

Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era

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Abstract

The 2014 judgment in *Richardson v Oracle Corporation Australia Pty Ltd* ('*Richardson*') had a seismic effect on workplace sexual harassment claims in Australia. Overnight, the 'general range' of damages awarded for non-economic loss in such cases increased from between \$12 000 and \$20 000 to \$100 000 and above. The judgment has made *Sex Discrimination Act 1984* (Cth) litigation considerably more attractive for plaintiffs and resulted in greater judicial recognition of the pain and suffering experienced by sexual harassment survivors. *Richardson*'s impact has also been felt beyond that immediate context, with the judgment cited in support of higher damages in discrimination cases and employment disputes. However, six years and over 40 judicial citations later, *Richardson*'s broader significance remains unclear—particularly following the emergence of the #MeToo movement. Drawing on a doctrinal analysis of subsequent case law and qualitative interviews with prominent Australian legal practitioners, this article evaluates *Richardson*'s legacy and considers how sexual harassment litigation may further evolve to reflect changing societal norms.

I Introduction

[T]he community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience—Justice Kenny, in *Richardson v Oracle Corporation Australia Pty Ltd* ('*Richardson*')¹

1. (2014) 223 FCR 334, 366 [117] ('*Richardson*').

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In July 2014, the Federal Court of Australia delivered judgment in *Richardson*.² At the time, it was suggested to be the most significant development in sexual harassment litigation since the *Sex Discrimination Act 1984* (Cth) ('SDA') first prohibited unwanted sexual conduct in the workplace.³ The Full Court, in a primary judgment written by Kenny J, with Besanko and Perram JJ concurring, held that the orthodox 'range' of general, non-economic damages in sexual harassment jurisprudence was no longer consistent with prevailing societal standards. Finding that the first-instance general damages award of \$18 000 was 'manifestly inadequate', on the basis that it was 'out of step with the general standards prevailing in the community', Kenny J awarded the appellant \$100 000.⁴

In subsequent years, *Richardson* has been cited frequently in other sexual harassment judgments. Its significance is not confined to harassment litigation: *Richardson* has been relied upon in numerous discrimination cases, as well as contractual, general protections, unfair dismissal and tort claims.⁵ Anecdotally, for employment lawyers, it seems in recent times that no letter of demand is complete without reference to the Full Federal Court's judgment. Given the case's importance, an analysis of *Richardson*'s jurisprudential resonance is overdue. Significant questions remain: Has Kenny J's proposition, that changing community standards demand increased general damages, been universally accepted? To what extent has *Richardson* been endorsed in other spheres, and in what contexts has it been distinguished? Beyond the case law, how has *Richardson* influenced the practicalities of sexual harassment litigation? Six years on, what is *Richardson*'s legacy?

Answering these questions has been made more urgent by the #MeToo movement, sparked in October 2017 by reporting from the *New York Times* and *New Yorker* on sexual harassment allegations against film producer Harvey Weinstein.⁶ #MeToo rapidly became a global phenomenon, with widespread media coverage of inappropriate behaviour across all sectors and jurisdictions. Australia was not immune. A 2018 survey from the Australian Human Rights Commission ('AHRC') suggested that, in the prior five years, one in three Australians had been sexually harassed at work.⁷ As the Commonwealth Sex Discrimination Commissioner Kate Jenkins has observed, #MeToo 'ignited a global discussion about sexual harassment and gender inequality. Victims who have for too long been silenced have found their individual and collective voice.'⁸

2. Ibid.

3. See, eg, Markus Mannheim, 'IT Executive Rebecca Richardson's Sexual Harassment Win to "Rock Employers"', *Canberra Times* (online, 16 July 2014) <<https://www.canberratimes.com.au/story/6138551/it-executive-rebecca-richardsons-sexual-harassment-win-to-rock-employers/>>; Therese MacDermott, 'Reassessing Sexual Harassment: It's Time' (2015) 40(3) *Alternative Law Journal* 157; Anna Casellas and Jessica Keogh, 'Landmark Sexual Harassment Judgment Opens the Gate for Significant Compensation Claims', *Clayton Utz* (Blog Post, 24 July 2014) <<https://www.claytonutz.com/knowledge/2014/july/landmark-sexual-harassment-judgment-opens-the-gate-for-significant-compensation-claims>>.

4. *Richardson* (n 1) 367 [118].

5. See below Part IV 'Jurisprudential Impact of *Richardson*'.

6. Jodi Kantor and Megan Twohey, 'Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades', *The New York Times* (online, 5 October 2017) <<https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>>; Ronan Farrow, 'From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories', *The New Yorker* (online, 10 October 2017) <<https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>>.

7. Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, August 2018) 8 ('*Everyone's Business*').

8. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, January 2020) 11 ('*National Inquiry*').

While Justice Kenny could hardly have predicted #MeToo when she drafted her landmark *Richardson* judgment, its impact must be assessed in the context of this new social milieu. What does #MeToo now mean for *Richardson* and its ongoing legacy? Is the judgment now out of date? Will post-*Richardson* litigation contribute to wider societal change?

This research is therefore timely. In the three years since #MeToo began, sexual harassment has remained a prominent issue domestically and internationally. In March 2020, the AHRC published its landmark National Inquiry, *Respect@Work* ('*National Inquiry*').⁹ The report highlighted pervasive sexual harassment in Australian workplaces and proposed a range of reforms to the current legal system. Among its recommendations, the AHRC proposed 'that further research be conducted on the award of damages in sexual harassment matters', given the 'complexity and importance of this area'.¹⁰ It is hoped that this research might assist in addressing that knowledge gap.

Part II of this article commences by outlining and contextualising the development of sexual harassment law in Australia. With that background in place, Part III will consider *Richardson*, describing the litigious history and assessing key aspects of Kenny J's judgment. Part IV then provides a doctrinal analysis of jurisprudence that cites *Richardson*, to evaluate the decision's influence in sexual harassment litigation and beyond. While that section will necessarily focus on several significant, indicative cases, as part of this research the authors have reviewed all cases between October 2014 and July 2020 that reference *Richardson*. Insight from this exhaustive study is provided alongside case-specific analyses. A full list of cases is provided in Part IV.

With the aid of qualitative research, Part V then considers *Richardson*'s wider legacy for sexual harassment litigation in the #MeToo era. The authors interviewed eight prominent Australian employment and discrimination legal practitioners. A purposive sampling approach was adopted to incorporate a diverse range of practitioners' perspectives.¹¹ This qualitative research was considered necessary given the high rate of settlement in such matters and to understand the practical impact of *Richardson*. The article concludes with several observations about potential future developments.

II Sexual Harassment Law in Australia Before *Richardson*

Interrogating the history of sexual harassment litigation in Australia is essential to understanding the development of judicial and societal attitudes and approaches in this area. While this article focuses on sexual harassment litigation in federal law, there are also avenues for redress available at the state and territory level.¹² While sexual harassment can, in certain circumstances, give rise to criminal liability, this article focuses on civil liability and remedies which exist at the federal level.¹³ This section first considers the legislative history of the *SDA*, before analysing some of the

9. Ibid.

10. Ibid 29.

11. The interview methodology is explained further below: see below pp 23–4.

12. These include the *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA). For a discussion regarding the prevention of workplace sexual harassment by state and territory-based work health and safety laws, see Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Law' (2019) 32(2) *Australian Journal of Labour Law* 219.

13. Note, some acts which constitute sexual harassment may attract criminal liability. For instance, in Victoria, pt 8A of the *Crimes Act 1958* (Vic) prohibits rape, sexual assault, threats to commit a sexual offence and other acts of a sexual

key early sexual harassment cases prior to *Richardson*. It concludes by considering issues emerging from the case law, to contextualise the judicial climate prior to Kenny J's seminal judgment.

A History of Sexual Harassment in Australia

Writing in the 1970s, Catharine MacKinnon was one of the first American feminist legal scholars to use the term 'sexual harassment'.¹⁴ Not only did MacKinnon name and expose the practice as 'pervasive' in the workforce, but importantly she also identified it as a form of sex discrimination.¹⁵ Until that point, sexual harassment against women had been an 'unspeakable' experience for which 'there has been no name'.¹⁶ This coincided with a growing international movement to acknowledge women's human rights. The period from 1976 to 1985 was proclaimed as the 'Decade for Women', with the United Nations calling upon governments to ensure equal participation of women in all aspects of political, economic, social and cultural life.¹⁷ Significantly, in 1979 the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW') opened for signature.¹⁸ CEDAW acknowledged that discrimination against women 'violates the principles of equality of rights and respect for human dignity'.¹⁹ All signatories were

nature which are designed to elicit fear or distress in another person. Stalking is also prohibited by s 21A. It is worthwhile noting that 'lesser' forms of sexual harassment, which do not elicit fear of violence, are often not prohibited by criminal law. As such, more subtle but insidious forms of sexual harassment, such as persistent unwanted attention or communication, may still cause significant harm and distress without attracting criminal liability: 'Criminal Offences for Harassment', *Australian Law Reform Commission* (Web Page, 15 July 2014) <<https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/15-harassment/criminal-offences-for-harassment/>> [15.35]. A sexual harassment claim may also be made under pt 3-1 of the *Fair Work Act 2009* (Cth) ('FWA'). However, Chapman notes that 'although it appears that the behaviour of sexual harassment and other forms of harassment comes within the concepts articulated as types of "adverse action" in s 342(1) [of the FWA], there may be difficulties in establishing that causal connection of "because" and moreover there appear to be insurmountable barriers to holding the employer liable for that behaviour where, as is usual, the harasser is a co-worker of the claimant' in Anna Chapman, 'Part 3-1 Adverse Action and Equality' (2020) 33(1) *Australian Journal of Labour Law* 107, 120. The introduction of sexual harassment provisions in pt 3-1 has been proposed: Victoria Legal Aid, Submission No 283 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (28 February 2019) 36; Australian Discrimination Law Experts Group, Submission No 423 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (4 March 2019) 44.

14. Other feminist academics credited with the emergence of the term sexual harassment include Lin Farley, Mary Rowe, Susan Meyer and Karen Sauvigne: see, eg, Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (McGraw-Hill, 1978); Mary Rowe, 'The Progress of Women in Education Institutions: The Saturn Rings Phenomenon' (1974) *Graduate and Professional Education of Women, American Association of University Women* 1; Enid Nemy, 'Women Begin to Speak Out Against Sexual Harassment at Work', *The New York Times* (online, 19 August 1975) <<https://www.nytimes.com/1975/08/19/archives/women-begin-to-speak-out-against-sexual-harassment-at-work.html?>>; Ann Crittenden, 'Women Tell of Sexual Harassment at Work', *The New York Times* (online, 25 October 1977) <<https://www.nytimes.com/1977/10/25/archives/women-tell-of-sexual-harassment-at-work.html?>>.
15. Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press, 1979) 3–4.
16. *Ibid* 27.
17. *United Nations Decade for Women*, GA Res 31/136, UN Doc A/Res/31/136 (adopted 16 December 1976) 112 [3].
18. *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').
19. *Ibid* preamble.

urged to pursue appropriate measures to eliminate discrimination against women, including in the workplace.²⁰

Australia ratified the International Labour Organization's *Discrimination (Employment and Occupation) Convention* in 1973 and *CEDAW* in 1983.²¹ Against this international backdrop, sex discrimination legislation was introduced in a number of states in the 1970s, laying the groundwork for national legislation.²² Although state legislation did not include sexual harassment as a separate ground of discrimination,²³ sexual harassment complaints were being received by state discrimination commissioners. The Victorian Equal Opportunity Commissioner had dealt with 82 complaints of sexual harassment by 1982, while in New South Wales, the Anti-Discrimination Board received 20 complaints of sexual harassment in the 12 months prior to 1980.²⁴

An Australian Tribunal first acknowledged that sexual harassment could constitute sex discrimination in 1984. In *O'Callaghan v Loder*, a junior lift attendant complained to the NSW Anti-Discrimination Board about unwelcome sexual conduct by the Commissioner for Main Roads.²⁵ The conduct included kissing, attempting to touch her breasts and forcing her to hold his penis while he masturbated.²⁶ In what was described as a 'trailblazing decision',²⁷ the Equal Opportunity Tribunal held that sexual harassment constituted 'unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her'.²⁸ The Tribunal found that O'Callaghan had been subject to unsolicited, unexpected and unwelcome sexual conduct and that such conduct amounted to her being 'treated less favourably than comparable males on the ground of her sex'.²⁹ However, the Tribunal held that in order for the conduct to constitute discrimination there must be an 'additional blameworthy feature'.³⁰ Thus, the complainant bore the onus of showing that either the employer had used their position of power to obtain sexual favours or that the complainant had made it clear the sexual conduct was unwelcome.³¹ Despite O'Callaghan's evident 'distress', the Tribunal considered that O'Callaghan had not made clear that the conduct was unwelcome.³² Consequently, her complaint failed.³³

20. Ibid preamble, arts 2, 11.

21. *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force in Australia 15 June 1973); *ibid* (entered into force in Australia 17 August 1983).

22. *Sex Discrimination Act 1975* (SA); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1977* (Vic).

23. Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31(1) *Federal Law Review* 195, 199.

24. Ibid 200.

25. *O'Callaghan v Loder* [1983] 3 NSWLR 89.

26. *O'Callaghan v Loder* (1983) 6 IR 1, 2.

27. Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422, 429.

28. *O'Callaghan v Loder* (n 25) 92.

29. Ibid 96.

30. *O'Callaghan v Loder* (n 26) 29.

31. Ibid.

32. Ibid 28.

33. Ibid.

B Is Sexual Harassment Sex Discrimination?

The timing of *O'Callaghan v Loder* was fortuitous, as it was determined simultaneously with the drafting of the *SDA*. The decision, along with lobbying from women's rights groups, led to sexual harassment being expressly proscribed as a ground of discrimination in the *SDA*.³⁴ Sex discrimination implies different treatment on account of one's sex. The language of s 28 of the *SDA* is gender-neutral, as both men and women experience sexual harassment. However, sexual harassment is empirically a gendered issue; women experience sexual harassment at far higher rates than men and the perpetrators of sexual harassment are overwhelmingly male.³⁵ MacKinnon argued that sexual harassment 'reinforce[s] the social inequality of women to men' and thus constitutes sex discrimination.³⁶ On this view, women experience sexual harassment *because* they are women; the implication being that a man in the same position would not experience the same conduct.³⁷ This reasoning was reflected in the 1988 decision of *Aldridge v Booth*.³⁸ Spender J held that when a woman experiences sexual harassment 'she is subjected to that conduct because she is a woman, and a male employee would not be so harassed the discrimination is on the basis of sex'.³⁹ That men can experience sexual harassment, either from other men or from women, does not change the discriminatory nature of sexual harassment.⁴⁰ The discrimination arises whereby a similarly situated person of the opposite sex would not be treated the same way.⁴¹

C Requirement of 'Disadvantage'

The introduction of s 28 stirred a hyperbolic, yet all too familiar, fear that the *SDA* would create a vehicle for women to blackmail innocent male colleagues. Senator Noel Crichton-Browne decried that the provision provided for 'a great deal of harassment by employees of employers', permitting a 'mischievous or vindictive employee . . . to cause trouble and anguish to an employer'.⁴² However, in the first statutory definition of sexual harassment, legislators emphasised the need for 'disadvantage' in order for conduct to constitute discrimination. Specifically, the Second Reading Speech clarified that the *SDA* only applied to sexual harassment that could be 'characterised as discriminatory in nature' where it led to disadvantage in relation to one's employment or education.⁴³ Sexual harassment was only understood as discriminatory where it resulted in tangible consequences, such as loss of employment, rather than being understood as being in and of itself discriminatory.⁴⁴

34. Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 59; *Sex Discrimination Act 1984* (Cth) s 28 ('*SDA*').

