



Australian
Human Rights
Commission

Ending workplace sexual harassment:

A RESOURCE FOR SMALL, MEDIUM
AND LARGE EMPLOYERS · 2014



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Ending workplace sexual harassment:

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medium and large
employers

Australian Human Rights Commission

May 2014



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Foreword



Elizabeth Broderick
Sex Discrimination
Commissioner
Australian Human Rights
Commission

The ability to work in a safe environment, free from sexual harassment, is a basic human right.

Steps have been taken in recent years to ensure the practical realisation of this right in Australian workplaces. For example, the *Sex Discrimination Act 1984* (Cth) was amended in 2011¹ and again in 2013² to strengthen protections against sexual harassment, including in the workplace. Many employers have also created initiatives to combat this serious business problem, including developing and implementing policies and procedures on sexual harassment.

Yet, significant gaps in the implementation of the right to a safe working environment continue to exist. The result is persistent and pervasive sexual harassment in Australian workplaces. According to the Australian Human Rights Commission's 2012 national telephone survey, workplace sexual harassment affects around 21% of people aged 15 years and older.³ We have also seen the emergence of new and different forms of sexual harassment, facilitated in part by the increasing use of social media and other technologies at work.

The effects of sexual harassment are costly not only to the individual employees who experience it and the bystanders who witness or later hear about it, but also to the businesses in which it occurs. Consequences such as reduced morale, absenteeism, injury to reputation and the loss of shareholder confidence show that sexual harassment is an issue that employers cannot afford to ignore.

If we are to succeed in creating safe workplaces where sexual harassment is a problem of the past, all of us—employers, employees, employer associations and unions, and government—need to work together to bridge the divide between law and practice. And we need to ensure that every workplace participant understands that sexual harassment destroys lives, divides teams and damages business productivity.

I am therefore pleased to publish *Ending workplace sexual harassment: A resource for small, medium and large employers*. The resource aims to assist small, medium and large employers to understand and meet their legal obligations under the Sex Discrimination Act. It also provides practical guidance on how employers can prevent sexual harassment and how to respond effectively when it occurs. In addition, the resource discusses recent legal developments concerning workplace sexual harassment and canvasses some of the new and innovative approaches to addressing sexual harassment in the workplace, including enlisting the help of bystanders.

The resource aims to assist small, medium and large employers to understand and meet their legal obligations under the Sex Discrimination Act. It also provides practical guidance on how employers can prevent sexual harassment and how to respond effectively when it occurs. In addition, the resource discusses recent legal developments concerning workplace sexual harassment and canvasses some of the new and innovative approaches to addressing sexual harassment in the workplace, including enlisting the help of bystanders.

I hope that this resource will help employers to create healthy and safe workplaces in which all women and men are able to work without fear. After all, as I have said many times before, being safe at work is both a basic human right and a business imperative.

A handwritten signature in black ink that reads "E. Broderick". The signature is written in a cursive, flowing style.

Elizabeth Broderick
Sex Discrimination Commissioner
Australian Human Rights Commission

May 2014



1. Introduction

1.1 Objectives

Most employers would like to think that sexual harassment—unwelcome conduct of a sexual nature that a reasonable person would anticipate could possibly make the person harassed feel offended, humiliated or intimidated—is not something that occurs in their workplace.

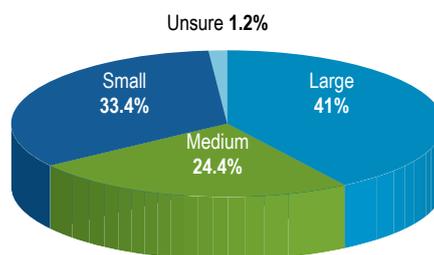
Yet regrettably, few workplaces in Australia are untouched by sexual harassment; it occurs frequently across a broad spectrum of occupations, workplaces and industries and in organisations of varying sizes.⁴

One in five people (21%) were sexually harassed in the workplace in the past five years.

79% of harassers (4 out of 5) were men.



Working without fear: The 2012 national sexual harassment survey



Working without fear: The 2012 national sexual harassment survey

Even though women comprise the overwhelming majority of people sexually harassed in the workplace, the Commission's 2012 national telephone survey found that men sexually harassing other men is increasingly common and now accounts for nearly a quarter (23%) of all sexual harassment.

Under the *Sex Discrimination Act 1984* (Cth), employers may be held legally responsible for sexual harassment unless they have taken all reasonable steps to prevent and redress the harassment. Employers must therefore take the obligation to address sexual harassment seriously.

In addition, employers should be conscious of the significant risks involved in failing to take effective action against sexual harassment. For instance, there are risks to the physical and mental health and wellbeing of workplace participants. There are also commercial risks, such as potential legal action, injury to reputation, loss of shareholder confidence, productivity losses or costs resulting from employee turnover, reduced morale and absenteeism.

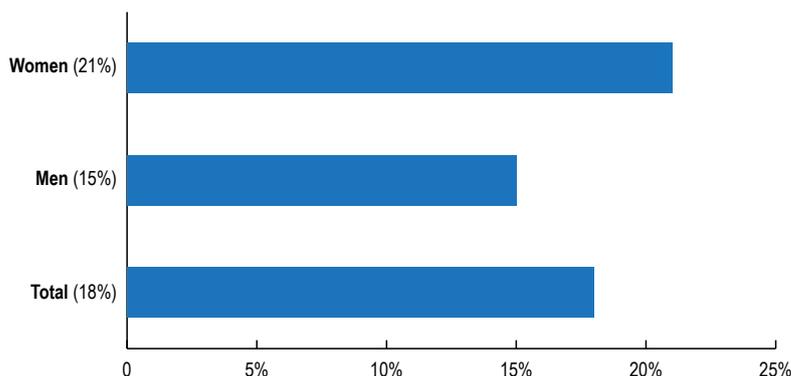
Many employers have taken important steps towards addressing sexual harassment in the workplace; they have introduced policies and procedures and conduct regular training on sexual harassment and the rights and responsibilities of all workplace participants.

However, there are gaps in the implementation of employers' legal obligations concerning sexual harassment. Many of these gaps were highlighted in the Commission's 2012 national telephone survey on the prevalence, nature and reporting of sexual harassment in Australian workplaces.

For instance, in addition to a high prevalence of workplace sexual harassment (21%), the Commission's survey found that the understanding of sexual harassment is limited amongst the general population.⁵

Employees don't recognise sexual harassment

18% of people who said they had not been sexually harassed based on the legal definition of sexual harassment went on to report sexual harassment behaviours.



Working without fear: Results of the sexual harassment national telephone survey 2012.

The limited understanding of sexual harassment has significant ramifications for employers. On the one hand, it could mean that workplace participants are unaware that they are being subjected to unlawful behaviour and that they have legal rights and avenues of redress (eg through internal or external complaint mechanisms). On the other hand, it could mean that workplace participants do not understand that they are engaging in conduct that violates the legal prohibition against sexual harassment. This, in turn, can leave employers legally exposed for that behaviour.

Employers must ensure that they comply fully with their obligations under the Sex Discrimination Act. An important part of ensuring full compliance is regularly reviewing and (where appropriate) revising sexual harassment policies, procedures and training programs to ensure they remain current. Workplace policies, procedures and training programs should, for instance, have been updated to reflect changes to the Sex Discrimination Act in 2011 and 2013.⁶

Ending workplace sexual harassment: A resource for small, medium and large employers aims to assist employers to meet their legal obligations related to sexual harassment. It does this by:

- explaining the nature and scope of employers' obligations under the Sex Discrimination Act with respect to sexual harassment
- linking employers' legal obligations with the latest national data on the prevalence, nature and reporting of sexual harassment in the workplace
- providing practical guidance on the steps employers can take to develop, improve and implement effective policies, procedures and training on sexual harassment.

The resource focuses primarily on employers' obligations under the Sex Discrimination Act and, to a lesser degree, other federal laws. It also provides limited guidance on employers' obligations in this area under state and territory laws. However, due to important differences between federal and state sexual harassment laws, employers are encouraged to consult state/territory resources and agencies when seeking to understand and implement their obligations under those laws (Appendix 1).

This resource addresses employers' obligations in the following workplaces:

- the private sector, including small business enterprises
- unions
- non-government organisations
- voluntary bodies
- clubs
- federal government agencies and business enterprises
- educational institutions not under the control of state or territory governments.

The resource does not apply to state government instrumentalities or state government employees.⁷

The resource updates and replaces earlier guidelines published by the Commission⁸ and is issued in accordance with its function to publish guidelines for the avoidance of sex discrimination and sexual harassment.⁹ The resource incorporates recent amendments to the Sex Discrimination Act, key developments in case law, and the latest national and trend data on the prevalence, nature and reporting of sexual harassment in Australian workplaces.

To minimise the risk of liability for sexual harassment, employers are encouraged to adhere to the guidance provided in the resource.

However, employers are advised that this resource provides general information only and is not legally binding. Employers should therefore seek their own legal advice, as needed.

Employers can contact the Commission for information on sexual harassment issues (Appendix 1).

1.2 Using this resource

This resource consists of five chapters.

- **Chapter 2** explains the legal definition of sexual harassment in the Sex Discrimination Act. Case studies are used throughout this chapter to provide examples which illustrate the key elements of the legislation to employers. The case studies are drawn from de-identified outcomes of successfully conciliated complaints at the Australian Human Rights Commission and federal/ state court and tribunal decisions.
- **Chapter 3** identifies the various legal causes of action in the Sex Discrimination Act concerning workplace sexual harassment. It also explains when and how employers can be held liable for sexual harassment under the Sex Discrimination Act.
- **Chapter 4** identifies other legal causes of action for sexual harassment.
- **Chapter 5** identifies practical steps that small, medium and large employers can take to help ensure their workplaces are free of sexual harassment.

The resource also contains four appendices.

- **Appendix 1** identifies further sources of assistance and information on sexual harassment issues.
- **Appendix 2** sets out important information about the Commission's processes for investigating and conciliating complaints of sexual harassment under the Sex Discrimination Act.
- **Appendix 3** outlines key provisions of the Sex Discrimination Act related to sexual harassment in the workplace.
- **Appendix 4** provides guidance for employers on good practices for developing internal complaint processes.





2. Understanding sexual harassment

Sexual harassment is defined in the Sex Discrimination Act as an unwelcome sexual advance, an unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, which, in the circumstances, a reasonable person would anticipate the possibility that the recipient would feel offended, humiliated or intimidated.¹⁰

Key elements of sexual harassment

Sexual harassment consists of three key elements, namely conduct:

- that is *unwelcome*;
- of a *sexual nature*;
- that a *reasonable person* (aware of the circumstances) would anticipate could possibly make the person subjected to the conduct feel *offended, humiliated or intimidated*.

Under the Sex Discrimination Act, it is unlawful to sexually harass another person in specified areas of public life, namely: employment; education; goods, services and facilities; the provision of accommodation; land; clubs; and Commonwealth laws and programs.¹¹ Sexual harassment is prohibited in a wide range of situations within each of these areas. For example, it is unlawful for an employer to sexually harass a prospective employee.

Chapter 2 explains how the Sex Discrimination Act defines sexual harassment. In doing so, it focuses on the area of employment and, in particular, the range of employment situations covered by the Act.

2.1 Unwelcome conduct

Conduct may constitute sexual harassment under the Sex Discrimination Act if it is unwelcome. Conduct is unwelcome if it is not solicited or invited and is regarded by the target as undesirable or offensive.¹² It is irrelevant that the conduct in question may not have been unwelcome to others or has been an accepted feature of the workplace in the past.¹³

Whether or not conduct is unwelcome is a subjective question. This means that it is determined from the perspective of the person subjected to the conduct (ie the recipient). Whether or not the person engaging in the conduct intended to sexually harass the recipient of the conduct is therefore irrelevant.

A one-off incident can constitute unwelcome conduct; the conduct does not need to be a continuous or a repeated course of conduct to be considered unwelcome.¹⁴

The circumstances in which the particular conduct occurred will affect whether or not conduct is considered unwelcome. This includes the reaction of the recipient of the conduct, the nature of the relationship between the two parties and the specific context in which the conduct occurred.¹⁵

Case study: Unwelcome conduct¹⁶

A young woman was employed at a medical centre. During her employment, the Director of the medical centre, who was an older male doctor, fondled and brushed against the women's breasts, patted her bottom, tried to kiss her and massaged her shoulders.

