SEXUAL HARASSMENT AND THE CORPORATION IN AUSTRALIA AND JAPAN: THE POTENTIAL FOR CORPORATE GOVERNANCE OF HUMAN RIGHTS

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INTRODUCTION

Corporations are undergoing a subtle transformation. Usually regarded as investment vehicles for shareholders, corporations are now assuming an additional identity—as entities which share responsibility for upholding human rights. This new identity does not sit comfortably with conventional wisdom on corporate governance. Traditional corporate governance theory, based on nineteenth century notions of trust, posits that 'the company' is a legal entity embodying the members from time to time. Directors, as trustees of corporate assets, owe duties to foster the interests of the shareholders by maximising their investments. Under this view, directors do not owe wider obligations to society.

This traditional understanding, however, is beginning to yield to more recent legal and social pressures. Legal developments in regulatory practice, in combination with an upsurge in social movement activism, is now forcing corporations to accept that they are more than mere economic entities. They are also private 'governments'—

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3 I Trethowan, "Director's Personal Liability to Creditors for Company Debts" (1992) 20 ABLJ 41 at 43.

4 Ibid at 41.

5 Neo-institutionalism in economics also sees the corporation as more than an economic entity. For an economic theory of the corporation that also sees the corporation as a
social and political entities with the ability to exercise general powers over themselves and, more importantly, over others. As Selznick points out, "management and governance coexist and interact. An organization that tries to be instrumentally single-minded, guided wholly by norms of purposive rationality, nonetheless finds itself faced with more comprehensive obligations." Corporations are increasingly acknowledging these broader social responsibilities (including those relating to human rights).

But should corporations play a part in upholding human rights? And, if so, how can corporations be effective in this role? In this article, we apply a comparative lens to answer these questions. We focus on one area of human rights—the right to work in a workplace free of sexual harassment—and contrast the experiences of Australian and Japanese corporations in assuming responsibility for sexual harassment. By so doing, we aim to identify the conditions in which corporate governance might be an effective way of advancing human rights within the corporation.

Our choice of case study is deliberate. To work in an environment free of sexual harassment is an inviolable human right. The Vienna Declaration prepared by the 1993 World Conference on Human Rights made this clear when it characterised sexual harassment as a human rights violation "incompatible with the dignity and worth of the human person". Similar reasoning is entrenched in most modern legal systems. In Australia, for example, sexual harassment is specified as sex discrimination in the workplace. In Japan, sexual harassment is regarded as an unlawful interference with the "personal rights" of women.

For example, A Jay, Management and Machiavelli: Power and Authority in Business Life (1987); R Dahl, "A Prelude to Corporate Reform" (1972) Business and Society Review 17; J Parkinson, Corporate Power and Responsibility: Issues in the Theory of Company Law (1993). Sometimes corporations can exercise power over people who did not even choose to enter into a contractual (or property) relationship with the company or had little bargaining power in doing so.


The right to work or study in an environment free of sexual harassment is usually regarded as part of the human rights of women. See E Defeis, "The Role of International Law in the Twenty-First Century: Women's Human Rights: The Twenty First Century" (1995) 18 Fordham Int’l L J 1748 at 1748-9. The main reason sexual harassment is regarded as an abuse of the human rights of women is that an overwhelming majority of victims are women. For the situation in Japan, for example, see A Okuyama, Shokuba ni Okeru Sekushu Harasumento [Sexual Harassment in the Workplace] (1999) at 9-13.


E Defeis, above n 10 at 1748-9.


See, for example, the Fukuoka Sexual Harassment case, Judgment of 16 April 1992, Fukuoka District Court, (1992) 783 Hanrei Taimuzu 60.
Our approach to our case study, however, is unusual. Although our approach is apparently comparative (in the sense that we seek to contrast the regulatory responses to sexual harassment in Australia and Japan), our article is not ‘classic’ comparative law. True comparative law, Reitz asserts, "involves explicit comparison of aspects of two or more legal systems". In this article, however, our aim is to develop—and test—a model for the successful corporate governance of human rights. We use the available data on Australian and Japanese sexual harassment law and practice to this end. Our method, therefore, is not to compare the different regulatory regimes in Australia and Japan with each other, but rather with our working model of corporate governance. To the extent that this approach confuses, irritates or offends traditional comparativists, we make no apologies. Our own 'spin' on comparative methodology helps us in our objective to advance corporate governance theory. By utilising the experiences of both Australian and Japanese corporations, we believe we can provide a more nuanced picture of the possibilities and pitfalls in entrusting corporations with human rights issues.

Thus, we will show that, in Australia, a combination of sexual harassment law and publicity about breaches of the law appears to have achieved some modest success in giving anti-discrimination rights an impact on corporate governments. This serves as a useful starting point from which to develop a working model on the effective intra-corporate management of sexual harassment. However, when we apply this model to the position in Japan, we observe some disadvantages to relying on corporate governance to regulate sexual harassment. This leads us to the view that corporate governance of sexual harassment issues specifically (and of human rights issues more generally) is possible—but only if there is strong public consciousness of the existence of the relevant right, an influential and ongoing social movement supporting it, and a strong legal regime holding individuals and companies accountable for breaches.

In the first part of this article, we explore the legal and social undercurrents in Australia and Japan which are encouraging corporations to embrace broader social responsibilities. We trace the divergent paths that Australian and Japanese companies and their management are taking towards a new culture of 'corporate citizenship'. In the second part, we turn to our case study—sexual harassment—and its regulation within Australian corporations. We note how large Australian companies have adopted sexual harassment policies with some modest successes, and uncover the legal and social conditions that have led to these results. By combining this with scholarly research and theory on business regulation, we propose a model for determining when corporate governance of sexual harassment is likely to be effective. In the third part, we test this model by reference to the experience of sexual harassment in Japan, a

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15 What amounts to comparative law is a debate with widely divergent views. As Demleitner correctly observes, there is an "apparent lack of a common core or a common purpose of comparative law". N Demleitner, "Challenge, Opportunity and Risk: An Era of Change in Comparative Law" (1998) 46 Am J Comp L 647 at 651.

16 J Reitz, "How to Do Comparative Law" (1998) 46 Am J Comp L 617 at 618. As Reitz observes, this apparently obvious statement is not without controversy. Some, for example, argue that comparative law may also be "implicitly" comparative. See D Foote, "The Roles of Comparative Law" (1999) 73 Wash L Rev 25 at 26.

country of which it is often thought that the culture/institutions of authority are often too quick to resolve potential disputes 'consensually' before they have a chance to enter the public sphere. In the final section, we draw some conclusions about what the experience of corporate implementation of management of sexual harassment might mean for other areas of human rights.

1. CORPORATE GOVERNANCE AND HUMAN RIGHTS: RECENT TRENDS IN AUSTRALIA AND JAPAN

In the 1990s, two trends are encouraging directors and top managers to see, at least tentatively, that corporate social responsibilities are part of their corporate governance obligations: (1) formal legal techniques for making senior managers and directors accountable for failures; and (2) public scrutiny and social movement activism.

Legal techniques

The legal path to incorporating social responsibilities into the duties of corporate management relies on two legal techniques. The first is a generally increased emphasis on broader corporate governance responsibilities. In the AWA case, the Supreme Court of New South Wales found that both the CEO and non-executive directors of a company could be found negligent for failing to ensure adequate internal controls were put in place to protect against losses due to foreign exchange dealings. The case made it very clear that directors are individually responsible, not just for setting broad policy, but also for taking an active interest in ensuring adequate corporate governance systems to bring the company into compliance with policy. In theory, at least, this decision leaves the way open for directors to be held personally responsible for corporate failures that result in breaches of a variety of laws and regulations (including those that explicitly or implicitly protect human rights such as health and safety regulation and anti-discrimination regulation). Certainly, the anecdotal evidence is strong that many directors and senior managers are now very concerned to ensure they have more detailed internal control and compliance systems in place to make sure they are meeting the requirements of not only the Australian Corporations Law but also the Trade Practices Act 1974 (Cth) and other regulations.

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18. There is some quantitative empirical evidence to support this. For example, see J Sanders, V L Hamilton and T Yuasa, "The Institutionalization of Sanctions for Wrongdoing Inside Organizations: Public Judgments in Japan, Russia and the United States" (1998) 32(4) L & Soc’y Rev 871, who find that Tokyo-based respondents to a survey about appropriate sanctions for organizational wrongdoing more often suggested restorative sanctions should be applied to the organization (eg, an apology) than did Russian and US respondents.

19. Daniels & Ors v AWA (1995) 13 ACLC 614. AWA decided to hedge against foreign currency fluctuations by forward purchases of foreign currency against contracts for imported goods. The company lost over $49 million, although the accounts appeared to show they had made a substantial profit. The company's management had relied on one person to control the dealing, and on the external auditors to check what went on. The management failed to set up an adequate system of internal control and record keeping, and did not act upon the failures in internal controls that were brought to its attention by the auditors.

20. This is a line of reasoning that the Delaware Court of Chancery has taken in the influential case of In Re Caremark International Inc. Derivative Litigation, 698 A 2d 959 (1996). See J Hill, "Deconstructing Sunbeam—Contemporary Issues in Corporate Governance" (1999) 17 C&SLJ 288.
In Japan, the legal mechanism for broadening directors’ duties lies in Article 266-3 of the Commercial Code. This article provides that directors are personally liable to third parties for losses sustained as a result of intentional or grossly negligent dereliction of duties. In the 1969 case of Mutō v Izuo Kōkai KK, the Supreme Court held that article 266-3 was a special provision designed to protect third parties (especially creditors) and that it operated in addition to, not in combination, with any civil law tort requirements. Third parties could seek compensation under article 266-3 for their losses, whether directly or indirectly caused. In seeking damages, third parties need only prove that the directors exercised bad faith or gross negligence when performing their duties to the company; it is unnecessary to establish any further illegality in the more immediate relationship between the third party and the director. The voluminous case law on article 255-3 has focused on balancing directors’ responsibilities to protect third parties with their broader discretion to take business risks. However, at least in theory, the courts would not allow a discretion to act if a business decision amounted to a violation of a law or the Articles of Incorporation. In such a case, an injured third party could invoke article 266-3 to seek compensation directly from the directors. This possibility throws open personal liability for directors of Japanese companies if a breach of a law or regulation—including those relating to anti-discrimination, environmental management and product safety—results in losses. Following the collapse of the bubble economy in the early 1990s and the banking crisis in the mid to late 1990s, many corporations are becoming increasingly sensitive to such a risk. As a result, since about 1998, a number of Japanese corporations and financial institutions have begun establishing internal compliance policies and systems to meet their responsibilities under the Civil Code, Commercial Code, banking and finance laws, environmental statutes and labour legislation.

The second legal technique by which directors and managers are being held accountable for social responsibilities is via strict vicarious liability for regulatory offences coupled with the availability of ‘due diligence’ defences or damages discounts

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22 Law No. 48 of 1899.
24 Article 709 of the Civil Code provides for tort liability for negligence. The Supreme Court in Mutō’s case held that Article 266-3 of the Commercial Code is not to be interpreted subject to article 709 of the Civil Code.
30 Ibid.
for having in place a system to prevent breaches. Due diligence defences allow directors and top management to escape personal liability for a regulatory offence committed by an agent of the corporation if they can show they had in place an effective internal control or compliance system to prevent the breach occurring.

'Due diligence' type defences abound in Australian law. For example, many pieces of environmental legislation deem directors and managers directly liable for high financial penalties or even prison sentences if the company is found guilty of environmental offences, unless they can prove that a defence such as due diligence applies. Similarly, in trade practices regulation, the courts will discount the damages payable by the company and top managers where an effective compliance system is in place. The Australian Competition and Consumer Commission regularly negotiates settlements and/or damages on this basis. In anti-discrimination regulation, top managers cannot be made personally liable unless they were personally involved in the incident. However, the company can be made vicariously liable, in which case they may invoke due diligence defences either in formal court proceedings or in informal negotiations with anti-discrimination regulators.

