CALLING TIME ON SEXUAL HARASSMENT

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Actress Sienna Miller recently spoke of having ‘had enough’ of sex discrimination and sexual harassment in her career. ‘I was pressured to accept a value of myself, which I knew was wrong…. and that changed something in me.’1 As she described her personal experience, there was the occasional discernible whisper of the words ‘yes, me too’ in the room. The room was, in fact, a packed conference room of government and civil society delegates from all over the world at the United Nations 62nd Commission on the Status of Women (CSW) in New York, 2018. Amongst the delegates from around the world, there was meaningful recognition that sexual harassment is an epidemic that has come to affect us all. For example, the managing editor of the East African newspaper, Pamela Sittoni, spoke of her shock at learning of its extensiveness through the #MeToo campaign, saying ‘We didn’t expect it to be as pervasive as it is. It was quite shocking for us.’2

‘Equality’ as a global focus

I am writing this article from New York, where I am attending the United Nations CSW and where I am engaged in conversations with people from every continent about achieving gender equality on a global scale. The official UN Women statement about the CSW explains that ‘during the Commission’s annual two-week session, representatives of UN Member States, civil society organisations and UN entities gather at UN headquarters in New York.’3 Our international measures of ‘equality’ are ultimately shaped by the CSW and each year different ‘priority’ and ‘review’ themes are considered.

I will explain the focus of these themes below, but first it is important to consider some facts about sexual harassment in the more local, Australian context.

Sexual harassment definition and statistics in Australia

The Sex Discrimination Act 1984 (Cth) is the law in Australia that prohibits sexual harassment at a national level. Section 28 of the Act defines sexual harassment as any unwanted or unwelcome behaviour of a sexual nature which might make a person feel offended, humiliated or intimated.

In Australia, the sexual harassment statistics are serious. Following its most recent national phone survey of the Australian population, the Australian Human Rights Commission reported that that 21 per cent of all women had experienced sexual harassment ‘since the age of 15’.4

More recently, in 2017 the Australian Human Rights Commission joined with Universities Australia to release their combined report on sexual assault and harassment in 39 universities nationally.5 The report showed that 21 per cent of all student respondents from 39 universities had experienced sexual harassment in the course of 2016 and that women were twice as likely as men to experience this type of behaviour. 6

Also in 2017, Unions ACT released the results of a study of 260 individuals aged between 15-25 years who work in the Australian Capital Territory. The study showed that 70 per cent of participants reported having been bullied or harassed in connection with their employment.7

In the course of my own research, I travelled the country to meet with more than 100 rural women about their experiences of sexual harassment in their relatively isolated workplaces.8

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2 Ibid.
6 Ibid.
8 Saunders, Skye ‘Whispers from the Bush- The Workplace Sexual Harassment of Australian Rural Women’
who worked in mines, on large cattle stations, in shearing sheds or in tiny take-away stores. I met with others who worked in National Parks, in remote-area hospitals, in isolated police stations or in forestry. Set against the backdrop of relative isolation and male dominance as a norm, I found that 73 per cent of these women had encountered unwanted behaviour of a sexual nature in the course of their rural working life. The figure was even higher for the women on cattle stations and shearing sheds, with 93 per cent having navigated sexual harassment as part of their workplace experience.

The quest for power is at the core of sexual harassment and in the context of the workplace, sexual harassment can be utilized to make a woman feel less able. Sexually harassing behaviour tends to increase incrementally over time, until even acts that might be considered ‘bizarre’ in nature can become normalized as part of an entrenched culture. Sexual harassment can impact a person’s sense of confidence, wellbeing and value over a long period of time.

The under-reporting of sexual harassment

The most recent national survey conducted by the Australian Human Rights Commission showed that one in five women felt able to approach their workplace leader about their experience of sexual harassment. There are complex reasons why the reporting of sexual harassment has traditionally been laden with fear and risk. Amongst other concerns, there may be a fear of the possible impact on the security of their job, or becoming the target of gossip or being labeled a ‘troublemaker’. This has long been the case for women, regardless of whether their experience has taken place in the rural or non-rural context, although the nature of the complexities may be magnified by relative isolation.