35. The Australian Human Rights Commission found that 85 per cent of women and 56 per cent of men have experienced sexual harassment in their lifetime. Seventy-nine per cent of perpetrators of sexual harassment are men: *Everyone's Business* (n 7) 7–8.

36. MacKinnon (n 15) 174.

37. *Ibid* 192.

38. *Aldridge v Booth* (1988) 80 ALR 1.

39. *Ibid* 16–7.

40. *Ibid* 17.

41. *Ibid*.

42. Commonwealth, *Parliamentary Debates*, Senate, 9 December 1982, 3629 (Noel Crichton-Browne).

43. Commonwealth, *Parliamentary Debates*, Senate, 2 June 1983, 1187 (Susan Ryan).

44. *SDA* (n 34) s 28(3) (amended).

The requirement for disadvantage was criticised and precipitated judicial disagreement over the *SDA*'s implementation. One of the first cases commenced under the new section was *Hall v Sheiban*.⁴⁵ At first instance, Einfeld J considered that the refusal to answer inappropriate sexual questions in a job interview could not be classified as sexual harassment—there was no 'disadvantage' as the women had been subsequently employed.⁴⁶ Furthermore, Einfeld J considered that none of the women suffered 'disadvantage' as they had not been sacked or forced to leave as a result of refusing the respondent's sexual advances.⁴⁷ Rather, as women, they should have known 'very well the various ways in which some men occasionally behave'.⁴⁸ As such, Einfeld J held that they 'tolerated [the respondent's] activities as an actual or perceived necessary condition of retaining their employment' and voluntarily chose to leave.⁴⁹ Thus, despite finding that the employer had sexually harassed the two employees, Einfeld J declined to award damages.

The Full Court of the Federal Court overturned Einfeld J's decision on appeal. As Lockhart J emphasised, while a woman may tolerate or negotiate unwanted sexual advances, this does not mean they will not also experience actual detriment or have a reasonable apprehension of detriment.⁵⁰ The Court found that where sex discrimination is proved, and loss or damage is demonstrated, appropriate damages must be awarded to compensate for that loss or damage.⁵¹ The Court ordered that the respondents pay each of the applicants' damages.⁵²

In 1992, the House of Representatives Standing Committee on Legal and Constitutional Affairs conducted a review of the *SDA*.⁵³ They recommended removing the requirement for disadvantage, emphasising that it is 'widely understood' that sexual harassment is in and of itself a 'serious offence'.⁵⁴ The definition of sexual harassment was subsequently amended to remove the requirement for disadvantage.⁵⁵ In 2011, the definition was further amended to add additional circumstances to be considered in determining whether sexual harassment had occurred.⁵⁶

D Damages for Sexual Harassment

Under the current framework, a complainant must lodge a sexual harassment complaint with the AHRC.⁵⁷ The AHRC will attempt to investigate and resolve the complaint through conciliation.⁵⁸ If unsuccessful, a complainant can commence proceedings in the Federal Court or Federal Circuit

45. *Hall v Sheiban* [1988] HREOCA 5.

46. *Ibid.*

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*

50. *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 242 (Lockhart J).

51. *Ibid* 261 (Wilcox J).

52. *Ibid* 263.

53. House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Report, April 1992).

54. *Ibid* 262 [10.3.11].

55. *SDA* (n 34) s 28A.

56. *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) s 54, inserting *SDA* (n 34) s 28(1A).

57. *Australian Human Rights Commission Act 1986* (Cth) s 46P ('*AHRC*').

58. *Ibid* s 11(1)(aa).

Court.⁵⁹ Under the *SDA*, an employer may be held vicariously liable for workplace sexual harassment committed by an employee or agent, unless they took ‘all reasonable steps’ to prevent the conduct.⁶⁰

A number of remedies are available to courts under the *Australian Human Rights Commission Act 1986* (Cth) (*AHRCA*),⁶¹ however the award of compensation is the most commonly utilised.⁶² Damages in discrimination cases are generally assessed in line with principles of tort.⁶³ Individuals can seek compensation by way of general (non-economic) damages, damages for economic loss or aggravated damages.⁶⁴ General damages are intended to compensate for hurt, humiliation and distress suffered by targets of discrimination.⁶⁵ In *Hall v Sheiban*, the Federal Court considered the difficulty of assessing damages for hurt and humiliation, concluding that damages should be ‘restrained’ without being ‘minimal’, to avoid diminishing the public policy objectives of anti-discrimination legislation.⁶⁶ The Court held the assessment of damages should be approached by comparing the position the complainant could be expected to have been in but for the discriminatory conduct, with the position in which they were placed as a result of the discriminatory conduct.⁶⁷

In order to strike the balance between ‘restrained but not minimal’ damages,⁶⁸ courts began conducting comparative analyses of circumstances and harm suffered, in order to establish an approximate range of damages. In *Shiels v James*, Raphael FM analysed previous sexual harassment cases and considered that the accepted ‘range’ for damages for hurt and humiliation was between \$7500 and \$20 000.⁶⁹ Raphael FM emphasised that the ‘higher’ range of damages was only ordered where sexual harassment complained of included physical conduct.⁷⁰ This approach has become commonplace. For example, in *Johanson v Michael Blackledge Meats*, Driver FM compared a series of sexual harassment events that resulted in a complainant resigning, as opposed to a single event that did not result in loss of employment, and held that an award of damages in the latter should be at the ‘lower end of the scale’.⁷¹

Pre-*Richardson*, significant awards of general damages were ordered in a limited number of cases involving serious physical conduct and significant resulting harm. In *Lee v Smith* (*Lee*), the complainant was awarded \$100 000 in general damages for serious physical sexual harassment,

59. Ibid 46PO.

60. *SDA* (n 34) s 106.

61. Other remedies include a declaration of unlawful discrimination, an order requiring a respondent to perform any reasonable act to redress the loss occasioned by the discrimination and an order requiring re-employment or a variation of a contract: *AHRCA* (n 57) s 46PO.

62. Beth Gaze, ‘Damages for Discrimination: Compensating Denial of a Human Right’ (2013) 116 *Precedent* 20, 21 (‘Damages for Discrimination’); Margaret Thornton, ‘The Political Contingency of Sex Discrimination Legislation: The Case of Australia’ (2015) 4 *Laws* 314, 323 (‘The Political Contingency of Sex Discrimination’).

63. *Hall v A & A Sheiban Pty Ltd* (n 50) 239 (Lockhart J).

64. Elizabeth Raper, ‘Show Me the Money: Damages Awarded in Sexual Harassment Matters’ (2010) 1(3) *Workplace Review* 100, 100.

65. Ibid 101.

66. *Hall v A & A Sheiban Pty Ltd* (n 50) 238.

67. Ibid 239.

68. Ibid 238.

69. *Shiels v James & Lipman Pty Ltd* [2000] FMCA 2, 24 [79].

70. Ibid.

71. *Johanson v Michael Blackledge Meats* (2001) 163 FLR 58, 84–5 [118].

including rape.⁷² In *Poniatowska v Hickinbotham* ('*Poniatowska*'), the complainant had developed significant psychiatric symptoms, including severe depression and anxiety, as a result of the sexual harassment experienced.⁷³ Justice Mansfield awarded \$90 000 in general damages to reflect the considerable pain and suffering experienced by the complainant, including making allowance for 'future disadvantage'.⁷⁴

Otherwise, awards of general damages have tended to sit at the lower end of the 'range'. An analysis by Beth Gaze revealed that of 20 sexual harassment judgments in the Federal Magistrates Court between 2000 and 2009, only 4 resulted in awards of damages over \$25 000.⁷⁵ While there is no statutory requirement for damages in discrimination cases to be measured against each other, the tendency by courts and tribunals to calculate damages by reference to past cases created a 'time capsule', whereby the quantum of damages became trapped within stagnating precedent.⁷⁶

E The Role of Settlements in Sexual Harassment Litigation

The private nature of conciliation and settlement in discrimination law also distorts the quantum of damages typically awarded. Conciliation is central to state, territory and federal anti-discrimination frameworks.⁷⁷ It occurs behind closed doors, with the majority of settlements covered by confidentiality agreements.⁷⁸ There are potentially much higher damages available in private settlement, as demonstrated by the highly publicised Christina Rich and Kristy Fraser-Kirk sexual harassment matters, which both settled out of court for reportedly large sums.⁷⁹

However, as Margaret Thornton emphasises, conciliation does not overcome the power imbalance between complainants and respondents.⁸⁰ Where conciliation fails, or does not reach a satisfactory result for a complainant, the onus is on the individual to enforce discrimination law and to bear the (potentially considerable) cost of pursuing a complaint. In state and territory tribunals, the norm is that each party is responsible for their own costs, making it difficult for an individual claimant who receives a small award of damages to derive any financial benefit, taking into account legal fees.⁸¹ There is a further risk that an unsuccessful complainant will have

72. *Lee v Smith* [2007] FMCA 59, 161 [215] ('*Lee*').

73. *Poniatowska v Hickinbotham* [2009] FCA 680, 106 [353] ('*Poniatowska*').

74. *Ibid.*

75. Beth Gaze, 'The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 107, 112 ('The *Sex Discrimination Act* at 25').

76. Carol Andrades, 'The Struggle to Restore Dignity—Part 1: Remedies in Anti-Discrimination Law' (2012) 18(6) *Employment Law Bulletin* 85.

77. Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 389.

78. Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83, 84 ('Remedying Discrimination').

79. Christina Rich, a former partner at PricewaterhouseCoopers, settled a \$11 million claim in 2008 after a three-year legal battle: "'Kisses Were Platonic': \$11m Harassment Claim Settled', *ABC* (online, 28 March 2008) <<https://www.abc.net.au/news/2008-03-28/kisses-were-platonic-11m-harassment-claim-settled/2385584>>; Kristy Fraser Kirk settled her \$37 million sexual harassment claim against former David Jones CEO Mark McInnes for \$850 000: Fenella Souter, 'The Damage Done', *The Sydney Morning Herald* (online, 28 August 2014) <<https://www.smh.com.au/lifestyle/the-damage-done-20140917-109cjm.html>>.

80. Thornton, 'The Political Contingency of Sex Discrimination' (n 62) 319.

81. *Ibid.*

costs awarded against them, particularly at the federal level.⁸² Consequently, the low quantum of damages available, financial risk and significant anxiety and stress involved act as a significant disincentive for pursuing a claim.⁸³

By placing the responsibility of enforcing anti-discrimination law largely on the individual, the current system fails to adequately address the systemic causes of discrimination.⁸⁴ Sexual harassment is fundamentally a social wrong, which requires collective, rather than individual, actions.⁸⁵ The introduction of the *SDA* and acknowledgement of sexual harassment as an actionable wrong represented a significant step forward. However, the prevailing emphasis on individual litigation and conservative awards of general damages contributed to not only low awards of compensation for the hurt and suffering occasioned by sexual harassment but also very little systemic change. The extent to which Kenny J's judgment in *Richardson* may have shifted judicial attitudes in sexual harassment litigation, in a way which potentially remedies this inequality, is considered next.

III *Richardson*

A Federal Court at First Instance

Rebecca Richardson and Randol Tucker were both employees of Oracle. In 2008, while collaborating on a project, Tucker subjected Richardson 'to a humiliating series of slurs, alternating with sexual advances . . . which built into a more or less constant barrage of sexual harassment'.⁸⁶ This 'barrage' consisted of 11 separate incidents of sexual harassment,⁸⁷ which included, for instance, Tucker saying to Richardson, 'I love your legs in that skirt. I am going to be thinking about them wrapped around me all day long'.⁸⁸

Richardson lodged a sexual harassment claim, pursuant to ss 28A and 28B(2) of the *SDA*. At first instance, Buchanan J held that Tucker's conduct constituted a 'systematic form of humiliation and sexually charged aggression'.⁸⁹ His Honour found that Richardson had suffered significant physical and psychological harm, which caused changes in her demeanour and physical condition, difficulty managing her diabetes and heightened feelings of stress and anxiety.⁹⁰ As Oracle had failed to take all reasonable steps to prevent Tucker's conduct, it was held vicariously liable.⁹¹

His Honour assessed damages with reference to the 'range' of general damages in sexual harassment cases.⁹² Distinguishing *Poniatowska* and *Lee*, Buchanan J considered that even if 'cruel and calculated', Tucker's sexual harassment of Richardson lacked the physical element and features of aggravation required for the higher range of damages to apply.⁹³ Furthermore, 'the

82. Ibid.

83. Gaze, 'Damages for Discrimination' (n 62) 22.

84. Allen and Blackham (n 77) 413–14.

85. MacKinnon (n 15) 172.

86. *Richardson v Oracle Corporation Australia Pty Ltd* (2013) IR 31, 35 [13] ('*Richardson v Oracle*').

87. Ibid 36 [15].

88. Ibid 38 [22]–[23].

89. Ibid 87 [211].

90. Ibid 87 [209].

91. Ibid 33 [1], 76 [164].

92. Ibid 94–5 [242]–[243].

93. Ibid 87 [211], 95 [243].

psychological damage to Richardson, while not insignificant, was not debilitating in that it did not prevent her from working or pursuing her career.⁹⁴ Richardson was awarded \$18 000 in general damages.⁹⁵

B Full Court of the Federal Court Decision

Richardson appealed. This was remarkable—it is rare for a successful plaintiff in sexual harassment litigation to challenge the quantum of compensation. However, Buchanan J had ordered Richardson to pay Oracle’s legal costs on an indemnity basis from mid-litigation onwards.⁹⁶ The order was made because Oracle had made an offer of settlement, rejected by Richardson, that was higher than the amount ultimately awarded.⁹⁷ Thus, despite successfully proving sexual harassment, the huge disparity between the costs order and the modest award of damages meant that Richardson had little choice but to appeal.

As Buchanan J emphasised:

[T]he final outcome of these proceedings, in financial terms at least, will probably be devastating for Ms Richardson both financially and personally. Although the findings made in the earlier judgment provide public vindication of her position, she will remain solely responsible for the payment of the bulk of her own legal costs and obliged to pay a high proportion of the legal costs of the respondents. That will be a very high price to pay for her victory.⁹⁸

On appeal, Richardson argued that the award of damages was ‘manifestly inadequate’, as it failed to adequately compensate her for the loss and damage she suffered because of Tucker’s sexual harassment, regardless of whether such damages fell within an appropriate range.⁹⁹ Justice Kenny, in the leading judgment, concluded that the damages awarded at first instance were ‘manifestly inadequate’.¹⁰⁰ Her Honour substituted the initial general damages award of \$18 000 for \$100 000. Her Honour clarified that there are three central and interconnected features which guide the Court’s approach to assessing general damages. First, the range of damages as provided by analogous cases is not the key factor in determining an appropriate quantum of damages. Second, analogous areas of law can assist in determining ‘reasonable’ compensation. Third, ‘prevailing community standards’ are reflected in the ‘price’ placed on the loss of enjoyment of life and pain and suffering by courts. These considerations are explored below.