In Japan, by contrast, the concept of 'due diligence' has yet to be entrenched in legislation, but its potential is currently of great interest to legal scholars. For example, some scholars forecast that Japanese corporate governance law will soon move in the direction taken by United States law and embrace 'due diligence' as the tool for testing directors' liability for regulatory breaches. Others predict developments in Japanese vicarious liability law. In form, this law provides corporations immunity from liability for the transgressions of employees if they take sufficient care assigning and supervising employees; in practice, however, no Japanese court in the postwar era has ever granted this exemption. This may possibly change with the advent of comprehensive corporate compliance policies and programs.
Social activism

The second path by which social responsibilities are entering the internal management of companies is via scrutiny of corporate activities by media outlets and activist groups. Public disclosure of corporate scandals has been especially important in driving this development. In recent years, the public's attention has been drawn to scandals on a range of issues: from ethical investments and payments, health and safety, financial responsibility and the environment; to workers' rights, discrimination, relations with indigenous communities, and entanglement with corrupt political regimes. Negative publicity has made top managements of targeted companies see social responsibility as a priority for practical reasons of public relations and brand image, even if liability is not technically a legal issue.

Corporate Japan has been especially susceptible to this trend. In the post-bubble recession which has gripped the Japanese economy for most of the 1990s, a series of corporate failures and banking scandals have severely tarnished the image of many Japanese businesses, both domestically and internationally. The financial sector's inability to contain bad debt, culminating in the collapse in November 1997 of Japan's tenth largest bank, Hokkaido Takushoku Bank, and fourth largest broking firm, Yamaichi Securities Corporation, led to a widespread loss of confidence in the Japanese financial system. Multi-billion dollar bailouts of financial institutions, such as Cosmo and Kizu Credit Unions and Hyogo Bank, and a string of insolvencies involving major corporations fuelled further public outcry. Reports of corporate excesses quickly filled the pages of newspapers: corporations expending lavish sums 'entertaining' public officials; securities brokers unlawfully covering the financial losses of their clients; company directors paying the mafia (sokaiya) to control annual general meetings of shareholders. With Japan still struggling to escape its longest recession since the war, corporations are looking to embrace 'compliance' programs to restore the public's faith in their businesses.

Outside of Japan, chemical companies and mining companies often bear the brunt of negative media attention. Consider, for example, BHP and Ok Tedi, Shell in Nigeria.
and the North Sea, Esso (Exxon) at Longford. But a number of companies are also coming under scrutiny on human rights issues, most notably clothing companies such as Nike, Levis and Disney for using local sweatshop labor or overseas under-age and under-paid labour. The result of this trend is that, globally, a number of very large companies are joining voluntary initiatives or hiring consultants with the aim of pursuing or appearing to pursue a 'triple bottom line'—financial sustainability, social sustainability and environmental sustainability. For example, the World Business Council for Sustainable Development which explicitly embraces the 'triple bottom line' approach includes members such as Australian mining companies BHP and WMC and international giants Dow, DuPont, General Motors, Procter & Gamble, Johnson & Johnson and Monsanto. After its experience of public outcry and brand value diminution over its proposed disposal of the Brent Spar in the North Sea, Shell withdrew from the Global Climate Coalition (a United States-based industry body dedicated to campaigning against regulatory measures to limit greenhouse gas emissions) and hired the consultants SustainAbility to help them consult with stakeholders and build a triple bottom line approach. In Australia companies like BHP and WMC are competing with each other to produce fuller and better 'triple bottom line'-type environmental reports that detail environmental and social responsibility management activities over a variety of areas.

2. 'SETTING UP' A MODEL FOR CORPORATE GOVERNANCE OF HUMAN RIGHTS: SEXUAL HARASSMENT AND THE AUSTRALIAN CORPORATION

Sexual Harassment and Corporate Compliance in Australia

In corporate Australia, compliance with sexual harassment law seems to be firmly on management's agenda. The evidence points to larger Australian companies devoting management attention to preventing sexual harassment, resolving grievances and disciplining wrongdoers. According to the anecdotal evidence of private lawyers and regulators, companies are regularly hiring lawyers and consultants to help implement sexual harassment policies and conduct inhouse training sessions. While in earlier cases, recipients of unwanted sexual attention and harassment were often forced to resign, now the person found by an internal corporate discipline system to have perpetrated an act of sexual harassment is likely to be dismissed. Sexual harassment complaints made against medium or large sized companies are more likely to be either conciliated successfully by the Human Rights and Equal Opportunity Commission (HREOC) or resolved even before a formal complaint to HREOC is lodged. Large corporations rarely go to court or to tribunal hearings on sexual harassment matters;

See for example, C Ronalds, "Sexual Harassment and Unfair Dismissal", unpublished paper, Sydney (on file with Christine Parker). This opinion is consistent with Parker's 1997 interviews with equal opportunity officers and lawyers responsible for sexual harassment policies in some of Australia's leading financial institutions. Each institution had dismissed people for sexual harassment in the last few years. Other respondents to complaints had voluntarily resigned when a formal investigation was commenced because they knew dismissal was a likely outcome. See C Parker, "How to Win Hearts and Minds: Corporate Compliance Policies for Sexual Harassment" (1999) 21(1) Law & Policy 21.
they now prefer to deal with incidents of harassment internally or to settle with a 
payout if the internal grievance system is exhausted.48

Over the last five or six years, both HREOC and state discrimination agencies, such 
as the New South Wales Anti-Discrimination Board (ADB), have received numerous 
requests for assistance from companies wishing to set up anti-discrimination policies. 
A majority of the requests concern sexual harassment policies in particular.49 In 
response to the demand, HREOC has published a general sexual harassment code of 
practice; it has also prepared a specific guide for educational institutions.50 The ADB 
has published guidelines and sample sexual harassment policies, grievance handling 
procedures and staff surveys to help employers prevent harassment and handle 
complaints. The ADB also offers consultancy and training services for organisations on 
sexual harassment and other aspects of anti-discrimination.51 Demand is high enough 
among Australian corporations to sustain a variety of other publications aimed at 
helping corporate legal and equal opportunity advisers set up sexual harassment 
policies.52

Some systematic quantitative evidence shows that Australian corporate 
managements are seriously addressing sexual harassment—and that they are doing 
better in this area than in other areas of gender discrimination. An Affirmative Action 
Agency (AAA) analysis of corporate equal employment opportunity performance 
found that 70 per cent of all organisations reporting to the AAA already had sexual 
harassment complaints resolution procedures in place by 1994, and that this had 
increased to over 85 per cent by 1996.53 These companies' sexual harassment policies 
were not merely confined to formal, document-based disciplinary and grievance 
handling procedures. Between 1994 and 1996, there was a 25 per cent increase among 
organisations in male-dominated and gender-mixed industries self-reporting that they 
proactively sought to prevent sexual harassment by providing training to management 
and staff. By 1996, 64 per cent of these organisations provided training to staff on

50 Ibid. See also Sex Discrimination Commissioner, Sexual Harassment and Educational 
51 See the Anti-Discrimination Board website at <http://www.lawlink.gov.au/adb>; Anti-
Discrimination Board of New South Wales, "Sexual Harassment: Why You Need to Prevent 
It", Equal Time 27 August 1998 at 6-7 and 9.
52 Other materials include the CCH looseleaf publication, Australian and New Zealand Equal 
Opportunity Law and Practice which contains a whole section on compliance policies and 
programs, and E Moston, Sexual Harassment: An Employer’s Guide to Cases, Consequences and 
Remedies (1997).
53 Affirmative Action Agency, Private Sector Facts and Figures (1997) at 19 and 30-33. All 
organisations with over 100 employees are required to report to the AAA on what steps 
they have taken to implement EEO in their organisation. By 1992 the AAA had already 
been successful in getting 95 per cent of organisations required to submit a report: 
effectiveness Review of the Affirmative Action (Equal Employment Opportunity for Women) Act 
sexual harassment, and 70 per cent provided training to management aimed at preventing harassment and learning to handle grievances.\textsuperscript{54}

A HREOC-sponsored study of gender discrimination in the finance industry (one of the major employers of women in Australia) provides further evidence that although gender discrimination is still rife in that industry, corporate managements have shown some sustained commitment to eliminating sexual harassment\textsuperscript{55}. The affirmative action reports of the top 75 Australian financial institutions showed that their performance on personnel policies relating to conditions of service was strongest in relation to sexual harassment. Eighty-seven percent self-reported that management actively promoted a work environment free of harassment and 81 per cent reported that formal procedures were in place to deal with complaints of sexual harassment in their firms. These results were two of the three strongest recorded out of 19 performance areas of affirmative action in conditions of service\textsuperscript{56}. The study also showed that paper policies have translated into some real change in corporate culture as judged by women employees.\textsuperscript{57} An attitudinal questionnaire found that only 26 per cent of women employees in three major banks thought that "sexual harassment occurs at pre-executive and executive level" in their firm, while 71 per cent agreed that "managers promote an harassment free workplace". This compared with much higher perceptions of more general sex discrimination problems: 58 per cent of women believed that "affirmative action is needed in this company, because there is still some discrimination against women"; and 41 per cent of women thought that sexual discrimination occurred at pre-executive and executive level in their firms.\textsuperscript{58}

While HREOC's finance industry study found that women's career opportunities were still limited by "glass ceilings and sticky floors",\textsuperscript{59} the relatively positive findings on sexual harassment show there is some movement by corporate management towards adopting anti-discrimination norms in at least this one area. We would not like to conclude from this evidence that all large Australian companies have excellent sexual harassment prevention and remedial systems. In fact, we are sure that all companies need to improve and that most companies outside of the services industries (such as manufacturing and mining) probably still have a long way to go. But neither should we ignore the voice of those women employees in the finance industry who believe their companies have already greatly improved in this area. In the following section of this article, we suspend disbelief for long enough to examine the conditions that have lead to these modest successes and try to determine whether we can draw any conclusions about whether or not—and, if so, when—corporate governance of

\textsuperscript{54} Affirmative Action Agency, Private Sector Facts and Figures (1997) at 19, 30-33.

\textsuperscript{55} L Still, Glass Floors and Sticky Ceilings: Barriers to the Careers of Women in the Australian Finance Industry (1997).

\textsuperscript{56} Ibid at 29.

\textsuperscript{57} Other quantitative evidence from the US evaluating the effects of perceived management attention to sexual harassment on actual incidents of harassment is also clear that more sexual harassment occurs in organisations in which management tolerates it, than in organisations where management is perceived to have made good faith efforts to stop it and provide good role models: C Hulin, L Fitzgerald and F Drasgow, "Organizational Influences on Sexual Harassment" in M Stockdale (ed), Sexual Harassment in the Workplace: Perspectives, Frontiers and Response Strategies (1996) 127.

\textsuperscript{58} L Still, above n 55 at 41-42 and 44.

\textsuperscript{59} Ibid.
human rights more generally might be possible. We will then use the experience of sexual harassment in Japan to examine possible pitfalls and dangers of a 'corporate governance' approach to human rights.

Towards successful corporate governance of sexual harassment

No company will spontaneously develop an effective internal governance system for sexual harassment (or, indeed, any other human right). Rather it will only do so in response to both external and internal pressures. To ensure a high quality governance system, external ideas and values about human rights—not just internal business concerns—must influence corporate management. Therefore, any model for the corporate governance of sexual harassment must explain how external values enshrined in human rights can interact with and impact on day-to-day internal corporate management. In other words, it must be a model for how the social movement politics of human rights can permeate the corporate managerial politics of profit and infiltrate human resources decision-making. It must also account for how conciliatory or disciplinary internal grievance handling systems can articulate with legal rights in formal courts and anti-discrimination tribunals.

