SEXUAL

HARASSMENT AND EDUCATIONAL INSTITUTIONS

A Guide to the Federal Sex Discrimination Act

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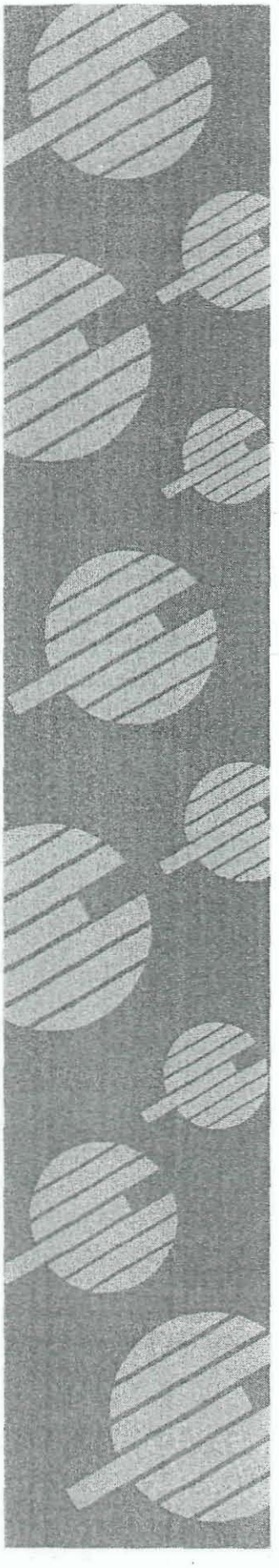
Sexual Harassment and Educational Institutions

A Guide to the Federal Sex Discrimination Act

Sex Discrimination Commissioner
Human Rights and Equal Opportunity Commission



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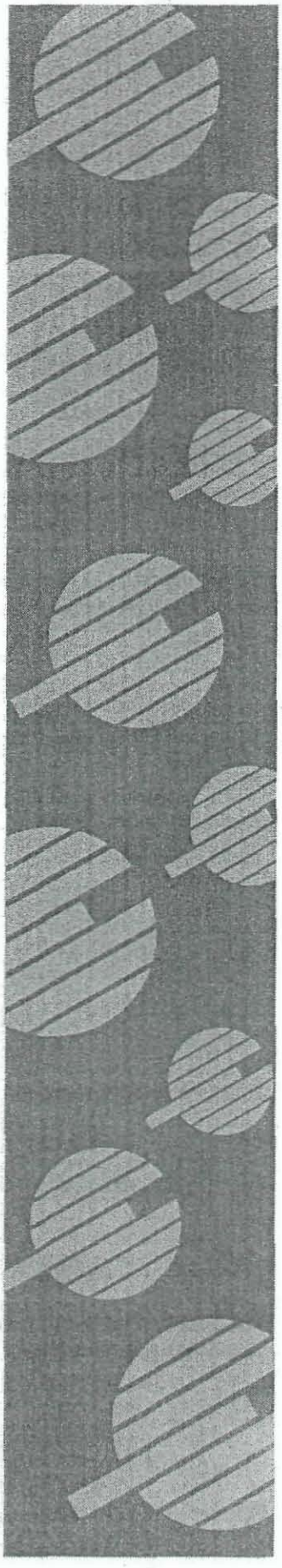
Foreword



The legal recognition of sexual harassment is perhaps one of the most significant achievements of the women's movement. This previously hidden, ignored and unnamed phenomenon is now a widely discussed public issue. But despite increased community awareness, it is clear from our advisory and complaint handling work at the Human Rights and Equal Opportunity Commission, that there is still widespread misunderstanding about the serious impact of sexual harassment and its legal ramifications.

Most people would accept that they have the right to be treated with respect, dignity and fairness in their working or learning environment. Sexual harassment is a violation of this right because it is behaviour which results in feelings of humiliation, embarrassment, intimidation or annoyance. Sexual harassment can affect job security, work or academic performance and health. It has serious implications for employers and educators because it contributes to reduced productivity, drop out rates, absenteeism, resignations, potential legal costs and poor public image.

The recognition that sexual harassment is a systemic problem which hinders equal opportunity in employment, education and other areas has resulted in State and Federal laws which make it an offence.

The Federal *Sex Discrimination Act* prohibits sexual harassment in a range of circumstances. Educational institutions have important dual responsibilities under the *Sex Discrimination Act* because they are both employers and providers of education.

These two tiers of responsibility are, of course, nothing new in the education sector but can add to the complexity of the situation. Many people also find the issue of sexual harassment confusing. Common questions are "what is sexual harassment?" and, on a more practical level, "what can we do about it?" The development of these guidelines has been aimed at clarifying the confusion, particularly at the practical level.

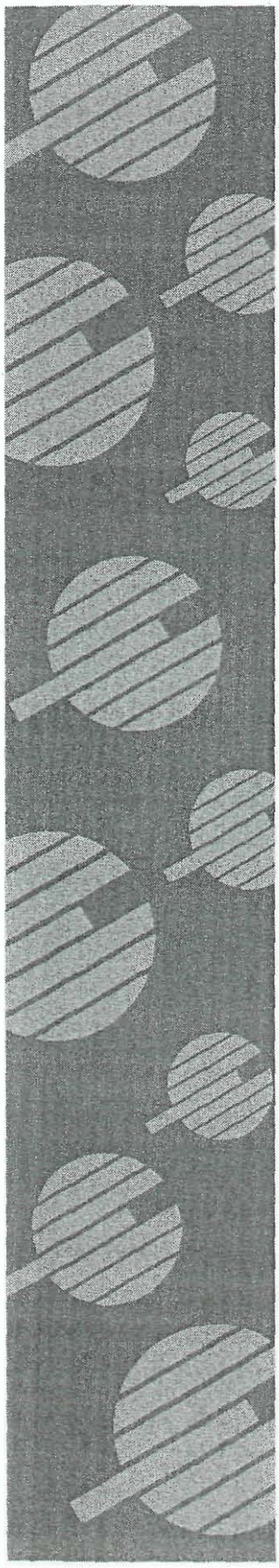
As the guidelines point out, the current definition of sexual harassment has two elements:

- the subjective response of the individual to a situation; and
- the reasonableness of that response in all the circumstances.

In my view this two part test ensures that sexual harassment can be addressed in a sensible and sensitive manner. It also ensures that the issue will continue to be debated and argued, as our notions of ourselves as individuals, our concepts of reasonableness and our very environment continue to change.

For this reason we are keen to receive your thoughts on the guidelines, particularly their practical use in your day to day work. As the case law and experience change and grow, the guidelines will be updated.

The recognition and acceptance within the education community of the principle of equality of men and women, and the elimination of sexual harassment as part of this, is an important objective of the *Sex Discrimination Act*. I trust that these guidelines will assist in its realisation.



In producing these guidelines we have been greatly assisted by many people but in particular, I would like to thank Lynne Bellis (NSW Teachers Federation), Joy Flannagan (Equity and Access Unit, La Trobe University), Lisa George (Jeitani Pty Ltd), Philippa Hall (Sex Discrimination Unit, Human Rights and Equal Opportunity Commission) Karen Heller (Women's Education & Training Coordination Unit, TAFE NSW), Nina Shatifan (Equity Section, Queensland University of Technology) and Prudence Borthwick (Publications Consultant). I would also like to extend special thanks to Meredith Osborne of the Sex Discrimination Unit, Human Rights and Equal Opportunity Commission for researching and writing these guidelines.

Sue Walpole
Federal Sex Discrimination Commissioner
Human Rights and Equal Opportunity Commission

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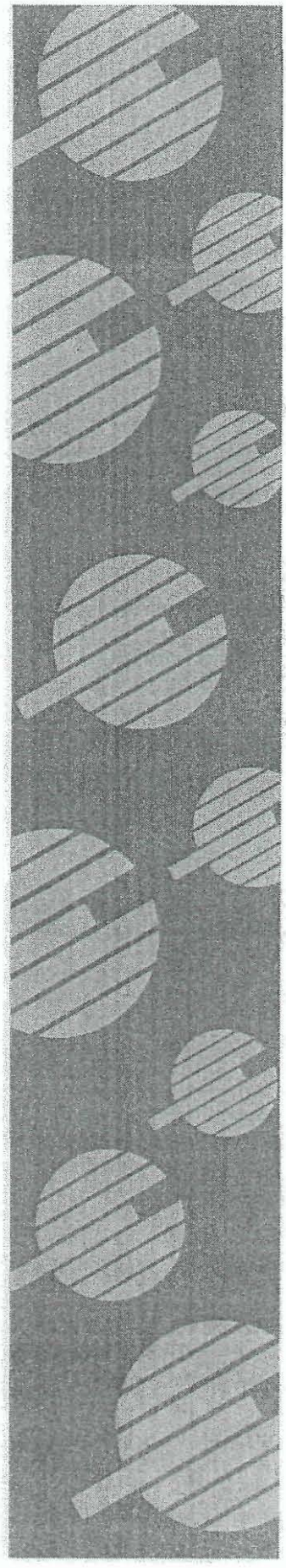

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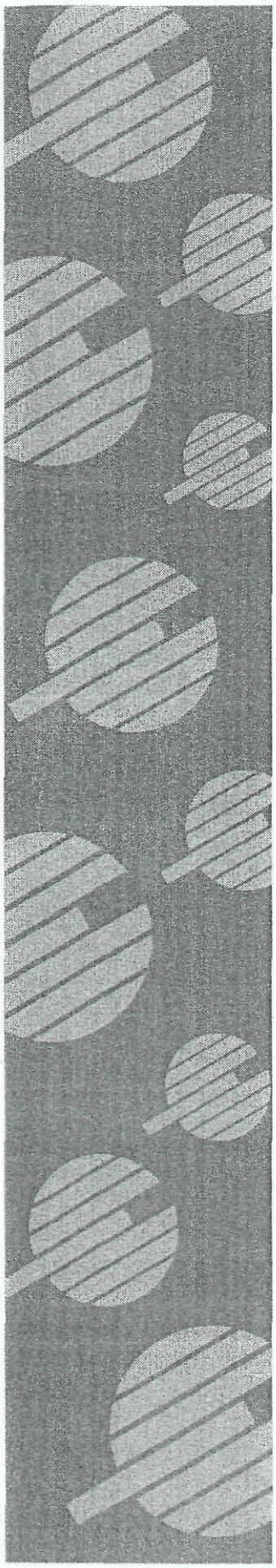

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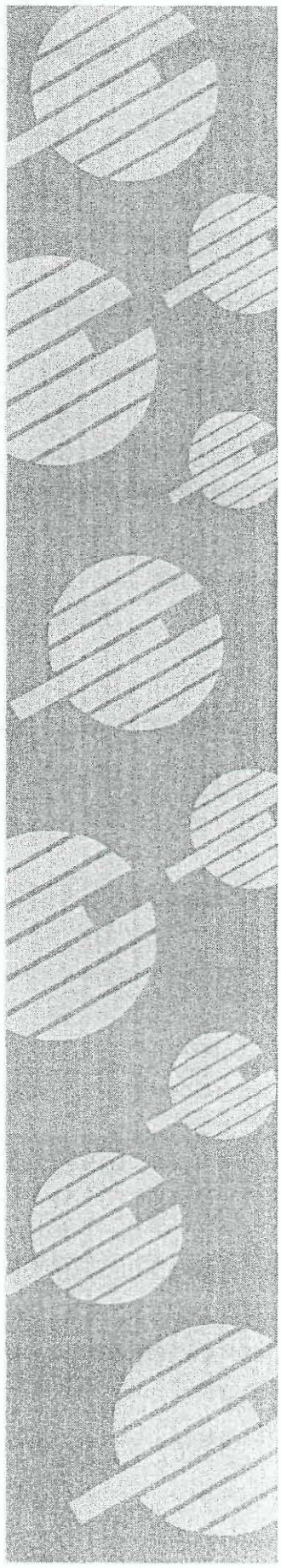

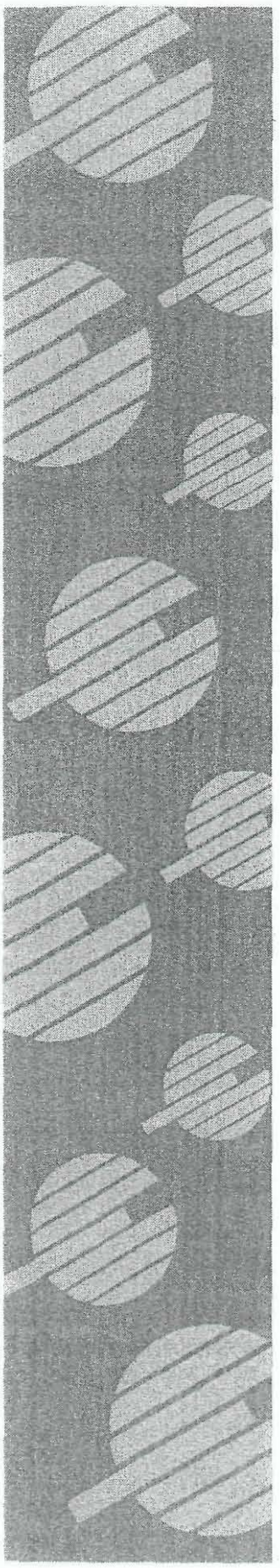

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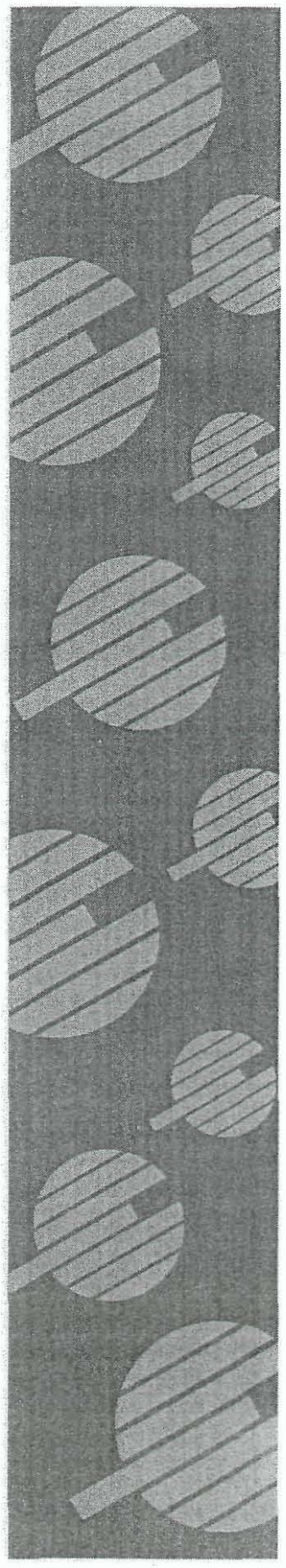
Introduction



Role of the Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission (HREOC) is an independent statutory authority which was established on 10 December 1986. Over the past ten years the organisation's responsibilities and functions have increased significantly. The Human Rights and Equal Opportunity Commission now administers Commonwealth legislation on race, sex and disability discrimination, human rights, privacy and Aboriginal and Torres Strait Islander social justice issues.

The Human Rights and Equal Opportunity Commission has a broad mandate to protect the human rights of all Australians and monitor the observance of international treaty obligations. It is empowered by law to investigate and resolve complaints, undertake research and educational programs, issue guidelines, advise government, review legislation and recommend action that should be taken on matters relating to human rights and equal opportunity.

These guidelines have been issued by the Sex Discrimination Commissioner, who is a member of the Human Rights and Equal Opportunity Commission, under section 48(ga) of the *Sex Discrimination Act* which authorises her to:

> *prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of sex, marital status or pregnancy and* ***discrimination involving sexual harassment.***

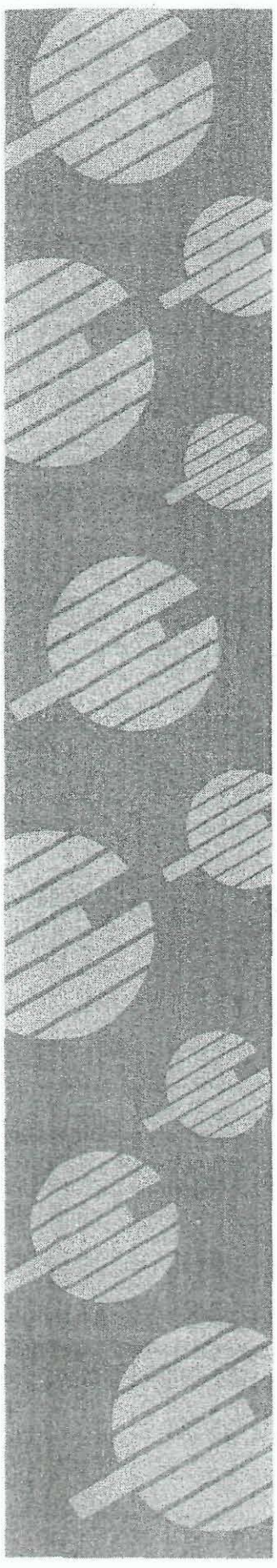
Purpose of the Guidelines

These guidelines have been designed for use in educational institutions - schools, vocational education and training colleges and universities. They focus specifically on sexual harassment which is a form of unlawful sex discrimination and a violation of basic human rights.

Educational institutions have important dual responsibilities under the *Sex Discrimination Act* because they are both employers and providers of education. They are places of learning for students and workplaces for staff. Institutions that fail to ensure that the teaching, learning and working environment of employees and students is free from sexual harassment will be implicated in unlawful discrimination. Unless all reasonable precautions are taken, the institution risks liability.

These guidelines were developed to assist educational institutions to understand and fulfill their obligations under Federal sexual harassment legislation. They address the complex legal and jurisdictional issues that arise for the different sectors of education under Federal law and provide practical advice on developing policies and handling complaints.

The guidelines are an essential resource for anyone who is responsible for addressing sexual harassment and requires a detailed knowledge of the principles that apply in the area. This includes equal opportunity officers, equity officers, harassment contact officers, women's officers, school principals, teachers, union officials and managers.

