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"It's not sexual harassment but…": legal and other understandings of what constitutes sexual harassment in the workplace

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Abstract

In Australia, sexual harassment was first recognised as a form of sex discrimination in the federal *Sex Discrimination Act 1984* and today all state and territory anti-discrimination provisions explicitly proscribe sexual harassment. This legal naming of unwelcome sexual conduct represented a significant victory for working women and sexual harassment continues to be a frequent source of complaints to human rights bodies. However, the persistence of sexual harassment in the workplace and the fact such behaviour remains significantly unreported suggest that legal definitions of sexual harassment may not be well understood within workplaces. In an Australian prevalence survey, conducted by the Australian Human Rights Commission in 2008, a significant minority of those who stated categorically they had *not* experienced sexual harassment went on to report experiencing behaviours that may constitute sexual harassment. Further, a large group of those who had experienced sexual harassment did not report or formally complain about this behaviour. In this paper we draw on the Australian survey data as a starting point to explore legal and other understandings of what constitutes sexual harassment in the workplace and the broader social and regulatory contexts within which sexual harassment may be named and claimed.

Introduction

Working women have long endured unwelcome sexual advances and conduct in the workplace. However, while today almost 50 countries have enacted laws prohibiting sexual harassment (McCann 2005), most have only taken this step in the last decade. Indeed it is only relatively recently that sexual harassment has come to be named as such and to be framed as a legal harm. It was not until the mid-1970s in the United States that sexual harassment was first legally recognised as a form of sex discrimination (MacKinnon 2007). In Australia and the United Kingdom (UK) sexual harassment was first recognised as a form of unlawful sex discrimination in the mid-1980s (Mason and Chapman 2003; Fredman 1997) and first explicitly named as a distinct type of discrimination in Australia with the enactment of the federal *Sex Discrimination Act 1984* (SDA). Today all Australian states and territories explicitly proscribe sexual harassment in employment and in other areas, such as in the provision of goods and services.

There have been a number of amendments to the definitions of what constitutes sexual harassment in most of the Australian anti-discrimination jurisdictions. In the federal jurisdiction, the current definition of sexual harassment in the SDA is provided in section 28A(1):

> For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

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The case law suggests that three critical elements of this definition are 'unwelcome conduct of a sexual nature'; 'reasonable person'; and the formula of 'offended, humiliated, or intimidated', all of which have proved problematic (Mason and Chapman 2003).[2] As Mason and Chapman eloquently put it:

> As further developments have been made to this definition—through both judicial and tribunal decision-making and legislative tinkering—it has become increasingly apparent that the nature, context and harm of sexual harassment continues to defy simplistic definition. (2003, p. 224)

The lack of clarity around what constitutes sexual harassment is not only an issue for tribunals and courts. Despite the widespread legal prohibition of sexual harassment in the workplace and the persistence of formal complaints of sexual harassment, there is evidence that there is a general lack of understanding in the community and workplaces as to what sexual harassment is and where the line is drawn between acceptable and unacceptable behaviour (Charlesworth 2002; McDonald, Backstrom and Dear 2008; Hayes 2004**)**. Further, prevalence studies undertaken by the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) suggest that sexual harassment in the workplace is still significantly underreported (HREOC 2003; AHRC 2008).

In this paper we canvass possible explanations for the apparent reluctance of many employees to identify and name certain behaviours as sexual harassment and, where it occurs, to take some sort of action in response to it. In doing so, we draw on the recent Australian survey undertaken by the Australian Human Rights Commission (AHRC) to identify the prevalence of sexual harassment in the Australian community (AHRC 2008). Two of the key findings from this survey were, firstly, almost a quarter of those who stated they had *not* experienced sexual harassment went on to report experiencing workplace behaviours that might well constitute sexual harassment. Secondly, the survey found that four-fifths of those who had experienced sexual harassment or sexually harassing behaviours did not make a formal report or complaint. As we explore in our analysis, these two findings may well be linked. In the next section we consider how sexual harassment comes to be named as such before turning to a more detailed analysis of the Australian survey data.

Understandings of sexual harassment

One useful way of understanding how sexual harassment comes to be constituted outside the intervention of formal legal institutions is the 'naming, blaming, claiming' framework of Felstiner, Abel and Sarat (1980-1981), used to categorise the way which certain experiences are transformed into a complaint or claim. This analysis focuses on transformations whereby an individual's experience is perceived as injurious (naming); it becomes a grievance where another person or entity is held responsible for the perceived injury (blaming); and the grievance is voiced to the person or entity believed to be responsible and a remedy sought (claiming). When a claim is rejected or resisted, even partly, it becomes a dispute or complaint. Clearly the attrition rate at each stage in this transformative process, although rarely quantifiable, will mean that relatively few perceived injurious experiences ever become complaints. In this paper our main focus is on the transitions around naming.