The orthodox means that governments have used to make corporations socially responsible over the last century is 'command and control' regulation—regulation in which standards, backed by criminal sanctions, are imposed on companies. Since the early 1980s, scholars and policy analysts have criticised command and control regulation from two main perspectives: (1) an economic analysis that sees the costs of assessing, understanding and complying with command and control regulation as unacceptably high; and (2) a socio-political analysis of the ineffectiveness of much command and control regulation to produce compliance with regulatory objectives. The experience of command and control shows that it is neither reasonable, practical nor effective for external legislatures and regulators to be solely responsible for determining how organisations should manage social issues. The design and enforcement of regulation to govern every potential social dilemma facing business is simply not achievable. And even if it were achievable, it would not make businesses better citizens, since citizenship implies an internal capacity to respond with integrity to external values.

John Braithwaite's policy-oriented criminology offers a springboard from which to develop an alternative model. As the leading empirical and theoretical account of corporate accountability, his body of work analyses how scrutiny by regulators and public interest groups—combined with the background threat of 'big stick' legal sanctions and negative publicity—can maximise the potential for corporate self-regulation. For example, Ayres and Braithwaite's theory of responsive regulation

60 See A Ogus, Regulation: Legal Form and Economic Theory, (1994) at 5.
suggests that, in general, it is better to maximise the possibility for regulatees to comply with regulatory objectives voluntarily rather than to constantly rely on heavy sanctions or coercive regulatory regimes. They find empirically that when regulators use strategies of "dialogue, communal judgment, reciprocal wooing, and persuasion, which is minimally coerced by power relations", they can negotiate more constructive regulatory outcomes. By contrast, when regulators use coercive strategies, they often break down the goodwill and motivation of actors who might otherwise have been responsive. However, they also find that persuasive and self-regulatory regulation is more likely to be effective when backed up by the possibility of more severe sanctions: regulatees, then, will know there is a certainty of punishment if they defect and that other regulatees will not get away with breaking the rules. Based on the same empirical and normative conclusions, Fisse and Braithwaite propose targeting punishment to mobilise those who can change corporate cultures to do so, and then giving self-regulation a chance. Ayres and Braithwaite argue that regulators should start with persuasive or restorative strategies and then move to more punitive strategies if voluntary compliance fails. Thus, if the regulator succeeds in bringing about compliance by applying punitive sanctions, then it can respond by reverting to a trusting demeanour rather than building resistance by being overly punitive. If the initial round of punitive sanctions does not bring about compliance, then the regulator can respond by invoking harsher sanctions. The wider the range of strategies (from dialogic to punitive) available to the regulator, the more successful this type of responsive, 'tit for tat' enforcement is likely to be. Prioritising self-regulation ensures more frequent use of cooperative measures, without compromising the accountability provided by using more punitive measures where necessary.

How may we apply this theory to corporate governance of sexual harassment? The Ayres and Braithwaite theory suggests that the policy goal is that companies should be primarily responsible for educating employees and seeking to change attitudes to resolve problems of harassment that do occur and to prevent harassment occurring in the future. But Ayres and Braithwaite also suggest that private adjudication of public rights can only be effective if public anti-discrimination agencies, courts and public interest groups have the power and capacity to hold corporate governments responsible to anti-discrimination standards when corporate compliance fails, as it inevitably will. Corporate liability for harassment and social movement activism must propel internal corporate justice systems to address harassment and to do it according to appropriate standards. Connecting public anti-sex-discrimination standards to internal corporate sexual harassment policies minimises the risk of subsuming an issue of sex discrimination to business management concerns alone.

The case of Julianne Ashton's suit against Bankers Trust (BT) for sexual harassment and its aftermath is a good example of how this might work. Ashton complained of

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64 I Ayres and J Braithwaite, above n 63 at 97.
65 B Fisse and J Braithwaite, Corporations, Crime and Accountability (1993). Fisse and Braithwaite demonstrate how regulatory enforcement action should be tailored to catalyse internal corporate justice systems to define who or which groupings are responsible for wrongdoing in the organisation and in what degrees and to rectify the wrong and learn ways to prevent similar wrongdoing in the future.
sustained harassment on the Sydney Futures Exchange trading room floor where she began working when she was 20. She took her case to the NSW Equal Opportunity Tribunal since BT had no sexual harassment policy or grievance handling procedure at the time. Bankers Trust decided to fight the case. Five years later in March 1996, the hearing started and BT attracted much negative publicity as its lawyers brought evidence that Ashton had not been discriminated against since filthy language and sexual banter were a "normal part of going on" in the Futures Exchange; women and men were equally subject to this environment; all young employees were put through "forms of embarrassment" as an initiation; and Ashton had implicitly accepted this conduct by using filthy language herself and not complaining sooner. The negative publicity cost the bank dearly in staff morale and lost custom—and, of course, legal costs—and the bank settled the case on the courtroom steps for an undisclosed sum.

The crisis, however, prompted a commitment to a sexual harassment governance system that went far beyond compliance with the law. The bank hired one set of consultants to study the culture of the organisation and another set to conduct workshops with staff to discover what values and quality of relationships they thought should be evident in their workplace. Training on harassment commenced, combining the values developed from the ground up through the staff workshops with considerations of legal liability. The bank introduced a new sexual harassment grievance handling process that surpassed what the law required. It gave employees the option of either utilising an internal complaint mechanism or taking their complaint to an external and independent ombudsman. The ombudsman could (a) help complainants work out how to solve the problem themselves within the company; (b) write a report to company management saying what ought to be done; or (c) advise the complainants that they should seek external legal remedies. While this process was expensive, the disaster of the Ashton case forced senior management to calculate the potential costs and benefits of a sexual harassment program and to decide it was worth implementing. Unfortunately, the crisis was so severe that it seems likely many employees still lacked trust and confidence in management's attempts to address the problem immediately after the new system was put in place. It would take several years of senior management commitment to weeding out sexual harassment and taking complaints of women like Ashton seriously before employees are likely to credit an employer with having changed.

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66 See Y Preston, "Macho Culture of the Dealing Room Floor Taken for Granted", Age 27 January 1996 at 22; J Curtin, "Sex Banter 'Normal'", Age 26 January 1996 at 17 and 19; G Haigh, "Taking the Bull by the Horns" Weekend Australian 17-18 August at 53-54.

67 J Curtin, ibid at 19. In fact the evidence from Ashton's witnesses suggested that as a new 20 year old woman employee, Ashton had been targeted for harassment and lewd requests for a "head job" or "to bend over". But she had gone on performing her work well despite her situation, even after her supervisor ignored her complaint and downgraded her work performance. "BT Traders Targeted Junior Female" Age 25 January 1996 at 17.

68 Interview by Parker with Bankers Trust Vice President for Human Resources, 1997. See J Scholz, "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory" (1997) 60(3) Law & Contemp Probs 253 on the problem of 'bounded rationality' which means that management often do not consider the benefits of implementing internal management systems to ensure compliance with legal and social responsibilities until a disaster brings the potential costs to their attention.
The Ashton case illustrates that invoking legal sanctions to champion equality rights outside the workplace might make possible the governance of harassment within the workplace. Formal legal sanctions invoked on one occasion by one brave woman can create the conditions in which internal corporate justice will benefit many more employees on other occasions. The crisis can prompt senior management to put in place internal procedures so that future complainants know they can have their grievances dealt with quickly and fairly without having to raise the stakes by going to law. Management may install an EEO unit and even, as in the Ashton case, appoint an external private ombudsman. They might conduct training and awareness programs to change the culture of the institution. Next time a problem occurs, the EEO officer may be able to use the threat of another HREOC case and the publicity that goes with it to sell a yet stronger anti-discrimination policy to senior management. This is likely to be an iterative process. One crisis of harassment is rarely enough to ensure ongoing commitment to an excellent system. Even building employees' trust to use a system that looks very good on paper is a long and difficult process. As the current splitting and sale of the Bankers Trust businesses to other banks also illustrates, gains made one moment can be overtaken by change the next.

The phases to corporate governance of sexual harassment

Successful corporate governance of sexual harassment, therefore, hinges on the background threat that victims of harassment can appeal to an effective anti-discrimination regulator and/or the possibility of negative publicity and social action. With the threat of potential (formal or informal) regulatory action, corporations can be motivated to maximise the effectiveness of their self-regulatory measures; and even if voluntary internal governance systems fail to achieve justice, the regulator can function as a fallback by deciding unresolved complaints.

In short, a governance model for sexual harassment depends on breaking down the distinction between private profit-making and public rights by making public equality rights a matter of private corporate justice systems, and making private corporate governance a matter of public regulation and accountability. Whenever abuse of power and injustice results from internal corporate handling of sexual harassment grievances, there should always be the possibility of invoking legal sanctions through recourse to an anti-discrimination regulator. The regulator can enunciate standards, grant rights and remedies, and reveal the unlawfulness of a discriminatory practice with the hope that the ensuing crisis will prompt fairer and more effective self-governance for the future (and the determination that if it does not, legal and public accountability will be swift to follow).

This approach recognises that organisations already have some internal systems and capacities for regulating their own conduct regardless of external regulatory intervention. The potential for corporate governance of human rights depends on triggering mechanisms of external accountability to affect internal governance

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processes. The aim is to use public accountability—through legal responsibility, media publicity, social movement politics and the willingness of individual victims of corporate wrongdoing to make their fight public in the law courts or the media—to create crises of corporate consciousness and force internal management to respond to human rights issues.

There are generally three phases in the managerial process of dealing with dilemmas raised by any social responsibility issue:72
(1) The commitment to respond;
(2) The acquisition of specialized skills and knowledge;
(3) The institutionalisation of purpose.

Management must appropriately respond through each of these three phases to ensure effective corporate governance of the issue. Mechanisms of external accountability must apply at each of these three stages to prompt continued corporate commitment and ensure appropriate action by management. This does not mean a company should be subject to legal prosecution every time it does not do the right thing. It does mean, however, that publicity, social movement politics and legal action that do occur should guide corporate management to what is appropriate at each step of a corporation's engagement with sexual harassment. Strict liability alone will provide insufficient guidance and incentives to ensure effective corporate governance of sexual harassment. Diagram One illustrates how regulators and law (the bottom level) and EEO officers, public interest groups, the media and other private actors (the top level) should each impact on the three phases (middle level) of corporate governance responses to sexual harassment as an issue.

The commitment to respond

The first phase of an appropriate corporate governance response to sexual harassment is the commitment to respond by top management.73 This entails the CEO becoming sufficiently interested and involved in the issue to make statements about it and to set aside resources to address it. A crisis—whether enveloping the company itself or a competitor—usually prompts corporate commitment to respond to a particular social

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72 R Chaganti and A Phatak, "Evolution and Role of the Corporate Environmental Affairs Function" (1983) 5 Research in Corporate Social Performance and Policy 183 at 187. Chaganti and Phatak analyse the evolution of corporate environmental affairs functions in four US companies according to this model.

73 Evaluative studies of corporate self-regulation repeatedly show that top management commitment is absolutely essential to effective corporate self-regulation. For example, D McCaffrey and D Hart, Wall Street Polices Itself: How Securities Firms Manage the Legal Hazards of Competitive Pressures (1988) at 174 find that "the differences among firms reflect, more than any other factor, how strongly top management communicates that complying with the rules is one of the firm's core critical tasks". From his evaluation of the top 5 coal mine safety performers, John Braithwaite finds that each of the companies, in different ways, exhibited "a corporate message that top management perceives cutting corners on safety to achieve production goals as not in the interests of the corporation". J Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (1985) at 61. The studies also make it clear that this does not mean that senior executives merely mouth support for compliance, but that they are actively involved in setting compliance goals and reviewing performance (see J Braithwaite, Corporate Crime in the Pharmaceutical Industry (1984); cf M Clinard, Corporate Ethics and Crime: The Role of Middle Management (1983)).
issue. Such a crisis is commonly precipitated by external action, such as regulatory enforcement action, private litigation or a widely reported corporate scandal.

