



A Short Guide to the Sexual Harassment Code of Practice

What is sexual harassment?

Sexual harassment is unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances. Sexual harassment in employment is unlawful under the *Sex Discrimination Act 1984* (Cth).

Whether the behaviour is **unwelcome** is a **subjective test**: how the conduct in question was perceived and experienced by the recipient rather than the intention behind it.

Whether the behaviour was **offensive, humiliating or intimidating** is an **objective test**: whether a reasonable person would have anticipated that the behaviour would have this effect.

Sexual harassment in the workplace can take various forms. It can involve unwelcome touching, hugging or kissing; suggestive comments or jokes; unwanted invitations to go out on dates or requests for sex; insults based on your sex or sexually explicit emails or SMS messages.

Both men and women can experience sexual harassment at work, however, it is most commonly experienced by women.

For more information about sexual harassment see 1.2 on page 11.

When is sexual harassment prohibited?

Sexual harassment is prohibited in almost every employment situation and relationship. For example, sexual harassment is prohibited at the workplace, during working hours, at work-related activities such as training courses, conferences, field trips, work functions and office Christmas parties. It is also prohibited between almost all workplace participants.

For more information on who is covered by sexual harassment laws see 2.2 on pages 17 to 19.

What are my legal obligations as an employer?

There are good practical reasons for preventing sexual harassment in the workplace – policies and procedures preventing harassment assist employers in maintaining positive workplace relationships and can improve employee motivation and performance. However, there are also laws requiring employers to take preventative action against sexual harassment.

As an employer, you may be held legally responsible for acts of sexual harassment committed by your employees. This is called 'vicarious liability'. The Sex

Discrimination Act makes employers liable unless they have taken **all reasonable steps** to prevent sexual harassment taking place.

There are two main actions that employers must take to show that they have taken all reasonable steps and avoid liability for sexual harassment.

First, to prevent sexual harassment an employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness. Of course, what is reasonable for some employers may not be for others.

For information on what a sexual harassment policy should contain see 4.2.2 on pages 27 to 30.

For information on how to implement and monitor a sexual harassment policy, see 4.2 on page 25.

Secondly, if sexual harassment does occur, the employer must take appropriate remedial action - an employer should have appropriate procedures for dealing with grievances and complaints once they are made.

For more information on liability and “all reasonable steps” see 3.2 on page 21 and 4.2 on page 25.

Other employer duties

In managing sexual harassment in the workplace, you may also have obligations under other laws, such as privacy, defamation, occupational health and safety and industrial laws.

Are there any specific guidelines for small business?

There is no exemption in the Sex Discrimination Act for small business. Employers in all small businesses, whatever the size, may be vicariously liable for acts of sexual harassment committed by employees unless all reasonable steps were taken to prevent it occurring.

Small businesses will still have to write and implement a sexual harassment policy and they still need to deal with complaints in an appropriate way. However, courts will take into account the size and resources of a business in deciding what is reasonable to expect them to do to prevent sexual harassment.

Further assistance

For further assistance on sexual harassment issues employers can contact HREOC or their State or Territory anti-discrimination agency. *Contact details for these organisations are at Appendix B.* Employers may also seek assistance from employer organisations, small business or industry associations.



The Legal Definition of Sexual Harassment

Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.

The *Sex Discrimination Act 1984* (Cth) defines the nature and circumstances in which sexual harassment is unlawful. It is also unlawful for a person to be victimised for making, or proposing to make, a complaint of sexual harassment to the Human Rights and Equal Opportunity Commission.

Examples of sexually harassing behaviour include:

- unwelcome touching;
- staring or leering;
- suggestive comments or jokes;
- sexually explicit pictures or posters;
- unwanted invitations to go out on dates;
- requests for sex;
- intrusive questions about a person's private life or body;
- unnecessary familiarity, such as deliberately brushing up against a person;
- insults or taunts based on sex;
- sexually explicit physical contact; and
- sexually explicit emails or SMS text messages.