There are many factors that influence whether an experience is perceived as sexual harassment in the first place and if and when it ultimately becomes a claim that raises issues of sexual harassment. The ways in which legislative provisions and legal institutions are understood within organisations to provide certain protections, rights or redress are clearly important in the naming and claiming of sexual harassment

[2] Analysis of the extant Australian case law suggests that the requirement of 'unwelcome conduct of a sexual nature' lacks clear boundaries, particularly as to whether the unwelcome behaviour had a sexual element or implication in it; that the 'reasonable person' concept fails to take women's experiences into account; and that the requirement a person be 'offended, humiliated or intimidated' introduces a test of morality rather than equality and fails to recognise other reactions to sexual harassment such as anger, distress, confusion and helplessness (see Mason and Chapman 2003; Mackay 2009; Senate Committee 2008).

(Parker 1999; Charlesworth 2002). Indeed the legal proscription of sexual harassment is important not only as a means of redress for those who experience sexual harassment; it also 'enables, empowers and legitimises other extra legal strategies' in the shadows of that law (Bacchi and Jose 1994, p. 10; Mason and Chapman 2003). However, while regulation proscribing sexual harassment is crucial, it is only one source of 'normative order' (Hunter, Ingleby and Johnstone 1995). Other factors that shape the perception of behaviour as sexual harassment include the presence and implementation of equal opportunity or occupational health and safety policies that name sexual harassment and provide for grievance processes (Parker 1999; Marshall 2005; McCann 2005). Indeed, many formal complaints of sexual harassment are directed as much as to the failure of such polices and processes to deal with in-house grievances as to the actual harassment itself (Charlesworth 2006). The workplace gender culture is also important and includes dominant norms about issues such as sexual harassment or what constitutes appropriate behaviour in the workplace and the extent to which organisational sexual harassment policies are taken seriously (Charlesworth 2002; McDonald and Dear 2008).

The broader context in which behaviours such as sexual harassment are named is also crucial. Broader societal attitudes towards gender roles and the place of women in workplaces; government policy and support for anti-discrimination legislation, more generally and also for the institutions such as the human rights and employment institutions that administer compliance with the law; as well as judicial interpretations and media representations as to what constitutes sexual harassment will all contribute to the perceptions and decisions made by those who experience what could be framed as sexual harassment at each stage of the dispute transformation process. Media depictions and framing of sexual harassment are particularly important and often work to further entrench gendered assumptions that women who report sexual harassment are overly vexatious or that they can't take a joke. The recent sudden resignation of the Chief Executive Officer of David Jones, a major Australian women's department store, after he had admitted behaving in a 'a manner unbecoming of the high standard expected of a chief executive officer to a female staff member' (Durie 2010) brought diverse reactions. There appeared to be general public and business support for the David Jones Board's decision to ask for Mark McInnes' resignation, particularly given the high-end female market for David Jones. However there have been rumblings in the media and in the blogosphere about the David Jones case and 'whether the punishment fits the crime', whether the country is 'becoming far too puritanical' (Gomes 2010) or whether accusations of sexual harassment fail to recognise mutual sexual attraction between co-workers (De Brito 2010). It is perhaps unsurprising then that there appears to be some confusion about what constitutes sexual harassment.

Much of the literature that examines perceptions of sexual harassment focuses on differences between different groups across race, class and gender divides in a fairly static way. Other scholars, however, focus on seeing individuals as actively constituting themselves and making sense of their experiences within different types of contexts (Marshall 2003, 2005; Hunter 2002, 2006) In this paper we draw in particular on Marshall's typology of interpretative frames in her analysis of the meaning women assign to their experiences of unwanted sexual attention. Drawing on a study of female staff members in administrative and clerical positions at a university, she argues that legal frames and law alone are insufficient for understanding the meaning that women assign to their experiences of unwanted sexual attention (2003 p. 686). Marshall identifies three other interpretive frames used by women in identifying behavior as sexual harassment or not. These include the 'injustice frame', which draws on legal and feminist understandings of sexual harassment as a form of discrimination that limits a woman's ability to participate in the workplace on an equal footing with men (p. 667). The second is the management frame, which draws on the risk of legal liability for employers, viewing sexual harassment as a harm to the organisation and emphasising the overlap between employees wanting to protect their career and employers wanting to protect their business (p.668). The third is the sexual freedom frame, which draws both on feminist concerns about the use of state power to regulate women's sexuality and on more conservative views that legal regulation creates impermissible limitations on freedom of speech (p. 669)

We take up the issue of what constitutes sexual harassment and for whom in our analysis of data from the 2008 AHRC sexual harassment prevalence survey. In the next section we outline the survey method and selected broad findings. In the following sections we explore a number of factors that may shape

understandings of what constitutes sexual harassment in the workplace and that may explain the low rate of formal complaints of sexual harassment.

The 2008 Australian Sexual Harassment Prevalence Survey

A national random telephone survey was conducted by the AHRC between July and September 2008 to investigate the nature and the extent of sexual harassment in Australian workplaces (AHRC 2008). The survey constituted telephone interviews with 2005 individuals aged 18 to 64 who were representative of the Australian population by age, gender and area of residence.