Justice Moore held that this conduct was unwelcome. He explained that:

*the applicant was, at the time, a teenager and the respondent a middle-aged medical-practitioner. In that context it is difficult to avoid the conclusion that [the conduct of the respondent] was unwelcome as were the sexual references or allusions specifically directed to the applicant.*¹⁷

Consent or participation obtained by fear, intimidation, threats or force will not rule out a complaint of sexual harassment.

Case study: 'Consent' under pressure¹⁸

A teenage girl got a job in a cake shop after being unemployed for one year. Shortly after commencing, a partner in the business began to kiss her neck, touch her buttocks and request sex. Under pressure, she consented to intercourse on several occasions.

Despite evidence that the girl's attitude towards the partner may have been ambivalent at times, the Commissioners held that 'by and large ... his sexual acts and advances were unwelcome to her'. They said:

It may seem surprising today that any young woman would endure the conduct of which she complained without taking some steps to bring it to an end. But ... I believe that this young woman was unsophisticated, was very keen to remain in employment, and apparently thought that this was the tariff which she had to pay. It was not, and she should be recompensed. She is entitled to damages for the humiliation and injury she suffered at the hands of one who knew that she had been unemployed and that she was eager to have employment.

The Commissioners recognised that the girl was in 'an extremely vulnerable position' and had only endured the situation because she feared the consequences of refusing. In these circumstances, the conduct was found to be unwelcome and the girl was awarded \$7,000 compensation.

A complaint of sexual harassment will not necessarily be dismissed because the complainant did not tell his or her alleged harasser that the conduct was unwelcome. Courts consider a number of factors that may affect an individual's ability to communicate the unwelcome nature of the conduct, including youth and inexperience, fear of reprisals and the nature of the power relationship between the two parties.¹⁹

Sexual interaction, flirtation, attraction or friendship that is consensual and invited, mutual or reciprocated is not considered to be unwelcome.

Case study: Relationship between workplace participants²⁰

A 20-year-old woman was employed at a trucking company. She and her boss engaged in consensual sexual intercourse on four occasions. In addition, the woman's boss engaged in a range of other conduct of a sexual nature, including giving the woman numerous gifts of a sexual nature (eg lingerie and sex toys), sending her sexually explicit text and multimedia messages and pursuing a romantic relationship on day and overnight 'business trips'.

In considering whether or not the boss' conduct was unwelcome, Justice Mansfield noted that:

it is not per se unlawful for two employees to form a personal relationship, or for an employer ... to form a relationship with an employee. Nor is it unlawful per se for an employer in an appropriate manner to invite an employee to a function at a personal level, or to express in an appropriate way an interest in a personal relationship with an employee. Of course, in such circumstances, the relative position of employer and employee require the employer to be careful not to take advantage of that status, and to be mindful of the circumstances of the employee. The conduct is to be assessed in its context.²¹

Employers need to take care to ensure that sexual conduct between employees, even if reciprocated, does not create an unpleasant and sexualised workplace for other workplace participants. Employers also need to ensure that they address complaints of sexual harassment following the breakdown of a consensual relationship with care. That is, just because two individuals used to be in consensual sexual relationship does not preclude the possibility of sexual harassment following the end of the relationship.



2.2 Conduct of a sexual nature

Unwelcome conduct may constitute sexual harassment under the Sex Discrimination Act if it is sexual in nature. Whether or not alleged conduct is sexual in nature is an objective question. In most cases, the sexual nature of the conduct is uncontentious.

The Sex Discrimination Act defines conduct of a sexual nature broadly. It provides that a person sexually harasses another person if he or she:

- makes an unwelcome *sexual advance*
- makes an unwelcome *request for sexual favours*
- engages in other unwelcome *conduct of a sexual nature*, which includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.²²

Australian courts have also interpreted the phrase 'conduct of a sexual nature' broadly. Conduct of a sexual nature can include physical and/or non-physical conduct and conduct across a variety of different mediums (eg in person or through social media).

Examples of conduct likely to be considered sexual in nature

Conduct likely to be considered sexual in nature includes:

- touching, hugging, cornering or kissing
- inappropriate staring or leering
- insults or taunts of a sexual nature
- repeated or inappropriate invitations to go out on dates
- requests for sexual favours
- repeated or inappropriate advances on email or social networking websites
- intrusive questions about a person's private life or physical appearance
- sexual gestures, indecent exposure or inappropriate display of the body
- sexually suggestive comments or jokes
- sexually explicit pictures, posters, gifts, emails or text messages
- requests or pressure for sex or other sexual acts
- inappropriate physical contact
- stalking, actual or attempted rape or sexual assault.

Case study: Sexually explicit email²³

The complainant was employed with the respondent law enforcement organisation. He claimed that a co-worker sent him a sexually explicit email in the workplace, which he found offensive. The complainant claimed the respondent failed to properly investigate his complaint about the incident.

On being advised of the complaint, the respondent indicated a willingness to try to resolve the matter through conciliation. The complaint was resolved with an agreement that the respondent pay the complainant \$14,000 in compensation for hurt, humiliation and legal costs.

Conduct that may not amount to conduct of a sexual nature on its own (eg flicking rubber bands at a colleague's legs²⁴) may be deemed sexual in nature if it forms part of a broader pattern of sexual conduct.

Case study: Conduct of a sexual nature²⁵

A woman learned that a colleague had informed others in their workplace that he was in love with her. The colleague later invited the woman to speak to him alone at his house, but she refused. Following the refusal, the colleague attacked the woman verbally. He blamed her for his feelings and criticised her (romantic) partner, who also worked for the company. The woman became upset and her supervisor sent her home.

The woman later made a complaint of sexual harassment. After making the complaint, her employer told her not to return to work until after the conciliation meeting dealing with the harassment was held. The woman was made redundant after the meeting.

The woman's colleague argued that his behaviour may have been unwanted but was not 'conduct of a sexual nature'. However, the Court found that declarations of love, suggesting a colleague spend time alone at one's home and commenting on a colleague's personal relationship did amount to conduct of a sexual nature.

Sexual harassment may occur where a work environment or culture is sexually charged or hostile, even if the conduct is not directed at any particular employee.²⁶ A sexually hostile workplace is one in which one sex is made to feel uncomfortable or excluded by the workplace environment. Factors that point to a sexually hostile workplace include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes.²⁷

Hostile workplaces can be a particular problem for women working in non-traditional or male-dominated workplaces, especially where they are employed on isolated work sites or with live-in arrangements.

Case study: Sexually hostile work environment²⁸

Two women were employed as trade assistants for a company constructing an offshore platform. They were the only women working on a site of over 600 men. Their duties involved cleaning offices and rooms in which soft core pornographic posters of semi-naked women were displayed. Although they would have preferred the posters not to be there, they felt they had to tolerate such things in a male-dominated environment.

On one occasion, the women were cleaning an office where there was a prominently displayed poster of a naked woman with her genitals exposed. After seeing this poster, they complained. From that time on, the women were vilified and abused. The posters displayed in their workplace became more explicit, degrading and hard core. They were even confronted by a room entirely covered with a montage of pornography, clearly placed there for their benefit.

The women received no support or assistance from management or their union despite being frightened by the inherently threatening nature of the pornography and the victimisation to which they were subjected. Rather, they were advised that their attitude made them unpopular on the site and were warned not to be troublemakers.

Their situation became increasingly unbearable. They were aware that the male toilets contained grossly offensive graffiti about them. One of them was also terrorised at the site Christmas party and had to lock herself into a storeroom for her own safety.

Both women left their jobs and sought counselling as a result of the treatment they received. The employer and union were subsequently held liable in legal proceedings and were required to pay a total of \$92,000 in damages.

Employers have an obligation to deal with entrenched group cultures and practices that may hinder participation in, and enjoyment of, working life. They should discourage any workplace behaviour that is sexist or potentially offensive to others. An atmosphere of respect in which workplace participants are careful of others' sensitivities will be least likely to foster sexual harassment complaints.

Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties. For example, if a group of workers makes offensive sexual jokes or comments about a colleague who is perceived to be homosexual, it is likely to be unlawful sexual harassment. Likewise, if a colleague asks intrusive questions about the private life or physical appearance of a trans* colleague, it is likely to be unlawful sexual harassment.



Case study: Conduct of a sexual nature²⁹

A male apprentice boiler-maker claimed that he was sexually harassed by his male co-workers. He said that his co-workers had inquired about his sexual preference, implied that he was a paedophile and told other employees that he 'often had sex with little boys' and frequented 'gay bars'. He also said that one co-worker had grabbed him and simulated acts of sexual intercourse.

The Tribunal found that this conduct amounted to sexual harassment and ordered the employer pay the complainant \$26,000 compensation.

Case study: Conduct of a sexual nature³⁰

The complainant said she shared overnight accommodation with her female manager, the individual respondent, when attending a work-related conference. She claimed the individual respondent questioned her about her sex life, told her she was attracted to her, touched her inappropriately and offered her the opportunity to have sex with her husband. The complainant said she resigned from her position due to the incident.

The individual respondent denied the allegations, however both the individual and respondent employer indicated a willingness to try to resolve the matter through conciliation. The complaint was resolved with an agreement that the respondent employer pay the complainant \$28,000.

Sexual harassment is unlawful even if the person committing the harassment had no sexual interest in the complainant. It is important to note that conduct may constitute sexual harassment even if the individuals involved are of the same sex.

Case study: Conduct of a sexual nature³¹

A young saleswoman claimed that she was sexually harassed by her male retail manager. The Court determined that the fact that the manager was homosexual and had no sexual designs on the woman was irrelevant to the outcome of the case.

General forms of harassment or bullying that are not sexual in nature will not constitute sexual harassment under the Sex Discrimination Act, but may nevertheless be unlawful if the conduct constitutes less favourable treatment on the ground of sex or another protected ground. They may also be unlawful under other anti-discrimination laws.

2.3 Reasonable person (offence, humiliation, intimidation)

Unwelcome conduct of a sexual nature may constitute sexual harassment under the Sex Discrimination Act if, in the circumstances, a reasonable person (aware of the circumstances):

- would anticipate the possibility that
- the recipient would feel offended, humiliated or intimidated by the conduct.

Whether or not a reasonable person would anticipate the possibility of such a reaction is an objective question.

Case study: Reasonableness³²

A woman claimed that she was sexually harassed in the workplace. She alleged that a colleague of hers had stared at her breasts, brushed past her breasts and remarked on the size of female employees' breasts. The woman's colleague argued that the woman was unlikely to be offended by the conduct as she herself swore at work and had sent two sexually explicit emails to a fellow female employee.

The Court rejected the argument made by the woman's colleague. The Court found that a reasonable person in the woman's position would have been offended, humiliated or intimidated by the actions and remarks. He explained:

I do not accept that [the complainant's] demeanour in cross-examination, the fact that she swore on occasion in the workplace or the evidence that she sent two emails in relation to sexual matters...is indicative of such a 'robust' workplace that...a reasonable person would not have anticipated that [the complainant] would be offended.³³

Case study: Reasonableness³⁴

A woman was employed as a building consultant selling house and land packages on behalf of her employer. During her employment, the woman made a number of complaints about conduct that occurred in the workplace, including complaints of sexual harassment. Regarding sexual harassment, she complained that her co-worker had made requests for sexual favours to her in two emails and a number of subsequent text messages. She had indicated in her response to her co-worker's first email that she did not wish to receive requests for sexual favours from him. The co-worker nevertheless persisted to make such requests. The woman alleged that the subsequent termination of her employment was because she had made complaints of sexual harassment.

In relation to the reasonable person test, Justice Mansfield stated that:

[h]aving indicated her attitude quite clearly, it was apparent, and a reasonable person would have anticipated, that [the woman] would be offended if the requests were maintained (as they were). It was also apparent, and a reasonable person would have anticipated, that she would be humiliated by such conduct because it conveys an understanding of the potential preparedness of [the woman] to have a sexual relationship with him, notwithstanding her clearly expressed attitude to the contrary. Even if [the co-worker] did not see the situation that way, and was nevertheless hopeful of establishing a sexual relationship, that does not result in a different conclusion. The test in s 28A is clearly an objective one...³⁵

Employers should note that the threshold for establishing sexual harassment was changed in 2011 following amendments to the Sex Discrimination Act.

The current test focuses on whether a reasonable person would anticipate the *possibility* that the other person would be offended, humiliated or intimidated by the behaviour. By contrast, the old test required that a reasonable person *would have* anticipated that the person harassed would be offended, humiliated or intimidated.