A working environment or workplace culture that is sexually permeated or hostile will also amount to unlawful sexual harassment. Some of the factors emerging from the case law which may indicate a potentially hostile environment include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes. See 1.2.4 on page 14 of *Sexual Harassment in the Workplace: A Code of Practice for Employers* for further information.

The Sex Discrimination Act makes sexual harassment unlawful in many areas of public life, including in employment situations, educational institutions, the provision of goods, services and accommodation and the administration of Commonwealth laws or programs.

A person who sexually harasses is primarily responsible for the sexual harassment under the Sex Discrimination Act. However, in many cases, employers and others can be held responsible under the Sex Discrimination Act for acts of sexual harassment done by their employers or agents. For further information see Chapter 3 of *Sexual Harassment in the Workplace: A Code of Practice for Employers*.

Employers may limit their liability if they can show that they took all reasonable steps to prevent the sexual harassment occurring. Reasonable steps may include policies and procedures designed to create a harassment-free environment. It could also include procedures to deal with allegations of discrimination made by employees or customers. To be effective, policies must be well implemented, including through the provision of ongoing training, communication and reinforcement.



The Complaint Process

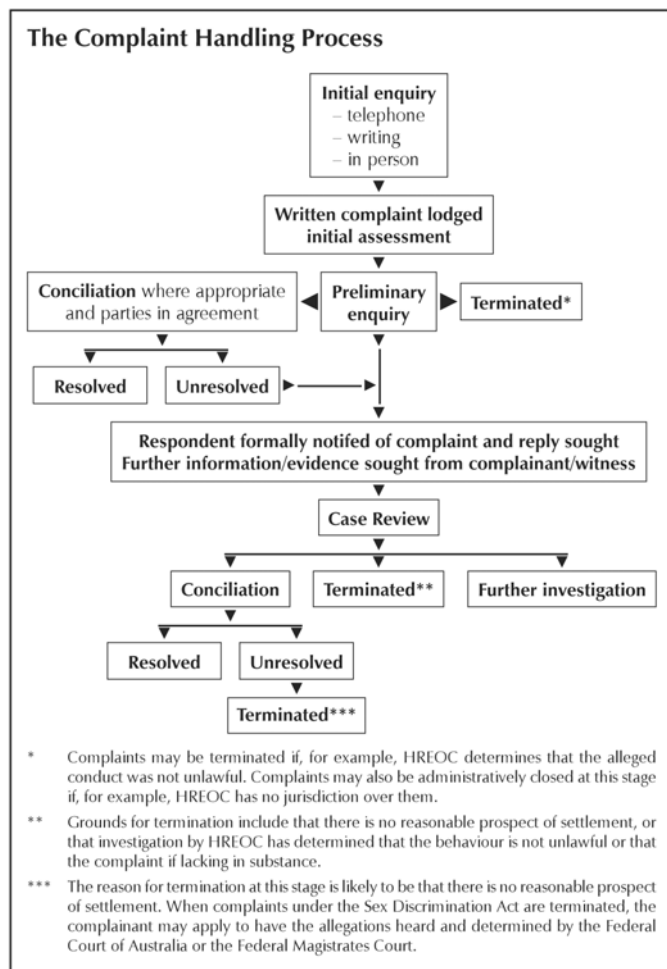
Individuals can lodge complaints of sexual harassment under the *Sex Discrimination Act 1984* (Cth) with the Human Rights and Equal Opportunity Commission (HREOC). The person who is claiming to have been harassed or victimised and lodges the complaint is referred to as the complainant. The respondent is the person against whom the complaint has been lodged and may be an individual, individuals and/or an employer.

A complaint is initially assessed to make sure it can be investigated under the *Sex Discrimination Act 1984* (Cth). After receiving all the relevant information, the complaint is then reviewed to decide if it should be administratively closed, terminated or if it is suitable for conciliation.

Conciliation is a process where HREOC brings the parties together – the complainant and the respondent – to try and resolve the matter. Conciliation is a confidential process where both parties are given the opportunity to talk through the issues and reach an agreement. HREOC does not determine whether or not there has been sexual harassment under the *Sex Discrimination Act*. This is a matter for the Courts, on application by the complainant, if the complaint is terminated.