The survey was conducted in two waves. Both waves asked respondents if they had experienced sexual harassment based on the SDA definition of sexual harassment which was read out to respondents. However, in order to avoid the tendency for sexual harassment to be under-reported using only legal definitions (Illies, Hauserman, Schwochau and Stibel 2003), wave 2 respondents who said they had not experienced workplace harassment in the last five years were asked whether they experienced a range of specific behaviours that are likely to constitute sexual harassment, such as unwelcome touching, hugging, cornering or kissing; sexually explicit emails or SMS messages; and sexually suggestive comments or jokes. These questions were also asked of wave 1 and wave 2 respondents who had indicated that they had experienced sexual harassment to the legal definition in order to identify the nature of the sexual harassment experienced.

Overall, 22% of women and 5% of men reported having experienced sexual harassment in the workplace in their lifetime, compared with 28% of women and 7% of men in a similar survey conducted in 2003 (HREOC 2004). The 2008 survey also indicated that there had been a statistically significant decrease in the level of sexual harassment experienced in the workplace in the last five years. Whereas in the 2008 survey, 4% of the population reported experiencing sexual harassment in the workplace in the last five years, this was the case for 11% of the population in the 2003 survey (AHRC 2008, p.13). The AHRC points to two possible explanations: firstly, an increase in employers using more effective policies and prevention strategies, and secondly, a reduced awareness of what sexual harassment is. Support for this latter explanation is highlighted in the finding that 22% of respondents who said that they had not experienced workplace sexual harassment in the last five years went on to report one or more behaviours that could well constitute sexual harassment under the SDA. However, in the 2003 survey, these follow up questions were not asked of respondents who said they had not experienced sexual harassment, making it difficult to be sure if there have been any changes in understandings of sexual harassment over time.

Another important finding of the 2008 survey was that the large majority of sexual harassment goes unreported. Only 15% of those 2008 survey respondents who had been sexually harassed (using the legal definition) or experienced sexual harassing behaviours (using the behavioural definition) in the workplace the last five years formally reported or made a complaint to their employer or other bodies. The survey found that women were more likely than men to make a formal complaint (19% of women and 9% of men) and that possible explanations for this gender difference are that women are more likely to be intimidated or offended by the harassment compared with men and are more likely to experienced physical types of sexual harassment that may be seen as more serious (35% of women who had experienced sexual harassment experienced some kind of physical sexual harassment compared with 25% of men; AHRC 2008, p. 19).

In the next section we focus on two groups of survey respondents — those respondents who used legal definitions of sexual harassment and those who used behavioural definitions — and consider possible explanations for different understandings of what might constitute sexual harassment and whether this affects the reporting of sexual harassment.

However we first note a number of limits to the AHRC 2008 survey and indeed to our analysis of the survey data. Recognised limitations of telephone surveys are that they under-represent individuals from culturally and linguistically diverse backgrounds, as well as those with disabilities and from lower socio-economic backgrounds, and younger people who may not have a household telephone. The survey also excluded people under the age of 18 because interviewing minors required consent from a parent or guardian (AHRC 2008, p. 39). These limits are problematic because the evidence suggests that young people and those from more vulnerable population groups may be more likely to experience sexual harassment than other groups. While women are overwhelmingly the victims of sexual harassment and men the perpetrators, many studies suggest that the most vulnerable are divorced or separated women, young women, women with precarious working conditions and employment contracts, women with disabilities, lesbian women, women from ethnic minorities, gay men and young men (Fredman 1997; Job Watch 2004; McCann 2005; McDonald and Dear 2008).

In our analysis of the AHRC 2008 survey data we focus on a relatively small sub-sample of the total 2005 respondents. Of those respondents who had experienced sexual harassment in any context (workplace, education, the provision of goods and services) at any time, 298 individuals reported experiencing sexual harassment in the workplace or at a work-related event in the past five years. A randomly selected sub-sample of this group (N = 226) participated in a longer telephone interview seeking information about the nature of the sexual harassment and responses to it. This sample includes those reporting workplace sexual harassment according to the legal definition in both survey waves (N = 36, wave 1; N = 40, wave 2), as well as those reporting no sexual harassment according to the legal definition, but who went on to report behaviours that may constitute sexual harassment in wave 2 (N = 150). There were no significant differences between the respondents in waves 1 and 2 with respect to age, gender, occupation or industry.[3]

Our analysis in the next section focuses on this sub-sample of 226 respondents.[4] The relatively small numbers in this sample, particularly where the data is broken down by sex and other variables, limit the extent of the analysis and makes it difficult to generalise our findings to all Australian men and women who have experienced sexual harassment in the workplace.[5] Nevertheless the AHRC data offers a unique opportunity to explore a number of factors that may explain the reluctance to name and claim sexual harassment where it occurs.

