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THE EFFECTIVENESS OF THE EMPLOYMENT EQUITY ACT AND THE CODE OF GOOD PRACTICE IN REDUCING SEXUAL HARASSMENT

DEBORAH ZALESNE*

ABSTRACT

South Africa has recently taken a progressive stand on sexual harassment as one of only a few countries to prohibit sexual harassment directly through legislation. The Employment Equity Act 55 of 1998 deals primarily with affirmative action, but is also groundbreaking in the area of sexual harassment. This Act, with its accompanying Code for handling sexual harassment cases, can be considered an international model because of its comprehensive approach to and ambitious treatment of sexual harassment, specifically defining the type of conduct that is prohibited, and providing detailed procedures to address the problem and prevent its recurrence. Although the Act and accompanying code represent an important starting point for combating sexual harassment, political, social, and economic progress are not necessarily close behind. A variety of factors can facilitate or retard the effectiveness of anti-harassment objectives. The law's effect on social reform might be questionable, given the endemic gender violence, the legacy of apartheid, the level of economic development, the political power of the trade union movement, and the extent of unemployment. Since the end of apartheid, South African women have made great gains in representation in government, law and society. Law, certainly an important mechanism for change, has been successfully used to remove the most blatant forms of discrimination against women. But women are at a critical juncture. Gender equality is central to the continued development of democracy in South Africa, and many women have yet to feel the effect of the new laws. Because of lack of education and resources, a majority of women have not been able to take advantage of the new legislation, and because of cultural notions about women and institutionalized gender stereotypes, women's experiences and testimony have been largely discredited and devalued. All laws are enforced and interpreted by individuals – equality will not be a reality for most women until gender stereotypes no longer inform the thinking of the judiciary, prosecutors, police and the larger society.

I INTRODUCTION

Sexual harassment in all societies and in all social classes hampers the integration of women into the labour market. Commonly understood as the 'unwanted imposition of sexual requirements in the context of a relationship of unequal power',¹ sexual harassment is a form of violence

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1 CA MacKinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 1.

against women. In addition to threatening a woman's right to physical integrity, it also threatens a woman's liberty, autonomy, and equality by limiting the number of workers able to secure gainful employment and by limiting the rights and opportunities of women in the workplace. Often, these inequities are so subtle they seem 'too small to bother with', but taken together 'they constitute a serious harm to productivity, advancement, and inclusion'.²

In 1998, South Africa joined those countries that formally prohibit sexual harassment as a form of gender discrimination through its enactment of the Employment Equity Act 55 of 1998 (EEA). Although this statute deals primarily with affirmative action, it is also groundbreaking national legislation in the area of sexual harassment. It can be considered an international model because of its comprehensive approach to and ambitious treatment of sexual harassment, specifically defining the type of conduct that is prohibited, and providing detailed procedures to address the problem and prevent its recurrence.³ The legislation recognises the severity and danger of sexual harassment and prescribes serious civil sanctions for the harasser.

Legal reform, however, has its limits. It is not yet clear to what extent sexual harassment has actually diminished in South Africa since the implementation of the EEA. South Africa is a strongly patriarchal society with a long history of sexual violence, and an extremely high incidence of reported rape.⁴ There is a feeling that the urgency of dealing with sexual violence is so powerful that it is distracting to deal with the more nuanced issues of nonphysical, problematic gender dynamics in the workplace. Accordingly, sexual harassment is not a top priority and many men and women alike see it as a relatively unimportant issue. Practically speaking, it is still very difficult for employees in subordinate positions to insist upon their rights, and if they do, their claims are likely to be met with resistance by employers and receive varied responses through the legal system. In fact, since the enactment of the EEA over two years ago, very few cases have been brought, and the problem of sexual harassment is still treated as of minor importance.

The South African experience is not surprising considering the entrenched, state-sponsored discrimination inherited from the apartheid

2 NV Benokraitis *Subtle Sexism: Current Practice and Prospects for Change* (1997) 38.

3 See notes 51-68 below and accompanying text.

4 See PE Andrews 'Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law' (1999) 8 *Temp Pol & Civ Rts LR* 425, 450-452; PC Johnson 'Danger in the Diaspora: Law, Culture and Violence Against Women of African Descent in the United States and South Africa' (1998) 1 *J Gender Race & Just* 472; AK Wing 'A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women' (1997) 60 *Alb LR* 943; C Romany 'Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender' (1996) 21 *Brook J Int L* 857, 867; N Pillay 'Judge and Gender: Wife Battery and Child Abuse' (1993) 16 *Agenda* 66. Also notes 125-26 and 169 below and accompanying text.

system and the sexism inherent in the system of customary law.⁵ As Judge Albie Sachs of the Constitutional Court said: 'It is a sad fact that one of the few profoundly non-racial institutions in South Africa is patriarchy.'⁶ Sexism is inherent across racial lines in all South African communities, so much so that

it is frequently given a cultural halo and identified with the customs and personality of different communities. Thus, to challenge patriarchy, to dispute the idea that men should be the dominant figures in the family and society, is to be seen not as fighting against male privilege but as attempting to destroy African tradition or subvert Afrikaner ideals...⁷

II THE ROOT OF THE PROBLEM

It is well documented that sexual harassment is a serious problem in South Africa.⁸ Although underreporting makes it impossible to know the true extent of sexual harassment, one survey, conducted in May of 1992, revealed that about 76 per cent of working women in South Africa claimed to have been subjected to some form of sexual harassment at work.⁹ That survey indicated most of those women would rather resign than 'make a fuss' and revealed that 37.7 per cent of respondents knew of sexual harassment in their organisations, but only 6.5 per cent of those companies have a formal sexual harassment policy.¹⁰ Another survey showed that although many respondents wish to remedy the gender imbalance in management, over 50 per cent of employers felt uneasy about promoting women to management positions.¹¹

5 For background on the laws of apartheid's caste system and the patriarchal traditions of customary law and how both those legal regimes 'relegated black women to the lowest form of citizenship in South Africa prior to 1993', see AK Wing & EP De Carvalho 'Black South African Women: Toward Equal Rights' (1995) 8 *Harv Hum Rts J* 57, 60-75.

6 A Sachs *Protecting Human Rights in a New South Africa* (1990) 53.

7 Ibid.

8 See generally P Halfkenny 'Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience' (1996) 17 *ILJ* 213; P Halfkenny 'Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 1): Lessons from Other Countries' (1995) 16 *ILJ* 1; G Mutume 'South Africa: Victims of Sexual Harassment Suffer in Silence' *International Press Service* (17 May 1995); M Reddi 'Sexual Harassment in the Workplace: Do we Need New Legislation?' (1994) *Acta Juridica* 109; L Dancaster 'Sexual Harassment in the Workplace: Should South Africa Adopt the American Approach?' (1991) 12 *ILJ* 449; JG Mowatt 'Sexual Harassment - New Remedy for an Old Wrong' (1986) 7 *ILJ* 637.

9 *Sexual Harassment in the Workplace* Survey Conducted by the Institute of Directors in South Africa, the Institute of Personnel Management, the UNISA Centre for Women's Studies, the Women's Bureau of South Africa and the ANC Women's League (May 1992) [hereinafter '1992 Sexual Harassment Survey']; L Vetten 'Adding up the Costs of Sexual Harassment' *Sunday Independent* (9 August 1998); A Ryder 'Devising a Sexual Harassment Policy' (Jan 1998) 16 *People Dynamics* in general; see also Unit for Gender Research in Law *Unisa Women and the Law in South Africa: Empowerment through Enlightenment* (1998) 169 (noting that 'researchers argue that the percentage of women in South Africa who have been subjected to some form of harassment during their employment may even be as high as 70%').

10 See 1992 Sexual Harassment Survey (note 9 above).

11 'Top 100 Survey: An Attitudinal Survey on the Role of Women in Business' cited in 'Human Rights Index' (1991) 7 *SAJHR* 366-67.

It is by now well accepted that the root of sexual harassment is generally not sexual attraction, but the desire to assert power over an individual.¹² Harassers exploit what they see to be a weakness in their victims so as to reassert their superiority and keep victims subordinated.¹³ There is a myriad of ways in which one person can come to have power over another, particularly in the workplace. Employers have inherent power over their employees because of employers' ability to punish or reward their employees, and because of economic and social inequalities likely to exist between the two groups.¹⁴

In addition to the natural power imbalances intrinsic to the employer/employee relationship, women, racial, and sexual minorities are often vulnerable to a different type of subordination based on a gendered and racialised imbalance of power in society. 'Power is socially constructed',¹⁵ and in most societies, masculinity and whiteness have come to be associated with power and success, while traits associated with 'other' have come to be devalued in the workplace.¹⁶ Therefore, women, racial, ethnic, and sexual minorities can be targets for sexual harassment.