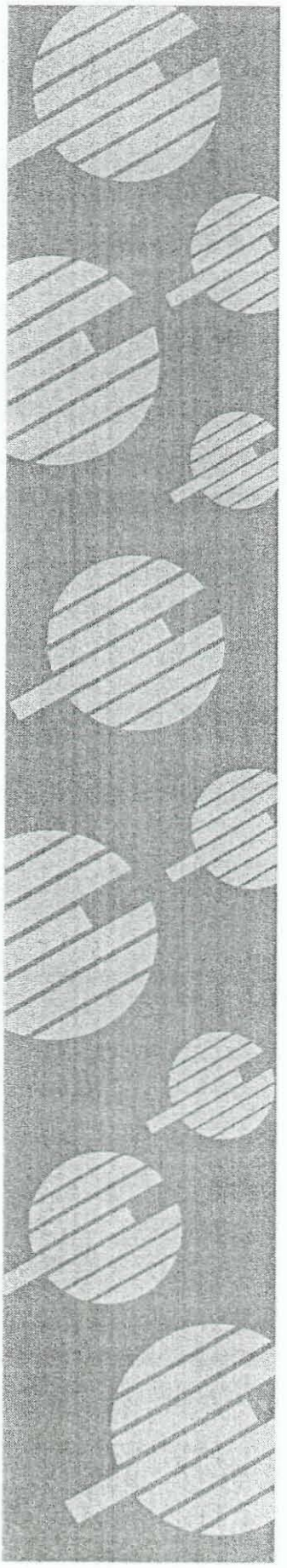


Scope of the Guidelines

Although this publication is a guide to the sexual harassment provisions in Federal law, most educational institutions are concurrently bound by anti-discrimination legislation that now exists in all States and Territories. Most of the general principles and procedures relating to sexual harassment are very similar in the State, Territory and Federal anti-discrimination Acts, however there are some differences in definitions and coverage. A brief summary of the sexual harassment provisions in State and Territory anti-discrimination laws is provided at Appendix A.

Contact details for the Human Rights and Equal Opportunity Commission and the State and Territory anti-discrimination agencies is at Appendix C. Each of these agencies offers a telephone enquiry service and can provide organisations with publications and resources. Some of the agencies, including the Human Rights and Equal Opportunity Commission, also offer training and other services.

1. Overview of the Sex Discrimination Act



The *Sex Discrimination Act* commenced on 1 August 1984. It prohibits certain types of discrimination in various areas of public activity. Individuals or groups can use the *Sex Discrimination Act* to make a complaint if they have experienced unlawful discrimination.

Purpose of the Sex Discrimination Act

The objects of the *Sex Discrimination Act*, set out in section 3, are:

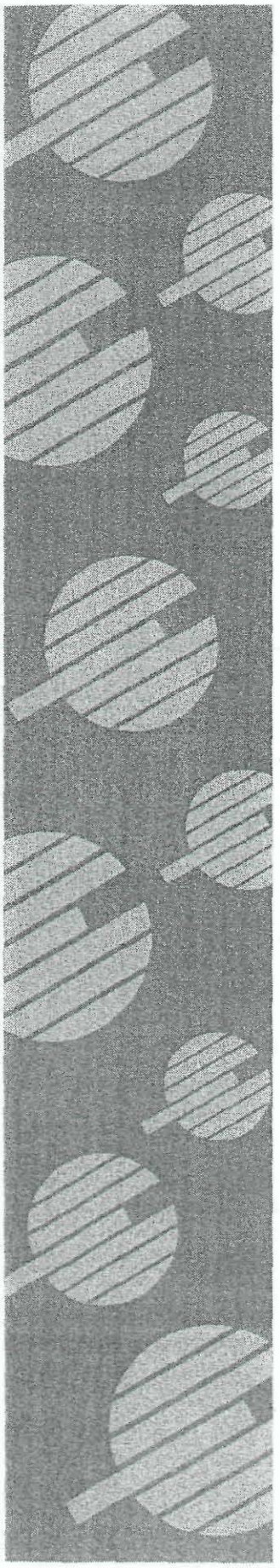
- to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women;
- to eliminate discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provisions of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;
- to eliminate discrimination involving dismissal of employees on the ground of family responsibilities;
- to eliminate discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and
- to promote recognition and acceptance within the community of the principle of the equality of men and women.

Constitutional Issues

The Commonwealth Parliament's law-making power is derived from the Australian Constitution. The Parliament can only pass laws on specific subject matters which are listed in section 51 of the Constitution. These include the power to regulate corporations, the Australian Public Service and external affairs. The external affairs power can be used to enact legislation which implements Australia's international treaty obligations.

The *Sex Discrimination Act* relies primarily on the external affairs power for its constitutional validity. This is because its main purpose is to give effect to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW is set out in a schedule to the *Sex Discrimination Act* and forms the basis of many of its provisions. Section 9 of the *Sex Discrimination Act* (the application section) refers to other heads of constitutional power to ensure that the scope of the *Sex Discrimination Act is as* broad as possible.

There are, however, some constitutional limitations which restrict the



application of the *Sex Discrimination Act*. It is a basic rule that unless a Commonwealth law faithfully implements the subject matter of an international treaty, the law is likely to be constitutionally invalid. As CEDAW relates specifically to the rights of women, all women and girls are protected by the *Sex Discrimination Act* unless an exemption applies. But as CEDAW makes no reference to men, the *Sex Discrimination Act* can only be used by males if an alternative head of constitutional power in section 9 can be applied.

In the area of employment, for example, men can lodge complaints if they are Commonwealth public servants or if they work for a foreign, trading or financial corporation (which covers many private sector companies) because these are other areas of Commonwealth constitutional power referred to in section 9. They can also complain about discrimination or harassment which occurs in the administration of Commonwealth programs.

In the area of education, all female students can lodge complaints of discrimination or sexual harassment. However, as education is not an area of Commonwealth law-making power under the Constitution, male students are generally not able to make complaints under the *Sex Discrimination Act* and would need to rely on State anti-discrimination laws. The main exception to this rule is where the harassment occurs in the administration of a Commonwealth law or program that relates to education.

Grounds and Areas of Discrimination

The *Sex Discrimination Act* prohibits discrimination on the grounds of:

- sex
- marital status
- pregnancy
- potential pregnancy
- sexual harassment
- family responsibilities (but only in the area of job dismissals)

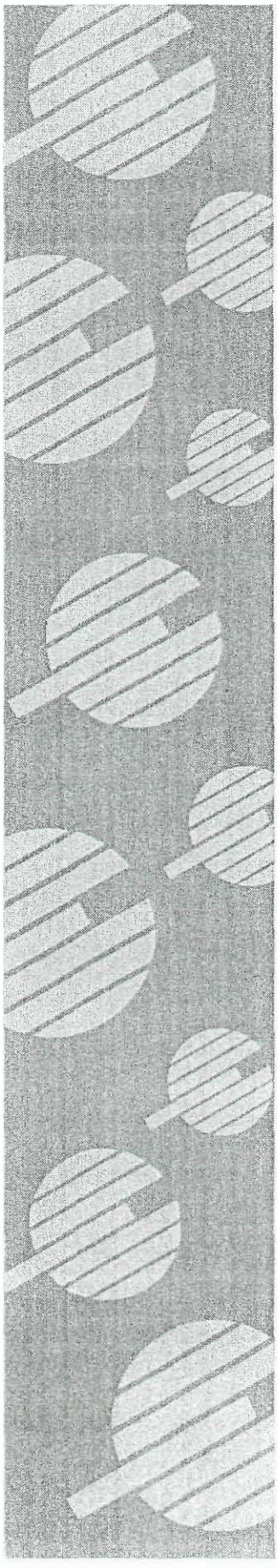
Discrimination on these grounds is unlawful if it occurs in:

- employment
- education
- providing goods, services or facilities
- accommodation
- land transactions
- clubs
- administration of Commonwealth laws and programs
- application forms

Direct and Indirect Discrimination

Definition of direct discrimination

The *Sex Discrimination Act* prohibits direct discrimination. Direct discrimination occurs when someone receives less favourable treatment than another in the same position would have received because of their sex, marital status, pregnancy or potential pregnancy.



Direct Discrimination

Case Example 1:

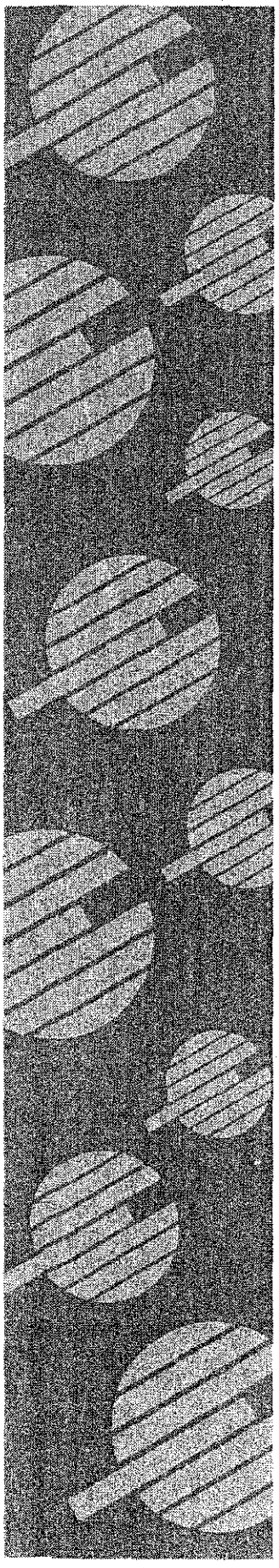
During a job interview, a woman was asked by the selection panel whether she intended to have children. Although she was taken aback by the question, she said that she would eventually like to have a family. Although she was the most qualified and experienced candidate, she did not get the job. This is direct discrimination on the ground of potential pregnancy.

Case Example 2:

An enterprise agreement contained a provision which said that adoption leave was only available to women employees. This is direct discrimination on the ground of sex.

Case Example 3:

A school dismissed a woman teacher when it was discovered that she was living in a de facto relationship. This is direct discrimination on the ground of marital status.



Definition of indirect discrimination

Indirect discrimination occurs where there is a requirement (such as a rule, policy or procedure) that is the same for everyone, but which actually has a discriminatory effect on a particular group. Until recently, the *Sex Discrimination Act* contained a complex and technical definition of indirect discrimination. This was replaced by a much simpler definition which came into effect on 16 December 1995. The new definition says that indirect discrimination occurs *where the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging* people because of their sex, marital status, pregnancy or potential pregnancy. Unless the condition, requirement or practice is *reasonable in the circumstances*, it is likely to be indirectly discriminatory[1]. It is up to the person who has imposed the condition, requirement or practice (usually an employer) to prove that it is reasonable in the circumstances.

Indirect Discrimination

Case Example1:

Promotions based on seniority or duration of service can indirectly discriminate against women workers because they are more likely to have taken career breaks to have children.

Case Example 2:

Due to a downturn in business, an employer decides to make all part-time staff redundant. As women make up most of the part-time workforce, this policy is more likely to disadvantage women than men and could be indirectly discriminatory.

Complaint Profile

Around 90% of complaints lodged under the *Sex Discrimination Act* concern discrimination or sexual harassment in employment. The majority of complaints are lodged by women (approximately 90% in the 1994/5 financial year).

Sexual harassment is the most common ground of complaint under the *Sex Discrimination Act*. Since the *Sex Discrimination Act* was passed in 1984 sexual harassment complaints have increased significantly in both number and as a proportion of all complaints (see Table A). In 1993/4, 50.5% of all complaints received under the *Sex Discrimination Act* were about sexual harassment. In the 1994/5 financial year the proportion fell slightly to 46% of the total, however the actual number of sexual harassment complaints received was the highest ever.

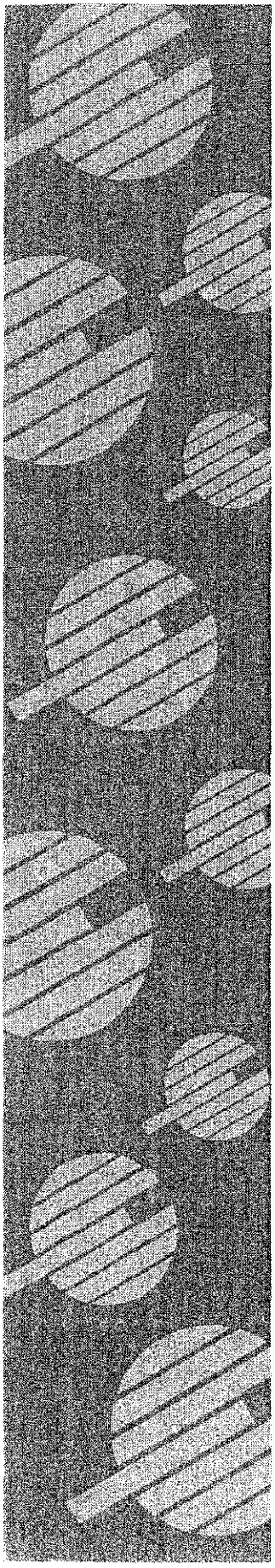
Table A: Sexual harassment complaints lodged under the Sex Discrimination Act

Year	Total SDA complaints received	No. sexual harassment complaints received	% sexual harassment complaints of all SDA complaints received
1984/5	822	121	14.7
1985/6	870	166	19
1.7.86 - 9.10.86	327	*	*
10.12.86 - 30.6.87	407	110	27
1987/88	440	135	30.7
1988/89	575	174	30.3
1989/90	593	223	37.6
1990/91	803	310	38.6
1991/92	800	366	45.8
1992/93	783	366	46.7
1993/4	1304	659	50.5
1994/5	1580	729	46.1

* Not available

Note: The Human Rights and Equal Opportunity Commission replaced the former Human Rights Commission on 10/12/86

[1] Section 7B(2) of the *Sex Discrimination Act* sets out the factors that are to be taken into account when deciding whether a condition, requirement or practice is reasonable in the circumstances. These include:
(a) the nature and extent of the disadvantage that is or would be imposed;
(b) the feasibility of overcoming or mitigating the disadvantage;
(c) whether the disadvantage is proportionate to the result sought.



2. Definitions and Concepts

Legal Definition of Sexual Harassment

Sexual harassment is defined in section 28A of the *Sex Discrimination Act*:

"...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 that the person harassed would be offended, humiliated or intimidated."

The legal test for sexual harassment in Federal law therefore contains three essential elements:

1. The behaviour must be **unwelcome**
2. It must be of a **sexual nature**
3. It must be **reasonable** in the circumstances that the person who was harassed felt offended, humiliated or intimidated

Unwelcome

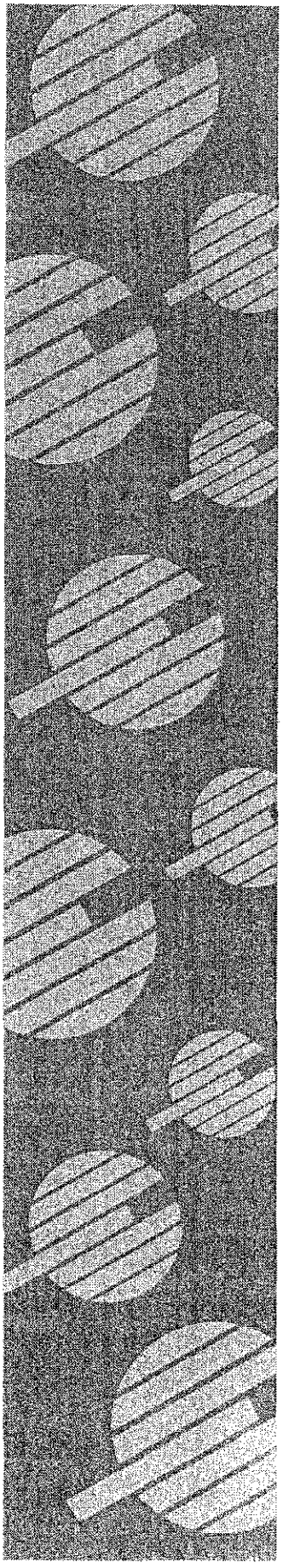
To be unwelcome, the behaviour in question must be uninvited and unsolicited and the person subjected to it must find it undesirable, offensive, humiliating or intimidating[1]. Whether the behaviour was unwelcome is a subjective question and will depend on the response of the particular individual who claims to have been sexually harassed. It is irrelevant that the behaviour may not offend others[2] or has been an accepted feature of the work or learning environment in the past. The rule that applies to sexual harassment is a general principle of tort law: you take your victim as you find them[3].

Sexual interaction or flirtation which is based on mutual attraction or friendship is not sexual harassment because it is not unwelcome. If the behaviour is invited, consensual and reciprocated it is not unlawful.

But different individuals will often perceive and react to behaviour in different ways. A person may think that their behaviour is welcome or innocuous, when the recipient actually finds it distasteful but goes along with it to avoid a confrontation. This can happen where there is a difference in age, racial or cultural background, seniority or personal power between those concerned. Sometimes people feel they have to join in to avoid being ostracised, victimised or teased by their peers. Relationships can sour or change, messages can be misread and the line between what is welcome and unwelcome can easily be crossed.

What may be acceptable socially or in private life could well be inappropriate in a professional or educational context. This may mean that employers and educators may decide to set higher standards than those strictly required by law in order to minimise the risk of a sexual harassment complaint. Erring on the side of caution is probably the best policy.

Consent or participation which is obtained by fear, intimidation, threats or coercion will not mitigate a complaint of sexual harassment. (see case example 2 on p.19).



Some common questions...

- ***What if the harasser didn't mean to cause offence?***

The intention or motive of the alleged harasser is not a relevant consideration when determining whether the behaviour was unwelcome. "Innocent" intention is not a defence in sexual harassment cases.

- ***Does a person have to tell the harasser their behaviour is unwelcome?***

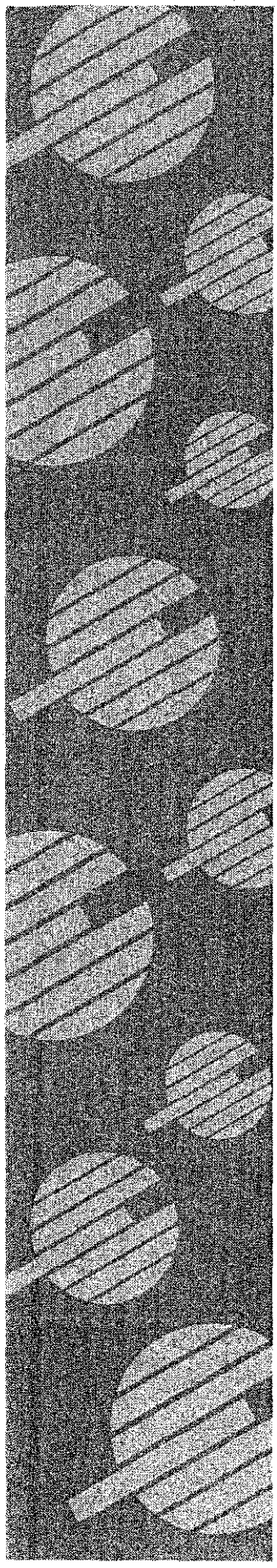
No. A complaint of sexual harassment can be successful even if the complainant did not inform the harasser that their behaviour was unwelcome. The cases take into account the reasons why someone may feel unable to confront a harasser directly. Factors which might be relevant include the youth and inexperience of the complainant, fear of reprisals and the nature of the power relationship between the parties. However, even if the complainant didn't say anything to the harasser there still needs to be some indication from the surrounding circumstances that the behaviour was unwelcome[4].