C Critique of the Range of Damages in Sexual Harassment Cases

Justice Kenny rejected the reliance on a ‘range’ of general damages in sexual harassment cases, observing that ‘it can be dangerous to rely too heavily on such a range in assessing the quantum of

94. Ibid 95 [244].

95. Ibid 95 [246], [243].

96. *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* (2013) 232 IR 99, 107–8 [39]–[41] (*‘Richardson (No 2)’*).

97. Ibid 107 [39].

98. Ibid 110 [51].

99. *Richardson* (n 1) 355 [81].

100. As required by *House v The King* (1936) 55 CLR 499 and *Rogers v Nationwide News* (2003) 216 CLR 327.

damages'.¹⁰¹ Considering *Poniatowska* and *Lee*, Kenny J rejected the assumption that higher awards of damages require 'more severe' injuries.¹⁰² Rather, the 'real issue' involves considering whether the quantum of general damages constitutes 'reasonable compensation for the loss and damage suffered' as a result of sexual harassment.¹⁰³ By tacitly limiting the range of damages available to Richardson, the Federal Court at first instance failed to do this.

In critiquing the 'range', Kenny J undertook a comparative analysis of general damages awards in non-sexual harassment cases. Arguing that the object of general damages awards in personal injury contexts and anti-discrimination contexts is similar, Kenny J observed that there is no discernible difference 'between the compensable value of the pain and suffering and loss of enjoyment of life suffered by a victim of sexual harassment . . . and of a victim of (workplace) bullying and harassment lacking a sexual element'.¹⁰⁴ However, in non-sexual harassment cases involving analogous psychological injuries and distress, Kenny J highlighted that damages of up to \$300 000 had been awarded.¹⁰⁵ The reliance by courts on a 'range' had meant that injury of a similar, or even higher, severity experienced by victims of sexual harassment had been historically devalued in monetary terms. As Kenny J concluded, 'this Court has in the past apparently placed a greater value on the loss of enjoyment of life outside the anti-discrimination legislation field than in it'.¹⁰⁶ While Buchanan J had correctly identified the accepted 'range' of general damages,¹⁰⁷ the range was now substantially out of step with other fields of law.¹⁰⁸

D 'Prevailing Community Standards'

Justice Kenny held the 'range' was also out of step with 'prevailing community standards'. As her Honour observed, the range of general damages in sex discrimination 'has scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters'.¹⁰⁹ Her Honour stated that the quantum of damages awarded in sexual harassment cases failed to reflect the community's 'deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct'.¹¹⁰ This notion has become increasingly

101. *Richardson* (n 1) 358 [90]. Cases cited include *O'Brien v Dunsdon* (1965) 39 ALJR 78; *Clarke v Catholic Education Office* (2003) 202 ALR 340.

102. *Ibid* 355 [79].

103. *Ibid* 355 [81], 359 [93], [95], citing *Hall v A & A Sheiban Pty Ltd* (n 50) 256 (Wilcox J), 281 (French J).

104. *Ibid* 363 [108].

105. *Ibid* 360–3 [96]–[108]. Cases cited include *Swan v Monash Law Book Co-operative* (2013) 235 IR 63, victim of workplace bullying and harassment awarded \$300 000; *Willett v Victoria* (2013) 42 VR 571, victim of workplace harassment and bullying awarded \$250 000; *Tan v Xenos (No 3)* [2008] VCAT 584, sexual harassment claimant awarded \$100 000; *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784, victim of workplace bullying and harassment awarded \$80 000; *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687, \$100 000 awarded for breach of contract.

106. *Ibid* 362 [104].

107. *Ibid* 358 [89].

108. *Ibid* 366 [117].

109. *Ibid*.

110. *Ibid*.

prominent in recent case law.¹¹¹ For example, Kenny J cited *Amaca v King* to demonstrate that, since 2011, courts have been aware that ‘modern society may place a higher value on the loss of enjoyment of life and the compensation of pain and suffering than was the case in the past’.¹¹²

The courts’ recognition of prevailing community standards improves the adequacy of compensation awarded in sexual harassment matters. After analysing damages awarded in other areas of law, her Honour concluded that the disparity ‘bespeaks the fact that today an award for sexual harassment... may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards.’¹¹³ Justice Kenny provided two qualifications to the courts’ reference to standards prevailing in the community. First, Kenny J explained that damages as awarded in analogous areas of law,¹¹⁴ such as personal injury, are relevant as they indicate ‘what contemporary courts have discerned as proper compensation for such [injuries] according to prevailing community standards.’¹¹⁵ Second, Kenny J acknowledged that, in assessing damages, courts do not act in a ‘conceptual vacuum’ but instead must be guided by the statutory purpose in determining ‘the requirements of justice and equity’.¹¹⁶

Richardson was determined prior to #MeToo, the global movement that has further shifted the community’s understanding of the harm occasioned by sexual harassment. The notion of ‘prevailing community standards’ presents a timely platform for the revaluation of the approach to the assessment of general damages in sexual harassment matters. The extent of this impact in the judicial sphere is explored next.

IV Jurisprudential Impact of *Richardson*

Richardson has been cited extensively since the decision was handed down. This section will explore the extent to which Kenny J’s notion of ‘prevailing community standards’ has been endorsed in sexual harassment matters and beyond and analyse incidences where it was distinguished or not applied. It will further interrogate whether the decision has resulted in an uplift of general damages awarded in sexual harassment and other discrimination contexts.

A Methodology

The authors reviewed all cases between October 2014 and July 2020 which substantively reference *Richardson*, using the Australasian Legal Information Institute (*AustLII*), *Westlaw* and *JADE* databases. A full list of cases is provided in the table of cases below.

AustLII, *Westlaw* and *JADE* are imperfect data sources; they are not exhaustive collections of all Australian court and tribunal decisions. However, this does not undermine the analysis’ utility. The information contained in the table provides a useful overview of *Richardson*’s juridical treatment and is a necessary foundation for a discussion of the decision’s efficacy. The doctrinal analysis provides an

111. *Richardson* (n 1) 358 [90]. Kenny J relied on *O’Brien v Dunsdon* (n 101), in which Barwick CJ, Kitto and Taylor JJ stated, at 78, that ‘the assessment [of damages] should be made having regard, as far as possible, to the general standards prevailing in the community’.

112. *Ibid* 360 [97]–[98], citing *Amaca Pty Ltd v King* (2011) 35 VR 280, 321 [177].

113. *Ibid* 363 [109].

114. *Ibid* 360 [96].

115. *Ibid* 359 [95].

116. *Ibid* 342 [26], citing *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 119 [26] (Gleeson CJ).

assessment of Kenny J's judicial determination regarding the value to be placed on the pain, suffering, hurt and humiliation occasioned by sexual harassment, and unlawful conduct more broadly.

The jurisprudential treatment of *Richardson* reveals three key themes. First, Kenny J's reasoning has received favourable treatment in sexual harassment matters and resulted in an increase in the quantum of damages awarded. Second, *Richardson* has been favourably applied in other areas of law, including anti-discrimination contexts more generally, as well as in adverse action and breach of contract claims. However, third, *Richardson* has not received unconditionally favourable treatment, and the decision has not resulted in a wholesale raise in awards of general damages by the courts. While the authors considered all cases to cite *Richardson*, this section analyses the five most significant judicial decisions to consider and apply *Richardson*.

B Table of Cases Which Consider Richardson

Case	Date	Jurisdiction	Area of law	General damages	Application of <i>Richardson</i>
1 <i>Slattery v Manningham City Council</i> [2014] VCAT 1442	23 October 2014	VCAT	Discrimination (disability)	\$14 000	Applied
2 <i>Martin v Padua College</i> [2014] VCAT 1652 affirmed in <i>Pearson v Martin</i> [2015] VSC 696	24 November 2014	VCAT (affirmed in VSC)	Discrimination (lawful sexual activity)	\$10 000	Applied
3 <i>Trad v Jones (No 7)</i> [2014] NSWCATAD 225	19 December 2014	NSWCAT (A&EO Div)	Discrimination (race)	\$10 000	Applied
4 <i>Jemal v ISS Facility Services Pty Ltd</i> [2015] VCAT 103	19 January 2015	VCAT	Discrimination (race)	\$3000	Applied
5 <i>Power v Bouvy</i> [2015] TASADT 2	11 February 2015	TASADT	Discrimination (sexual orientation)	\$25 000	Applied
6 <i>Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd (No 2)</i> [2015] VCAT 693	28 May 2015	VCAT	Discrimination (pregnancy)	\$10 000	Cited
7 <i>Pop v Taylor</i> [2015] FCCA 1720	26 June 2015	FCCA	Discrimination (disability)	\$5000	Applied
8 <i>Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)</i> [2015] FCCA 1827	3 July 2015	FCCA	Discrimination (disability), breach of contract	\$75 000	Cited
9 <i>Fair Work Ombudsman v Maritime Union of Australia (No 2)</i> [2015] FCA 814	11 August 2015	FCA	Adverse action	\$40 000	Applied
10 <i>Dziurbas v Mondelez Australia Pty Ltd</i> [2015] VCAT 1432	9 September 2015	VCAT	Discrimination (disability)	\$20 000	Cited
11 <i>Lipman v Commissioner of Police</i> [2015] NSWCATAD 250	1 December 2015	NSWCAT (A&EO Div)	Discrimination (carer's responsibilities); victimisation	\$0 (majority); \$70 000 (in dissent)	Applied in dissent
12 <i>Ingram v QBE Insurance (Australia) Ltd</i> [2015] VCAT 1936	18 December 2015	VCAT	Discrimination (disability)	\$15 000	Cited
13 <i>Butterworth v Independence Australia Services</i> [2015] VCAT 2056	22 December 2015	VCAT	Discrimination (disability)	\$10 000	Cited

(continued)

B Table (continued)

Case	Date	Jurisdiction	Area of law	General damages	Application of Richardson
14 <i>Collins v Smith</i> [2015] VCAT 1992	23 December 2015	VCAT	Sexual harassment	\$180 000	Applied
15 <i>Kovac v Australian Croatian Club Ltd (No 2)</i> [2016] ACAT 4	25 January 2016	ACAT	Discrimination (political conviction)	\$30 000	Applied
16 <i>Ellis v FJM Property Pty Ltd</i> [2016] FCCA 1798	13 April 2016	FCCA	Discrimination (disability)	N/A (dismissed)	Cited
17 <i>Heraud v Roy Morgan Research Ltd (No 2)</i> [2016] FCCA 1797	15 July 2016	FCCA	General protections	\$20 000	Applied
18 <i>Collison v Brighton Road Enterprises Pty Ltd t/as The Grosvenor Hotel (No 2)</i> [2016] FCCA 1798	15 July 2016	FCCA	Adverse action	\$10 000	Applied
19 <i>Maritime Union of Australia v Fair Work Ombudsman</i> (2016) 247 FCR 154	11 August 2016	FCAFC	Adverse action	\$20 000–\$40 000	Applied
20 <i>Murugesu v Australia Post (No 2)</i> [2016] FCCA 2355	15 September 2016	FCCA	Discrimination (race)	\$40 000	Cited
21 <i>Byrne v Spotless Facility Services Pty Ltd</i> [2016] QCAT 420	4 November 2016	QCAT	Discrimination (workplace discrimination based on impairment)	\$10 000	Cited
22 <i>Wotton v Queensland (No 5)</i> [2016] FCA 1457	5 December 2016	FCA	Discrimination (race)	N/A	Cited
23 <i>STU v JKL (Qld) Pty Ltd</i> [2016] QCAT 505	6 December 2016	QCAT	Sexual harassment	\$70 000	Not followed
24 <i>Green v Queensland, Brooker and Keating</i> [2017] QCAT 8	10 January 2017	QCAT	Sexual harassment	\$70 000	Not followed
25 <i>McGuire v Reyes t/as the Entrance Lakehouse</i> [2017] NSWCATAD 50	8 February 2017	NSWCAT (A&EO Div)	Sexual harassment	\$6000	Cited
26 <i>Chalker v Murrays Australia Pty Ltd</i> [2017] NSWCATAD 112	10 April 2017	NSWCAT (A&EO Div)	Discrimination (disability)	\$10 000	Cited
27 <i>Kordas v Ruba & Jo Pty Ltd t/as Aztec Hair and Beauty</i> [2017] NSWCATAD 156	25 May 2017	NSWCAT (A&EO Div)	Sexual harassment; victimisation	\$30 000	Applied
28 <i>NSW (Dept of Justice—Corrective Services) v Huntley</i> [2017] FCA 581	26 May 2017	FCA	Discrimination (disability); breach of contract	N/A	Cited
29 <i>Sutton v BE Australia WD Pty Ltd (No 3)</i> [2017] NSWSC 689	1 June 2017	NSWSC	Unfair contract	N/A	Distinguished
30 <i>Sutton v BE Australia WD Pty Ltd (No 4)</i> [2017] NSWSC 1123	24 August 2017	NSWSC	Unfair contract	\$20 000	Distinguished
31 <i>Thorne v Toowoomba Regional Council & Tytherleigh</i> [2017] QCATA 128	23 November 2017	QCAT (Appeals Division)	Discrimination (disability or impairment)	\$10 000	Cited
32 <i>Whelan v Cigarette & Gift Warehouse Pty Ltd</i> [2017] FCA 1534	19 December 2017	FCA	Adverse action	\$5000	Cited

(continued)

B Table (continued)

