

ADDRESSING SEXUAL HARASSMENT LAW'S INADEQUACIES IN ALTERING BEHAVIOUR AND PREVENTING HARM: A STRUCTURAL APPROACH

ELIZABETH SHI* AND FREEMAN ZHONG**

Section 3(c) of the Sex Discrimination Act 1984 (Cth) provides that one object of the Act is 'to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational organisations and in other areas of public activity'. This article argues that the Act, in its current form, is not adequate for achieving that object for two reasons: first, its operative provisions reflect a normative principle that has, as its aim, the compensation of harm but not the prevention of future harm; and second, it fails to recognise some systemic harms caused by sexual harassment. The article proposes a structural approach to workplace sexual harassment regulation, which involves a positive duty for organisations to take reasonable steps to prevent sexual harassment and a regulatory framework aimed at putting in place the necessary motivations and incentives to ensure compliance with that duty. The article draws on insights from regulatory theory to explain how this regulatory approach can better serve the object of eliminating sexual harassment so far as is possible.

I INTRODUCTION

The Australian Human Rights Commission's ('AHRC') recently-published report on sexual harassment¹ has highlighted the shortcomings of current sexual harassment law ('*AHRC Report*'). As those shortcomings become increasingly apparent, there is greater reason to consider implementing what may be described as a *structural* or *systemic* approach to the legal regulation of sexual harassment law, given that one object of the *Sex Discrimination Act 1984* (Cth) ('*SD Act*') is

* BSc, LLB, LLM, SJD; Senior Lecturer, Graduate School of Business and Law, RMIT University.

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1 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, 2018) ('*AHRC Report*').

to ‘eliminate’ discrimination in the form of sexual harassment ‘so far as is possible’ (section 3(c)).

Currently at the federal level, sexual harassment is regulated directly by a prohibition of sexual harassment in certain circumstances in the *SD Act*, with remedies limited to compensation or orders specific to individual instances of sexual harassment. Section 351(1) of the *Fair Work Act 2009* (Cth) also prohibits adverse action (defined in section 342) against employees and prospective employees ‘because of’ their sex (and various other characteristics), which may be broad enough to encompass sexual harassment (although the provision has not been tested in this respect).² The states and territories all have their own sexual harassment and discrimination legislation.³ The focus of this article will largely be on the *SD Act*. Much of the discussion in this article is generalisable to the state and territory legislation due to similarities across jurisdictions, so although the article focuses on the federal legislation it is not only relevant to the federal legislation.

The current approach to sexual harassment regulation reflects a conceptual framing of sexual harassment as a private, individual issue rather than as a result of systemic causes or problems. Further, as Part II of this article will argue, the design of the current law is fit for the purpose of compensating victims of sexual harassment, but not the purpose of changing behaviour to prevent sexual harassment from occurring. As Part II will argue, this is an incongruity between the stated object of the *SD Act* (eliminating discrimination in the form of sexual harassment) and the principle that appears to have guided the design of its operative provisions. Part III will identify another deficiency in the current law, which is its failure to recognise and prevent some important harms caused by sexual harassment.

This article proposes an approach that would treat sexual harassment as a systemic problem, which in turn would allow the *SD Act* to better pursue its object of eliminating sexual harassment. Part IV will present the case for taking this approach. Taking this approach, employers should have a positive duty to prevent sexual harassment; remedies should include orders for employers to address systemic causes of sexual harassment, rather than being limited to achieving redress for particular instances of sexual harassment; and, in influencing employers to comply with their positive duties, a broader regulatory framework should be imposed to create the incentives, motivations and means necessary to induce organisations to pursue the *SD Act*’s object of eliminating

2 See generally *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284; Unions NSW, ‘Reforms to Sexual Harassment Laws’ (Discussion Paper, 4 October 2018) 8.

3 The states and territories also have anti-discrimination legislation prohibiting sexual harassment: *Discrimination Act 1991* (ACT) ss 58–64; *Anti-Discrimination Act 1977* (NSW) ss 22A–22J; *Anti-Discrimination Act 1992* (NT) s 22; *Anti-Discrimination Act 1991* (Qld) ss 118–20; *Equal Opportunity Act 1984* (SA) s 87; *Anti-Discrimination Act 1998* (Tas) s 17; *Equal Opportunity Act 2010* (Vic) ss 92–102; *Equal Opportunity Act 1984* (WA) ss 24–6. The *Sex Discrimination Act 1984* (Cth) s 10(3) (*‘SD Act’*) provides that it is not intended to operate to the exclusion of state and territory laws, so persons making a complaint can elect to make a complaint under the federal legislation or the relevant state or territory legislation. This article focuses on the federal legislation.

sexual harassment. In combination, these are the elements of what this article refers to as a 'structural' approach to sexual harassment regulation.

Victoria already has a positive duty to eliminate sexual harassment and other unlawful discrimination in section 15 of the *Equal Opportunity Act 2010* (Vic). But, as will be discussed, there is no statutory provision providing for enforcement of this provision. Even if there were such a mechanism, it is suggested that Victoria lacks crucial features of a regulatory framework that are necessary to ensure compliance with positive duties like the duty in section 15. Part V will explain how this regulatory framework can be developed to create the incentives, motivations and means necessary to induce organisations, with a particular focus on workplaces, to comply with a positive duty, with examples of specific measures that can be taken.

II THE CURRENT LAW, ITS OBJECTS AND ITS NORMATIVE ASSUMPTIONS

A Sex Discrimination Legislation

In Australia, sex discrimination legislation specifically prohibits sexual harassment. In Australia, a civil remedy for sexual harassment was first created through the enactment of the *SD Act* in 1984, and substantially broadened in amendments introduced by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).⁴ The current post-1992 prohibition on sexual harassment is contained in part II division 3 of the *SD Act*. Sexual harassment is defined in section 28A of the *SD Act*. The elements of sexual harassment are:

1. The perpetrator 'makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed' (section 28A(1)(a)) or the perpetrator 'engages in other unwelcome conduct of a sexual nature in relation to the person harassed' (section 28A(1)(b));
2. In the circumstances, 'a reasonable person ... would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated' (section 28A(1)).

Under section 28A(2), 'conduct of a sexual nature' is defined to include 'making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing'.

The *SD Act* only makes sexual harassment unlawful in particular contexts. A particular focus of this article is sexual harassment in the workplace, which is included within the scope of the sexual harassment provision in the *SD Act* by section 28B.

4 Under these amendments, which entered into force on 13 January 1993, one important change was the removal of any need to show that the complainant suffered disadvantage. See generally Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31(1) *Federal Law Review* 195, for a more detailed survey of the history of the sexual harassment provisions.

In addition to the perpetrator of sexual harassment, other persons may be liable under the *SD Act*'s vicarious liability provision. Under section 106(1) of the *SD Act*, an employer or principal can be held liable for the unlawful acts of their employee or agent 'in connection with the employment of the employee or with the duties of the agent as an agent'. There is also an accessory liability provision – section 105 – which imposes liability on any person who 'causes, instructs, induces, aids or permits' a person to do an unlawful act, but this provision does *not* apply to acts that are unlawful under part II division 3 of the *SD Act*, so accessory liability is not available for sexual harassment.

Sexual harassment legislation in the states and territories⁵ is broadly similar, but the Victorian legislation goes further in one notable respect. Under section 15 of the *Equal Opportunity Act 2004* (Vic), persons subject to discrimination law obligations have a positive duty to eliminate sex discrimination, including sexual harassment, as far as possible.

The purposes of the *SD Act* are clearly stated and, relevantly, include 'to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity'⁶ and 'to give effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination against Women* and to provisions of other relevant international instruments'.⁷ The international instruments referred to similarly have goals of eliminating discrimination against women.⁸

B The Current Conceptualisation of Sexual Harassment

As is evident from the *AHRC Report*, the *SD Act* has fallen far short of achieving its object of eliminating sexual harassment. The shortcomings of sexual harassment law in its current state, and anti-discrimination law more generally, are well documented. The *AHRC Report* provides ample evidence of the continuing prevalence of sexual harassment. It found that 72% of Australians report having experienced sexual harassment at some point in their lives,⁹ 33% of Australians aged 15 and older and who have been in the workforce in the last 5 years report having experienced workplace sexual harassment during that period,¹⁰ and 39% of women (compared to 26% of men) report having experienced workplace sexual harassment in the last 5 years.¹¹

Most victims of sexual harassment never make a complaint. According to the *AHRC Report*, only 17% of people who experienced workplace sexual

5 See above n 3.

6 *SD Act* s 3(c).

7 *Ibid* s 3(a).

8 See *Discrimination (Employment and Occupation) Convention (No 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 2; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 2.

9 *AHRC Report* (n 1) 18.

10 Workplace sexual harassment includes sexual harassment experienced 'at work, at a work-related event or while looking for work': *ibid* 26.

11 *Ibid*.

harassment in the previous five years made a 'formal report or complaint'.¹² An even smaller number of sexual harassment complaints proceed to a public authority or to litigation: the AHRC or a state or territory anti-discrimination agency were involved in finalising only 6% of formal reports or complaints.¹³ Thus, the vast majority of instances of sexual harassment are not redressed or punished through any official means.

There has been much criticism of the individual complaints approach of the current law.¹⁴ Outside the strictly legal context, McDonald, Charlesworth and Graham have criticised Australian society's 'conceptual framing of [sexual harassment] as an individual problem, rather than one with causes and consequences at a systemic level' as limiting 'the development of effective organizational responses'.¹⁵

The law also adopts this individualised conceptual framing. In Thornton's words, 'the focus [of sexual harassment law] is on the aberrant behaviour of individuals rather than the structural and systemic manifestations of discrimination'.¹⁶ Civil remedies are available in respect of specific instances of unwelcome sexual advances, requests for sexual favours, or other unwelcome sexual conduct.¹⁷ Obviously, this means a victim making a claim under part II division 3 of the *SD Act* must identify a specific instance of such conduct and can be made only against the perpetrator of the conduct. Individual victims are responsible for lodging complaints and prosecuting their claims – they are required to 'name, blame and claim' in every case.¹⁸ This is a substantial burden on individual claimants due to the costs and risks of pursuing such claims,¹⁹ as evidenced by the low rate of formal complaints and even lower rate of litigation.

This part seeks to identify the principle that has informed the design of part II division 3 of the *SD Act*, which (it will be argued) is incongruous with the stated object of section 3(c) of the *SD Act*. The principle is corrective justice. It will be argued that part of the reason why the *SD Act* has failed to achieve the object of eliminating sexual harassment is that it embodies the principle of corrective justice, when the *SD Act* ought to have a *regulatory* function – that is, it ought to

12 Ibid 67.

13 Ibid 71.

14 See, eg, Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 84, 86; Paula McDonald, Sara Charlesworth and Tina Graham, 'Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment' (2015) 53(1) *Asia Pacific Journal of Human Resources* 41, 42 ('Developing a Framework').

15 McDonald, Charlesworth and Graham, 'Developing a Framework' (n 14) 42, 53 (citations omitted).

16 Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422, 424.

17 *SD Act* s 28A(1).

18 Allen (n 14) 84, referencing William L F Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980–81) 15(3) *Law and Society Review* 631.

19 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 196–9.

change the behaviour of individuals to fulfil the objective of the regulatory regime.²⁰

Under a corrective justice approach, the dominant non-economic approach to the analysis of tort law,²¹ the law aims to correct wrongs or wrongful losses by depriving the wrongdoer of any gain made through the wrong and restoring the victim of the wrong to his or her initial position.²² A core principle of corrective justice is the duty of ‘repair’ or ‘rectification’ imposed on the wrongdoer.²³

The principle of corrective justice is fulfilled through imposing two legal rules: (i) a rule prohibiting the wrongful conduct (a ‘first-order rule’); and (ii) a rule requiring the wrongdoer to compensate the victim of the wrongful conduct for any loss or damage caused by the conduct (a ‘second-order rule’).²⁴ Such rules are imposed in the current law of sexual harassment: part II division 3 of the *SD Act* prohibits sexual harassment and section 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) (*AHRC Act*) allows sexual harassment (and other forms of unlawful discrimination) to be redressed upon application to the Federal Court or Federal Circuit Court, upon which sexual harassment is treated as analogous to a tort.²⁵

Section 46PO(4) authorises the Court to make ‘such orders (including a declaration of right) as it thinks fit’, then gives the following examples:

- (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
- (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
- (c) an order requiring a respondent to employ or re-employ an applicant;
- (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
- (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant ...