The reality is that if a workplace has a tolerance for sexual harassment, many women have felt that they must enter a survival mode by default. In my interviews with women around Australia they explained that instead of reporting sexual harassment, they have adopted philosophies such as ‘if you can’t beat ’em, join ’em’, ‘learning to laugh it off’ and ‘fitting in or f’ing off’.

In other words, women have traditionally felt that they have had no choice but to ‘grin and bear it’; but we are in the process of turning this perception on its head.

Global priority theme: ‘The Empowerment of Rural Women and Girls’

This year, the priority theme for the UN CSW is ‘The Empowerment of Rural Women and Girls’. The notion of empowerment incorporates so many elements that must be considered holistically, such as women and girls’ access to health services, legal services, communications services and so on.

Sexual harassment is but one manifestation of misogynous practice designed to suppress women’s equality and value. In the rural context, it is apparent that communities continue to be saturated in masculine tradition and ethos which serves to perpetuate the imbalance of power in both the public and private life.

Global review theme: Women’s Access to the Media and Communications

The review theme is about women’s access to the media and communications technologies as an instrument for empowerment. Of course, these technologies are fundamental to breaking down communication barriers and bridging accessibility issues. Being able to access technology can transform a person’s experience of isolation and fear into connectedness and empowerment. Equally, it’s important that women and girls are educated about how to navigate social media and technological communication methods with vigilance, so as not to endanger their privacy and safety.

The combination of themes and the #MeToo Movement

This dynamic combination of CSW themes is timely in relevance, given the current global climate where the collective strength of women’s voices is ringing with profound clarity through the #MeToo movement.

We are witnessing a revolutionary new phase in the
international movement towards gender equality. Through the media and online social networking systems, women’s collective rage at gendered injustices – sexual harassment, gender pay inequity, pregnancy discrimination and so on – has reached an identifiable boiling point. Spurred by the public uncovering of Harvey Weinstein’s brazen attacks on a cast of women and progressed locally by conduits for justice such as Tracey Spicer, women are finding our collaborative voice. Experience by experience, we are speaking squarely to truth and to our values as womankind.

The media and communication technologies are our powerful tools for the maintenance of momentum through our international dialogue as we share and work for the empowerment of all women and girls – rural, regional, remote or otherwise. We are seeing individuals transforming anger, shame and fear into the clear voice of change.

Valentis and Devane explain that ‘to translate the fire of her rage and change it into positive energy, a woman must control and direct the flames’. So it is against this backdrop of blazing courage, the CSW becomes an opportunity for the further ‘translation of female rage’ as we evaluate the state of international gender dynamics, address new and ongoing issues and agree on further actions to be taken.

Raging… with due care

The #MeToo movement is about giving true voice to lived experience. Consistent with this, it is important to remember that there is a standard of proof that must be satisfied if any matter were to proceed to court.

In a matter relating to discrimination or sexual harassment, the complainant must show that ‘on the balance of probabilities’ the law was breached. The strength of a complainant’s evidence must be solid to meet that standard; this is where file notes, personal diary entries, conversations with other people, time stamps, photos and so on become important.

In this way, it is ultimately important that women are as wise as they are bold in speaking the truth about their experiences. It is this wisdom that will protect women from any counter claim of defamation, which is also a topical issue in Australia.

Beyond #MeToo – stepping up together in the workplace context

Ultimately, it is not enough that women’s voices merely be amplified through the #MeToo campaign. Each


and every one of us must also respond to the call for action to progress meaningful change. The role that we play will be different, depending on the nature of our circumstances.

Senior managers and employers have a critical responsibility in this context. They must ensure that they are fulfilling their common law duty of care to create a safe working environment for all employees in the workplace. Section 106 of the Sex Discrimination Act 1984 (Cth) provides that if an employer does not take all reasonable steps to prevent sexual harassment from occurring in connection with employment, they can be held vicariously liable for any sexual harassment that happens on their watch. This means that employers must ensure that they provide clear information and workplace policies about sexual harassment. The essence should be clear – sexual harassment and other discriminatory conduct will not be tolerated. Everyone in the workplace should be given adequate opportunities to ask questions and grapple with the policy until they are comfortable with the meaning of the rules.

Beyond the role of employers, men must actively pause to consider the impact that language and certain types of behaviour, which might once have been considered ‘normal’, is having on the confidence and wellbeing of their female peers. This means that men need to actively think about the words that they use in speaking to women – it is a sign of strength, dignity and confidence to use the words that support and empower. On the other hand, the use of language that corrodes a person’s sense of self is hurtful to both the perpetrator and the person to whom he speaks.