**Diagram one:**

**Corporate governance responses to sexual harassment**

<table>
<thead>
<tr>
<th>Negative Publicity</th>
<th>Creation of Internal Constituency (eg EEO unit)</th>
<th>Media Attention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Opinion</td>
<td>Professional Networking</td>
<td>Public Interest Group Scrutiny</td>
</tr>
<tr>
<td>Social Movement Politics</td>
<td>Contact with Public Interest Group, Union etc</td>
<td>Accreditation to Private Standards</td>
</tr>
<tr>
<td>Staff Pressure</td>
<td>Modelling Other Companies' Policies</td>
<td>Voluntary Reporting</td>
</tr>
<tr>
<td>Values of CEO</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>THE COMMITMENT TO RESPOND</th>
<th>ACQUISITION OF SPECIALISED SKILLS &amp; KNOWLEDGE</th>
<th>INSTITUTIONALISATION OF PURPOSE IN DAILY MANAGEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement Action</td>
<td>Connection Between Internal Constituency and Regulators Regulatory Rules/Standards</td>
<td></td>
</tr>
<tr>
<td>Litigation</td>
<td>Regulatory Back-up for Internal Staff Mandatory Reporting</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Requirements Regulatory inspections</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Court Action</td>
</tr>
</tbody>
</table>

All this helps explain why large Australian companies have devoted so much attention to implementing sexual harassment policies in recent years. The statistics show that people are complaining about sexual harassment to the anti-discrimination regulators in greater numbers than in other areas of gender discrimination. In 1984-1985, 14.7 per cent of complaints lodged in the Human Rights and Equal Opportunity Commission (HREOC) under the Commonwealth's Sex Discrimination Act 1984 (SDA) were of sexual harassment. By 1989-1990, the figure was almost 38 per cent; by 1993-1994, 1994-1995 and 1997-1998, the figures were 50.5 per cent, 46 per cent, and 45 per cent respectively of the sex discrimination complaints (and a constantly increasing absolute number) By 1998-1999, sexual harassment remained the largest single area

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74 Sex Discrimination Commissioner, above n 50 at 28.
of complaint with 32 per cent of the sex discrimination complaints. The sheer numbers of complaints throughout the 1990s suggest that many companies were receiving many more internal complaints and that the risk of legal action was (and remains) high.

In 1997, Parker interviewed twelve officers responsible for sexual harassment and EEO policies in seven of Australia's largest financial institutions about why their companies introduced a policy and the nature of their programs. Interviewees at four of the seven companies explicitly stated that the major reason for being serious about the sexual harassment policy was to resolve grievances internally (or prevent them occurring) in order to avoid complaints being made to external bodies and the company being 'tried by media' for harassment. Many explicitly mentioned the Ashton case. Interviewees at (a differently constituted) four of the seven companies described particular disasters or potential disasters their company had faced that directly prompted them to introduce the policy in the first place or to implement a renewed preventive training program. One was Bankers Trust where there had been no sexual harassment or EEO policy before the Ashton case. Another bank had also introduced a program for the first time in response to two complaints that had also taken five years to settle through HREOC. A different bank had found itself facing a large number of internal complaints of harassment and discrimination in the early 1990s; it, therefore, decided to introduce a new more proactive sexual harassment training program and grievance handling process as part of a general new training system devised in response to new industrial relations legislation. The fourth company had received a letter from the AAA saying their affirmative action plan was inadequate. This prompted management to employ an EEO officer and introduce a sexual harassment policy. A fifth bank had had a sexual harassment policy since 1987, but had been the unsuccessful defendant in a major court case in 1996 which prompted major rethinking of the program.

Interviewees at the two remaining financial institutions did not mention the avoidance of disaster or a particular case as crucial to their decisions. Rather, the moving force in each company was an American CEO who was strongly committed to EEO principles. Indeed, the CEOs in these two banks—Westpac and AMP—were well known publicly and in the industry for their stance that the pursuit of EEO was important in allowing their institutions to compete by attracting high quality staff. A recent survey found that in the year since those two CEOs left, female executives in the financial services industry believed their organisations' commitment to affirmative action and diversity had stalled. Eighty-six per cent believed no CEO was leading in this area any more. This change in just a few years illustrates how crucial it is that top

75 Ibid. Now that Australian women are becoming more familiar with their rights under the Sex Discrimination Act 1984 (Cth), complaints about other matters are becoming more common.

76 These institutions were chosen from information supplied by the Affirmative Action Agency as the institutions with the leading sexual harassment policies in the finance industry. See C Parker, above n 47 at 21-48 for further discussion of the methodology and findings of this research.

77 If a company's annual affirmative action report is failed, it is ineligible for federal government contracts, an issue of some importance to this company.

management remains committed to effective internal governance of issues such as discrimination.

This Australian experience contains clues about the mechanisms of external accountability that prompt corporate commitment to internally respond to sexual harassment as an issue. On one level, a combination of clear legislative prohibition, media publicity and feminist action ensures good public knowledge of issues and rights surrounding sexual harassment. Why do people complain so much more frequently about sexual harassment than other aspects of gender discrimination? It seems unlikely that sexual harassment is so much more common than other forms of sex discrimination. Rather, sexual harassment is a fairly concrete concept that lends itself to sensational media coverage and also to social action campaigns, both of which can educate women about their right to an harassment-free workplace. It is also specifically prohibited under Australian law. High media publicity for a particular case can help: one US study found that women were more likely to spontaneously label behaviour as sexual harassment after the Thomas-Hill hearings, which received saturation media coverage, than before. In Australia, the divisive and heavily reported debate over Helen Garner’s *The First Stone* may also have raised awareness of potential legal liability for sexual harassment and discussion of how problems might be solved.

On another level, the law should provide a clear statement that employers are responsible for the implementation of preventive sexual harassment policies and remedial systems—and law and regulatory practice must provide incentives for employers to do so. A distinctive feature of Australian sexual harassment law and practice is how potential vicarious liability for acts of sexual harassment under anti-discrimination legislation interacts with industrial law decisions relating to dismissal of individual perpetrators, to both encourage and authorise strong corporate policies against sexual harassment. Specifically, Australian discrimination law has imposed a rudimentary duty on companies to implement a sexual harassment policy through:

(1) the possibility of employers' vicarious or direct liability for sexual harassment that occurs in the workplace;

(2) industrial law decisions on unfair dismissals that authorise strong policies allowing for a wide range of disciplinary actions, including dismissal of a perpetrator; and

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79 See E Weeks, J Boles, A Garbin and J Blount, "The Transformation of Sexual Harassment From a Private Trouble Into a Public Issue" (1986) 56 Sociological Inquiry 432 for an analysis of how media attention, litigation and agitation by interest groups converged to transform sexual harassment from a trouble affecting many individual women into a public issue in the US during the 1970s and 1980s.


82 Compare this with the confused position under US law where it is not clear how the implementation of a sexual harassment policy will affect the legal liability of employers: D Harmelink, "Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment" (1999) 84 Iowa L Rev 561.
(3) the conciliation and educational activities of the anti-discrimination "regulators" (HREOC and the state anti-discrimination boards and tribunals) in encouraging workplace sexual harassment policies.

First, Australian sexual harassment law encourages companies to develop sexual harassment policies to avert the possibility of vicarious or direct corporate liability for harassment by employees. Under s 106 of the Federal Sex Discrimination Act 1984 (Cth) employers (and other persons) are vicariously liable for unlawful acts of sexual harassment and other forms of sex discrimination by employees or agents done in connection with their employment or agency. Liability can only be avoided (under s 106(2)) if the employer establishes that they "took all reasonable steps to prevent the employee or agent" from doing those acts. The courts have held that this usually requires proof of an effective harassment or discrimination policy implemented in the company. Medium or large sized organisational employers will only escape liability if they can give evidence that they have taken active measures to prevent sexual harassment by issuing a policy, effectively communicating management disapproval of such practices, and training staff about their responsibilities. For example, in the case of Dippert v Luxford, HREOC stated that:

While there is no legal requirement under the Act that in order to establish a defence under s 106(2) there must be a sexual harassment policy as such, the existence of such a policy would go some way toward demonstrating that the second respondent had perceived the issue as a relevant workplace problem and had taken steps towards addressing that problem.

Second, the industrial relations courts have confirmed that, under a harassment policy, employees can legitimately be dismissed for harassing other staff or customers. Westpac dismissed a perpetrator of harassment who then sued them for unfair dismissal in the industrial relations court. Westpac won the case, providing a landmark in industrial relations law that legitimises corporate sexual harassment disciplinary processes so long as procedural fairness is followed. This case empowered employers to take internal actions that go beyond "the palliative of conciliation". Indeed, dismissal of the perpetrator was a more severe remedy than HREOC or a court could have ordered if the initial sexual harassment complaint had been taken to the public justice system.

83 Under s 106 of the Sex Discrimination Act 1984 (Cth), employers (and other persons) are vicariously liable for unlawful acts of sexual harassment and other forms of sex discrimination by employees or agents done in connection with their employment or agency. Liability can only be avoided (under s 106(2)) if the employer establishes that they "took all reasonable steps to prevent the employee or agent" from doing those acts. The State Acts have similar provisions: See Anti-Discrimination Act 1977 (NSW), s 53; Anti-Discrimination Act 1991 (Qld), s 133; Equal Opportunity Act 1995 (Vic), s 34; Equal Opportunity Act 1984 (SA), ss 90 and 91(1); Equal Opportunity Act 1984 (WA), ss 160 and 161.

84 (1996) EOC 92-808.


Third, anti-discrimination "regulators" use the introduction of a policy as a bargaining chip in the conciliation of complaints. Since conciliations are private and confidential, publicly available knowledge of how they are conducted is sparse. Devereux's study of forty HREOC conciliation files suggests that HREOC uses the background threat of a hearing as leverage to ensure respondents accede to proposed conciliated settlements, especially in Sex Discrimination Act cases. In employment cases, Commission staff often encourage settlements that include not only remedies for the individuals involved but also undertakings to implement EEO or sexual harassment training programs which might engender wider cultural change within the organisation. However, under the current law, the anti-discrimination agencies do not have any power to enforce a conciliated settlement that includes a requirement to introduce a sexual harassment policy nor to monitor whether it complies with standards and guidelines issued.

**Acquisition of specialised skills and knowledge**

The prompting of a commitment to respond is not enough. The second phase is the acquisition of specialised skills and knowledge in which the corporation acquires the know-how and personnel to deal with sexual harassment. This often results in setting up a specialist EEO unit and employing EEO officers to introduce a sexual harassment policy. The research repeatedly shows that an internal constituency—empowered to put the relevant issue on the agenda and formulate procedures and policies for ensuring it is dealt with—make a significant difference to corporate implementation of social responsibility policies.

Once an internal constituency is in place within the organization, it can bring external pressures to the attention of management and renew their commitment to the issue or even prompt action on broader issues. Specialist EEO officers can act as a conduit of external accountability into the organisation. They carry information, skills and concerns from external groups (such as regulators, public interest groups, and communities of professional experts) that can significantly shape the way the sexual harassment policy is set up. For example, Valerie Braithwaite evaluated both procedural and substantive compliance with the Australian Affirmative Action Act, 1986.

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89 Ibid at 296 and 294. Private communication to Parker by Commission staff suggests that this is usually HREOC policy. See also M Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 Modern Law Review 733 at 758 for evidence that this is also the approach taken by the NSW ADB.