It is apparent from each of these examples that they are aimed at redressing or compensating wrongful conduct that has already occurred, with the sole exception of (a) (in that an order can be to ‘direct’ the respondent ‘not to repeat or continue such unlawful discrimination’).

20 Christine Parker and John Braithwaite, ‘Regulation’ in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119.

21 Jules Coleman, Scott Hershovitz and Gabriel Mendlow, ‘Theories of the Common Law of Torts’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2019) [3.1]. Although this is the dominant theoretical approach, there are obviously divergences between the actual state of tort law and the ideal envisioned by corrective justice theorists.

22 Ernest Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52(4) *University of Toronto Law Journal* 349, 350.

23 Jules Coleman, ‘The Practice of Corrective Justice’ (1995) 37(1) *Arizona Law Review* 15, 26.

24 Coleman, Hershovitz and Mendlow (n 21) [3.1].

25 See *Allders International Pty Ltd v Anstee* (1986) 5 NSWLR 47, 65 (Lee J); *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 604 (McHugh JA), cited in *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 281 (French J) (*‘Hall’*).

The broadest provision, '(b) an order requiring a respondent to perform any reasonable act or course of conduct', appears to authorise a wide range of orders, but the qualification means that such orders must still be made for the purpose of redressing loss or damage. It is also generally accepted that punitive damages, which might have a deterrent effect, may not be awarded under anti-discrimination legislation.²⁶

The opening words of section 46PO(4) may appear to confer a power broad enough to make orders to prevent future sexual harassment. But the Court will, generally, not be in a position to fashion an order that would effectively do so because all the evidence before it will relate to the contravention of part II division 3 of the *SD Act* and the parties and witnesses to that contravention. Because of the individualistic focus of the *SD Act*, it is likely that such evidence will focus on what happened in the circumstances of the particular contravention and what loss was suffered by the immediate victim. Without a framework allowing information on the systemic causes and effects of the sexual harassment to be put before the Court, it will not be in a position to address those causes and effects. As a result, courts will likely confine themselves to orders that address the immediate effects of the contravention of the *SD Act*, which will be compensatory in nature.²⁷

Corrective justice theorists have traditionally considered the object of changing behaviour more broadly – for example, by deterring wrongful conduct – to be antithetical to areas of law that embody corrective justice.²⁸ Because a corrective justice approach requires legal remedies to be awarded to undo loss or damage inflicted by the defendant on the plaintiff, a corrective justice approach cannot justify remedies being imposed for other purposes, such as the deterrence of other potential wrongdoers who have not wronged the plaintiff.

Despite corrective justice's uneasiness with the object of behavioural alteration, sexual harassment law as it currently stands exhibits all the core features of corrective justice. A sexual harassment proceeding under section 46PO can only be between the wronged (the sexual harassment victim) and the wrongdoer (the perpetrator). A court considering orders under section 46PO(4) will generally only be in a position to make orders redressing the harm. Vicarious liability is available in sexual harassment cases,²⁹ but this too is consistent with a corrective justice approach – according to Weinrib, vicarious liability can fit into

26 Beth Gaze, 'Damages for Discrimination: Compensating for Denial of a Human Right' [2013] (116) *Precedent* 20, 22; Carol Andrade, 'The Struggle to Restore Dignity: Remedies in Anti-Discrimination Law Part 1' (2012) 18(6) *Employment Law Bulletin* 85.

27 Part of the reason courts do not have the necessary evidence available to them is likely that parties do not put that evidence before the court, given what they are required to establish in the current system. This is another reason why conferring a power on a court to make systemic remedies, without more, is not sufficient to address discrimination on a systemic level. The regulatory system must, as a whole, be designed in a way that makes achieving systemic change (including through curial remedies) a central objective. The authors are grateful to one of the anonymous reviewers for this point.

28 Jules Coleman, *Risks and Wrongs* (Oxford University Press, 2002) 374–82; Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 1995) 56–83.

29 *SD Act* s 106(1).

corrective justice because the doctrine of vicarious liability enables the normative imputation of the employee or agent's wrongful acts to the employer or principal.³⁰ Vicarious liability is used by the AHRC as one motivator for workplaces to adopt its *Sexual Harassment Code of Practice*.³¹ However, vicarious liability can only be engaged if a complainant has proven that a perpetrator has sexually harassed them,³² so it is of little use when (as is the case) sexual harassment claims are rarely pursued. It is certainly no substitute for a more comprehensive and considered regulatory approach such as that proposed in this article.

The remedial focus of the current law means there is an incongruity between the stated purpose of the *SD Act* (to eliminate sexual harassment, presumably through changing behaviour) and the principle that appears to have informed the design of the *SD Act* and *AHRC Act's* operative provisions. It is, therefore, unsurprising that the legislative regime has not effectively altered the behaviour of individuals who commit sexual harassment or organisations that allow sexual harassment to occur: there simply has not been any attempt to shape the legislative regime in accordance with the object of changing behaviour.³³

A system of private law with fault-based liability and compensatory remedies can have a regulatory function,³⁴ such as through deterrence. Legal doctrines and remedies based on corrective justice may have a behaviour-altering effect. However, any such effect must be incidental:³⁵ courts are not in a position to determine what orders they should make to maximise their deterrent effect because of the limited nature of the evidence that will be before them and their limited ability to supervise the implementation of such orders. As Smith says, there is 'no mechanism for monitoring or evaluating' measures to change discriminatory behaviour, 'causing initiatives to be patchy and their effectiveness untested'.³⁶

In any event, the results of the recent AHRC survey indicate that sexual harassment is nowhere close to being eliminated,³⁷ despite the existence of the *SD Act* and *AHRC Act*. In general, the attempt to achieve regulatory goals by deterrence (referred to in the regulatory literature as 'command and control') has

30 Weinrib, *The Idea of Private Law* (n 28) 185–6.

31 Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008) 19–20.

32 *SD Act* s 106.

33 Cf Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act* 1984 (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105, 109.

34 As Richard Posner has pointed out: Richard Posner, 'A Theory of Negligence' (1972) 1(1) *Journal of Legal Studies* 29, 31.

35 Cf Ernest J Weinrib, 'Deterrence and Corrective Justice' (2002) 50(2) *University of California Los Angeles Law Review* 621.

36 Belinda Smith, 'It's About Time: For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 132 ('It's About Time').

37 *AHRC Report* (n 1) 103.

been criticised as ineffective.³⁸ Further, an approach based on individual complaints is highly dependent on the regulated having certainty in the likelihood that they will be punished.³⁹ It can therefore only succeed if victims do stand up for their rights and litigate,⁴⁰ which clearly is not happening given the low percentage of formal complaints that are made.⁴¹

III THE FAILURE OF SEXUAL HARASSMENT LAW TO RESPOND TO THE HARMS OF SEXUAL HARASSMENT

In addition to the shortcomings of a corrective justice approach where the law aims to change behaviour on a systemic level, the current law on sexual harassment is deficient even when assessed against the object of redressing the loss or damage caused by sexual harassment. This is primarily because the current law fails to recognise or respond to important harms caused by sexual harassment. This Part will describe three harms that sexual harassment tends to cause: harm to physical and mental health, an undermining of individual autonomy, and the entrenchment of some aspects of gender inequality. While the current law recognises and allows for the compensation of the first harm, it fails to recognise or address either of the other harms.

One compelling reason to regulate sexual harassment is that it causes harm. It may seem obvious that this is the case. But considering the way sexual harassment causes harm is useful because it sheds light on whether the current law adequately recognises or addresses those harms. If the law fails to recognise important harms caused by sexual harassment, then the law fails to live up to its justification.

38 See generally Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 8–12; Doreen McBarnet and Christopher Whelan, 'Creative Compliance and the Defeat of Legal Control: The Magic of the Orphan Subsidiary' in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford University Press, 1997); John T Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspectives of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253.

39 Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, 1994) 93.

40 As Smith points out in 'It's About Time' (n 36) 117–8. Here, Smith characterises the *SD Act's* regulatory approach as relying on a 'ripple effect' from individuals standing up for their rights. That may, in fact, be too generous to the current legislative regime. There is no indication in the text of either the *SD Act* or the *AHRC Act* that Parliament contemplated the legislation having this effect, and no indication of any attempt to facilitate this effect, whatever the drafters' subjective intention. Instead, the better characterisation of the legislation is that it *simply takes no regulatory approach*. It is not underpinned by any regulatory theory. As argued in this article, the rules and remedies created by the legislation indicate that the approach is purely one of corrective justice.

41 Commentators have explained how individuals are disincentivised from pursuing litigation due to the costs and risks of doing so: see Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 312 ('Barking and Biting'); Gaze and Smith (n 19) 196–7.

A Physical and Mental Health Effects

One important harm of sexual harassment is its adverse physical and psychological health effects. This is a well-studied phenomenon. The legislation and current case law seem to adequately recognise this harm.

Empirical studies have linked sexual harassment with psychological and physical health issues and it is now uncontroversial that sexual harassment is often followed by such issues, including anxiety and depression; post-traumatic stress disorder; alcohol and drug abuse; other forms of psychological distress such as feelings of anger and powerlessness; physical symptoms such as headaches, difficulty sleeping, nausea, and loss or gain of appetite; and loss of job satisfaction, commitment and productivity.⁴² A 2007 meta-study of 41 sexual harassment studies, with a total sample size of nearly 70,000 respondents, found that the available data (predominately gathered from research in the United States ('US')) shows that sexual harassment victims have 'higher rates of symptoms such as anxiety, depression, and even PTSD'.⁴³

Most of the harms to physical and mental health detailed above are recognised by the current sexual harassment law. The section 46PO(4) remedies include orders to redress such harm, such as compensation orders that are broadly analogous to common law damages.⁴⁴ In cases that followed *Richardson v Oracle Corporation Australia Pty Ltd* ('*Richardson*'),⁴⁵ sexual harassment complainants have received reasonably generous compensation awards (\$100,000 was awarded for psychological harm in *Richardson*)⁴⁶ for the psychological harm of sexual harassment, although *Richardson* is not uniformly followed.⁴⁷ In principle, compensation seems to be capable of adequately

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- 42 See, eg, Rebecca C Thurston et al, 'Association of Sexual Harassment and Sexual Assault with Midlife Women's Mental and Physical Health' (2019) 179(1) *Journal of the American Medical Association Internal Medicine* 48; Maria K Friborg et al, 'Workplace Sexual Harassment and Depressive Symptoms: A Cross-Sectional Multilevel Analysis Comparing Harassment from Clients or Customers to Harassment from Other Employees amongst 7603 Danish Employees from 1041 Organizations' (2017) 17 *BMC Public Health* 675; Nicole T Buchanan et al, 'Sexual Harassment, Racial Harassment, and Well-Being among Asian American Women: An Intersectional Approach' (2018) 41(3-4) *Women and Therapy* 261; Amy L Culbertson and Paul Rosenfeld, 'Assessment of Sexual Harassment in the Active Duty Navy' (1994) 6(2) *Military Psychology* 69, 81-3; Judith A Richman et al, 'Workplace Harassment/Abuse and Alcohol-Related Outcomes: The Mediating Role of Psychological Distress' (2002) 63(4) *Journal of Studies on Alcohol and Drugs* 412; Kimberley T Schneider, Suzanne Swan and Louise F Fitzgerald, 'Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations' (1997) 82(3) *Journal of Applied Psychology* 401; Jason N Houle et al, 'The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career' (2011) 1(1) *Society and Mental Health* 89.
- 43 Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60(1) *Personnel Psychology* 127, 150.
- 44 *Hall* (1989) 20 FCR 217, 281 (French J); *Richardson v Oracale Corp Australia Pty Ltd* (2014) 223 FCR 334, 359-60 [95] (Kenny J).
- 45 (2014) 223 FCR 334.
- 46 *Ibid* 367 [118] (Kenny J).
- 47 In state sexual harassment cases, *Richardson* has been cited as authority in a number of decisions awarding compensation for sexual harassment: *Collins v Smith* (2015) 256 IR 52 (\$332,280 awarded); *Kordas v Ruba & Jo Pty Ltd* [2017] NSWCATAD 156 (\$30,000 awarded). Cf the following cases that did not follow *Richardson*: *Green v Queensland* [2017] QCAT 8 (\$156,051 awarded); *STU v JKL (Qld)*

recognising the physical and mental harms of sexual harassment and their seriousness, even if money can never perfectly restore a victim. The same is not true for the two other harms discussed in this section, which are not confined to a specific victim and cannot, even in principle, be adequately recognised through monetary awards to individuals.⁴⁸