Case	Date	Jurisdiction	Area of law	General damages	Application of <i>Richardson</i>
33 <i>Colwell v Sydney International Container Terminals Pty Ltd</i> [2018] FWC 174	9 February 2018	FWC	Unfair dismissal	Dismissed	Cited
34 <i>Andrew Roos; Loretta Roos; Bree Dargan v Winnaa Pty Ltd</i> [2018] FWC 5692	12 September 2018	FWC	General protections	\$5000 (awarded to each applicant)	Cited
35 <i>XVC v Joanne Baronessa (Human Rights)</i> [2018] VCAT 1492	3 October 2018	VCAT	Discrimination (gender)	\$10 000	Cited
36 <i>Tafao v Queensland</i> [2018] QCAT 409	16 November 2018	QCAT	Discrimination (sex)	Dismissed	Distinguished
37 <i>Black v Owners Corporation (Human Rights)</i> [2018] VCAT 2014	20 December 2018	VCAT	Discrimination (disability)	Dismissed	Distinguished
38 <i>Andrew Roos; Loretta Roos v Winnaa Pty Ltd</i> [2018] FWC 7394	21 December 2018	FWC	General protections	N/A	Cited
39 <i>Saad v Ada Evans Chambers Pty Ltd</i> [2019] FCCA 1101	29 April 2019	FCCA	Contravention of award	N/A	Cited
40 <i>BDT v BDG</i> [2019] QDC 74	10 May 2019	QDC	Assessment of damages (battery, assault); child sex abuse	\$130 000	Distinguished
41 <i>Hill v Hughes t/as Beesley and Hughes Lawyers</i> [2019] FCCA 1267	4 May 2019	FCCA	Sexual harassment	\$120 000	Applied
42 <i>Ellis v Solutions Matchmaking Pty Ltd & Anor</i> [2019] FCCA 1454	30 May 2019	FCCA	Discrimination (disability)	N/A	Cited
43 <i>Ellis v Target Australia Pty Ltd</i> [2019] FCCA 1820	8 July 2019	FCCA	Discrimination (disability)	N/A	Cited
44 <i>Butlin v ACA Home Improvements Pty Ltd</i> [2019] FCCA 2145	6 August 2019	FCCA	Dismissing employee to engage as independent contractor	N/A	Distinguished
45 <i>Nandutu v University of Sydney & Anor</i> [2019] FCCA 2754	6 August 2019	FCCA	Sexual harassment (application for leave)	Dismissed	Cited
46 <i>Hughes t/as Beesley and Hughes Lawyers v Hill</i> [2019] FCA 1234	7 August 2019	FCA	Sexual harassment (application for stay of orders)	N/A	Cited
47 <i>Ridd v James Cook University (No 2)</i> [2019] FCCA 2489	6 September 2019	FCCA	Contravention of enterprise agreement	\$90 000	Cited
48 <i>Hughes t/as Beesley and Hughes Lawyers v Hill</i> [2020] FCAFC 126	24 July 2020	FCAFC	Sexual harassment	N/A	Applied

C Richardson Has Led to an Uplift in Quantum of General Damages

A review of the judgments citing *Richardson* indicates that the case has resulted in an uplift in the quantum of damages sought in sexual harassment cases. At the time of writing, there are

48 citations of *Richardson*, of which 9 concern sexual harassment. This figure demonstrates that comparatively few sexual harassment matters reach the courts, notwithstanding the prevalence of sexual harassment in Australia.¹¹⁷ The reasons for this will be discussed further in the next section. Of the six sexual harassment matters where damages were awarded, the average award of general damages was \$79 333. This is far higher than the typical range of \$12 000–\$20 000 articulated in *Richardson* at first instance and prior case law. Of particular note, two decisions resulted in damages over \$100 000.

I Collins v Smith. One such case was the 2015 Victorian Civil and Administrative Tribunal (VCAT) decision of *Collins v Smith*.¹¹⁸ David Smith directed ‘persistent and unwelcome’ sexual conduct over a four-month period towards an employee, Amanda Collins. His conduct included ‘physical contact; verbal comment including propositioning for sex and threatening comments; and written communications including a card, note and text messages.’¹¹⁹ Collins terminated her employment¹²⁰ and ‘suffered severely’ as a result of Smith’s harassment.¹²¹ She was diagnosed with chronic post-traumatic stress disorder (PTSD), major depressive disorder and anxiety disorder.¹²² Her personality and marriage were adversely impacted; she required ongoing psychological counselling and treatment for depression and became incapacitated for work.¹²³

In the assessment of damages, Jenkins J endorsed Kenny J’s emphasis in *Richardson* regarding the ‘importance of having regard to the general standards prevailing in the community for loss of enjoyment of life, and the experience of pain and suffering.’¹²⁴ *Richardson*, Jenkins J observed, clarified that there is no longer a basis for distinguishing between sexual harassment and workplace bullying as it relates to the determination of compensation.¹²⁵ It also extended principles applying to sex discrimination to other forms of discrimination.¹²⁶ *Collins v Smith* also signifies the application of Kenny J’s reasoning at the state tribunal level, with Jenkins J noting that federal anti-discrimination cases ‘provide a useful approach and analysis of factors to be taken into account.’¹²⁷ Notably, Jenkins J described *Richardson* as a ‘significant milestone in the articulation of the proper approach to the assessment of damages in the context of sexual harassment cases’,¹²⁸ which signified a ‘substantial change’ from previous approaches.¹²⁹ Collins was awarded \$180 000 in general damages.¹³⁰

2 Hill v Hughes. The most recent substantive treatment of *Richardson* at the time of writing, *Hill v Hughes*, signifies continuing favourable treatment of the decision in the sexual harassment

117. *Everyone’s Business* (n 7) 7–8.

118. *Collins v Smith* (2015) 256 IR 52.

119. *Collins v Smith (Human Rights)* [2015] VCAT 1029 (first instance), [3]–[4].

120. *Ibid* [3].

121. *Collins v Smith* (n 118) 94 [176].

122. *Ibid*.

123. *Ibid*.

124. *Ibid* 95 [179].

125. *Ibid* 89 [148].

126. *Ibid*.

127. *Ibid* 60 [18].

128. *Ibid* 85 [133].

129. *Ibid* 87 [140].

130. *Ibid* 95 [181].

context.¹³¹ The applicant, a paralegal and aspiring lawyer, was sexually harassed by a principal at her law firm. The respondent exploited his position of power, engaging in ‘relentless’ conduct over a three-month period, which included sending a bombardment of emails requesting they begin a personal relationship, forcing hugs from the applicant and behaving inappropriately on a work trip, including entering her room in his underwear.¹³²

Constituting a ‘very grave example of sexual harassment’,¹³³ the Court found, at first instance, that Hill was ‘offended, humiliated and intimidated’ and experienced ‘disturbances of mood, technician and neuro-vegetative function consistent with a depressive illness.’¹³⁴ Justice Vasta adopted *Richardson*, recognising that

the general standards prevailing in the community regarding the assessment of the monetary value of the loss and damage of the kind that this [a]pplicant sustained, has changed over time. There is an acceptance and an understanding of the pernicious nature of sexual harassment.¹³⁵

The applicant was awarded \$120 000 in general damages. Justice Vasta declared that Kenny J’s judgment ‘recalibrated the assessment of damages in sexual harassment cases.’¹³⁶ His Honour went further, stating that *Richardson* resembles a point of departure from previous case law: ‘As far as guidance as to the level of general damages is concerned, I am of the view that any authority prior to *Oracle* is not going to be of assistance.’¹³⁷

The appellant challenged the decision at first instance on the basis that his conduct was not sexual but rather, ‘like Mr Darcy in *Pride and Prejudice*’, and in respect of *Richardson*, that the damages awarded were manifestly excessive.¹³⁸ Justice Perram, Reeves and Collier JJ, concurring, emphatically dismissed the appeal. The Full Federal Court affirmed *Richardson*’s impact, stating Kenny J’s judgment:

effected a substantial increase in the general damages which could be awarded in a case of sexual harassment. As comparators, decisions involving awards of general damages pre-dating *Oracle* are not useful, as this Court there explained.¹³⁹

Justice Vasta’s treatment of *Richardson*, as unequivocally endorsed by the Full Federal Court, further emboldens the case’s impact on the assessment of damages going forward.

131. *Hill v Hughes* (2019) 287 IR 86; *Hughes v Hill* (2020) 297 IR 323.

132. *Hill v Hughes* (n 131) 119 [241]; *Hughes v Hill* (n 131) 326 [10].

133. *Hill v Hughes* (n 131) 119 [251].

134. *Ibid* 113 [184], 117 [221].

135. *Ibid* 118 [234].

136. *Ibid* 118 [238].

137. *Ibid* 118 [235].

138. *Hughes v Hill* (n 131) 327 [16].

139. *Ibid* 334 [49].

D Richardson Has Been Broadly Applied Beyond Non-Sexual Harassment Contexts

Richardson's application has extended beyond sexual harassment to be endorsed in cases regarding discrimination in respect of disability,¹⁴⁰ race,¹⁴¹ pregnancy,¹⁴² gender,¹⁴³ sexual orientation¹⁴⁴ and political conviction.¹⁴⁵ Justice Kenny's reasoning has been cited as having a 'broad application' in the assessment of damages in disability and racial discrimination.¹⁴⁶ The Federal Circuit Court considered Kenny J's comments regarding the assessment of damages according to prevailing community standards as 'apposite' in relation to assessing damages in a disability discrimination claim.¹⁴⁷ Furthermore, Member Goodman-Delahunty applied Kenny J's judgment, albeit in dissent, in relation to a discrimination and victimisation matter concerning the applicant's carer's responsibility.¹⁴⁸ Her Honour's reasoning has also been applied in adverse action¹⁴⁹ and unfair dismissal.¹⁵⁰ The following analysis focuses on two cases which provide the most substantive consideration of *Richardson* beyond a sexual harassment domain, before discussing the case's application in employment law contexts.

I Kovac v Australian Croatian Club. In *Kovac v Australian Croatian Club*,¹⁵¹ the ACT Civil and Administrative Tribunal ('ACAT') applied *Richardson* to a discrimination claim regarding political conviction. The Tribunal found that Kovac was discriminated against when the Croatian Club inhibited his full participation in the club because of his political conviction regarding the Croatian government.¹⁵² As a result of the discrimination, Kovac had been isolated and ostracised from the Croatian community and his personal relationships had been detrimentally impacted.¹⁵³

The Tribunal held that the assessment of damages by reference to community standards, in accordance with *Richardson*, was not confined to sexual harassment.¹⁵⁴ *Richardson* was 'directly applicable' to the club's discriminatory conduct as it 'involve[d] an element of cruelty and humiliation.'¹⁵⁵ Specifically, Justice Kenny's reasoning applied because, as opposed to determining

140. *Slattery v Manningham City Council* [2014] VCAT 1442; *Pop v Taylor* [2015] FCCA 1720; *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 1432; *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936; *Butterworth v Independence Australia Services* [2015] VCAT 2056; *Ellis v FJM Property Pty Ltd* [2016] FCCA 1798; *Chalker v Murrays Australia Pty Ltd* [2017] NSWCATAD 112; *NSW (Department of Justice—Corrective Services) v Huntley* [2017] FCA 581.

141. *Trad v Jones (No 7)* [2014] NSWCATAD 225; *Jemal v ISS Facility Services Pty Ltd* [2015] VCAT 103.

142. *Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd (No 2)* [2015] VCAT 693.

143. *XVC v Joanne Baronessa (Human Rights)* [2018] VCAT 1492.

144. *Power v Bouvy* [2015] TASADT 2.

145. *Kovac v Australian Croatian Club Ltd (No 2)* [2016] ACAT 4 ('Kovac').

146. *Slattery v Manningham City Council* (n 140) [64]; *Jemal v ISS Facility Services Pty Ltd* (n 141) [172]–[174].

147. *Pop v Taylor* (n 140) [296]–[298].

148. *Lipman v Commissioner of Police* [2015] NSWCATAD 250 [313]–[315]. Note, the majority decided differently as to whether discrimination and victimisation claims were substantiated, not whether Kenny J's reasoning applied.

149. *Collison v Brighton Road Enterprises Pty Ltd t/as The Grosvenor Hotel (No 2)* [2016] FCCA 1798; *Maritime Union of Australia v Fair Work Ombudsman* (2016) 247 FCR 154.

150. *Luke Colwell v Sydney International Container Terminals Pty Ltd* [2018] FWC 174.

151. *Kovac v Australian Croatian Club Ltd* [2014] ACAT 41.

152. *Ibid* 3 [5], 46 [158].

153. *Kovac* (n 145) 23 [67], 24 [70].

154. *Ibid* 15 [43] (emphasis added).

155. *Ibid* 15 [42].

whether the type of discrimination is analogous to sexual harassment, the ‘critical element’ involves considering whether there is unlawful conduct.¹⁵⁶ As such, ACAT ordered the Club to pay Kovac \$30 000 in general damages.¹⁵⁷

2 Maritime Union of Australia v Fair Work Ombudsman. Justice Kenny’s judgment was also a central focus in *Maritime Union of Australia v Fair Work Ombudsman*.¹⁵⁸ In this adverse action case, a union official distributed posters referring to five employees as ‘scabs’.¹⁵⁹ The employees sought compensation for the loss of quiet enjoyment of their working entitlements, contending they experienced marginalisation and apprehension and fear of violence.¹⁶⁰

At first instance, Siopis J distinguished the employees’ harm from that in *Richardson*. His Honour explained that although the poster action was ‘intended to inflict emotional distress’,¹⁶¹ ‘the nature of the emotional distress suffered in [*Richardson*] gave rise to “not insignificant” psychological damage and so it is different to the distress suffered by each of the named employees.’¹⁶² Noting this, *Richardson* was distinguished because of the discrepancy in distress caused, as opposed to an inability to apply *Richardson* to adverse action contexts. His Honour awarded complainants between \$20 000 and \$40 000 compensation.¹⁶³

When evaluating whether the compensation awarded at first instance was ‘manifestly excessive, unreasonable or plainly unjust’, the majority of the Full Federal Court upheld Siopis J’s reasoning.¹⁶⁴ They stated, simply: ‘We can see no error in his consideration of that case. It would not govern the exercise of discretion in the present case.’¹⁶⁵ Justice Bromberg dissented on the assessment of the quantum of damages.¹⁶⁶ However, his Honour confirmed that *Richardson* applies to adverse action claims:

Like Kenny J... I am unable to discern any basis for thinking that the pain and suffering and loss of enjoyment of life should be valued because of the type of conduct which brought about the suffering. Whether the cause be sexual harassment, other forms of harassment, bullying or adverse action of various kinds (save that the nature of the conduct may throw some light upon the extent of the harm done), the compensable value of the harm is to be assessed by reference to the pain and suffering and the loss of enjoyment of life experienced by the particular victim.¹⁶⁷

156. Ibid 15 [43] (emphasis added).

157. Ibid 16 [44].

158. *Maritime Union of Australia v Fair Work Ombudsman* (n 149).

159. *Fair Work Ombudsman v Maritime Union of Australia (No 2)* [2015] FCA 814, 1 [1], 5 [20].

160. Ibid 13 [64].

161. Ibid 8 [35].

162. Ibid 14 [70].

163. Ibid 16 [78].

164. *Maritime Union of Australia v Fair Work Ombudsman* (n 149) 163 [28] (Tracey and Buchanan JJ).

165. Ibid 164 [31].

166. Ibid 188 [148]–[155]. Justice Bromberg held that the quantum of damages awarded at first instance went beyond fair compensation for the harm incurred and thus were ‘manifestly excessive’. Undertaking a review of decided cases, Bromberg J reassessed the quantum of damages by ‘reference to prevailing community standards as illustrated by the cases surveyed’ and concluded that damages in the ambit of \$7500–\$10 000 were more appropriate: citing *RailPro Services Pty Ltd v Flavel* [2015] FCA 504.