The circumstances of a particular situation may affect whether or not a reasonable person would have anticipated the possibility that the sexual conduct would have caused the recipient offence, humiliation or intimidation. For example, putting an arm around a colleague because he or she is upset might be assessed as compassionate and not sexual harassment where the individuals concerned are friends and perhaps of similar age. However, the same action might be assessed as sexual harassment where the action is by a senior male manager to a young female employee.

The 2011 amendments to the Sex Discrimination Act introduced a non-exhaustive list of circumstances to be taken into account when determining whether sexual harassment has occurred.³⁶ This list was amended in 2013.³⁷

Circumstances relevant to a determination of sexual harassment

- The circumstances to be taken into account include:
- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstance.³⁸

The intent of the change was to ensure that all relevant circumstances are taken into account when applying the objective element of the sexual harassment definition. These circumstances may also help to explain why a particular individual person felt that the conduct was unwelcome and inappropriate.

Case study: Reasonableness³⁹

The complainant claimed that during her employment as a station hand for the respondent farming company, male colleagues made sexual requests and offensive comments about her body. The complainant also claimed that her colleagues called her a lesbian. The complainant subsequently left her employment.

The respondent said the complainant was open about her sexuality and that she was in a same-sex relationship. The respondent denied the complainant's allegations of sexual harassment and sexual preference discrimination.

The complaint was resolved with an agreement that the respondent would pay the complainant \$12,400 in general damages and provide her with a statement of regret and statement of service.

2.4 Workplace

Sexual harassment is prohibited in the workplace. The relationship between the alleged harasser and the person allegedly harassed is the key to understanding when the Sex Discrimination Act applies in the area of employment.

Under the Act, it is unlawful to sexually harass:

- an employee, a commission agent or a contract worker
- a prospective employee, commission agent or contract worker
- a colleague, partner, fellow commission agent or fellow contract worker
- a prospective colleague, partner, fellow commission agent or fellow contract worker
- another workplace participant.⁴⁰

Employees, commission agents and workplace participants

Who is an employee?

An employee includes full-time, part-time and casual workers as well as independent contractors.⁴¹

Who is a commission agent?

A commission agent is a person who does work for another person as the agent of that other person and who is remunerated, whether in whole or in part, by commission.⁴²

Who is a workplace participant?

A workplace participant includes employers (eg sole trader), employees, commission agents, contract workers and partners in a partnership.⁴³

It is unlawful for an employee to harass their employer, including sole trader employers.

It is also unlawful to sexually harass:

- a person seeking approval in connection with an occupational qualification (eg renewing a qualification needed to practice a profession or carry on a trade)⁴⁴
- a member or prospective member of a registered organisation (eg union)⁴⁵
- a person in the course of providing, or offering to provide, services of an employment agency.⁴⁶

It is unlawful for a workplace participant to engage in sexual harassment in the *workplace*. The term 'workplace' refers to 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant'.⁴⁷

- A place at which a workplace participant works might, for instance, be an office, a building site, a factory, a supermarket, a hospital, a ship, an aircraft or a vehicle.⁴⁸
- A place at which a workplace participant carries out functions in connection with being a workplace participant might include conferences and training centres, restaurants for work lunches, hotels for work trips and office parties. It is likely that it will also include the online environment, where there is a sufficient connection between this environment and the workplace.

In this context, employees should be made aware that the employer's responsibility for sexual harassment extends to conduct that occurs beyond the normal workplace and normal working hours. This is particularly important at high-risk events, such as work functions involving alcohol.

Case study: sexual harassment by a co-worker⁴⁹

The complainant was employed as a tradesman / bricklayer with the respondent construction company. The complainant claimed a male co-worker sexually harassed him during a social gathering at a work campsite. The complainant claimed the co-worker grabbed his chest, stomach, testicles, buttocks and penis. The complainant had not returned to work since the incident.

The respondent company confirmed that an incident occurred on a work campsite between the complainant and his co-worker. The company submitted that it could not determine from its investigations what had happened and whether the complainant was sexually harassed. The company advised that it offered to move the complainant to a different worksite the day after the alleged incident.

The complaint was resolved with an agreement that the parties continue the employment relationship with assurances that the complainant would not have to work with the co-worker who was alleged to have sexually harassed him. The company also agreed to pay the complainant \$20,000 compensation for his hurt and distress.

Case study: Sexual harassment during interstate training⁵⁰

A woman travelled interstate to participate in a training course for work. After a dinner, a work colleague sent her inappropriate text messages indicating that he wanted to have sex with her. The woman said she lodged an internal complaint about the matter.

The work colleague argued that the woman had invited him back to her room and he gave her a back rub. He said he had apologised for the text messages the next day and the woman had accepted his apology. The work colleague's employment was terminated due to the incident.

The complaint was resolved with an agreement that the employer would provide the woman with an apology and pay her \$1,500.

The wide use of technologies such as mobile phones, email and social networking websites creates new spaces where sexual harassment may occur. With employees increasingly working remotely and using work phones and laptops for personal use, employers should make it clear to their staff that laws about sexual harassment apply equally in the virtual world.

Case study: Sexual harassment through email and text messages⁵¹

A man alleged that he was sexually harassed by a female co-worker who sent him sexually explicit text messages and pornographic emails. The man claimed that after he made a complaint about his co-worker's conduct, other staff members isolated him in the workplace and his employment was terminated.

The complaint was resolved with an agreement that the employer would provide the man with a written letter of apology, a statement of service and pay him \$8,500 financial compensation.⁵²

Sexual harassment may also be covered by the Sex Discrimination Act if it occurs away from the particular workplace (eg at a private function), but is the culmination or extension of events that occurred within the workplace.

Case study: Sexual harassment 'in connection with' the workplace⁵³

A woman accepted an invitation to attend after-work drinks at the home of a colleague. She became intoxicated and passed out. When she woke up the next day, she was being raped by another colleague. The rape followed a series of sexual harassment incidents, including the display of pornography in the workplace and unwanted sexual advances.

The court found that the woman's employer was vicariously liable for the rape. The rape occurred 'in connection' with the colleague's employment as it '...was an extension or continuation of his pattern of behaviour that started and continued to develop in the workplace'.⁵⁴

The court rejected the employer's argument that it had taken all reasonable steps to prevent the conduct. While the employer had appropriate equity and diversity guidelines in place, these were not followed in this particular case. It was noted that the rape may have been avoided if the woman had received training on reporting incidents of sexual harassment.

Sexual harassment between workplace participants may occur at the workplace of one or both workplace participants.⁵⁵ Sexual harassment may, for example, occur in the same small business site or in the workplace of a client, an advisor, a colleague at a different company or a service provider.



3. Causes of action and types of liability under the *Sex Discrimination Act*

Sexual harassment in the workplace may give rise to various causes of action under the *Sex Discrimination Act 1984* (Cth). Chapter 3 identifies and explains these causes of action, namely: sexual harassment; sex discrimination; and victimisation. It also explains how employers can be held legally liable for sexual harassment in the workplace.

3.1 Causes of action

(a) Sexual harassment

Sexual harassment is unlawful under the Sex Discrimination Act.

A person who alleges sexual harassment, including in the workplace, can submit a complaint to the Commission.

When the Commission receives a complaint alleging sexual harassment covered by the Sex Discrimination Act, it can inquire into and attempt to conciliate the complaint. This means that the Commission will try to help the complainant (ie the person alleging harassment) and the respondent (ie the person or organisation about whom there has been a complaint) resolve the complaint.

The Commission is not a court and therefore cannot determine whether or not sexual harassment has occurred. Instead, the Commission's role in individual cases is to get both sides of the story and help those involved try to resolve the complaint (see Appendix 2 for further information about the Commission's complaint process).

Resolutions reached during conciliation vary, but might include compensation or an apology from the employer. They might also include an agreement from the employer to create or amend its sexual harassment policy or conduct workplace training on sexual harassment.

If a resolution cannot be reached the Commission will 'terminate' the complaint.

The complainant can then take the matter to the Federal Circuit Court of Australia or the Federal Court of Australia within 60 days of the complaint being 'terminated' by the Commission. If the complainant chooses to proceed to court, he or she will need to prove sexual harassment 'on the balance of probabilities'. This is the standard of proof applied to civil matters in Australia.

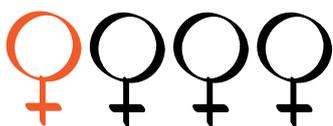
If the complainant succeeds in proving his or her claim of sexual harassment on the balance of probabilities, the Court may make a range of orders. These orders may vary, depending on the seriousness of the particular act or acts of sexual harassment and the particular circumstances of the case. For example, orders may declare that no further action is to be taken, or they could require the respondent to employ or re-employ an applicant, to pay damages, or to redress any loss or damage suffered by an applicant in other ways.⁵⁶

(b) Sexual harassment as sex discrimination

In addition to being unlawful in its own right, sexual harassment is recognised as a form of sex discrimination against women. Like sexual harassment, sex discrimination is unlawful.

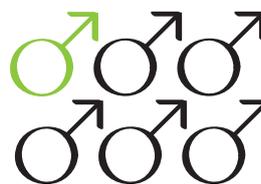
Sexual harassment is recognised as a form of discrimination because women are harassed in far greater numbers than men. This fact is supported by the Commission's national survey.

One in four women (25%) are sexually harassed in the workplace.



Working without fear: The 2012 national sexual harassment survey

One in six men (16%) are sexually harassed in the workplace.



Working without fear: The 2012 national sexual harassment survey

The Federal Court of Australia has also recognised the discriminatory impact of sexual harassment.

Case study: Sexual harassment as a form of sex discrimination⁵⁷

In *Aldridge v Booth*, Justice Spender explained that:

when a woman is subjected to sexual harassment ... she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the discrimination is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman.

Conduct that falls short of sexual harassment (eg because the conduct was found not to be 'sexual' in nature) may nevertheless constitute sex discrimination if it amounts to less favourable treatment by reason of sex. Such conduct is sometimes referred to as sex-based harassment.

Case study: Sex-based harassment and sex discrimination⁵⁸

A woman complained about her supervisor's behaviour. Federal Magistrate Driver found that the behaviour did not constitute sexual harassment but did constitute sex discrimination.

I find that Mr Ong subjected Ms Cooke to a detriment by reason of her sex in the course of his supervision of her. Mr Ong's supervision of Ms Cooke was more objectionable and more vexing than it would have been if she had been a man. ... Part of the reason for Mr Ong's conduct was that he had very poor human relations skills, although he was technically highly competent. However, part of the reason for his treatment of Ms Cooke was that she was a woman...

(c) Victimisation

It is an offence under the Sex Discrimination Act to victimise another person.⁵⁹ Victimisation is punishable by a fine and/or imprisonment.

Victimisation means subjecting, or threatening to subject, another person to a detriment if she or he has or proposes to:

- make a complaint to the Commission
- provide information or documents to the Commission
- attend a conciliation conference or appear as a witness before the Commission
- reasonably assert any rights under the Sex Discrimination Act or the Australian Human Rights Commission Act 1986 (Cth)
- make an allegation that a person has done an act that is unlawful under the Sex Discrimination Act.

Examples of victimisation may include:

- an employee being moved to a position with lesser responsibilities while his or her complaint is being considered
- an employee being denied the opportunity of a promotion after unsuccessfully lodging a sexual harassment complaint against his or her supervisors
- an employee receiving a critical reference from his or her former employer because she or he made a complaint of sexual harassment.

Case study: Victimisation⁶⁰

The complainant, who was employed by the respondent community organisation, alleged she was sexually harassed by a male co-worker. The complainant said the co-worker sent her sexually explicit emails that she found offensive. She claimed that she complained to her manager about the emails and was then ostracised. The complainant said she resigned from her employment.

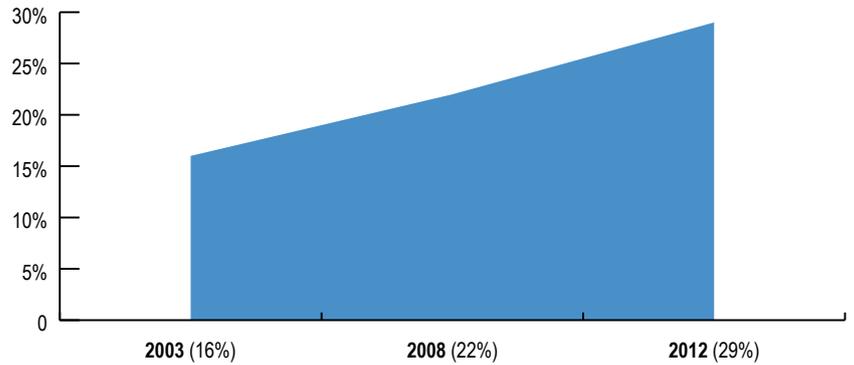
The respondent organisation did not dispute that sexually explicit emails were sent to the complainant. However, the organisation denied that the complainant was victimised because she complained about the emails.

