (QADT), after making detailed findings that the alleged incidents of sexual harassment did in fact occur, had no difficulty in finding that the test was satisfied ie. that a reasonable person would, in all the circumstances, have anticipated the *possibility* that the particular complainant would be offended, humiliated or intimidated by the conduct. In the majority of decisions in fact, only bare comments have been made regarding satisfaction of the test.[107]

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104 See *Anti-Discrimination Act 1992* (NT) s 22(2).

105 See, eg, *Rutherford v Wilson & Anor* [2001] QADT 7 (21 May 2001) 33; *Smith v Hehir & Anor* [2001] QADT 11 (26 June 2001) 14-16 (on appeal, *Hehir & Anor v Smith* [2002] QSC 92 (10 April 2002) but note appeal against QADT decision was allowed on quantum of damages only and the QADT decision was otherwise not disturbed); *Whittle & Anor v Paulette & Anor* QADT Nos H2 & H3 of 1994, 9; (1994) 1 QADR 55, 60; (1994) EOC 92-621, 77,306; *Hambleton v Gabriel the Professional Pty Ltd t/a Gabriel the Professional & Anor* QADT No H11 of 1995, 10-11; (1996) 1 QADR 219, 227; (1996) EOC 92-791, 78,836; *Doyle v Riley & Anor* QADT No H12 of 1994, 10; (1995) 1 QADR 102, 107; (1995) EOC 92-748, 78,582; *Moore v Browne & Anor* QADT No H11 of 1994, 7; (1995) 1 QADR 109, 113; (1995) EOC 92-749, 78,586; *Smith v Buvet & Anor* QADT No 24 of 1995, 10; (1996) 1 QADR 340, 345-346; (1996) EOC 92-840, 79,229; *Alexander & Ors v Anoun & Ors* QADT Nos H16-H19 of 1995, 30-31, 33-35; (1996) 1 QADR 440, 468-469, 470-472; *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 733; QADT No H25/95, 8; (1997) EOC 92-879; *Tulk & Anor v Moore & Anor* QADT No H35 & H36 of 1995, 27; (1996) EOC 92-870, 77,083-77,084.

106 Other than Queensland, found only in s 22(2) *Anti-Discrimination Act 1992* (NT).

107 *Rutherford v Wilson & Anor* [2001] QADT 7 (21 May 2001), especially at 33; *Smith v Hehir & Anor* [2001] QADT 11 (26 June 2001) 16 (on appeal, *Hehir & Anor v Smith* [2002] QSC 92 (10 April 2002) but note appeal against QADT decision was allowed on quantum of damages only and

The recent decision of *Smith v Hehir and Anor*[108] is the exception to the rule in that it contains some discussion on how the reasonableness test should be applied under s 119 of the *QADA*. The complainant Smith, a female telemarketer, complained of three principal incidents of sexual harassment by her employer. The first incident involved a massage of the complainant's shoulders by the respondent. The second incident involved the respondent putting his arm around the complainant's shoulders and telling her "everything will be OK". The third incident alleged that the respondent again massaged the complainant's back and shoulders but also made sexual remarks to her, put his arm around her shoulder and pressed his lips to her head.

In finding that all three incidents amounted to unlawful sexual harassment,[109] Member Tahmindjis considered that "a global approach to the issue of reasonable anticipation"[110] was appropriate. He indicated that the correct approach to application of the reasonableness test was as follows:

(1) consider the context as found by the facts in this case;
(2) take into account the purposes of the Act, one of which is expressed to be the need to protect people's dignity (Preamble, paragraph 1);
(3) take into account the express wording of s 119(f) *QADA* which only requires the reasonable anticipation of the *possibility* that the complainant would be offended or humiliated (and not that she necessarily felt humiliation immediately).[111]

In adopting this approach to the first incident, Member Tahmindjis found that whether or not the respondent in fact intended to harass the complainant, a reasonable person would have anticipated that it was possible that the complainant would be offended or humiliated by the behaviour.[112] This was despite the fact that at the time of the incident, "the complainant may have been bewildered by actions she felt to be inappropriate, with the feeling of 'violation' arising as the events compounded in the following two weeks".[113]