B Sexual Harassment as Sexual Violation

On one view, sexual harassment is a form of sexual violation, analogous to rape.⁴⁹ This view has been expressed by feminist scholars⁵⁰ and by Richard Posner in the context of his economic analysis of sex discrimination law.⁵¹ This analysis applies most clearly to sexual harassment as Catharine MacKinnon defined the term: 'the unwanted imposition of sexual requirements in the context of a relationship of unequal power'.⁵² In her discussion of sexual assault as a form of sexual harassment, MacKinnon also observes that:

Sexual assault as experienced during sexual harassment seems less an ordinary act of sexual desire directed toward the wrong person than an expression of dominance laced with impersonal contempt, the habit of getting what one wants; and the perception (usually accurate) that the situation can be safely exploited in this way – all expressed sexually. It is dominance eroticized.⁵³

On this view, one way in which sexual harassment causes harm is by undermining victims' individual autonomy. This undermining of individual autonomy is especially serious in circumstances where a victim feels pressure to tolerate or even participate in the perpetrator's sexual conduct for fear of retaliation. Crucially, an environment in which sexual harassment frequently occurs is likely to be one in which there is a culture of accepting sexual harassment,⁵⁴ and therefore one in which victims of sexual harassment are likely

Pty Ltd [2016] QCAT 505 (\$313,316.10 awarded). The award of compensation may, of course, be offset by adverse costs orders, as Gaze and Smith explain: Gaze and Smith (n 19) 196–7.

- 48 French J's list of these categories consists of the compromising of a person's 'right of personal physical privacy', 'physical injury, injury to feelings, humiliation and loss of income': *Hall* (1989) 20 FCR 217, 283. It is difficult to see how the next two harms can fall under these categories.
- 49 Of course, rape can itself be a form of sexual harassment – as French J pointed out, 'sexual harassment, covering as it does unwelcome sexual advances and conduct, will clearly extend to acts which may also constitute offences and civil wrongs': *ibid.*
- 50 See Susan Estrich, 'Sex at Work' (1991) 43(4) *Stanford Law Review* 813; Caroline Forell, 'Essentialism, Empathy, and the Reasonable Woman' [1994] (4) *University of Illinois Law Review* 769.
- 51 Richard A Posner, 'An Economic Analysis of Sex Discrimination Laws' (1989) 56(4) *University of Chicago Law Review* 1311, 1318.
- 52 Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979) 1.
- 53 *Ibid* 162.
- 54 Kathryn J Holland et al, 'Sexual Harassment against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context' (2016) 17(1) *Psychology of Men & Masculinity* 17, 19, 23; James Campbell Quick and M Ann McFadyen, 'Sexual Harassment: Have We Made Any Progress?' (2017) 22(3) *Journal of Occupational Health Psychology* 286, 291; Junghyun Lee, 'Passive Leadership and Sexual Harassment: Roles of Observed Hostility and Workplace Gender Ratio' (2018) 47(3) *Personnel Review* 594, 594–5, 598. The importance of 'organisational norms and practices' in sexual harassment prevention is discussed by McDonald, Charlesworth and Graham, 'Developing a Framework' (n 14) 52,

to feel greater pressure to tolerate sexual harassment.⁵⁵ Individual acts of sexual harassment can contribute to the perpetuation of such a culture.

The existence of such pressure also makes it harder for subsequent victims of sexual harassment to prove that they have been sexually harassed, due to the unwelcomeness element of sexual harassment (discussed below). In this way, each individual act of sexual harassment has systemic consequences that go beyond the harm to the individual victim and also beyond the physical and mental health effects that it may have on the individual victim. Through this systemic effect, individual acts of sexual harassment expose others within an organisation, aside from the immediate victim, to a greater risk of sexual harassment.

In the American context, Susan Estrich identifies the requirement that a sexual advance be ‘unwelcome’⁵⁶ – a requirement that also exists in section 28A(1) of the *SD Act* – as creating difficulties similar to those involved in proving that sexual penetration is non-consensual in a rape trial. As Estrich argues, ‘unwelcomeness may be judged not according to what the woman meant, but by the implication that the man felt entitled to draw’:⁵⁷ that is, the male’s perception of his own conduct as not unwelcome may be privileged over the woman’s perception that it is unwelcome. Women who do not complain about their treatment or who dress ‘provocatively’ are assumed to have welcomed it or felt ambivalent about it,⁵⁸ despite empirical studies suggesting that men are far more likely to feel ambivalent or be flattered by workplace sexual advances than women.⁵⁹ All in all, the requirement that a sexual advance be unwelcome, like traditional attitudes to sexual consent, results in the conduct of the woman being on trial: ‘how she lives, how she dresses, how she acts’.⁶⁰

The requirement of unwelcomeness has had the same consequences in Australia. *O’Callaghan v Loder*,⁶¹ the first Australian tribunal case to accept a sexual harassment claim under sex discrimination legislation, is a frequently-discussed example in the sexual harassment literature.⁶² In that case, Mathews J held that the complainant ‘had failed to make known to the respondent that his

citing Christine Parker, ‘Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation’ (1999) 5(1) *Australian Journal of Human Rights* 159; Jennifer L Berdahl, ‘The Sexual Harassment of Uppity Women’ (2007) 92(2) *Journal of Applied Psychology* 425; Chris Ronalds, New South Wales Police, *Report of the Inquiry into Sexual Harassment and Sex Discrimination in the NSW Police* (Report, 2006).

55 See Skye Saunders and Patricia Easteal, ‘The Nature, Pervasiveness and Manifestations of Sexual Harassment in Rural Australia: Does “Masculinity” of Workplace Make a Difference?’ (2013) 40 *Women’s Studies International Forum* 121, 125, 130; Sara Charlesworth, ‘Risky Business: Managing Sexual Harassment at Work’ (2002) 11(2) *Griffith Law Review* 353, 368.

56 Estrich (n 50) 826.

57 Ibid 829.

58 Ibid 828–30.

59 Barbara A Gutek, *Sex and the Workplace* (Jossey-Bass, 1985) 46.

60 Estrich (n 50) 827.

61 (1983) 3 NSWLR 89.

62 See Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (n 16) 428–9; Mason and Chapman (n 4); Jacinta Wright, ‘Sexual Harassment in the Workplace: The Loophole Exposing Western Australia’s Parliament’ (2010) 17(2) *Murdoch University Electronic Journal of Law* 50, 56–7.

attentions were unwelcome'.⁶³ As Thornton argues, the complainant 'knew perfectly well that any intimation of rejection could have resulted in job-related repercussions'.⁶⁴ Such a fear would be warranted – the *AHRC Report* found that 43% of people who made a formal report or complaint reported negative consequences, including being 'labelled as a troublemaker' or 'ostracised, victimised or ignored by colleagues', or resignation.⁶⁵

The approach to unwelcomeness has been relaxed since *O'Callaghan v Loder*. In more recent cases, the surrounding circumstances are taken into account with the result that unwelcomeness is often established if the sexual conduct was not invited or wanted by the complainant.⁶⁶ However, while this alleviates the problem, it does not completely eliminate it. The complainant's conduct will still be scrutinised by courts to determine whether the complainant has done anything that could be interpreted as inviting or desiring the sexual conduct. In a workplace environment, complainants may still feel pressure to participate in and tolerate a perpetrator's conduct, which may lead a court to conclude that the conduct was not unwelcome. Respondents in sexual harassment cases frequently argue that the complainant participated in or tolerated their conduct, and they are sometimes successful.⁶⁷

As Estrich's analysis suggests, sexual harassment disputes still prompt a shift in focus to the complainant's conduct – her conduct is on trial rather than the respondent's. In the recent high-profile defamation claim brought by Geoffrey Rush with respect to an allegation of sexual harassment by Eryn Jean Norvill, the same observation was made about her conduct being on trial.⁶⁸ It then becomes a matter of interpreting the complainant's conduct, and as the cases listed in footnote 67 show, this can result in a sexual harassment claim failing. This issue may be aggravated by the well-studied phenomenon of 'passive' victims of sexual harassment being subject to condemnation and scorn by observers of the

63 Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (n 16) 428.

64 Ibid.

65 *AHRC Report* (n 1) 73.

66 See, eg, *Hall* (1989) 20 FCR 217, 250–1 (Wilcox J); *Aldridge v Booth* (1988) 80 ALR 1, 19–20 (Spencer J).

67 See, eg, *Horman v Distribution Group* [2001] FMCA 52, [43]–[47] (Raphael FM) (conduct found to be unwelcome); *TN v BF* [2015] FCCA 1497, [100]–[101] (Lloyd-Jones J) (conduct found not to be unwelcome); *Daley v Barrington* [2003] FMCA 93, [33]–[34] (Raphael FM) (conduct found not to be unwelcome); *Wong v Su* [2001] FMCA 108, [17]–[18] (Driver FM) (conduct found not to be unwelcome); *San v Dirluck Pty Ltd* (2005) 222 ALR 91, 98 [23] (Raphael FM) (conduct found to be unwelcome); *Elliott v Nanda* (2001) 111 FCR 240, 277 [108] (Moore J) (conduct found not to be unwelcome). See also the discussion and cases cited in Fiona Pace, 'Concepts of "Reasonableness" in Sexual Harassment Legislation: Did Queensland Get It Right?' (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 189, 194.

68 Wendy Tuohy, 'Why Is It EJ Norvill's Honesty that Appears to Be on Trial?', *Sydney Morning Herald* (online, 7 November 2018) <<https://www.smh.com.au/lifestyle/life-and-relationships/why-is-it-ej-norvill-s-honesty-that-appears-to-be-on-trial-20181107-p50e18.html>>. The case followed an article in the *Daily Telegraph* alleging that Rush had sexually harassed an actress, later revealed to be Eryn Jean Norvill.

sexual harassment, which one study suggests is the result of observers failing to take important motivations for the victims into account.⁶⁹

C Sexual Harassment as Entrenching Gender Inequality

The conception of sexual harassment as individualised, aberrant behaviour entirely fails to address one particular way in which sexual harassment causes harm: its broader effects in discouraging women from entering particular occupations, workplaces or other areas of social life. The conception of sexual harassment as involving a systemic harm arising from gender inequality, rather than merely being instances of improper expressions of sexual desire, can be traced at least as far back as Catharine MacKinnon's work.⁷⁰ In Thornton's words, less direct forms of sexual harassment are targeted at women who 'endeavour to move into what is predominantly thought of as "men's work"'.⁷¹ Vicki Schultz has described some forms of sexual harassment as 'designed to maintain work – particularly the more highly rewarded lines of work – as bastions of masculine competence and authority'.⁷²

This kind of conduct is a subset of a broader discriminatory phenomenon involving 'innumerable daily encounters between employees at all levels of the occupational hierarchy'.⁷³ In US jurisprudence, it is known as 'hostile environment' sexual harassment.⁷⁴ Victims of hostile environment harassment are subjected to persistent, regular comments and jokes of a sexual or sexist nature, open display of pornographic material in the workplace, or frequent inappropriate touching.⁷⁵ Earlier research on sexual harassment found that such conduct is especially prevalent in traditionally male-dominated workplaces such as blue collar workplaces, technological fields and insurance sales,⁷⁶ with scholars attributing this in some cases to women's vulnerability in traditionally

69 Kristina A Diekmann et al, 'Double Victimization in the Workplace: Why Observers Condemn Passive Victims of Sexual Harassment' (2013) 24(2) *Organization Science* 614.