In South Africa, women are particularly vulnerable to sexual harassment because of their low status on the employment hierarchy. Women have always been vastly underrepresented in management, occupying the lowest status jobs.¹⁷ Professions traditionally filled by

12 See MacKinnon (note 1 above) (identifying sexual harassment as an act of power); AA Craig 'Musing About Discrimination Based on Sex and Sexual Orientation as 'Gender Role' Discrimination' (1995) 5 *South Calif Rev of Law and Women's Studies* 105, 110 ('courts ... recognize that the objective of such harassment is maintenance and abuse of power and dominance, rather than a real desire for sex'). It is also well accepted today that rape, sexual harassment in its most extreme form, is a crime of violence rather than sexual attraction. See P Miller & N Biele 'Twenty Years Later: The Unfinished Revolution' in E Buchwald et al (eds) *Transforming a Rape Culture* (1993) 47, 49 (stating that rape in all its forms 'is an act of violence, a violation of the victim's spirit and body, and a perversion of power'); S Brownmiller *Against our Wills: Men, Women and Rape* (1975) (characterising rape as a widespread and violent effort to assert power and possession over women's bodies). Sexual harassment is generally viewed as a mild form of rape, so undoubtedly the motivations of the two crimes are similar. See N Stein 'No Laughing Matter: Sexual Harassment in K-12 Schools' in Buchwald et al (eds) (this note) 310, 317-18 (comparing child's motivation in bullying to motivation behind sexual harassment).

13 Craig (note 12 above) 105, 106, 112 (1995) (explaining both that many men see qualities typically regarded as 'feminine' as denoting weakness and that motivation behind sexual harassment is the desire of heterosexual men to maintain power and dominance).

14 D Zalesne 'When Men Harass Men: Is it Sexual Harassment?' (1993) 7 *Temple Pol & Civ Rts LR* 395, 415.

15 MH Schwartz 'Power Outage: Amplifying the Analysis of Power in Legal Relations (With Special Application to Unconscionability and Arbitration)' (1997) 33 *Willamette LR* 67, 74.

16 See generally Zalesne (note 14 above) 414.

17 'Top 100 Survey' (note 11 above) 366 ('although 35,6 per cent of the workforce in the companies [surveyed] were women, only 13,1 per cent of management were women'); C O'Regan 'Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Legislation' (1994) *Acta Juridica* 64, 65 ('[w]omen constitute less than ten percent of the top three income brackets'). This is especially true of black women. See F Kaganas & C Murray 'Law and Women's Rights in South Africa: An Overview' (1994) *Acta Juridica* 1, 29 ('of the 3770 women reflected in the 1991 *Manpower Survey* as being in managerial positions, only four were Africans').

women are undervalued and poorly paid.¹⁸ Almost 20 per cent of all employed women are in domestic service, 15 per cent are in clerical jobs,¹⁹ and more than half of the employees in the lowest two income brackets are women even though women make up only one third of all employees.²⁰

Yet, even women who have been able to achieve greater than usual power in the workplace face a type of discrimination at work that makes them equally vulnerable to sexual harassment. Gender bias still exists in the workplace in the form of stereotyping, as many men still view women in their traditional, passive, subordinate, and domesticated role. Accordingly, working women who do not conform to approved images of womanhood and motherhood face discrimination:

While those women who remain within their traditional stereotypes of good wives and mothers are treated with protective paternalism, women who venture outside those boundaries and attempt to assert themselves apart from their husbands, for instance as career women, are punished by lack of recognition of status or financial hardship.²¹

The discrimination faced by women who fail to conform to gender-based stereotypes and norms often takes the form of sexual harassment. In these scenarios, typically the harasser 'targets and penalises the woman for diverging from prescribed notions of appropriate female appearance and demeanor'.²² Ironically, women are often targeted both for possessing stereotypically female traits, since femininity is generally associated with weakness and incompetence in the workplace, as well as for portraying stereotypically masculine characteristics, such as physical strength or assertiveness, because many men feel threatened when women exhibit the valued characteristics which are often deemed necessary for success in many jobs.²³

But sexual harassment does not affect all women equally. South African women are divided by, among other things, race, class, culture,

18 L Gernholtz 'Gender Bias in Law' *Sowetan* (16 March 1999).

19 C O'Regan & B Thompson *The Unionisation of Women Workers in Different Sectors in South Africa* (1993) 8.

20 O'Regan (note 17 above) 64, 65.

21 M O'Sullivan 'Stereotyping and Male Identification: Keeping Women in their Place' (1994) *Acta Juridica* 185, 190.

22 HS Axam & D Zalesne 'Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies and the Myth of the Gender Monolith Before and After Oncale' (1999) 11 *Yale J of Law & Feminism* 155, 169.

23 See generally *ibid* 165-70. This pattern is present with overwhelming consistency in sexual harassment cases in the United States. In South Africa there are many fewer sexual harassment cases from which to derive such a pattern. But given the strong expectations in South Africa that women should conform to their traditional role of mothers and nurturers, it is not a big leap to assume that sexual harassment in South Africa stems from a similar discomfort regarding women in the male-dominated workplace. See, for example, *Reddy v University of Natal* (1998) 19 *ILJ* 49 (LAC) (where complainant was employed as a security guard on the night shift at a university, a job traditionally held by men).

urban and rural situation, education, and language.²⁴ Black women are the most likely victims of sexual harassment, because of their historical position on the lowest rung of the working ladder.²⁵ They experience subordination not only as women and blacks, but also typically as members of the working class.²⁶ Working class black women face different stereotypes from middle class career women. It is a truism that working class women have always worked.²⁷ Accordingly, 'while there is a strong disapproval of middle-class wives engaging in careers in the public sphere, there is a presumption that lower-class and working-class women should be employed.'²⁸ The presumption, though, is that they should be employed in the lowest paying occupations, which historically has been the case.²⁹ Eighty per cent of working black women are employed in agriculture and domestic work, which are among the lowest paying jobs:

Most black women work without trade union rights and legislative protection. Many work the land or in the textile and canning industries where working conditions are not that much different from those of farm laborers. South Africa has few black female

24 See Wing (note 4 above) 954 and n46; C Albertyn 'Women and the Transition to Democracy in South Africa' (1994) *Acta Juridica* 39.

25 Kaganas & Murray (note 17 above) 29; A Haroz 'South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding Choice and International human Rights to Black South African Women' (1997) 30 *Vand J of Transnat L* 863, 869. The status of African women in South Africa reflects a history of limited educational and occupational opportunities: 'Prior to the 20th century, African women in South Africa worked primarily as domestics or teachers. When missionaries opened hospitals for Africans in the mid-19th century, they employed African women as domestics and nurse's aides. By 1910, only one African woman had completed full nurse's training compared to 3,446 African women with teacher's qualifications; shortly thereafter, however, nursing became one of the most popular and prestigious professions open to African women in South Africa. By as late as 1960, economic prospects for the nation's African women had changed little. Out of a population of 7.5 million African women, only 800,000 were classified as economically active. Half that number were working as domestic servants; 200,000 as workers on White farms; 25,000 as professionals (including 12,000 nurses and 11,000 teachers); and the remainder were employed as factory workers or clerks.' R Martineau 'Women and Education in South Africa: Factors Influencing Women's Educational Progress and Their Entry into Traditionally Male-Dominated Fields' (1997) *J Negro Educ* 383, 395.

26 See O'Regan (note 17 above) 65; Romany (note 4 above) 861 ('Black women in South Africa have suffered multiple oppressions and have been marginalized by virtue of being both black and female. . . . [T]heir subordination in society is magnified by the sexism that intersects with official racism and economic deprivations').

27 See IU Zeytinoglu & JK Muteshi 'A Critical Review of Flexible Labour: Gender, Race and Class Dimensions of Economic Restructuring' (2000) 27 *Resources for Feminist Research* 97 (within advanced industrialised economies, because of financial necessity 'minority women and working class women have had consistent economic participation over their lifetimes, have been expected to work outside the home and have been more systematically positioned as wage earners in full-time domestic work, field work and industrial work'); P Cooper 'A Masculinist Vision of Useful Labor: Popular Ideologies About Women and Work in the United States, 1820 to 1939' (1995) 84 *Ky LJ* 827, 831.

28 O'Sullivan (note 21 above) 196.

29 As stated by Nelson Mandela: 'black women, in thousands, occupy the lowest ranks in employment. . . . [B]lack women are underpaid and are most brutally exploited as farm labourers and domestic workers.' Quoted in Romany (note 4 above) 857.

professionals. In the mid-1970's there were no black 'women lawyers, judges, magistrates, engineers, architects, veterinarians, chemists, or pharmacists.'³⁰

Pigeonholing black women in these roles leaves them with the least amount of power in the workplace.

As affirmative action programs begin encouraging more women, and particularly black women, into jobs traditionally reserved for white men, sexual harassment will undoubtedly continue. In fact, the rate of sexual harassment may increase, as some men, who desire to maintain the socially constructed perception of male strength, seek to reinforce their own sense of identity and position of privilege in the gender hierarchy.³¹

III INADEQUACY OF THE LAW BEFORE 1998: HISTORY OF SEXUAL HARASSMENT LAW IN SOUTH AFRICA

During most of the apartheid regime, 'sexual harassment was neither recognized nor defined as a social or legal problem.'³² Prior to 1998 there was no legislation specifically addressing the problem of sexual harassment in South Africa. There were, however, several possible avenues for combating sexual harassment through more general laws. Most broadly, the Constitution protects the right to equality and non-discrimination, the right to 'security of the person,' and the right to 'dignity.'³³ Although no sexual harassment case has ever been won as a straight constitutional claim, sexual harassment has been characterised as a violation of 'that right to integrity of body and personality which belongs to every person,'³⁴ and has been said to infringe 'the right to human dignity'.³⁵ Additionally, a victim of sexual harassment in the workplace could seek civil redress in delict or under labour law, or could seek redress through the criminal law. But like many countries that do not explicitly prohibit sexual harassment through statute, the available sources of relief under former South African law did not adequately protect women who were subjected to sexual harassment.