Individuals also need to be prepared to be good bystanders – that is, men and women who might observe occasional sexual harassment as it happens. It might be as simple as pausing to look the harasser in the eye and asking them if they care to adjust the words that were last spoken. If they say ‘no’ the bystander might say firmly ‘Well, that sounded like sexual harassment. Please don’t say that again.’ If the behaviour does reoccur, the bystander must support the person who has experienced the behaviour by offering to seek help from the manager or employer.

Taking steps to fulfill the above roles is important because, as discussed earlier, women have long felt risks associated with reporting sexual harassment. By each playing our part, it is time to make reporting the new normal when sexual harassment does occur.

Whilst speaking truth to outdated workplace nonsense might still come at the cost of time, energy and undaunted guts, by giving voice to lived experience, we will together discover fresh truth in the words of Emily Dickinson: ‘Much madness is divinest strength.’
Student activities

1. Do you agree with the sentiments expressed by Sienna Miller? Give your reasons.
2. Read the definition under the Act of sexual harassment. Write a short scenario illustrating a situation that would constitute sexual harassment in Australia.
3. Investigate Universities Australia and explain its role.
4. Study the statistics given in this article about the prevalence of sexual harassment. Are you surprised at the percentages given? Discuss.
5. In your own words, discuss what you believe to be the consequences for the victim of experiencing sexual harassment in the workplace.
6. In today’s climate of people being more willing to report sexual harassment in the workplace, what consequences do you think the perpetrator may suffer if he or she is brought to account for their actions? Refer to what may be expected for a person who is found guilty and a person who is found to be innocent of the accusations.
7. Why do you think people in the workforce may find it difficult to report instances of sexual harassment? Discuss.
8. Do you think that women should ‘grin and bear it’? Explain.
9. Do you think that rural communities continue to be saturated in masculine tradition and ethos? Explain.
10. Do you think women are sufficiently familiar with technological communications methods? Explain. What problems can exist for women in relation to privacy and safety?
11. How would you describe the momentum for change in relation to gender equality that was prompted by the Harvey Weinstein revelations?
12. What do you think you would have to do if you wanted to make a claim of discrimination or sexual harassment in the workplace?
13. What responsibilities to their staff do managers and employers have in relation to discrimination or sexual harassment?
14. What are the responsibilities of innocent bystanders?
15. Do you think the #MeToo Movement and other initiatives have gone too far in relation to sexual harassment in the workforce? Discuss.
16. In your opinion should the various movements be focusing on equality of all people, regardless of gender alignment or ethnicity instead of the plight of women alone? Discuss.
LEGAL MOUNTAINS TO CROSS IN FIGHTING CLIMATE CHANGE

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Abstract

Climate change poses immense threats and immense opportunities both for your future and human prosperity. The law has an important role to play in meeting these challenges but there are many mountains to cross and the path forward is uncertain and difficult.

Introduction

Former South African President Nelson Mandela, who led his country out of the racist and repressive Apartheid regime, famously said, 'Every important change in history was impossible until it happened'.

Mandela's inspiring wisdom is, hopefully, the future for the world’s response to climate change. The alternative, where we allow catastrophic impacts on human society and the environment that currently appear impossible to avoid, paints a bleak future where the vivid colours and life of ecosystems such as the Great Barrier Reef are lost, and humanity suffers immeasurably.

The dilemma at the heart of the Paris Agreement

In late 2015, the global community adopted the Paris Agreement, which set goals of holding the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.

On the surface, a 1.5 degrees Celsius or 2 degrees Celsius increase seems small, as we experience far greater temperature changes each day. But these goals reflect a plan to turn up the entire globe’s thermostat and their effects will be profound.

The Paris Agreement was an enormous milestone. It crossed huge political and legal mountains that had divided the global community and prevented progress on responding to the threat of dangerous climate change for over a decade. Its goals, and the impacts we expect to occur, if they are achieved, are far better than unmitigated climate change where the global temperatures increase by 4 degrees Celsius or more, a future that would imperil humanity’s continued existence.