70 MacKinnon (n 52).

71 Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (n 16) 430. See also Margaret Collinson and David Collinson, "'It's Only Dick": The Sexual Harassment of Women Managers in Insurance Sales' (1996) 10(1) *Work, Employment and Society* 29.

72 Vicki Schultz, 'Reconceptualising Sexual Harassment' (1998) 107(6) *Yale Law Journal* 1683, 1687.

73 Samuel R Bagenstos, 'The Structural Turn and the Limits of Anti-Discrimination Law' (2006) 94(1) *California Law Review* 1, 12.

74 See, eg, the United States Supreme Court's landmark decision in *Meritor Savings Bank v Vinson*, 477 US 57 (1986).

75 See generally the US Equal Employment Opportunity Commission, 'Policy Guidance on Current Issues of Sexual Harassment' (Policy Guidance No N-915-050, 19 March 1990).

76 See, eg, Collinson and Collinson (n 71); Cynthia Cockburn, *Machinery of Dominance: Women, Men and Technical Know-How* (Pluto Press, 1986); Ann Game and Rosemary Pringle, *Gender at Work* (Allen & Unwin, 1983) 16; Margaret Thornton, 'Job Segregation, Industrialisation and the Non-Discrimination Principle' (1983) 25(1) *Journal of Industrial Relations* 38; Nathalie Hadjifotiou, *Women and Harassment at Work* (Pluto Press, 1983).

male-dominated workplaces⁷⁷ and men's perception of women as 'intruders' in fields properly left to men.⁷⁸

The *AHRC Report* suggests that a large portion of women are still subject to sexual harassment of this nature, and that women are subject to it more often than men: overall across all genders, 43% of respondents reported 'sexually suggestive comments or jokes that made [the victim] feel offended' (with 59% for women); 39% reported 'inappropriate physical contact' (with 54% for women); 36% reported 'unwelcome touching, hugging, cornering or kissing' (with 51% for women); and 19% reported 'sexually explicit pictures, posters or gifts that made you feel offended' (with 24% for women).⁷⁹ The effect of this behaviour, when targeted at a woman, can be to 'undermine her image and self-confidence as a capable worker'.⁸⁰ When such behaviour is highly prevalent in an organisation, it can have a wider effect of discouraging or excluding women from that organisation.⁸¹

This harm of sexual harassment is a systemic harm. It involves behaviour that 'may be so subtle and insidious that it is accepted as part of the organisational culture and it is certainly not tractable to amelioration within sex discrimination law'.⁸² Again, the direct victim of sexual harassment is not the only person who is made worse off; other women who might otherwise wish to enter an occupation or workplace, or participate in some other area of social life, may be dissuaded from doing so. Sexual harassment can thereby contribute to the entrenchment of gender inequality. Current sexual harassment law is most clearly inadequate in addressing this kind of harm. As already explained, the current law treats sexual harassment as the aberrant conduct of individuals. The operative provisions of the current law, particularly section 46PO(4) of the *AHRC Act*, contain no indication that Parliament recognised this systemic harm, and provide no means of either preventing or redressing the harm.

IV A STRUCTURAL APPROACH TO SEXUAL HARASSMENT REGULATION

A What Is a Structural Approach?

Part II of this article sought to demonstrate that the operative provisions of the *SD Act* and *AHRC Act* dealing with sexual harassment and remedies are

77 Hadjifotiou (n 76). More recently, see, eg, Saunders and Eastal (n 55) 125–6, 130; Lee (n 54) 595–6, 599, 606.

78 Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (n 16) 430; Collinson and Collinson (n 71) 51; Rohan Collier, *Combating Sexual Harassment in the Workplace* (Open University Press, 1995).

79 See *AHRC Report* (n 1) 20.

80 Schultz (n 72) 1687.

81 Ibid 1760.

82 Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19(4) *International Journal of the Sociology of Law* 453, 466.

discordant with the stated purpose of the *SD Act*, which is to eliminate sexual harassment so far as is possible. Part III identified harms of sexual harassment that are not recognised or addressed by the current law. This Part will propose a ‘structural’ approach to sexual harassment regulation which aims to overcome both of these inadequacies in the current law. The approach is structural because it treats sexual harassment as having systemic causes and effects, with legal measures to eliminate sexual harassment being aimed at shaping organisational structures and processes to change behaviour in line with the objective of eliminating sexual harassment.

Broadly speaking, the structural approach proposed here consists of two elements: first, a legislatively-imposed positive duty or set of positive duties for organisations to prevent sexual harassment so far as is reasonably practicable, supported by remedies enabling courts to order employers to take specific actions to comply with such duties; and second, a regulatory framework imposed by legislation and enforced by a public regulator to ensure that organisations have incentives to comply with their positive duties to prevent sexual harassment, in part through enabling compliance staff and third parties to influence organisational behaviour.

B Advantages of Positive Duties

A positive duty is a legal obligation for organisations and individuals to take steps to prevent and redress sexual harassment or other forms of discrimination, by contrast to the current law which simply prohibits sexual harassment and requires perpetrators to compensate victims. They reflect a ‘recognition that societal discrimination extends well beyond individual acts’ and are ‘proactive rather than reactive’.⁸³

The proposal to impose a positive duty to prevent sexual harassment is not new. It has previously been made by other commentators and organisations.⁸⁴ In particular, it is central to the literature on a structural approach in the US – for example, Susan Sturm argues that a structural approach depends on employers having an obligation to exercise ‘reasonable care to avoid harassment and to eliminate it when it might occur’.⁸⁵ The general approach recommended in these proposals has been forcefully criticised by Samuel Bagenstos. Part V seeks to explain how a structural approach can be effectively implemented in light of Bagenstos’s criticisms and other issues with existing proposals for a structural approach.

83 Sandra Fredman, ‘Equality: A New Generation?’ (2001) 30(2) *Industrial Law Journal* 145, 164 (‘Equality’).

84 Unions NSW (n 2) 3–5; Equality and Human Rights Commission, *Turning the Tables: Ending Sexual Harassment at Work* (Report, 27 March 2018) 13–15; ‘Put Harassment Regulation on Same Footing as OHS Laws: Expert’, *Workplace Express* (30 July 2018); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008); Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework* (Hart Publishing, 2000) xvii. A more guarded approach to the effectiveness of positive duties is in Smith, ‘It’s About Time’ (n 36) 141–2.

85 Susan Sturm, ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101(3) *Columbia Law Review* 458, 481, quoting *Faragher v City of Boca Raton*, 524 US 775, 805 (1998).

The imposition of a positive duty would represent a step beyond the current corrective justice approach in sexual harassment law by imposing a legal requirement for organisations to prevent, not merely redress, sexual harassment. Such a duty already exists in Victoria under section 15 of the *Equal Opportunity Act 2010* (Vic), which provides (in part) that:

1. This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.
2. A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.

It will be argued that the strengths of such a duty, if effectively enforced and generally complied with, are twofold. First, it would be a more effective method of influencing organisational and individual behaviour to prevent sexual harassment. Second, it would more effectively recognise and prevent the harms identified in Part III of this article.⁸⁶

The imposition of a positive duty would make organisations liable for failings in their practices, policies and cultures, rather than just individual instances of sexual harassment. There is a substantial literature on the causes of hostile environment harassment in workplaces, much of which points to organisational factors and work conditions as the primary cause of such harassment.⁸⁷ Some of this literature, in the situationist research program in psychology, goes further and argues that individual personalities have limited relevance to the prevalence of sexual harassment.⁸⁸ There is also a literature on how organisational strategies, including policies and training, can prevent or reduce the incidence of sexual harassment.⁸⁹

86 Sandra Fredman has also argued that a positive duty would better recognise the systemic effects of discrimination: Fredman, 'Equality' (n 83) 164.

87 See generally Paula McDonald, Sara Charlesworth and Tina Graham, 'Action or Inaction: Bystander Intervention in Workplace Sexual Harassment' (2016) 27(5) *The International Journal of Human Resource Management* 548, 562–3 ('Action or Inaction'); Lee (n 54) 595–6; Ståle Einarsen, Bjørn Inge Raknes and Stig Berge Matthiesen, 'Bullying and Harassment at Work and Their Relationships to Work Environment Quality: An Exploratory Study' (1994) 4(4) *European Work and Organizational Psychologist* 381; Maarit Vartiainen, 'The Sources of Bullying: Psychological Work Environment and Organizational Climate' (1996) 5(2) *European Journal of Work and Organizational Psychology* 203; Dieter Zapf, Carmen Knorz and Matthias Kulla, 'On the Relationships between Mobbing Factors, and Job Content, Social Work Environment and Health Outcomes' (1996) 5(2) *European Journal of Work and Organizational Psychology* 215; Elfi Baillien, Inge Neyens and Hans De Witte, 'Organizational, Team Related and Job Related Risk Factors for Bullying, Violence and Sexual Harassment in the Workplace: A Qualitative Study' (2008) 13(2) *International Journal of Organisational Behaviour* 132; Heather Antecol and Deborah Cobb-Clark, 'Does Sexual Harassment Training Change Attitudes? A View from the Federal Level' (2003) 84(4) *Social Science Quarterly* 826.

88 See Ståle Einarsen, 'Harassment and Bullying at Work: A Review of the Scandinavian Approach' (2000) 5(4) *Aggression and Violent Behavior* 379, 391 for critical discussion of this view.

89 See McDonald, Charlesworth and Graham, 'Developing a Framework' (n 14) for an overview. See also Nicole T Buchanan et al, 'A Review of Organizational Strategies for Reducing Sexual Harassment: Insights from the US Military' (2014) 70(4) *Journal of Social Issues* 687, 696–9; McDonald, Charlesworth and Graham, 'Action or Inaction' (n 87) 561; Lee (n 54) 606–7; Diekmann et al (n 69) 625.

If the conclusions of this literature are correct, then sexual harassment has both systemic harmful effects and systemic *causes*. Sexual harassment can be prevented by addressing those causes. By holding organisations accountable for the organisational factors that increase the risk of sexual harassment, the legislative regime would directly address the underlying problems that cause sexual harassment rather than mere symptoms of those problems (ie individual acts of harassment). If those problems are addressed, then sexual harassment could be more effectively prevented. As Fredman has argued, and as the international discrimination literature has increasingly recognised, equality goals are best served by ensuring that those in a position to prevent wrongdoing are required to act to eliminate wrongdoing.⁹⁰

Positive duties would have clear advantages over the current law in addressing the coercive harm of sexual harassment (discussed in Part IV(B)). If organisations are liable merely for failing to have adequate processes, policies or practices for addressing sexual harassment and thereby exposing individuals to an unreasonable risk of being sexually harassed, then for the burden will no longer be on individual complainants to go to court themselves and prove that they have been sexually harassed. A sexual harassment regulator would have the capability to identify non-compliance with sexual harassment law without being reliant on the evidence of an individual victim. The role and capabilities of such a regulator are explored further below in Part V(B)(2) below.

Further, it would not be necessary for complainants to prove ‘unwelcomeness’, which was identified in Part III(B) as creating significant difficulties for complainants. Instead, courts would consider whether the organisation in question (for example, a workplace) is one in which unwelcome sexual conduct is likely to occur.