The complaint was resolved with an agreement that the respondent would pay the complainant \$4,000, which represented compensation for hurt and embarrassment.

Evidence shows that employers need to take victimisation related to sexual harassment seriously. According to the Commission's 2012 national telephone survey on sexual harassment, there has been a significant increase in the number of people reporting negative consequences, such as victimisation, after making a complaint of sexual harassment.

Negative consequences of reporting are on the rise

Nearly one in three (29%) people who made a formal sexual harassment complaint experienced negative consequences as a result.



Working without fear: The 2012 national sexual harassment survey

Whilst internal complaints mechanisms offer an important tool for addressing workplace sexual harassment, employers need to ensure appropriate safeguards are in place to protect individuals against victimisation and other negative consequences that can occur when they make a complaint of sexual harassment.

See also section 4.2 below on 'General Protections' claims under the *Fair Work Act 2009* (Cth).





3.2 Employers' legal liability

There are a number of different ways that employers may be held liable under the Sex Discrimination Act for workplace sexual harassment, namely:

- *personal liability* for sexual harassment
- *accessory liability* for sexual harassment
- *vicarious liability* for sexual harassment
- *liability for victimisation* of a person in connection with a complaint of sexual harassment.

Employers should be aware that they may be held liable for workplace sexual harassment under other federal laws as well as state and territory laws related to sexual harassment (see chapter 4 below).

(a) Personal liability

Employers (eg a sole trader or a partner in a partnership) individual managers and employees are liable for their own acts of sexual harassment. This is known as 'personal liability'.

An employer may be found personally liable for sexual harassment if he or she made an unwelcome sexual advance, unwelcome request for sexual favours or engaged in other unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.⁶¹

(b) Accessory liability

Employers are liable under the Sex Discrimination Act if they cause, instruct, induce, aid or permit another person to engage in sexual harassment. This is known as accessory or ancillary liability.

An employer is likely to have accessory or ancillary liability for sexual harassment if it was aware or should have been aware that sexual harassment was occurring or there was a real possibility that sexual harassment was occurring and it failed to act.⁶²

In order to be held liable as an accessory to sexual harassment, an employer must have contributed to the sexual harassment either knowingly, recklessly or through wilful blindness. For instance, an employer permits another person to engage in sexual harassment if, before the harassment occurs, the employer knowingly places the person subjected to the unlawful conduct in a situation where there is a real, and more than a remote, possibility that the unlawful conduct will occur.⁶³

Case study: Employment agency's accessory liability for sexual harassment⁶⁴

An employment agency referred a young woman to a doctor's office for employment, despite previous complaints of sexual harassment against the doctor from earlier clients of the agency. The young woman was later sexually harassed by the doctor.

The Federal Court of Australia found that the employment agency had permitted the sexual harassment to take place. Justice Moore found that the caseworker who referred the woman for employment did not have to know about the past complaints of sexual harassment, as the collective knowledge of the employment agency's officers was sufficient to establish liability. Justice Moore went on to identify a number of actions that the employment agency could have taken to address the situation.

There is no reason apparent to me why an employment agency, to whom several complaints had been made about sexual harassment ... by one of the employers it serviced ..., could not either terminate the service or inform the employer that the agency would tell, as a condition of maintaining the service, potential employees that complaints had been made and the nature of the complaints or at least require the employer to put in place measures at the workplace to stop or at least influence the potentially unlawful conduct.

Case study: Employment agency's accessory liability for sexual harassment complaint⁶⁵

The complainant alleged disability discrimination and sexual harassment in employment. The complainant has a learning disability and was employed by the respondent company to do landscaping duties.

The complainant alleged that his co-workers harassed him because of his disability and also made frequent sexual comments to him. The complainant said he complained about this to the recruitment agency that placed him with the company, but his complaints were not taken seriously.

The recruitment company denied that the complainant had made an internal complaint. In addition, the employer denied that the complainant had been harassed in his employment.

The complaint was resolved with an agreement that the recruitment agency would pay the complainant the equivalent of 13 weeks of wages and place him in suitable alternative employment. In addition, the employer agreed to pay the complainant \$1,500 and provide him with a reference.

There is no defence available for accessory liability.

(c) Vicarious liability

Employers can be held liable under the Sex Discrimination Act for sexual harassment committed by their employees in connection with their employment and by their agents in connection with their duties as agents. This is known as vicarious liability.

Employers can only be held vicariously liable for sexual harassment if there is an employment or agency relationship between the organisation and the person who was found to have committed the harassment. No such relationship is required for an employer to be found an accessory to sexual harassment.

An employer will be found vicariously liable for sexual harassment committed by one of their employees or agents if they failed to take 'all reasonable steps' to prevent the sexual harassment from occurring.⁶⁶

Case study: Vicarious liability for sexual harassment

The applicant was employed as a management consultant and the individual respondent was employed as a sales representative by the respondent software company. The complainant and respondent worked together on a project. The applicant was based in Sydney but frequently travelled to Melbourne, where the respondent was based, because of the project.

The applicant claimed that she was subjected to a barrage of sexual slurs over a period of over six months including:

- persistent comments about what the applicant was wearing and how she looked, often made in front of colleagues or clients;
- persistent sexual comments and innuendo;
- invitations to go out and to go away for the weekend; and
- repeated references to the applicant and respondent having sex.

The applicant resigned from her employment as a result of the respondent's behaviour and made a complaint of sexual harassment against the individual respondent and her employer.

When considering the liability of the employer, the court considered that the sexual harassment training that the employer required its employees to complete every two years was adequate even though it involved the giving of yes/no answers that could be changed and the training did not involve a face to face component.

However, the court found that the respondent employer did not take all reasonable steps to prevent the sexual harassment because the online training package completed by the individual respondent made:

- no reference to the legislative foundation in Australia for the prohibition of sexual harassment;
- no clear statement that sexual harassment is unlawful; and
- no statement that an employer might also be vicariously liable.

Buchanan J stated

In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly that consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee. That is an additional element emphasising the lively and real interest that an employer will have in scrupulous adherence to its warnings.⁶⁷

It is becoming more common for people with different employers to be located in the same workplace. The person responsible for the workplace is not always the employer of the people working in it. In these situations, it is important for workplace participants to be clear about their responsibility for sexual harassment.

An employer will not be vicariously liable for sexual harassment if it is established that it took 'all reasonable steps' to prevent the sexual harassment (see section 5.1).⁶⁸ However, it is not a defence to vicarious liability to claim a lack of awareness of the sexual harassment.

Even when an employer or principal is found to be vicariously liable for sexual harassment committed by individual workplace participants, the person who committed the harassment remains personally liable for their unlawful acts.

(d) Victimisation

It is unlawful to victimise a person if he or she has taken (or proposes to take) action in relation to a discrimination claim. Victimisation includes subjecting or threatening to subject another person to detriment in the workplace.⁶⁹ The penalty for victimisation is a fine and/or three months' imprisonment in the case of a natural person and a fine in the case of a body corporate.

It is a defence to a prosecution for victimisation if it is proved that the person's allegation of sex discrimination, including sexual harassment, was false and not made in good faith.⁷⁰

Case study: Victimisation of bystander⁷¹

The complainant worked as a consultant with the respondent company. He alleged he was victimised because the respondent company terminated his contract after he raised allegations of sexual harassment on behalf of his colleague.

The respondents denied victimisation. The respondents claimed the complainant's contract was terminated because of loss of confidence in his abilities to perform his role.

The complaint was resolved with an agreement that the respondents pay the complainant \$7,500 and provide him with a statement of regret.





4. Other causes of action and types of liability

Chapter 4 identifies some of the other legal causes of action and types of liability that may arise as a result of sexual harassment in the workplace. It addresses:

- criminal offences related to sexual harassment
- claims under the Fair Work Act, including 'General Protections' claims and unfair dismissal
- breach of contract
- breaches of work, health and safety requirements

Employers should be aware that individuals who allege that they have been sexually harassed in the workplace may rely on one or more of these causes of action in addition to the causes of action under the Sex Discrimination Act. Employers need to ensure that they understand all of their obligations and are aware of the full range of potential legal consequences that may flow from a claim of sexual harassment in the workplace.

4.1 Criminal offences related to sexual harassment

In addition to being unlawful under the Sex Discrimination Act, some types of sexual harassment may also be offences under criminal law. Relevant criminal offences include: physical assault; indecent exposure and sexual assault.

A criminal offence is prosecuted under the relevant state criminal law and not under the Sex Discrimination Act. The alleged perpetrator is prosecuted by the Crown, who must prove that the alleged perpetrator committed the alleged offence 'beyond reasonable doubt'. This is a higher standard of proof than in civil proceedings.

Employers should be aware that a single incident of sexual harassment in the workplace may give rise to both civil and criminal proceedings. Allegations of criminal conduct do not prevent the Commission from considering sexual harassment complaints under the Sex Discrimination Act.

If employers suspect that a criminal offence has occurred, they should:

- advise the target to report the incident to the police as soon as possible
- provide the target with the necessary support and assistance
- proceed with an internal investigation into the alleged sexual harassment, even if the police decide not to pursue the allegations.

4.2 General protections claim based on exercise of a workplace right

An action similar to a victimisation action may be taken under the *Fair Work Act 2009* (Cth). Under the Fair Work Act, a person must not take 'adverse action' against another person to prevent that other person from exercising a 'workplace right', or because that other person:

- has a 'workplace right';
- has or has not exercised a workplace right; or
- proposes or proposes not to exercise a workplace right.⁷²

'Workplace right' is broadly defined and would appear to encompass making a complaint of sexual harassment under the Sex Discrimination Act.

These claims are included within the type of claim known as 'General Protections' claims and are considered by the Fair Work Commission. Employers should also be aware that the burden of proof is reversed in general protections claims. This means that an employer must prove that the exercise of a workplace right by an employee (eg making a sexual harassment complaint) was not the reason that the employer took the action in question.

Generally, claims cannot be made simultaneously under the Fair Work Act and the Sex Discrimination Act.

Further information

For further information about what to do if an employee makes a General Protections claim, see:

Fair Work Ombudsman, *General Workplace Protections Factsheet* (2013)

www.fairwork.gov.au/complaints/someones-made-a-complaint-about-my-business/pages/default.aspx

Fair Work Commission, *General Protections Guide* (2013)

www.fwc.gov.au/documents/factsheets/GeneralProtectionsGuide.pdf

4.3 Unfair dismissal

Where an employer is a national system employer⁷³ and decides to dismiss an employee because it is satisfied that he or she engaged in sexual harassment, the employer must ensure that any subsequent action complies with:

- the Fair Work Act (or the state or territory equivalent) and any relevant award or enterprise agreement; and
- the Small Business Fair Dismissal Code, in the case of a small business (ie a business with fewer than 15 employees).

Failure to comply with the instruments above may give rise to a claim for unfair dismissal. The term 'unfair dismissal' refers to a termination of employment that is harsh, unjust or unreasonable, is not consistent with the Small Business Unfair Dismissal Code (if applicable), and is not a genuine redundancy.⁷⁴

National System Employer

A national system employer is a constitutional corporation, the Commonwealth, or a Commonwealth authority which employs staff.

The definition also includes a person who, in connection with constitutional trade or commerce, employs staff to do particular roles such as flight crew, maritime officer or waterside worker.

Case study: Unfair dismissal⁷⁵

An employee was accused of misconduct, including sexually harassing his co-workers. Numerous complaints had been made against him by his colleagues, but the employee was not aware of these complaints and did not receive any official warnings about his conduct. Unrelatedly, but whilst employed by the company, the employee was convicted of several criminal offences, including stalking, harassment and child pornography. The employee was dismissed and subsequently lodged an unfair dismissal application.

Fair Work Australia held that the dismissal of the employee was justified insofar as the employee's criminal convictions for offences of a sexual nature were a valid reason for dismissing an employee. However, it ultimately held that the dismissal was 'unfair' (ie harsh, unjust and unreasonable) as the employer had not notified the employee of the reason for his dismissal or given him an opportunity to respond to the allegations. The employee was awarded 10 days' salary.