Naming Sexual Harassment

Naming is the point at which an individual decides whether an experience was harmful and whether it was sexual harassment (Marshall 2003, p. 665). So why do some people view some behaviours as sexual harassment while others do not? Table 1 sets out selected demographic employment characteristics of the two groups of respondents our study is focused on: the 76 individuals who reported that they had experienced sexual harassment in the workplace after being read the SDA definition of sexual harassment (the legal definition group) and the 150 individuals who stated they had not experienced workplace sexual harassment (according to the legal definition) but who went on to indicate they had experienced one or more of what can be constituted as sexually harassing behaviours (the behavioural definition group).

[3] Based on unpublished analysis by Market Focus International, the company that ran the 2008 AHRC survey.

[4] The sub-sample of 226 individuals consisted of 152 women (67%) and 74 men (33%). Compared with many prevalence studies, which frequently employ only the legal definition of sexual harassment (see Timmerman and Bajema 1999), the AHRC study includes an unusually high proportion of men.

[5] For this reason we have limited the gender analysis undertaken.

While there are some small and interesting differences between these two groups in terms of gender breakdown, workplace size and aggregate industry and occupational groupings, these differences were not statistically significant.[6]

Table 1: Selected demographic and employment characteristics of legal & behavioural definition groups

Selected Characteristics	**Legal definition group**		**Behavioural definition group**	
	N=76	**%**	**N=150**	**%**
Sex				
Male	19	25.0%	55	36.7%
Female	57	75.0%	95	63.3%
Age (years)[7]	38.17 SD 10.94		45.16 SD 12.03	
Workplace size*				
Small (<25 employees)	21	27.6%	50	33.3%
Medium–sized (25-100 employees)	24	31.6%	43	28.7%
Large (>100 employees)	31	40.8%	57	38.0%
Full or part-time status*				
Full-time	52	68.4%	102	68.0%
Part-time	24	31.6%	48	32.0%
Employment status*				
Permanent	58	76.3%	118	78.7%
Casual/temporary	18	23.7%	32	21.3%
Time working for employer*				
Less than 3 months	9	11.8%	17	11.3%
More than 3 months but less than 12 months	26	34.2%	27	18.0%
More than 12 months but less than 3 years	18	23.7%	41	27.3%
3 or more years	23	30.3%	65	43.3%
Gender composition of industry[8]****				
Female-dominated	19	25.0%	41	27.3%
Male-dominated	22	28.9%	60	40.0%
Mixed	34	44.7%	47	31.3%
Occupational groups*[9]				
Manager	7	9.2%	25	16.7%
Professional/white collar	24	31.6%	51	34.0%
Blue collar	20	26.3%	21	14.0%
Pink collar	24	31.6%	50	49.1%

* At time of harassment

However, there were statistically significant differences between the two groups in terms of tenure with their employer at the time of the harassment (p=0.043).[10] Those who reported sexual harassment according to the legal definition were much more likely to have been employed for a shorter period of time when the harassment occurred than those who identified with a behavioural definition. For example,

[6] Data in this report are presented as frequencies for categorical data and means for continuous data. Chi-square tests were performed for categorical data and t-tests for continuous data. Where p-values are less than 0.05 results are considered to be statistically significant (that is, we can be 95% sure that differences between groups are not likely to be due to chance).

[7] Mean age at time of survey. Data on age at time of harassment or harassing behaviours was only collected for 33 of the 150 individuals who reported harassing behaviours so it was not possible to compare the two groups on this latter variable.

[8] Male, female and mixed industries are defined by the sex composition of employed persons within each industry as at August 2008 (ABS 2008). Male and female dominated industries are those in which 60% of employees are men or women respectively. Mixed industries are those in which women and men constitute between 41% and 59% of employed persons. We note that three individuals did not provide industry details so n=223 and %=98.7%.

[9] These occupational groupings are aggregations of the occupational categories used in the AHRC 2008 survey. We note that four individuals did not provide occupation details so n=222 and %=97.7%.

[10] As shown in Table 1, the mean ages of both groups at the time of the survey (not the time of the harassment) are also significantly different (t=-4.252 (226) p=0.000). However given the relevant questions of the two groups related to sexual harassment in the workplace in the last five years it is difficult to interpret age differences between the two groups with any confidence. We did not calculate the mean age at the time of harassment as there was missing data for all but 33 of the behavioural definition group.

46% of the legal definition group had been employed for less than 12 months compared with 19% of the behavioural definition group. This might suggest a greater tolerance for sexualised behaviour in the workplace among those who had been in the workplace for a longer period of time and who consequently did not identify the unwelcome or inappropriate sexual behaviour they experienced as sexual harassment legally defined. As highlighted below, the perceptions of behaviour which may constitute sexual harassment as more normative amongst employees of longer tenure may also be related to perceptions of the behaviours as less serious — both in terms of the nature of the sexual harassment itself and the level of intimidation and offence it caused.

Type of harassment

Table 2 sets out the type of harassment experienced by the legal and behavioural definition groups according to different subtypes of physical and non-physical harassment.