- ***What if it's only a single incident?***

Under Federal law, the unwelcome conduct does not need to be repeated or continuous. The legal definition is drafted in the singular (ie. "**an** unwelcome sexual advance" and "**an** unwelcome request for sexual favours") which indicates that a one-off incident can amount to sexual harassment. This view is supported by the case law. In *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors*[5] Justice Lockhart of the Federal Court said the definition of sexual harassment "clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct."[6] In the same case, Justice French also held that sexual harassment need not involve repetition. He stated that "circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs."[7]

- ***What about sexual relationships between students and staff?***

In the tertiary education sector, there has been much debate over whether consensual relationships between students and academic staff should be prohibited or discouraged. Such relationships are likely to involve considerable disparity in authority, status and maturity between the parties and are probably unwise. It is recommended that tertiary institutions develop clear guidelines on this issue. Educational institutions must have systems and procedures in place to deal with any conflict of interest that may arise in sexual or romantic relationships between employees and students, including mechanisms which allow students to appeal assessments.



Unwelcome

Case Example 1:

The complainant was employed as a legal secretary to a solicitor for a number of years. She had a close personal friendship with her boss and they often socialised together. He took her on several holidays and bought her clothing and jewellery.

Their relationship was characterised by a level of mutual dependence and intimacy. She often had to provide attention and support beyond the call of duty, as her employer had a drinking problem. On one occasion, when she was visiting him at home, a sexual incident occurred which the complainant claimed amounted to sexual harassment.

The complaint was dismissed because the President of HREOC was not satisfied that the complainant had rejected her employer's advances. He said that she failed to convey any impression that the conduct was unwelcome. It appeared from the evidence that she had consented to the encounter at the time and voluntarily participated, but later regretted her actions. This was insufficient to uphold her complaint of sexual harassment.

However, the President gave a warning about the potential dangers of unintended messages being conveyed in the context of intimate working relationships. He said that,

> *A small professional practice may result naturally in the development of a close personal relationship between the principal and secretary. It is important that in such a case the employer be alert to the possibility that conduct by him in the course of the relationship may carry unintended messages to the employee and thereby assume an aspect of sexual oppression giving rise to sexual harassment. In such a context even acts of generosity towards the employee from the employer, however well-intentioned, may nevertheless contribute to an increasing sense of that oppression.*
>
> *Furthermore, the sense of oppressive authority that often lies at the heart of allegations of sexual harassment is more likely to be imparted in the context of a close employment relationship where there is a wide disparity in ages between the older and the younger employee.*

In the area of education, the potential for similar problems to arise may exist in relationships between a principal and his or her secretary, an academic and their research assistant or a teacher and student. ***Straney v Brady* (1994) EOC 92-584**

Unwelcome

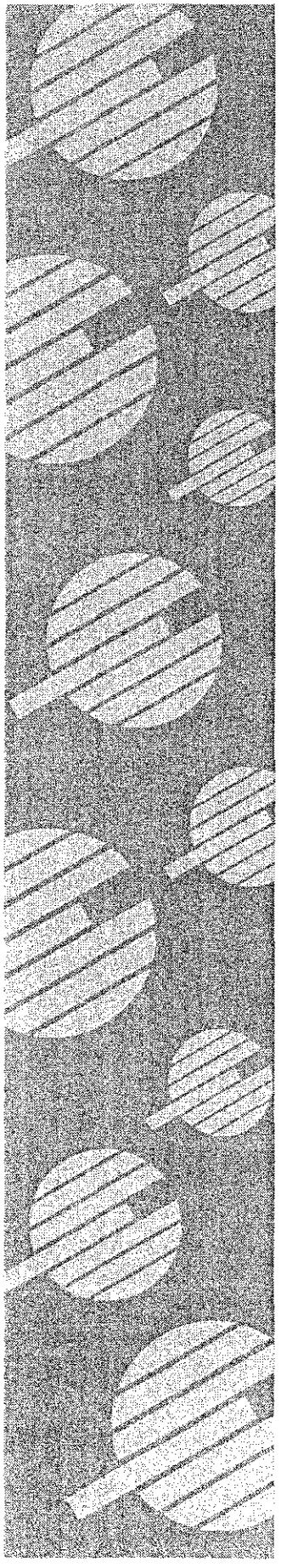
Case Example 2:

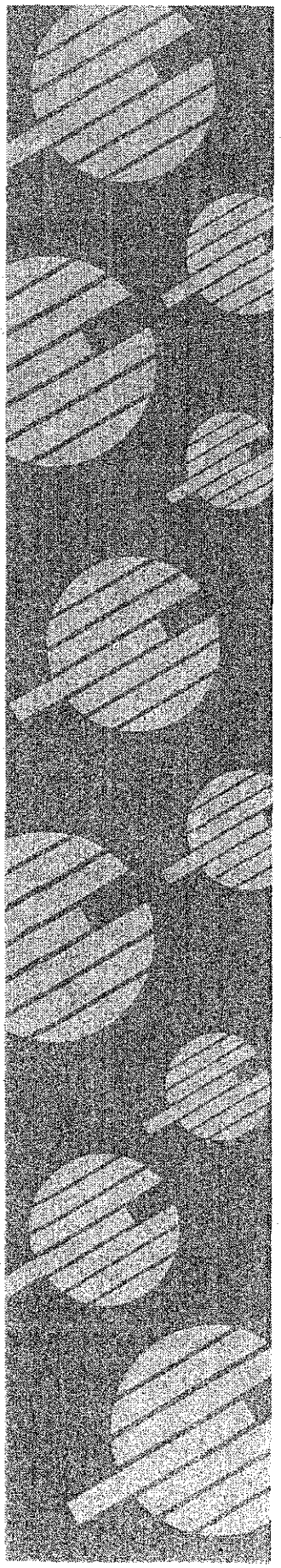
A teenage girl who had been unemployed for a year got a job in a cake shop through a government training scheme. After her first week, the respondent (a partner in the business) began to kiss her on the neck, touch her on the buttocks and request sex. Under pressure, she consented to have intercourse with him on a number of occasions.

Although there was evidence that her attitude towards him may have been ambivalent at times, it was held that "by and large...his sexual acts and advances were unwelcome to her." The Commissioners who heard the case went on to say,

> *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 she was in "an extremely vulnerable position" and had only endured the situation because she was afraid. In these circumstances, the conduct was still found to be unwelcome and the complainant was awarded $7000 compensation.
Aldridge v Booth & Ors (1986) EOC 92-177 (at first instance)





Conduct of a sexual nature

The behaviour concerned must involve a sexual element, overtone or implication, although a broad approach has been applied to this part of the definition in a recent case (see case example below). Section 28A(2) of the *Sex Discrimination Act* says that 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."

Examples of behaviour which can constitute sexual harassment are set out on page 24.

Sexual harassment needs to be distinguished from general harassment or bullying that is not sexual in nature. However, other forms of harassment based on a person's race, sexuality or disability, for example, would be unlawful under other anti-discrimination laws.

Although some types of harassment (such as harassment based on a personality clash) are not explicitly unlawful, it makes good sense to have procedures in place to deal with all types of unfair or unacceptable treatment.

Conduct of a sexual nature

Case Example:

In 1994 a woman employed as a packer in a Queensland meat processing factory was awarded $22 000 for sex and race discrimination and sexual harassment. Part of her complaint concerned the aggressive way she was treated and spoken to by her supervisor. In his decision, the President of HREOC took an expansive approach to what can amount to "conduct of a sexual nature". He found that the supervisor's behaviour towards the complainant (which she described as "pushing her") over a sustained period reflected a sex-based hostility that was oppressive. He stated that he "had no hesitation in characterising such behaviour as sexual harassment" as it was "a serious abuse of power." ***Djokic v Sinclair & anor*** **(1994) EOC 92-643**

Some common questions...

- ***What's the difference between sexual harassment and sex-based harassment?***

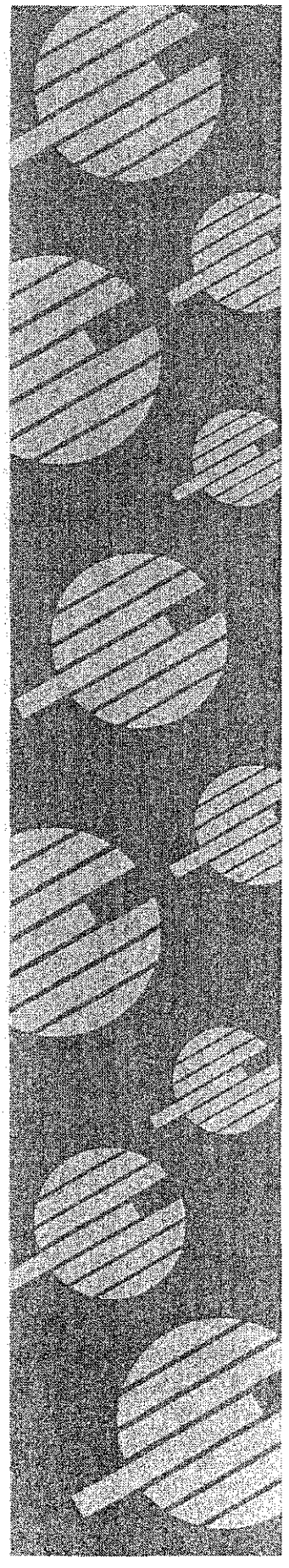
Sex-based harassment is a general term which covers sexual, sexist and gender-based harassment. The *Sex Discrimination Act* prohibits sexual harassment, however other forms of sex-based harassment which are not explicitly sexual in nature (such as derogatory comments about women and their abilities) would usually be forms of unlawful sex discrimination rather than sexual harassment.

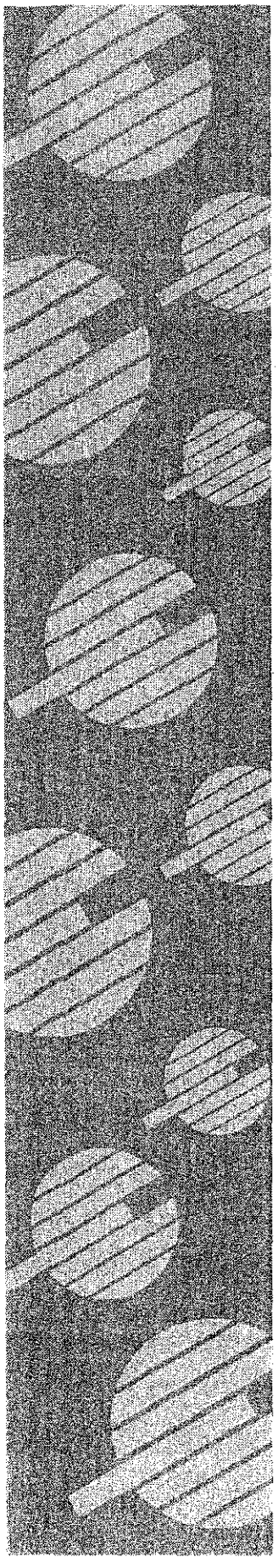
- ***What if a person is sexually harassed by someone of their own sex?***

The *Sex Discrimination Act* prohibits sexual harassment regardless of the gender of the parties.

- ***What about harassment of gay men and lesbians?***

Gay men and lesbians can make sexual harassment complaints under the *Sex Discrimination Act* so long as the behaviour was unwelcome conduct of a sexual nature and their reaction was reasonable in the circumstances. For example, if a group of workers make offensive sexual jokes about a gay colleague it is likely to be unlawful sexual harassment.





Reasonableness

The definition of sexual harassment in the *Sex Discrimination Act* also requires that a "reasonable person" would have anticipated that the person harassed would be offended, humiliated or intimidated. The reasonableness test was introduced by amendments which came into force on 13 January 1993. The amendments replaced a provision which had required a complainant to show that they suffered actual disadvantage as a result of the harassment (for example, dismissal or demotion). The revised definition recognises that sexual harassment is a serious offence in its own right and that a person should not have to prove they suffered any additional detriment.

The reasonableness test requires consideration of the following question: Would a hypothetical "reasonable person" feel that the complainant's reaction to the behaviour was understandable in the circumstances?

Some common questions...

- ***How do you know what's "reasonable"?***

So far, there have been few cases on how the reasonableness element of the definition is to be interpreted. However, in indirect discrimination cases reasonableness has been held to be a question of fact to be determined by weighing all the relevant circumstances[6]. What's relevant will vary from case to case.

- ***What sort of circumstances might be relevant?***

Although the reasonableness of an individual's reaction to the harassment will be examined objectively, the new definition specifies that the particular circumstances of the case are to be taken into account. Presumably, factors such as the age of the complainant, their race or ethnicity, any disability they may have, the context in which the harassment occurred and the nature of the relationship between the parties will all be relevant when determining what is reasonable in the circumstances.

Reasonableness

Case Example 1:

A woman employed as a waitress complained of sexual harassment by the proprietor of the restaurant where she worked. She alleged that her boss frequently made comments loaded with sexual innuendo and persistently invited her to go out with him despite her refusals.

During the hearing into the complaint, the proprietor argued that conversation about sexual matters between staff was commonplace in the hospitality industry and that it should not have offended the complainant. In other words, he claimed that her reaction to his behaviour was unreasonable. This argument was firmly rejected and her complaint was upheld. ***McLaren v Zucco* (1994) EOC 92-650**

Case Example 2:

A young woman employed as a console attendant at a service station complained that she was sexually harassed by one of the male proprietors. She alleged that he talked to her about sex, touched her on the buttocks and breasts, rubbed his genitals against her and offered her money for sex. The harassment continued over a twelve month period before she was dismissed over an unrelated matter. Inquiry Commissioner Graeme Innes upheld the complaint and awarded $8000 damages for injury to feelings.

In her evidence, the complainant stated that she was not distressed by the harassment because she thought that it was normal male behaviour. But she didn't like it and wanted it to stop. Inquiry Commissioner Innes found that although the complainant was not intimidated by the harassment, a reasonable person would find that she was offended and humiliated by it. In reaching his decision, he relied on the definitions of offense, intimidation and humiliation found in the Concise Oxford Dictionary. He also said that,

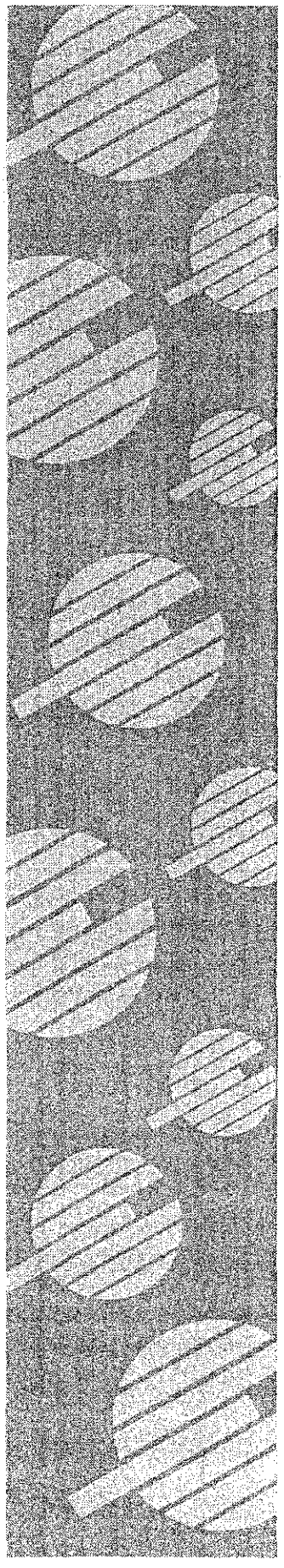
> *It is a sad comment on the workplaces in which Ms Filas has been employed if she finds such totally inappropriate behaviour normal. It demonstrates that Australian society still has a long way to go before women can go to work knowing that they can focus on the tasks which they have to do, and not be bothered by men who do not have the decency and professionalism to treat them with the respect and courtesy that all work colleagues, irrespective of their gender, deserve.*

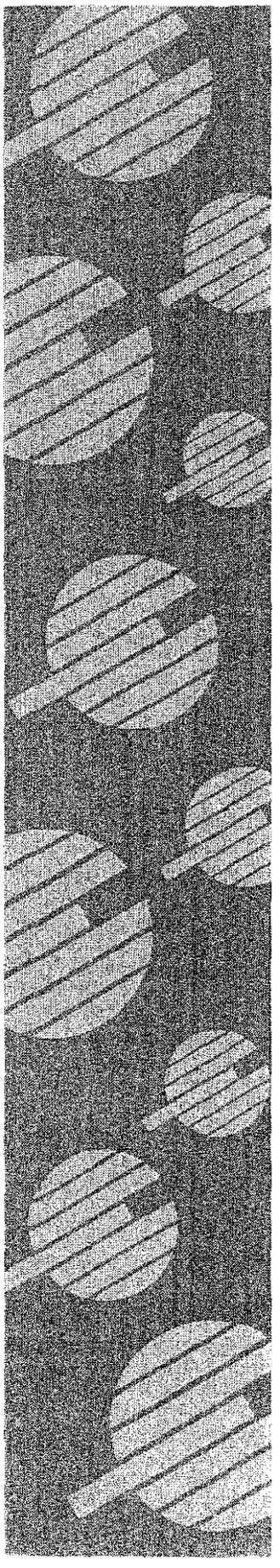
***Filas v Fourtounis and EM and M Fourtounis Pty Ltd*, unreported decision of HREOC, 21 November 1995.**

Case Example 3:

In *Rohan v Thomas* Inquiry Commissioner Crennan found that it was reasonable that a 21 year old woman felt offended, humiliated and intimidated by sexual conversations initiated by her boss "given their age difference and the relationship of employer and employee."

***Rohan v Thomas* unreported decision of HREOC, 27 November 1995.**





Examples of Sexual Harassment

Sexual harassment can take a variety of forms. It may involve physical contact, verbal remarks or non-verbal conduct of a sexual nature. It can also include the display of offensive materials. Here are some examples of sexual harassment that could occur in an educational institution between students and/or staff.