Prior to the enactment of the EEA, the few cases dealing with sex discrimination by means of sexual harassment were generally brought under the Labour Relations Act 66 of 1995 (LRA) and its predecessor,

30 Black women make up 86 per cent of South Africa's domestic workers. Romany (note 4 above) 865.

31 Reddi (note 8 above) 119 ('the expected increase in the frequency of sexual harassment is on account of the fact that male supervisors and co-workers would probably fight back with the last weapon available to them: sexual coercion').

32 Wing & De Carvalho (note 5 above) 69.

33 See ss 9, 10 and 12 of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'). See also *Sowter v Intertech* (1997) 18 ILJ 689 (LAC).

34 See *J v M* (1989) 10 ILJ 755 (IC).

35 See *Reddy v University of Natal* (note 23 above).

Act 28 of 1956.³⁶ A majority of those claims, however, involved claims of unfair dismissal by the 'aggrieved' harasser, rather than claims by the sexual harassment victim.³⁷ The first case of sexual harassment in South Africa was heard only in February 1989. In *J v M*, the court addressed the validity of the dismissal of a senior engineering manager found to have sexually harassed female co-workers. The harasser was asked to resign after he was found to have repeatedly touched various female employees in a sexual manner without their consent. The harasser resigned, but later withdrew his resignation. The court found the dismissal was fair, despite the original complaining party withdrawing her complaint and several female employees signing a petition in support of his reinstatement.³⁸ Again in *Mampuru v Putco*,³⁹ an employee was dismissed on charges of sexual harassment. As in *J v M*, the court found the dismissal fair as the harasser had an 'intimidating attitude' towards female employees, thus frightening them into not complaining for fear that they would be dismissed. Other judges were not so sympathetic toward claims of harassment, and reinstated employees suing for unfair dismissal, despite findings of 'serious misconduct',⁴⁰ and 'abhorrent' behaviour.⁴¹

Although the Industrial Court recognised in several cases that dismissal based on behaviour constituting sexual harassment is proper,⁴² courts overall still seemed resistant to the idea, and it remained unclear whether sexual harassment would be deemed 'sex discrimination' under the LRA. It was not until 1994, five years after *J v M* and *Mampuru v Putco*, that the first case was brought by a victim of sexual harassment. However, in *Lynne Martin-Hancock v Computer Horizons*, and several similar cases that followed, the rulings were limited to the fairness of the dismissal of the female employee, and failed to address whether sexual harassment had in fact occurred.⁴³

36 See *J v M* (note 34 above); *Gert Visser v Sunripe Fruit* Case No NHK 13/2/1219; *Mampuru v Putco* Case No IC 11/2/2136 (Sep 1989) (unreported); *Lynne Martin-Hancock v Computer Horizons* Case No NH 11/2/14268 (Oct 1994) *Sowter v Intertech* (note 33 above); *Anthony v 007 Casino* and *Du Preez v The Car Connection* cited in N Smythe 'Handling Cases of Sexual Harassment Code of Good Practice' (Aug 1998) 16 *People Dynamics* 17, 18; *Pretorius v Britz* 1997 (5) BLLR 649 (CCMA); *Sadulla v Jules Katz & Co* (1997) 18 ILJ 1482 (CCMA); *Gerbber v Algorax* 1999 (1) BLLR 41 (CCMA); *Reddy v University of Natal* (note 23 above); *Gregory v Russells* (1999) 20 ILJ 2145 (CCMA).

37 See *J v M* (note 34 above); *Mampuru v Putco* (note 36 above); *Lynne Martin-Hancock v Computer Horizons* (note 36 above); *Reddy v University of Natal*, (note 23 above); *Gregory v Russells* (note 36 above); *Sadulla v Jules Katz & Co* (note 36 above); *Gerbber v Algorax* (note 36 above).

38 *J v M* (note 34 above).

39 Note 36 above.

40 *Sadulla v Jules Katz & Co* (note 36 above).

41 *Gregory v Russells* (note 36 above).

42 See, for example, *J v M* (note 34 above); *Mampuru v Putco* (note 36 above); *Lynne Martin-Hancock v Computer Horizons* (note 36 above).

43 *Lynne Martin-Hancock v Computer Horizons* (note 36 above) (finding constructive dismissal of a woman who claimed to be sexually harassed for two years); *G v K* (1988) 9 ILJ 314 (IC) (finding wrongful dismissal and reinstating female employee after her employer fired her for

Although the LRA offered recourse in some situations, it had several important limitations. Remedies under the LRA were limited to instructing an employer to cease the unfair labour practice, and did not allow the plaintiff to recover damages for humiliation or lost opportunities.⁴⁴ Additionally, even if the Industrial Court would have allowed such a claim, this cause of action was not necessarily available to people applying for employment, and may not have been available against an employer who was not aware of the harassment. The LRA also did not cover all categories of workers. For example, domestic workers were excluded from the 1956 Act's purview.⁴⁵ Therefore, labour law was not the best route for a plaintiff to seek compensation for damages suffered.

A woman subjected to sexual harassment in the workplace also had the option of suing in delict for damages suffered as a result of the harassment. Again, there were several limitations to such a suit. Most significantly, the victim would not be able to recover damages for lost employment, or for loss of other tangible assets. Damages could only be recovered under the delictual head of iniuria for the wrongful and intentional impairment of the victim's physical integrity, dignity, or reputation.⁴⁶ Moreover, suing in delict could be quite expensive for a plaintiff who would have to hire a lawyer and might have to pay the defendant's legal fees if she lost her case. There are thus no reported cases involving a sexual harassment case in delict. Sexual harassment could also probably give rise to civil damages for assault, although there is also no reported case using that remedy.⁴⁷

Finally, sexual harassment may also fall into one of the categories of crimes against the person, such as rape, assault, indecent assault, or

ending their consensual affair); *Anthony v 007 Casino* (note 36 above) (finding wrongful dismissal and awarding six months' salary as compensation where a woman was fired for refusing to succumb to sexual favours in exchange for a salary increase); *Du Preez v The Car Connection* (note 36 above) (finding wrongful constructive dismissal where a female employee resigned after her employer attempted to touch her breasts, made comments of a sexual nature and repeatedly used foul language over a fairly lengthy period); *Pretorius v Britz* (note 36 above) (finding wrongful constructive dismissal and awarding nine months' salary as compensation where a female employee resigned after, over a period of eighteen months, an employer made a number of sexual advances towards her, including giving her unsolicited gifts of a sexual nature such as pink G-string panties, attempting to kiss her, and asking her not to wear a brassiere); *Sowter v Intertech Sys* (note 33 above) (finding wrongful constructive dismissal and awarding twelve months' salary where an employee resigned after severe and prolonged emotional, physical and sexual abuse by a co-worker both inside and outside the workplace).

44 Mowatt (note 8 above) 637. This also meant that the court could find that sexual harassment is an unfair labour practice without ruling that it amounts to sexual discrimination. *Dancaster* (note 8 above) 465.

45 C Sutherland *Paying for Stolen Kisses? Sexual Harassment and the Law in South Africa* (24 March 1992).

46 See *Dancaster* (note 8 above) 464-465 and the authorities cited there.

47 See WA Joubert (ed) *LAWSA* vol 10(2) para 244 n.4.

crimen injuria, allowing for criminal prosecution.⁴⁸ In the past decade, women were increasingly bringing charges of criminal assault as companies refused to act in matters of sexual harassment.⁴⁹ A victim filing criminal charges, however, would not be able to recover any monetary damages, nor would she be able to bring charges against an employer for sexual harassment perpetrated by a co-worker, since the criminal law requires only direct suits against the person alleged to have committed the crime. Additionally, in criminal cases against the harasser, there is a heavier burden of proof than in civil cases.⁵⁰ Since neither labour law, delict, nor criminal law were written specifically to address the unique problem of sexual harassment, the available options for employees subjected to sexual harassment were all lacking in significant ways.

IV LEGAL REFORM: SOUTH AFRICA TAKES A PROGRESSIVE STAND ON SEXUAL HARASSMENT

Recognising that businesses had 'largely failed to achieve employment equity in the absence of legislation,'⁵¹ the EEA was enacted on 19 October 1998, and came into operation in August 1999. This legislation seeks to put an end to years of inequalities in the labour market resulting from apartheid policies, societal prejudices, and stereotypes,⁵² by promoting the use of affirmative action and prohibiting unequal treatment of employees in the workplace.

48 Ibid 244. In *J v M* (note 34 above) for example, the physical contact, where the harasser repeatedly and without consent touched female employees under his control in a sexual way, might have been grounds for a criminal charge of indecent assault. Dancaister (note 8 above) 465.

49 *LAWSA* (note 47 above) para 244 n4.

50 'The disadvantage to laying a criminal charge [regarding sexual harassment] is the high burden of proof required; guilt needs to be proved beyond a reasonable doubt. This is very often difficult considering that there are generally no witnesses to incidents of sexual harassment; cases often consist of one person's word against another's.' See Paper 1: Presentation to SADC Conference on the Prevention of Violence Against Women by Sexual Harassment Education Project: 'Dealing with Sexual Harassment' (5-8 March 1998) available at www.sn.apc.org/sadc_pvaw/papers/skakel.htm (accessed 19 January 2001).

51 COSATU Submission on the Employment Equity Act; Presented to the Portfolio Committee: Labour on 11 April 2000. Available at www.cosatu.org.za/docs/2000/empeqa.htm.