Yet the goals at the heart of the agreement also reflect a dilemma. On one hand they were the best that was politically possible at the time of the agreement and better than a future of unmitigated climate change. On the other hand, even if they are achieved, we will lose iconic ecosystems such as coral reefs and humanity will suffer terribly. Even at these levels, the Earth may reach tipping points that are uncontrollable (Steffan et al, 2018).

Even at present levels of greenhouse gases and climate change (of around 1 degree Celcius increase of average global temperatures) the Great Barrier Reef has been heavily impacted. Allowing global temperatures to increase to 2 degrees Celcius above pre-industrial levels poses an extreme risk to coral reef ecosystems (Great Barrier Reef Marine Park Authority, 2014).

Acidic political debate in Australia

The political debate in Australia over action to prevent dangerous climate change has been acidic. It has contributed directly to election losses and changes of prime ministers.

At the heart of this acidic political debate lies the fact that Australia mines, uses and exports enormous quantities of fossil fuels, particularly coal, which cause climate change.

Australia’s political culture and hostility to doing what is needed (especially stopping mining coal) presents huge political mountains to cross if we are to protect the Great Barrier Reef and save our world from future climate change. Perhaps Nelson Mandela’s words will ring true and this change will be ‘impossible until it happened’.

The drug dealers’ defence of Australian coal mines

Australian governments and courts are already confronting climate change issues. But the results are not pretty.

Australian governments and courts have largely allowed coal mines to avoid legal liability for the emissions of greenhouse gases contributing to climate change from the burning of coal produced by the mines.

The most recent way in which coal mines have avoided...
legal liability for their contribution to climate change is akin to the drug dealers’ defence. It says: ‘if we didn’t supply the coal, another mine would, so allowing this mine will have no impact on climate change’.

This defence was approved by the Queensland Court of Appeal in 2016 and the High Court of Australia refused an application for special leave to appeal against it (McGrath, 2017).

This defence would not avoid criminal liability for a person charged with drug dealing. A drug dealer cannot avoid liability by saying, ‘if I didn’t sell them the drugs, someone else would’. Yet it has succeeded, at least for now, in Australian courts for coal mines.

Reality has a way of knocking on the door

Reality has a way of knocking on the door. Deciding to remain deaf to the warnings or taking inadequate steps to prevent the impacts will not stop them occurring.

The impacts of climate change will continue to increase in the future. Our political and legal systems will be forced to respond. We don’t have a magical escape hatch to avoid this future. It will require hard work and sacrifices but it also presents many job opportunities.

A future of greater ambition and opportunities

Technology such as renewable energy has a critical role in responding to climate change, and there is a great deal of money to be made in this, but what governments and the courts do matters enormously.

The question really is not if but how our legal system will respond in the future to the increasing impacts of climate change?

Will governments be held liable for taking inadequate action to prevent damage to people and their property, such as beachfront properties that are flooded?

Will the courts find large polluters can be held directly liable for the damage their carbon pollution contributes to?

Will insurers refuse to cover the liability of property owners who choose to live in areas impacted by climate change?

Will shareholders and other investors flee from the risks of companies with heavy exposure to liability for climate change?

Will the global community, facing huge impacts, decide that greater ambition is needed than the Paris Agreement goals of 2 degrees Celcius and 1.5 degrees Celcius?

Will we, ultimately, try to remove huge amounts of carbon dioxide and other greenhouse gases from the atmosphere, to achieve ‘negative emissions’ on a global scale?

This is a future of great risks but also great opportunity. We have enormous political and legal mountains to climb. Whether we have the will to climb them is up to us.

Student activities

1. What does the Paris Agreement hope to achieve?
2. Why is it important to the world as we know it?
3. Investigate how fossil fuels contribute to climate change.
4. Form two teams and debate whether an Australian coal mine should be legally responsible for the impacts of greenhouse emissions contributing to climate change produced by burning the coal from the mine?
   - Should it matter that, if the mine did not supply the coal, another mine (in Australia or overseas) would supply the same amount of coal?
   - Should drug dealers be allowed to escape criminal liability using the same defence (‘if I didn’t sell the drugs, someone else would’)?
5. Should Australia agree with the Paris Agreement goals (of limiting increased global average temperature rises to 2 degrees Celcius or 1.5 degrees Celcius), if achieving these goals will lead to the loss of the Great Barrier Reef as we currently know it? Discuss.
References