As mentioned above, sexual harassment complainants may feel considerable pressure to tolerate or participate in unwelcome sexual conduct. Imposing a positive duty could directly address this pressure by requiring organisations to create a culture in which this pressure does not exist. For example, Fiona Pace has argued that victims may be afraid to reject or complain about sexual harassment because of:

- Fears that objecting/complaining will result in disadvantage (for example ridicule, demotion or dismissal);
- Fear that objecting/complaining would be futile;
- Feelings of shame, embarrassment, vulnerability and intimidation experienced by the victim;
- Ongoing nature of the harassment (rather than a discrete event); or
- Power relationships and gender hierarchy between harasser and victim.⁹¹

90 Fredman, ‘Equality’ (n 83) 164; Smith, ‘It’s About Time’ (n 36) 137.

91 Pace (n 67) 195, citing Edmund Wall, *Sexual Harassment: Confrontations and Decisions* (Prometheus Books, 1992) 201; MacKinnon (n 52) 51–2; Wendy Pollack, ‘Sexual Harassment: Women’s Experiences. Legal Definitions’ (1990) 13 *Harvard Women’s Law Journal* 35, 60–1, 76.

Imposing a positive duty would also better prevent hostile environment harassment and its attendant harm, the entrenchment of gender inequality. Because complainants are required to prove that each individual act of sexual harassment took place when bringing an action under the *SD Act*, the systemic nature and causes of sexual harassment in an organisation are unlikely to be fully appreciated in litigation under the current law. Neither is the systemic way in which sexual harassment undermines gender equality in public life.

C What Positive Duties Should Organisations Have?

The aim of imposing the positive duty is to alter behaviour and prevent sexual harassment from occurring in the future. For this reason, it is useful to consider the literature on regulatory studies in shaping the duty. This literature sheds light on how legal obligations should be shaped in a way that best achieves the purpose of the regulatory regime. As Fredman has explained, the positive duty should be imposed on 'the body in the best position to perform this duty' even if the body is 'not responsible for creating the problem in the first place'.⁹² The regulatory literature assists in identifying which body (and which individuals) are in the best position to perform the duty and what the content of the duty should be if the objective of sexual harassment law is to be achieved. In this regard, there are two insights from the regulatory literature that should inform the design of positive duties. The first relates to how certainty can be achieved when the overarching duty involves a general, open-ended standard such as a reasonable steps standard. The second relates to how duties can be designed in a way that encourages compliance with the main duty to prevent sexual harassment.

Both insights support the view that in addition to a primary positive duty to prevent sexual harassment so far as is reasonably practicable, organisations should also be subject to a number of more specific subsidiary duties that support the primary positive duty. The design of those duties must, of course, be informed by empirical findings about how sexual harassment is best prevented.⁹³ This approach mirrors occupational health and safety law, in which there is a primary duty of care and some more specific duties relating to various specific aspects of worker health and safety.⁹⁴ The approach is supported by findings in the regulatory literature.

Turning to the first insight foreshadowed above: the main advantage of having more specific duties is greater certainty in identifying what the positive duty requires. Achieving this certainty requires the regulatory framework to adopt a balance between strict rules and general standards. As regulatory theorists have argued, imposing strict and precise rules has the disadvantage of encouraging 'creative compliance' whereby the spirit or purpose of the rule is

92 Fredman, 'Equality' (n 83) 164.

93 See above n 89 and accompanying text.

94 See, eg, *Occupational Health and Safety Act 2004* (Vic) s 19.

defeated but the rule is literally adhered to.⁹⁵ On the other hand, where there are no specific rules but only open-ended principles, there is likely to be more disagreement about whether a particular practice complies with the principle.⁹⁶

Braithwaite has found that certainty and consistency are best promoted by a ‘wise mix’ of rules and principles.⁹⁷ This involves creating a general standard of reasonable steps that organisations must take to prevent sexual harassment, while also supporting that standard with more specific guidelines (potentially including both binding and non-binding guidelines) and more specific subsidiary duties.⁹⁸ Braithwaite acknowledges that ensuring certainty and consistency require more than designing duties, rules and principles the right way: it also requires the right kind of culture in the regulatory agency and by strengthening the links between regulators and the regulated community (a matter dealt with in the next Part).⁹⁹ Nonetheless, getting the design of the duties right is an important starting point that should be informed by the regulatory literature.

Turning to the second insight, regulatory scholars have found that positive duties are only effective if certain ‘pre-conditions’ are met.¹⁰⁰ These pre-conditions will be discussed in greater detail in the next Part, as many of them relate to the regulatory framework supporting positive duties rather than the content of the duties themselves. But one pre-condition, according to McCrudden, is that organisations must be required to ‘seriously consider alternative approaches that are available for them to take that will shift entrenched patterns of inequality’.¹⁰¹ This pre-condition means that one subsidiary duty should be a duty that requires organisations to consider alternative approaches. McCrudden gives one example from the Northern Ireland equality legislation: employers must regularly review their ‘recruitment, training and promotion’ practices. A similar duty could be imposed in the context of sexual harassment specifically in the *SD Act*.

As mentioned above, the Victorian legislation already contains a positive duty to eliminate sexual harassment in section 15 of the *Equal Opportunity Act 2010* (Vic). No cases in VCAT or the courts have successfully been brought alleging a breach of section 15. It appears that, at the very least, section 15 is under-enforced, and even if a breach of section 15 can be proven, it is unclear what orders VCAT could make in response to that breach. As the next Part will show, simply inserting a positive duty in the legislation will not, by itself, be enough to change organisational or individual behaviour. If section 15 has failed to have an effect on sexual harassment in Victoria, that failure can be explained

95 John Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy* 47, 71 (citations omitted) (‘Rules and Principles’); McBarnet and Whelan (n 38).

96 Braithwaite, ‘Rules and Principles’ (n 95) 71. For further discussion of one example of over-reliance on general principles leading to regulatory failure, see Cristie Ford, ‘Principles-Based Securities Regulation in the Wake of the Financial Crisis’ (2010) 55(2) *McGill Law Journal* 257.

97 Braithwaite, ‘Rules and Principles’ (n 95) 73.

98 *Ibid* 65–6.

99 *Ibid* 74.

100 Christopher McCrudden, ‘Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review’s Consultative Paper’ (2007) 36(3) *Industrial Law Journal* 255, 265.

101 *Ibid*.

at least in part by the absence of a regulatory framework in Victoria like the framework described below.

V ENSURING ORGANISATIONS COMPLY WITH POSITIVE DUTIES

A Creating the Success Conditions of a Structural Approach

As Gaze and Smith point out, monitoring and enforcing of a positive duty are likely to be highly expensive and onerous on whichever body is tasked with enforcement.¹⁰² The existing literature on structural approaches to discrimination law draws insights from regulatory theory to explain how compliance with a positive duty can be secured without relying on the traditional approach to enforcement, ie, legal action or the threat of legal action.¹⁰³

Primarily, proponents of a structural approach seek to achieve this by transferring some of the compliance burden to other parties, including employees and particularly compliance staff working for the regulated organisation. On a structural approach, the regulatory framework is aimed at incentivising organisations to adopt the regulatory objective of the law – in the case of sexual harassment, for example, the goal would be for organisations to implement effective prevention and redress strategies.

Sturm singles out professionals and experts who she labels ‘intermediaries’: human resources professionals, consultants and lawyers who are part of the regulated organisation (and are therefore close enough to monitor the behaviour and processes of the organisation) but maintain links to professional communities which, Sturm argues, gives them the motivation to pursue compliance with the law even at the expense of the employer’s other objectives such as profitability.¹⁰⁴ Sturm calls these professionals ‘intermediaries’ because of their intermediary role, in her theory, in working with both courts and employers to develop standards for sexual harassment prevention processes.¹⁰⁵ This article will refer to such professionals as ‘compliance staff’ instead to avoid overreliance on the broader theoretical framework Sturm uses.

Other scholarship on a structural approach to sexual harassment (and other regulatory fields) places similar reliance on elements within the regulated organisation itself, such that much of this scholarship can be described as advocating some form of self-regulation (but without endorsing de-regulation).¹⁰⁶

102 Gaze and Smith (n 19) 268.

103 See generally Christine Parker, ‘Reinventing Regulation within the Corporation: Compliance-Oriented Regulatory Innovation’ (2000) 32(5) *Administration and Society* 529 (‘Reinventing Regulation within the Corporation’); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); McCrudden (n 100).

104 Sturm (n 85) 524.

105 See *ibid* 555–65.

106 See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 150–2.

This scholarship emphasises the importance of designing procedures and incentives that cause the organisation to change its own behaviour in accordance with the law's objects.¹⁰⁷ Christopher McCrudden refers to this general approach as 'reflexive regulation'.¹⁰⁸

The key difficulty for reflexive regulation is ensuring that the law is successful in altering the behaviour of organisations such that those organisations pursue equality goals¹⁰⁹ internally. As Olivier De Schutter and Simon Deakin say, the conditions necessary for the regulatory approach to succeed 'must be affirmatively created, rather than taken for granted'.¹¹⁰

An important criticism of this proposal, made by Bagenstos, is in effect an argument that such conditions *cannot* be created, at least not in a way that will ensure widespread compliance with a positive duty to prevent sexual harassment. One of his main criticisms is that Sturm's approach is highly reliant on compliance staff pursuing equality goals themselves. In his view, however, compliance staff cannot be 'trusted to internalise and pursue' those goals, and as a result, the practices they adopt as 'best practices' would simply be 'the practices that are "best" for employers' or the compliance staff themselves.¹¹¹ He argues that empirical evidence shows that the pursuit of equality goals by compliance staff would be subordinated to managerial interests.¹¹²

The question of whether it is possible to create the conditions necessary for a structural approach (or other forms of reflexive regulation) to succeed is largely an empirical one.¹¹³ It requires examination of the empirical literature on regulatory approaches and the behaviour of compliance staff. Bagenstos does refer to empirical results – in particular, he gives the example of compliance staff and consultants urging employers to adopt processes and policies that 'serve the interests of employers by making them appear to be invested in achieving workplace equality' but where 'there is scant evidence that the responses ... actually result in equal treatment or unbiased decision-making'.¹¹⁴ A further

107 See, eg, Hugh Collins, 'Book Review: Reflexive Labour Law' (1998) 61(6) *Modern Law Review* 916, 917; Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jacinta Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 145, 151; Julia Black, 'Proceduralising Regulation: Part I' (2000) 20(4) *Oxford Journal of Legal Studies* 597, 597–8.

108 McCrudden (n 100) 259.

109 A note on terminology: 'regulatory objectives' or 'goals' are those objectives that a regulatory regime seeks to achieve through altering behaviour. 'Equality objectives' or 'goals' are regulatory objectives that discrimination law seeks to achieve. In this article, the relevant equality objective is eliminating sexual harassment through compliance with the positive duties proposed here. However, the article will refer to regulatory or equality objectives more generally where it draws on the more general literature on regulation.

110 Olivier De Schutter and Simon Deakin, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, 2005) 3.

111 Bagenstos (n 73) 27–8. See also Earl Wysong, *High Risks and High Stakes: Health Professionals, Politics, and Policy* (Greenwood Press, 1992), who makes a similar argument.

112 Bagenstos (n 73) 28, citing Lauren B Edelman et al, 'Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace' (1993) 27(3) *Law and Society Review* 497, 511 ('Internal Dispute Resolution').

113 McCrudden (n 100) 262.

114 Bagenstos (n 73) 29–30.

consequence, he argues, is that these ineffective methods become part of the 'conventional wisdom' among compliance staff, such that the dominant norms governing organisational behaviour are redefined in a way that better serves managerial interests, potentially at the expense of equality objectives.¹¹⁵

Bagenstos's criticism has some force, and it can be seen as an elaboration of De Schutter and Deakin's point that it cannot be taken for granted that the conditions of regulatory success already exist or will emerge. But the critique is not fatal to the prospects of a structural approach. There are two reasons for this, and an appreciation of both reasons will point the way to an effective structural approach to sexual harassment law.