Table 2: Physical and non-physical harassment experienced by legal & behavioural definition groups[11]

Type of Harassment	**Legal definition group**			**Behavioural definition group**		
	N=76	**% of responses (n=281)**	**% of cases (n=76)**	**N=150**	**% of responses (n=289)**	**% of cases (n=150)**
Physical						
Unwelcome touching, hugging, cornering or kissing	35	12.5%	46.1%	17	5.9%	11.3%
Inappropriate physical contact	5	1.8%	6.6%	20	6.9%	13.3%
Actual or attempted rape or assault	3	1.1%	3.9%	3	1.0%	2.0%
Non-physical						
Inappropriate staring or leering	40	14.2%	52.6%	32	11.1%	21.3%
Repeated or inappropriate advances on email, social networking websites or internet chat rooms by a work colleague	5	1.8%	6.6%	6	2.1%	4.0%
Repeated or inappropriate invitations to go out on dates	23	8.2%	30.3%	9	3.1%	6.0%
Intrusive questions about your private life or physical appearance that make you feel offended	49	17.4%	64.5%	53	18.3%	35.3%
Sexually suggestive comments or jokes that make you feel offended	64	22.8%	84.2%	68	23.5%	45.3%
Sexually explicit pictures, posters or gifts that make you feel offended	8	2.8%	10.5%	37	12.8%	45.3%
Sexually explicit emails or SMS messages	30	10.7%	39.5%	40	13.8%	26.7%
Requests or pressure for sex or other sexual acts	15	5.3%	19.7%	4	1.4%	2.70%

Those using the legal definition of sexual harassment reported experiencing, on average, 3.6 different forms of behaviours while those who used a behavioural definition reported only 1.9 different forms of behaviours. The most frequent type of behaviour reported by both groups was ‘sexually suggestive comments or jokes that make you feel offended’ (84.2% of the legal definition respondents reported this behaviour compared with 45.3% of the behavioural definition group). It is clear too that those who used the legal definition were much more likely to report physical as opposed to non-physical forms of harassment. Almost half of the legal definition group (46.1%) reported experiencing ‘unwelcome touching hugging, cornering and kissing’ compared with just 11.3% of the behavioural definition group.

[11] This was a multiple response question and as such those interviewed were able to report more than one behaviour. The percentage of responses indicates the proportion of all the responses that fell into a particular category while the percentage of cases indicates the proportion of respondents who had reported a specific behaviour.

When we aggregated the original 11 categories of reported behaviours into 'physical'(e.g., inappropriate physical contact, unwelcome touching) and 'non-physical' sexual harassment (e.g., inappropriate staring or leering, sexually explicit pictures), there was a statistically significant difference between the two groups on the likelihood of reporting each type of harassment. The legal definition group were far more likely to describe physical forms of sexual harassment (52.6%) compared with the behavioural definition group (17.3%) (p=0.000). This suggests that respondents might draw a line between sexual harassment and other unwelcome workplace behaviours on the basis of whether these behaviours are physical or non-physical. We note that three individuals in the behavioural definition group, who stated they had not been sexually harassed, reported that they had experienced actual or attempted rape or assault. This may be because they understood such behaviour as criminal assault rather than as (only) sexual harassment. However, the fact that an additional three individuals in the legal definition group did report such assault as sexual harassment suggests that the line between what is sexual harassment and what is not can be stretched in both directions.

While there are gender differences in the frequency with which physical compared with non-physical sexual harassment is reported by individuals in the legal and behavioural definition groups, the trends are similar. Both male and female respondents in the legal definition group were significantly more likely to report physical forms of sexual harassing behaviours than those in the behavioural definition group (for men, 47.4% in the legal definition group compared with 14.5% in the behavioural definition group, p=0.006; for women, 54.4% in the legal definition group compared with 18.9% in the behavioural definition group, p=0.000).

Being offended and intimidated

The literature suggests that it is not only the type of unwelcome behaviour that may makes a difference to whether such behaviour is seen as sexual harassment but also the level of intimidation and offence that is experienced (Marshall 2003, 2005; McDonald et al. 2008). As noted above, both these elements are central to the legal definition of sexual harassment under the SDA.

Respondents were asked to report on a five-point Likert scale how offended ('not offended at all' to 'extremely offended') and how intimidated ('not at all intimidated' to 'extremely intimidated') they felt in response to the sexual harassment or sexually harassing behaviours they reported. As set out in Table 3, there were some differences between the two groups in terms of the level of offence they felt. Of the legal definition group, almost half (47.4%) reported that they had been very or extremely offended compared with 37.3% of the behavioural definition group. A larger proportion of the behavioural definition group reported that they had only been mildly offended or not offended at all (36.7%), compared with the legal definition group (19.5%). Similarly, mean scores for the level of offence experienced was higher for those in the legal definition group (3.46) than for the behavioural definition group (3.12); however these differences were not statistically significant. This suggests that being offended may not be enough to identify unwelcome sexual conduct as sexual harassment. Such an analysis is supported by Marshall's study, which found that even where women were offended by the behavior that they tended to use an external standard that resembled the legal definition of sexual harassment to gauge whether such behaviours were sexual harassment or not (2003, p. 685).