52 The preamble to the EEA recognises that 'disparities in employment, occupation and income within the national labour market' resulted from 'apartheid and other discriminatory laws and practices.' The drafters noted that such disparities 'create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.' The preamble to the EEA sets out as its goal to 'promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation'. The EEA applies only to 'designated employers', which is defined to include employers who employ 50 or more employees or have an annual turnover equal to or above the amount stipulated in Schedule 4, municipalities; organs of state and employers bound by collective agreements.

Section 6(1) of the EEA prohibits discrimination in the workplace, either directly or indirectly, on the grounds of 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.' Section 6(3) further specifies that 'harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

Positive aspects of the EEA include the fact that it identifies sexual harassment in the workplace as a serious problem in need of attention, and the fact that it places the burden of proof on the employer.⁵³ This is significant because of the difficulty of proving sexual harassment when there are few or no witnesses. The EEA also provides the Labour Court with the power to award appropriate damages, including reinstatement and compensation for harm suffered.⁵⁴ The law is written to apply not only to current employees, but also to former employees and applicants for employment, as well as to temporary employees, where their employment is of indefinite duration or for a period of three months or longer.⁵⁵ Additionally, the EEA provides for vicarious liability on the part of employers if the employee tells the employer about the problem and the employer fails to take the necessary steps to eliminate the undesirable conduct.⁵⁶ The provisions on employer liability, however, are more employer-friendly than the law in the United States, where an employer is always vicariously liable for sexual harassment committed by a superior if there is tangible harm to the plaintiff, even if the employer was unaware of the problem.⁵⁷

While the EEA briefly describes the procedure for referral of a dispute about sexual harassment, it leaves many questions unanswered. The 'Code of Good Practice on the Handling of Sexual Harassment Cases' ('the Code'), approved on 4 May 1998 by the NEDLAC Market Chamber under the LRA, answers many of those questions.⁵⁸ The Code, a guideline for handling sexual harassment cases, sets out an ambitious objective to 'eliminate sexual harassment in the workplace' by encouraging and promoting 'the development and implementation of

53 Section 11 of the EEA.

54 Section 50(2) of the EEA.

55 Sections 51(5) and 57 of the EEA. Section 2(1) of the Code elaborates, explaining that the perpetrators and victims of sexual harassment may include 'owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors, or others having dealings with a business'.

56 Section 60(3) of the EEA.

57 See *Faragher v City of Boca Raton* 118 s Ct 2275 (1998); *Burlington Industries v Ellerth* 118 s Ct 2257 (1998).

58 The Code is the product of eight months of negotiations in NEDLAC which commenced in September of 1997: 'The drafters studied a variety of international precedents, and began negotiations on a draft which was partly inspired by the European Community's Code of Practice on Measures to Combat Sexual Harassment.' Smythe (note 36 above) 18.

policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace.⁵⁹ Despite its ambitious goals, it remains to be seen what type of effect the Code will actually have on the outcome of sexual harassment cases. As a detailed government sponsored guideline, it seems likely that courts will refer to the Code in the disposition of sexual harassment cases, but no reported cases to date have done so.

Perhaps the greatest achievement of the Code is its detailed definition of sexual harassment in s 3, which reads:

- (1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
- (2) Sexual attention becomes sexual harassment if:
 - (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
 - (b) The recipient has made it clear that the behaviour is considered offensive; and/or
 - (c) The perpetrator should have known that the behaviour is regarded as unacceptable.

Section 4(1) of the Code elaborates on the forms that sexual harassment takes:

- (1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:
 - (a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
 - (b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
 - (c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
 - (d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

Sexual favouritism is further prohibited under s 4(2), and occurs where:

a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases.

The forms of harassment listed are not meant to be exclusive, but rather are just examples of what conduct might constitute sexual harassment.⁶⁰ The Code also provides procedures to deal with the problem and prevent

59 Sections 1(1) and 1(3) of the Code.

60 Section 4(1) of the Code.

its recurrence, suggesting that employers designate someone outside of management available to give advice and assistance, and outlining informal and formal procedures that can be taken to resolve conflict.⁶¹

The Code's definition of sexual harassment is legally and politically important because it provides comprehensive legal protection to women against a broad range of abusive tactics. The EEA responds to women's experiences by penalising physical and emotional harassment, as well as verbal and written harassment, assuring that harm from all types of unwanted behaviour of a sexual nature may be addressed through legal interventions.

The Code presents what seems to be a subjective standard for making the determination of what conduct constitutes sexual harassment: 'sexual attention becomes sexual harassment if ... the recipient has made it clear that the behaviour is considered offensive...'.⁶² This differs from the standard in the United States, under which actionable harassment must be hostile and abusive in both the subjective and objective senses. The victim must perceive the environment to be abusive and the situation must be such that a reasonable person would find the conduct hostile or abusive.⁶³

Despite its recognition of the importance of the problem of sexual harassment, the Code falls short in its failure to give employers an affirmative duty to act in a preventative manner against potential sexual harassment. Although employers are 'required to take appropriate action ... when instances of sexual harassment which occur within the workplace are brought to their attention',⁶⁴ the Code indicates only that they '*should* create and maintain a working environment in which the dignity of employees is respected', '*should attempt*' to ensure the workplace is free of sexual harassment, and '*should*' implement a sexual harassment policy and 'take disciplinary action against employees who do not comply with the policy.'⁶⁵ While the Code is explicit and detailed about what the sexual harassment policy should include and about the procedures to be followed once a complaint is filed,⁶⁶ these are only guidelines which employers are not bound to follow. This management prerogative is problematic because management structures are typically dominated by men who are less likely to identify sexual behaviour in the

61 Section 7 of the Code.

62 Section 3(2)(b) of the Code.

63 *Harris v Forklift Systems* 510 US 17 (1993) 21-22.

64 Section 5(1)(d) of the code.

65 Sections 5(1); 6(1) and 6(2) of the Code (my emphasis).

66 Sections 6 and 7 of the Code (policy statements should explain that 'allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially' and should state that 'employees will be protected against victimization, retaliation from lodging grievances and from false accusations').

workplace as harassment, and less likely to perceive sexual harassment as a serious issue.⁶⁷

There is, however, a strong incentive for employers to prevent harassment from occurring. While the Code does not impose penalties on an employer for failing to issue a policy, failure to do so could provide the court with a basis on which to hold employers liable in cases where the employee files a complaint against the employer for failing to 'take the necessary steps to eliminate the alleged conduct. . .'.⁶⁸ Additionally, s 20 of the EEA requires that all designated employers prepare and implement an 'employment equity plan which will achieve reasonable progress toward employment equity in that employer's workforce'. This plan must state, among other things, 'the objectives to be achieved for each year of the plan.' A court might interpret the EEA in such a way that an employer's failure to institute a policy in accordance with the Code will amount to a failure to accommodate women as required under the plan.

There are also non-legal incentives for compliance. In addition to legal costs, sexual harassment can also cost companies money by reducing productivity, morale and motivation.⁶⁹ As noted in a business magazine, 'the penalty for not adhering to the "Code of Good Practice for the Handling of Sexual Harassment Cases" is bad publicity, low morale and loss of employee loyalty which could follow a case of serious sexual harassment, within a company.'⁷⁰ A pamphlet produced by the Women's Bureau of South Africa suggests that sexual harassment can have serious financial implications for companies, including:

An intimidating or hostile environment, lower productivity, poor performance and poor quality, low staff morale, absenteeism, accidents caused by stress and distraction, resignations of valuable staff, staff losing respect for people in power positions who 'turn a blind eye,' poor image of the company in the eyes of members of both the staff and the public, and litigation and costly legal battles.⁷¹

67 In an earlier article on sexual harassment in rental housing I argued that 'because women have not historically held power positions, men and women often have different perspectives regarding what conduct constitutes sexual harassment,' and 'actions deemed harassment by women were often perceived as harmless by men.' D Zalesne 'The Intersection of Socio-Economic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?' (1997) 38 *Bost Col LR* 861, 871-72 and the authorities cited there.

68 Section 60(2) of the EEA. This theory has yet to be tested.

69 Ryder (note 9 above) 27. 'Sexual harassment can have a direct impact on productivity and profitability. The stress resulting from sexual harassment can make employees ill, resulting in time off work and reduced efficiency, and increasing costs for the employer in the form of sick pay and medical insurance. While they are at work, victims of sexual harassment are likely to be less productive and less motivated, thereby affecting both the quantity and quality of their work.' *Sexual Harassment: Breaking the Taboo* available at www.nepalbews.com (August 2000) 2.

70 *Business Voice* (May 1998) 25, 26. See also 1992 Sexual Harassment Survey (note 9 above) 1 ('case histories and research, both internationally and in South Africa, have proven that sexual harassment can cost companies money, by reducing productivity, morale and motivation. Companies may lose valuable staff or incur legal costs').

71 1992 Sexual Harassment Survey (note 9 above) 6.