90 Studies show that an internal compliance constituency is a crucial lynchpin of effective corporate self-regulation. See J Rees, Reforming the Workplace: A Study of Self-Regulation in Occupational Safety (1988) at 92, 98-99 and 108. Evaluation of the Californian branch of the US Occupational Safety and Health Administration (OSHA) experiment with the Cooperative Compliance Program between 1979 and 1984 found that the growth of safety management professionalism was crucial to compliance with regulatory goals. D McCaffrey and D Hart, above n 73, concluded from their study of self-regulation in the US securities industry that the institutionalisation of regulatory occupations within industry (in this case financial compliance officers) is one of the main conditions in which self or 'shared' regulation is most likely to be effective so long as the law strengthens the position of the compliance staff.

91 See C Parker, above n 47.
which requires companies to develop an equal opportunity policy for women, set objectives, monitor them and submit a report on their progress. She found a positive correlation between the degree of professionalism of equal employment opportunity (EEO) officers—and with the EEO agency—and procedural and substantive compliance with the requirements of the regulation. Similarly, in a study of corporate compliance with United States civil rights laws, Edelman found that the professional practices of personnel officers were instrumental in spreading 'due process' protections for employees (in relation to discipline, for example) throughout the industry. Personnel officers viewed due process compliance as part of their 'professional' function. Therefore as more and more companies established personnel departments, personnel officers became a direct channel through which models of implementing employee rights could enter the organization and functioned as an internal constituency for elaborating and enforcing employee rights.

This suggests that regulators and feminist activists should aim to work with corporate officers responsible for sexual harassment, equipping them with the necessary skills to effectively govern harassment. Working with these officers creates a direct link between external human rights and internal corporate governance, because the EEO officers can often be encouraged to see themselves both as loyal corporate managers and as members and advocates of external networks concerned with anti-discrimination. But a specialist unit within an organization, by itself, does not necessarily lead to the success of a human rights corporate governance program; success hinges on senior management investing the compliance constituency with 'autonomy and power', "clout" or organisational muscle. To ensure organisational muscle, internal officers must have regulatory and community group back-up. Thus, the interaction between management commitment and external regulatory pressure can boost the effectiveness of internal officers responsible for a sexual harassment program.

Institutionalisation of purpose

The third phase is the institutionalisation of purpose, in which the policy is made an integral part of corporate objectives, daily management procedures, reward systems and corporate culture. The most sophisticated indicator of a successful compliance program is the extent to which the company has integrated social and legal

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92 V Braithwaite, "The Australian Government's Affirmative Action Legislation: Achieving Social Change through Human Resource Management" (1997) 15(4) Law & Policy 327–354. Braithwaite also used the reports to measure procedural compliance with the eight steps required by the legislation and a more substantive measure of compliance via reported implementation of practices that 'accommodate' women (eg, via career break schemes, women's networks, provision of child care facilities, affirmative action awareness training) from the reports and the AWIRS data set.


responsible into operating procedures, everyday decision making and performance appraisal/reward systems.\

Where human rights are left to corporate justice systems, rights are likely to be subverted to management goals and priorities. In one study of officers within ten United States corporations with responsibility for internal grievance processes, researchers found that companies introduced internal complaints handling mechanisms to avoid liability in anti-discrimination law, but that the main objective of corporate complaints handlers was to resolve complaints, restore good working relations and avoid legal intervention—not to identify and eliminate practices of discrimination. Complaints were consistently seen as examples of poor management or personality clashes and were rarely linked to public rights and standards of equal employment opportunity. They concluded that "internal forums tend to reaffirm the employer's authority over employees and autonomy from outside intervention".

It is not enough to motivate companies to put a formal policy in place if accountability does not follow through to the details of how the governance of harassment is accomplished within daily management. Organisational cultures and structures are so different that evaluation is difficult and perfect recipes impossible to predict. Yet regulators, courts and public interest groups must oversee the quality of implementation of sexual harassment governance programs by providing guidelines and best practice examples and by evaluating the quality of programs when complaints are made to external bodies or when grievances cannot be resolved adequately internally. Australian courts and tribunals are already showing a willingness to make decisions about the quality of effective sexual harassment policies. They certainly should not be satisfied with evidence that there was a paper policy, but should examine both the terms of any policy and whether it was effectively implemented in deciding whether reasonable precautions have been taken. In the 1997 decision of Hopper v MIM, for example, the Queensland Anti-Discrimination Tribunal examined the implementation of MIM's anti-discrimination policies in some detail in order to decide whether MIM was vicariously liable for harassment and discrimination against Ms Hopper by her colleagues (underground mining engineer apprentices) and immediate supervisor. The Tribunal criticised a number of aspects of MIM's anti-discrimination policy as inadequate management of the problem. Supervisors were trained in their responsibilities to detect and prevent sexual harassment, but were not told that their responsibilities included training employees on sexual harassment. Supervisors were told that posters of semi-clad men and women had to be removed, but there was no evidence that anybody ever checked that they were removed. The Court was particularly critical of MIM for failing to monitor the high attrition rate of

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96 For example John Braithwaite's study of the companies with the best mine safety records found that important factors of success were developing programs for safety training and performance, clearly defining safety performance requirements for line managers and holding them accountable for their performance. J Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (1985). Haines identifies a 'harmonising' management philosophy that is oriented towards putting safety and business together. F Haines, Corporate Regulation: Beyond 'Punish or Persuade' (1997).


98 Ibid at 530.

female apprentices recruited to the mine or to follow up the reasons for it. Courts and tribunals in sexual harassment cases will need evidence on two issues in order to evaluate compliance systems where a breach is before them: first, they should look at whether there is a substantial and actively implemented program; second, they should look at whether it has been effectively implemented with particular emphasis on whether training has reached everybody it needs to reach and includes monitoring, and on self-evaluation to gauge whether the system is achieving its objectives.

Australian anti-discrimination regulators are making an effort to provide guidelines, best practice examples and consultancy services to companies to ensure that the sexual harassment and EEO policies they implement are of a sufficiently high standard. For example, the NSW ADB has made a point of trying to protect the rights of victims of harassment within corporate justice systems by stating that informal grievance resolution procedures normally will not be adequate and organizations must provide formal grievance procedures. A further step might be to provide some incentive for companies to introduce high quality harassment programs by providing some sort of accreditation and by taking into account the level of accreditation received when decisions are made about penalties and at what level to pursue complaints.

To make this approach effective, the anti-discrimination regulators should be given greater and more proactive powers to pursue companies that fail to prevent and deal with harassment adequately. At the moment, the actions available to a complainant and to the anti-discrimination boards are not sufficient to provide an appropriate gradation of sanctions for regulators to be "responsive" to different levels of corporate governance achievement by companies. The Federal Sex Discrimination Commissioner has stated that HREOC's Code of Practice can be taken into account by HREOC when making its determinations in public hearings. It seems clear that it will also be used in conciliations. However, courts and tribunals will find it difficult to use corporate sexual harassment policies or model codes much more proactively than they already do without legislative change. There is little scope for a tribunal to hold that the adoption of a model code or development of a corporate policy will reduce damages since the Commission and the courts only have power to order compensatory damages; there is no punitive or exemplary component to the damages awarded as there is, for example, under trade practices legislation, where a company's bona fide adoption of a compliance program can reduce the penalty paid.

Private actors can also make internal corporate governance systems accountable to external standards when companies hire consultants, auditors and ombuds officers to help them implement effective systems. Employees, union representatives and local community representatives may also have an opportunity to input their personal or social values through direct involvement in the program and consultative bodies. Indeed, the involvement of affected communities and stakeholders can also improve the quality of the program. For example, Valerie Braithwaite found that women

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100 M Osborne, above n 49 at 7.
101 The Sex Discrimination Act 1984 (Cth) s 81(1)(b)(iv) expressly uses the word "compensation". See also Hall v Sheiban (1989) EOC 92-250 where it was held that damages under the legislation are remedial and not punitive. See also C Ronalds, above n 48 at 213.
employees were rarely included in consultation about EEO polices under the Affirmative Action legislation, but when they were the program was likely to be better.

3. 'TESTING' THE MODEL FOR CORPORATE GOVERNANCE OF HUMAN RIGHTS: SEXUAL HARASSMENT AND THE CORPORATION IN JAPAN

Why Japan?
The message from Australia's experience with corporate regulation over sexual harassment is largely positive—that there is real potential for the corporate governance of human rights. The key to unlocking the potential for successful corporate governance of human rights, according to the Australian evidence, is to ensure the convergence of external and internal values at each stage of the corporation's response to the issue. Each step—whether (1) commitment to respond, (2) acquisition of specialised skills and knowledge, or (3) institutionalisation of purpose—is a critical point at which external standards of public rights must interact with internal corporate processes. The Australian case study shows how external values can impact on internal corporate workings through the agency of regulators, public interest groups, the media and, most significantly in many instances, internal employee constituencies that also advocate those values. Indeed, the Australian data we have reported emphasise a permeability between the 'internal' and 'external' under which:

1. employees are empowered within corporate structures by the ability to strategically move from internal to external remedies;

2. courts and tribunals, anti-discrimination regulators, public interest groups and the media devote attention to the existence and quality of corporate governance of sexual harassment; and

3. an internal constituency of EEO officers use appeals to public values and business goals to change the corporation from within.

But is there a flipside to this message of promise? Are there not pitfalls that underlie the potential problems that attach to the possibilities? In this section, we shift our gaze to the case of Japan to highlight some of the risks involved in entrusting corporate responsibility to issues of human rights.

The choice of Japan as a counter-balancing case study is deliberate. Japan's recent move to a system of corporate governance of sexual harassment[104] raises a perfect opportunity to test our model of corporate accountability for sexual harassment. Indeed, on one level, by applying the model we have developed in light of Australian experience to the Japanese context, we can chart—albeit tentatively—the course of corporate governance of sexual harassment might initially take in Japan and predict

103 V Braithwaite, above n 92.
104 In April 1997, amendments to the Equal Employment Opportunity Act took effect, including the new section 21 which requires companies to ensure a workplace free of sexual harassment. Kōyō no Bunya ni okeru Danjō no Kintō na Kikai oyobi Taigu no Kakuho tō ni kansuru Hōritsu [An Act to Promote the Welfare of Female Workers by Providing for Equality of Opportunity and Treatment in Employment for Women], Law No 45 of 1985.
some of the early challenges Japan will need to overcome. On a deeper level, by testing the model against the situation in Japan, we can gain some broader insights into the true scope of the model, especially some of the in-built limitations. In short, using Japan as case study allows us to test both the predictive as well as the explanatory capabilities of our model.

In these two ways, Japan's recent experiment with corporatisation of management of sexual harassment complaints offers invaluable insights. This is important to stress. The purpose of using Japan as a case study is not to stereotype Japanese law and society, but to derive lessons about the potential for entrusting corporate governments with responsibilities over human rights, even if these lessons expose shortcomings or limitations. Therefore, it is not a simple exercise in legal orientalism to surmise that Japan's recent efforts—precisely because they are so recent—will reveal shortcomings to relegating regulation authority over sexual harassment to corporate governments. Since Japan's law on sexual harassment has "only just begun," the nascent state of legal developments and relatively recent public awareness about sexual harassment is likely to mean that external pressures will be less influential in directing internal corporate processes.