167. Ibid 180 [111] (Bromberg J).

3 Employment Law Contexts. Justice Kenny's reasoning has also been cited in broader employment law contexts. The Federal Circuit Court has applied *Richardson* in a general protections claim.¹⁶⁸ The Fair Work Commission has also observed, in relation to an unsuccessful application for unlawful dismissal, that 'anti-discrimination laws and judgments considering the scope and application of those laws are evolving, including as to matters concerning orders for damages.'¹⁶⁹ More recently, the Federal Circuit Court awarded \$90 000 in general damages because of an employer's unfair treatment of an employee in contravention of an enterprise agreement.¹⁷⁰ Justice Vasta stated that '[s]ince the decision in [*Richardson*], there has been an awareness by the Court of the change in community attitudes as to the quantum of compensatory damages for non-pecuniary loss.'¹⁷¹

The courts' broad application of *Richardson* beyond sexual harassment demonstrates the decision's growing influence. In particular, if *Richardson*'s application turns on simply whether there is 'unlawful conduct'¹⁷² and the impact of such conduct on the pain and suffering and loss of enjoyment of life experienced by an individual,¹⁷³ then, by extension, its application is unfettered, as discrimination generally, as well as tort law and other similar legislative frameworks, require 'unlawful conduct'.

E Limitations of Richardson's Application

The extent to which *Richardson* has recalibrated the assessment of general damages is not unequivocal. While *Richardson* has been widely endorsed, it has not resulted in a broad increase in damages awarded in all instances. Of the cases in which *Richardson* was cited and general damages were awarded, the average award was \$35 093.75. Only 9 per cent of judgments resulted in an award of \$100 000 or more. Further, although *Richardson* has been widely cited in areas outside of sexual harassment, this has largely not resulted in significant damages awards. For example, of the nine disability discrimination cases in which general damages were awarded, 88 per cent of awards were \$20 000 or under. However, the average quantum of damages alone cannot provide detailed conclusions as to the reasons for persisting low general damages. Without looking at the individual facts and circumstances of each case, it cannot be concluded that these particular awards of general damages are inadequate to compensate in all the circumstances. Nonetheless, the persistence of minimal awards of damages across litigated discrimination matters is a matter for concern. Further research is recommended. The following section evaluates two reasons why *Richardson* has been treated with hesitation or not applied in some instances.

I Queensland's Approach. *Richardson* has not been followed in Queensland on the basis that the Queensland Civil and Administrative Tribunal (QCAT) should maintain consistency with its own decisions, as opposed to following federal precedent. In *STU v JKL (Qld) Pty Ltd*, QCAT chose not to follow *Richardson* on the basis that it was 'preferable to take guidance from other like cases

168. *Heraud v Roy Morgan Research (No 2)* [2016] FCCA 1797 [64]–[74].

169. *Colwell v Sydney International Container Terminals Pty Ltd* [2018] FWC 174 [81].

170. *Ridd v James Cook University (No 2)* [2019] FCCA 2489 [6].

171. *Ibid* [138].

172. *Kovac* (n 145) 15 [43].

173. *Maritime Union of Australia v Fair Work Ombudsman* (n 149) 180 [111] (Bromberg J).

determined by this Tribunal.¹⁷⁴ Member Fitzpatrick was guided by sub-ss 3(c)–(d) of the *QCAT Act 2009* (Qld), which directs QCAT to prioritise consistency with its own decisions.¹⁷⁵ However, in failing to recognise the rise in quantum of damage, Queensland decisions are out of step with society's perception of harm as it relates to sexual harassment. This approach also undermines the quality of QCAT decisions and its responsiveness to the diverse needs of persons who use the Tribunal, which are required according to the Queensland legislation.¹⁷⁶ No such consistency provision applies in respect of the Victoria or NSW tribunals, which have followed *Richardson* without issue.

In *Green v Queensland*, QCAT clarified when it would apply *Richardson*.¹⁷⁷ Despite acknowledging that *Richardson* increased the level of awards in Queensland, it stated that 'those increases have not been nearly as dramatic as in *Richardson* itself.'¹⁷⁸ Member Gordon went further, stating that

it seems . . . that Tribunal awards have not kept pace with prevailing standards in the community but more recently, in so far as consistency has allowed, efforts have been made to raise the level of awards, particularly those involving recognised personal injury, to the level of awards made in personal injury cases in Queensland.¹⁷⁹

Considering whether such increases should occur, it maintained that 'the Tribunal should stay on its existing course and not suddenly increase awards where there is recognisable personal injury because of *Richardson*, particularly as the Tribunal is established by State law.'¹⁸⁰ *Richardson* would apply in sexual harassment and anti-discrimination cases where there is no personal injury but only offence, embarrassment, humiliation or intimidation.¹⁸¹ In such circumstances,

the Tribunal can be influenced by *Richardson* to increase its level of awards if it is appropriate to do so, to ensure that the level of awards in the Tribunal keep pace with inflation and prevailing standards in the community, whilst of course remaining consistent with its own previous decisions.¹⁸²

Similarly, in *BDT v BDG*,¹⁸³ the District Court of Queensland declined to apply *Richardson*, holding that Kenny J's reasoning is limited to the determination of awards in Federal regimes. The Court conducted an assessment of damages in relation to battery and assault and child sexual abuse. Justice McGill rejected the submission that damages were trending upwards in Queensland as a result of *Richardson*: 'No doubt it is part of the function of the Full Federal Court to set

174. [2016] QCAT 505 [220].

175. Ibid [219].

176. *QCAT Act 2009* (Qld) ss 3(c)–(d) and 4(e); for a discussion of the duty of consistency as it affects administrative law in Australia, see Matthew Groves and Greg Weeks, 'The Ongoing Quest to Define a Duty of Consistency' (2020) 27 *Australian Journal of Administrative Law* 3.

177. *Green v Queensland* [2017] QCAT 8.

178. Ibid 45 [240].

179. Ibid 46 [247].

180. Ibid 47 [252].

181. Ibid 49 [261].

182. Ibid.

183. [2019] QDC 74.

standards for awards of statutory compensation in particular fields. This is not such a case.¹⁸⁴ His Honour flagged that '[i]f there is to be an attempt to align Queensland awards with awards in other states, that I think is a matter for the Court of Appeal.'¹⁸⁵ The Queensland Court of Appeal is yet to have an opportunity to resolve whether *Richardson* applies in respect of damages in Queensland.

2 Distinguished on the Facts. In some instances, *Richardson* has been distinguished on the facts. In *Black v Owners Corporation*, VCAT rejected a party's reliance on *Richardson* in a disability discrimination case.¹⁸⁶ VCAT considered that the 'claimed loss... was not caused by sexual harassment, but rather by the [r]espondents' failure to give any consideration to the discriminatory effect their ways of providing services affected her.'¹⁸⁷ This reasoning is out of step with VCAT's application of *Richardson* in a number of other disability discrimination cases.¹⁸⁸ Similarly, in *Sutton v BE Australia WD Pty Ltd (No 3)*, an unfair contract claim, the NSW Supreme Court confined *Richardson* to its facts, warning 'some care' should be taken in its application as '[e]ach matter turned upon its own facts and circumstances.'¹⁸⁹ The judgment in *Sutton* indicates that there are limitations to how far *Richardson* will extend into other areas of law. Assessment of damages remains a fact-specific exercise and will turn on a court's consideration of the alleged conduct and the actual effect on the claimant.¹⁹⁰

F Non-Richardson Sexual Harassment

Finally, it is worth noting that some sexual harassment judgments, post-*Richardson*, have not cited Kenny J's reasoning in their assessment of damages. A review of the available case law suggests there are five such cases. Damages of over \$100 000 were awarded in two instances. In *Mathews v Winslow*, the Supreme Court of Victoria awarded \$380 000 in general damages for 'very considerable psychiatric injuries' caused by bullying, abuse and sexual harassment.¹⁹¹ The perpetrator sexually abused the plaintiff over two years, making remarks such as 'I am going to follow you home, rip your clothes off and rape you.'¹⁹² In calculating general damages, Forrest J acknowledged that the plaintiff's severe psychiatric illnesses 'have and will continue to diminish the quality of her life.'¹⁹³ While Forrest J did not cite *Richardson*, the quantum of the award aligns with Kenny J's judgment.

184. Ibid 8 [31].

185. Ibid 8 [30].

186. [2018] VCAT 2014.

187. Ibid [126].

188. *Dzirubas v Mondelez Australia Pty Ltd* [2015] VCAT 1432 [241]; *Ingram v QBE Insurance (Australia) Ltd* (n 140) [270]; *Jemal v ISS Facility Services Pty Ltd* (n 141).

189. *Sutton v BE Australia WD Pty Ltd (No 3)* (2017) 272 IR 311, 336 [139].

190. An evaluation of the principle of ratio decidendi and the doctrine of precedent, and when courts may decide that a precedent such as *Richardson* is distinguishable on its facts, is outside the scope of this article. However, see, eg, Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93 at 95 observing: '[t]he pressure on the courts to take a more active part in updating the law brings the doctrine of precedent into critical focus. The tension between the desire for consistency and predictability on the one hand and the desire for adaptability and justice in the particular case presents a problem for precedent. It calls for a doctrine which is sufficiently flexible and elastic to enable courts to share in the best of inconsistent worlds. And it explains why it is that there is a want of precision in some aspects of the doctrine'.

191. *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728, [32].

192. Ibid [5].

193. Ibid [33].

In *Kerkofs v Abdallah*, VCAT awarded \$130 000 in general damages to a 20-year-old claimant following the respondent's unwelcome sexual comments and physical conduct, which included massaging, kissing and touching the claimant's breasts.¹⁹⁴ The claimant developed PTSD and anxiety, lost trust in men and her 'capacity to function in daily life' became impaired.¹⁹⁵ While Judge Harbison did not explicitly cite *Richardson*, her Honour stated that the award of damages must make clear that sexual harassment is not acceptable in the workplace, as guided by 'legislation designed to enforce community standards'.¹⁹⁶ Judge Harbison also acknowledged that an award of general damages 'must reflect the need to eliminate sexual harassment to the greatest extent possible in the workplace and encourage the identification and elimination of sexual harassment generally'.¹⁹⁷ Similar to Forrest J's approach immediately above, Judge Harbison's reference to 'community standards' as a means of justifying a high quantum of damages validates the central premise of *Richardson*.

However, this upwards trend in non-*Richardson* sexual harassment cases has not been universal. Of the five sexual harassment cases to omit *Richardson*, three awarded a low or unfavourable quantum of damages. For instance, in *Evans v Ikkos Holdings*, Farrell J labelled a submission for a claim of \$150 000 in general damages 'excessive'.¹⁹⁸ Her Honour did not cite *Richardson* but rather, after considering the 'legislative provisions' and 'general principles', held that the sexual harassment experienced by the complainant was 'not of the most serious kind nor did it continue over a period of time'.¹⁹⁹ Evans had experienced non-consensual and unwanted physical touching, eliciting her depression, anxiety and trauma-related symptoms.²⁰⁰ She was awarded \$30 000 in general damages.²⁰¹

Similarly, in *James v Department of Justice, Corrective Services NSW*, the plaintiff alleged she was victimised by her employer because she lodged a sexual harassment claim against her Director.²⁰² NSWCAT awarded the plaintiff \$20 000 in general damages for distress and loss of enjoyment of life.²⁰³ The low quantum of damages was attributable to the absence of medical evidence to support a finding of a negative psychological impact.²⁰⁴ Moreover, in *Morton v CSIRO*, the Federal Court of Australia dismissed a sexual harassment claim as not credible and untrue, however it awarded the applicant \$7500 for a CSIRO employee's failure to 'perform her duties with professionalism' when handling the applicant's complaint.²⁰⁵

There are various explanations as to why *Richardson* was not cited, at least explicitly, in the above cases. Most simply, the parties may not have relied on *Richardson*. Alternatively, the parties may have relied upon Kenny J's reasoning, for instance in their submissions, but confirmation of whether *Richardson* was in fact relied upon, and to what extent, is not easily accessible to the public. Otherwise, the above judgments may be a peculiarity, as is the nature of case law and

194. *Kerkofs v Abdallah (Human Rights)* [2019] VCAT 259, [181]–[182].

195. *Ibid* [263]–[265].

196. *Ibid* [262].

197. *Ibid* [256].

198. *Ibid* [165].

199. *Ibid* [159].

200. *Evans v Ikkos Holdings Pty Ltd* [2019] SAET 222, [139]–[140].

201. *Ibid* [165].

202. *James v Department of Justice, Corrective Services NSW* [2017] NSWCATAD 238, [135].

203. *Ibid*.

204. *Ibid* [126]–[127].

205. *Morton v Commonwealth Scientific and Industrial Research Organisation (No 3)* [2019] FCA 1943, [5].

common law precedent. Regardless, these cases suggest that *Richardson* has had enduring influence in recalibrating damages in meritorious sexual harassment matters, whether cited or not.

G Conclusion

The increasingly favourable treatment and application of Kenny J's reasoning, in both sexual harassment contexts and beyond, demonstrates its growing significance. While *Richardson*'s application regarding the courts' assessment of damages is not constant, this momentum suggests that *Richardson*, by extension, will increasingly be relied upon by parties in more areas of law, including, for instance, whistleblower protections and tort. The extent to which *Richardson* has in fact altered the way the courts and practitioners consider claims of sexual harassment will be discussed in the next section.

V Qualitative Assessment of *Richardson*'s Impact

As the majority of sexual harassment cases settle out of court, a doctrinal analysis of judicial decisions post-*Richardson* provides a useful but incomplete understanding of damages in sexual harassment matters. To supplement the above research, eight employment and anti-discrimination lawyers and barristers were interviewed to evaluate *Richardson*'s impact on sexual harassment matters outside the courtroom. In light of the #MeToo movement, this qualitative research seeks to gain a broader understanding of the impact of *Richardson* on the navigation of sexual harassment matters for employers, employees and the judiciary. It seeks to supplement existing theoretical and doctrinal literature with a practical perspective, which is often overlooked.

A Methodology

To provide a representative sample of legal perspectives, participants who predominately represent employees, employers or both were chosen. Participants were chosen for their established practical expertise in the area of anti-discrimination and sexual harassment law. Interviews were conducted with Joydeep Hor (partner, People + Culture Strategies—typically representing employers); Josh Bornstein (partner, Maurice Blackburn—typically representing employees); Joelle Grover (partner, MinterEllison—typically representing employers); Michael Harmer (chairman, Harmers Workplace Lawyers); Margaret Diamond (executive counsel, Harmers Workplace Lawyers); Jenny Inness (executive counsel, Harmers Workplace Lawyers—each typically representing employees); Kate Eastman SC (barrister, New Chambers—representing both) and a senior barrister, practising in the area of anti-discrimination law, who chose to remain anonymous (representing both). It should be noted that Harmers acted for *Richardson* in *Richardson*.

Interviews were conducted in accordance with the Australian National University's 'Policy: Responsible Conduct of Research'. Participants were asked a range of questions, regarding *Richardson*'s impact in the discrimination sphere, their own practice and their interactions with clients, along with broader questions as to the functionality of discrimination law in Australia, the role of the courts and the impact of the #MeToo movement in this space. The interviews were semi-structured: although discussion was guided by specific questions, participants were given the space to provide open and free-flowing opinions. While participants had to be mindful of legal professional privilege, all participants were willing to engage openly at a level of generality. Interviews lasted between 30 minutes and an hour and were conducted in person, except for one which was

conducted over the phone. Consistent with the ethics protocol, each participant was given an opportunity to review their quotes prior to publication.