Many complaints are successfully conciliated. The settlements that have been agreed upon are wide and varied. Outcomes depend on how the complainant is seeking to resolve the complaint and what the respondent is prepared to offer.

If a complaint cannot be conciliated, it will be terminated by the President of HREOC. A complainant may then make an application to the Federal Court of Australia or Federal Magistrates Court to hear and determine the allegations.





Executive Summary

'20 Years On: The Challenges Continue ... Sexual Harassment in the Australian Workplace'

The Human Rights and Equal Opportunity Commission (HREOC) is an independent statutory authority established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). It has a variety of functions and powers to promote and protect the human rights of all people in Australia. HREOC administers the *Sex Discrimination Act 1984* (Cth) (SDA).

Sexual harassment is a legally recognised form of sex discrimination. Sexual harassment in certain areas of public life is unlawful under the SDA.

In 2003, HREOC undertook a review of the sexual harassment in employment complaints finalised by the Commission in 2002. That review, entitled *A Bad Business: Review of sexual harassment in employment complaints 2002* (A Bad Business) highlighted the continuing challenges that sexual harassment presents, particularly for women in paid employment.

A national telephone survey *20 Years On: The Challenges Continue... Sexual Harassment in the Australian Workplace* conducted for HREOC by the Gallup Organization confirmed this finding. This is the first such comprehensive national survey of sexual harassment undertaken in Australia, with 1,006 interviewees randomly selected from the Australian adult population.

The survey found that 41 per cent of Australian women aged between 18 and 64 years and 14 per cent of men have experienced sexual harassment. Two-thirds of this sexual harassment occurs in the workplace, with 28 per cent of Australian women and seven per cent of Australian men having experienced sexual harassment at work.

The survey indicates that 14 per cent of Australians have witnessed incidences of sexual harassment in the workplace in the five years prior to the conduct of the survey. The vast majority of these witnesses elected to take some action in relation to the incident, from talking and offering advice to the target of the harassment, to confronting the harasser.

Over half of the interviewees to the survey who were sexually harassed at work experienced physical forms of sexually harassing conduct, including unwelcome touching, hugging, cornering, kissing or unnecessary familiarity. However, non-physical types of sexual harassment were most frequently experienced (most interviewees experienced more than one type of sexually harassing conduct), such as suggestive comments or jokes, staring or leering, sexually explicit emails or SMS messages, and sexually explicit pictures of posters.

Workplace sexual harassment is rarely a one-off incident. Half of the experiences continued for up to six months, suggesting that workplace sexual harassment may have a significant impact on an employee's productivity.

A significant proportion of the sexual harassment experienced in the workplace is perceived as serious in nature, with half of the survey interviewees rating the experience as very or extremely offensive.

As the general incidence rate indicates, sexual harassment in the workplace predominantly affects women. The largest group affected was women under the age of 45. Seven in 10 cases of sexual harassment involved men harassing women.

Almost half of the harassers were co-workers of the target, with over a third of harassers a person in authority in the workplace in relation to the target. Of those harassed by someone in authority the harasser was more likely to be male than female. Females were more likely to harass co-workers than those under their supervision.

Less than one third of the sexual harassment experienced is formally reported to either employers or external agencies such as HREOC. Of the sexual harassment reported, most is reported to the target's manager, supervisor, employer or boss. Only one per cent of workplace sexual harassment is reported to anti-discrimination agencies such as HREOC.

The main reasons for not reporting the sexual harassment were:

- i. a lack of faith in the formal complaints mechanism;
- ii. a belief that the experience was not serious enough to warrant reporting; and
- iii. the target dealing with the problem themselves.

At the same time, of those who did formally report the sexual harassment experienced in the workplace, just under half were either satisfied or very satisfied with the formal complaints mechanism, and in most cases (59 per cent) action was taken against the harasser. This suggests that employers may need to do more to promote the use of their formal grievance procedures to overcome employees' reluctance to formally complain.