At the same time, including Japan as a case study is not to make facile and, ultimately, meaningless comparisons with Australia. This article, we reiterate, is not an exercise in traditional comparative law. To do so would merely result in highlighting differences between two legal regimes on sexual harassment that are at different stages of development and proceeding on different trajectories. Even if it is possible to surmise that Australia is in a 'superior' state of development compared to Japan, this conclusion carries no significance. Japanese law, after all, is not frozen in time—indeed, especially in the case of sexual harassment, it is in a constant state of development and change. Further, the conclusion assumes that there is one true path along which the law must travel to achieve effective legal regulation of sexual harassment—and that Australia's is more advanced along that route. This is not the case. Indeed, Wetherfield and Yamakawa correctly note that Japanese sexual harassment law


106 R Yamakawa, above n 37.


109 See R Yamakawa, above n 37.

110 Wetherfield makes the distinction between Japanese and American legal constructions of sexual harassment by using the Japanese words 'sekushuaru harasumento' to describe the Japanese case and the English words 'sexual harassment' for the American case. A Wetherfield, "Amerikajin Bengoshi no Mita Nihon no Sekushuaru Harasumento (Jō)" [A
has unfolded along different lines and taken a distinctive shape compared to that in the West. But more importantly, an explicit comparison of Australian and Japanese law and practice on sexual harassment fails to advance our working model of the successful corporate governance of sexual harassment. We do not propose to impoverish our legal analysis by merely polarising the distinction between East and West. Our approach, by contrast, is to unite, not divide—to incorporate the Japanese experience with sexual harassment as part of an effort to learn more about effective corporate governance of sexual harassment specifically and human rights generally.

So is there a key lesson from Japan on the pitfalls to assigning responsibility over sexual harassment to corporations? The lesson, we submit, is a simple one. The evidence from Japan is that the prospects for achieving corporate governance of a human rights is less likely to be promising when 'external' factors—such as public understanding of the right and the state of the law—remain uncertain, incomplete or tentative.

**Sexual harassment and corporate compliance in Japan**

The latest statistics from Japan on corporate compliance with sexual harassment law reveals that Japanese corporations are still languishing in their efforts to proscribe sexual harassment in their workplaces. However, there have been some modest improvements over the last decade. In November 1989, when sexual harassment was still a relatively new topic of public debate, a survey by Asahi Television showed that 78 out of 80 companies had not given much thought to introducing policies on sexual harassment. By the late 1990s, little had changed. In 1997, a survey of 2,254 companies and 6,762 employees indicate that only 5.5 per cent of companies had implemented systems to prevent sexual harassment with another 14.5 per cent planning to do so in the near future. In 1999, with the new sexual harassment provisions in the Equal Employment Opportunity Act taking effect from April, a survey of 322 corporations revealed 28.1 per cent had established an internal grievance-handling unit, with a further 23.5 per cent currently preparing to do so.

According to the same survey, however, 80 per cent of companies self-reported that they had at least taken some steps to respond to the issue of sexual harassment in the workplace. These steps included incorporating new rules in employees' code of conduct (55 per cent), amending the internal manual to add information about sexual harassment (20 per cent), and running training sessions on sexual harassment (10 per cent).

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111 R Yamakawa, above n 37.
113 B S Turner, above n 105 at 32.
harassment (34.8 per cent), establishing awareness and training programs (27 per cent), preparing and distributing information pamphlets (24.2 per cent) and developing an internal sexual harassment policy (14.6 per cent). Larger corporations are leading the way in dealing with the issue of sexual harassment: 100 per cent of companies with over 3,000 employees self-reported that they had taken action to combat sexual harassment, compared to 88.5 per cent for companies with between 1,000 and 2,999 employees and 70.7 per cent for companies with less than 1,000 employees.

Results from attitudinal surveys among Japanese working women are even less auspicious. In 1989, most women believed that Japanese corporations tended to quickly dismiss allegations of sexual harassment and that the only course open to victims was to resign. A decade later, Japanese women remain wary. An attitudinal survey of female employees in 7,200 private companies in 1999 reveal that a mere 4.8 per cent of women believed that their employers were taking concrete action to combat sexual harassment. Although 64.1 per cent of those women who had lodged a complaint of sexual harassment believed that their complaints were dealt with effectively and swiftly, a majority of women responded that their companies did not have adequate sexual harassment training programs (82.4 per cent) nor any internal grievance handling procedures (82.1 per cent).

These statistics match informal anecdotal evidence from academics and lawyers. At a meeting of inhouse lawyers at the Commercial Law Centre (Tokyo) on 10 April 2000, one participant reported how a company’s training session on sexual harassment went awry when the male employees started laughing during a video presentation. This reaction, he noted, served to trivialise the problem of sexual harassment, and isolated the women at the training session. Masaomi Kaneko, a senior official at the Tokyo Metropolitan Labour and Economics Bureau with research expertise in sexual harassment law and policy, confirms that confusion still reigns in Japan over what constitutes sexual harassment and why it is wrong. Mizuho Fukushima, a feminist lawyer who has handled numerous cases of sexual harassment, believes that this confusion underlines the lethargic response by Japanese companies to the problem of sexual harassment. In her experience, corporate Japan still underplays the seriousness of sexual harassment and is failing to protect the human rights of women workers.

Applying the lessons from Australia to Japan

Clearly, then, a gap divides Australia and Japan on how successfully corporations in the two countries are dealing with sexual harassment. The key to explaining this gap lies in the model for the successful corporate governance of sexual harassment we

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117 Ibid.
118 Ibid.
119 Ibid.
121 M Kaneko, above n 36 at ii.
developed in light of the Australian data. One of the core tenets of this model is that 'public' values about sex discrimination must infiltrate the 'private' realm of corporate governance. This, however, assumes that such 'public' values are firmly entrenched in society and, by corollary, in the legal system. In the Japanese case, this assumption does not necessarily hold.

**Public consciousness about sexual harassment in Japan**

For example, public understanding about sexual harassment in Japan is still in a state of flux. No doubt this is because sexual harassment is a relatively new issue to most Japanese. Although sexual harassment as a phenomenon has had a long history in Japan, it was not until the late eighties and early nineties that it emerged as a problem[123] Some Japanese scholars estimate that Japan is about ten to fifteen years behind the United States in bringing sexual harassment into the public arena. This is why Mizuho Fukushima, a Japanese attorney, describes sexual harassment in Japan as both a "new and old problem".

Sexual harassment was unknown to the Japanese public for so long because it was hidden under a shroud of ignorance. In fact, until 1989, the Japanese language was ill-equipped to even express the concept[127] A Japanese work for 'sexual harassment' (sekushuaru harassment, commonly abbreviated to seku hara) did not become part of commonly accepted language use until 1989[127] Even among academic circles, sexual harassment was only introduced as an issue of comparative law in 1983[128]—it was not explored as an issue in Japanese law until the late 1980s.

However, interest in the problem of sexual harassment surged in August 1989 when the first sexual harassment case was filed in the Fukuoka District Court[129] Newspapers[130] and popular magazines[131] carried numerous articles and commissioned surveys on sexual harassment. Some surveys revealed that as many as six out of ten working women had been sexually harassed during the course of their

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124 J Ueda, above n 107 at 55; T Akimoto, above n 107 at 22; M Kaneko, above n 107 at 5.

125 M Fukushima, above n 108 at 16.

126 The Japanese language does have the phrase seiteki iyagarase—combining native Japanese words seiteki (sexual) and iyagarase (bullying)—as a coinage denoting sexual harassment. However, some commentators argue that the phrase does not fully convey the seriousness of sexual harassment, since the word iyagarase has a lighter connotation of 'pestering' or 'irritating'. See H Sogabe, "Shokuba ni okeru Seiteki Iyagarase no Jittai to Shomondai" ["Sexual Harassment in the Workplace: The Facts and the Issues"], (1990) 41 jiyū to Seigi 52 at 52.


128 T Akimoto, above n 107 at 22.

129 Y Nakashita et a), Sekushuaru Harasumento [Sexual Harassment] (1987) at i.


131 Y Nakashita, above n 129 at 7-8.
Books proliferated: "[I]n 1990 alone some ten separate books on sexual harassment appeared, including 'guides' for male coworkers that ranged from sensitisation and consciousness-raising strategies to more basic 'how not to' and 'how not to get caught' guidebooks." There was even a prime-time made-for-television movie in which the female character encounters sexual harassment in the workplace.  

Even so, confusion still prevails. As Kaneko writes:

Ten years have already elapsed since the word sekushuaru harasumento [sexual harassment], hardly a word which slips off the tongue, entered the Japanese language. Although difficult to say, the word has firmly infiltrated Japanese society. The word even became 'trendy', no doubt because it was a word of the times, and I highly doubt whether there are any Japanese unfamiliar with the word.

But familiarity with the word itself and comprehension of its meaning are two entirely different matters. Even ten years after sexual harassment was first introduced to Japan, Japan is still asking itself 'what is sexual harassment?' Many still confess to not knowing. Recent attitudinal surveys confirm that a mature understanding of sexual harassment has yet to take firm root in Japan, especially among Japanese men.

Japanese sexual harassment law

This nascent state of public awareness about sexual harassment hardly provides a firm bedrock on which to overlay a strong legal statement about sexual harassment. An overview of the legal development of Japan's sexual harassment law attests to the fact that Japan's legal response, although rapidly evolving and maturing is still lacking a firm voice.

In large part, this is because the law itself is still young. Japan's sexual harassment law, after all, is barely ten years old. The filing of Japan's first sexual harassment case in the Fukuoka District Court in August 1989 kick-started legal moves to develop a sexual harassment doctrine. With saturation media coverage of the case, public interest in the issue surged. This popular interest spurred feminist lawyers and labour law specialists to probe the problem of sexual harassment and analyse possible legal remedies. Law journals filled quickly with their analyses; some major legal periodicals even published special editions dedicated to the theme of sexual harassment. Faced with no explicit law outlawing sexual harassment, the academics typically argued that the practice of sexual harassment, as a form of sex discrimination, offends a fundamental principle in Japanese law of sexual equality. In pursuing this argument, the academics invariably defined sexual harassment consistently with international definitions as unwarranted, unsolicited and unreciprocated attention of a sexual nature, which either is accompanied by employment threats or benefits or creates a...
hostile working environment. Since such behaviour is patent discrimination against women and thereby contravenes the principle underlying the legal system of sexual equality, Japanese law, they concluded, carries an inherent prohibition against acts of sexual harassment.\footnote{For an overview of the legal development of a Japanese sexual harassment law doctrine, see L Wolff, "Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harassment in Japan" (1996) 5 Pac Rim L & Pol'y J 509 at 517-520.}

The courts have picked up on the academic theories and moulded these into a judicial doctrine. Judgments have see-sawed—from decisions cautiously recognising the illegality of sexual harassment\footnote{For example, Judgment of 16 April 1992, Fukuoka District Court, (1992) 783 Hanrei Taimuzu 60.} to reactionary responses, such as dismissing the complainant's suits for evidentiary reasons\footnote{Judgment of 24 May 1995, Yokohama District Court, (1995) 670 Rōdō Hanrei 20.} or upholding the defendant's counter-claims in defamation\footnote{Judgment of 11 April 1994, Tokyo District Court (1994) 655 Rōdō Hanrei 44.} and, most recently, back again to an affirmation of the unlawfulness of sexual harassment\footnote{Judgment of 29 August 1995, Osaka District Court (1996) 883 Hanrei Taimuzu 203.}. However, as a general trend, the courts have accepted the basic tenor of the scholars' arguments, recognising that acts of sexual harassment may constitute a tort under Article 709 of the Civil Code. This doctrine is beginning to take firmer shape as the early drizzle of sexual harassment cases turns into a steadier flow. By 1992, there were only two sexual harassment decisions. At the end of 1995, over 20 sexual harassment cases were pending before the courts\footnote{Nihon Keizai Shimbun (evening edition) 5 February 1996 at 13.} by 1999, 88 cases had resulted in judgment or in-court compromises.\footnote{M Kaneko, above n 36 at 191-202.}

The legislature has since intervened in Japanese sexual harassment law by introducing amendments to the Equal Employment Opportunity Act requiring corporations to ensure a workplace free of sexual harassment. When these new provisions came into effect in April 1999, they brought to a close the first ten years of a Japanese legal response to sexual harassment.