Further information

For further information about unfair dismissal claims under the Fair Work Act, see:

- Fair Work Commission, *Unfair Dismissals Benchbook* (2013) benchbooks.fwc.gov.au/unfair/
- Small Business Fair Dismissal Code www.fwc.gov.au/documents/legislation/download/dismissal_code.doc
- Fair Work Ombudsman, *Small Business Fair Dismissal Code Checklist* www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.rtf

4.6 Breach of contract

An employee who alleges that he or she has been sexually harassed in the workplace could potentially sue his or her employer for breach of contract. An employee might, for instance, claim that the failure to prevent or redress sexual harassment was contrary to an express or implied term of the employment contract.⁷⁶

Case study: Breach of contract⁷⁷

A woman was employed as a building consultant selling house and land packages on behalf of her employer. She alleged that a co-worker had sexually harassed her in the workplace. The woman's employment was subsequently terminated and she alleged that the termination was due to her sexual harassment complaint.

Breach of contract was one of the causes of action relied on by the woman. She argued that her contract of employment contained an implied term that her employer would not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between herself and the employer. She alleged that her employer breached this implied term by discriminating against her and terminating her employment following the sexual harassment complaint.

The Federal Court of Australia noted that the question of whether such terms can be implied in employment contracts is controversial. However, the Court decided the case on other grounds and did not deal with the breach of contract claim.

4.7 Work, health and safety requirements

An employer must ensure, so far as is reasonably practicable, the health and safety of its workers. An employer who fails to maintain a safe workplace may be held liable under the common law or under the *Work Health and Safety Act 2011* (Cth) or equivalent state or territory law.⁷⁸

The physical and psychological harms of sexual harassment—both for employees who are sexually harassed and any bystanders—have been widely documented. Accordingly, employers who fail to take reasonable steps to prevent the foreseeable risk of such harm may be in breach of the obligation to ensure a healthy and safe work environment and safe systems of work.

Further information

For further information about work, health and safety requirements, see:

- Safe Work Australia
www.safeworkaustralia.gov.au
- *Australian Work Health and Safety Strategy 2012–2022*
www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/719/Australian-WHS-Strategy-2012-2022.pdf



5. Preventing and redressing sexual harassment

Chapter 5 identifies practical steps that small, medium and large employers can take to help ensure their workplaces are free of sexual harassment. It outlines a range of measures that employers can take to help prevent sexual harassment in the workplace. It also identifies a number of steps employers should take to ensure they respond effectively to allegations of workplace sexual harassment.

5.1 Preventing sexual harassment

Every employer, regardless of size, has a duty to take all reasonable steps to prevent sexual harassment in the workplace. This means that employers must actively minimise the risk of sexual harassment and respond appropriately when harassment does occur.

What constitutes reasonable steps is not defined in the Sex Discrimination Act and may vary depending upon the size, structure and resources of a particular workplace. However, all employers should adopt a number of essential preventative measures, including:

- creating a healthy and safe work environment based on respect
- developing and implementing a sexual harassment policy
- providing or facilitating education and training on sexual harassment.

(a) Create a healthy and safe work environment based on respect

The key to preventing sexual harassment is for employers to send an unequivocal message to every workplace participant that sexual harassment is unacceptable in the workplace. The first step toward sending this message is creating a work environment that is healthy, safe and based on courtesy and respect.

Permitting or ignoring sexist, intimidating or offensive behaviour creates a chilly or hostile environment. This can increase the risk of sexual harassment and have a significant and ongoing negative impact on employees and business as a whole. By taking positive steps to create a work environment that takes sexual harassment seriously, employers can both significantly reduce the instances of sexual harassment in their workplace and increase the productivity and self-esteem of their employees.

Some key steps toward creating a healthy and safe work environment include:

- distributing communications from senior leaders that sexual harassment is unlawful and will not be tolerated in the workplace
- setting expectations for senior leaders to model appropriate behaviour and respond swiftly and effectively to sexual harassment complaints
- responding promptly to any concerns raised
- supporting and encouraging bystanders to report any inappropriate or sexist behaviour
- removing offensive, sexually explicit or pornographic materials from the workplace
- ensuring workplace policies prohibiting inappropriate use of technology address sexual harassment
- distributing and displaying posters and pamphlets that explain rights and obligations around sexual harassment
- conducting regular audits to monitor the incidence of sexual harassment and effectiveness of the complaint process.

(b) Develop and implement a sexual harassment policy

A crucial aspect of prevention is the development and implementation of a written workplace policy that makes it clear that sexual harassment is unlawful and will not be tolerated under any circumstances. Employers might develop a stand-alone policy on workplace sexual harassment or incorporate sexual harassment into a broader policy on workplace harassment. For businesses operating internationally, it may be important to consider how to maximise the safety of workplace participants and how the policy does or does not apply in foreign countries. Further, as the range of technologies used in the workplace expands, employers should also consider addressing sexual harassment in their internet policy.

Sexual harassment policies can vary between workplaces. However, there are a number of key elements that should be included in any sexual harassment policy.

1. Recognise that sexual harassment will not be tolerated

A sexual harassment policy should include an opening statement from the chief executive officer that recognises that:

- the employer is committed to ensuring a safe work environment free from sexual harassment
- sexual harassment will not be tolerated under any circumstance
- swift disciplinary action will be taken against anyone who breaches the policy
- bystanders will be supported to take action against sexual harassment
- appropriate standards of conduct apply at all times.



2. Recognise that sexual harassment is unlawful

A sexual harassment policy should inform staff that sexual harassment is prohibited under federal and state law. It should also inform staff that legal action can be taken against individual employees and the employer for workplace sexual harassment.

3. Identify the strategy for addressing sexual harassment

A sexual harassment policy should identify the organisation's strategy for preventing and redressing sexual harassment. The policy could note, for instance, that the organisation is committed to:

- creating a working environment that is free from sexual harassment and where all staff members are treated with dignity, courtesy and respect
- implementing training and awareness-raising strategies to ensure that all employees know their rights and responsibilities with respect to sexual harassment
- providing an effective procedure for complaints based on the principle of procedural fairness
- treating all complaints in a sensitive, fair, timely and confidential manner
- guaranteeing protection against any victimisation or reprisals
- encouraging the reporting of behaviour that breaches the policy
- promoting appropriate standards of conduct at all times.

4. Clearly define sexual harassment

Workplace participants need to have a clear understanding of sexual harassment. It is therefore important that employers include a definition of sexual harassment in their policy. The definition should emphasise that sexual harassment is unwelcome conduct of a sexual nature. It may also be useful to provide behavioural based examples of sexual harassment that may be relevant to the particular working environment.

Sexual harassment could, for instance, be defined as follows:

Sexual harassment is unwelcome conduct of a sexual nature that a reasonable person anticipates could possibly make the recipient feel offended, humiliated and/or intimidated.

Sexual harassment can take various forms. It can involve: unwelcome touching, hugging or kissing; staring or leering; suggestive comments or jokes; sexually explicit pictures, screen savers or posters; unwanted invitations to go out on dates or requests for sex; intrusive questions about an employee's private life or body; unnecessary familiarity; insults or taunts based on sex; sexually explicit emails or text messages; suggestive or sexually explicit comments or references on social media networks; accessing sexually explicit internet sites; and behaviour which would also be an offence under the criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

The policy could also clarify that sexual interaction, flirtation, attraction or friendship that is invited, mutual, consensual or reciprocated does not constitute sexual harassment.

The policy should also make it clear that sexual harassment can occur in any work-related context, including conferences, work functions, office Christmas parties or business trips. Such behaviour is also unlawful when it occurs away from the workplace but is a culmination or extension of events in the workplace. This includes the private use of work mobile phones or comments through email or social media.

(See chapter 2 for further information.)

5. Explain the consequences of breaching the policy

A sexual harassment policy should operate as a general warning to all employees of the consequences of non-compliance. The policy should therefore clearly identify the various consequences of breaching the policy. Depending on the severity of the case, this might include making an apology, counselling, transfer, dismissal or demotion.

(See chapters 3 and 4 for further information.)

6. Identify the responsibilities of management and staff

A sexual harassment policy should make it clear that all staff have responsibilities to comply with the sexual harassment policy. The policy should also identify the responsibilities of specific staff, for example complaints and contact officers (see section 5.2(a) below) and managers and supervisors. Additional manager and supervisor responsibilities should include:

- monitoring the working environment to ensure acceptable standards of conduct
- modelling appropriate behaviours themselves
- promoting the sexual harassment policy within their work areas
- treating all complaints seriously and taking immediate action to resolve matters or refer to another officer.

The policy should also include information about the role, rights and responsibilities of bystanders.

7. Outline the available options for dealing with sexual harassment

The sexual harassment policy should tell workplace participants where they can go to get help if they are sexually harassed in the workplace or witness sexual harassment. At a minimum, the policy should refer to the organisation's sexual harassment complaint process (see section 5.2(a) below). Additional sources of support and advice might include the Commission and its state and territory equivalents and the police.

(c) Provide or facilitate education and training on sexual harassment

A written policy can only be effective in addressing sexual harassment if it is implemented effectively. All workforce participants should be made aware of the policy and their rights and obligations in relation to sexual harassment. Employers should distribute the sexual harassment policy widely and conduct regular information sessions on compliance. This may be achieved by:

- officially launching the sexual harassment policy at a full staff meeting with endorsement from senior management
- emailing copies of the policy to all staff members and clearly explaining any new responsibilities to staff members that are promoted to management positions
- displaying the policy on the intranet, office noticeboards and in induction manuals for new staff members
- ensuring that the policy is accessible to employees from different cultural backgrounds, employees with disabilities or those working in remote areas
- requiring all staff to sign a copy of the policy acknowledging that they understood the content
- periodically reviewing the policy to ensure it is operating effectively and contains current information (eg about the law, contact and complaint officers).

Ongoing training is also important in effectively implementing a sexual harassment policy. Employers should ensure that sexual harassment training forms part of the organisation's core training, including workplace induction.

5.2 Responding to sexual harassment

Employers are required to provide a safe workplace for their employees and, accordingly, must respond effectively to sexual harassment in the workplace. It is therefore vital that employers develop and implement robust procedures for dealing with sexual harassment complaints.

There are a number of steps that employers can take to enhance the effectiveness of their responses to workplace sexual harassment. These steps include:

- establishing and implementing an internal complaint procedure
- investigating sexual harassment complaints and taking appropriate remedial action
- keeping confidential records of complaints.

Establishing effective procedures for dealing with sexual harassment enables employers to respond to complaints efficiently and fairly and, at the same time, affords employees the opportunity to seek redress for alleged sexual harassment. An effective complaint procedure also affords employers the opportunity to resolve complaints internally and will likely play an important role in preventing other incidences of sexual harassment.

(a) Establish and implement an internal complaint procedure

Employers should establish an internal complaint procedure for addressing sexual harassment. This might be a stand-alone procedure for sexual harassment complaints or a broader procedure that deals with a range of workplace complaints, including sexual harassment.

Employers are free to develop a flexible procedure that suits their organisation's size, structure and resources. However, when deciding which type of procedure to establish, it is important that employers keep in mind the potential sensitivities associated with complaints concerning alleged conduct of a sexual nature.

The purpose of an internal complaint mechanism is to provide an opportunity for a complaint to be made by an employee and for the employer to investigate the complaint, take action to address the situation and resolve the complaint, where this is appropriate. An investigation will usually involve gathering the relevant information, assessing whether or not sexual harassment has occurred and taking appropriate remedial action as needed.

A complaint procedure should be a staged process. Employees should be made aware of their right to raise an issue with their manager, supervisor, member of the Human Resources team or an equal employment opportunity/harassment/equal opportunity or complaints officer as well as the opportunity to lodge a complaint and work through the complaints process should they choose.

However, employees should be clear that the initial contact person cannot be the same person who investigates or makes decisions in relation to complaints. This initial contact person can only act in a supportive capacity to the person making the complaint.

Employers should keep a confidential record of all reports and complaints of sexual harassment, even where those do not proceed through the full complaints process (including investigation).

Employers should note that if an employer is aware of an allegation of sexual harassment or has observed sexual harassment in the workplace but does not take any action, the employer may be found to have neglected to take all reasonable steps to prevent the sexual harassment, even if the complainant did not want the respondent to take any action at the time of making the complaint.⁷⁹

While there is a degree of flexibility, there are a number of key elements that employers should incorporate into their internal complaint procedures.