Promoting equality and diversity and treating workers with dignity and respect can have a positive impact on a company's image, and 'with the growing importance of women as clients, it is necessary to create a gender sensitive image.'⁷²

Employment equity has been further advanced in South Africa by the recent enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act), which deals with equality and discrimination in broader society, specifically prohibiting unfair discrimination against any person (by the state or by any person), on any of the prohibited grounds.⁷³ The Equality Act has been said to complement and in certain respects reinforce the EEA, by establishing an affirmative duty on the part of the state to promote and achieve equality by developing awareness of fundamental rights, enacting further legislation, and providing assistance, advice, and training on issues of equality.⁷⁴ It complements the EEA in several ways: first, it provides protection to employees that are excluded from the EEA, such as members of the defence force; and second, it imposes responsibility and liability on some employers that are not 'designated employers' under the EEA.⁷⁵

Overall, the EEA and the accompanying Code, together with the Equality Act, provide a solid basis for prosecuting sexual harassment. However, the law will only be effective if those whom it was meant to protect know about their rights and choose to assert them, if employers implement policies and take action against employees who do not comply, and if lawyers and judges interpret the laws in accordance with the intent of the drafters.

V SEXUAL HARASSMENT CONTINUES: POLITICAL, ECONOMIC, AND CULTURAL IMPEDIMENTS TO THE EFFECTIVE IMPLEMENTATION OF THE EMPLOYMENT EQUITY ACT

Despite the enthusiasm that accompanied the enactment of the EEA, its effectiveness is still largely untested. Although some believe that because of the new legislation sexually harassed women no longer fear speaking out,⁷⁶ evidence indicates otherwise. In fact, since its enactment over two

72 *Sexual Harassment: Breaking the Taboo* (note 69 above).

73 Apart from the grounds listed in s 1 of the Act, discrimination on any other ground that causes systematic disadvantage, undermines human dignity, or seriously affects equal enjoyment of rights and freedoms is also prohibited. Under s 14, measures designed to 'protect or advance persons or categories of persons disadvantaged by unfair discrimination' do not constitute unfair discrimination.

74 Section 25 of the Equality Act. See also COSATU Submission on the EEA (note 51 above).

75 *Ibid.*

76 See P Covender 'Sex, Lies, and Bosses: Harassment Victims Turn to Lie Detectors to Nail Workplace Lechers' *Durban Sunday Times* (6 June 1999).

years ago, only a few cases have been brought under the EEA, with unclear results.⁷⁷

There is still 'entrenched hostility towards employment equity by employers and conservative trade unions in some sectors'.⁷⁸ Many employers 'do not involve unions and workers in the assessment of the workplace as required by the EEA', and continue to resist attempts to place matters of employment equity on the table for discussion at all.⁷⁹ This hostility is not surprising given the fact that the statute directly challenges inherited privileges and disrupts the current balance of power.

Women report that sexual harassment is still not taken seriously in the workplace.⁸⁰ A 1999 study of the private sector by the Commission for Gender Equality shows that 'despite new legislation, South African business has done little or nothing to change the poor status of women in their organisations'.⁸¹ The study revealed that of the companies interviewed, 41 per cent did not have a sexual harassment policy. Of those companies, 24 per cent said they did not feel obligated to provide a policy 'because staff had not asked for one,' and 19 per cent indicated that having a sexual harassment policy was 'unimportant'. Nerishni Shunmugam, a representative of the company that conducted the survey, suggests that the results show a 'general disrespect for women' and reflect 'the society we live in as a whole'.⁸²

Law does not exist outside of culture. To be sure, the social setting in which the law functions, including the cultural and historical background of society, will influence the effect of sexual harassment legislation on social behaviour. In South Africa, historical sexism and racism, unequal access to the law, gender-specific cultural norms, and failure to make sexual harassment a priority may continue to thwart recent legal progress in the area of sexual harassment.

(a) Unequal access to the law

Most sexual harassment goes unreported in South Africa. Lisa Vetten states that 'sexual harassment is one of the most under-reported crimes, because it was often hard for women to decide if comments or behaviour were 'inappropriate' – it is also difficult to know what one can do about it.'⁸³ One study of the extent of sexual harassment in Pretoria found that

77 In *Ngantwini v Daimler Chrysler* 2000 (9) BALR 1061 (CCMA) for example, despite the recent promulgation of the EEA, the court made no mention thereof, instead applying the LRA to determine that a dismissal based on accusation of sexual harassment was appropriate. Because the incident involved unwanted physical contact, the court determined the conduct amounted to assault and found no need to address whether sexual harassment had also occurred.

78 COSATU Submission on the EEA (note 51 above).

79 Ibid.

80 See Covender (note 76 above).

81 C Jacobson 'Women Still on a Road to Nowhere' *Business Times* (16 May 1999) 1.

82 Ibid.

83 L Vetten *A Step Too Far* available at www.iafrica.com (accessed 24 March 2001).

'a lower reporting rate was recorded among the victims of sexual harassment than sexual assault.'⁸⁴ Of the women surveyed who said they had been sexually harassed, only 35 per cent reported the offence to the police, whereas 57 per cent of women who said they had been sexually assaulted later reported the attack to the police. Reasons advanced for the failure to report include believing the crime was not serious enough (18 per cent), feeling ashamed (36 per cent) and feeling that the police would not be able to help (27 per cent).⁸⁵ Although the laws may change some of the structures and procedures in the courts 'many of the problems related to a lack of resources, poor administration and unskilled staff are likely to continue to hamper people's access to justice in South Africa.'⁸⁶

The infrequent use of the law as a solution to sexual harassment is not altogether surprising, given common cultural attitudes against litigation, particularly for women. Women are often reluctant to assert their legal rights because of their cultural upbringing to be humble, submissive and unassertive.⁸⁷ Women are also often reluctant to report violence against them because of the social stigma, shame and humiliation associated with such claims, the fear of being ostracised by their families and communities if they report the harassment, and the fear of reprisal, retaliation, or loss of job. In addition, the courts continue to be staffed primarily by men, and 'a white male dominated court system has contributed to cementing black women's distrust.'⁸⁸ Many women feel that reporting the problem would be of no use because of indifference or hostility on the part of police and judicial authorities. Also, it has been suggested that 'the legal system is currently too embattled with rising crime rates to take gender issues as seriously as it might otherwise take them.'⁸⁹ Thus, women often prefer alternative dispute resolution to subjecting themselves to gender-biased courts.⁹⁰

Income level also contributes to the likelihood of filing suit. The 'stakes hypothesis' suggests that 'the higher a person's salary, the greater the likelihood of filing because the person's "stake" in the outcome is greater or because they would stand to lose more by not protecting their rights through filing suit.'⁹¹ Also, victims with higher education levels are likely

84 See *Addendum: Notes on Sexual Harassment and Sexual Assault* available at www.iss.co.za/Pubs/pta.vic.surv/sexual%20harassment.html.

85 Ibid.

86 B Goldblatt 'A Feminist Perspective on the Law Reform Process: An Evaluation of Attempts to Establish a Family Court in South Africa' (1997) 13 SAJHR 373, 375.

87 See CL Morna 'Equity Act Will Affect Women' *Business Day* (18 August 1999) 14; *Business Times* (13 August 2000) 15; *South Africa – Women in Business*, National Trade Data Bank Market Reports (23 April 1997); *Business Day* (05 March 1999) 15.

88 Romany (note 4 above) 867.

89 *South Africa – Women in Business* (note 87 above).

90 See generally LA Obiora 'New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations' (1995) 28 *Ind LR* 575, 591 (addressing an 'African experience').

91 M Hoyman & L Stallworth 'Suit Filing By Women: An Empirical Analysis' (1986) 62 *Notre Dame LR* 61, 73.

to file lawsuits more frequently,⁹² most likely because they better understand their legal rights. The type of employment might also impact on a woman's decision whether to sue. Finally, people who have experienced a lifetime of 'double discrimination,' such as discrimination on the basis of both race and gender, 'may be more likely to produce survival oriented coping strategies', making them more likely to 'continue in the workplace and remain silent about the harassment'.⁹³

In South Africa, the most likely victims of sexual harassment are black women. Women occupy the lowest status jobs and, specifically, black women sit on the lowest rung of the working ladder. 'In South Africa, many black women have little education, time or resources. It is unrealistic to expect them to know how to write and present comprehensive complaints in legal language.'⁹⁴ Therefore, it is no surprise that highly educated, urbanised women have benefited most from legislation like the EEA. For example, as Amien and Paleker noted, 'even though the Constitutional Court has been vocal about its advancement of gender equality, it is noteworthy that the only litigants who have evoked the equality clause in the Constitutional Court have been either men or persons of financially privileged backgrounds.'⁹⁵ One might expect, then, that a high percentage of women subjected to sexual harassment have hesitated and will continue to hesitate to file a lawsuit.

(b) Institutional gender bias

It is not only access to the law that limits the effectiveness of the statute, but also resistance and scepticism from law enforcement, courts, prosecutors, the business community and the general public. Even the best-intentioned law will not have the anticipated effect on the lives of real people if those called upon to evaluate the underlying incidents are laden with biases about the crime and its victims.

Gender bias is still prevalent in South Africa, but uniquely so. The South Africa Constitutional Court, progressive in its treatment of equality issues, has taken strong feminist positions and has shown particular sensitivity to all forms of marginalisation and exclusion.⁹⁶ The Court's approach to equality is fundamentally different from most countries, focusing primarily on 'respect for the equal worth and dignity

⁹² Ibid.

⁹³ JL Dolkart 'Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards' (1994) 43 *Emory LJ* 151, 208.

⁹⁴ See Goldblatt (note 86 above) 398. For example, it is difficult to imagine a black female domestic worker taking her white male employer to court for sexual harassment.

⁹⁵ W Amien & M Paleker *Women and the Law* (1988) 6-7.