Due to time and financial restraints, the sample size was limited. Future research would benefit from engaging with a larger sample of legal practitioners. In addition, participants were drawn from only one stakeholder group (practitioners), thus limiting the consideration of other voices in this sphere, such as individual claimants, statutory bodies and independent regulators. It should be acknowledged that participants are speaking from a particular vantage point within the legal system and occupy positions of power in relation to clients. In considering the practitioners' perspectives, the inherent pressures, assumptions and biases associated with such perspectives must be acknowledged.

The prevalence of non-disclosure agreements ('NDAs') in the discrimination sphere creates challenges to engaging with claimants, as do the ethical challenges posed by interviewing targets of sexual violence. However, this area of research would greatly benefit from engaging with claimants and prospective claimants, to allow for a more robust analysis of individual litigants' experiences of the discrimination law system. Providing a platform for such perspectives would mitigate the risks of erasing the (usually female) complainant, who is seldom heard from in sexual harassment literature. Notwithstanding the barriers that would need to be overcome, the authors recommend claimant-focused research as an area for valuable future study. However, it was not the focus of the present study.

Participants predominately practised in Victoria and NSW. As a result, this section cannot consider divergent practical approaches between different state and territory jurisdictions. Future research would benefit from engaging with legal professionals beyond NSW and Victorian contexts.

B Summary of Richardson's Impact

In practice, *Richardson* has had a largely positive impact on awards of general damages, both in the courts and in settlement negotiations. Justice Kenny's consideration of community standards, combined with the impact of the #MeToo movement, has raised the profile of workplace sexual harassment. *Richardson* has also positively impacted areas of law beyond sexual harassment, including in relation to other areas of discrimination and employment law contexts, such as adverse action. However, while *Richardson* is considered a step in the right direction, a disjuncture between the aims of anti-discrimination law and the efficacy of the legal system remains. As is, the anti-discrimination law framework places the burden of enforcing the law on individual claimants, who must grapple with the high costs, both financial and personal, of pursuing a claim. The power imbalance that exists between individual claimants and respondents ensures that the anti-discrimination framework, as currently conceptualised, is unable to bring about systemic change.

C Richardson Has Increased General Damages

Consistent with the above doctrinal research, participants unanimously agreed that *Richardson* has precipitated an increase in the quantum of general damages available in sexual harassment matters, both in the courts and in settlement. The senior barrister commented,

there was a realignment of general damages and the ‘range’ that has influenced individuals’ thinking about commencing claims and what they might be worth, the thinking of those trying to resolve them and what the likely exposure may be, and the Court’s consideration of the principle.²⁰⁶

Richardson has also influenced plaintiff firms’ advice to potential claimants, at least among those interviewed. The decision is used as a ‘benchmarking’ tool in early discussions, mediation and negotiation. According to Harmer, the decision has been ‘catalytic’ in facilitating negotiations and improved resolution of matters, without having to go through the court system.²⁰⁷ This sentiment was echoed by Bornstein, who highlighted that post-*Richardson* the financial incentive of pursuing a claim often makes more sense:

If the case is good in the sense that liability can be established, it has reasonable prospects of success and there is evidence of strong impact and effect on health, then when you’re discussing options in conference with a client you can recommend proceeding a lot safer in the knowledge that it is likely to be more economically viable than it was previously.²⁰⁸

D *Richardson’s Impact Beyond Sexual Harassment*

Participants confirmed that *Richardson* has influenced other areas of law. Specifically, Kenny J’s consideration of changing community expectations may have traction in other areas of discrimination where there is a disparity in quantum of damages. According to Grover, a ‘natural consequence’ of the decision is that lawyers and the courts ‘will turn their minds to whether there are other areas which have equivalent deficiencies in the way that courts have assessed loss historically.’²⁰⁹ She suggested gender identity discrimination may be one such area.²¹⁰ Similarly, Bornstein indicated that *Richardson* is having a ‘broader effect’ on the approach of plaintiff lawyers to other discrimination settlements, adverse action and general protection cases.²¹¹ According to him, ‘as far as we’re concerned, there’s no different approach, we’ll still cite [*Richardson*] when we’re negotiating or litigating other discrimination cases.’²¹²

However, the senior barrister emphasised that the extent to which *Richardson* is impacting the higher quantum of damages in other areas of discrimination is not yet clear.²¹³ While the senior barrister cited *Huntley* as an outlier example of a high award of general damages,²¹⁴ she indicated that matters in other discrimination areas are typically resolving for far smaller amounts than in sexual harassment.²¹⁵ This assessment is consistent with the doctrinal research that reveals *Richardson* is being cited in a wide range of areas beyond sexual harassment. However, this has

206. Interview with Senior Barrister (Madeleine Castles, 19 December 2019).

207. Interview with Michael Harmer (Madeleine Castles, 28 November 2019).

208. Interview with Josh Bornstein (Madeleine Castles, 2 December 2019).

209. Interview with Joelle Grover (Madeleine Castles and Tom Hvala, 2 December 2019).

210. *Ibid.*

211. Bornstein (n 208).

212. *Ibid.*

213. Senior Barrister (n 206).

214. *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (the claimant received \$75 000 in general damages).

215. Senior Barrister (n 206).

not necessarily translated into significant awards of damages. Whether *Richardson* will in time raise awards in other anti-discrimination law areas remains to be seen.

E The Role of Settlement

All participants maintained that settlement is the most favourable outcome for both claimants and defendants. Participants indicated that an overwhelming majority of matters settle. As Harmer exclaimed, ‘one way or another, it is a failure if a sexual harassment matter reaches the courts.’²¹⁶ According to Hor, claimants are more likely to receive an elevated sum of damages in settlement, often far higher than the amount awarded in *Richardson*.²¹⁷ Additionally, participants emphasised the importance of protecting claimants’ mental health. As Harmer observed, putting a claimant through a protracted court process has serious impacts on ‘their health, their career, their reputation and their family.’²¹⁸

Furthermore, Grover highlighted that there are often ‘particular sensitivities for complainants in sexual harassment matters, because many people who have been the subject of sexual harassment don’t want to have a public profile.’²¹⁹ This was supported by Bornstein who suggested that most people who seek legal advice in discrimination cases have already suffered a high degree of harm and their mental health is often already compromised.²²⁰ As highlighted above, settlements are typically faster, cheaper and facilitate constructive resolutions. As Hor emphasised, ‘settlements are good, they allow people, on both sides, to move on with their lives.’²²¹

F Confidentiality in Settlement

The need for confidentiality in resolving sexual harassment complaints remains a fraught issue, for both commentators and practitioners. Allen and Blackham note that confidentiality ‘is ingrained within equality law’; the majority of settlement agreements are accompanied by confidentiality clauses and NDAs.²²² Confidentiality agreements often encompass, in addition to the terms of settlement, the complaint’s details, internal investigation and negotiation and mediation process.²²³ It has positive consequences for both parties, namely complainants can seek resolution without fear of public judgment, while respondents are encouraged to participate freely and openly in negotiating a complaint’s resolution.²²⁴

However, the efficacy of confidentiality in discrimination contexts has been criticised in academic and policy spheres for obscuring ‘the breadth and depth of workplace sexual harassment.’²²⁵ As Bornstein explained, in practice, ‘NDAs are a double-edged sword because they tend to mask

216. Harmer (n 207).

217. Interview with Joydeep Hor (Madeleine Castles, 27 November 2019).

218. Harmer (n 207).

219. Grover (n 209).

220. Bornstein (n 208).

221. Hor (n 217).

222. Allen and Blackham (n 77) 385.

223. Ibid 398–9.

224. Ibid 412.

225. See Allen and Blackham (n 77); Allen, ‘Remedying Discrimination’ (n 78); Gaze, ‘The Sex Discrimination Act at 25’ (n 75); Thornton, ‘The Political Contingency of Sex Discrimination’ (n 62); Margaret Thornton, ‘Sex Discrimination, Courts and Corporate Power’ (2008) 36(1) *Federal Law Review* 31; *National Inquiry* (n 8); Interview with Kate Eastman (Madeleine Castles and Kieran Pender, 2 March 2020).

the extent of the problem.’²²⁶ In addition, the AHRC’s *National Inquiry* received numerous submissions that confidential settlements create a ‘culture of silence, which disempowers victims, covers up unlawful conduct and facilitates repeat offending.’²²⁷ The desire to place sexual harassment on the public record must be balanced against the need to protect a claimant’s wellbeing and ensure they receive the best possible outcome. Bornstein continued:

at the time of settlement negotiations and for some time after that, most women will want an NDA. Because of the shame, the embarrassment, and the fear that their future employment will be threatened. . . . While philosophically I think it is unfortunate in masking the extent of the problem, my main interest in the moment is to look after the health and wellbeing of my client and get them a good outcome.²²⁸

The #MeToo movement has added momentum to this debate, particularly with historical targets of sexual harassment breaking their silence (notwithstanding such NDAs). One of the most potent consequences of the #MeToo movement was its capacity to increase public awareness about the prevalence of sexual harassment in Australia by disregarding such restrictions.²²⁹ According to Grover, confidentiality is a ‘live area’, with ongoing consideration being given in settlement agreements to allow complainants, within confined terms, to still discuss their experience, ‘whether to law enforcement agencies, a commission of inquiry or a potential future employer.’²³⁰ The *National Inquiry* stated that, ‘[g]iven the complexity and importance of this issue’, it would ‘develop a practice note or guideline that identifies best practice principles to inform the development of regulation on the use of NDAs in workplace sexual harassment matters.’²³¹

G The Development of Precedent

The private nature of settlement also inhibits the development of case law. Grover pointed out, ‘there aren’t that many opportunities for courts to conduct a really rigorous assessment of damages in these cases because they’re very fact specific but also there just aren’t that many cases that make it all the way there.’²³² It is estimated that less than 2 per cent of all complaints proceed to hearing.²³³ The doctrinal evidence supports this claim: only nine sexual harassment matters have cited *Richardson* since it was handed down six years ago, providing little opportunity for the courts to further scrutinise and apply the decision. This is problematic because, as Kenny J highlighted, sexual harassment litigation in Australia has a comparatively short history.²³⁴ Her Honour noted that the courts’ failure to reassess damages in sexual harassment contributes to a stagnation at the lower end of the spectrum, which significantly hampers the ability of discrimination law to bring about systemic change.²³⁵

226. Bornstein (n 208).

227. *National Inquiry* (n 8) 557.

228. Bornstein (n 208).

229. *Ibid.*

230. Grover (n 209).

231. *National Inquiry* (n 8) 32.

232. Grover (n 209).

233. Thornton, ‘The Political Contingency of Sex Discrimination’ (n 62) 319.

234. *Richardson* (n 1) [83].

235. *Ibid* [89].

Consequently, notions of open justice are undermined, leading to a lack of guidance for both plaintiffs and respondents as to the application of the law.²³⁶

This impact is compounded because judicial determinations influence settlement outcomes in practice. Harmer noted that while settlement is preferable and predominantly in the client's best interest, there is some benefit in seeking a judicial determination if it presents 'an opportunity to change the law.'²³⁷ Diamond observed that settlements are only achieved 'in the shadow of what people expect will happen should it come to litigation.'²³⁸ She explained: 'what people are prepared to do in the negotiation, mediation and non-litigious space is very much determined by what would be the outcome for them if they did go to court.'²³⁹ Harmer and his colleagues encourage courts to take a stronger position on workplace sexual harassment to constructively influence what happens out of the courtroom.²⁴⁰ However, out-of-court settlement does not necessarily lead to a lack of just outcomes for complainants. The senior barrister said that 'those of us who practice in the field know what matters settle for, because we're in all the cases.'²⁴¹ In other words, as a result of the limited pool of practitioners in this field, solicitors, barristers and registrars dealing regularly with discrimination matters 'know, apply and are informed by the number of cases that they're in', confidentiality notwithstanding.²⁴²

H A Consideration of Costs

The issue of costs presents a substantial barrier to potential claimants. There are no costs protections contained in the *SDA*. Consequently, the court has the power to award costs at any stage of the proceedings.²⁴³ Where a plaintiff does litigate, they face a substantial adverse costs order. This is a significant disincentive.²⁴⁴ The costs order made against *Richardson* at first instance is an apt illustration.²⁴⁵ This consideration is exacerbated by the inaccessibility of legal support services—such as legal aid commissions, community legal centres and pro bono services—to potential claimants.²⁴⁶ Australia provides less funding for legal support services compared to other nations.²⁴⁷ Gaze suggests that legal aid is seldom available for sexual harassment matters.²⁴⁸ If available, legal support services are often selective and impose stringent eligibility criteria which disqualify many individuals from receiving grants of legal assistance, particularly those experiencing disadvantage.²⁴⁹ High demand and finite resources undermine the provision of quality

236. Allen and Blackham (n 77) 412–3.

237. Harmer (n 207).

238. Interview with Margaret Diamond (Madeleine Castles, 28 November 2019).

239. Ibid.

240. Harmer (n 207).

241. Senior Barrister (n 206).

242. Ibid.

243. *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit Court of Australia Act 1999* (Cth) s 79.

244. *National Inquiry* (n 8) 29.

245. *Richardson v Oracle* (n 86) [39]–[41].

246. See, eg, Jeff Giddings, 'Rhyme and Reason in the Uncertain Development of Legal Aid in Australia' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid* (Hart Publishing, 2017) 43.

247. Australian Government Productivity Commission, *Access to Justice Arrangements Volume 2* (Inquiry Report No 72, 5 September 2014) 734.

248. Gaze, 'Damages for Discrimination' (n 62) 22.

249. Australian Government Productivity Commission (n 247) 716–17.

services and resource allocation.²⁵⁰ As a result, there are often delays for advice appointments.²⁵¹ Alternatively, clients are unable to receive ongoing legal advice or representation even if they have a strong claim.²⁵²

To remedy these financial barriers, the *National Inquiry* recommended the introduction of a costs protection provision to the *AHRCA*, replicating s 570 of the *Fair Work Act 2009 (FWA)*.²⁵³ Under the *FWA*, parties to proceedings bear their own costs and can only be ordered by a court to pay costs incurred by another party where proceedings are brought vexatiously, without reasonable cause, or where a party's unreasonable act or omission caused the other party to incur costs.²⁵⁴ The inclusion of a similar provision in the *AHRCA* would protect individual litigants from adverse costs orders and lower the financial barriers to commencing a meritorious claim.

The prohibitive financial costs of pursuing a matter was emphasised by participants. According to Hor, discrimination law is, in practice, a 'no costs jurisdiction', with costs orders rarely made.²⁵⁵ If protracted, a plaintiff's legal fees will likely be significant, not all of which may be recovered even if they are successful. As Hor expressed, 'a \$10,000 settlement in week one or week two is probably \$9000 in the pocket of the person. A \$10,000 settlement at the end of six months means a person is in deficit by 40 or 50 thousand.'²⁵⁶ Costs are therefore an operative factor in the common resolution of sexual harassment matters behind closed doors, away from the courts.