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the QADT decision was otherwise not disturbed); *Whittle & Anor v Paulette & Nor* QADT Nos H2 & H3 of 1994, 9; (1994) 1 QADR 55, 60; (1994) EOC 92-621, 77,306; *Hambleton v Gabriel the Professional Pty Ltd t/a Gabriel the Professional & Anor* QADT No H11 of 1995, 11; (1996) 1 QADR 219, 227; (1996) EOC 92-791, 78,836; *Doyle v Riley & Anor* QADT No H12 of 1994, 9; (1995) 1 QADR 102, 107; (1995) EOC 92-748, 78,582; *Moore v Browne & Anor* QADT No H11 of 1994, 7; (1995) 1 QADR 109, 113; (1995) EOC 92-749, 78,586; Upheld in *Browne v Moore* [1996] QSC 120 (15 July 1996); 1 QADR 410; (1996) EOC 92-835; *Smith v Buvet & Anor* QADT No 24 of 1995, 10; (1996) 1 QADR 340, 346; (1996) EOC 92-840, 79,229; *Alexander & Ors v Anoun & Ors* QADT Nos H16-H19 of 1995, 30, 33-35; (1996) 1 QADR 440, 468, 470-472; *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 733; QADT No H25/95, 8; (1997) EOC 92-879; Upheld in *Mount Isa Mines Ltd & Ors v Hopper* [1998] QSC 287 (17 December 1998); *Tulk & Anor v Moore & Anor* QADT No H35 & H36 of 1995, 27; (1996) EOC 92-870, 77,084; *Porter v Matson & Anor* QADT Nos H85 & H 87 of 1996; 1 QADR 545; (1997) EOC 92-882; *Sibley v Roche* QADT No H16 of 1996; 1 QADR 375.

108 [2001] QADT 11 (26 June 2001) (on appeal, *Hehir & Anor v Smith* [2002] QSC 92 (10 April 2002) but note appeal against QADT decision was allowed on quantum of damages only and the QADT decision was otherwise not disturbed).

109 Ibid 14-16.

110 Ibid 15.

111 Ibid.

112 Ibid 14-15.

113 Ibid 15.

In holding that the second incident satisfied the reasonableness test, Member Tahmindjis looked at the overall context in which all of the incidents occurred, including the age difference between the parties and their relationship as employer/employee. Since the perceptions of men and women may differ in relation to what behaviour does or does not constitute sexual harassment, what the respondent thought about his conduct was irrelevant to the determination of reasonableness. Member Tahmindjis also noted that sexual harassment potentially leaves its victims so stunned that they feel nothing and therefore what the complainant thought or felt at the time of the events was not necessarily relevant either.[114]

In relation to the third incident, Member Tahmindjis simply noted that there was no doubt that the reasonableness test was satisfied.[115]

The decision in *Smith v Hehir and Anor*[116] illustrates the high point of the application of the Queensland reasonableness test and represents a significant shift forward from the difficulties experienced by complainants in other jurisdictions. The incidents complained of in *Smith* could be described as 'low level' sexual harassment and might not have constituted sexual harassment under legislative tests in other jurisdictions. Due to Queensland's broad test and the macro approach taken to its application by the QADT, the incidents were considered sufficient to satisfy the Queensland test.

A number of other Queensland cases can be found which illustrate that, as a general rule, the QADT has failed to adopt the 'male view' of reasonableness for which decision makers in other jurisdictions have been criticised. For example, failure of the victim to complain at the time of the harassment has not been held against the complainant. The reality that women experience sexual harassment in different but nonetheless legitimate ways has been recognised. There has been a recognition by QADT members that victim responses to sexual harassment are influenced by factors such as their feelings of powerlessness,[117] upbringing,[118] embarrassment,[119] fear for their safety[120] or loss of employment[121] and belief that complaining would do no good.[122] QADT members have also recognised that evidence of a complainant's banter or conversation about matters of a sexual nature does not necessarily refute a claim of

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114 Ibid 15-16.

115 Ibid 16.

116 [2001] QADT 11 (26 June 2001) (on appeal, *Hehir & Anor v Smith* [2002] QSC 92 (10 April 2002)

117 See, *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 740; QADT No H25/95, 23; *Smith v Buvet & Anor* QADT No 24 of 1995, 7; (1996) 1 QADR 340, 344; *Doyle v Riley & Anor* QADT No H12 of 1994, 9; (1995) 1 QADR 102, 107; (1995) EOC 92-748, 78,582; *Moore v Browne & Anor* QADT No H11 of 1994, 4; (1995) 1 QADR 109, 111; (1995) EOC 92-749, 78,586.

118 See, eg, *Smith v Buvet & Anor* QADT No 24 of 1995, 7-8; (1996) 1 QADR 340, 344.

119 See, eg, *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 740; QADT No H25/95, 23.

120 See, eg, *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 741; QADT No H25/95, 25.

121 See, eg, *Whittle & Anor v Paulette & Anor* QADT Nos H2 & H3 of 1994, 4; (1994) EOC 92-621, 77,305, 77,306; *Moore v Browne & Anor* QADT No H11 of 1994, 4; (1995) 1 QADR 109, 111; (1995) EOC 92-749, 78,586.