Nevertheless, a significant number of formal complaints were perceived to be handled badly, suggesting that some employers may need to review and improve their grievance procedures.

The survey results of the telephone survey suggest that the effectiveness of current employer policies to prevent and eliminate sexual harassment in the workplace may vary considerably. Employers may also need to review the effectiveness of their prevention policies in light of the survey's results.

The persistent nature of sexual harassment in employment, despite 20 years of legislation making such conduct unlawful, requires on-going monitoring and vigilance in order to reduce its incidence. The findings of the telephone survey and *A Bad Business* suggest that employers, employer associations, unions, and anti-discrimination agencies such as HREOC, must continue to focus on educating workplace participants of their rights and responsibilities, take action to prevent sexual harassment, and deal effectively and comprehensively with sexual harassment when it does occur. The challenges continue . . .



Key Findings – Overview

'20 Years On: The Challenges Continue ... Sexual Harassment in the Australian Workplace'

The Human Rights and Equal Opportunity Commission (HREOC) commissioned the Gallup Organization to conduct a national household telephone survey on the incidence and nature of sexual harassment experienced in the Australian community.

The incidence of sexual harassment experienced in the community

- 28 per cent of interviewees stated that they have personally experienced sexual harassment at some time in an area of public life.
- 41 per cent of women and 14 per cent of men stated that they have personally experienced sexual harassment at some time in an area of public life.

The incidence of sexual harassment experienced in the workplace

- 18 per cent of interviewees stated that they have personally experienced sexual harassment in the workplace at some time.
- 28 per cent of women and 7 per cent of men stated that they have personally experienced sexual harassment in the workplace at some time.

The incidence of workplace sexual harassment experienced in the last five years

- 11 per cent of interviewees stated that they have personally experienced sexual harassment in the workplace in the last five years.
- 15 per cent of women and 6 per cent of men stated that they have personally experienced sexual harassment in the workplace in the last five years.

The incidence of witnessing sexual harassment in the workplace in the last five years

- 14 per cent of interviewees stated that they have witnessed sexual harassment in the workplace in the last five years.
- 87 per cent of those witnesses of sexual harassment in the workplace in the last five years took some sort of action when the sexual harassment occurred.

Nature of sexual harassment in the workplace in the last five years

- 94 per cent of the sexual harassment experienced involved "crude or offensive behaviour".
 - 85 per cent involved "unwanted sexual attention".
 - 43 per cent involved "sexist behaviours".
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- 20 per cent involved “sexual assault”.
- 19 per cent involved “sexual coercion”.
- 62 per cent included physical harassment.

Duration of the sexual harassment in the workplace in the last five years

- 15 per cent of interviewees who experienced workplace sexual harassment in the last five years stated that it was a one-off incident.
- 50 per cent stated that it continued for up to six months.

Seriousness of the sexual harassment in the workplace in the last five years

- On average, interviewees who experienced workplace sexual harassment felt more offended than intimidated by the sexual harassment experienced.
- 40 per cent of interviewees rated the sexual harassment experienced as very or extremely intimidating.
- 50 per cent of interviewees rated the sexual harassment experienced as very or extremely offensive.
- On average, female interviewees rated the sexual harassment experienced as more offensive and intimidating than male interviewees.

Characteristics of the target of sexual harassment in the workplace in the last five years

- 72 per cent of the targets of harassment were women; 28 per cent were men.
- The greatest prevalence of sexual harassment in the workplace occurs among women younger than 45 years of age.
- 70 per cent of the sexual harassment experienced by interviewees involved men sexually harassing women.
- 19 per cent of the sexual harassment experienced by interviewees involved women sexually harassing men.
- Nine per cent of the sexual harassment experienced by interviewees involved men sexually harassing men.
- Two per cent of the sexual harassment experienced by interviewees involved women sexually harassing women.
- 70 per cent of the targets of workplace sexual harassment were working full time and 30 per cent part time.
- Employees who have been at a workplace for less than 12 months appear to be more likely to experience sexual harassment.