First, Bagenstos seemingly assumes that the incentives and motivations that influence compliance staff are static, universal and immutable. He frames Sturm's proposal as premised on the belief that those incentives and motivations will influence compliance staff to pursue equality goals due to their connections with professional communities. He frames his own disagreement with the proposal as based on empirical findings that the incentives and motivations that influence compliance staff instead drive them to subordinate equality objectives to managerial interests. But the point of a structural approach to regulation is that it should not take the motivations and incentives of people and organisations as it finds them. One objective of a structural approach is to change those incentives and motivations so that compliance staff are driven to pursue equality objectives and organisations are driven to listen to compliance staff.

Second, Bagenstos does not undertake an examination of *why* regulation fails in particular cases that would be necessary for his critique to have force. His argument can only succeed if it can be proven that the reasons for regulatory failure would infect any attempt at implementing a reflexive regulation approach. But this conclusion is not borne out by the more recent regulatory literature, particularly in the wake of the global financial crisis, which has considered the causes of regulatory failures.

For example, Ford argues that reflexive regulation can only be successful where the regulator is 'credible' with the regulated industry.¹¹⁶ She identifies some reasons why the relevant US regulators did not have the necessary credibility in the lead-up to the financial crisis: the industry's 'ability to hire lobbyists and fund political campaigns', the ability of firms to maintain positions of political influence, firms' ability to operate across (and threaten to exit) jurisdictions, and numerous other factors.¹¹⁷ Arup has undertaken a more detailed study of financial services firms' political influence.¹¹⁸ Also in relation to financial regulation, Black identifies the misalignment of the incentives of key

115 Ibid 30–1, citing Edelman et al, 'Internal Dispute Resolution' (n 112) 511.

116 Cristie Ford, 'Macro and Micro Level Effects on Responsive Financial Regulation' (2011) 44(3) *University of British Columbia Law Review* 589, 605.

117 Ibid 605–10.

118 Christopher Arup, 'The Global Financial Crisis: Learning from Regulatory and Governance Studies' (2010) 32(3) *Law and Policy* 363.

actors, regulators' lack of regulatory capacity, and, simply, the failure of key actors to understand errors in their assumptions about market behaviour.¹¹⁹

In a more relevant context, Edelman has published a recent study on the failures of equal opportunity law in the US. Again, she identifies multiple reasons for regulatory failures. One reason she points to is ambiguities in equal opportunity legislation, which could be exploited by lawyers acting for employers.¹²⁰ Employers' representatives, Edelman argued, have structural advantages in litigation against employees and unions due to their status as 'repeat players' in the legal system and consequent ability to implement a long term strategy – settling cases that might set precedent against employers and litigating cases that might set precedent in favour of employers.¹²¹

Relevantly for the approach set out in this article, Edelman also extensively discussed the role of compliance professionals in shaping organisational responses to law.¹²² In the equal opportunity context, Edelman argues that compliance professionals have 'defined' compliance with equal opportunity law as 'a mandate for symbolic structures rather than for race and gender equality'.¹²³ A symbolic structure is a policy or practice whose very presence connotes or evokes legitimacy irrespective of whether the structure has any substantive value (in this context, irrespective of whether the structure actually advances the interests of women and minorities).¹²⁴ And, irrespective of whether the structure has any substantive value, compliance professionals, organisations and courts come to accept them as indicia of compliance with equal opportunity law.¹²⁵ This is despite the lack of any necessary connection between the existence of a symbolic structure and compliance with the substantive requirements of equal opportunity law. In this way, the diffusion of symbolic structures undermined the ability of women and minorities to use the law to protect their substantive rights under equal opportunity legislation.¹²⁶

In the context of construction regulation, van der Heijden has discussed the benefits and drawbacks of regulatory reliance on intermediaries (who have an equivalent role to Edelman's compliance professionals). Where regulatory failure happens, it may be attributable, on van der Heijden's findings, to 'client capture' of intermediaries¹²⁷ or regulatory capture by intermediaries.¹²⁸ 'Client capture' involves members of the regulated community using intermediaries to advance

119 Julia Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75(6) *Modern Law Review* 1037, 1058–61.

120 See generally Lauren B Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (University of Chicago Press, 2016) ch 3 ('*Working Law*').

121 *Ibid* 71.

122 See especially *ibid* 82; see generally at chs 4–6.

123 *Ibid* 122.

124 *Ibid* 101.

125 See *ibid* ch 7.

126 *Ibid* 160.

127 Jeroen van der Heijden, 'Brighter and Darker Sides of Intermediation: Target-Oriented and Self-Interested Intermediaries in the Regulatory Governance of Buildings' (2017) 670 *The ANNALS of the American Academy of Political and Social Science* 207, 217.

128 *Ibid* 218–19.

their own interests; regulatory capture involves intermediaries influencing regulators to advance the intermediaries' interests.

These are all examples of empirical analyses of failed implementations of the regulatory approach broadly advocated in this article. But none of these analyses conclude that a structural approach, dependent on intermediaries or compliance professionals, is doomed to failure. The causes of regulatory failure can only be identified in the context of specific industries and political and economic environments. The regulatory literature does not support the conclusion that intermediaries will *necessarily* support managerial interests.

Indeed, what also follows from Edelman's study is that compliance professionals do have the capability to influence organisational responses to the law. She discusses the ability of academic lawyers to lend legitimacy to the legal profession, which in turn trains the 'front line' compliance staff (human resources professionals).¹²⁹ And she explains the ability of networks of compliance professionals to 'create widespread agreement about the legal environment'.¹³⁰

There are also examples of regulatory successes in the regulatory literature. Parker and Wolff's study of Australian and Japanese corporations showed that some of them demonstrated 'sustained commitment to eliminating sexual harassment'.¹³¹ In an American study of organisational responses to disability discrimination legislation, Barnes and Burke found that a university had adopted a 'proactive, cooperative' response to the law and committed substantial resources to ensuring it was compliant after hiring professional compliance staff.¹³² In a later study, Barnes and Burke again found that some organisations took costly measures to comply with disability discrimination law, while others did not.¹³³

In light of (i) the existence of both regulatory successes and failures in the implementation of reflexive regulation, and (ii) the complex and varying reasons for regulatory failures, Bagenstos's argument is overstated. Nothing in the regulatory literature indicates that a structural approach cannot succeed or must always end up pursuing managerial interests over regulatory objectives. The real question is what conditions must exist for a structural approach to be successful?

129 Edelman, *Working Law* (n 120) 79–80

130 *Ibid* 81–2.

131 Christine Parker and Leon Wolff, 'Sexual Harassment and the Corporation in Australia and Japan: The Potential for Corporate Governance of Human Rights' (2000) 28(3) *Federal Law Review* 509, 518.

132 Jeb Barnes and Thomas F Burke, 'The Diffusion of Rights: From Law on the Books to Organizational Rights Practices' (2006) 40(3) *Law and Society Review* 493, 506–8 ('The Diffusion of Rights').

133 Jeb Barnes and Thomas F Burke, 'Making Way: Legal Mobilisation, Organisational Response, and Wheelchair Access' (2012) 46(1) *Law and Society Review* 167, 182.

B What Are the Success Conditions for the Structural Approach Proposed Here?

At a relatively general level, McCrudden states three key conditions for reflexive regulation to be effective, drawn from empirical research on the success of positive duties in Northern Ireland equality legislation:¹³⁴

First, there needs to be some regular requirement that private sector firms and public sector bodies have to examine what they are doing on the basis of evidence that is objective and comparable across the sectors in which they operate ... Second, there needs to be some requirement that firms and public bodies seriously consider alternative approaches that are available for them to take that will shift entrenched patterns of inequality, and this needs to be able to be monitored by some external authoritative body ... Third, there needs to be some mechanism whereby firms and public bodies are required to engage with some other stakeholders that will regularly challenge the set of assumptions that these bodies currently adopt.¹³⁵

Drawing from McCrudden's work, and the studies of regulatory successes and failures set out in the previous section, a successful structural approach to regulation seems to require three basic conditions. These conditions are set out below.

1 Monitoring and Comparison

Implementing the first condition seems relatively straightforward, and to an extent it is already implemented in Australian equality law through the *Workplace Gender Equality Act 2012* (Cth) ('*WGE Act*'), which requires employers above a certain size to report on a set of 'gender equality indicators' ('GEIs') relating to the composition, remuneration and employment conditions of its workforce, and crucially relating to 'sex-based harassment and discrimination in the workplace'.¹³⁶ Under section 13 of the Act, reports must be made publicly available and in a standardised and comparable form. Compliance with the *WGE Act* is monitored by the Workplace Gender Equality Agency ('WGEA').¹³⁷

However, the information sought by the WGEA on sexual harassment is relatively limited. Under its most recent guidelines, employers are only asked the following questions about GEI 6 (relating to sexual harassment):

Do you have a formal policy or strategy for preventing sex-based harassment and discrimination? Does it include a grievance process?

134 *Northern Ireland Act 1998* (NI) s 75. See Eithne McLaughlin and Neil Fairs, *Section 75 Equality Duty: An Operational Review* (Conference Paper No 2, Operational Review Conference, School of Social Sciences, Cardiff University, June 10 2004); Equality Commission for Northern Ireland, *Section 75: Keeping it Effective: Reviewing the Effectiveness of Section 75 of the Northern Ireland Act 1998* (Report, November 2008); Christopher McCrudden, Robert Ford and Anthony Heath, 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment' (2004) 24(3) *Oxford Journal of Legal Studies* 363; Bob Osborne and Ian Shuttleworth (eds), *Fair Employment in Northern Ireland: A Generation On* (Blackstaff Press, 2004).

135 McCrudden (n 100) 265.

136 *Workplace Gender Equality Act* ss 3 (definition of 'gender equality indicators'), 13–13A ('*WGE Act*'); *Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2013 (No 1)* (Cth) sch 1.

137 *WGE Act* s 10(c).

Do you train all managers about how to prevent sex-based harassment and discrimination?

If you would like to provide more information about GEI 6, please do so below. This question is optional.¹³⁸

The approach here can be contrasted with the approach elsewhere in the *WGE Act* regime. Unlike GEI 6, other GEIs are based on outcomes rather than programs or policies,¹³⁹ a change from earlier versions of gender equality reporting legislation. The current reporting requirements could be improved if, as part of their public reports, employers were required to include statistics on sexual harassment complaints and how those complaints are dealt with. A further potential step would be requiring employers to administer mandatory surveys of their employees designed to elicit information on the prevalence of sexual harassment, the existence of sexual harassment risk factors, and the workplace culture in relation to sexual harassment, and then to include the results as part of public reports. Such a survey would obviously need to be designed carefully and with the assistance of sexual harassment experts to ensure that it is an effective measure of sexual harassment prevention and redress outcomes.

2 *An Enforced Requirement to Improve Internal Processes*

The first part of this condition, a requirement that organisations seriously consider alternative approaches, requires that the organisation internalise the regulatory object of eliminating sexual harassment. As Parker and Wolff explain, this can be indicated by ‘the extent to which the company has integrated social and legal responsibilities into operating procedures, everyday decision-making and performance appraisal/reward systems’.¹⁴⁰ Parker and Wolff go on to discuss the importance of external oversight by courts, regulators and interest groups to ensure that these processes are designed to pursue the regulatory object rather than being ‘subverted to management goals and priorities’.¹⁴¹ The positive duties proposed in this article provide the basis for a regulator to intervene and hold organisations accountable for their internal processes. The effectiveness of the regulator in holding organisations accountable is, therefore, essential.

This condition obviously cannot be met under the current legal framework in relation to sexual harassment because there is no sexual harassment regulator (or other body that could take responsibility for monitoring organisations’

138 Workplace Gender Equality Agency, ‘Guide to Reporting under the *Workplace Gender Equality Act 2012*’ (Reference Guide, 19 December 2018) 49.