1. Establish a complaint procedure that is transparent, efficient, confidential and fair

Employers should establish a procedure for receiving internal complaints related to sexual harassment. They should also ensure that the procedure is implemented and operational in practice.⁸⁰

Employers should take care to ensure that the procedure is transparent, efficient, confidential and fair. For instance, employers should ensure that:

- workplace participants are notified of any allegations made against them and are afforded the opportunity to respond to those allegations
- workplace participants are informed about the process for resolving complaints
- complaints of sexual harassment are dealt with impartially and without bias
- information about a complaint is only provided to those people who need to know in order for the complaint to be actioned properly
- there is a clearly defined review process.

2. Educate workplace participants about the complaint procedure

Workplace participants must be aware of complaint procedures before they can use them to seek redress for sexual harassment. Employers should therefore regularly inform workforce participants about the existence of internal (and external) complaint procedures and how they can be used to address sexual harassment in the workplace.

Employers could, for instance, include information about complaint procedures in induction materials, in workplace training and education and in sexual harassment and other workplace policies. They could also post information about complaint procedures on the intranet, around the workplace and in bulletins.

3. Appoint and train contact and complaint officers

Employers often encourage a person with a complaint to raise it with their immediate supervisor (or another manager if the supervisor is the alleged harasser). Employers should also identify employees to act as contact or complaint officers.

Contact officers

Contact officers are the first point of contact for a person who alleges sexual harassment and are usually selected from various areas and levels of an organisation.

Contact officers should: listen to the complaint; provide information about the available avenues of redress; and assist the complainant or the alleged harasser by acting as a support person.

Contact officers should not: investigate the complaint; counsel the complainant or alleged harasser; present the case for the complainant or alleged harasser at meetings or inquiries; support both parties at the same time; recommend a particular course of action or pre-empt outcomes; or unnecessarily disclose information about the complaint.

Complaint officers

Complaint officers take an active role in managing sexual harassment complaints and usually have a relatively senior status within an organisation. Some organisations contract out formal complaint procedures to professional consultants. Owners and employers in small businesses should appoint themselves or a senior employee as the complaint officer, provided they are not the alleged harasser.

Wherever possible, employers should try to appoint and train both male and female sexual harassment complaints and contact officers.

Training

Sexual harassment complaints may be complex, sensitive and potentially volatile. Anyone who has responsibility for dealing with complaints should receive specialist training in complaint handling in the area of sexual harassment. Contact the Commission or state or territory anti-discrimination agencies for information about who may be able to assist with training.

4. Establish safeguards to protect against victimisation

Employers should put in place safeguards to ensure that individuals associated with a sexual harassment complaint, including the complainant and any bystanders, are not victimised.

See Appendix 4 for good practice guidelines on internal complaint processes.

(b) Investigate sexual harassment complaints and take appropriate remedial action

It is crucial that employers act immediately to conduct effective investigations into individual complaints of sexual harassment and, where appropriate, provide remedial action. Investigations may be undertaken by a complaint officer, or in certain cases (eg when allegations have been made against senior staff members), an external consultant.

To ensure consistency and fairness, employers should document the steps involved in a formal complaint investigation and clearly inform the parties about the complaint process in advance. The usual process involves interviewing the parties and examining relevant evidence to determine whether or not the complaint has sufficient substance and what, if any, remedial action is appropriate. A confidential report is then compiled documenting the complaint, the investigation, the finding and the recommended outcome.⁸¹ It is important to explain to both the complainant and respondent that they will be allowed the opportunity to respond to any allegations made against them before the report is finalised and a final decision is made.

Those responsible for investigating complaints should consider all available evidence and make their finding on the balance of probabilities (ie that it is more probable than not that the harassment did or did not occur). Relevant evidence might include supervisor reports, emails, text messages or the complainant's personal records. It is important to note that even if there is insufficient evidence for a complaint to be substantiated, it does not mean that the discrimination did not occur or that the allegations are untrue. Findings may be that harassment did or did not occur, or that it was not possible to make a conclusive finding.

Remedial actions following a finding of sexual harassment can range from an apology to disciplinary action against the person found to have engaged in harassment (such as demotion, transfer, suspension, probation or dismissal). Disturbingly, in recent years, we have seen an increase in the number of people alleging negative consequences as a result of reporting sexual harassment,⁸² for example, through a reduction in hours, demotion or workplace bullying. Employers should implement safeguards against victimisation to ensure that the outcome of a complaint does not disadvantage the complainant in any way.

In addition to taking remedial action in the individual case, it is good practice for employers to make systemic changes to their workplace to prevent the recurrence of sexual harassment and to avoid any perception that sexual harassment is condoned by them. For example, reissue discrimination and harassment policies or codes of conduct to all employees. Employers should also follow up with the person who reported their concerns a few months later, to check whether their concerns remain, and to monitor the relationships involved. Whenever a complaint is made, even where allegations have not been admitted or substantiated, it may still be appropriate for an employer to take action to prevent future sexual harassment in the workplace. For instance, it is a good time to consider the internal processes for preventing and responding to sexual harassment, provide training and remind employees of their general obligations not to sexually harass others.

(d) Keep confidential records of complaints

Employers should keep records of any complaints of workplace sexual harassment and must ensure that such records comply with any relevant laws.⁸³ Employers should also develop clear guidelines on how to document and record sexual harassment complaints and ensure that all employees understand their obligations under the guidelines.

The type and extent of information recorded by employers will be influenced by a range of factors, including the level of formality of the complaint.

In cases where a *formal complaint* of sexual harassment is received, employers should, at a minimum, keep a record of:

- the complaint from the target of the alleged sexual harassment
- statements from the alleged target, the alleged harasser, alleged witnesses and any other relevant individuals, which have been reviewed and endorsed by the relevant person⁸⁴
- interviews conducted by the investigation officer, using the interviewee's own words as far as possible
- other key documentation related to the investigation, including any findings of the investigation and any action taken in response to the allegations.

If an employer determines that an employee sexually harassed another person, it should also record its findings and subsequent response in the employee's personnel file. An employer can remove the record from the personnel file after a reasonable period of time, provided it is satisfied that there has been no further harassment.

Employers should retain records related to investigations into sexual harassment for a reasonable period of time. If an alleged target subsequently lodges a complaint under the Sex Discrimination Act, the Commission may request a copy of the employer's records to assist it in its investigation of the complaint. Records will help employers to establish what actions they took in response to the initial complaint and may assist in discharging or reducing their liability for sexual harassment. Employers should also be aware that they may be required to produce records related to sexual harassment complaints under freedom of information laws.

At the very minimum, employers should store any written records related to allegations of sexual harassment in locked storage and restrict access to the records to authorised personnel. In addition, employers should ensure that they put appropriate safeguards in place to secure electronic records related to allegations of sexual harassment (eg emails, electronic files).





Appendix 1: Sources of assistance and information

Assistance

Australian Human Rights Commission

Telephone

National Information Service: 1300 656 419 (local call)
TTY: 1800 620 241 (toll free)

NRS: **133 677** (TTY/Voice) or **1300 555 727** (Speak & Listen)
Fax: (02) 9284 9611

Post

Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Online

Email: infoservice@humanrights.gov.au
Website: www.humanrights.gov.au

If you need an interpreter you can call the Translating and Interpreting Service (TIS) on **131 450** and ask to be connected to the Australian Human Rights Commission.

Other federal agencies

Fair Work Commission 1300 799 675 https://www.fwc.gov.au/	Fair Work Ombudsman 13 13 94 http://www.fairwork.gov.au
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State and territory agencies

ACT Human Rights Commission (02) 6205 2222 or (02) 6205 1666 (TTY) www.hrc.act.gov.au/	Anti-Discrimination Board of New South Wales (02) 9268 5544 or 1800 670 812 www.lawlink.nsw.gov.au/adb
Anti-Discrimination Commission Queensland 1300 130 670 www.adcq.qld.gov.au	Equal Opportunity Commission (South Australia) 1800 188 163 or (08) 8207 1911 (TTY) www.eoc.sa.gov.au
Equal Opportunity Commission – Western Australia 1800 198 149 or (08) 9216 3963 (TTY) www.equalopportunity.wa.gov.au	Northern Territory Anti-Discrimination Commission 1800 813 846 or (08) 8999 1466 (TTY) www.adc.nt.gov.au/
Office of the Anti-Discrimination Commissioner – Tasmania (03) 6233 4841 or 1300 305 062 www.antidiscrimination.tas.gov.au	Victorian Equal Opportunity and Human Rights Commission 1300 891 848 or 1300 289 621 (TTY) www.humanrightscommission.vic.gov.au

Information

Australian Human Rights Commission, *Know where the line is: Awareness Raising Strategy*
www.knowtheline.com.au

Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment National Telephone Survey* (2012)
www.humanrights.gov.au/sexualharassment/survey/index.html

M Flood and P McDonald, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (2012),
Australian Human Rights Commission
www.humanrights.gov.au/sexualharassment/bystander/index.html

Australian Human Rights Commission, *Federal Discrimination Law* (updated 2011), pp 47-59
www.humanrights.gov.au/legal/FDL/index.html

Charlesworth, Sara et al, *Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009* (2012)
www.sexualharassmentinaustralia.org/wp-content/uploads/2012/04/SH-Report.pdf

Sexual Harassment in Australia Project Website (Associate Professor Paula McDonald, Associate Professor Sara Charlesworth, Tina Graham, Anthea Worley)
www.sexualharassmentinaustralia.org/

Victorian Equal Opportunity & Human Rights Commission, *Guideline: Sexual Harassment. Complying with the Equal Opportunity Act 2010* (2013)
www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/eoa-practice-guidelines

Victorian Equal Opportunity & Human Rights Commission, *Employer's Checklist: Preventing Sexual Harassment* (2011)
www.victorianhumanrightscommission.com/www/files/Employers%20Toolkits/Sexual%20harassment%20-%20Employers%20checklist.pdf

Women's Legal Services NSW, *My work My rights My life*
<http://www.womenslegalnsw.asn.au/wlsnsw/our-services/wwls/>

Appendix 2: Complaints to the Australian Human Rights Commission

A person who believes he or she has been sexually harassed in the workplace can make a complaint to the Australian Human Rights Commission alleging sexual harassment under the *Sex Discrimination Act 1984* (Cth).

A person who makes a complaint to the Commission is known as a complainant. A complainant can make a complaint about an individual and/or an organisation, for example an employer. This means that the complainant may consider both an individual and/or organisation responsible for the alleged sexual harassment. The person or organisation a complaint is about is known as a respondent.

What is the Commission's role in relation to complaints?

When the Commission receives a complaint alleging sexual harassment under the *Sex Discrimination Act 1984* (Cth), the President of the Commission can inquire into the complaint and try to resolve it by conciliation.

Commission staff who deal with complaints on behalf of the President are not advocates for the complainant or respondent.

The Commission is not a court and cannot decide if a complainant has been sexually harassed. The Commission's role is to get both sides of the story and help those involved try to resolve the complaint.

What happens when the Commission receives a complaint?

The Commission will advise a respondent that a complaint has been received and provide them with a copy of the complaint. The Commission wants to hear a respondent's views on the matter and wants to make sure they have a fair opportunity to respond to and resolve the complaint.

Where appropriate, the Commission will invite the complainant and respondent to participate in conciliation.

If the Commission asks a respondent to provide information or documents, they will also be asked to provide this within a specific timeframe. If the respondent does not provide the information in the timeframe or does not respond at all, the President of the Commission has power under the law to compel the respondent to provide the information. The law also says that the President can compel people and organisations to attend conciliation.

It is the Commission's usual practice to give the complainant a copy of information and documents that a respondent provides to the Commission. This can help the complainant understand how the respondent sees things.

Complainants and respondents do not need a lawyer to make or respond to a complaint. If complainants or respondents want a lawyer, they need to organise this themselves. Complainants and respondents can also seek advice from other organisations such as industry groups, advocacy organisation and trade unions.

What is conciliation?

Conciliation is an informal process that allows the complainant and respondent to talk about the issues in the complaint and try to find a way to resolve the matter.

Conciliation is not like a court hearing. The conciliator does not decide who is right or wrong and the conciliator does not decide how the complaint should be resolved.

The conciliator is there to help ensure that the process is fair and to help the complainant and respondent discuss and negotiate an outcome. The conciliator can also provide information about the law and how it has been interpreted.