⁹⁶ A Sachs *Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court* The Tenth McDonald Lecture (April 1998); Amien & Paleker (note 95 above) 2. The Court is currently comprised of 9 men and 2 women (Mokgoro and O'Regan JJ).

of all human beings.⁹⁷ The Constitutional Court has not yet decided any cases involving sexual harassment. Like the Constitutional Court, Parliament has been particularly sympathetic to gender issues. Since at least one third of ANC members of Parliament must be women,⁹⁸ South Africa is now among the top ten countries in the world with respect to representation of women in Parliament.⁹⁹ As a result, women have seen great legislative victories over the past several years.

However, despite unequivocal support for gender equality at the highest legislative and judicial levels, sensitivity to gender issues is not the same at the local level. The 'Report on the Audit of Legislation that Discriminates on the Basis of Sex and Gender' describes inherent discrimination in the local electoral system, in which there is typically no quota system, just the discretion of political parties.¹⁰⁰ As for the court system, women continue to receive inadequate protection from lower courts. In 1998, only one quarter of court personnel were women, two of thirty four chief magistrates were women, and all attorneys-general were men, leaving women distrustful of the criminal justice system.¹⁰¹

97 Sachs (note 96 above) notes that '[t]he main focus of equality jurisprudence is what I would call the human rights dimension. Equality as we understand it in the contemporary world is associated with non-discrimination. It is designed to deal with the ways and means whereby societies marginalise, oppress, diminish, or demean people because they are what they are.' In *Harksen v Lane* 1998 (1) SA 300 (CC) para 52 the Court enumerated the following factors for determining whether conduct amounts to unfair discrimination: '(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage ... (b) the nature of the provision or power and the purpose sought to be achieved by it ... (c) the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.' The goal of the South African constitutional order is to achieve equal treatment in a way that 'prevent[s] further disadvantage' and 'remed[ies] the consequences of unfair discrimination endured by already vulnerable and historically disadvantaged groups.' Amien & Paleker (note 95 above) 2. For example, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) the Constitutional Court found that the common law crime of sodomy violated the constitution because, among other things, it 'constitutes an infringement of the right to dignity.' In *President of the RSA v Hugo* 1997 (4) SA 1 (CC), the Court upheld a 'Presidential Act' which ordered the release of, among others, mothers of children under twelve, but not similarly situated fathers, because the impact of the measure did not undermine human dignity. Similarly, in *Prinsloo v Van der Linde* 1997 (2) SA 1012 (CC), the Court rejected plaintiff's equality challenge based on a statute which treated people living in non-fire controlled zones differently from people living in fire-controlled zones, because his dignity was not assailed. See also *Brink v Kitshof* 1996 (4) SA 197 (CC); *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC); *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

98 The ANC adopted a quota that one third of their parliamentarians be women, which resulted in women comprising one quarter of parliament after the 1994 elections. Z Rathus *The New South Africa Women and Making of the Constitution* Women's Constitutional Convention (29-30 January 1998) www.womensconv.dynamite.com.au/rathus.htm (accessed 06 June 2001). See also A Mama *Transformation Thwarted: Gender-Based Violence in South Africa's New Democracies* (May 2000) available at www.uct.ac.za/org/agi/newslet/col6/transf.htm (accessed 30 May 2001).

99 Amien & Paleker (note 95 above) 48.

100 Gerntholz (note 18 above).

101 Commission on Gender Equality *Framework for Transforming Gender Relations in South Africa* (1998) available at www.gov.za/reports/2000/transformation.pdf (accessed 12 June 2001).

There is a distinct history of South African employers, police officers, and judges failing to take claims of sexual harassment seriously. The Industrial Court's approach to sexual harassment cases for example, has in the recent past been one of utilitarianism. That is, the court has generally viewed the employer's obligation as one of 'capitalist rationality' rather than one of moral obligation. As the *Gregory* court noted, in referring to former Industrial Court decisions, 'it is conceivable that the corporate value of the abuser to the organisation might so far outweigh the value of the abused, that it is 'logical' that little or no action is taken against the former.'¹⁰² For example, in a 1996 case the court ordered only a two-week suspension without pay of a seriously abusive employee, because of his being 'valued by the company both as a skilled and efficient employee as well as an effective shop steward.'¹⁰³ That court clearly did not understand the value to a low-level employee, to the company, and ultimately to the larger society in which it operates, of a tolerable work environment for all employees.

The Industrial Court showed a similar lack of sympathy toward victims of sexual harassment in a 1997 case. In *Sadulla v Jules Katz & Co*¹⁰⁴ an employee was fired based on allegations that he had invited a female employee to watch a pornographic movie with him, described some of the scenes in the video to her, asked her if she 'used her finger when she gets a sexual urge', and asked her whether she used a vibrator.¹⁰⁵ Despite a finding that the employee had, in fact, engaged in such conduct, the court found that there was no 'real victim' since they were 'two willing and consenting adults',¹⁰⁶ noting that it is often difficult to distinguish between 'the real victim and the pretended or ridiculously hypersensitive victim'.¹⁰⁷ Although the complainant indicated that the male employee's conduct was unwelcome and spurned, the court failed to see how she was truly victimised. The court felt she had not adequately indicated her offence at his conduct, and thus refused to punish the aggressor.

In the more recent case of *Gregory v Russells* an employee was fired for alleged sexual harassment and later reinstated. A female employee complained that he had brought a *Hustler* magazine into her office, asked her to look at it and left it on her desk. When she refused he told her 'not to act like a fucking virgin'.¹⁰⁸ She also complained he 'grabbed her from behind' and asked her to apply ointment to a sore on his penis that he had gotten from having sex with an 18 year old the previous night.¹⁰⁹

102 *Gregory v Russells* (note 36 above) 2162.

103 *Tiger Wheels Manufacturing and NUMSA and D Dikgang & Others* (1996) 5 ARB 8.25.10 cited in *Gregory* (note 36 above) 2162.

104 Note 36 above.

105 *Ibid* 1483-84.

106 *Ibid* 1488.

107 *Ibid* 1486.

108 *Gregory v Russells* (note 36 above) 2148.

109 *Ibid* 2148-49.

Despite the employee denying those charges, the court believed the victimised employee to be particularly credible, found most of her accusations to be true,¹¹⁰ and found the male employee to be guilty of harassment in the form of a hostile work environment claim. Considering, among other things, 'evidence of his competence as a manager' and his 'corporate worth', the court nonetheless decided to reinstate him, averring that appropriate sanctions would have been 'a stern reprimand, a final written warning and perhaps psychological counseling'.¹¹¹ Here, the court recognised that harassment had occurred, but failed to see how it harmed the victim.

As the *Gregory* court pointed out, the history of jurisprudence in South Africa on sexual harassment is one of 'indulging the sexual peccadilloes of a senior employee'.¹¹² In the past, employers and courts have, for productivity reasons, cared more about pleasing high-ranking employees than about the well being of more dispensable workers. The *Gregory* court noted that 'strict rules prohibiting sexual interplay in the workplace, even that which is found offensive, may interfere with the productivity of (male) employees used to functioning in a macho corporate culture'.¹¹³ It hardly needs stating that this court did not see the negative productivity implications of a hostile work environment.

Although abandoned by the Supreme Court of Appeal in 1998,¹¹⁴ some courts continue to apply the 'cautionary rule' in sexual harassment cases.¹¹⁵ This rule urges against convicting upon the word of the complainant, because of the belief that women are 'devious and hysterical'¹¹⁶ and that they habitually lie about sexual offences.¹¹⁷ In *Ngantwini v Daimler Chrysler*, although not officially applying the cautionary rule, the judge noted that 'uncorroborated evidence of a complainant in sexual harassment matters must be approached with great caution'.¹¹⁸ Likewise, the court in *Sadulla* required evidence to corroborate the sexual harassment victim's testimony, because of, among other things, 'hysteria that can cause a neurotic victim to

110 Ibid 2155, 2157 and 2158. While finding that the employee did refer to a sore on his penis, the court did not find that he asked her to apply ointment to the wound.

111 Ibid 2170.

112 Ibid 2163.

113 Ibid 2162.

114 See *S v Jackson* 1998 (4) BCLR 424 (SCA) 430H (cautionary rule in sexual assault cases is based on irrational and out-dated assumptions).

115 Andrews states that, while the cautionary rule was abolished, 'it is trite that legal enforcement does not always follow legislative or judicial pronouncements.' PE Andrews 'Globalization, Human Rights, and Critical Race Feminism: Voices from the Margins' (2000) 3 *J of Gender, Race & Justice* 373, 381-82 and n42. See also *Dispatch Online* (27-07-1998) available at www.dispatch.co.za/1998/07/27 (accessed 23 March 2001) (although the cautionary rule is no longer applied officially, 'most of the magistrates are men, ... some were appointed when it was still in place and subconsciously apply it').

116 Johnson (note 4 above) 509.

117 Andrews (note 115 above) 381-82 and n42.

118 *Ngantwini v Daimler Chrysler* (note 77 above).

imagine things which did not happen'.¹¹⁹ The continued application of such stereotypical assumptions validates the notion that women are not rational or credible witnesses and keeps women from asserting their rights when there are no other witnesses.