139 Cf the following questions in GEI 1 (ibid 30):

- 1.10 How many employees were promoted during the reporting period against each category? Appointments include promotions, so the number of promotions should never exceed the number of appointments.
- 1.11 How many total appointments were made to manager and non-manager roles during the reporting period? Promotions should be added to these totals because they are considered internal appointments.
- 1.12 How many employees resigned during the reporting period against each category?

140 Parker and Wolff (n 131) 529–30.

141 Ibid 530.

compliance with a positive duty to prevent sexual harassment) at the federal level. The first step would, therefore, be establishing a regulator with enforcement powers akin to the Fair Work Ombudsman or occupational health and safety regulators, a measure already proposed by several discrimination scholars.¹⁴²

A sexual harassment regulator would be responsible for enforcing the positive duties proposed above. There is now a substantial body of literature on how regulators ought to approach their role, with the dominant approach being Ian Ayres and John Braithwaite's 'responsive regulation' model.¹⁴³ On this approach, the regulator is given a set of tools including cheaper, softer, less intrusive tools (such as negotiation, persuasion and enforceable undertakings) escalating up to stronger, more intrusive, more expensive tools (which can include criminal prosecution). The deterrent effect of more intrusive regulatory tools is strengthened by the possibility of negative media coverage, which Nielsen and Parker find is for many Australian businesses 'the main thing to fear' from regulatory action.¹⁴⁴ The essential insight of responsive regulation is that the softer regulatory tools are made more effective by the threat of the regulator escalating its response, so the regulator need only resort to the stronger tools when the softer tools fail to have the desired effect.¹⁴⁵

As a necessary part of this approach, there would need to be punitive sanctions available for breaches of the positive duty and the current prohibition on sexual harassment,¹⁴⁶ in addition to systemic remedies requiring organisations to change their procedures and policies to comply with their positive duties. In a recent comparative study of employment law in four common law jurisdictions, Vosko and her colleagues argued that an overemphasis on 'soft law' would exacerbate regulatory failures, and that there must remain a 'prominent role for "hard" enforcement mechanisms'.¹⁴⁷ Aside from fines, punitive measures for organisations could include equity fines (in the case of companies, forcing companies to issue new shares to a victim compensation fund); publicity orders

142 See, eg, Gaze and Smith (n 19) 289–94; Allen, 'Barking and Biting' (n 41); Parker and Wolff (n 131) 522.

143 See generally Ayres and Braithwaite (n 103) 38. In Australia, this approach is already endorsed in the Commonwealth government's guidance to administration of the *Competition and Consumer Act 2010* (Cth) ('Australian Consumer Law'): Commonwealth of Australia, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (Guide, 2010) 11. Gaze and Smith suggest a responsive regulation approach for a discrimination regulator: (n 19) 290–2.

144 Vibeke Lehmann Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2008) 35(3) *Journal of Law and Society* 309, 338 ('To What Extent').

145 Ayres and Braithwaite (n 103) 38–9; John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475, 484; Allen, 'Barking and Biting' (n 41) 331.

146 As Smith has suggested: Smith, 'It's About Time' (n 36) 135.

147 Leah F Vosko, John Grundy and Mark P Thomas, 'Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions' (2016) 37(2) *Economic and Industrial Democracy* 373, 391.

(forcing organisations to advertise their breach); and community service orders (forcing organisations to perform relevant community services).¹⁴⁸

Of course, a regulator would not be able to act unless it has sufficient information about when and where wrongdoing is occurring. To that end, it is necessary for the law to empower and incentivise victims as well as third parties, particularly unions and whistleblowers, to report sexual harassment or breaches of sexual harassment law to the regulator. This is partly done through existing victimisation provisions such as section 94 of the *SD Act*, which prohibits persons from subjecting or threatening to subject another person to detriment for taking action under the *SD Act* or *AHRC Act* or, more generally, making an allegation that another person has committed an act that is unlawful under part II of the *SD Act* (which would include sexual harassment) (section 94(2)(g)). The *Fair Work Act 2009* (Cth) section 340 similarly confers protection from adverse action in relation to workplace complaints, such as complaints about workplace sexual harassment.

Victimisation laws serve an important function, similar to the function served by whistleblower protection. It is, therefore, important to ensure such laws are effectively enforced.¹⁴⁹ The purpose of this article is not to discuss whistleblowing or victimisation protections in depth, but it is necessary to recognise that whistleblowing can be an effective means for both deterring misconduct (emphasised in the American whistleblower protection legislation, the *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, §806, 116 Stat 745, 802–4 (2002) and *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 922, 124 Stat 1376, 1842–50 (2010))¹⁵⁰ and for promoting internal compliance (the focus of British whistleblower protection legislation, the *Public Interest Disclosure Act 1998* (UK) c 23).¹⁵¹

The final element of this condition is ensuring that when a regulator or third party does take an organisation to court, the court adequately scrutinises the organisation's processes and holds it accountable for any breaches of the positive duties. Here, again, Bagenstos raises a concern: courts will have to make normative choices about how far the organisation should go in preventing sexual harassment and what sacrifices to profitability, convenience, and countervailing values are acceptable.¹⁵² But, he argues, judges may be reluctant to interfere with practices that 'draw on widely shared cultural understandings'.¹⁵³ This objection can be quickly dealt with. Bagenstos may have a point in relation to equality law

148 See generally Brent Fisse and John Braithwaite, 'Sanctions against Corporations: Dissolving the Monopoly of Fines' in Roman Tomasic (ed), *Business Regulation in Australia* (CCH, 1984) for discussion of these and other sanctions for punishing corporations.

149 Although breaches of s 94 can be criminally prosecuted, it seems that in practice no such prosecution takes place: Gaze and Smith (n 19) 141.

150 Elletta Sangrey Callahan, Terry Morehead Dworkin and David Lewis, 'Whistleblowing: Australian, UK, and US Approaches to Disclosure in the Public Interest' (2004) 44(3) *Virginia Journal of International Law* 879, 904–5.

151 Ibid 906.

152 Bagenstos (n 73) 35–40.

153 Ibid 43.

generally, but social attitudes to sexual discrimination are less likely to provoke judicial resistance to the standards proposed here, given the apparent improvement in social attitudes toward sexual harassment and other forms of violence against women.¹⁵⁴

The more challenging objection Bagenstos makes is that as courts do not themselves have expertise in sexual harassment prevention, they are likely to defer to experts and professionals when normative choices must be made. Those experts and professionals come from a community that is predominately employed by the regulated organisations and are, therefore, likely to (consciously or unconsciously) favour managerial interests.¹⁵⁵

The answer to this problem will arise out of the discussion in the next section of this article. Broadly, the answer is that a regulatory approach can seek to motivate compliance staff, even those employed by the regulated organisations, to pursue regulatory objectives over managerial interests. This will eliminate the problematic consequence of judicial deference to experts and professionals whose peers, or who themselves, have worked in regulated organisations' compliance teams. There is no reason to be concerned about the courts' own willingness to hold organisations accountable for process failures in sexual harassment prevention as long as they are given adequate evidence: Parker and Wolff give an example of the Queensland Anti-Discrimination Tribunal rigorously examining sexual harassment policies and processes in a vicarious liability case.¹⁵⁶

3 Ensuring Third Parties Challenge Organisations on their Sexual Harassment Obligations

It is now time to return to Sturm's suggestion that compliance staff can, through their connection to professional communities, influence organisations to pursue regulatory objectives.¹⁵⁷ Compliance staff cannot just be assumed to have the means and incentives to do this – the regulatory framework must give them those means and incentives. Fortunately, there is a substantial literature on what makes for successful and unsuccessful internal compliance programs.

The following discussion draws on findings in a range of industries and regulatory regimes, including financial services, environmental regulation, occupational health and safety and pharmaceuticals, as well as discrimination. It might be objected that some of these findings are not applicable to sexual harassment. However, the common thread running through each example is that

154 Australia's National Research Organisation for Women's Safety, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey* (Report No 3, 2018) 5.

155 See generally *ibid* 27–8. Bagenstos also raises a problem with the likelihood that judges will enforce standards that 'draw on widely shared cultural understandings': Bagenstos (n 73) 43. This may be a problem for positive duties in equality law more general, but social attitudes to sexual discrimination are unlikely to provoke judicial resistance to the standards proposed here, given the apparent increasing social acceptance of the wrongfulness of discrimination and particularly harassment: see Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth)' (n 33) 115–6.

156 Parker and Wolff (n 131), 530–1, citing *Hopper v MIM* (1997) EOC 92, 92–879.

157 Sturm (n 85) 524.

there is always a tension between pursuing regulatory objectives and the managerial interest of profitability. Bagenstos's criticism assumes that the latter interest will always win out. These empirical findings demonstrate that this is not so.

(a) *Motives and Incentives*

First, how can the right motivations and incentives be created for compliance staff? The question can be analysed by reference to the three sets of motives for compliance identified in the literature: economic motives (the goal of ensuring one's business is profitable), social motives (the goal of earning the respect of significant individuals with whom a person interacts, including other professionals and, potentially, regulators), and normative motives (a sense of a duty to comply with the law).¹⁵⁸

Social motives to pursue regulatory objectives might be fostered by encouraging the development of professional networks. Research in Australian equal opportunity law shows that professional networking between equal opportunity compliance professionals is positively correlated with compliance with the law,¹⁵⁹ and as previously noted, Edelman has also argued that professional networks can perpetuate a particular understanding of the legal environment.¹⁶⁰ This research typically attributes the effectiveness of professional networks to the social pressure they exert on their members. Additionally, the threat of exclusion from such associations would be one deterrent for misconduct by compliance staff.¹⁶¹ Exclusion for misconduct might have implications for the employment prospects of compliance professionals, creating economic as well as social motives.

To ensure a range of interests are represented in these professional networks, they should include not just organisational compliance staff but also professionals working for unions, advocacy groups, the community legal sector and other organisations that might be expected to have interests contrary to the managerial interests of private sector firms and public organisations.¹⁶² The regulatory literature also suggests that regulators should be part of these communities so that they can communicate their understandings of regulatory goals to the regulated.¹⁶³

158 See Vibeke Lehmann Nielsen and Christine Parker, 'Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance' (2012) 34(4) *Law and Policy* 428, 431–3.

159 Valerie Braithwaite, *First Steps: Business Reactions to Implementing the Affirmative Action Act* (Report, September 1992).

160 Edelman, *Working Law* (n 120) 81–2.

161 As Braithwaite suggests: John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Routledge & Kegan Paul, 1984) 353.

162 See also Vosko, Grundy and Thomas (n 147) 392; Janice Fine and Jennifer Gordon, 'Strengthening Labour Standards Enforcement through Partnerships with Workers' Organizations' (2010) 38 *Politics and Society* 552, 561.

163 Julia Black, *Rules and Regulators* (Clarendon Press, 1997) 30–8; Errol Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9(4) *Law and Policy* 355, 365.

Of course, it is necessary to avoid the risk of regulatory capture through the regulated community exerting cultural and social influence on the regulator's behaviour.¹⁶⁴ But the risk of capture should not be overestimated or over-diagnosed, as Carpenter and Moss argue it currently is,¹⁶⁵ nor should it be fatalistically assumed that capture is inevitable whenever a regulator has close relationships with the regulated. Kwak suggests the following measures for addressing capture resulting from social interactions: (i) an extended period of time during which ex-regulators are prohibited from lobbying their former agencies; (ii) court action against non-complying organisations to reduce their prestige and temptation for ex-regulators to accept jobs with them, if necessary; and (iii) ensuring the regulator also interacts with interest groups opposed to managerial interests, such as (in the case of sexual harassment) unions or advocacy groups.¹⁶⁶ As has been suggested for banking and mining regulators, there should be an internal separation of powers within the regulator: the regulator's enforcement officers should be isolated from informal interactions with the regulated as far as possible, with participation in the professional community being left to regulatory officers responsible for continuing supervision of the regulated.¹⁶⁷

Lastly, as Braithwaite suggests, reliance on internal compliance systems requires the regulator to ensure that compliance staff are sufficiently independent of other parts of an organisation, to audit and carry out inspections to assess the compliance staff's performance, and to punish organisations for failings in internal compliance systems.¹⁶⁸ Particular regulatory scrutiny of compliance staff, with penalties for negligence, lack of independence or acting under the dictation of management, would provide an additional motivation for compliance staff to take regulatory objectives seriously.