- uninvited touching
- uninvited kisses or embraces
- smutty jokes or comments
- making promises or threats in return for sexual favours
- displays of sexually graphic material including posters, pin-ups, cartoons, graffiti or messages left on notice boards, desks or lockers
- repeated invitations to go out, especially after prior refusal
- "flashing" or sexual gestures
- sex based insults, taunts, teasing or name-calling
- staring or leering at a person or at parts of their body
- unwelcome physical contact such as massaging a person without invitation or deliberately brushing up against them
- touching or fiddling with a person's clothing eg. lifting up skirts, flicking bra straps
- requests for sex
- sexually explicit conversation
- persistent questions or insinuations about a person's private life
- offensive phone calls or letters
- stalking
- sexual insults or taunting
- offensive e-mail messages or computer screen savers

Sexual harassment in educational institutions

Here are a few examples of sexual harassment which have occurred in educational institutions. Some of these have been reported to HREOC, while others have been documented in studies and reports.

Case Example 1:

A woman teacher employed at a boys' school was intimidated and offended by hard core pornographic pictures that a male student had attached to the front cover of his work folder. The student refused to remove the pictures, despite repeated requests. He also threatened the teacher because she had objected. After obtaining information on her rights from HREOC, she was able to resolve the situation successfully within the school. The student was counselled and provided a written apology. Awareness sessions on sexual harassment were also conducted within the school.

Case Example 2:

A first year teacher employed at a private boys' school was subjected to a campaign of harassment by her students. This included the anonymous delivery of pornography, the class prearranging to stare at her breasts throughout a lesson, messages left on her car and obscene phone calls at home. When she complained to the Principal, she was told that there was a problem with her ability to discipline the students. The matter was eventually resolved with the assistance of the teachers' union. She was given time off on full pay, access to counselling and a transfer to a position at another school.

Case Example 3:

Listening to Girls, the 1991 report commissioned by the Australian Education Council[9], provides many examples of sexual harassment occurring in the school context. Common types of harassment reported to the researchers included offensive name calling of female students ("moll", "slut", "dog" and "slag"), derogatory comments about appearance and clothing, wolf-whistling, embarrassing public references to menstruation, forced removal of clothing and physical assault (including sexual assault).

Case Example 4:

Teachers' unions have reported incidents such as group wolf-whistling directed at teachers whilst on yard duty, references to and questions about the teacher's private life and the telling of offensive jokes in their presence.

Case Example 5:

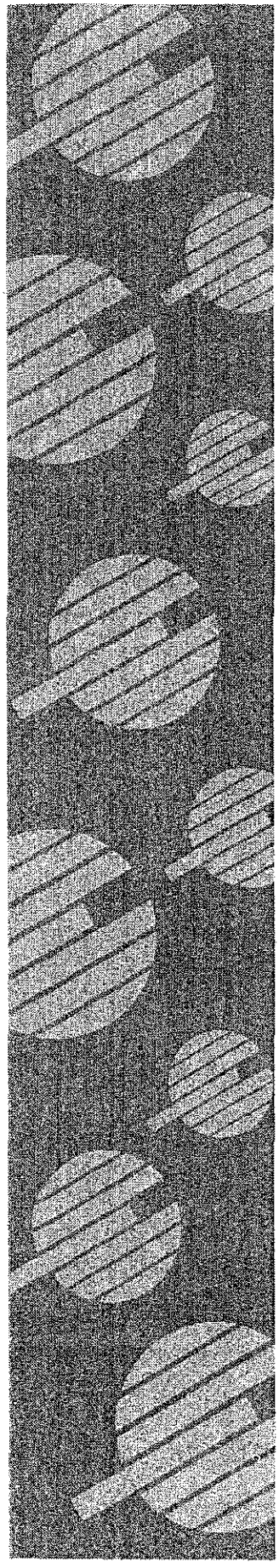
A male university lecturer made a comment to a female student in front of the class which suggested that he had slept with her.

Case Example 6:

A group of engineering students distributed posters promoting a student party. The content of the poster was offensive to women students and created a hostile environment.

Case Example 7:

A first year university student living on campus in a residential college was fondled and groped by a group of male students as part of an "initiation" ceremony.



Two Types of Sexual Harassment

Australian case law has recognised two main types of sexual harassment:

1. Sexual harassment which is accompanied by a direct or implied threat, benefit or promise. This type of sexual harassment is sometimes termed "quid pro quo" harassment or "sexual blackmail". For example, if a lecturer implies to a student that their results are dependent on compliance with sexual propositions, or if an employee consents to sex with their employer because they're afraid of losing their job[10]. This type of harassment usually occurs where the harasser has some authority to influence the terms, conditions or outcomes of an individual's employment or education.

2. Behaviour which creates a hostile or sexually permeated environment. This is where sexual conduct such as crude remarks, jokes or general banter or the display of offensive material makes the working or learning environment uncomfortable for an individual or affects their performance or general enjoyment of work or education. The law on hostile environments is discussed in the following section.

Hostile Environments

Australian case law on sexual harassment has continued to develop and evolve. In the early cases, tribunals tended to identify specific types of conduct that would amount to sexual harassment. For example, in *O'Callaghan v Loder*[11], the NSW Equal Opportunity Tribunal provided a non exhaustive list of behaviour which could constitute harassment. The list included activities such as attempts at intercourse, kissing, touching or pinching, sexual propositions and gender-based insults or taunting.

In the more recent cases, it has been recognised that an environment or culture which is sexually permeated or hostile to women will also amount to unlawful sexual harassment. All of these cases have been in the area of employment, but the principles would also apply to the learning environment.

This approach to sexual harassment first emerged in *Bennett v Everitt* where it was held that -

> *All employees have a right to employment without sexuality or attempts at the introduction of sexuality either direct or indirect.*[12]

Since then, there have been numerous cases where a work atmosphere has been examined to assess whether it constitutes an unwelcome, sexually permeated environment. Some of the factors which may indicate a potentially hostile environment include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes[13]. It can be a particular problem in male dominated work or learning environments.

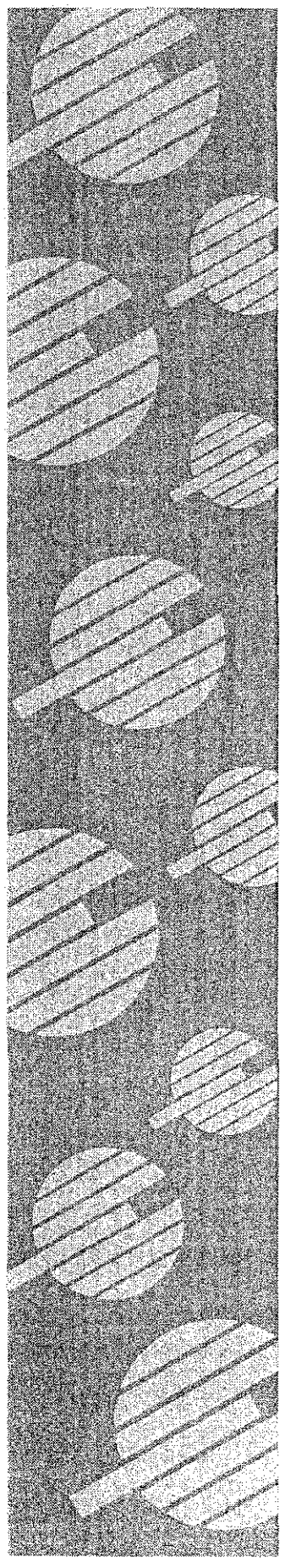
It's important to know that a person has the right to complain about the effects of a hostile environment even if the conduct in question is not specifically targeted at them. As the President of HREOC said in *G v R and Department of Health, Housing and Community Services,*

> *...the presence in the workplace of sexually offensive material which is not directed to any particular individual may still constitute sexual harassment where a hostile or demeaning atmosphere becomes a feature of the workplace environment.*[14]

One of the clearest examples of a hostile environment case is a 1994 decision of the WA Equal Opportunity Tribunal - *Horne and anor v Press Clough Joint Venture and anor*[15] (see case example below for details). Although the two women in this case were never touched, propositioned or harassed by a particular individual, they nevertheless suffered severe, long-term distress and humiliation. It's a good example of how a hostile environment can discriminate against women and undermine their opportunities, self confidence and general enjoyment of what they do. The Tribunal summed this up when it stated that -

It is now well established that one of the conditions of employment is quiet enjoyment of it. That concept includes not only freedom from physical intrusion or from being harassed, physically molested or approached in an unwelcome manner, but extends to not having to work in an unsought sexually permeated work environment. [16]

The case law on hostile environments sends a clear message to employers and educators. Action must be taken to deal with entrenched group cultures and practices which hinder women's equal participation in and enjoyment of public life.



Hostile Environment

Case Example:

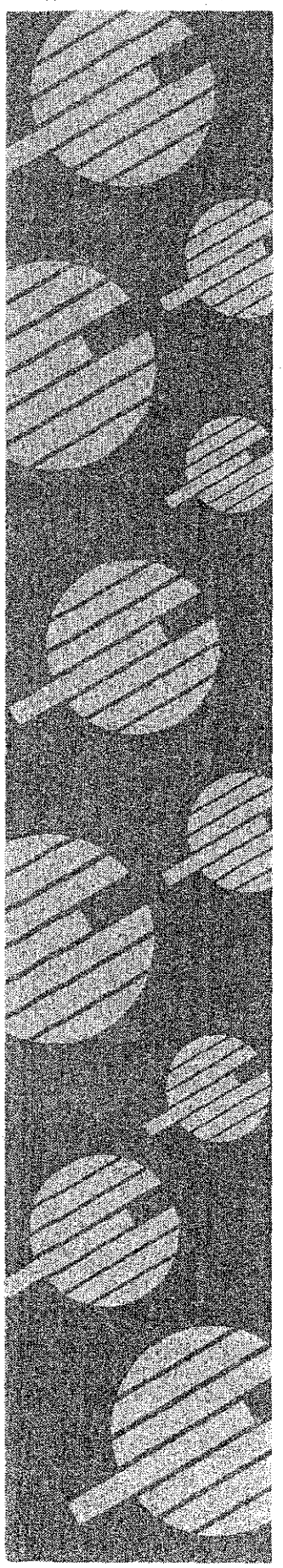
Two women were employed as trades assistants for a company constructing an offshore platform. They were the only women working on a site of over 600 men. Their duties involved cleaning offices and rooms in which soft core pornographic posters of semi-naked women were displayed. Although they would have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

On one occasion, they were cleaning an office which contained a prominently displayed poster of a naked woman with her genitals exposed. This went too far and they complained. From this time on the women were vilified and abused because they had objected. The posters displayed in their workplace became more explicit, degrading and hard core. They were even confronted by a room in which the walls and ceilings were entirely covered with a montage of pornography, clearly placed there for their benefit.

Although the women were frightened by the inherently threatening nature of the pornography and the victimisation they were subjected to, they received no support or assistance from management or their union. They were in fact 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.

As a result of this treatment, both women left their jobs and sought counselling. In subsequent legal proceedings, both the employer and the union were held liable and had to pay a total $92 000 damages. This is one of the highest awards ever made in a discrimination case.
Horne & anor v Press Clough Joint Venture & anor (1994) EOC 92-556



Criminal Conduct

Although the *Sex Discrimination Act* makes sexual harassment a civil offence, some types of harassment may also be offences under the criminal law[17]. These include:

- physical molestation or assault
- indecent exposure
- sexual assault
- stalking
- obscene communications (telephone calls, letters etc)

In criminal proceedings the victim appears as a witness for the Crown and the proceedings can result in prosecution of the offender. In civil proceedings, the case is brought by the victim themselves and can give rise to an entitlement to damages. The two types of proceedings are not mutually exclusive. However, allegations of criminal conduct can be more difficult to establish because they must be proved "beyond reasonable doubt." Civil offences on the other hand need only be proved "on the balance of probabilities".

Some common questions...

- ***What if you suspect that criminal behaviour has occurred?***

If you suspect that a criminal incident has occurred, the individual should be advised to report the matter to the police and be provided with any necessary support and assistance. In the school context, teachers may be under a duty to report the matter themselves. The relevant departmental guidelines on reporting suspected criminal offences should be observed.

- ***What is HREOC's policy on dealing with complaints that involve allegations of criminal behaviour?***

If a complaint involves allegations of criminal conduct, a complainant may well be advised to pursue criminal proceedings. In such cases, HREOC will advise the complainant of their right to report the matter to the police and provide an appropriate referral.

However, HREOC will not refuse to deal with a matter on the ground that it may involve an alleged criminal element, particularly if a matter has not been pursued by law enforcement agencies. Sometimes a matter has a greater chance of success in civil proceedings because the standard of proof is lower than in criminal proceedings. It is HREOC's policy that it is preferable to provide an individual with a remedy rather than none at all. However, there are some difficult issues to reconcile in this area, as pointed out by Justice Einfeld in *Bennett & anor v Everitt & anor* (1988) who said:

I recognise that reporting such matters to the police may present, or be thought to present, considerable discomfort to women. However, there is

simply no reason in principle why the conduct described in this case should not be brought to account with all the force which the law can command. As necessary, police forces should be encouraged to provide adequate facilities and support, including the services of specially trained female officers, to enable such complaints to be made and acted upon...

...It ought not to be acceptable that criminal offences go undetected and unpunished because society cannot supply the necessary support mechanisms to enable their prosecution with the least possible trauma for their victims. Otherwise, in this area, the exploitation of women by the power of men will be institutionalised even more than at present. It should be remembered that sexual harassment inquiries by this Commission are only one, and by no means in cases such as this necessarily the most appropriate, means of doing so.[18]

Complaint involving criminal conduct

Case Example:

A woman alleged that she had been sexually assaulted by her employer and threatened with dismissal if she told anyone. She had reported the matter to the police but it was not pursued because of lack of evidence. However, her sexual harassment complaint under the *Sex Discrimination Act* was upheld and she was awarded $12 000 damages. ***Gorden v Davis*** **unreported decision of HREOC, 16 April 1992.**

Sexual Harassment is Sex Discrimination

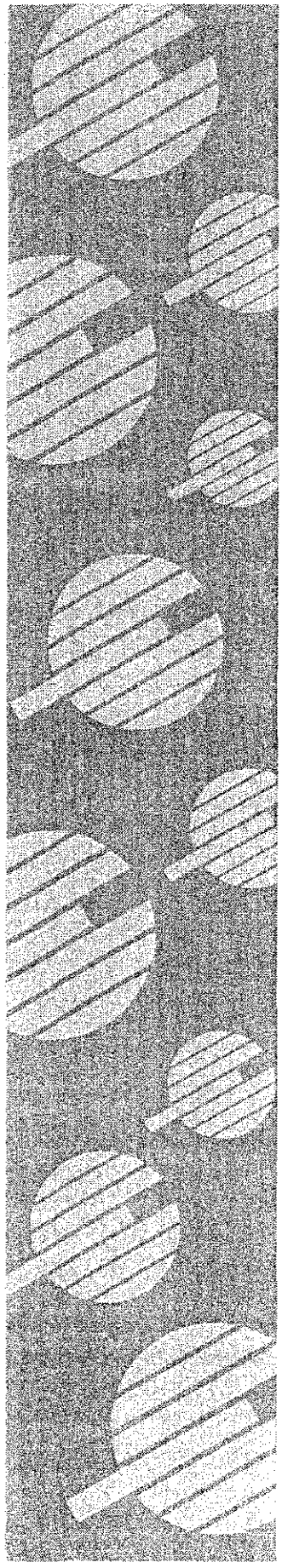
In Australia sexual harassment is a legally recognised form of sex discrimination[19]. This is consistent with the approach taken in the United Kingdom, Canada, USA and the European Union.

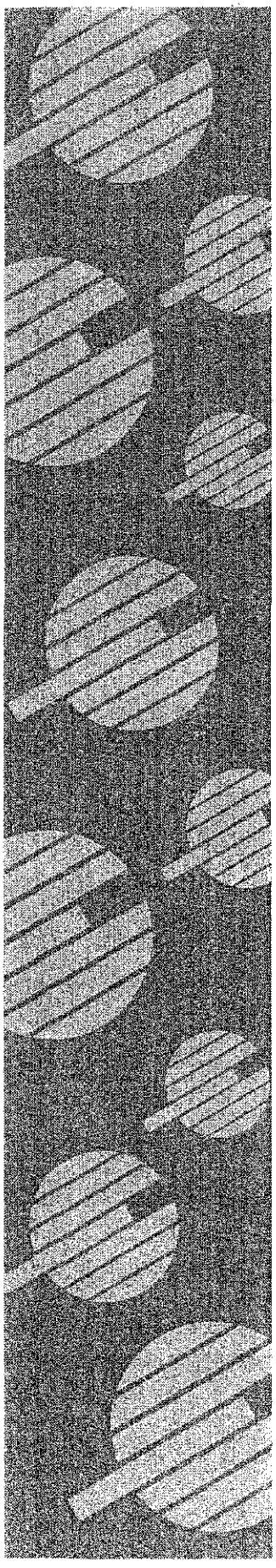
One of the clearest explanations of how sexual harassment is a form of sex discrimination was put by Justice Nathan in the 1985 Victorian case *R v Equal Opportunity Board; Ex parte Burns*.

It is an act of discrimination to deny an employee a benefit connected with the employment such as accrues to other employees. A benefit of employment is the entitlement to quiet enjoyment, that is the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner. If molestation, physical and sexual affronts are permitted by an employer, it is denying a benefit and permitting a detriment to those employees who suffer such unwelcome intrusions vis a vis those who do not...[20]

Similarly, in *Aldridge v Booth*, Justice Spender held that,

when a woman is subjected to sexual harassment as defined in section 28, 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[21]





Although men can be sexually harassed, it is overwhelmingly a detriment experienced by women. Women's disadvantaged position in the labour market increases their vulnerability to harassment. Australia continues to have one of the most gender segregated workforces in the industrialised world, with women concentrated in the lowest paid positions with less job security and fewer opportunities for promotion. Women's average weekly ordinary time earnings are 85.8% of average male earnings, although the pay gap is more marked in certain occupations and industries. When part-time workers are included, women in employment earn just 66.4% of men's earnings[22]. Women are seriously under-represented in management positions and face many difficulties trying to balance their work and family responsibilities. Sexual harassment reinforces women's subordinate status in the labour market by hindering their full and equal participation and undermining their general enjoyment of working life.

Complaint data indicates that sexual harassment has a disparate impact on women and can therefore be regarded as a form of sex discrimination.

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[1] In *Aldridge v Booth* (1988) 80 ALR 1 at p5, Justice Spender said,

By "unwelcome", I take it that the advance, request or conduct was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive.

[2] In *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) EOC 92-250 at 77,399 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 sec. 28 if they otherwise "vex and annoy" so as to amount to sexual harassment.

[3] This point was made by Justice Wilcox in *Hall & Ors v A. A Sheiban Pty Ltd* (1989) supra at 77,412.

[4] This point was made by HREOC Inquiry Commissioner Kevin O'Connor in *McLaren v Zucco* (1992) EOC 92-650.