It is tempting to conclude from this legal history that the relative shortcomings to Japan's recent experiment in relegating regulatory authority over sexual harassment to corporations may be precisely because the experiment is so new. But this is not all. Not only is Japanese sexual harassment law new, but its evolution reveals certain trademarks which suggest that it will not offer the strong framework necessary to support an informal system of corporate regulation over sexual harassment. Two themes are particularly striking. The first is Japan's very cautious and gradual legal approach to the issue of sexual harassment\footnote{Parkinson discusses the notion of gradualism in Japan's approach to equal opportunity law. See L Parkinson, "Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change" (1989) 89 Col L Rev 604.}. The second is the role of law and legal institutions in diluting the effect of an emerging law against sexual harassment.

The first theme—Japan's cautious attitude to sexual harassment—is most starkly demonstrated by the initial reluctance of Japanese judges, bureaucrats and legislators to use the words 'sexual harassment'. The earliest judgments on sexual harassment, for
example, make no mention of 'sexual harassment'. The first government report into the problem does not even carry the words 'sexual harassment' in its title (instead, the issue is obliquely referred to as a 'communication gap' between men and women). And the Equal Employment Opportunity Act with new provisions coming into effect in 1999 regulating workplace sexual harassment, neither refers to nor defines 'sexual harassment'.

This earlier reticence, however, is slowly breaking down and a legal response to sexual harassment is beginning to emerge. Judges now are more forthright in their treatment of sexual harassment, and are beginning to construct a network of civil law concepts that can support a Japanese doctrine of sexual harassment. In addition, the Ministry of Labor is exercising its rule-making authority under the Equal Employment Opportunity Act by progressively developing definitions and standards that it will, over time, incorporate into regulations. Even so, caution and gradualism are still evident in the way sexual harassment has been subsumed within broader discourses on law, thereby stunting its emergence as an issue of legal importance in its own right. Under Japanese civil law, for example, judges do not ask whether the facts before them amount to sexual harassment; they mostly employ the language of torts to ascertain whether the facts constitute 'unlawful acts' for the purposes of Article 709 of the Civil Code. Under the Equal Employment Opportunity Act, too, sexual harassment is not a statutory offence; it is ensconced within a corporation's wider duty to maintain responsible workplace policies and procedures.

The first theme of gradualism is closely connected to the second theme of erosion. Not only is Japanese sexual harassment law emerging in guarded, short steps; its development is being hampered—and its effect partly eroded—by counter-movements in legal doctrine and ineffectual legal machinery. An example of a doctrinal development that threatens to undermine sexual harassment law is the new direction that defamation law is heading in Japan. In sexual harassment suits, courts are now

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147 The first judicial statement on sexual harassment was by Judge Akimoto of the Shizuoka District Court. Since the defendant in that case did not enter a defence, the judge issued a default judgment upholding the plaintiff's claims. Judgment of 20 December 1990, Shizuoka District Court, (1991) 745 Hanrei Taimuzu 238. The second sexual harassment case—but the first contested case—was decided by the Fukuoka District Court. Judgment of 16 April 1992, Fukuoka District Court, (1992) 783 Hanrei Taimuzu 60. Neither judgment contains the term 'sexual harassment' within its reasoning.

148 A Okuyama (Chair), Report by the Research Committee on the Communication Gap between Female Employees and Management (Ministry of Labor, October 1993).


150 Guidelines issued by the Ministry of Labor under s 21(2) of the Equal Employment Opportunity Act, Law No 45 of 1985, contain a definition of sexual harassment, a classification of sexual harassment into quid pro quo harassment and environmental harassment, and some illustrative examples. See Notification No 20 of the Ministry of Labor.

recognising counter-claims in defamation. These counter-claims are brought by
defendants who, in a cross-action, contend that the plaintiff's allegations of sexual
harassment are unsubstantiated and, by communicating them to company
management or in public court documents, unlawfully harm the defendant's
professional and personal reputation. Thus, in one case, the court not only dismissed
the plaintiff's case (on the grounds of lack of evidence), but also awarded damages
against her for defaming the defendant.152

In addition, evidence law—or, at least, its application—is also causing difficulties
for female victims of sexual harassment. In some cases, despite very specific evidence
of rape or sexual assault, courts have dismissed claims for damages because of a
stereotypical view of how women should behave when the victim of sexual
violation.153 Apparently unfamiliar with the characteristics of the psychological
reaction to physical assault known as 'Rape Trauma Syndrome', Japanese courts have
questioned the reliability of testimony when the plaintiff has not cried, run away,
screamed, strongly resisted physical advances or confided in family or friends
immediately after an attack.154 Legal infrastructure is also inhibiting, rather than
supporting, legitimate cases of sexual harassment. Low (although rising)155 damages
awards and weak enforcement mechanisms continue to discourage Japanese women
from bringing legal actions in court.156 Further, Japanese women cannot invoke the
quasi-judicial powers of the Equal Opportunity Mediation Commission since the
Commission is currently not vested with jurisdiction to hear and decide sexual
harassment cases. Mediation allows women to negotiate solutions with their
employees without the need to resign their positions and engage in expensive, time-
consuming and risky litigation.

Future challenges for Japan
These social and legal dynamics underpinning Japan's policy response to sexual
harassment, however, are not at a standstill. The gradual approach to law reform by
the courts and the legislature do allow for the realistic prospect of a stronger public
regime eventually emerging in Japan. According to our model, this will widen the
possibility of public values entering—and influencing—Japanese corporate
governments.

153 See, for example, Judgment of 24 March 1995, Yokohama District Court, (1995) 670 Rōdō
Hanrei 20.
154 A Wetherfield, "Amerikajin Bengoshi no Mita Nihon no Sekushuaru Harasumento (Ka)"
(“A Foreign Lawyer Comments on Japanese Sexual Harassment Law (Part 2)”), 1080
Jurisuto 75 at 79. However, note that recent decisions are upholding the plaintiff's claims,
even if she did not respond to the alleged acts of sexual harassment in a stereotypical
fashion. For example, see Yokohama Sexual Harassment Case (Decision of the Tokyo High
Court, 20 November 1997) 728 Rōdō Hanrei Jihō 12.
155 M Fukushima, above n 122 at 1.
156 See generally N Yamanouchi and S J Cohen, "Understanding the Incidence of Litigation in
Social movement activism in Japan

Two social actors in Japan will play an important role in steering the momentum for change. The first is the media. Sexual harassment has attracted—and continues to attract—considerable press coverage. The Fukuoka Sexual Harassment case, Japan's first contested case on sexual harassment, reached the front pages in all of Japan's major newspapers. The latest criminal trial against the former governor of Osaka, brought by a 21 year old university student campaign assistant following her victory in a civil action, continues to make sexual harassment headline news in both television and the papers.

Our model for the corporate governance of human rights suggests that this ongoing media scrutiny will ensure that Japanese corporations take their responsibilities for sexual harassment seriously. In the Julianne Ashton case, the Australian media certainly was influential in propelling Bankers Trust to rethink their corporate response to sexual harassment. Patterson, in her analysis of the aftermath to the Fukuoka Sexual Harassment case, credits the Japanese media for forcing a similar "flurry of activity" within some Japanese corporations. However, the role of the media may be more ambiguous than Patterson suggests. A number of commentators have noted that the Japanese media tends to pick up sexual harassment stories to sensationalise the more salacious elements. With headlines such as "Can't Tell Dirty Jokes Anymore", "Don't Use Familiar Forms of Address to Your Female Employees," and "American Sexual Harassment Cases Reap Million Dollar Damages Verdicts", the popular press has sensationalised, and thereby trivialised, the problem of sexual harassment. The media, many argue, has treated sexual harassment as more a 'trendy' topic of conversation than a real example of gender inequality. This dilutes the impact of ongoing media scrutiny.

The more important social actor for the future of sexual harassment law and policy in Japan will be the Japanese feminist movement. This view may surprise those expert on Japanese law. After all, it runs counter to the wider assumption that feminism is generally an irrelevant social force in Japanese society. According to this view, Japanese feminism is merely an American import which has failed to take root in Japan. Feminism, the argument goes, has never established a foothold in Japan as a vigorous movement "with a mass-roots or strong national presence". When it has
orchestrated public campaigns, its tactics were outlandish and eccentric, rendering it an object of public ridicule. As a result, it is "politically irrelevant".

However, a brief survey of the history of post-war feminism in Japan, as well as an analysis of contemporary efforts by Japanese feminist groups to fight sexual harassment, does not lend support to this view. First, Japanese feminism is not a carbon copy of its American cousin; it developed out of distinct indigenous conditions. Accordingly, it is a specifically Japanese phenomenon. Second, the localized, fragmented structure of Japanese post-war feminism does not mean that Japanese feminism has failed to extend its influence within Japan. Indeed, the preference towards community-based groups rather than broad-based, national organizations has allowed the feminist voice to find expression in different communities throughout Japan. The effectiveness of Japanese feminism, therefore, has been because of, not despite, its decentralized and fractional organization. Third, Japanese feminism, like its counterparts elsewhere, is characterized by diverse interests and is divided into moderate and militant wings. While some feminist activists have chosen to adopt highly controversial strategies, their choice of tactics—indeed, the ideas that they advocate—do not necessarily describe the broader feminist movement. Therefore, it is unfair to dismiss the Japanese feminist movement as generally unimportant on the basis of an analysis of just one of its elements. Fourth, and most recently, the feminist campaign against sexual harassment confirms the significance of Japanese feminism as a social force. After all, the efforts of feminist groups and feminist lawyers have secured the issue of sexual harassment a place on the social agenda.

To date, the Japanese feminist movement has pursued a multi-faceted strategy to raise awareness about sexual harassment in Japan. Marshalling the resources of law, mass communication and scholarship, Japanese feminist activists have highlighted both the pervasive extent of sexual harassment in Japanese society as well as its iniquitous nature.

Initially, Japanese feminists tackled the problem of sexual harassment through research, surveys and theorising. Feminists first learnt about sexual harassment from the pages of existing American research on the problem. Women's groups translated handbooks on sexual harassment published by American labour unions and feminist scholars referred to key scholarly works on sexual harassment by, for example, Lin Farley and Catherine MacKinnon. Numerous female legal academics also studied the United States law on sexual harassment, focusing on both the doctrinal statements on sexual harassment by the American courts and the

167 Ibid.
168 Ibid.
170 Ibid.
171 Ibid at 158.
172 M Asakura, "Sekushuaru Harasumento" ["Sexual Harassment"] 1350 Toki no Hōrei 3 at 4.
173 L Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978)
174 C MacKinnon, The Sexual Harassment of Working Women (1979)
administrative guidelines on sexual harassment prepared by the Equal Employment Opportunity Commission.\(^{175}\)

Feminists then approached the task of identifying the nature and extent of the problem of sexual harassment within Japan. Recognising that Japan's situation may not necessarily parallel America's due to differences in culture, political institutions, and social structure, Japanese feminists conducted face-to-face interviews, sponsored telephone consultation sessions or delivered surveys in order to demonstrate the pervasive extent of the problem of sexual harassment in Japan. For example, the Shokuba ni okeru Sekushuaru Harasumento o Kangaeru Nettowāku (The Network on Sexual Harassment in the Workplace) interviewed several Tokyo women over a one-and-a-half month period from late May of 1989 until late August. The Network collected about 71 second-hand accounts of sexual harassment. Seventy cases involved women; one involved a man. The findings were formally announced in December 1989 in a pamphlet entitled Shōgen Sekushuaru Harasumento (Testimony on Sexual Harassment). The pamphlet reported that 23 respondents were approached for a relationship in their workplace; another 33 were forced into a sexual relationship; and an additional 14 were raped or otherwise violently assaulted by their bosses or colleagues. Perpetrators were mostly senior company officials—including company presidents (42.6 per cent), division managers (11.5 per cent), section chiefs (19.7 per cent), and department heads (4.9 per cent).\(^{176}\)

The Committee for the Equality of the Sexes, a subsection of the lawyers' group Tokyo Dai-ni Bengoshikai (Tokyo Second Bar Association), sponsored a telethon on October 7, 1989. Ten telephones were made available for the telephone telethon, and phone lines were open from 10 am to 4 pm. Calls jammed its telephone lines for [the full] six hours, and callers lodged 137 formal complaints, forty percent of which were from women who had been compelled to have sexual relations with their superiors. Six calls were from men, three of whom were victims of sexual harassment.\(^{177}\) Higashiko Sogabe, a member of the Bar Association, writes that the number of calls far exceeded previously sponsored special telephone consulting sessions; the results, she adds, speaks volumes about the seriousness of the problem in Japan.\(^{178}\)

The women's magazine Nikkei Ōman (Nikkei Woman) conducted its own survey, also in October 1989. Targeting 301 women and 216 men in major regional centres throughout Japan, the survey was published in the March 1990 edition of the magazine. According to the results, 56 percent of female respondents replied that they had experienced some form of sexual harassment in their workplace and 70 percent of male respondents confessed that they had witnessed acts of sexual harassment.\(^{179}\) In November of 1989, the Hataraku koto to Seisabetsu o Kangaeru Mitama no Kai (Mitama Association on Working and Sex Discrimination) conducted a significantly larger-scale survey. With the participation of eleven women's groups, 10,000


\(^{176}\) M Kaneko et al, above n 107 at 16-17.