In terms of the level of intimidation experienced, 47.4% of the legal definition group reported being very or extremely intimidated compared with 37.3% of the behavioural definition group. At the other end of the scale only around one-third (35.9%) of the legal definition group reported being not at all or mildly intimidated compared with over half (53.3%) of the behavioural definition group. Overall, the legal definition reported significantly higher levels of intimidation than those in the behavioural definition group (3.09 compared with 2.53; t=2.801 (224), p=0.006). What is important to note in terms of the way sexual harassment is perceived and constituted is that over a third of the behavioural group, who had specifically rejected the legal label of sexual harassment, reported being very or extremely intimidated by the behaviour in question. Paradoxically, more than a third of the legal definition group reported being only mildly or not at all intimidated by the sexual harassment they reported. This suggests that while the level of intimidation may have an effect on the naming of sexual harassment for some individuals, it may

be only one factor among many that influence what is seen to constitute sexual harassment from the point of view of employees.

Table 3: Level of intimidation and offence experienced by legal and behavioural definition groups

	Legal definition		**Behavioural definition**	
Level of Offence	**N=76**	**%**	**N=150**	**%**
1. Not offended at all	6	7.9	18	12.0%
2	9	11.8%	37	24.7%
3	25	32.9%	39	26.0%
4	16	21.1%	21	14.0%
5 Extremely offended	20	26.3%	35	23.3%
Means*	3.46		3.12	
t	1.855			
df	224			
Sig (2-tailed)	0.065			
Level of Intimidation	**N=76**	**%**	**N=149**	**%**
1. Not intimidated at all	13	17.1%	53	35.3%
2	9	11.8	27	18.0%
3	25	32.9%	32	21.3%
4	16	21.1%	14	9.3%
5 Extremely intimidated	13	17.1%	23	15.3%
Means	3.09		2.53	
t	2.801			
df	224			
Sig (2-tailed)	0.006			

* Higher scores indicate greater levels of intimidation/offence on the five-point Likert scale

There were, however, important gender differences within both groups in terms of offence and intimidation as set out in Table 4. In both the legal and behavioural definition groups, women reported being more offended than men, although these differences were not significant. However, women in the behavioural definition group were significantly more likely to be intimidated than men in the group (2.81 compared with 2.05; t=-3.126 (148), p=0.002). This suggests some gender differences in the emotional responses to, and perceptions of the nature and seriousness of the reported behaviours, whether or not they are named as legally defined sexual harassment. This finding is consistent with a robust conclusion in the literature that women are less accepting than men of sexual behaviour at work and view gender harassment, unwanted sexual attention and sexual coercion as more serious (Gallivan Nelson, Halpert and Cellar 2007; McCabe and Hardman 2005; Reese and Lindenberg 1999).

Table 4: Level of intimidation and offence experienced by men and women in the legal and behavioural definition groups

Group	**Response to the SH**	**Sex**	**Mean***	**t**	**df**	**Sig (2-tailed)**
Legal Definition	Offence	Women	3.58	-1.469	74	0.146
		Men	3.11			
	Intimidation	Women	3.07	0.252	74	0.802
		Men	3.16			
Behavioural Definition	Offence	Women	3.27	-1.860	148	0.065
		Men	2.85			
	Intimidation	Women	2.81	-3.126	148	0.006
		Men	2.05			

*Higher scores indicate greater levels of intimidation/offence on a five-point Likert scale from 1 (not intimidated/offended at all) to 5 (highly intimidated/offended).

However, as Marshall's work suggests, coming to frame behaviour or behaviours as sexual harassment depends on factors apart from the actual behaviour, including those to do with the organisational context.

While we found that there was no significant difference in the employment status, occupational groupings, industry gender composition and the size of workplace between the two groups, other factors that hint at dominant workplace norms may lead an individual more towards an interpretative frame that enables the naming of certain behaviours as sexual harassment. Using relevant questions asked in the AHRC 2008 survey, we found there were no significant differences between the legal definition and behavioural groups in terms of how rare the behaviour was in their workplace, nor how likely it was that the behaviour had happened to someone else, nor the gender of the harasser (although women in both groups were much more likely than their male counterparts to say that their harasser was male).[12] However there were significant differences between the two groups in respect of their relationship to the harasser. Those in the legal definition group were twice as likely to say the harasser had been in a more senior position as their employer, boss, supervisor, manager or as more senior co-worker (42.2%) than those in behavioural group (20.3%) (p=0.042). This suggests that one of the popular understandings of sexual harassment as 'quid pro quo harassment' — where harassment is accompanied by an employment threat or benefit typically from someone in a more powerful relationship than the victim — remains important in naming sexual harassment as such, despite this not being a requirement of the SDA nor of other Australian state and territory definitions of sexual harassment. This finding is in line with other research which indicates that men and women are more likely to agree that conduct is sexual harassment when the perpetrator is a supervisor than a peer or co-worker (Rotundo, Nguyen and Sackett 2001). Indeed the sharp differential in the power relationship between the David Jones CEO and the woman he is alleged to have harassed may underpin the broad media and community acceptance that the CEO's inappropriate behaviour was indeed sexual harassment. The media's focus on cases involving large power differentials works both to reinforce the idea that this is what constitutes 'real' sexual harassment and to make sexual harassment by co-workers less visible.