[5] (1989) EOC 92-250

[6] *Ibid*, at 77,389

[7] *Ibid*, at 77,431

[8] *Waters v Public Transport Corporation* (1991) EOC 92-390

[9] Sandra Milligan and Karen Thomson, *Listening to Girls*. A report

of the consultancy undertaken for the Review of the National Policy for the Education of Girls, conducted by the Australian Education Council, 1992.

[10] See *Aldridge v Booth* (1988) 80 ALR 1

[11] (1984) EOC 92-023

[12] (1988) EOC 92-244 at 77,280

[13] As the Commission stated in *Freestone v Kozma* (1989) EOC 92-249 at 77, 377,

The permeation of the work environment can be imposed or created by many means other than physical acts, including sexual suggestion or embarrassment by unwanted public displays of sexuality...

[14] Unreported decision of HREOC dated 17 September 1993 at p.6

[15] (1994) EOC 92-556

[16] *Ibid*, at 77, 175

[17] This is confirmed by the case law. In *Hall & Ors v A.A. Sheiban Pty Ltd & Ors* (1989) supra at 77, 417 Justice French said,

The concept of sexual harassment does not exclude criminal behaviour. Indeed it may be the case that such conduct often occurs in connection with it.

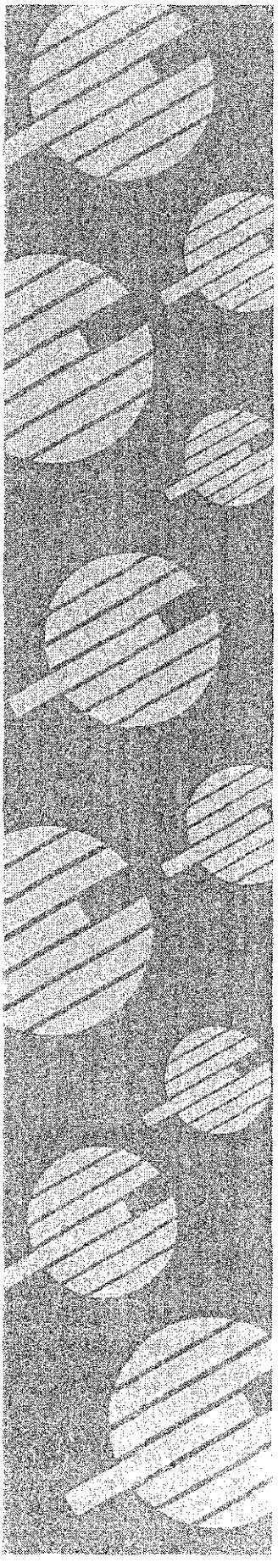
[18] (1988) EOC 92-244 at 77,269

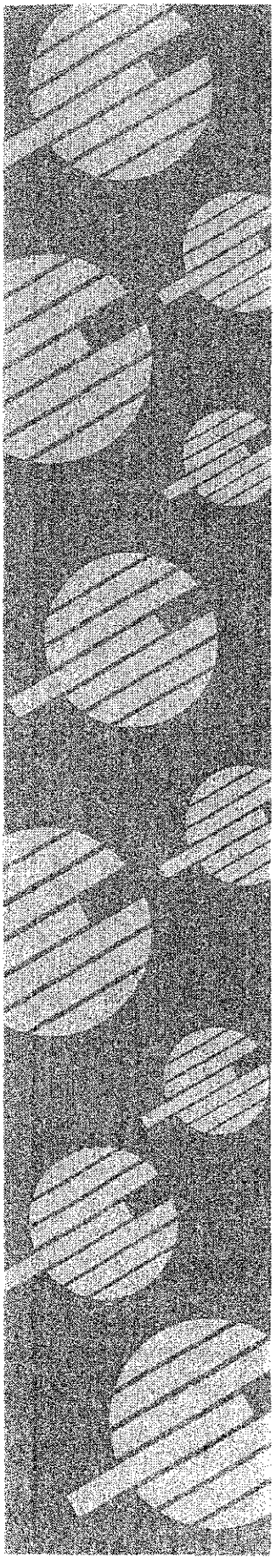
[19] See for example: *O'Callaghan v Loder* (1984) EOC 92-023, *Aldridge v Booth* (1988) 80 ALR 1 and *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) EOC 92-250.

[20] [1985] VR 317,322

[21] (1988) EOC 92-222 at 77,094

[22] ABS Cat. No. 6305.0, May 1995.





3. Student Complaints

As a result of the constitutional restrictions referred to on pp11 & 12, the ability of students to lodge a sexual harassment complaint under the *Sex Discrimination Act* will depend on whether they are male or female.

Female Students

Sexual harassment by a member of staff

All female students, regardless of their age or where they are studying, can complain if they are sexually harassed by a teacher or any other member of staff[1]. This protection extends to female students who are intending to enroll at a particular educational institution.

Sexual harassment by a fellow student

All female students have the right to complain if they are sexually harassed by a fellow student. However, whether the complaint is against the individual harasser and/or the educational institution[2] depends on the age of the students involved.

(a) If both students are 16 or over

Section 28F(2) makes it unlawful for an "adult" student (defined as a student aged 16 and over) to sexually harass another "adult" student or a member of staff[3]. If a female student is aged 16 or over and she is sexually harassed by a fellow student who is at least the same age, she can make a complaint against the individual concerned.

Both male and female students who have turned 16 need to be aware that legal action could be taken against them if they sexually harass their teachers or other students who are also aged 16 and over. If the complaint is substantiated, they could be held personally liable. This might involve payment of damages or some other kind of reparation.

As well as taking action against the individual harasser, a female student could also make a complaint against the educational institution under section 21 of the *Sex Discrimination Act*. This would be on the ground that the institution had discriminated against her on the grounds of sex by allowing sexual harassment to occur in her learning environment. The operation of section 21 is explained in more detail below.

(b) If either student is under 16

If either of the parties has not turned 16, a complaint cannot be made against the individual harasser. However, there are other provisions in the *Sex Discrimination Act* which can be used by younger students if they are sexually harassed by fellow students.

Section 21 prohibits sex discrimination in education in areas such as admissions, expulsions and access to benefits[4]. It also contains a general prohibition which makes it unlawful for an educational authority to

discriminate against a student by subjecting them to "any detriment" on the basis of their sex, marital status, pregnancy or potential pregnancy.

Sexual harassment is a legally recognised form of sex discrimination (see p.29). This means that younger students who are not covered by the specific student/student sexual harassment provisions could nevertheless lodge a sex discrimination complaint under section 21. They would argue that the educational authority discriminated against them by allowing sexual harassment to occur in their learning environment. A complaint under this provision would be against the educational authority and not the individual harasser. This approach is yet to be tested.

Male Students

Male students can only lodge a complaint against a member of staff or a fellow student in limited circumstances because of the constitutional restrictions referred to on p.11.

Male students can complain if they are sexually harassed at an educational institution established by a Commonwealth law. The Australian National University and the University of Canberra are the only examples of educational institutions established under Commonwealth legislation.[6]

Male students can also complain under section 28L of the *Sex Discrimination Act* if the sexual harassment occurs in connection with a "Commonwealth program".[7] This would probably cover any educational program or scheme which is funded or administered by the Commonwealth government. The case law suggests that the mere presence of Commonwealth funding could bring a program or scheme within the *Sex Discrimination Act*'s definition of a "Commonwealth program". This may be the case even if the program is administered by a State or is jointly funded by the Commonwealth and a State. Although funding alone will not be determinative, it may nevertheless provide a strong indication of Commonwealth interest and activity which is sufficient for the purposes of the *Sex Discrimination Act*.

This has important implications for male students because it means that they may be able to make a complaint if they are undertaking a course or studying at an institution which receives Commonwealth funding[8]. This would depend on the facts of a particular case and has not yet been tested.

It is important to note that these provisions would not cover sexual harassment complaints from male students against fellow students. This is because section 28L only prohibits sexual harassment by a person who "performs any function", "exercises any power" or "carries out any responsibility" for the administration or conduct of the Commonwealth program. However, this section may cover complaints from male students who are sexually harassed by a member of staff as they are carrying out official functions and responsibilities. This approach has not been tested.

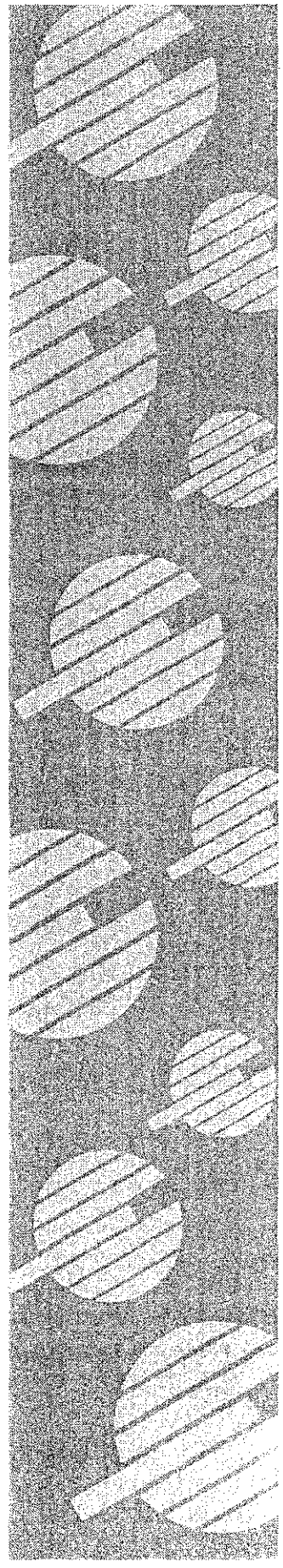


Table B: Coverage of female students under the Sex Discrimination Act

	Harassed by a fellow student	*Harassed by a member of staff*
State schools	Covered	Covered
Independent schools	Covered	Covered
Vocational education and training colleges	Covered	Covered
Universities	Covered	Covered

Table C: Coverage of male students under the Sex Discrimination Act

	Harassed by a fellow student	*Harassed by a member of staff*
State schools	Not covered	Not covered (unless the harassment occurs in connection with a Commonwealth program)
Independent schools	Not covered	Not covered (unless the harassment occurs in connection with a Commonwealth program)
Vocational education and training colleges	Not covered	Not covered (unless the harassment occurs in connection with a Commonwealth program)
Universities	Not covered (unless student is at ANU or University of Canberra)	Not covered (unless student is at ANU or University of Canberra or the harassment occurs in connection with a Commonwealth program)

[1] s28F (1) It is unlawful for a member of 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] The *Sex Discrimination Act* defines an educational institution as "a school, college, university or other institution at which education or training is provided".

[3] s28F (2) It is unlawful for a person who is an adult student at an educational institution to sexually harass:
(a) a person who is an adult student at the institution; or
(b) a member of the staff of the institution.

(3) In this section:
"adult student" means a student who has attained the age of 16 years.

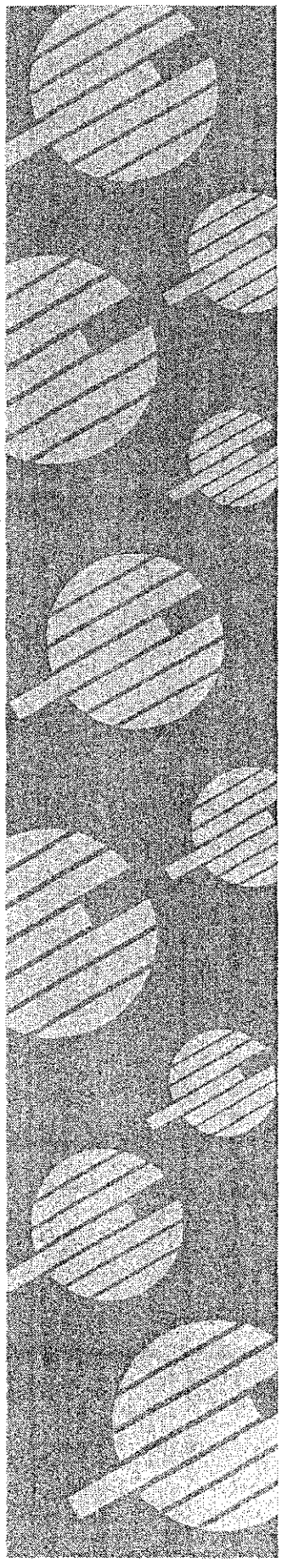
[4] s21 (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, marital status or pregnancy:
(a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
(b) by expelling the student; or
(c) by subjecting the student to any other detriment.

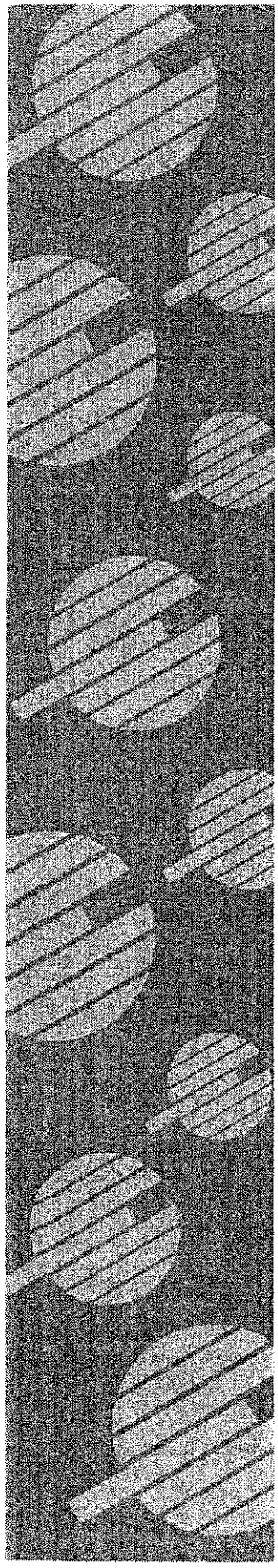
[5] An educational authority is defined as "a body or person administering an educational institution".

[6] These institutions are established by the *Australian National University Act* 1991 and the *University of Canberra Act* 1989.

[7] s28L 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;
(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.

[8] Examples of Commonwealth laws which confer funding for education and training include the *States Grants (Advanced Education Assistance) Act* 1976, *States Grants (Education Assistance - Participation and Equity) Act* 1983, *States Grants (Primary and Secondary Education Assistance) Act* 1992, *States Grants (Schools Assistance) Acts, States Grants (TAFE Assistance) Act* 1989, *States Grants (Technical and Further Education Assistance) Act* 1989, *States Grants (Tertiary Education Assistance) Acts, Vocational Education and Training Funding Act* 1992.





4. Employee Complaints

This chapter discusses the circumstances under which employees of educational institutions can use the *Sex Discrimination Act* to make a sexual harassment complaint against individual harassers (either co-workers, students or others). The potential liability of the educational institution is discussed in Chapter Six.

The vast majority of sexual harassment complaints are employment-related. The *Sex Discrimination Act* prohibits sexual harassment by employers, co-workers, contract workers, commission agents, partners and "workplace participants". This last category is intended to cover situations where the complainant and the harasser work or carry out functions in the same work-place but have different employers.

The *Sex Discrimination Act* covers any sexual harassment which occurs in connection with a person's employment, even if it is outside of working hours or off the premises. The Human Rights and Equal Opportunity Commission has dealt with complaints where sexual harassment has occurred on training courses, at conferences and at work social functions such as after hours drinks and Christmas parties. Sexual harassment which occurred on a field trip, excursion or in-service training course would also come under the *Sex Discrimination Act* .

It should be noted that the constitutional restrictions referred to on pp. 11 & 12 may affect the ability of male employees in some sectors of education to lodge complaints under the *Sex Discrimination Act*. If a male employee has been sexually harassed, they should contact the Human Rights and Equal Opportunity Commission to determine whether a complaint can be made under federal law.

Sexual Harassment by a Co-worker

The *Sex Discrimination Act* currently contains an exemption which may affect whether or not a member of staff can take action against a fellow employee for sexual harassment[1]. The application of the *Sex Discrimination Act* to staff working in different education sectors is discussed below.

State schools

State government agencies and State employees are exempt from the discrimination and sexual harassment provisions of the *Sex Discrimination Act* in the area of employment[2]. This means that teachers working in the State education system cannot lodge a complaint if they have been sexually harassed or discriminated against by a co-worker. This is because their employment comes under the direct control of the relevant State Education Department and falls within the State government exemption contained in the *Sex Discrimination Act*.

It should be noted that the State government exemption only applies to employment and does not affect any other area of discrimination covered by the *Sex Discrimination Act* (such as education). Nor does it affect the right of staff in State schools to lodge a complaint against individual students aged 16 and over.

Various reports have recommended that the State exemption be removed from the *Sex Discrimination Act*[3].

If staff employed in state schools are harassed by a colleague, they should contact the anti-discrimination agency in their State. In nearly all cases they will be able to make a complaint under the relevant State law. Contact details can be found at Appendix C.

Independent schools

Staff employed in independent schools are protected by the sexual harassment provisions in the *Sex Discrimination Act* and can make complaints against co-workers. This is because independent schools are autonomous institutions and do not come under the direct control of State Governments.

Although there is a limited exemption in the *Sex Discrimination Act* which applies to educational institutions established for religious purposes[4], it has absolutely no affect on the right of staff to lodge complaints of sexual harassment against other employees.

