Want to end workplace sexual harassment? Easy. Make it a criminal offence.

Sexual violence is a scourge that permeates every layer of Australian society. To fight it, our laws need to be reformed.

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The global gold standard for bringing down a sexual predator is Ronan Farrow's relentless pursuit of Harvey Weinstein, exhaustively chronicled in his book *Catch and Kill*.

But here in Australia, because of the differences between US and Australian defamation law, the big catches have not been reeled in by the media but by the (so far) rare instances of institutional leaders being prepared to call powerful perpetrators to account.

Our incoming defamation law reforms, which will create a public interest defence for investigative reporting, are the first of three major legal developments that I believe are prerequisites to a genuine change of culture around sexual harassment in the workplace. The other two are starkly illustrated in Farrow's book.

First is the question of how harassment is legally framed within the continuum of sexual violence. Under our law at present, sexual harassment is not a crime; it is a legal wrong that gives its victims an entitlement to sue for damages.

It sits alongside other bad things that can happen to an employee in their workplace, like unfair dismissal, discrimination and bullying, with the same degree of moral culpability and societal disapprobation attached.

The Weinstein case underlines the problem with the supposedly neat division between harassment and conduct recognised as a criminal offence: essentially, indecent assault and sexual assault.

Weinstein did everything imaginable: lecherous looks, creepy comments and harassing calls/texts, constant propositioning, turning up unannounced, forcing his way into rooms and homes, dropping his pants, demanding a massage or a shower, chasing women around the room, coerced “consensual” sex, violent rape. His victims probably count in the thousands, and his patterns of behaviour are unmistakeable. The differences in outcome were solely a product of how each victim reacted (to be clear: that is not their fault).

When considering a predator’s conduct, much of the discussion about what can be done centres on which parts equalled a sexual assault, indecent assault or “just” harassment. The Dyson Heydon allegations illustrate this as well; a couple of the alleged incidents may have amounted to indecent assaults but most were “mere” workplace harassment with no criminal consequences.

The reality is the continuum: as with the different forms of abuse that define domestic violence, the legal distinctions are arbitrary and misleading. A predator is a predator is a predator. Everything Weinstein did had the same degree of moral culpability, and he should be criminally liable for all of it. His intentions never wavered and his victims always suffered.

Sexual harassment in the workplace — because of its context of necessary power imbalance — should be a criminal offence. The responsibility for identifying, prosecuting and punishing it should not just rest with its victims, as it does now. Nor should employers be expected to carry the burden of stamping it out, simply because most of them can’t and won’t. (Weinstein’s employer was The Weinstein Company — how do you reckon that played out?)

The final piece is going to get howls of objection from lawyers, but it’s right nonetheless: non-disclosure agreements (NDAs) need to be outlawed.

The most critical weapon in Weinstein’s armoury was his ability to buy silence. For decades, his entire organisation and its lawyers followed along behind his sexual predation, cleaning up by intimidating the victims and, when necessary, paying them off. They, along with every employee, were signed up to NDAs that obliged them to take their knowledge of his crimes to the grave.

This practice is ubiquitous in corporate cultures; it is routine and unquestioned practice that, when a victim calls out harassment or assault, the settlement includes an NDA that gags them forever. Unless silence is agreed, the money doesn’t flow.

I raised this point at a round table of lawyers early in the Me Too movement’s days here. I argued that it should be illegal to enter into an NDA with a victim of alleged sexual violence of any kind and that, until it is, we won’t get very far in changing the corporate culture which enables and covers up that violence. I was shouted down.

Actually, an NDA that seeks to silence the victim of a crime is, as a matter of public policy, quite possibly void and unenforceable. There is a longstanding principle that the courts will not enforce contracts that enable or protect criminal conspiracies. It's hard to see the Weinstein NDAs, for example, in any other light. Likewise those bought for pennies by the Catholic Church from the victims of its paedophile priests.

If harassment became a crime then that policy argument would take on even more strength. Why should the law allow itself to be co-opted by perpetrators of the scourge of sexual violence that permeates every layer of our society?

Law aside, there's the simple pragmatic issue: sexual violence is a scourge. It hasn't diminished, in volume or harm. It's great that it's being more frequently called out and that its victims are increasingly seen as not shamed by their disclosure. But that is not enough, and it still places all the burden unfairly on the victims.

It's time for our state and territory parliaments to step up and make the reforms that will really change the game. We can do this.