Linking Naming to Claiming

In the dispute transformation process, claiming occurs when someone with a grievance makes a complaint, formal or otherwise, to the person or persons seen as responsible or accountable for the detriment and asks for some remedy (Felstiner et al. 1980-1981, p. 635). The 2008 AHRC survey results highlighted a very low rate of claiming or formal reporting of workplace sexual harassment whether legally defined or not. Only 15% of the 2008 survey respondents (19% of women and 9% of men) who had experienced sexual harassment in the workplace in the last five years went on to formally report it to their managers, employers or other bodies. Given that the legal definition group had named sexual harassment as such, we would expect that they would be more likely to make a formal report. However, while 19.7% (15 respondents) of the legal definition report made a formal report or complaint compared with 14.0% (21 respondents) of the behaviour definition group, these differences were not statistically significant.[13]

What does seem to make a difference to whether individuals in either group made a formal report or complaint is the level of offence and intimidation experienced. As set out in Table 5, those in the legal definition group who made a formal report were significantly more likely to be offended by the behaviour than those who did not make such a report (4.20 compared with 3.28; t=-2.714 (74), p=0.008). Similarly, those in the behavioural definition group who made a formal report were significantly more likely to be offended by the behaviour than those who did not make such a report (3.90 compared with 2.99; t=2.967 (148), p=0.004). This is an interesting finding as there was no significant difference in the level of offence experienced by the two groups (see Table 3).

[12] 98.2% of the women in legal definition group (compared with 57.9% of men) and 89.5% of women in the behavioural definition group (compared with 60.0% of men) reported that their harasser had been male (p=0.000).

[13] It should be noted that the numbers of those making a report are small so the results should be interpreted with caution.

Table 5: Formal report by legal & behavioural definition groups, level of offence and intimidation

Response to the SH	Group	Report	Mean*	t	df	Sig.
Level of Offence	Legal	Yes	4.20	2.714	74	0.008
		No	3.28			
	Behavioural	Yes	3.90	2.967	148	0.004
		No	2.99			
Level of the Intimidation	Legal	Yes	3.67	1.933	74	0.057
		No	2.95			
	Behavioural	Yes	3.24	2.409	148	0.017
		No	2.42			

*Higher scores indicate greater levels of intimidation/offence on a five-point Likert scale from 1 (not intimidated/offended at all) to 5 (highly intimidated/offended).

Similar extrapolations can be drawn from findings related to the impact of the level of intimidation on decisions to make a formal report. As illustrated in Table 5, those in the legal definition group who made a formal report were more likely to be intimidated by the behaviour than those who did not make such a report (3.67 compared with 2.99). While this difference was not significant, the trend was in the same direction as findings which indicated significant differences in the levels of intimidation between those who made a formal report and those who did not in the behavioural definition group (3.24 compared with 2.43; t=2.409 (148), p=0.017). These findings suggest, firstly, that decisions to make a report or to pursue a formal complaint are independent from how the behaviours are framed by those experiencing them. Secondly, they suggest that there is a behavioural threshold (experienced as affective reactions such as intimidation and/or offence) that has to be crossed before most individuals will make a formal report, whether or not they have framed that behaviour as sexual harassment according to the legal definition.

However, it is important to caution against assuming that those who decide not to pursue a claim in respect to sexual harassment necessarily acquiesce to or accept the behaviours they have experienced. Those who do complain of such discrimination have typically reached a point where the workplace disadvantages or detriment they have experienced are sufficient to threaten or preclude their ongoing employment (Conaghan 2004). As Marshall argues, employees concerned about their career advancement can internalise their employer's concern in preventing risks with sexual harassment before making a formal complaint and minimise the harm they have experienced (2003, p. 669). For other employees, sexual expression at work can be a source of bonding and so they will put up with the sexual conduct, even where they find it uncomfortable. In most cases individuals will balance several competing frames and, as Marshall notes, even those familiar with the injustice frame may feel responsible for the sexual conduct or decide that the behaviours are just not serious enough. Deciding not to report sexually harassing behaviours may also reflect the 'blow it off' or 'suck it up' attitude of women who wish to negotiate the world differently to previous generations and who have come of age in a world saturated by 'backlash rhetoric and politics' (Wear, Aultman and Borgers 2007). It may also reflect attempts by some women to actively constitute themselves as non-gendered, non-embodied subjects, disavowing their femininity and any disadvantages flowing from it (Hunter 2002, 2006), particularly where they want to be seen as a serious player in the workplace. As Hunter and Marshall both argue, while such strategies can help women to survive in male-dominated workplaces, they do not challenge the practices of discrimination such as sexual harassment (Hunter 2006; Marshall 2005).[14]

[14] However, as Thornton (2002) notes, although those who make formal complaints may have the satisfaction of eventually being told they are in the right, they are unlikely ever to win more than a pyrrhic victory against their employer and their careers will have been reduced to tatters in the process.