Universities

Universities are independent institutions which are not controlled by State governments. This means that university staff are able to lodge sexual harassment complaints against their co-workers under the *Sex Discrimination Act.*

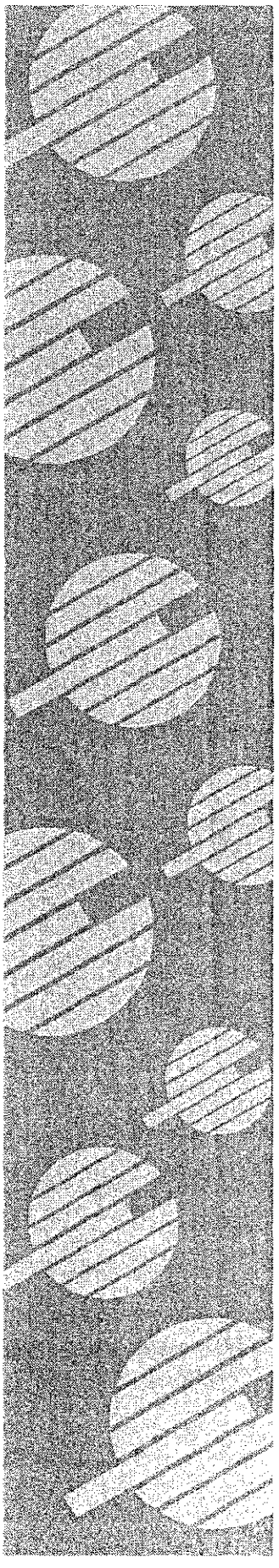
Vocational education and training colleges

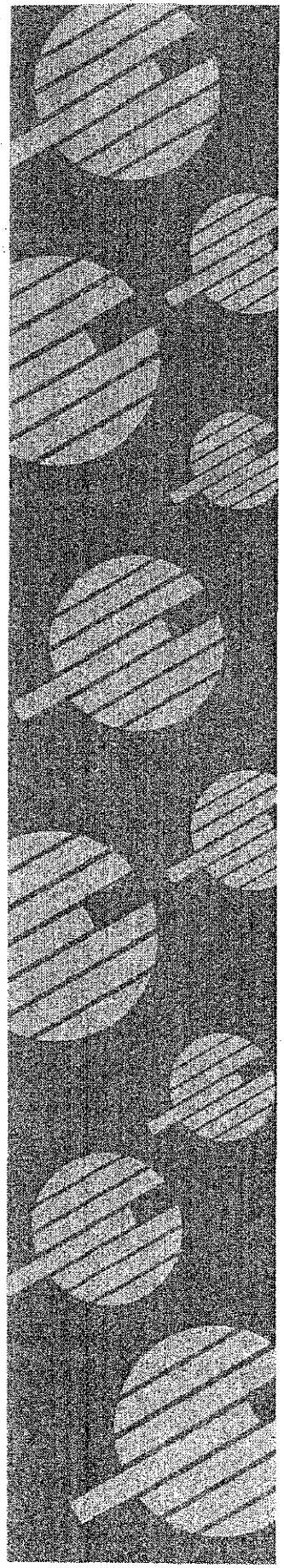
Public sector

The situation for public sector (ie.TAFE) employees depends on the nature of the individual college and its administrative and funding arrangements. If the college is established under a State law and is controlled solely by or on behalf of the State government, staff will probably be unable to use the *Sex Discrimination Act* to make sexual harassment complaints against co-workers because of the State government exemption discussed above.

But if, for example, a TAFE college has merged with another institution (such as a university), staff employed by the university in the technical division may be able to lodge complaints against co-workers under the *Sex Discrimination Act*. It would seem to depend on the level of State government involvement in the institution and the nature of the particular employment contract. Factors such as who pays the person, who has the power of dismissal and who has overall control of how work is performed would have to be considered in assessing whether the person is employed by a State government body.

There may be an alternative mechanism available to TAFE employees for lodging a complaint of sexual harassment in employment. Sections 26 and 28L prohibit discrimination and sexual harassment in the administration of Commonwealth laws and programs.[5] Unlike the provisions relating to employment, these particular sections bind all State Governments.





In light of recent case law[6], it is possible that the provision of Commonwealth funding to TAFE institutions may be a sufficient indication of Federal interest to bring the colleges within the jurisdiction of the *Sex Discrimination Act*. It appears arguable that the Human Rights and Equal Opportunity Commission could accept a discrimination or harassment complaint from a TAFE employee against a co-worker under these sections, depending on the facts and circumstances of the particular case.

This approach has not yet been tested.

Private sector

Staff employed in private education and training colleges can lodge a complaint under the *Sex Discrimination Act* if they are sexually harassed by a co-worker. This would include, for example, private language institutes, business colleges, hospitality training schools and computer training colleges.

> ***Remember :*** any employee who is not protected by the *Federal Sex Discrimination Act* will almost always be covered by their relevant State anti-discrimination law. If you are in any doubt about which law you should use, contact the Human Rights and Equal Opportunity Commission or the anti-discrimination agency in your State for advice. (See Appendix C.)

Sexual Harassment by a Student

Student harasser is 16 or over

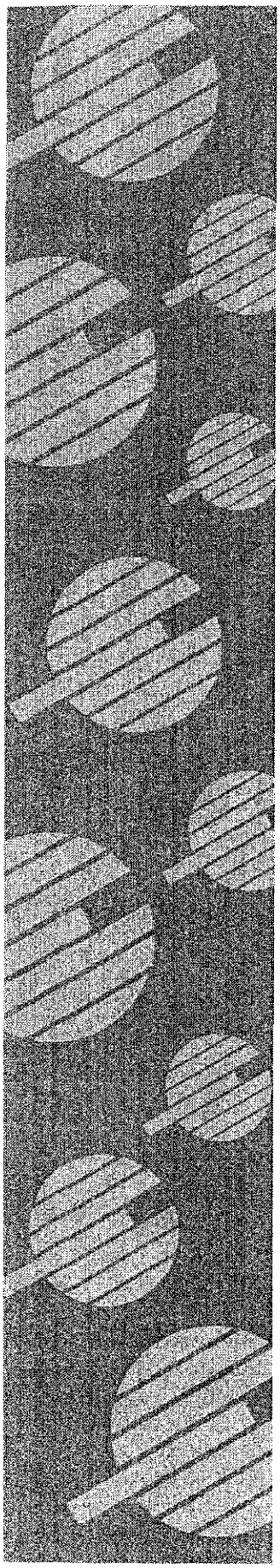
Staff members working in any educational sector who are sexually harassed by a student aged 16 or over can lodge a complaint against the individual student[7]. They may also be able to lodge a simultaneous complaint against their employer if it can be shown that they were required to work in a sexually hostile environment (unless they are State government employees).

Student harasser is under 16

If the student is under 16, the teacher cannot lodge a complaint against the individual concerned. However, they may be able to make a complaint against their employer under the provisions in the *Sex Discrimination Act* which prohibit discrimination in employment. They would argue that by allowing sexual harassment to occur in their working environment, the employer subjected them to a form of sex discrimination in employment. This avenue would not be available to teachers employed in the State school system and some TAFE colleges due to the operation of the State government exemption discussed above.

Table D: Coverage of employees under the Sex Discrimination Act

	Harassed by a student	*Harassed by a fellow employee*	*Harassed by a contractor*
State schools	Covered if student is 16+ (but can only complain against the individual harasser, not the employer) Not covered if student is under 16	Not covered	Covered
Independent schools	Covered if student is 16+ If student is under 16, cannot complain against the individual harasser but could lodge a discrimination complaint against the employer	Covered	Covered
Vocational education and training colleges	Covered if student is 16+ If student is under 16, may be able to lodge a discrimination complaint against the employer	TAFE employees may be covered (depending on facts of the case) Employees of private colleges covered	Covered
Universities	Covered	Covered	Covered



[1] State government agencies and State employees are exempt from the discrimination and sexual harassment provisions of the *Sex Discrimination Act* in relation to employment. 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 the exemption only applies to the area of employment. States are therefore bound to comply with the provisions in the *Sex Discrimination Act* which prohibit discrimination in other areas such as education, the provision of goods and services, the administration of Commonwealth programs etc. State government's agencies and their employees are also required to comply with State anti-discrimination legislation.

[2] The relevant provisions are:

SECTION 12 EXTENT TO WHICH ACT BINDS THE CROWN
12(1) [Act binds Crown] This Act binds the Crown in right of the Commonwealth and of Norfolk Island but, except as otherwise expressly provided by this Act, does not bind the Crown in right of a State.
12(2) [Liability of Crown] Nothing in this Act renders the Crown in right of the Commonwealth, of a State or of Norfolk Island liable to be prosecuted for an offence.

SECTION 13 EXTENT TO WHICH ACT APPLIES TO INSTRUMENTALITIES OF STATES
13(1) [Offering employment] Section 14 does not apply in relation to employment by an instrumentality of a State.
13(2) [Sexual harassment] Section 28B does not apply in relation to an act done by an employee of a State or of an instrumentality of a State.

[3] See Sex Discrimination Commissioner HREOC, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS, Canberra, 1992, House of Representatives Standing Committee on Legal and Constitutional Affairs; *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, AGPS, Canberra 1992; Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, Part 1, ALRC, Sydney, 1994.

[4] Section 38(1) states that:

Nothing ...renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

[5] Section 26(1) provides:

[Exercise of power under Commonwealth law] It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the

ground of the other person's sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

Section 28L provides:

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.

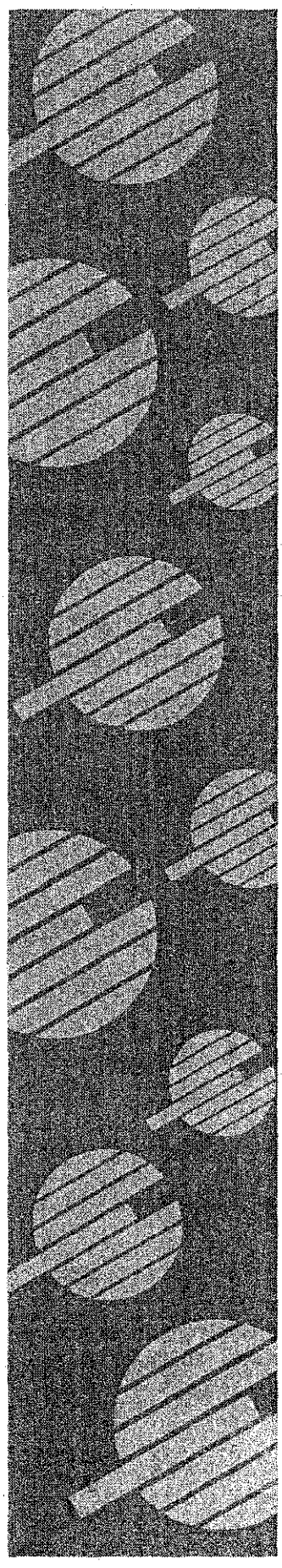
[6] In *Hough v Council of the Shire of Caboolture* 1993 EOC 92-480, Justice Spender of the Federal Court considered what constituted a "Commonwealth program". In that case, Caboolture Shire Council had received Commonwealth funding to conduct an employment program. Even though the program was jointly administered by the Commonwealth and the State, it was held to be a "Commonwealth program". In carrying out that program, the Council was performing a function within the meaning of s26.

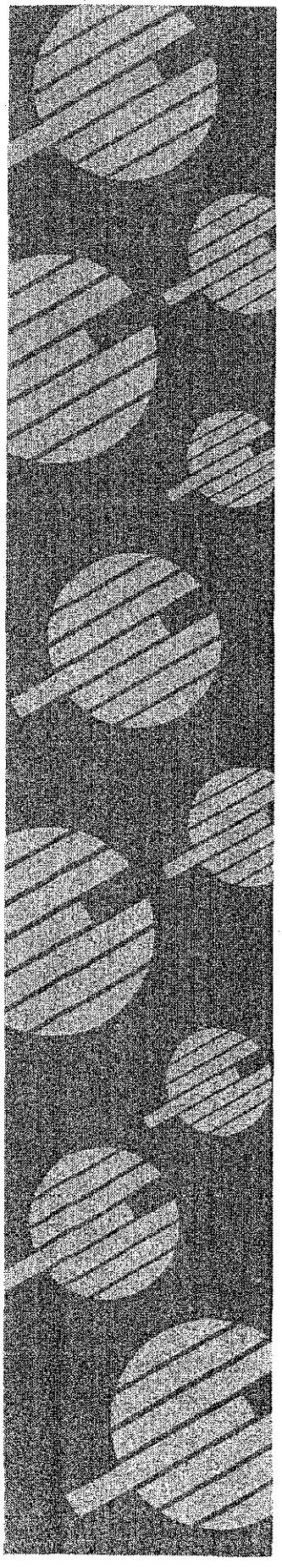
In *Harris v Bryce*, unreported decision of HREOC, 25 March 1993, His Honour, Mr Justice Morling of the Federal Court stated that a "Commonwealth program" can include a hybrid program where both Commonwealth and State purposes are pursued conjointly.

[7] s28F (2) It is unlawful for a person who is an adult student at an educational institution to sexually harass...

... (b) a member of the staff of the institution.

(3) In this section:
"adult student" means a student who has attained the age of 16 years.





5. Liability of Educational Institutions

Vicarious Liability

It is a general legal principle that an individual is personally liable for his or her own unlawful acts. However, in the area of employment (including discrimination and harassment) employers can be held liable for wrongs committed by employees in the course of work, even if there is no personal fault on the part of the employer. This is referred to as the principle of vicarious liability.

Section 106 of the *Sex Discrimination Act* makes employers vicariously liable for the unlawful conduct of their employees or agents[1]. This means that if an employee sexually harasses students or other staff the employer can be held legally responsible and may be liable to pay damages.

But the vicarious liability provisions in the *Sex Discrimination Act* also provide employers with a defence[2]. Vicarious liability can be reduced or perhaps avoided altogether if the employer can show that "all reasonable steps" were taken to prevent sexual harassment or discrimination. This means that employers are required to implement precautionary measures to minimise the risk of unlawful behaviour.

The *Sex Discrimination Act* does not specify the types of positive measures that constitute "reasonable steps." However, for most employers in the education sector the minimum level of action required is to:

- issue and distribute a sexual harassment policy;
- establish fair and effective sexual harassment grievance procedures;
- raise awareness of all employees;
- train those responsible for dealing with complaints or enquiries (including all managers and supervisors);
- monitor the working and learning environment.

The first two requirements will be discussed in detail in Chapters Eight and Nine.

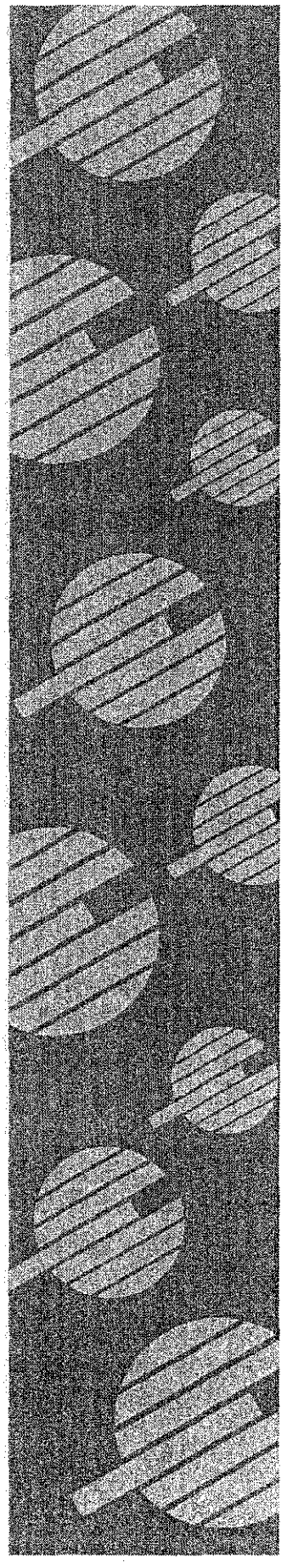
Three important principles emerge from the cases concerning vicarious liability:

1. "Reasonable steps" must be active, preventive measures.
2. The obligation to prove that "all reasonable steps" were taken rests with the employer.
3. Lack of awareness that the harassment was occurring is not a defence for employers.

These requirements were summed up by Justice Spender in the Federal Court decision *Aldridge v Booth*,

> *It is noted that...it is for an employer or principal to establish all reasonable steps to be taken by that employer or principal to prevent the acts constituting the unlawful conduct.*
>
> *The discharge of this onus, of course, depends on the particular circumstances of a case, but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity*[3].

Even if your staff are not covered by the *Sex Discrimination Act* (if, for example, they are employed in a State school), you should be aware that vicarious liability provisions are also included in all state anti-discrimination laws.



Vicarious liability

Case Example 1:

In the case of *Boyle v Ishan Ozden & Ors* it was found that the manager of a shop (the first respondent) had sexually harassed an employee. Although the owner employers (the second and third respondents) were overseas at the time and were not aware the harassment was occurring, they were still held vicariously liable. This was because they had failed to take reasonable steps to prevent such behaviour in the first place. It was held that,

There was no evidence that any steps had been taken by the second or third respondents to prevent the commission of acts such as those complained of by the complainant...

...But the fact is that sec. 106 attaches vicarious liability to them unless they have done something active to prevent the acts complained of. So that if we find the acts complained of were done and that the complainant's case is correct, then clearly not only the first respondent but the second and third respondents are also liable.

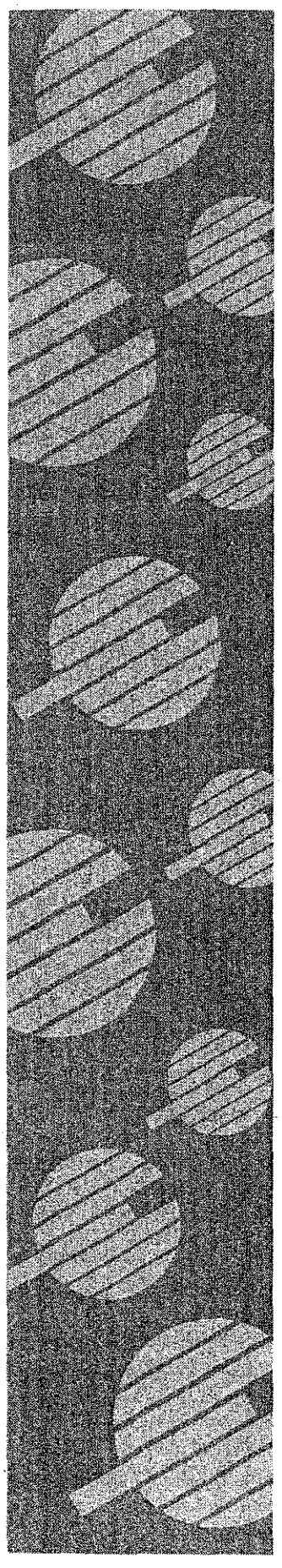
***Boyle v Ishan Ozden & Ors* (1986) EOC 92-165**

Case Example 2:

In a decision of the Queensland Anti-Discrimination Tribunal, an Aboriginal housing service was held vicariously liable for acts of sexual harassment committed by a director and treasurer of the company. The Tribunal found that there was no evidence that any steps had been taken to prevent him from acting in the way he did and therefore the housing service had not made out a defence to vicarious liability. The Tribunal said,

...evidence was given by the complainant that at no stage did the housing service have an articulated policy on sexual harassment. There were no documents on the policy and no seminars given nor any education given to the people working at the service to communicate that a policy was in existence. This was the case even though there had been an earlier complaint made by another woman against another man who worked there.

***Moore v Brown & Anor* (1995) EOC 92-749**



Liability for the Conduct of Agents

Section 106 also makes "principals" vicariously liable for the unlawful conduct of "agents". An agent is a person authorised to act on behalf of another (referred to as the "principal"). If the agent is acting in accordance with the express or implied authority conferred on them, the principal is bound by their actions and can be held vicariously liable for their wrongs.