Similarly, South African police, busy with issues involving racial violence and more serious physical violence against women, have not made sexual harassment a priority. In a survey of women who reported incidents of sexual harassment to the police, all of them said they were dissatisfied with the way the police treated them, and half reported that the police did not investigate their cases.¹²⁰

Resistance to sexual harassment law is driven in large part by deep-rooted patriarchal notions about the role of women in the workplace and the sexual role of women generally. Despite consciousness-raising of the past few years, in most countries women are still expected to perform particular roles in the workplace and the family. This type of stereotypical expectation is perpetuated by images of women in their traditional role as nurturers and caregivers in popular culture. Advertisers continue to feature women 'as victims and caregivers, for example, without their broader role being seen',¹²¹ and women continue to be portrayed in their stereotyped roles in textbooks and through the attitudes of schoolteachers.¹²² 'Even educated, successful women ... face expectations that they will fulfill a traditional role as obedient, serving wives.'¹²³

Because of gender-based stereotypes about the role of women in the workplace and a lack of understanding of the real harm of sexual harassment, society permits such conduct to go unchallenged. Lack of enforcement of the law tends to legitimise the prohibited conduct, and ultimately it becomes a societal decision to again permit such practices.

(c) Tradition of violence against women and pre-existing cultural norms

As a form of oppression of women, sexual harassment cannot be controlled without an understanding of a culture's history with respect to violence against women and traditional beliefs regarding male aggressiveness.

In South African tradition and culture, violence against women is endemic. South Africa is a highly male-dominated and patriarchal society

119 *Sadulla v Jules Katz & Co* (note 36 above).

120 See *Addendum: Notes on Sexual Harassment and Sexual Assault* (note 84 above).

121 L Barnes 'African Media Give Women a Raw Deal' *Cape Argus* (11 June 1998).

122 Martineau (note 25 above) 395.

123 A Zavis 'Hopes Rise for Women's Rights in the New South African Gender' *LA Times* (3 August 1997) A32. See also G Smith 'Just Don't Say No' *Mail & Guardian* (4 December 1998) (South Africa is still 'caught up in the mythology of the kind, nurturing, caring, selfless mother'); C Keeton 'South African Women a Priority' *Sowetan* (7 May 1999) (reporting president Mbeki's statement that 'girls were often taught to be inferior and 'wrong messages' reinforced this, while family socialization did not encourage them to go beyond their traditional roles in society').

where women have limited power over their own lives or bodies. Women are often expected to follow gender-based, exploitative practices that keep them subordinated and powerless. It is a culture of sexual violence, estimated to have the highest incidence of reported violence against women in the world.¹²⁴ One in three South African schoolgirls are victims of sexual abuse,¹²⁵ and one in two South African women will get raped at least once in her lifetime.¹²⁶ There is little evidence to suggest these numbers are decreasing.¹²⁷ Boys are taught that rape is 'macho,' and many view it as 'fun' and 'harmless.'¹²⁸ Girls are taught that 'male violence is the condition against which their rights and freedom are negotiated'.¹²⁹ Sexual abuse is so common that it is discussed in a casual way, and many adolescents see it as an 'expression of love'.¹³⁰

These endemic attitudes stem in part from deeply entrenched cultural norms, such as the belief that 'forced sex with your girlfriend is not rape because she's yours',¹³¹ or the belief that forced sex with someone you know does not constitute sexual violence.¹³² One study showed that eight of ten young men think that women are generally responsible for causing sexual violence¹³³ and that women are 'asking for it' if they wear tight clothing.¹³⁴ Young girls are even blamed for rapes of 80-year-old grandmothers: 'After seeing her we are aroused. When you turn the corner and you see a granny, then you just shove it in.'¹³⁵ Another study revealed that it is a commonly-held view that men have 'insatiable urges to have sex with an unlimited number of women',¹³⁶ a finding consistent with the common view that 'once aroused, a man cannot control his

124 See *Africa News* (12 March 1999); M Dynes, 'A Nation's Disgrace' *The Times (London)* (2 December 2000); C Schuler 'A Voice Against Rape Rattles South Africa' *Christian Science Monitor* (13 October 1999) 1. In 1999 alone 51 249 cases of rape were reported to the police. See Annexure A of the SAPS Semester Report 1/2000 *The Incidence of Serious Crime in South Africa Between January and December 1999* (2000) available at www.saps.co.za (accessed 28 November 2000).

125 *Agence France Presse* (7 January 1999).

126 Halfkenny (note 8 above) 214; C Smith 'Mbeki's AIDS Stand Intolerable' *Toronto Star* (11 July 2000).

127 In fact, 'the reported incidence of rape and attempted rape increased by 20 percent from 1994 to 1999 – though there are serious concerns about the quality of the statistics.' SAPS Semester Report 1/2000 (note 124 above).

128 Schuler (note 124 above) (citing a survey of 1 500 students from South African black townships which found that 25 per cent of boys between the ages of twelve and twenty-two considered gang rape to be fun).

129 G Mutume 'South Africa Education: Violent Crime Begins in the Classroom' *Inter Press Service* (20 February 1998).

130 S Usdin & L Ramafoko 'Callous Normality of Rape in South Africa' *Africa News* (5 July 1999).

131 *Ibid.*

132 T Masland, 'Breaking the Silence' *Newsweek* (17 July 2000) 30 (citing a three year study released in June 2000 by Johannesburg's Southern Metropolitan Local Council).

133 *Ibid.*

134 Usdin & Ramafoko (note 130 above).

135 *Ibid.*

136 C Schuler 'A Small Step in Combating AIDS' *Christian Science Monitor* (24 November 1999) and the authorities cited there.

sexual urges and is not henceforth responsible for his actions.’¹³⁷ In a separate study, one half of the boys interviewed said they thought ‘when a girl said “no” she usually meant “yes”’, a third of the boys thought that ‘girls who were abused were looking for it’, and one out of ten believed the victims enjoyed the experience.¹³⁸

The normality of violence against women in South African culture has also affected women’s attitudes about sexual violence. Most women do not believe they have a right to disobey men.¹³⁹ A study conducted by CIET Africa, an NGO researching sexual violence, showed that ‘12% of young girls do not know they have a right to refuse sex in relationships’¹⁴⁰ or avoid sexual abuse.¹⁴¹

Many of these widely-held beliefs are confirmed by a tradition of tolerance toward sexual crimes by families of children who have been raped, who will often accept very small bribes to drop the matter,¹⁴² and by legal authorities, who are known to blame the victim completely or grant very light sentences. As stated by Johanna Kistner, a clinical psychologist who runs a counselling program for rape victims and rapists in Johannesburg, ‘South Africans have simply become used to employing violence as a means of resolving conflict or asserting power over others.’¹⁴³

Violence against women succeeds in the workplace because of unequal power relations between the sexes in the typical workplace hierarchy. Power disparities are typically the result not of ‘nature or evolution, but societies which, through legislation and social custom, have made women second-class citizens’.¹⁴⁴ Such a cultural reality will undoubtedly have a grave impact on South Africa’s sensitivity to sexual harassment law.

(d) Cultural attitudes about sex

Since sexual harassment laws prohibit sexual behaviour in the workplace, a society’s attitudes about appropriate sexual behaviour will sharply affect its approach to the legislation. For instance, compared to most other Western societies, Americans have typically been viewed as more prudish about sex, often described as having ‘puritanical,’ ‘conservative,’ and ‘reserved’ attitudes about sex. Stringent sexual harassment laws are seen by critics as attempts to ‘stomp out people’s fun’, and have been

137 Usdin & Ramafoko (note 130 above).

138 *Agence Feance Presse* (note 125 above) and the NGO study cited there.

139 S Ruden ‘AIDS in South Africa: Why the Churches Matter’ *Christian Century* (17 May 2001) 566.

140 Usdin & Ramafoko (note 130 above).

141 Masland (note 132 above).

142 Smith (note 123 above).

143 Dynes (note 124 above).

144 Vetten (note 83 above).

referred to as causing the 'desexualization of the United States'.¹⁴⁵ Conversely, in many countries, sexual flirtation is viewed as second nature. In these countries, suggestive remarks and flirtatious behaviour in the workplace are often considered harmless,¹⁴⁶ and generally 'the concept of sexual harassment is widely perceived as a Western plague that threatens to spoil the "natural" relations between men and women.'¹⁴⁷ Accordingly, understanding a country's social climate and its attitudes and customs about sex and flirtation is deeply critical to the evaluation and understanding of the effect of sexual harassment laws.¹⁴⁸

The balance between freedom of expression and social control might prove particularly problematic in a country with South Africa's cultural history. During apartheid, South Africa was a country with 'an official code of sexual behavior rooted in conservative Afrikaner Christianity'.¹⁴⁹ Sex across race lines was banned under the Prohibition of Mixed Marriages Act 55 of 1949 and under s 16 of the Immorality Act 23 of 1957.¹⁵⁰ Not only were gays and lesbians considered indecent and immoral, but discrimination against them was legally sanctioned. Legislation made it illegal for a male to commit 'any act which is calculated to stimulate sexual passion or to give sexual gratification' to another male, and the common law punished 'sodomy, frottage, mutual masturbation, and "other unnatural sex offences" between men'.¹⁵¹

145 See V Walt 'Regarding Sexism on the Job: Plus Ça Change...' *New York Times* (24 May 2000) G1. Although these stereotypes are, of course, quite imprecise, they may still have a germ of truth to them. But more importantly, even if they are not altogether true, it remains relevant to know whether they are still perceived as true. For example, in the USA there is a sense that prudish attitudes about sex have been changing in recent years. See G Himmelfarb *One Nation, Two Cultures* (1999); E Harrison 'The Sex Revolution' *Toronto Star* (12 October 1999).