122 See, eg, *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 740; QADT No H25/95, 22; *Smith v Buvet & Anor* QADT No 24 of 1995, 7; (1996) 1 QADR 340, 344; *Doyle v Riley & Anor* QADT No H12 of 1994, 9; (1995) 1 QADR 102, 107; (1995) EOC 92-748, 78,582; *Alexander & Ors v Anoun & Ors* QADT (1996) 1 QADR 440, 470.

sexual harassment or prove that she would not be offended, humiliated or intimidated by sexual remarks made by others.[123]
Decisions can of course be found in Queensland where sexual harassment claims have been dismissed but such cases are few and far between and in any event, have not been dismissed because of the complainant's failure to satisfy the reasonableness test.[124]

An examination of sexual harassment decisions in Queensland to date clearly indicates that the test of reasonableness under the *QADA* is conducive to achieving one of the *QADA*'s stated purposes of promoting 'equality of opportunity for everyone by protecting them from sexual harassment'.[125]

In enacting the *QADA*, the Queensland legislature appears to have learned valuable lessons from problems experienced with tests in other jurisdictions. The same can be said for the application of the reasonableness test by QADT members. Inclusion of the term 'possibility' in s 119, the use of a hybrid objective/subjective test, the shift of focus away from the reasonableness of the complainant's behaviour, and the absence of any requirement for the complainant to prove work detriment in addition to being sexually harassed per se, are important features of the Queensland test. Such features combined with the global approach taken to sexual harassment by QADT members, have removed unnecessary hurdles for complainants in establishing unlawful sexual harassment.

VII CONCLUSION

Sexual harassment is clearly unacceptable. Every effort must be made to ensure that sexual harassment is recognised as a serious harm and dealt with accordingly. Much progress has been made in that legislatures throughout the world, including those in all Australian jurisdictions and the United States, have legislated to make sexual harassment unlawful.

There is ongoing debate as to how sexual harassment should be defined so as not to unfairly and unnecessarily disadvantage women complainants. Legislative attempts to define sexual harassment all contain some variation on the element of reasonableness as a means of identifying conduct that will constitute unlawful sexual harassment.

Examination of reasonableness as it has been defined and applied in the United States and the federal Australian jurisdiction reveals a number of problems experienced by complainants seeking to establish unlawful sexual harassment in these jurisdictions. In the case of the *SDA*, progress has clearly been made since the introduction of s 28A but this progress must continue by addressing problems that remain regarding how the reasonable person test is defined and applied. In relation to the United States, the position also remains unsatisfactory in at least two respects:

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123 See, eg, *Rutherford v Wilson & Anor* [2001] QADT 7 (21 May 2001) 27; *Smith v Hehir & Anor* [2001] QADT 11 (26 June 2001) 11, 12; *Whittle & Anor v Paulette & Anor* QADT Nos H2 & H3 of 1994, 1; (1994) 1 QADR 55, 56 (on appeal, *Hehir & Anor v Smith* [2002] QSC 92 (10 April 2002) but note appeal against QADT decision was allowed on quantum of damages only and the QADT decision was otherwise not disturbed); *Alexander & Ors v Anoun & Ors* QADT (1996) 1 QADR 440, 461-463; *Hopper v Mount Isa Mines Ltd & Ors* 1 QADR 728, 733; QADT No H25/95, 9.

124 See, eg, *Carter v Secombe & Ors* [2000] QADT 11 (12 September 2000); *Bowden v Waldock & Anor* QADT No H2 of 1995; 1 QADR 118.

125 *Anti-Discrimination Act 1991* (Qld) s 117(1).

(1) Its failure to use clear and consistent criteria in interpreting reasonableness; and
(2) The problems inherent in the use of both the reasonable person and the reasonable woman standards.

Sexual harassment cases in Queensland, on the other hand, illustrate that the Queensland approach to the issue of reasonableness fares extremely well in comparison to other jurisdictions. Perhaps the Queensland legislature in defining sexual harassment, and QADT members in applying the definition, have reflected on and learned from the problems with reasonableness in other jurisdictions. Whatever the reason, 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.

The notion of reasonableness found in ss 119(f) and 120 of the *QADA* and the macro level approach to its application by QADT members are a significant step forward for women in Queensland - both actual and potential victims of sexual harassment. The Queensland test removes a number of unnecessary hurdles present in other jurisdictions that a complainant must jump in order to establish unlawful sexual harassment; and fundamentally, the Queensland approach recognises the seriousness of the harm of sexual harassment, and constitutes a necessary and pragmatic step towards its elimination.