The concept is probably best illustrated with some relevant examples from the case law.

Agents

Case Example 1:

In ***Horne v Press Clough Joint Venture*** (see p.27 for facts) the WA Equal Opportunity Tribunal found that the union played a role in allowing the sexual harassment of the complainants to continue by failing to support their efforts to have the pornography removed. The union had also actively participated in the unlawful conduct by displaying an offensive poster in the union office. The union was held liable for the role played by both the union organiser (a union employee) and the union shop stewards (employees of Press Clough Joint Venture). Even though the shop stewards were not union employees, it was found that they were acting as agents of the union when the harassment occurred. The Tribunal stated that,

> *We accept that these...shop stewards had a great deal of de facto power on the site and that they spent most of their time actually or ostensibly involved in Union business. They were perceived by both workers and management as representing both the workers and the Union...*
>
> *...although they were employed by the Joint Venture as tradesmen, they spent the majority of their time in the Union office and looking after shop steward issues.*

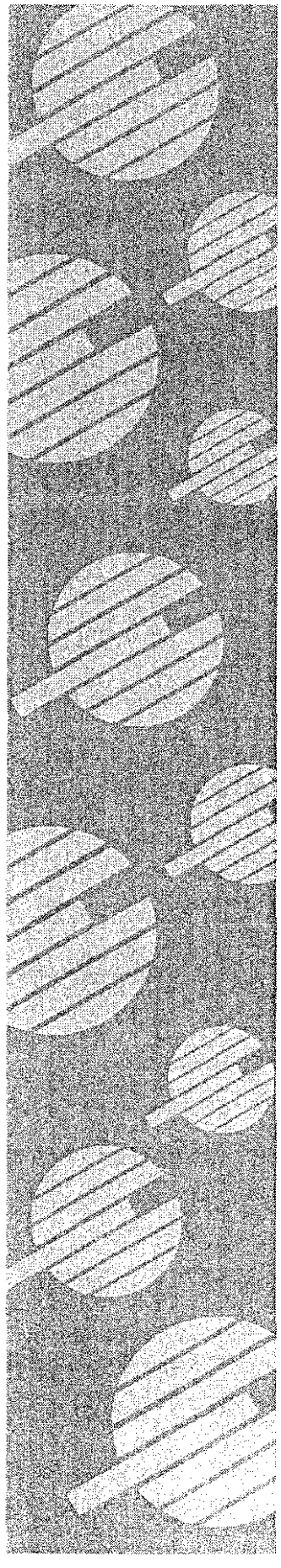
On the basis of these facts, the union was held jointly liable with the employer and was required to pay $42 000 of the total $92 000 damages awarded to the complainants.

Case Example 2:

A woman employed as a secretary and book-keeper by the Altona Workers Sports Club Inc. was sexually harassed by a volunteer who was acting as Secretary/Manager and honorary Treasurer of the club. As the volunteer was not an employee, he could not be held personally liable for the harassment under the the *Sex Discrimination Act*. However, the Club was held vicariously liable for his conduct because the harassment occurred in connection with performance of his duties as an agent. The Club therefore had to pay the full amount of damages awarded to complainant ($35 000). ***Watkins v Fryer & anor*** **(1995) EOC 92-121**

Educational institutions can also be held liable for sexual harassment committed by its agents. The test will be whether the harasser was performing duties on behalf of the institution. Depending on the particular facts of a case, agents in an educational setting could include:

- volunteers (eg. parents providing classroom assistance or supervising excursions or sporting events, volunteer coaches, fund raisers etc)
- office bearers (eg. school prefects)
- holders of unpaid honorary positions (eg. committee or board members)
- boards of directors
- contractors and consultants



"Accessory" Liability

Educational institutions can also be held liable under section 105 of the *Sex Discrimination Act* if they "caused, instructed, induced, aided or permitted" an individual to commit an unlawful act[4]. There is no defence available for this type of liability.

This section differs from the vicarious liability provisions in section 106 in several ways. An organisation can be held liable under section 105 even if there is no legal relationship between the parties (such as that of employer/employee or principal/agent which is required under section 106). In contrast to section 106, an organisation must at least have been aware of the situation in order to be liable under section 105. In *Howard v Northern Territory of Australia & ors* the President of the Human Rights and Equal Opportunity Commission said that:

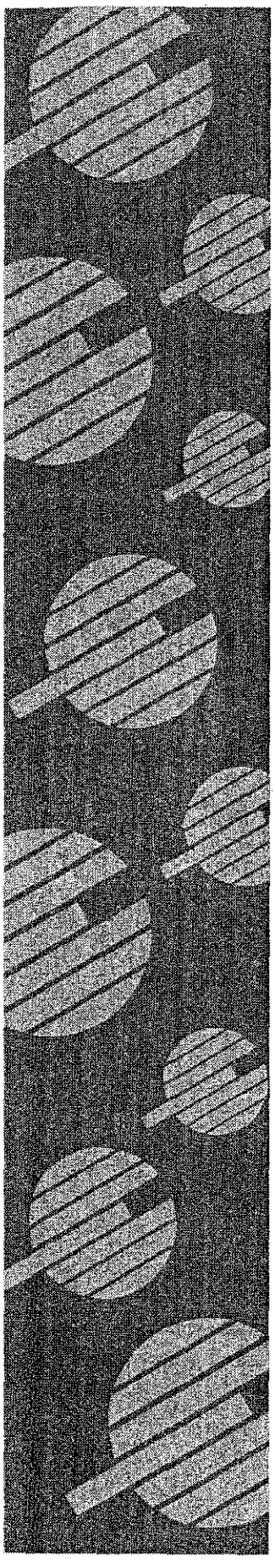
> *...s105 requires a degree of knowledge or at least wilful blindness or recklessness in the face of the known circumstances in order to attract the operation of the section. That knowledge does not have to go so far as to constitute knowledge of the unlawfulness of the proposed conduct but it must extend to an awareness of, or wilful blindess to, the circumstances which could produce a result, namely discrimination, which the Act declares to be unlawful*[5]

Depending on the circumstances of a particular case, it is arguable that educational institutions could be held liable under section 105 if sexual harasment between students remained unchecked and was allowed to occur. This is further discussed below.

Liability for Student Conduct

The *Sex Discrimination Act* does not contain a specific provision which makes educational institutions vicariously liable for the conduct of their students (unless the student is acting as an agent of the institution). However, this does not mean that educational institutions are immune from sexual harassment complaints involving their students.

As previously mentioned, section 21 of the *Sex Discrimination Act* prohibits sex discrimination in education (see p.32). This section makes it unlawful to discriminate against a student (or a person intending to become a student) on the basis of their sex, marital status, pregnancy or potential pregnancy. The section covers admissions and expulsions, access to benefits and any other type of discriminatory sex-based detriment. It is possible for sexual harassment complaints to be made under this section because sexual



harassment is a type of unlawful sex discrimination (see p.29).

A student who is sexually harassed by another student could lodge a complaint against both the individual harasser and/or the educational institution itself. If the institution had failed to take any active steps to prevent the occurrence of sexual harassment, the student complainant could argue that the institution had allowed unlawful sex discrimination to occur in their learning environment.

In addition, section 105 of the *Sex Discrimination Act* provides that any "person" (which includes organisations) who causes, instructs, induces, aids or permits an act of unlawful discrimination can be held liable. If an educational institution knowingly allowed sexual harassment between students to occur, it could be held responsible under this provision (see p.45).

A staff member who is sexually harassed by a student could lodge a complaint against their employer on the basis that they were required to work in a sexually hostile environment. Their complaint would be run under the sex discrimination in employment provisions, rather than the sexual harassment provisions.

In order to minimise the risk of involvement in a complaint, it is important that all educational institutions implement preventive measures aimed at both staff and students.

Common Law Duties

Employer's duty of care

Employers have a common law duty to take reasonable care for the health and safety of their employees. This common law duty is reinforced by occupational health and safety legislation in all Australian jurisdictions.

An employer will be held liable for forseeable injuries which could have been prevented by taking the necessary precautions. As there is considerable evidence documenting the extent and effects of sexual harassment in the workplace, it has been argued that the duty to take reasonable care imposes a positive obligation on employers to reduce the risk of it occurring,

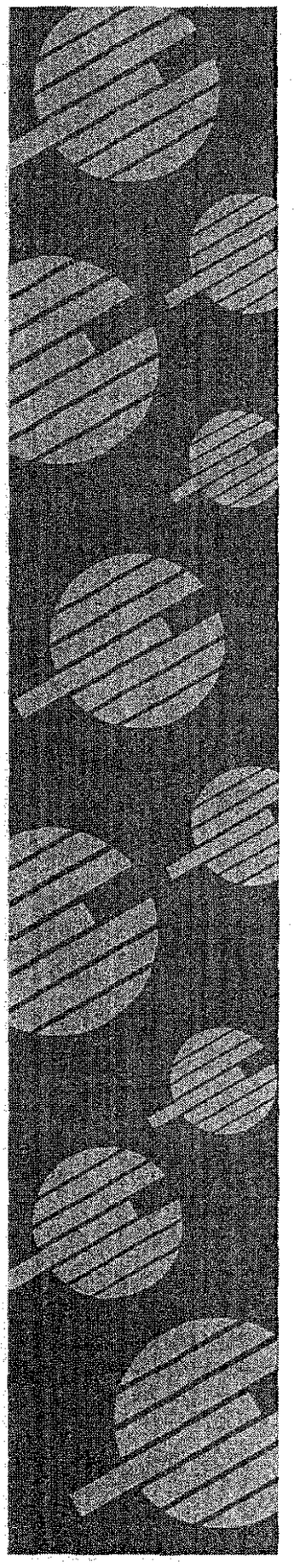
> *A work environment in which an employee is subject to unwanted sexual advances, unwelcome requests for sexual favours, other unwelcome conduct of a sexual nature, or forms of sex-based harassment, is not one in which an employer has taken reasonable care for the health and safety of its employees. A work environment or a system of work that gives rise to this type of conduct is not a healthy and safe work environment or system of work...An employer could be regarded as not having acted reasonably to prevent a forseeable risk if practicable precautions are not taken to eliminate or minimise sexual harassment in the workplace*[6]

Failure to fulfill the duty of care will amount to a breach of the employment contract as well as negligence on the part of the employer.This means that an employee who has been harmed could bring an action against their employer in either contract and/or tort.

Common law action for sexual harassment

Case Example:

A teenage woman employed as an apprentice gardener by Hobart City Council took civil action against her employer and the co-workers who had subjected her to unrelenting sexual harassment. She was unable to pursue her case under anti-discrimination law because the *Sex Discrimination Act* does not apply to local government employees and, at the time, there was no State law in place. She brought a range of tort actions including negligence, defamation, false imprisonment, assault and battery. The employer was personally liable for failing to provide a safe workplace and was also held vicariously liable for the conduct of its employees. The woman was awarded $120 000 damages. ***Barker v Hobart City Council*, 1993, unreported.**



Teachers' and schools' duty of care

Teachers and school authorities also have a special common law duty of care to protect students and provide a safe and secure environment. Teachers have a duty to take steps to ensure the safety of students against risks that can be reasonably foreseen[7] and school authorities (such as State Education Departments) can be held vicariously liable if there is a breach of this duty.

Along with obligations under anti-discrimination laws, it is likely that the common law duty of care would extend to cover sexual harassment of a student by a teacher, sexual harassment of a student by an adult on school grounds during school hours (even if that adult is not involved in the school in any way) and sexual harassment of a student by another student if the school had some suspicion or notice that harassment might be occurring.

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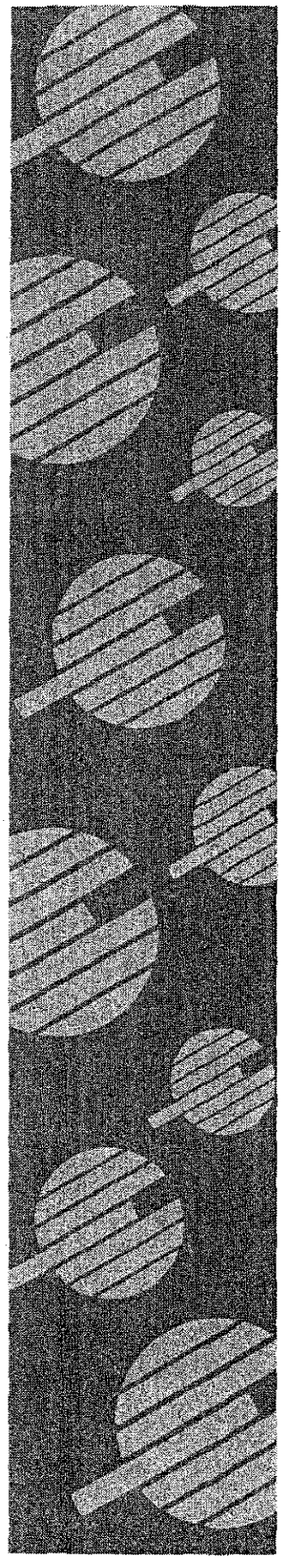
[1] s 106(1) [unlawful act of employee or agent] Subject to sub-section (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent

(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] s106(2) [exception] Sub-section (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.



[3] (1988) EOC 92-222 at 77,091

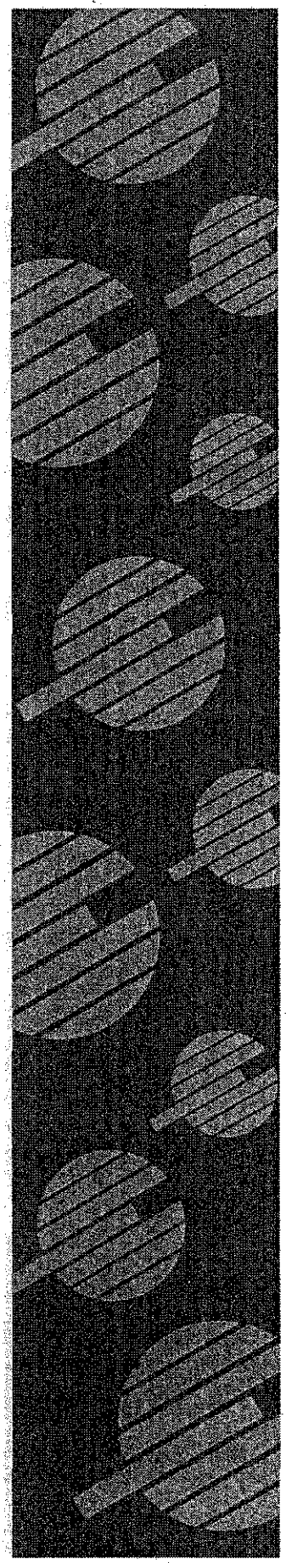
[4] s105 [Liability of persons involved in unlawful act] A person who causes, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall for the purposes of this Act, be taken also to have done the act.

[5] (1995) EOC 92-672 at 78,133

[6] Therese MacDermott, "The Duty to Provide a Harassment-Free Work Environment", (1995) 37 *Journal of Industrial Relations* 495.

[7] *Introvigne v Commonwealth of Australia* (1980) 32 ALR 251

6. Policies for the Prevention of Sexual Harassment



Educational institutions have a legal responsibility to prevent sexual harassment. The law does not prescribe how this should be done, but a number of standard strategies are now widely accepted by employers, educators and organisations such as the Human Rights and Equal Opportunity Commission.

A key aspect of prevention is the development and promotion of a written policy which makes it clear that sexual harassment will not be tolerated under any circumstances. Some organisations incorporate information on sexual harassment into a general workplace harassment policy which also covers other forms of illegal harassment, based, for example, on a person's race, disability or sexuality. Other organisations decide that they need to issue a specific sexual harassment policy, particularly if it is a common or recurring problem. Both options are valid and it is up to each educational institution to decide what is most appropriate for them. If a general policy is adopted, however, it is important that the different types of unlawful harassment are well defined and addressed comprehensively. If the policy is too broad or generic its impact and clarity may be compromised.[1]

Although sexual harassment policies will vary according to the structure and size of an organisation and the particular group at which they are aimed, there are certain basic features which should be common to all policies.

Sexual Harassment Policy Checklist

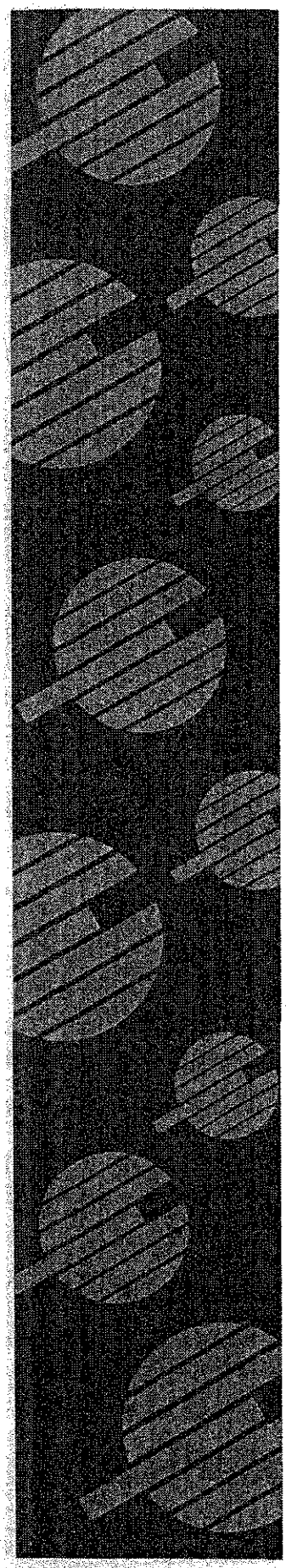
Your sexual harassment policy should include:

- a strong opening statement on the educational institution's attitude to sexual harassment

This should state that the institution is committed to ensuring that the working and learning environment is harassment-free. It should also state that sexual harassment is unlawful, will not be tolerated under any circumstances and that action will be taken against those who breach the policy. In order to give the policy credibility and to maximise its impact, the opening statement should preferably appear above the signature of the most senior officer in the institution such as the Principal or Vice-Chancellor.

