



# Good practice, good business

Eliminating discrimination and harassment from your workplace

## A GUIDE TO VICARIOUS LIABILITY

Under federal anti-discrimination law an employer, regardless of their size, may be legally responsible for discrimination and harassment which occurs in the workplace or in connection with a person's employment unless it can be shown that **'all reasonable steps'** have been taken to reduce this liability. This legal responsibility is called **'vicarious liability'**.

'All reasonable steps' is not defined in the legislation because what is reasonable for a large corporation may not be reasonable for a small business. Rather it is worked out on a case-by-case basis. However, it does mean that employers must actively implement precautionary measures to minimise the risk of discrimination and harassment occurring. An *'all reasonable steps' checklist* is included as a guide in this fact sheet.

### ***Where is vicarious liability applicable?***

The vicarious liability provisions of the legislation only apply where the alleged discrimination and harassment occurs in connection with the person's employment. This means the employer may be held vicariously liable for the actions of employees if they have not taken all reasonable steps to prevent the discrimination and harassment from occurring both within the usual work environment and at employer events, such as sponsored seminars, conferences, work functions, Christmas parties, business or field trips.

### ***Whose conduct is covered?***

An employer may be vicariously liable for the conduct of:

- individual employees or groups of employees
- directors, supervisors or managers

- workplace participants (where two people work on the same premises, but have different employers)
- agents (eg. insurance salespersons operating on a company's behalf)
- contract workers or people being paid commission
- a partner of a company harassing another partner
- members of organisations which grant occupational qualifications
- a person employed by a trade union harassing a member
- a person operating an employment agency who harasses someone who uses the agency

### ***Liability of individuals***

The vicarious liability provisions of the legislation do not preclude individual persons from being held liable for their own discriminatory or harassing behaviour in the workplace or in connection with their employment. It may be that both the employer, who has been found to have not taken all reasonable steps to prevent the discrimination and harassment from occurring, and the individual, who is the alleged discriminator or harasser, will be held jointly liable for the behaviour.

### ***Factors for employers to consider***

When deciding what level of preventative action is reasonable, an employer should consider:

- the size and structure of the organisation
- available resources
- the nature of the work undertaken

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- gender imbalances in the workplace
- the employment of women in non-traditional areas
- the number of junior staff
- the workplace culture
- cultural diversity in the workplace
- any history of harassment
- any relevant provisions in industrial awards or agreements
- working hours
- level of supervision
- any other relevant factor, such as geographic isolation of the work location, duties which require working in close physical proximity, live-in arrangements, etc.

***Taking steps to prevent discrimination and harassment***

It is recommended that employers take the following 'reasonable steps' to prevent harassment and reduce their vicarious liability:

- obtain high level support from the chief executive officer and senior management for the implementation of a comprehensive strategy to address discrimination and harassment
- develop in consultation with staff or their union a written policy which prohibits discrimination and harassment
- consult relevant parties including staff, employer organisations, unions, industry and professional associations, the Australian Human Rights Commission (the Commission) and/or state and territory anti-discrimination agencies, when developing anti-discrimination or anti-harassment policies
- regularly distribute and promote the policy at all levels of the organisation
- translate the policy into relevant community languages where required so it is accessible to employees from culturally and linguistically diverse communities

- ensure that managers and supervisors discuss and reinforce the policy at staff meetings (verbal communication of the policy is particularly important in workplaces where the English language ability of staff is an issue)
- provide the policy and other relevant information on discrimination and harassment to new staff as a standard part of induction
- periodically review the policy to ensure it is operating effectively and contains up to date information
- display posters on notice boards in common work areas and distribute relevant brochures (these may be obtained from the Commission, state and territory anti-discrimination agencies and/or relevant unions)
- train all line managers on their role in ensuring that the workplace is free from discrimination and harassment
- ensure that line managers model appropriate standards of professional conduct at all times
- include accountability mechanisms in position descriptions for managers
- ensure that selection criteria for management positions include the requirement that managers have a demonstrated understanding of and ability to deal with discrimination and harassment issues as part of their overall responsibility for human resources (competence in this area can be tested at selection interviews)
- check that managers are fulfilling their responsibilities through performance appraisal schemes
- conduct awareness raising sessions for all staff on discrimination and harassment issues
- remove offensive, explicit or pornographic calendars, literature, posters and other materials from the workplace
- develop a policy prohibiting inappropriate use of computer technology, such as e-mail, screen savers and the Internet.

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***Taking steps to deal with complaints of discrimination and harassment***

It is recommended that employers take the following 'reasonable steps' to deal with discrimination and harassment and reduce their 'vicarious liability':

- implement an internal system for dealing with complaints of discrimination/harassment or adapt existing grievance procedures for this purpose
- ensure that the organisation's policy on discrimination and harassment provides employees with advice on what to do if they are discriminated against or harassed. Employees should be given information on:
  - how to deal with the discrimination or harassment themselves – employees should not be pressured into pursuing this option and should only confront the harasser directly if they feel confident enough to do so
  - speaking to their supervisor, manager or other contact officer who has responsibility for dealing with discrimination or harassment
  - lodging a formal complaint through the organisation's complaint/grievance procedure
  - approaching an external organisation such as the Commission or a state or territory anti-discrimination agency.
- depending on the size of the organisation, appoint anti-discrimination and harassment contact officers of both sexes at various levels who are responsible for:
  - providing employees with information on discrimination and harassment and clarifying any questions or concerns they may have

- providing confidential advice on the options that are available for dealing with discrimination/harassment
- providing advice to an individual who wishes to confront the discriminator/harasser themselves.

- provide employees who have been discriminated against or harassed with access to counselling services or employee assistance programs (costs should be fully borne by the employer)
- provide employees who have harassed other staff members with information and training to ensure the discrimination or harassment does not occur again.

**CHECKLIST**



An 'all reasonable steps' checklist could include:

- ✓ ***preparing and promoting a written policy on workplace discrimination and harassment***
- ✓ ***training staff to identify and prevent workplace discrimination and harassment***
- ✓ ***establishing an effective internal complaints procedure***
- ✓ ***appointing trained harassment contact officers***
- ✓ ***treating all complaints seriously and investigating them promptly***
- ✓ ***ensuring that appropriate action is taken to address and resolve complaints***
- ✓ ***monitoring the workplace environment and culture, such as holding staff surveys or reviewing recruitment practices***

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This fact sheet is part of *good practice, good business* – information and resources for employers to address discrimination and harassment in the workplace.

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