Experience and the literature suggest that often, the problem is not ensuring compliance staff have the right motivations – they frequently do disagree with line managers and urge compliance at the expense of profitability.¹⁶⁹ The greater challenge is the second task – ensuring compliance staff have the means and

164 See, eg, James Kwak, 'Cultural Capture and the Financial Crisis' in Daniel Carpenter and David Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2014) 71–98.

165 Daniel Carpenter and David Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2014) 4–8.

166 Kwak (n 164) 95–6.

167 *Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry* (Final Report, February 2019) vol 1, 443–4; John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985) 155 ('*To Punish or Persuade*').

168 Braithwaite, *To Punish or Persuade* (n 167) 126.

169 Braithwaite finds that this is the case with compliance successes in the mining industry: *Ib id* 65. In correspondence between the Commonwealth Bank of Australia's compliance manager and CEO released by the Financial Services Royal Commission, it was revealed that the general attitude of compliance staff at the bank was that a scathing regulator report on compliance 'reflected what the team was feeling and saying for some time': Letter from Larissa Shafir to Matt Comyn, 11 May 2018 <<https://financialservices.royalcommission.gov.au/public-hearings/Documents/transcripts-2018/transcript-19-november-2018.docx>>. Braithwaite also notes examples where internal compliance staff in the pharmaceutical industry took a tougher stance on compliance than the public regulator: see, eg, Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (n 161) 134–40.

power to influence organisations to comply with the law. Braithwaite and Murphy emphasise the importance of ensuring compliance staff have ‘clout’ such that senior management frequently overrule line managers in favour of compliance concerns.¹⁷⁰ This, they say, is a benchmark for judging the effectiveness of internal compliance systems.¹⁷¹ If compliance staff lack the power or means to influence organisations to comply with their positive duties, then the structural approach proposed here will fail.

(b) *Capability*

What measures can be taken to give compliance staff the means to influence their organisations’ behaviour? An important object of such measures is to give senior executives an incentive to accept recommendations from compliance staff over line managers where there is a conflict between the two. This is effective because while line managers are heavily concerned with the productivity of their particular group, a senior executive may be less concerned with the performance of one small part of the organisation and more concerned with the risk of bad publicity if compliance failures (such as a culture of tolerating sexual harassment) become well-known.¹⁷² This is one example of the ability of organisational culture and incentive structures to affect the capability of compliance professionals to influence organisational behaviour.¹⁷³

As Braithwaite points out, it is a mistake to assume that ‘corporations are unitary entities where every activity is guided by the goal of profit maximisation’.¹⁷⁴ Rather, the employees of large organisations with multiple groups will pursue the interests of *that group* over the interests of the organisation as a whole: for example, compliance staff will pursue the compliance group’s interests.¹⁷⁵ Bagenstos’s conclusion that compliance staff will always pursue managerial interests reflects this mistake.

With all this in mind, examples of measures to empower compliance staff include: (i) requiring organisations to adopt a policy that compliance

170 John Braithwaite and Joseph E Murphy, ‘Clout and Internal Compliance Systems’ [1993] (Spring) *Corporate Conduct Quarterly* 52, 53.

171 *Ibid.*

172 *Ibid.* 52. Recall that bad publicity is a very significant motivator for Australian businesses: Nielsen and Parker, ‘To What Extent’ (n 144).

173 More generally, see Parker and Wolff (n 131) 523; Jennifer Howard-Grenville, Jennifer Nash and Cary Coglianese, ‘Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions’ (2008) 30(1) *Law and Policy* 73, 81–2; Michael Russo and Niran Harrison, ‘Organizational Design and Environmental Performance: Clues from the Electronics Industry’ (2005) 48 *Academy of Management Journal* 582.

174 Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (n 161) 352.

175 *Ibid.* 352–3, citing Simeon M Kreisberg, ‘Decision-Making Models and the Control of Corporate Crime’ (1976) 85 *Yale Law Journal* 1091. The Commonwealth Bank letter referred to above (n 169) also bears this out: it suggests an environment in which compliance staff were fighting to be heard over other groups within the bank, including senior executives, with conflicting interests. See also *Royal Commission into Misconduct in the Banking, Financial Services and Superannuation Industry* (Interim Report, September 2018) vol 1, 308–9, citing Australian Prudential Regulation Authority, *Prudential Inquiry into the Commonwealth Bank of Australia* (Final Report, April 2018) 4.

recommendations on sexual harassment practices can only be countermanded by the CEO or managing director;¹⁷⁶ (ii) ensuring the regulator and other interest groups (eg, unions) publicise the identities of CEOs of organisations that perform poorly from a compliance standpoint; (iii) allowing the regulator to reduce oversight and the compliance burden for organisations that perform well from a compliance standpoint, or otherwise reward those organisations, giving management an economic incentive to listen to compliance staff;¹⁷⁷ (iv) ensuring compliance executives hold senior, powerful roles in organisations;¹⁷⁸ and (v) implementing a formalised process for compliance staff to recommend changes to sexual harassment practices, with a legal requirement that if those changes are rejected by senior management, the organisation must inform the regulator.

As these measures relate centrally to internal corporate governance, a structural approach to sexual harassment regulation should therefore seek to ‘institutionalize, indeed constitutionalize, the compliance function through the role of general counsel, the Board Audit Committee, compliance committees, and other checks and balances’.¹⁷⁹ This could be done through legislation or regulatory guidelines requiring organisations to implement a compliance program with features that ensure compliance staff have influence.

Separately, it is crucial to ensure that compliance and other staff have the resources and understanding to improve compliance with positive duties. It was explained above that membership of professional communities can create social pressure for compliance staff to pursue the objectives of the regulatory regime. Membership of those communities can also, self-evidently, improve compliance staff’s understanding of how sexual harassment should be prevented through the sharing of knowledge and competence across organisations. So can dialogue between the regulator and the regulated community, with ‘regulatory conversations’ being an important part of developing the regulated community’s understanding of legal standards in the theory of reflexive regulation.¹⁸⁰

The issue of resourcing must be borne in mind when designing the regulatory regime. If the regulatory burden is such that small businesses face disproportionately high compliance costs, there can be distortionary effects on competitive markets.¹⁸¹ There are two ways by which the law can limit the regulatory burden to which smaller businesses with limited resources are subject. The first relates to what was discussed at the end of Part IV(C), which is ensuring that the positive duties imposed on organisations are an appropriate mix of general standards and specific rules. Ensuring that the regulatory regime does not consist substantially of overly technical and specific rules will improve certainty and consistency, as discussed in Part IV(C), but it will also make the regime simpler to understand.

176 Braithwaite and Murphy (n 170) 52.

177 Ibid 53.

178 Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (n 161) 354.

179 Christine Parker, ‘Reinventing Regulation within the Corporation’ (n 103) 559.

180 Julia Black, ‘Talking about Regulation’ [1998] *Spring Public Law* 77.

181 Victorian Competition and Efficiency Commission, *The Victorian Regulatory System* (Report, March 2006) 27.

An example that Braithwaite gave in the context of aged care regulation was the requirement to ensure that aged care services are provided in a 'homelike environment', a general and easily understandable standard.¹⁸² There were better compliance outcomes when this standard was applied than when more specific, technical rules relating to (for example) the number of pictures to be hung up in each room and other minutiae on a lengthy checklist.¹⁸³

The second way to limit the regulatory burden is to simply design regulation based on the principle that all regulation should be capable of being complied with by small businesses because regulation designed with small business in mind would be 'readily implemented by larger businesses'.¹⁸⁴ This can be done by ensuring there is thorough consultation with small businesses before implementing the regulatory regime. The Organisation for Economic Co-operation and Development has identified failures of consultation as a major factor in regulatory failures.¹⁸⁵

There are weaknesses to this regulatory approach. While it has been argued that compliance staff can be motivated and empowered to pursue goals without subservience to managerial interests or an organisation's bottom line, the reliance on compliance staff nonetheless means that the success of this regulatory approach will vary according to the behaviour of compliance staff. It will also mean that the regulatory approach will be less successful in smaller organisations with limited resources to devote to compliance – Barnes finds that such organisations tend to take minimalist approaches to compliance 'reflecting their understanding of the law's minimum requirements'.¹⁸⁶

Despite its limitations, the approach sketched here is nonetheless an improvement on the current system. It would be a mistake to criticise this approach as weakening sexual harassment regulation by placing reliance on organisations and their compliance staff for two reasons: first, individuals and regulators would still be able to go to court to enforce the law under this approach; and second, it is *already* the case that because 'the overwhelming majority of gendered grievances do not reach public fora, the internal management of these grievances largely determines the nature of the environment that employees work in, and to a large extent their *de facto* employment rights'.¹⁸⁷ The approach here is not to give organisations and compliance staff power over the environments that employees work in, and then to trust them to use it for good. They already have that power and there is no way to take it from them. The approach here is to incentivise organisations and

182 Braithwaite, 'Rules and Principles' (n 95) 61.

183 Ibid.

184 Victorian Competition and Efficiency Commission (n 181) 27.

185 Organisation for Economic Co-operation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (Report, 2000) 18–19.

186 Barnes and Burke, 'The Diffusion of Rights: From Law on the Books to Organizational Rights Practices' (n 132) 517.

187 Charlesworth (n 55) 359, citing Edelman et al, 'Internal Dispute Resolution' (n 112) 498.

compliance staff to use that power in a way that is beneficial to employees and serves the *SD Act's* object of eliminating sexual harassment.

VI CONCLUSION

The aim of this article was twofold: first, to explain how and why the current law of sexual harassment is inadequate; and second, to sketch an approach to sexual harassment regulation that overcomes those inadequacies as far as is possible. The first aim was pursued by explaining how the current law embodies a normative principle, corrective justice, which is not suited to the law's stated object of eliminating sexual harassment and which fails to recognise and prevent some of the important harms of sexual harassment. The second aim was pursued by proposing a structural approach to sexual harassment regulation, which, it is hoped, can induce organisations to prevent sexual harassment themselves.

The limitations of this article must be acknowledged. As should be clear from the language of Part IV and Part V, which spoke of influencing, incentivising and motivating organisations and compliance staff, a structural approach cannot guarantee the prevention of sexual harassment. The approach outlined here will only be successful if specific regulatory measures are taken, such as those listed in Part V, to create an environment in which organisations internalise and pursue the regulatory objective of eliminating sexual harassment.

Further, the structural approach proposed in this article has been sketched at a relatively high level of abstraction and in a way that is highly dependent on empirical propositions. The literature cited in Part V indicates that the approach of this article is supportable, but it is impossible to avoid the fact that there is very little empirical research on the *specific* regulatory context of sexual harassment law. Even the empirical research on positive duties in Northern Ireland equality legislation, cited at the start of Part V, reflects a quite different regulatory context because it is not specific to sexual harassment. It has thus been necessary to take insights from a range of comparable regulatory contexts and apply them to sexual harassment.

Aside from its critique of the existing law, the key contribution of this article is that it provides one example of how sexual harassment might be regulated in a way that better pursues the legislative object of eliminating sexual harassment. In response to Bagenstos's vigorous critique of structural approaches, the article has sought to explain how a structural approach can meet the problems posed by managerial interests and reliance on compliance staff. Because the approach of Part V identifies both broad regulatory goals (the three success conditions of a structural approach) and specific measures, it can be altered or refined in accordance with the findings of subsequent research about how those broad regulatory goals can be achieved.