Conciliation can take place in a face-to-face meeting called a 'conciliation conference' or through a telephone conference. In some cases complaints can be resolved through an exchange of letters or by passing messages through the conciliator.

The conciliator decides how the conciliation process will run and who will participate. Complainants and respondents can ask to bring a support person or an advocate to assist them in the conciliation process. If a person needs special assistance such as a language or sign language interpreter, the Commission can arrange this.

Conciliation is a confidential process in that the Commission cannot provide information about anything that is said or done in conciliation to the court, if further legal action is taken in relation to the complaint.

Complaints can be resolved in many different ways and the officer who is handling the complaint can provide complainants and respondents with information about how other complaints have been resolved.

More information about conciliation (including examples of outcomes) is available on the Investigation and Conciliation Service's section of the website – <http://www.humanrights.gov.au/complaints-information>. The Commission has a DVD about conciliation. This DVD can be obtained by contacting the Commission or can be viewed online – www.humanrights.gov.au/complaints_information/pathways_to_resolution/index.html.

What happens if the complaint is not resolved?

If the complaint is not resolved, the Commission may request more information from the complainant and respondent before making a final decision about the complaint.

If the President of the Commission is satisfied that the complaint cannot be resolved, the complaint will be terminated. Once a complaint is terminated, the complainant has the option of applying to the Federal Circuit Court or the Federal Court of Australia for the court to hear the allegations in the complaint. The complainant must make this application within 60 days of the date of termination.

The complainant can also make an application to the court if the President terminates the complaint for some other reason. For example, because the President is satisfied the complaint is lacking in substance or is satisfied that the complaint has already been adequately dealt with.

Where can I get more information?

If you would like more information about federal anti-discrimination law, including the sexual harassment provisions in the *Sex Discrimination Act 1984* (Cth), or the Commission's investigation and conciliation process, you can contact the Commission's National Information Service.

If you are a party to a complaint that is currently being dealt with by the Commission and have more questions about the complaint process and conciliation you can contact the officer who is handling the complaint.

Call us

Infoline: 1300 656 419 or (02) 9284 9888

TTY: 1800 620 241

If you need an interpreter you can call the Translating and Interpreting Service (TIS) on **131 450** and ask to be connected to the Australian Human Rights Commission.

If you are deaf or have a hearing or speech impairment you can contact the National Relay Service (NRS) on **133 677** (TTY/Voice) or **1300 555 727** (Speak & Listen) and ask to be connected to the Australian Human Rights Commission.

Write to us

Postal Address: GPO Box 5218, Sydney NSW 2001

Email: infoservice@humanrights.gov.au

Fax: (02) 9284 9611

Go online

Website: www.humanrights.gov.au

Make a complaint: www.humanrights.gov.au/complaints/lodging-your-complaint

Appendix 3: Sex Discrimination Act

For ease of reference, Appendix 3 outlines key provisions of the Sex Discrimination Act related to sexual harassment in the workplace. The provisions are current as at the time of publication (ie May 2014). Employers should always consult the latest version of the Sex Discrimination Act, which is available at <http://www.comlaw.gov.au/>.

5 Sex discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

13 Extent to which Act applies to State instrumentalities

(1) Section 14 does not apply in relation to employment by an instrumentality of a State.

(2) Section 28B does not apply in relation to an act done by an employee of a State or of an instrumentality of a State.

14 Discrimination in employment or in superannuation

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

- (a) in the arrangements made for the purpose of determining who should be offered employment;
- (b) in determining who should be offered employment; or
- (c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, marital status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

- (a) in the terms or conditions of employment that the employer affords the employee;
- (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
- (c) by dismissing the employee; or
- (d) by subjecting the employee to any other detriment.

(3) Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with employment to perform domestic duties on the premises on which the firstmentioned person resides.

(4) Where a person exercises a discretion in relation to the payment of a superannuation benefit to or in respect of a member of a superannuation fund, it is unlawful for the person to discriminate, in the exercise of the discretion, against the member or another person on the ground, in either case, of the sex or marital status of the member or that other person.

(5) Subsection (4) does not apply if section 41B applies to that member in respect of that fund.

(6) In this section:

member, in relation to a superannuation fund, includes a person who has been a member of the fund at any time.

28A Meaning of sexual harassment

(1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.

(2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

28B Employment, partnerships etc.

(1) It is unlawful for a person to sexually harass:

- (a) an employee of the person; or
- (b) a person who is seeking to become an employee of the person.

(2) It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

(3) It is unlawful for a person to sexually harass:

- (a) a commission agent or contract worker of the person; or
- (b) a person who is seeking to become a commission agent or contract worker of the person.

(4) It is unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.

(5) It is unlawful for a partner in a partnership to sexually harass another partner, or a person who is seeking to become a partner, in the same partnership.

(6) It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.

(7) In this section:

place includes a ship, aircraft or vehicle.

workplace means a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.

workplace participant means any of the following:

- (a) an employer or employee;
- (b) a commission agent or contract worker;
- (c) a partner in a partnership.

28C Members of bodies with power to grant etc. occupational qualifications etc.

(1) It is unlawful for a member of an authority or body that has power to take action in connection with an occupational qualification to sexually harass a person seeking action in connection with an occupational qualification.

(2) In this section:

action in connection with an occupational qualification means conferring, renewing, extending, revoking or withdrawing an authorisation or qualification that is needed for, or facilitates:

- (a) practising a profession; or
- (b) carrying on a trade; or
- (c) engaging in an occupation.

28D Registered organisations

It is unlawful for:

- (a) a member of a registered organisation; or
- (b) a member of the staff of a registered organisation;

to sexually harass a member of the organisation, or a person who is seeking to become a member of the organisation.

28E Employment agencies

It is unlawful for:

- (a) a person who operates an employment agency; or
- (b) a member of the staff of an employment agency;

to sexually harass another person in the course of providing, or offering to provide, any of the agency's services to that other person.

28F Educational institutions

(1) It is unlawful for a member of the staff of an educational institution to sexually harass:

- (a) a person who is a student at the institution; or
- (b) a person who is seeking to become a student at the institution.

(2) It is unlawful for a person who is an adult student at an educational institution to sexually harass:

- (a) a person who is a student at the institution; or
- (b) a member of the staff of the institution.

(2A) It is unlawful for a person (the *first person*) who is a member of the staff of an educational institution (the *first educational institution*) to sexually harass a person who is a student at another educational institution if the sexual harassment occurs in connection with the first person being a member of staff of the first educational institution.

(2B) It is unlawful for a person (the *first person*) who is an adult student at an educational institution (the *first educational institution*) to sexually harass:

- (a) a person who is a student at another educational institution; or
- (b) a member of the staff of another educational institution;

if the sexual harassment occurs in connection with the first person being a student at the first educational institution.

(3) In this section:

adult student means a student who has attained the age of 16 years.

28G Goods, services and facilities

(1) It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.

(2) It is unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that other person.

28H Provision of accommodation

(1) It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, (whether as principal or agent) accommodation to that other person.

(2) This section does not apply to anything done by a person in the course of providing, or offering to provide, accommodation to a near relative.

28J Land

It is unlawful for a person to sexually harass another person in the course of dealing (whether as principal or agent) with that other person in connection with:

- (a) disposing of, or offering to dispose of, an estate or interest in land to the other person; or
- (b) acquiring, or offering to acquire, an estate or interest in land from the other person.

28K Clubs

It is unlawful for a member of the committee of management of a club to sexually harass a member of the club or a person seeking to become a member of the club.

28L Commonwealth laws and programs

It is unlawful for a person:

- (a) in the course of performing any function, or exercising any power, under a Commonwealth law or for the purposes of a Commonwealth program; or
- (b) in the course of carrying out any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program;

to sexually harass another person.

94 Victimisation

(1) A person shall not commit an act of victimisation against another person.

Penalty:

- (a) in the case of a natural person—25 penalty units or imprisonment for 3 months, or both; or
- (b) in the case of a body corporate—100 penalty units.

(2) For the purposes of subsection (1), a person shall be taken to commit an act of victimization against another person if the firstmentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:

- (a) has made, or proposes to make, a complaint under this Act or the *Australian Human Rights Commission Act 1986*; or
- (b) has brought, or proposes to bring, proceedings under this Act or the *Australian Human Rights Commission Act 1986* against any person; or
- (c) has furnished, or proposes to furnish, any information, or has produced, or proposes to produce, any documents to a person exercising or performing any power or function under this Act or the *Australian Human Rights Commission Act 1986*; or
- (d) has attended, or proposes to attend, a conference held under this Act or the *Australian Human Rights Commission Act 1986*; or
- (e) has appeared, or proposes to appear, as a witness in a proceeding under this Act or the *Australian Human Rights Commission Act 1986*; or
- (f) has reasonably asserted, or proposes to assert, any rights of the person or the rights of any other person under this Act or the *Australian Human Rights Commission Act 1986*; or
- (g) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II;

or on the ground that the firstmentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (g), inclusive.

(3) It is a defence to a prosecution for an offence under subsection (1) constituted by subjecting, or threatening to subject, a person to a detriment on the ground that the person has made an allegation that another person had done an act that was unlawful by reason of a provision of Part II if it is proved that the allegation was false and was not made in good faith.

105 Liability of persons involved in unlawful acts

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act.

106 Vicarious liability etc.

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

- (a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or
- (b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

Appendix 4: Good Practice Guidelines for Internal Complaint Processes

Why have an internal complaint process?

Addressing employee complaints about discrimination and harassment quickly and fairly is good for business because it can:

- identify ways to improve workplace practices and policies
- improve staff morale, productivity and retention
- help avoid complaints to external agencies and/or legal action.

Under federal anti-discrimination laws, if an employer wants to argue that the organisation should not be held liable for any discrimination or harassment by one of its employees, the employer will need to demonstrate that the organisation took 'reasonable precautions and exercised due diligence'¹ or took 'all reasonable steps'² to prevent the discrimination or harassment. While the size of the employer is relevant to these considerations, an important factor that is likely to be considered is whether the organisation has an effective complaint handling procedure.³

Employers can establish a specific procedure for discrimination and harassment complaints or use the procedure already in place for other types of complaints. However, it is important to note that discrimination and harassment complaints can be complex, sensitive and may potentially involve external agencies, such as the Commission. Therefore, it is vital that those responsible for dealing with internal complaints have the appropriate expertise and receive relevant training.

Characteristics of a good internal complaint process

A good complaint process will be:

- **Fair** – This means that both the person complaining (the complainant) and the person being complained about (the respondent) should have the opportunity to present their version of events, provide supporting information and respond to any potential negative decisions. In addition, the person investigating and/or making decisions about the complaint should be impartial; that is, he or she should not favour the complainant or the respondent or prejudge the complaint in any way.
- **Confidential** – This means that information about a complaint is only provided to those people who need to know about it, in order for the issue to be resolved appropriately.
- **Transparent** – The complaint process and the possible outcomes of the complaint should be clearly explained and those involved should be kept informed of the progress of the complaint and the reasons for any decisions.
- **Accessible** – The complaint process should be easy to access, easy to understand and everyone should be able to participate equally. For example, an employee may require a language interpreter to understand and participate and a person with a disability may need information provided in a specific format.
- **Efficient** – The complaint process should be conducted without undue delay. As time passes, information relevant to the complaint may deteriorate or be lost, which will impact on the fairness of the process. In addition, unresolved complaints can have a negative and ongoing impact on a workplace.

A good complaint process will also include provisions to:

- protect employees from being victimised because they have made a complaint
- protect employees from vexatious and malicious complaints
- ensure appropriate confidential records are kept about complaints and that this information is stored and managed appropriately.

Stages in a complaint process

Initial contact point

An organisation's discrimination and harassment policy should explain how to make a complaint and, identify an initial contact person. In larger organisations, the contact person may be an Equal Employment Opportunity (EEO) Officer or a Harassment Officer. In smaller organisations, this person may be a line manager or supervisor. The contact person should not be the same person who is responsible for investigating or making decisions about a complaint.

1 See section 57 of the *Age Discrimination Act 2004* (Cth) and section 123 of the *Disability Discrimination Act 1992* (Cth).

2 See section 106 of the *Sex Discrimination Act 1984* (Cth) and section 18A of the *Racial Discrimination Act 1975* (Cth).

3 See discussion of *Johanson v Blackledge* (2001) 163 FLR 58, 82 [105] in *Federal Discrimination Law Online*, Australian Human Rights Commission, 2011; available at <http://www.humanrights.gov.au>.