However, the extent to which this is a failure of the anti-discrimination system was contested by participants. According to Eastman and the senior barrister, 'by and large meritorious claims settle',²⁵⁷ while the cases that reach the courts do so 'because one or both of the parties are unreasonable.'²⁵⁸ Eastman maintained that, predominately, complainants are not motivated to seek judicial determination but simply want a resolution and for the conduct to cease.²⁵⁹ Similarly, the senior barrister emphasised, 'I have not met an applicant who has said I should have run my case, I shouldn't have resolved it. It would have been better for me. Because certainty and getting on with your life is much more important.'²⁶⁰ For the senior barrister, an assessment of the discrimination law framework's effectiveness should not focus solely on the quantity of cases going through the courts and receiving just outcomes.²⁶¹ Rather, it should also evaluate the number of employers who genuinely know and understand their obligations and, when sexual harassment

250. *National Inquiry* (n 8) 38; Asher Flynn et al, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40(1) *Melbourne University Law Review* 207, 208.

251. Kingsford Legal Centre, Redfern Legal Centre, Women's Legal Service NSW and the National Association of Community Legal Centres, Submission No 450 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (29 March 2019) 33.

252. *Ibid.*

253. *National Inquiry* (n 8) Recommendation 25.

254. *Fair Work Act 2009* (Cth) s 570.

255. Hor (n 217).

256. *Ibid.*

257. Senior Barrister (n 206); Eastman (n 225).

258. Eastman (n 225).

259. *Ibid.*

260. Senior Barrister (n 206).

261. *Ibid.*

occurs, ‘they work out a way through financial settlement or otherwise to properly compensate the person for what’s happened.’²⁶² The senior barrister concluded:

That’s by and large what happens. The meritorious claims for which people have suffered as a result of harassment and otherwise, they do resolve, and they resolve for figures that are often much higher than what they’d get in a court process.²⁶³

This may be so. However, the likely disparity of resources between parties also warrants consideration. Both Bornstein and participants from Harmers stated that one of the primary challenges for individual complainants is going up against large companies with superior resources who attempt to ‘wear the person down.’²⁶⁴ Diamond argued this creates substantial barriers to access to justice.²⁶⁵ It was estimated that by December 2011, Richardson’s legal costs amounted to \$224 475.80.²⁶⁶ As Buchanan J acknowledged at first instance, had Richardson accepted the offer made by Oracle, rather than proceeding to trial, she would still have owed tens of thousands of dollars in legal fees.²⁶⁷ This ‘very disturbing’ situation meant that there was additional impetus to proceed with the claim, regardless of its individual merits.²⁶⁸

On appeal, Richardson was vindicated: the Full Court ordered Oracle to pay Richardson’s costs on an indemnity basis from mid-litigation onwards.²⁶⁹ Despite her ultimate victory, *Richardson* demonstrates the stark financial risk involved in such litigation and the considerable resource disparity between individual complainants and respondents. If the cost of pursuing a meritorious claim is too high, even accounting for damages and a successful costs order, victory for targets of sexual harassment will remain ‘a very high price to pay.’²⁷⁰

I Individualising Sexual Harassment

The current discrimination law framework fails to remedy structural and systemic discrimination by placing the responsibility of combatting sexual harassment largely on the individual.²⁷¹ As currently articulated, the law ignores how sexual harassment is perpetrated, predominately against women, as a manifestation of entrenched hierarchies of power within workplaces that deny women substantive equality.²⁷² The *National Inquiry* heard that a range of factors contribute to the pervasive nature of sexual harassment, including power, gender inequality and gender roles, intersectional discrimination and workplace cultures that promote or tolerate sexual harassment.²⁷³ Sexual harassment has ‘nothing to do with desire’ and everything to do with a society that remains

262. Ibid.

263. Ibid.

264. Bornstein (n 208).

265. Diamond (n 238).

266. *Richardson v Oracle* (n 86) [20].

267. Ibid.

268. Ibid.

269. *Richardson (No 2)* (n 96).

270. Ibid [51].

271. Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (n 27) 429–30.

272. Ibid 424.

273. *National Inquiry* (n 8) [3.4].

deeply patriarchal and discriminatory.²⁷⁴ Thus, as MacKinnon argued, sexual harassment, as it intersects with legal frameworks, should be reconceptualised as ‘a social wrong and a social injury that occurs on a personal level.’²⁷⁵

However, currently, sexual harassment is conceptualised as the misplaced and inappropriate sexual desire of one aberrant individual.²⁷⁶ Under the *AHRC*, only the ‘affected person’ has standing to commence proceedings in a court.²⁷⁷ This means that public interest groups, unions and the AHRC itself cannot bring complaints on behalf of individuals (although the AHRC has previously sought leave to intervene). The individualistic nature of pursuing a claim exacerbates the significant power imbalance between respondents and claimants.²⁷⁸

Participants emphasised that the individualisation of the discrimination law framework creates an imbalance of power between plaintiffs and defendants. Eastman highlighted that self-represented claimants are particularly vulnerable.²⁷⁹ Specifically, self-represented claimants have ‘little awareness of the law and what their case may actually be worth’, a barrier compounded by the existing costs regime and the lack of legal aid available.²⁸⁰ For such claimants, *Richardson* has had a minimal impact on their ability to negotiate for higher damages.²⁸¹

These imbalances of power conflict with the public interest in exposing workplace sexual harassment and the value of creating precedent. As Inness pointed out, the reality is that ‘the burden [of pursuing a claim] sits on the shoulders of the applicant who has to fight that fight . . . It’s an enormous investment of your life and time and energy and health.’²⁸² As a result of this individual investment, Bornstein rejected the precedent-setting approach, emphasising that lawyers should prioritise their client’s best interests, in particular, their mental health.²⁸³ The sexual harassment experienced by *Richardson* occurred in 2008. The Full Court’s judgment was not delivered until 2014. While the decision ultimately had a significant positive impact on judicial approaches to sexual harassment, does that net societal benefit justify the enormous personal cost? Bornstein was emphatic: ‘That’s *six* years. One hundred thousand dollars is not worth six years.’²⁸⁴

J Sexual Harassment Damages are Historically Low

Where sexual harassment matters do make it to the courtroom, the damages awarded are, and have been, low. One explanation is that the pain and suffering occasioned as the result of the conduct is devalued—comparative to compensation in other areas of law—precisely because the conduct is *sexual*.²⁸⁵ As Kenny J observed in *Richardson*: ‘this Court has in the past apparently placed a

274. Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (n 27) 423.

275. MacKinnon (n 15) 173.

276. Ibid 424.

277. *AHRC* (n 57) s 46PO(1).

278. Thornton, ‘The Political Contingency of Sex Discrimination’ (n 62) 319; Thornton, ‘Sex Discrimination, Courts and Corporate Power’ (n 225) 35.

279. Eastman (n 225).

280. Ibid.

281. Ibid.

282. Interview with Jenny Inness (Madeleine Castles, 28 November 2019).

283. Bornstein (n 208).

284. Ibid (emphasis added).

285. The authors acknowledge that it is difficult to make a wholesale comparison between sexual harassment and other areas of law, as courts determine damages on a case-by-case basis, with awards of damages often fact-specific.

greater value on the loss of enjoyment of life outside the anti-discrimination field than in it.²⁸⁶ For example, damages for loss of reputation in defamation typically far exceed damages awarded in sexual harassment litigation. A 2018 UTS study found that 43 per cent of all damages awards in defamation cases between 2013 and 2017 were over \$100 000.²⁸⁷ There are also examples of courts awarding incredibly high values for loss of reputation.²⁸⁸ This discrepancy is unpersuasive. The notion that the harm arising from reputational damage is valued higher than the actual physical and emotional toll experienced by survivors of sexual harassment is a significant injustice.

A similar discrepancy exists between damages awarded in matters concerning sexual harassment and workplace bullying. In *Swan v Monash Law Book Co-operative*, as a result of bullying by a male supervisor, the female plaintiff was awarded \$300 000 in general damages for pain and suffering and loss of enjoyment of life, including isolation from family and friends, and loss of independence and decreased confidence and interest in life.²⁸⁹ In comparison, in *Elliott v Nanda*, the 17-year-old applicant was sexually harassed by her middle-aged employer, including fondling her breasts, patting her on the bottom, trying to kiss her, massaging her shoulders, brushing against her breasts and asking her to tell him if she was raped ‘so he could join in.’²⁹⁰ The court found that, as a result of her ‘traumatic’ employment with the respondent, the applicant was withdrawn, frightened, gained weight, experienced insomnia and her relationships with her partner, family and friends were damaged.²⁹¹ Yet, despite acknowledging the ‘significant and negative impact’ of the conduct as well as her ‘age and comparative vulnerability’, the applicant was only awarded \$15 000 in general damages.²⁹² Even accounting for inflation (the judgments were more than a decade apart), this discrepancy is startling. Further evaluation of comparative awards of damages, with reference to sexual harassment cases, would have considerable utility.

The applicant’s experience in *Elliott* is not atypical. In some state and territory jurisdictions, statutory caps exist for damages awarded for discrimination. In NSW, damages awarded in discrimination complaints are capped at \$100 000, in the Northern Territory damages are capped at \$60 000, while in Western Australia it is \$40 000.²⁹³ Andrades maintains that the very existence of limits on damages are reflective of the diminished value placed on hurt, humiliation, pain, suffering and loss of enjoyment of life occasioned as a result of discrimination.²⁹⁴ In their submission to the *National Inquiry*, the Law Council of Australia similarly emphasised that the value of damages awards ‘provide[s] an important normative statement’ on attitudes to sexual harassment and the

Damages vary considerably, even within defined areas, making it very difficult to benchmark average awards. Despite this, a general comparison provides a useful demonstration of the range of damages awards available to the courts.

286. *Richardson* (n 1) [104].

287. University of Technology Sydney Centre for Media Transition, *Trends in Digital Defamation: Defendants, Plaintiffs, Platforms* (Report, 2018) 5.

288. Most recently, Geoffrey Rush was awarded \$850 000 in general damages, for the ‘devastating . . . hurt to his feelings occasioned by allegations of sexual harassment’: *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, [789], [792].

289. *Swan v Monash Law Book Co-operative* (n 105) [264].

290. *Elliott v Nanda* (2001) 111 FCR 240, [107] (‘*Elliott*’).

291. *Ibid* [173].

292. *Ibid* [178].

293. *Anti-Discrimination Act 1977* (NSW) s 108(2)(a); *Anti-Discrimination Act 1992* (NT) s 88(1)(b); *Anti-Discrimination Regulations 1994* (NT) reg 2; *Equal Opportunity Act 1984* (WA) s 127(b)(i).

294. Carol Andrades, ‘What Price Dignity?—Remedies in Australian Anti-Discrimination Law’ (Research Paper 13, Parliamentary Library, Parliament of Australia, 12 May 1998).

serious negative impact on targets.²⁹⁵ While statutory caps at the state and territory level do not impact federal sexual harassment litigation pursuant to the *SDA*, they do create a culture that systemically devalues the serious physical, psychological and financial consequences of sexual harassment.²⁹⁶ The *National Inquiry* recommended that NSW, NT and WA review the justification for caps on damages and consider removing them, in order to reflect the federal jurisdiction.²⁹⁷

Participants gave various reasons as to why damages have historically been assessed at the lower level by courts. Eastman and the senior barrister suggested that the cases that reach the court often lack merit.²⁹⁸ Allen and Blackham's research supports this contention, albeit in respect of discrimination claims more generally. They suggested that weak, spurious and vexatious cases routinely make it to the courtroom, creating a misleading picture of the nature of sexual harassment.²⁹⁹ This may be one explanation for the persisting number of discrimination matters with very low awards of general damages; 43 per cent of matters examined resulted in awards of damages of \$10 000 or less.

Furthermore, low levels of reporting conceal the true extent of sexual harassment in Australian workplaces. Only 17 per cent of those who experience sexual harassment choose to formally report it.³⁰⁰ While targets do not report for a multiplicity of reasons, one suggested reason is that women may not report because they do not deem the conduct as serious enough to consider it as sexual harassment.³⁰¹ Society's preoccupation with the most egregious, explicitly sexualised acts means that less 'severe' sexism and inequality experienced daily by working women, such as insults, jokes and taunts, is often trivialised, ignored and dismissed because it is insufficiently *sexual*.³⁰² By extension, individuals may accept inappropriate behaviour as the cost of working in a male-dominated workplace.³⁰³ Hor pointed out that 'it still remains the case that a lot of people will just move on from a place of work where they are harassed . . . because if you're early on in your career, the fear of the taint is too strong.'³⁰⁴ The AHRC found that the inappropriate behaviour most commonly experienced in the workplace—offensive and sexually suggestive comments or jokes, intrusive questions and inappropriate staring—were the least likely to be reported.³⁰⁵

In contrast, more 'serious' incidents of sexual harassment—sexual assault or rape and sexually explicit or indecent email or phone communication—have a low incidence but a high level of reporting.³⁰⁶ A disproportionate focus on the most egregious forms of sexual harassment overlooks pervasive, 'everyday' sexual harassment. As Harmer emphasised, the 'few cases that get talked up are literally the tip of the iceberg. Sexual harassment is still happening to a level

295. Law Council of Australia, Submission No 249 to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) [111].

296. For a detailed analysis of the serious impacts of sexual harassment, see *National Inquiry* (n 8) 257–98.

297. *National Inquiry* (n 8) 45.

298. Senior Barrister (n 206); Eastman (n 225).

299. Allen and Blackham (n 77) 399–400.

300. *Everyone's Business* (n 7) 67.

301. Sara Charlesworth, Paula McDonald and Somali Cerise, 'Naming and Claiming Workplace Sexual Harassment in Australia' (2011) 46(2) *Australian Journal of Social Issues* 141, 154–5.

302. Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (n 27) 442–3.

303. *Ibid* 154–5.

304. Hor (n 217).

305. *Everyone's Business* (n 7) 68.

306. *Ibid*.

which is abjectly unacceptable.³⁰⁷ Not only is the current system failing targets of ‘severe’ sexual harassment, it is also concealing the pervasive nature of ‘everyday’ sexual harassment in Australia. Despite #MeToo and the gains that have been made, for many, sexual harassment remains, as it was for MacKinnon in the 1970s, an ‘unspeakable’ experience for which there is ‘no name.’³⁰⁸

K ‘Prevailing Community Standards’

Courts and tribunals’ acknowledgement of broader community standards is a positive step towards addressing these deficiencies. Put simply, since *Richardson* and more-so post-#MeToo, society increasingly understands and considers sexual harassment to be a serious wrong, which requires proportionate compensation. However, it is unclear whether the current anti-discrimination law framework facilitates this. As presently formulated, courts principally assess loss through the lens of tort law.³⁰⁹ Hor emphasised that while *Richardson* saw a high general damages award, its impact should be contextualised to represent that ‘it is possible to get a high general damages award, as opposed to meaning you will always have a high general damages award.’³¹⁰ This goes some way in explaining the minimal increase in the average award of general damages in the doctrinal research. While higher general damages are available, this is still dependent on the context and the facts of the case and the claimant’s ability to prove not only that they were sexually harassed but that they also incurred significant physical or psychological damage.