146 Needless to say, it is typically the men that see such behaviour as harmless. But many women, conditioned to living under these conditions, also do not see the harm in such behaviour.

147 In Czechoslovakia, for example, sexual harassment is considered 'a stupid invention of hysterical American feminists,' and in many South American countries, 'if a boss grasps a female employee by her shoulders ... it might just be considered "graceless paternalism."' S Orihuela & A Montjoy 'The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru' (2000) 30 *Cal N Int LJ* 323, 325. See also the authorities cited there.

148 Within a multi-cultural society, cultural differences in attitude about sex might also affect the perception of whether sexual harassment has occurred.

149 B Keller 'New Freedom in South Africa Brings Easing of Sexual Taboos' *NY Times* (15 January 1995) A25; see also A Gouws & LM du Plessis 'The Relationship Between Political Tolerance and Religion: The Case of South Africa' (2000) 14 *Emory Int LR* 657 (arguing that the three Afrikaans churches heavily influenced South African law under apartheid); JD Van der Vyver 'State-Sponsored Proselytization: A South African Experience' (2000) 14 *Emory Int LR* 779 (arguing that separation of law and religion in South Africa was largely a myth).

150 This idea was also central to the NGK, one of the fundamental splinter groups of the white Afrikaner community, which proclaimed: 'Basic to our overall attitude is without doubt the strongest aversion to ... all instances of miscegenation between white and non-white.' See Van der Vyver (note 149 above) 803-04. These laws, of course, were less about prudishness than about racism.

151 See EC Christiansen 'Ending the Apartheid of the Closet; Sexual Orientation in the South African Constitutional Process' (2000) 32 *NYU J Int Law & Pol* 997, 1000; GC Reid 'It Takes Faith to Make Church: Gay and Lesbian Christian Proselytizing in South Africa' (2000) 14 *Emory Int LR* 613, 625.

Continuing in a tradition of sexual intolerance, erotica and pornography of all kinds were also banned.¹⁵² The old Afrikaner regime 'frowned on public dancing, banned TV until 1976,¹⁵³ and enforced more than 100 censorship laws in an Orwellian attempt to protect strict Calvinist morality and white supremacy'.¹⁵⁴

Since the 1994 election, there has been a 'rapid relaxation of the sexual taboos enforced by the old order'.¹⁵⁵ As discussed above, the new Constitution is among the most progressive and tolerant in the world, prohibiting discrimination against anyone on seventeen separate grounds including pregnancy, marital status, and sexual orientation, and distinguishing between sex and gender as two separate grounds of discrimination. New progressive laws have opened the door for a revolution of sexual mores.

The new South Africa is sexually permissive, with a booming and still growing sex industry. Although not supported by national consensus,¹⁵⁶ there has been a 'proliferation of sex clubs and erotic cabarets,'¹⁵⁷ and nightclubs and restaurants are known to 'offer everything from topless waitresses to jelly or oil wrestling and live sex shows.'¹⁵⁸ Sexually explicit films and magazines have been unbanned¹⁵⁹ and have become 'more risqué',¹⁶⁰ while pornography is flourishing.¹⁶¹ Full frontal nudity is now being allowed, whereas prior to 1994, 'photographs of female breasts couldn't be published without a censor's star covering the nipples.'¹⁶² Newspapers are filled with 'lurid ads for prostitutes, massage parlors, and escort services', and brothels, and hard-core adult book and video stores

152 See B Drogin 'In South Africa Freedom is a Cultural Revelation' *LA Times* 1 (5 January 1996); RL Berner (Jan 1998) 72 *World Literature Today* 192 (reviewing M de Lange *The Muzzled Muse: Literature and Censorship in South Africa* (1997)); J Matloff 'As Porn Proliferates, South Africa Debates Free Speech' *Christian Science Monitor* (8 August 1997).

153 And after 1976, 'even a hint of nudity was banned on television.' Matloff (note 152 above).

154 Drogin (note 152 above).

155 Keller (note 149 above).

156 For example, the moral right, whose agenda is 'to ensure that the Christian ethos of sex in marriage is maintained,' has serious problems with the new sexual freedom. They argue that pornography 'makes sex dirty and easy.' See *Pornography In South Africa: Draft Paper For SADC Conference* available at www.sn.apc.org/sadc_pvaw/papers/porn.html (accessed 6 April 2001). Alternatively, some feminists claim that pornography leads to violence against women: 'These feminists focus on dehumanisation and the sexualization of brutality in a context that suggests endorsement or approval of such behaviour. They claim that pornography is a form of discrimination based on sex. It focuses on the presentation of women dehumanised as sexual objects, being raped, or physical hurt or in postures of subordination.' *Ibid.* The feminist objections to pornography typically have nothing to do with morality, or religious values.

157 Keller (note 149 above).

158 See *SA Bus Intelligence* (3 November 1995) 1.

159 *Ibid.* See also K Wells 'Nation in Flux: The New South Africa Sheds Calvinist Past and Mutates Daily' *Wall Street Journal* (9 June 1995) A1; Drogin (note 152 above); Matloff (note 152 above).

160 Keller (note 149 above).

161 Wells (note 159 above).

162 *Ibid.*; Drogin (note 152 above).

are opening even in the most respectable neighbourhoods.¹⁶³ The sex trade, though still technically illegal, is also flourishing.¹⁶⁴ This movement to 'free the national libido' has been called the 'second liberation movement'.¹⁶⁵ This recent 'sexual revolution' could have anomalous effects on the enforcement of the sexual harassment law. The 'dizzying pace of change',¹⁶⁶ since the end of apartheid could lead to confusion about appropriate sexual behaviour, and many feminists and anti-porn activists believe it could contribute to an increase in sexual violence.¹⁶⁷

Generally a more liberal sexual climate may promote more promiscuous behaviour in the workplace, and sexual behaviour in the workplace can contribute to a hostile work environment. If sections of society (particularly men) view legislation against any sexual or flirtatious behaviour in the workplace as inconsistent with their culturally bestowed sexual freedom, it could lead to resentment of the law. These cultural attitudes about sex are likely to seriously influence interpretations of sexual harassment legislation.

VI CONCLUSION

Since the end of apartheid there has been wholesale legal transformation, but it could take generations for accompanying social transformation. Despite the new Constitution, women are still subject to the sexist conventions and ideology of their primarily male employers, and in many cases, women are still expected to conform to traditional roles. Many believe that, given the severe impact of apartheid on the overall well-being of blacks, at this point in history there is rightly more concern with racial equality than with gender issues.¹⁶⁸ To the extent that there is concern over the treatment of women in South Africa, it involves the

163 Drogin (note 152 above).

164 Wells (note 159 above); see also A Maykuth 'Prostitution Explodes in Cape Town' *Seattle Times* (12 December 1999) A30. The police have eased up on sex-related crimes, and at one point, South Africa was even considering decriminalising prostitution. In 1997, the Gauteng provincial government submitted a proposal to the national government to decriminalise prostitution in the hope that this would influence changes to the Sexual Offences Act of 1957, which makes prostitution illegal. See G Mutume 'South Africa: Gauteng Province Decriminalizes Prostitution' *Intern Press Serv* (7 November-1997). The ANC, at its 1997 national conference, supported this initiative. See S Rakgoadi *Sex Work: Decriminalization* available at www.sn.apc.org/sadc_pvaw/papers/sexwork.html (accessed 2 March 2001). In 1998, however, the Gauteng provincial government 'quietly shelved plans to decriminalize prostitution, fearing a backlash from conservatives'. See *English Newswire* (21 April 1998). The current law against prostitution has been criticised as highly discriminatory, as only the sex worker is prosecuted, but not pimps or buyers of sex. See *Baltimore Sun* (23 April 1997) 18A.

165 Keller (note 149 above).

166 Drogin (note 152 above).

167 See Maykuth (note 164 above).

168 R Grawitzky 'Companies Warned to Act Against Offensive E-Mail' *Business Day* (7 January 2000) 1.

rampant physical abuse and rape. In a country with an alarming crime rate, and an alarming rate of racial violence and violence against women,¹⁶⁹ sexual harassment is considered a low priority. Accordingly, sexual harassment, especially if it is non-physical, is often tolerated in the workplace.

It has become clear that litigation should not be relied on as the sole, or even the best, method for dealing with sexual harassment. Political and social progress, as well as women's more active participation in economic development, are also necessary to combat sexual harassment. Since the most likely victims of sexual harassment are those with the least amount of power, reliance on the courts means relief for those with the best lawyers, at the exclusion of those who need and deserve representation most. The problem of sexual harassment is one involving ordinary people in ordinary settings, which makes it amenable to ordinary solutions, outside the context of law enforcement agencies, such as greater involvement of unions and other employee organisations. For many women, a shift away from litigation to active engagement of the working community might have greater empowerment value than going to court. The success and utility of the EEA will ultimately depend on the eradication of misperceptions and stereotypes about the nature of sexual harassment and the harm it causes, and its integration into the legal and political discourse on both economic equality and violence against women.

169 Racial attacks are still fairly commonplace in post-apartheid South Africa. See, for example, 'South Africa Police Probing Attack on American' *LA Times* (13 January 2000) 11; SAPA (1 September 2000). It is reported that in South Africa a woman is killed by her husband or boyfriend every six days and a rape occurs every 30 seconds. See Johnson (note 4 above) 497.