The contact person should:

- be available to listen to an employee's concerns about discrimination or harassment
- not form a view of the merit of any allegations
- provide information about the internal complaint process
- advise the person that in some situations where serious allegations are raised – for example, that may expose the organisation to legal liability – the issue may need to be reported to management and dealt with as a formal complaint
- where appropriate, provide support for person if he or she wants to try and resolve the issue personally
- provide information about available support services; for example, workplace counselling services
- outline other options available to the person, such as lodging a complaint of discrimination or harassment with an external agency.

Early resolution

In some situations it may be appropriate to consider early resolution of an initial complaint without undertaking an assessment of its merit. This approach may be useful where:

- the complainant indicates a desire to sit down and discuss the matter with the respondent informally and this seems appropriate in the circumstances
- the information on hand supports a view that the complaint has arisen from a misunderstanding or miscommunication
- the behaviour being complained about is not serious and does not appear to be discrimination or harassment, as defined by the organisation's policy.

Early resolution may involve:

- a direct private discussion between the complainant and the respondent
- an impartial third person conveying information between those involved
- an impartial third person helping those involved to talk to each other and find a solution.

In some situations the impartial third person may need to be someone external to the organisation, such as a professional mediator.

Formal resolution

If a person wants to proceed with a formal complaint about discrimination or harassment, or if this is considered to be the most appropriate course of action, the following steps are recommended.

a. Obtain information from the complainant

The person handling the complaint (the complaint officer) should:

- provide information about the complaint process, potential outcomes, options for assistance/support and protections from victimisation
- ensure the allegations are documented, either by the complainant or the complaint officer
- explain that the process is confidential, what this means and why it is important
- explain what records of the complaint will be kept, for how long and where
- explain the action that may be taken if the complaint is found to be vexatious or malicious
- ask the complainant to provide relevant documents or details of witnesses that may support the allegations.

Where there is a concern about supporting information being destroyed or compromised, the complaint officer should try to obtain this information before taking any further action.

b. Advise the respondent about the complaint

The complaint officer should:

- advise the respondent that a complaint has been made against him or her and provide as much information as possible about the allegations and supporting information (where applicable)
- confirm that he or she will be given the opportunity to respond to the allegations in writing or through an interview
- provide information about the complaint process, potential outcomes and options for assistance/support
- explain that the process is confidential, what this means and why it is important
- explain what records of the complaints will be kept, for how long and where
- explain that it is unacceptable to victimise someone who has made a complaint.

c. Assess the information

If the respondent confirms that he or she did what is alleged to have occurred, and if this behaviour would be considered discrimination or harassment as defined in the organisation's policy, the next step is to consider an appropriate outcome (see below). It is recommended that the respondent is provided with the opportunity to comment on any proposed decision and outcome before a final decision is made.

If there is disagreement about what happened, the complaint officer should consider whether there is other information that will help to determine what happened. It is generally understood that the person making the decision should be satisfied that it is 'more probable than not' that what is alleged to have happened did happen.

Given the nature of discrimination and harassment, there may often be no direct witnesses or documents to support the complainant's version of events. This does not mean that the allegation is untrue. In these situations the complainant should be given the opportunity to comment on the information that has been provided by the respondent and to provide any other information to support his or her allegations before a final decision is made.

Outcomes from the process

a. Where the allegations are admitted or substantiated

Outcomes for the respondent may include:

- disciplinary counselling
- an official warning
- a requirement to attend discrimination and harassment awareness training
- a requirement to provide a formal apology to the complainant
- disciplinary action (e.g. demotion, transfer, suspension, probation or dismissal) and/or
- participation in mediation to restore relationships in the workplace.

Outcomes for the complainant may include:

- recrediting of any leave taken as a result of the discrimination or harassment
- supportive counselling
- a change in the work environment, as requested; for example, a change in work teams or location
- participation in mediation to restore relationships in the workplace.

It is important that the complainant is provided with general information about the outcome of a complaint, as this may affect their decision to pursue the matter with an external agency. The level of detail provided should be balanced against the need to respect the privacy of the respondent.

b. Where the allegations are not admitted or substantiated

Where allegations have not been admitted or substantiated, it may still be appropriate for the employer to take some action as a result of the complaint. For example, it may be appropriate to:

- provide refresher training for all staff regarding appropriate workplace behaviour, and/or
- re-issue the discrimination and harassment policy or code of conduct to all employees.

If such action is taken, it is important that it is not done in a way which could be seen as singling out or punishing the respondent, especially where there has been no finding that he or she has breached the organisation's policy or code of conduct.

- 1 *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth), ss 53-59.
- 2 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), s 28A (1A)(a).
- 3 Australian Human Rights Commission, *Working without Fear: Results of the 2012 Sexual Harassment National Telephone Survey* (2012), pp 4, 15, 16-17. At: <http://www.humanrights.gov.au/working-without-fear-results-sexual-harassment-national-telephone-survey-2012> (viewed 14 May 2014).
- 4 Above, 37.
- 5 Above, 4, 15, 18.
- 6 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), s 46; *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth), ss 53-59.
- 7 State government instrumentalities and state government employees are exempt from the discrimination and sexual harassment provisions of the Sex Discrimination Act in relation to employment (see section 13). The Act defines an 'instrumentality of a State' as 'a body or authority established for a public purpose by a law of a State and includes a technical and further education institution conducted by or on behalf of a State, but does not include any other institution of tertiary education' (section 4). The breadth of the State exemption has not been fully tested but would seem to include state government departments, statutory corporations, public authorities, local councils, state schools and state vocational education and training institutions. The exemption also applies to the Northern Territory and the Australian Capital Territory, which are defined as states in the Sex Discrimination Act. It should be noted that state government instrumentalities and state government employees are required to comply with all non-employment related areas of the Sex Discrimination Act, such as the provision of goods and services under section 22 of the Sex Discrimination Act, and with state and territory anti-discrimination laws, which include sexual harassment provisions.
- 8 Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008). At: http://humanrights.gov.au/sexualharassment/employers_code/index.html (last viewed 30 July 2013).
- 9 Sex Discrimination Act, s 48(ga).
- 10 Sex Discrimination Act, s 28A(1). Section 28A(1) provides:
For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
- 11 Sex Discrimination Act, ss 28B-28L.
- 12 *Aldridge v Booth* (1988) 80 ALR 1 at 5.
- 13 In *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) 85 ALR 503 at 526 Justice Lockhart stated that:
In principle, advances by an employer, particularly if there is a series of them, all of which may have been tolerated by an employee out of sympathy or out of lack of choice, and each of which or all of which may have been tolerated by the majority of women, may nevertheless contravene s. 28 [at the time the section of the Sex Discrimination Act prohibiting sexual harassment] if they otherwise "vex and annoy" so as to amount to sexual harassment.
- 14 *Johanson v Blackledge Meats* [2001] FMC 6; *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11 at 28; *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) 85 ALR 503 at 514-515.
- 15 *Noble v Baldwin* [2011] FMCA 283, [235] (Federal Magistrate Barnes), citing *Elliott v Nanda* (2001) 111 FCR 240 [108].
- 16 *Elliott v Nanda* (2001) 111 FCR 240.
- 17 Above 277 [107].
- 18 *Aldridge v Booth & Ors* (1986) EOC 92-177.
- 19 For example, see above.
- 20 *Kraus v Menzie and The Truck Factory Pty Ltd* [2012] FCA 3.
- 21 Above [45].
- 22 Sex Discrimination Act, ss 28A(1), 28A(2).
- 23 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 24 *Shiels v James and Lipman Pty Ltd* [2000] FMCA 2 [72]. See also *Harwin v Pateluch* [1995] HREOCA 23 (extract at (1995) EOC 92-770).
- 25 *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81.
- 26 *G v R and Department of Health, Housing and Community Services* [1993] HREOCA 20.
- 27 *Freestone v Kozma* (1989) EOC 92-249 at 77,377.
- 28 *Horne v Press Clough Joint Venture* (1994) EOC 92-556; (1994) EOC 92-591.
- 29 *Lulham v Shanahan, Watkins Steel and Ors* [2003] QADT 11.
- 30 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 31 *Font v Paspaley Pearls* [2002] FMCA 142.
- 32 *Noble v Baldwin & Anor* [2011] FMCA 283.
- 33 Above [250].
- 34 *Poniatowska v Hickinbotham* [2009] FCA 680.
- 35 [2009] FCA 680, [289].
- 36 Sex and Age Discrimination Legislation Amendment Act, s 54.
- 37 Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, s 46.
- 38 Sex Discrimination Act, s 28A(1A).
- 39 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 40 Sex Discrimination Act, ss 28B(1)-28B(6).
- 41 Above, s 4 (defining 'employment' to include: '(a) part-time and temporary employment; (b) work under a contract for services; and (c) work as a Commonwealth employee').
- 42 Above, s3 (1) (defining 'commission agent'...).
- 43 Above, s 28B(7) (defining 'workplace participant' as (a) an employer or employee; (b) a commission agent or contract worker; (c) a partner in a partnership).
- 44 Sex Discrimination Act, s 28C. This section defines 'action in connection with an occupational qualification' as 'conferring, renewing, extending, revoking or withdrawing an authorisation or qualification that is needed for, or facilitates: (a) practising a profession; or (b) carrying on a trade; or (c) engaging in an occupation'.
- 45 Sex Discrimination Act, s 28D. This section defines a 'registered organisation' as 'an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009*'.
- 46 Sex Discrimination Act, s 28E.
- 47 Sex Discrimination Act, s 28B(7).
- 48 Sex Discrimination Act, s 28B(7).
- 49 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 50 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.

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- 51 As above.
- 52 As above.
- 53 *Lee v Smith* [2007] FMCA 59.
- 54 Above [206].
- 55 Sex Discrimination Act, s 28B(6). Previously, the Sex Discrimination Act prohibited sexual harassment by workplace participants against other workplace participants at a place that is a workplace of *both* the workplace participants.
- 56 Australian Human Rights Commission Act, s 46PO(4).
- 57 *Aldridge v Booth* (1988) 80 ALR 1 at 16-17.
- 58 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.
- 59 Sex Discrimination Act, s 94(1).
- 60 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 61 Sex Discrimination Act, s 28A(1).
- 62 Sex Discrimination Act, s 105. Strictly speaking, section 105 only applies to liability for unlawful sex discrimination, not sexual harassment. However, the courts have accepted that sexual harassment is a form of sex discrimination. Accordingly, section 105 can still operate to render a person liable as an accessory to sexual harassment.
- 63 *Elliott v Nanda & the Commonwealth* (2001) 111 FCR 240 at 259 [163] (Moore J).
- 64 *Elliott v Nanda & the Commonwealth* (2001) 111 FCR 240.
- 65 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 66 Sex Discrimination Act, s 106.
- 67 *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 [163].
- 68 Above, s 106(2).
- 69 Above, s 94.
- 70 Above, s 94(3).
- 71 Complaints are resolved in conciliation at the Australian Human Rights Commission on a without-admission-of-liability basis.
- 72 *Fair Work Act 2009* (Cth), s 340.
- 73 See *Fair Work Act*, s 14.
- 74 *Fair Work Act*, s 385.
- 75 *Leigh v Nestle Australia Ltd* [2010] FWA 4744 (unreported, Drake SDP, 25 June 2010).
- 76 See generally Patricia Easteal *et al*, 'Sexual Harassment on Trial: The DJs Case' (2011) 36(4) *Alternative Law Journal* 230, 232 (discussing statement of claim in *Kristy Fraser-Kirk v David Jones*).
- 77 *Poniatowska v Hickinbotham* [2009] FCA 680.
- 78 *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (QLD); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (TAS); *Occupational Health and Safety Act 2004* (VIC); *Occupational Safety and Health Act 1984* (WA).
- 79 See *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 [169]-[172].
- 80 For example, see *Lee v Smith* [2007] FMCA 59.
- 81 For more information on keeping confidential records of complaints see section 5.2(c).
- 82 Above note 3, 39.
- 83 The *Privacy Act 1988* (Cth) does not apply to private-sector employees' personal information which: relates directly to the employment relationship between an employer and a current or former private sector employee; is held by the employer in an employee record. Records relating to an employee's sexual harassment complaint fall within this exemption.
- 84 The interviewee should be provided with a copy of their own record of interview if requested. To avoid any possibility of collusion, they should not be provided with anyone else's statement or record of interview. A complainant's support person should not also be a witness as this may compromise their evidence.

Further Information

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