Characteristics of the workplace harasser in the last five years

- 79 per cent of the harassers identified by interviewees were men; 21 per cent were women.
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- The age of the harasser estimated by the target of the sexual harassment was predominantly over 30 years of age.
- 35 per cent of interviewees who experienced workplace sexual harassment stated that the harasser was a “boss or employer”, “supervisor or manager”, or a person in a more senior position.
- 48 per cent of interviewees who experienced workplace sexual harassment stated that the harasser was a “co-worker”.
- 16 per cent of interviewees who experienced workplace sexual harassment stated that the harasser was a “client or customer” or “others associated with the workplace”.

Characteristics of the workplace where the sexual harassment occurred in the last five years

- Sexual harassment is prevalent across all employer sizes and is widely spread across industries.

Reported sexual harassment in the last five years

- Less than one third (or 32 per cent) of interviewees who experienced sexual harassment in the workplace stated that they made a formal report or complaint about the sexual harassment.
- Female targets of sexual harassment were more likely than male targets to formally report the sexual harassment experienced.
- Of those interviewees who did report the sexual harassment, the majority reported it to their “manager or supervisor at work” or “boss or employer”.
- Only one per cent of interviewees to the telephone survey who experienced sexual harassment in the workplace stated that they made a complaint of sexual harassment to either HREOC or to a State or Territory anti-discrimination agency.

Reasons for not reporting sexual harassment experienced in the last five years

- 31 per cent of those who did not report the sexual harassment experienced stated that they “did not think that the harassment was serious enough” to warrant reporting.
 - 26 per cent stated that they “took care of the problem myself”.
 - Almost half of those who did not report the sexual harassment experienced expressed a lack of faith in the grievance process as one of the reasons for not reporting it.
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Key Findings – Nature and Severity

'20 Years On: The Challenges Continue ... Sexual Harassment in the Australian Workplace'

Nature of sexual harassment experienced in the workplace in the last five years

- 62 per cent of interviewees who experienced sexual harassment in the workplace in the last five years described it as including physical sexual harassment, 38 per cent described it as involving exclusively non-physical sexual harassment.
- Interviewees who experienced sexual harassment in the workplace were subjected to an average of five forms of harassing behaviour (of a possible 13 categories – see 2.3. on page 19 for discussion of these categories).
- Interviewees who experienced physical sexual harassment were more likely to formally report the harassment to their employer or to external agencies than interviewees who experienced exclusively non-physical sexual harassment.
- Interviewees who experienced physical sexual harassment stated that the harassment tended to continue for a longer period of time than interviewees who experienced exclusively non-physical harassment.
- Sexual harassment by the boss or employer is more likely to involve physical sexual harassment whereas sexual harassment by a co-worker is more likely to involve non-physical sexual harassment.
- Male to female sexual harassment is more likely to involve physical sexual harassment while male to male sexual harassment is more likely to involve non-physical sexual harassment.

Severity of the sexual harassment experienced in the workplace in the last five years

- On average, interviewees who experienced sexual harassment in the workplace in the last five years felt more offended than intimidated by the experience.
 - On average, women felt both more offended and more intimidated than men.
 - 50 per cent of interviewees rated the severity of the sexual harassment experienced as either very or extremely offensive, 40 per cent of interviewees rated the severity of the sexual harassment experienced as either very or extremely intimidating.
 - The greater the severity rating of the sexual harassment, the more likely the interviewee was to report the sexual harassment.
 - On average, interviewees felt both more offended and more intimidated by physical sexual harassment than exclusively non-physical sexual harassment.
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Prevalence of sexual harassment in some workplaces

- 58 per cent of interviewees who have experienced sexual harassment in the workplace in the last five years said that it had happened to someone else in the same workplace.
- Of these, 33 per cent said sexual harassment was common in their workplace, 37 per cent said it had occurred sometimes, 19 per cent said sexual harassment was rare in their workplace, and 11 per cent said it was very rare.



Summary of Comparisons

The following is a summary of Chapter 3 of *20 Years On: The Challenges Continue ... Sexual Harassment in the Australian Workplace* – the comparisons between the findings of the national telephone survey and the results of HREOC's review of sexual harassment in employment complaints in *A Bad Business: Review of sexual harassment in employment complaints 2002*.