\(^{177}\) K Kinjo, above n 127 at 38.

\(^{178}\) H Sogabe, above n 126 at 209.

\(^{179}\) Ibid.
respondents were surveyed from Hokkaido to Okinawa. After five months of surveying, the Association received 6,500 responses. The results revealed that 90.5 per cent of respondents had been groped on their commute to or from work; 60 per cent had experienced verbal harassment on the basis of their appearance (for example, they were told they were "ugly"); 70 per cent had been told how useless or unimportant they were because they were female; and 60 percent had been touched against their will, shown pornographic pictures, or told lewd jokes or stories.180

Not content to merely report on the extent of sexual harassment, feminists are also discussing why sexual harassment is against the public interest. Existing American research on sexual harassment has provided a springboard for Japanese theorising on the issue. Mizuho Fukushima, a feminist lawyer, for example, has developed a theory of a woman's right to sexual self-determination—a right, she argues, which entitles female plaintiffs of sexual harassment to bring suit against their male aggressors.181 Yumiko Ehara, Associate Professor of Sociology and Women's Studies at Tokyo Metropolitan University, pursues a sociological analysis of the interaction of normal sexuality and sexual harassment, arguing that sex-based norms perpetuate sexual double standards and obscure sexual harassment as an example of gender inequality.182 Women's support groups, such as the Tokyo Lawyers' Association for Equal Rights and the Committee for Women's Rights and Sexuality, offer environments for continuing discourse and consultation.

The feminist campaign against sexual harassment transcends mere research and scholarship. Feminist lawyers have also assisted female victims bring their disputes before the courts. Yukiko Tsunoda, a feminist lawyer and member of the Tokyo Second Bar Association, for example, agreed to handle a Shizuoka's woman's complaint of sexual harassment, securing a 1.1 million yen damages award for her client in the 1990 judgment of the Numazu branch of the Shizuoka District Court. Less than two years later, she joined a team of nineteen feminist lawyers to litigate (pro bono) a Fukuoka woman's sexual harassment suit. Similarly, Mizuho Fukushima, another feminist lawyer and member of the Tokyo Second Bar Association, has actively represented female clients in sexual harassment disputes. By 1993, she had negotiated settlements in another twenty cases.183

Feminist groups have also exploited the massive media interest in sensationalist court cases to gain maximum publicity for their fight. For example, feminist lawyer Mizuho Fukushima ensures the feminist perspective on sexual harassment is represented in the media by regularly appearing on Japanese television programs on sexual harassment and attending public seminars on the issue.184

Japanese feminists have has made important strides in placing sexual harassment under the spotlight and encouraging debate within the community. Their ongoing efforts will be critical in ensuring the success of sexual harassment as an issue of corporate governance. The test for the Japanese feminist movement will be whether or not it can retain sexual harassment on the public agenda and transform community

180 M Hayashi, above n 175 at 64.
181 M Fukushima, above n 107.
182 Y Ehara, above n 123.
attitudes. If they do, our model suggests that this will raise the expectations on how corporate Japan should regulate sexual harassment and, in addition, spark greater public criticism should they fail to meet these expectations. This will keep Japanese corporations committed to not only dealing with complaints of sexual harassment arising within their four walls, but also complying with (rising) public standards in resolving them.

Converging the public and private in Japan

The immediate future of corporate governance of sexual harassment in Japan is complicated by conflicting evidence on Japan's external—that is, social and legal—response to sexual harassment so far. The social setting to sexual harassment in Japan is especially complex. Public awareness of sexual harassment is rising, but confusion about the meaning and parameters of sexual harassment remains widespread. Intense media coverage of sexual harassment cases should keep public attention focused on the issue. However, if Japanese journalists and reporters are simply drawn to the lurid and shocking, public understanding is unlikely to deepen. Most hope rests on the Japanese feminist movement. If they continue their diversified campaign to expose instances of sexual harassment in Japan and educate the community on why it should not be tolerated, Japan will achieve a broader consensus on anti-sex discrimination values.

Similarly, Japanese law on sexual harassment, although riddled with weaknesses, is fast growing. As more and more women continue to fight their cases in court, the judicial doctrine on sexual harassment is gaining greater strength and internal coherence. Vicarious (and direct) liability on corporations for failing to stamp out sexual harassment is now established law. Damages awards are rising; and more verdicts are being handed down in favour of the female plaintiff. The legal community is actively debating 'kinks' in the judicial doctrine—including the gender bias inherent in how some courts have evaluated evidence and the effect of the counter-claim in defamation in deterring legitimate complaints of sexual harassment—and reforms in these areas are already under way. Nevertheless, Japan lacks a strong background regulator. The Ministry of Labour is largely limited to issuing administrative guidance and has no express power to compel recalcitrant corporations to improve their internal justice systems. The Equal Opportunity Mediation Committee is powerless to hear complaints of sexual harassment mishandled by corporate management.

Our model for the successful corporate governance of sexual harassment rests on blurring the distinctions between 'public' and 'private', 'external' and 'internal'. In short, public values about anti-sex discrimination must permeate the private domain of corporate governance, and private governance must be the subject of public—social and legal—oversight. Expressed broadly, the challenge for Japan lies in how to blur this distinction between the 'public' and 'private' when the 'public' is itself blurred. More concretely, the challenges for Japan can be summed up in how likely external norms will converge with internal corporate processes at each of the following three stages:

(a) The first stage is management's commitment to respond to the issue of sexual harassment. The evidence in Japan suggests that corporate managements are beginning to articulate a corporate response to workplace harassment, although the pickup rate has been gradual and sporadic. The fear of legal liability is an important motivating factor in this move. However, a murky understanding of
what sexual harassment is among Japanese men—who dominate top management positions in Japanese companies—is likely to keep improvements in this area piecemeal.

(b) The second stage is corporations acquiring specialised skills in managing sexual harassment. The main inhibitor to this development in Japan is the absence of a strong regulator—either the Ministry of Labour or the Equal Opportunity Mediation Committee—to oversee this process. Although the Ministry of Labour has power under the Equal Employment Opportunity Act to issue guidelines on sexual harassment, the first set of guidelines issued by the Ministry suggests that it intends to maintain an incremental approach to social change. In addition to explaining some definitional issues, the guidelines require corporations to draft a corporate sexual harassment policy, distribute it to all employees and educate their workforce as to its purport. How they should do so is kept vague. Corporations are also required to set up internal systems to provide counselling services and to handle complaints of alleged harassment "appropriately and flexibly." 185

(c) The final stage is for corporations to institutionalise a strategy to eradicate sexual harassment as part of the corporation's mission (and not merely to protect against potential legal liability or trial by media). Since this stage rests heavily on Japan travelling successfully through the previous two stages, the immediate prospects of achieving this stage are particularly dim.

The key lesson from Japan, therefore, is that a nascent, unsettled state of sexual harassment law—accompanied by a lack of public understanding of the issue—will mean that external pressures will be less influential in directing internal corporate processes.

CONCLUSION

The key to the successful corporate governance of a human rights issue is the convergence of external and internal values at each stage of the corporation's response to the issue—whether (1) commitment to respond, (2) acquisition of specialised skills and knowledge, or (3) institutionalisation of purpose (see Diagram One). The Australian experience emphasizes the significance of permeability between the 'internal' governance and 'external' accountability so that:

(a) employees (and other victims of harassment) are empowered within corporate structures by the ability to move strategically from internal to external, informal to formal remedies;

(b) courts and tribunals, anti-discrimination regulators, public interest groups and the media devote attention to the existence and quality of corporate governance of sexual harassment; and

(c) an internal constituency of EEO officers uses appeals to public values and business goals to change the corporation from within.

Diagram One illustrates how regulators and law (the bottom level) and EEO officers, public interest groups, the media and other private actors (the top level)

185 Notification No 20 of the Ministry of Labor.
186 Ibid.
should each impact on the three phases (middle level) of corporate governance responses to sexual harassment as an issue.

The lesson from Japan, by contrast, is that achieving corporate governance of sexual harassment is less likely to be promising when 'external' factors, especially the state of the law, remain uncertain, incomplete or tentative. Of course, the corollary is also true—as sexual harassment law develops greater internal coherence and awareness of sexual harassment strengthens, corporations are more likely to be more forthright in their own treatment of the issue.

These observations apply beyond our chosen case study of sexual harassment. Expressed broadly, the key to entrusting human rights to corporate governments rests on ensuring that public values interface effectively with private management systems. This interaction between the public ('external') and the private ('internal') is necessarily symbiotic. Not only must public standards about human rights infiltrate corporate governance decision-making and human resources practices, but corporations must actively receive public standards and embed them in their organisational fabric.

The Australian case study on sexual harassment gives cause for optimism that corporations may successfully take charge of human rights issues. This, of course, is provided certain conditions are firmly in place. An effective—and, if necessary, intrusive—regulator, a high level of public awareness, a strong legal regime, ongoing media scrutiny and active social movements can not only compel corporations to take their compliance obligations seriously, but can also play a continuing role in ratcheting up internal regulatory standards to higher levels of quality. The Japanese case study, however, reminds us that without these conditions, informal governance may not achieve hoped-for results.

One question that arises from our comparative analysis is whether or not corporations should be entrusted to self-regulate on new or emerging human rights. Our analysis of the Australian experience with sexual harassment led us not only to conclude that corporations can successfully self-regulate on issues of human rights, but also allowed us to explore how this could be achieved. Thus, we argue that the convergence of public standards and private systems needs to pass through a three-stage continuum through which (1) management commits to addressing the human right; (2) the corporation develops internal expertise to tackle the issue; and (3) the corporation internalises the human right as part of its organisational goals. These conclusions, however, were mainly possible because sexual harassment has a relatively clear meaning in Australian society and under Australian law.

However, in Japan, where sexual harassment is still evolving both as a legal issue and as a social problem, the potential for corporate governance of sexual harassment rests on further developments in Japanese law and social awareness. This means it is too early to expect sexual harassment as an issue to travel smoothly through each of the three stages we have identified. Does it follow, then, that Japan moved too quickly to legislate in favour of a corporate regulation of sexual harassment? Corporate governance of sexual harassment in Japan would probably be more successful if the Ministry of Labour had waited until the judicial doctrine on sexual harassment took firmer shape—or, better still, if they had moved first to bolster sexual harassment law itself. Does this imply that states should generally wait until new human rights take root socially, politically and legally before entrusting their regulation to private corporations?
These questions are important. With the categories of human rights in a constant state of flux, the next debate will be over whether corporations can—and should—assume responsibilities over new public rights when the courts and the legislatures are still struggling with their import.