For example, in *McGuire v Reyes t/as The Entrance Lakehouse*, the case with the lowest award of general damages for sexual harassment identified in the doctrinal research, the applicant’s reliance on *Richardson* failed primarily due to a lack of evidence.³¹¹ NSWCAT emphasised that the applicant did not provide any reports from a qualified specialist, GP, psychologist or psychiatrist to demonstrate a relapse of her mental illness.³¹² In the absence of such evidence, the Tribunal could only rely on the applicant’s own evidence that the sexual harassment had caused her significant distress.³¹³ She was awarded \$6000 in general damages.³¹⁴

Thus, although the *SDA* does not require plaintiffs to prove disadvantage—as sexual harassment in and of itself constitutes discrimination—the assessment of damages in sexual harassment matters remains tied to actual disadvantage. Specifically, the current paradigm struggles to assist a plaintiff who has experienced sexual harassment but cannot demonstrate a sufficiently serious recognisable physical or psychiatric harm. Therese MacDermott has suggested that the assessment of damages should move away from focusing solely on individual compensation towards recognising a perpetrator’s wrongdoing that warrants punishment.³¹⁵ Similarly, Gaze has highlighted that for many complainants, compensation is not the only goal of pursuing a matter, rather they may seek to ‘reject victimhood, and . . . the employer’s acknowledgment of wrongdoing and

307. Harmer (n 207).

308. MacKinnon (n 15) 27.

309. *Hall v A & A Sheiban Pty Ltd* (n 50) 238–9 (Lockhart J).

310. Hor (n 217) (emphasis added).

311. *McGuire v Reyes t/as The Entrance Lakehouse* [2017] NSWCATAD 50, [59].

312. *Ibid.*

313. *Ibid.*

314. *Ibid* [61].

315. MacDermott (n 3) 158.

commitment to change its practices to prevent repetition.³¹⁶ The suggestion is that punitive or exemplary damages will not only acknowledge the wrongfulness of the conduct but also have a deterrent effect.³¹⁷ If it is accepted that community expectations have continued to evolve in the post-*Richardson*, post-#MeToo era, it is worthwhile considering whether sexual harassment damages should be informed by a punitive rationale.

Such a shift would be radical. Punitive damages have previously been rejected in this context. In *Wotton v Queensland (No 5)*, Mortimer J held that the court did not have the power to award exemplary damages in discrimination matters, stating that the *AHRCA* was ‘not a regime designed to punish, or confer any deterrent or punitive functions on a court by its orders.’³¹⁸ Similarly, some participants did not support a move to punitive damages. Eastman argued that damages should be tied to compensating for harm caused, rather than punishment for a failure to meet community expectations.³¹⁹ Punishing workplaces for the aberrant behaviour of one or more of their employees raises difficult questions, particularly in relation to vicarious liability. However, while sexual harassment is perpetrated by an individual, passivity and sustained inaction on the part of organisations have created workplace cultures that permit sexual harassment to occur, unimpeded.³²⁰ Anti-discrimination law in Australia is therefore grappling with an identity crisis: Is the role of anti-discrimination law to provide redress for individual complainants against an individual perpetrator? Or should anti-discrimination law engage in law reform to address systemic injustice? This tension requires renewed consideration in the #MeToo era.

L Potential for Systemic Change?

The principal object of the *SDA* is to systemically ‘eliminate, so far as is possible, discrimination against persons on the ground of sex’,³²¹ including to eliminate ‘discrimination involving sexual harassment’.³²² These stated goals imply a social change objective.³²³ However, despite the introduction of the *SDA* over 30 years ago, sexual harassment and sex-based discrimination remain pervasive.

Yet, participants emphasised that, while the central objects of anti-discrimination law may be systemic change, the current legal structures are ill-equipped for this purpose. Eastman pointed out that, as is, the *SDA* is not designed for law reform.³²⁴ According to her, while #MeToo may have given applicants more coverage and achieved greater awareness, the actual legal structures have not changed.³²⁵ This asynchronous development has left potential claimants with a ‘lack of understanding about what sexual harassment means legally, resulting in sensationalist claims and

316. Gaze, ‘Damages for Discrimination’ (n 62) 23.

317. Ibid; MacDermott (n 3) 158. Note, although available in discrimination cases, aggravated damages are directed at ‘compensat[ing] the victim for damage occasioned by the defendant’s aggravating conduct and not to punish the defendant’: Raper (n 64) 100.

318. *Wotton v Queensland (No 5)* [2016] FCA 1457, [1788].

319. Eastman (n 225).

320. MacDermott (n 3) 159–60.

321. *SDA* (n 34) s 3(b).

322. Ibid s 3(c).

323. Dominique Allen, ‘Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria’ (2009) 18(3) *Griffith Law Review* 778, 789.

324. Eastman (n 225).

325. Ibid.

a very large gap between the social movement and how the law actually works.³²⁶ Specifically, Eastman emphasised, there is a risk of becoming ‘so consumed with the social justice objectives’ that cases are litigated despite an absence of legal merit.³²⁷ Community standards should not provide compensation for cases that lack merits.³²⁸ Eastman concluded: ‘the job of the courts is to administer the law, not to engineer social change. Once you start to do that, you undermine the effectiveness of the law.’³²⁹

If courts remain an inappropriate and inaccessible forum, the onus shifts to the ability of settlement negotiations to provide for systemic change. While Kenny J emphasised that ‘community expectations’ have shifted, employer motivations largely have not. Existing remedies seek to provide one-off solutions for claimants, rather than institute systemic or structural change in an organisation.

Furthermore, participants emphasised that, rather than being guided by the community’s heightened awareness of sexual harassment and its harms, settlement amounts are often calculated in relation to reputational damage. As the senior barrister pointed out, ‘respondents will often pay a lot more for confidentiality than the person would ever get in a court proceeding.’³³⁰ The extent of incidents of sexual harassment within both individual workplace and broader society therefore remains obscured. Organisations have little incentive to introduce structural reforms. Furthermore, individual compensation is a narrow remedy; it addresses sexual harassment as an isolated incident, rather than responding to structural policies and practices from which the specific event emerged.³³¹ Pre-*Richardson* levels of damages did little to deter respondents and their employers, and even a raise in potential damages to \$100 000 did not, according to participants, significantly impact employer behaviour. As Grover stated:

[Employers] are more motivated to act on, to mitigate, to adopt better governance practices, to do better reporting, to train, to do all of those things, the whole package of preventative medicine, but I don’t think it’s because of *Richardson*. It’s not because they’re saying ‘we might have had to pay 30 grand and now it might be 100’—that’s not a material difference. It’s more about reputation damage, PR impacts, media, high profile executives who have been the subject of sexual harassment complaints.³³²

When they do respond, organisations often achieve little structural change. As Eastman noted, the #MeToo stories that gain publicity involve high-profile complainants.³³³ She emphasised that the resolution of a high-profile claim has different implications. For example, a complainant working full-time for a large corporate entity may have greater incentive to remain in their job; there are realistic prospects of contributing to systemic change, with the company changing policies and practices, or appointing more women to senior positions.³³⁴ Individuals in short-term casual employment have far less incentive to push for systemic change within an

326. *Ibid.*

327. *Ibid.*

328. *Ibid.*

329. *Ibid.*

330. Senior Barrister (n 206).

331. Allen, ‘Remedying Discrimination’ (n 78) 88.

332. Grover (n 209).

333. Eastman (n 225).

334. *Ibid.*

organisation.³³⁵ They also have less bargaining power.³³⁶ While #MeToo is undeniably a factor in raising the profile of sexual harassment, its actual impact on the anti-discrimination space appears to be qualified. Bornstein said:

There are still cases fought viciously and still many cases where it feels like nothing much has changed... it's still a complex beast and it still doesn't mean that companies and employers will address these cases differently. It can still be terribly slow, terribly damaging. There can still be spurious defences being conducted. There can still be an attempt to wear the person down with superior legal resources. Those who think it's a nirvana post-#MeToo are in for a rude shock. I have some doubt about whether #MeToo has had such a big impact as some people might think.³³⁷

Participants indicated that unless Australian courts began handing out far higher awards of damages in anti-discrimination matters, employers will have little financial incentive to address sexual harassment. Reputational damage and corporate social responsibility will remain the primary drivers for employer behaviour.

M Beyond Richardson

Richardson's legacy remains contested. It helped bridge the gap between damages in sexual harassment and those in other areas of law. It signified an acknowledgement by courts that a victim's pain and suffering experienced as a result of sexual harassment is tangible, serious and worthy of real compensation. As Diamond noted, *Richardson* recognised the 'grief and disruption of life and the things that general damages compensate people for, were real, for people who experience sexual harassment, and that they weren't to be discounted because they arose in that sphere.'³³⁸ The law has a legitimate, if perhaps narrow, role to play in contributing to social change in this space. For those able to bring a claim, *Richardson* has helped level the playing field, by providing greater prospects of higher settlements and increased damages awards. For an individual who experiences sexual harassment, this may go some way to helping them reclaim autonomy over their life.

However, this is only a 'drop in the ocean.'³³⁹ The law is not a panacea for workplace sexual harassment. As currently formulated, Australia's sex discrimination law framework is ill-equipped to bring about systemic change. Unless broad legislative change is adopted, litigation under the *SDA* will continue to play a limited role in bringing about tangible change. According to Bornstein: 'Law is really only a small part of the jigsaw. It's a much broader issue; lawyers have been litigating sexual harassment cases for decades now. They'll continue to do so.'³⁴⁰ However, he emphasised that while sexual harassment is a legal issue and a workplace issue, it is also a societal issue, inherently linked to inequality, gender, power and hierarchy.³⁴¹ Lawyers, the courts and workplaces can, and should, strive to handle complaints of sexual harassment better. Issues around

335. Ibid.

336. Ibid.

337. Bornstein (n 208).

338. Diamond (n 238).

339. Harmer (n 207).

340. Bornstein (n 208).

341. Ibid.

confidentiality, costs and the accepted ‘range’ of damages require ongoing interrogation. A collective obligation to protect targets of sexual harassment requires this much. This being said, as Bornstein finally emphasised, ‘the real gains are going to occur with broader political and social change.’³⁴² As more individuals stand up, speak out and exclaim ‘#MeToo’, the voices of sexual harassment survivors must be heard, not only by our workplaces, our lawyers and our courts but by the whole of society.

VI Conclusion

On 5 March 2020, the AHRC published the *National Inquiry, Respect@Work*.³⁴³ Across almost 1000 pages, the report exhaustively detailed the alarming prevalence of sexual harassment in Australian workplaces, its personal and economic toll and the failure of existing mechanisms to effectively address the pervasive phenomena. As Sex Discrimination Commissioner Jenkins observed in her foreword, ‘[t]he current legal and regulatory system is no longer fit for purpose.’³⁴⁴ The AHRC recommended wholesale reform to improve ‘coordination, consistency and clarity’ between various legal schemes intended to address harassment.³⁴⁵ At the time of writing, the Australian government was yet to formally respond to the report.

The AHRC’s findings and recommendation must be confronted. In undertaking a comprehensive review of *Richardson*’s jurisprudential and practical legacy, this article hopes to assist in efforts to improve the ways in which Australian law prohibits, prevents and provides remedies following sexual harassment. In its report, the AHRC called for further research on sexual harassment damages, focused on ‘whether current damages reflect contemporary understandings of the nature, drivers, harms and impacts of sexual harassment.’³⁴⁶ This article has sought to do just that.

It found, via an analysis of cases to substantively consider *Richardson*, that Kenny J’s landmark judgment contributed to an elevation in the typical range of general damages awarded in sexual harassment litigation. The Full Federal Court’s unequivocal endorsement of *Richardson* as a ‘point of departure’, in the most recent case to cite the judgment at the time of writing, suggests this elevation will continue.³⁴⁷ *Richardson*’s legacy is not limited to sexual harassment—the case has been endorsed in a range of anti-discrimination and employment law contexts. However, *Richardson*’s positive legacy is not absolute—it has been disregarded in numerous Queensland decisions, and sometimes distinguished on the facts. More broadly, while there is a perceptible post-*Richardson* rise in damages, the decision’s influence in absolute dollar terms is modest.

This doctrinal analysis was supplemented by qualitative interviews with practitioners in this field. These discussions provided a more complex picture of *Richardson*’s legacy in the #MeToo era. While *Richardson* has contributed to an increase in compensation sums provided via settlement agreements, participants were sceptical of the case’s broader, systemic impact. The research identified, particularly from the practitioner’s perspective, a range of barriers to the existing system

342. Ibid.

343. *National Inquiry* (n 8).

344. Ibid 10.

345. Ibid.

346. Ibid 29.

347. *Hughes v Hill* (n 131).

acting as a tool for achieving wider social change. *Richardson* may have been a step forward, but Australia remains a long way from effectively addressing workplace sexual harassment.

Six years after *Richardson*, Harvey Weinstein was convicted of rape and sentenced to 23 years in prison.³⁴⁸ The allegations against him sparked global recognition of the endemic and pervasive nature of sexual harassment. However, the #MeToo movement is far from over. In the Australian context, in June 2020, multiple women broke their silence, alleging sexual harassment at the hands of former High Court Justice Dyson Heydon.³⁴⁹ The allegations against Heydon have forced a re-evaluation of the inescapable and ubiquitous presence of sexual harassment in society. The hurt and humiliation experienced by survivors of sexual harassment, acknowledged by Kenny J years earlier, has now become an undeniable part of Australia's collective consciousness. As Inness observed: 'There's an acknowledgement that this is just not good enough anymore. It is not good enough to protect perpetrators and pay somebody off and just get on with business. The community will not tolerate it anymore.'³⁵⁰ With her landmark decision, Kenny J changed the course of sexual harassment law in Australia. But the movement for change has only just begun. How society will respond to this fundamental shift in community expectations will be determined, not only in our courtrooms but importantly in our homes, our communities, our workplaces and our parliaments. The AHRC *National Inquiry* noted: '[w]orkplace sexual harassment is not inevitable. It is not acceptable. It is preventable.'³⁵¹

At the end of his interview with the authors, Bornstein mused:

[T]he lawyers and the courts apply band-aids. Power is redistributed by blood, sweat, tears, struggle, polemicists, protestors, fights. It is ugly, brutal and awful. It is not about going and having tea and scones in corporate boardrooms. We did not get the eight-hour day or the women's vote or superannuation through tea and scones.³⁵²

348. Jan Ransom, 'Harvey Weinstein's Stunning Downfall: 23 Years in Prison', *The New York Times* (online, 11 March 2020) <<https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html>>.

349. Kate McClymont and Jacqueline Maley, 'High Court Inquiry Finds Former Justice Dyson Heydon Sexually Harassed Associates', *The Sydney Morning Herald* (online, 22 June 2020) <<https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html>>.

350. Inness (n 282).

351. *National Inquiry* (n 8) 10.

352. Bornstein (n 208).