Conclusion

There have been many Australian and international studies on sexual harassment case law and somewhat fewer on the in-house and external grievance mechanisms that may be used by those who experience workplace sexual harassment. While very important, few of these studies move beyond a legal or injustice framing of sexual harassment. What this analysis of the AHRC 2008 survey offers is a chance to consider some of the reasons why sexual harassment continues to be an issue in Australian workplaces despite its explicit legal prohibition since 1984. One of the most crucial is how sexual harassment comes to be named or recognised as such. Perhaps surprisingly, it would appear that for many employees and workplaces a far narrower definition of sexual harassment than exists in Australian legislation is used as a benchmark for deciding when and if certain sexualised behaviours are sexual harassment. Thus factors such as whether the behaviour is physical or non-physical, the extent to which the individual finds the behaviour intimidating, and whether the harasser is higher up the hierarchy than the individual harassed, all shape the identification and naming of sexual harassment.

However, being able to name sexual harassment does not necessarily mean that an individual will make a formal complaint or report. As the AHRC study shows, reporting rates in Australia remain very low, which is consistent with many other international studies (McCann 2005). Two factors identified in the AHRC study which might shape whether or not an individual makes a formal complaint, irrespective of whether or not the sexually harassing behaviour is named as such, are the level of offence and intimidation experienced. Whether such judgements and decisions about naming and claiming sexual harassment reflect the use of injustice, management or sexual freedom frames or a mixture of all three is uncertain from the survey data and there is clearly a need for more Australian research studies such as Marshall's and Hunter's in-depth qualitative studies. What our findings do suggest, however, is that there is a need for renewed attempts to address and prevent sexual harassment both within organisations and by governments.

In response to the 2008 recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the effectiveness of the *Sex Discrimination Act 1984*, the federal government has announced it intends to broaden the definition and reach of the sexual harassment provisions.[15] However better legal definitions of sexual harassment provisions are only part of ensuring the prevention of sexual harassment and the protection of those who have been sexually harassed, as our analysis has demonstrated.[16] One of the main flaws of the current management of sexual harassment complaints by human rights bodies is the focus on individual complaints and the individual complainant. This means that sexual harassment is seen as an individual problem and, in many instances a problem between individuals, with little to do with broader organisational practices and norms. Recent legislative developments in Victoria with the enactment of the *Equal Opportunity Act 2010*, which focus on positive action and the investigation of systemic discrimination without the need for individual complaints, may work to shape framings of sexual harassment as a broader social and organisational issue.

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[15] As it affects the area of employment, the government has committed to introducing legislation to amend (Attorney-General 2010):

1. The definition of sexual harassment in section 28A to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.
2. Section 28A to provide that the circumstances relevant to determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include:
    - the sex, age and race of the other person;
    - any impairment that the other person has;
    - the relationship between the other person and the person engaging in the conduct; and
    - any other circumstance of the other person.
3. The SDA to protect workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment.

[16] The Senate Committee also made a recommendation that positive duties be imposed on employers to eliminate sexual harassment and promote gender equality (Senate Committee 2008, p. 164; see also Mackay 2009 for an analysis of how this might be done). However we note that the federal government's response to the Senate Committee's recommendation has been to put this and most other Senate Committee recommendations off to a proposed harmonisation of the four federal anti-discrimination statutes (Attorney-General 2010).

Our analysis of the 2008 AHRC data also suggests that there is a need for more proactive leadership in workplaces in shifting the burden of identifying unprofessional behaviour from the (more vulnerable) individual to the institution itself (Wear et al. 2007). To that end Wear et al. (2007) suggest institution-wide conversations, beyond the limits of formal policies, are necessary to determine how sexual harassment is defined (legally, ethically, institutionally and personally) in the workplace, how it should be addressed and the implications for ignoring or normalising it. If the lines between appropriate and inappropriate behaviours including sexual harassment were openly discussed, it may make it easier for both managers and employees to identify and name behaviour that is likely to be sexual harassment. Likewise, using climate surveys to identify issues that may contribute to unwelcome sexual conduct and sexually permeated workplaces would work to alert managers to problem areas without formal complaints having to be made by a few brave individuals. This is particularly important in the context of new technologies and the increasing overlap between private and work lives. At the same time research pointing to ineffective internal organisational responses to sexual harassment (Charlesworth 2002, 2006) also highlights the critical role of community and other external agencies beyond the confines of the immediate workplace in offering grass-roots information, referral, legal and industrial advice on gendered workplace issues (McDonald et al. 2008), such as the Working Women Centres in Adelaide, Queensland and the Northern Territory and JobWatch in Victoria.

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