Demographics of harassers and their targets

HREOC's review of sexual harassment in employment complaints in *A Bad Business* and the findings of the telephone survey reported in *The Challenges Continue* reinforce many previous findings on the characteristics of the targets and perpetrators of sexual harassment, including that:

- women are more likely to be the targets of harassment than men;
- men are more likely to be harassers than women;
- younger people are more likely to be the targets of sexual harassment than older people; and
- most sexual harassment involves men harassing women.

New-starters

A Bad Business found that almost three quarters of complainants of sexual harassment were relatively new to the workplace when the harassment occurred. *The Challenges Continue* found that almost half of the telephone survey interviewees who experienced sexual harassment at work in the past five years had been at the workplace for less than 12 months. These findings suggest that those newest to the workplace may be particularly susceptible to sexual harassment.

Relationship between harassers and their targets

In *A Bad Business*, the majority of alleged harassers were in a superior position in the workplace in relation to the complainant. *The Challenges Continue* found that co-workers were the most frequent harassers, but that over one third of harassers were in formal authoritative relationships with the targets. Moreover, where the harasser was described as the "employer or boss", interviewees were less likely to formally report the sexual harassment.

Harassed by customers

Ten per cent of interviewees described the harasser as a client or customer. The relationship between an employee and a customer or client may not fall under the provisions of the SDA, so that an employee may not have an avenue for redress directly against the client harasser. Moreover, managing formal workplace complaints of an employee who has been allegedly sexually harassed by a client of the employer presents employers with a range of complexities not easily addressed. See page 19 of *Sexual Harassment in the Workplace: A Code of Practice for Employers* for more information

Types of sexual harassment experienced

Over half of the sexual harassment experienced tends to include physical behaviour, although the most frequently occurring categories of sexual harassment in both sets of data (“crude or offensive behaviour” in the telephone survey in *The Challenges Continue* and “lewd suggestive comments, innuendo, display of offensive material” in *A Bad Business*) were non-physical types. This may suggest a system of progression of sexually harassing behaviour.

Workplace size and occupation

It seems that workplace size has little or no influence on the incidence of sexual harassment. However, occupation does appear to play a role. Gender segregated occupations such as clerical, sales and services occupations tend to have high incidence rates.

Duration of harassment

Both *A Bad Business* and *The Challenges Continue* show that over half of the sexual harassment experienced continues for up to six months, suggesting that sexual harassment may have a significant impact on the productivity of a workplace.



2004

marks the 20th anniversary of the federal
Sex Discrimination Act 1984

The world today is a very different place for women than the world of 20 years ago. The *Sex Discrimination Act* has played a crucial role in promoting a greater acceptance of the need for equality between women and men.

The *Sex Discrimination Act* requires the Sex Discrimination Commissioner to:

- raise awareness on issues including sex discrimination, paid maternity leave and pay equity;
- run public education campaigns on issues such as sexual harassment; and
- contribute to landmark court cases that have furthered equality for women by, for instance, embedding anti-discrimination principles in the industrial and workplace relations system, advancing pay equity, extending understanding of discrimination against women on the basis of their family responsibilities and ensuring the rights of all women to access IVF and other forms of reproductive technology.

In 2000 Australia was ranked number one on the United Nations Development Programme Gender Development Index.

But if Australia is to remain at the forefront of gender issues and continue to set the global benchmark there remain important equality issues to address, such as:

- overcoming a significant and stagnant pay equity gap
- engaging men on work and families issues, and
- putting in place a universal system of paid maternity leave.

I have asked to hear from women and men around Australia about how we should celebrate the 20th anniversary of the *Sex Discrimination Act*, mark our achievements and focus on the challenges that lie ahead.

The *Sex Discrimination Act* received Royal Assent on 21 March 1984 and commenced operation on 1 August 1984 – expect to hear more about planned activities for August 2004.

Pru Goward
Federal Discrimination Commissioner
Human Rights and Equal Opportunity Commission