- an outline of the institution's objectives regarding sexual harassment

This demonstrates that the institution is committed to a comprehensive strategy for eliminating sexual harassment. You may wish to consider something along the following lines:



This school/university/college aims to:

1. create a working and learning environment that is free from sexual harassment and where all members of the school/university/college community are treated with dignity, courtesy and respect;
2. implement training and awareness raising strategies to ensure that all employees and students know their rights and responsibilities;
3. provide an effective procedure for complaints based on the principles of natural justice;
4. treat all complaints seriously in a sensitive, fair, timely and confidential manner;
5. guarantee protection from any victimisation or reprisals;
6. encourage the reporting of behaviour which breaches the sexual harassment policy;
7. promote appropriate standards of conduct at all times.

a plain English definition of sexual harassment

There is no single, universally accepted definition of sexual harassment. However, you should ensure that the definition you adopt is consistent with the legal definition to minimise the risk of any confusion. The most important element to emphasise in any definition is that sexual harassment is UNWELCOME behaviour of a sexual nature. For example, you could define sexual harassment in the following way:

Sexual harassment is any unwanted, unwelcome or uninvited behaviour of a sexual nature which makes a person feel humiliated, intimidated or offended. Sexual harassment can take many different forms and may include physical contact, verbal comments, jokes, propositions, the display of offensive material or other behaviour which creates a sexually hostile working or learning environment.

what sexual harassment is not

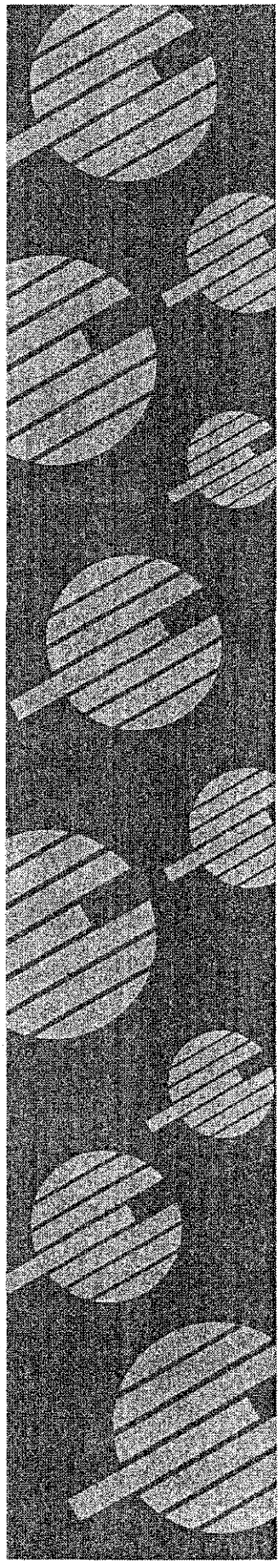
The policy should state that sexual harassment is not behaviour which is based on mutual attraction, friendship or respect. If the interaction is consensual, welcome and reciprocated it is not sexual harassment.

some examples which are relevant to the particular audience and environment

A list of behaviour which can amount to sexual harassment is provided on p.24. You may want to include other examples which are relevant to your educational institution, particularly if they illustrate a common or recurring problem.

a statement that sexual harassment is against the law

The policy should make it clear that sexual harassment is against the law. Reference should be made to the State and Federal anti-discrimination laws that apply to the institution. Students and staff need to know that legal action could be taken against them for sexual harassment and that they could be exposing the institution to liability. Depending on the audience, you may want to include details of the relevant legislative provisions.



the circumstances in which sexual harassment can occur

Depending on whether the policy is designed for employees, students or the institution as a whole, the policy should state that a person can be sexually harassed by a:

- supervisor or manager
- co-worker
- teacher
- contractor
- client or customer
- service provider
- student

Although not all these situations would necessarily give rise to a complaint under State or Federal anti-discrimination laws (for example, the *Sex Discrimination Act* does not explicitly cover harassment by a client or customer), it makes good sense to provide a procedure for dealing with any sexual harassment which could affect the welfare of students and/or employees.

Furthermore, if the policy is intended for employees, it should state that sexual harassment is not just unlawful during working hours or in the workplace itself. The behaviour is illegal in any work-related context, including conferences, work functions, business or field trips.

Similarly, harassment between students may also be unlawful if it occurs at organised social events, on field trips or excursions or in residential colleges.

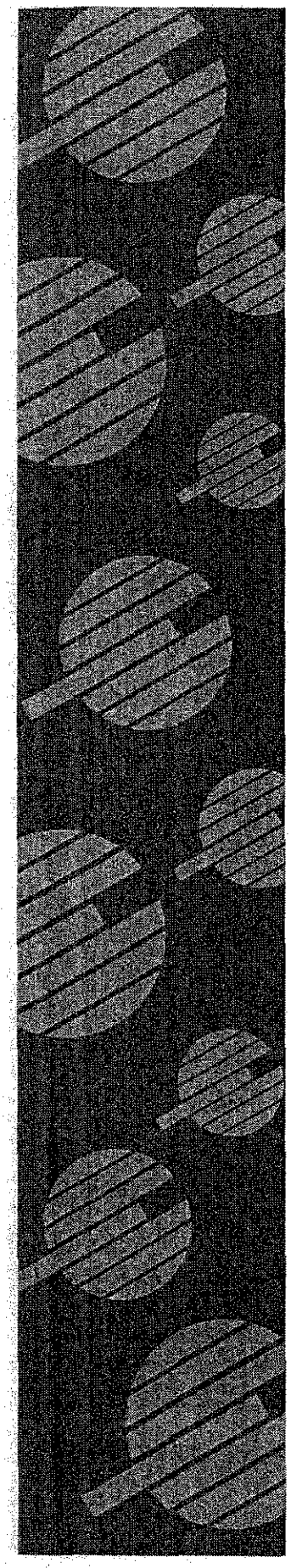
a list of possible consequences if the sexual harassment policy is breached

The policy should operate as a general warning to staff and students of the possible consequences they can expect if a complaint against them is substantiated. Depending on the severity of the case, consequences can include an apology, counselling, compensation and/or disciplinary action or misconduct proceedings against the harasser.

The policy should also state that retaliation or reprisals will not be tolerated and that disciplinary action will be taken against anyone who victimises a person for complaining of sexual harassment.

a brief explanation of the options available for dealing with sexual harassment

Staff and students should be advised of the different ways that sexual harassment can be addressed. This includes informal action such as confronting the harasser directly (but only if the individual is confident enough to do so) or making a formal complaint to a line manager or through the institution's established grievance procedures. The way that complaints will be handled should be documented in the policy or in a separate grievance procedure.



- information on where individuals can get help, advice or make a complaint

The policy should include the contact details of people who have been appointed to provide information and assistance or are responsible for receiving complaints. Staff and students can also approach their union, the Human Rights and Equal Opportunity Commission and /or the relevant State or Territory anti-discrimination agency for information and confidential advice.

Making it Work

A written policy will have no practical or legal value unless it is:

- widely distributed and promoted so that everyone is aware of their rights and responsibilities (for example, a copy of the policy can be periodically included with pay slips, attached to or incorporated in contracts of employment, displayed on notice boards, included in personnel manuals and made accessible on computer networks);
- provided to new students and employees during induction or orientation activities;
- regularly re-issued;
- periodically reviewed and updated;
- translated into community languages where required; and
- accompanied by other prevention strategies such as training and awareness-raising campaigns.

To ensure that these things happen, responsibility for the maintenance and circulation of the policy should be allocated to a specific position or area.

Many educational institutions already have sexual harassment policies in place. If this is the case at your institution, you may want to to use the above information to review the content and dissemination of your current policy.

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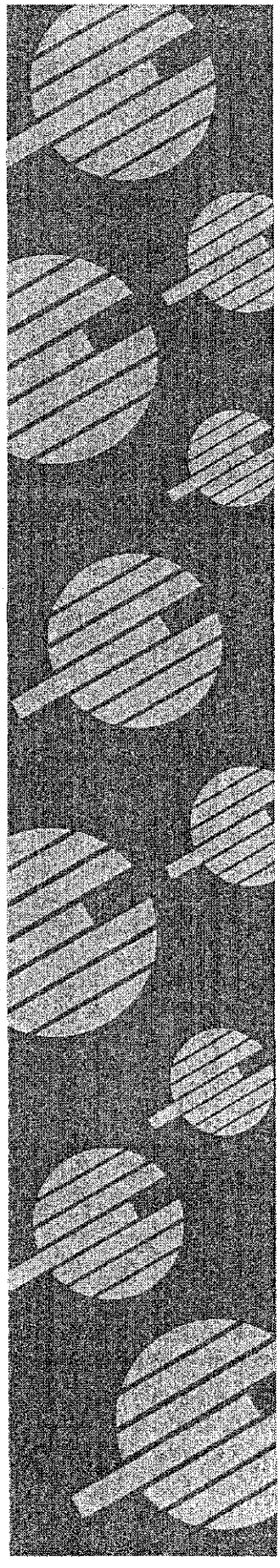
[1] In the case of *Kelson & Anor v Forward in her Capacity as Director of the Merit Protection and Review Agency* (1995) EOC 92-762 the Federal Court held that care needs to be taken when defining a concept such as "workplace harassment". It is important to define the term with precision to ensure that it is not confused with legitimate management action which may also cause a person to feel threatened or uncomfortable.

7. Sexual Harassment Grievance Procedures



As part of the legal responsibility to deal with sexual harassment, all educational institutions must implement effective, accessible grievance procedures for employees and students.

Benefits of a Grievance Procedure

A good grievance procedure has many benefits. It can:

- convey the message that the institution takes sexual harassment seriously;
- prevent escalation of a case;
- ensure that complaints are dealt with consistently;
- reduce the likelihood of external agency involvement which can be time consuming, costly and damaging to public image;
- alert an organisation to patterns of unacceptable conduct and highlight the need for prevention strategies in particular areas;
- reduce the risk of an educational institution being held liable under the *Sex Discrimination Act* and other anti-discrimination laws.

The *Sex Discrimination Act* does not prescribe any particular type of procedure, so educational institutions have the flexibility to design a system that suits their size, structure and resources. Educational institutions can establish a specific procedure for sexual harassment complaints or, alternatively, utilise the procedure that is in place for other types of employee or student grievances. However, sexual harassment complaints are often complex, sensitive and potentially volatile. Anyone who has responsibility for dealing with them will require specialist expertise and should receive appropriate training.

Formal and Informal Grievance Procedures

Sexual harassment complaints will always vary. They may be against a senior member of staff who has managerial or supervisory authority over the complainant, or they may involve a co-worker or fellow student. They may be about individual or group behaviour. The allegations might be extremely serious or relatively minor, but annoying and unacceptable nonetheless. Complaints may be about a single incident or a series of incidents. The parties may be angry, distressed or anxious. Other issues or grievances may form part of the overall context of the complaint. The alleged harasser may admit to the allegations or emphatically deny them. A complex investigation may be required or the matter may be resolved quickly and informally with minimal third party intervention.

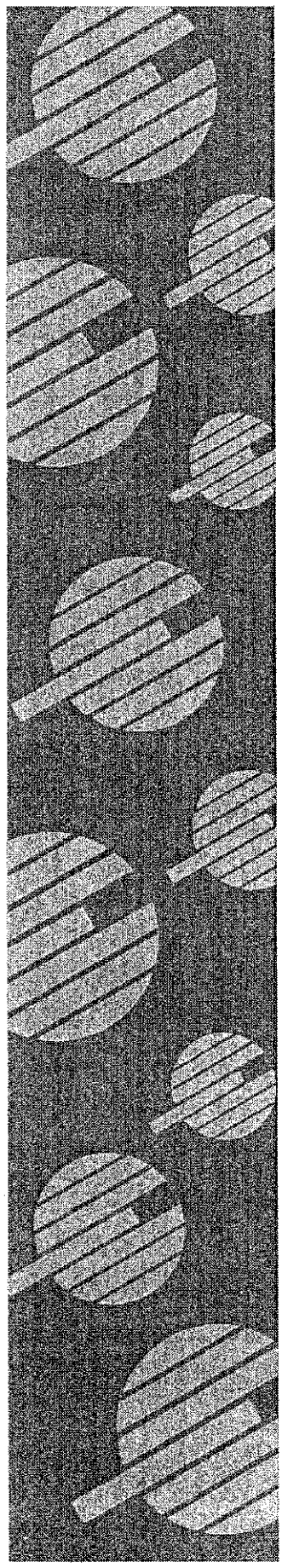
Because of the variables that can arise in sexual harassment cases, it is advisable to offer both informal and formal mechanisms for dealing with complaints. Table E summarises the main differences between these two approaches[1].

Table E: Differences between informal and formal complaint procedures

Informal	*Formal*
Informal action can include: - an individual dealing with the situation themselves after seeking advice or information from their supervisor or other officer (eg. a sexual harassment contact officer, EEO officer etc); - a supervisor or manager privately conveying an individual's concerns to the alleged harasser without assessing the merits of the case; - the harasser admiting the behaviour, investigation is not required and the parties are willing to resolve the complaint through conciliation or counselling; - supervisor observing unacceptable conduct and taking independent action.	Formal action usually involves: -investigation of the allegations by an impartial third party; - application of the principles of natural justice; - making a finding on whether the complaint is substantiated; - submitting a report with recommended action to a decision-maker (senior management); - implementation of the outcome by the decision-maker.
Informal procedures are usually most appropriate where: - the allegations are of a less serious nature but the individual wants the behaviour to stop; - the individual would prefer to pursue an informal resolution; - the parties are likely to have ongoing contact with one another (eg. fellow students).	Formal procedures are usually most appropriate where: - informal attempts have failed; - there have been reprisals or victimisation of the complainant; - the complaint involves serious allegations; - the allegations are denied, the complainant wishes to proceed and investigation is required to substantiate the complaint; - the alleged harasser has authority over the complainant and is in a position to influence their employment or educational outcomes; - the complainant wishes to proceed formally from the outset.
Emphasises resolution rather than factual proof or substantiation of the complaint.	Focus is on investigation, gathering evidence and determining whether the complaint has substance.
Does not involve investigation or prescribed steps.	Set procedure is followed. The parties are interviewed, witnesses may also be interviewed, personnel records and other documents are examined, the rules of natural justice are applied, a report with a recommended course of action is prepared for senior management.
Limited written records kept.	The complaint is usually made in writing, records of interview are retained and the process is comprehensively documented.

Grievance Procedure Models

There are various grievance procedure models you may wish to consider. Those discussed below are suggestions only and are by no means exhaustive. You may wish to modify or adapt them to suit your own purposes or you may decide to adopt an alternative model altogether.



Model 1 - Up the Line

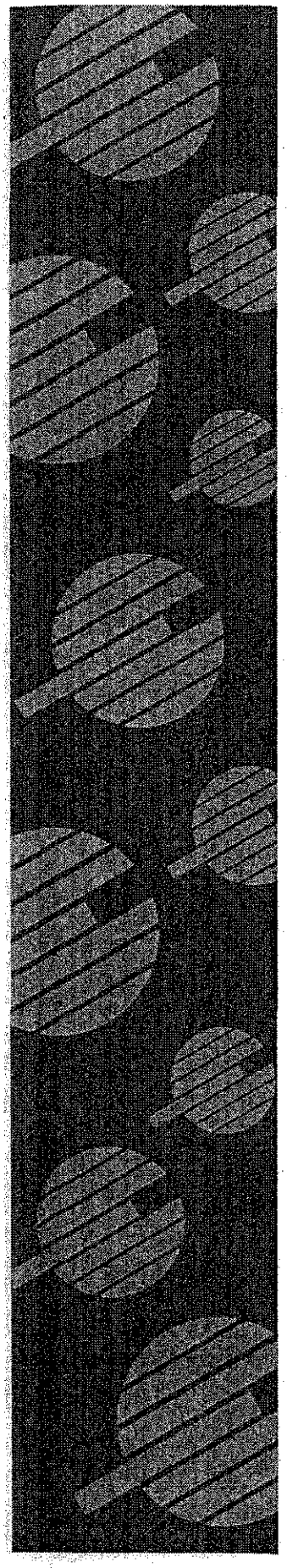
Some organisations take a hierarchical approach to grievance handling. If a person has a complaint, they raise it with their immediate supervisor (or the supervisor's superior if the supervisor is the harasser). If they are not satisfied with the outcome, they take it to a higher level of management, moving up the line until there is resolution. The aim is to resolve the situation at the earliest possible stage. The advantage of this approach is that it sets up a clear chain of responsibility and gives the complainant a number of opportunities to get the matter settled. The disadvantages include the risk that complaints get drawn out or that confidentiality is compromised as more people become involved. Sexual harassment complaints frequently involve sensitive or embarrassing information and an individual may be reluctant to discuss the details with the management hierarchy (particularly if it is predominantly male and the complainant is female). This approach is also dependent on supervisors and managers at all levels possessing the necessary grievance handling skills and knowledge about sexual harassment.

Model 2 - Designated Employees

Another approach is to designate particular employees who are responsible for handling sexual harassment grievances, such as an Equal Opportunity officer or nominated management respresentative. They usually deal with both informal and formal complaints (although if they have been involved in informal attempts at resolution, the complaint should be referred to another employee if it becomes formalised to ensure there is no risk of bias). Grievance officers are selected on the basis of their skills, experience and sensitivity. They often have relatively senior status in the organisation to ensure that their role is respected and they can operate with the necessary level of authority.

Many large organisations, particularly in the public sector and tertiary education sector, have implemented a dual system of designated employees. Contact officers are selected from various areas and levels of the organisation to provide information and support to a person who has been sexually harassed. The role of the contact officer is to:

- listen to the complaint;
- explain what constitutes sexual harassment and answer any questions;
- provide information on the internal options that are available to deal with sexual harassment complaints;
- inform the individual of their rights under anti-discrimination law (including the right to take their complaint directly to the Human Rights and Equal Opporunity Commission or a State anti-discrimination agency);
- discuss possible strategies the individual can use to deal directly with the harasser, if this is their preferred course of action (they can accompany the individual if requested);
- refer the individual to counselling or other support services if necessary.



Contact officers are **not** involved in the formal investigation or resolution of a complaint.

Separate grievance officers are appointed to take an active role in the investigation and resolution process. They may act as a conciliator where appropriate or they may be responsible for conducting an investigation, making a finding on the substance of the complaint and recommending an appropriate course of action to Senior Management. Some organisations separate these roles even further by using grievance officers to facilitate the informal dispute resolution process (through conciliation/mediation) and appointing separate investigation officers to conduct inquiries into formal complaints.

Model 3 - Hybrid Approach

In the Human Rights and Equal Opporunity Commission's experience, the most effective grievance procedures (particularly for large organisations) offer a range of options for dealing with sexual harassment. A person can complain to their own supervisor or another manager, Equal Opportunity officer, human resource or industrial relations personnel or designated grievance officers. These staff can assist with the informal resolution of a complaint or they may be selected to investigate formal complaints and recommend a course of action to senior management. Information about these alternatives is provided through a network of trained contact officers. The individual is then able to select the option which bests suits the particular circumstances of their case.

This approach depends on the implementation of a comprehensive training program to ensure that anyone who is responsible for receiving complaints has the necessary knowledge, skills and expertise.

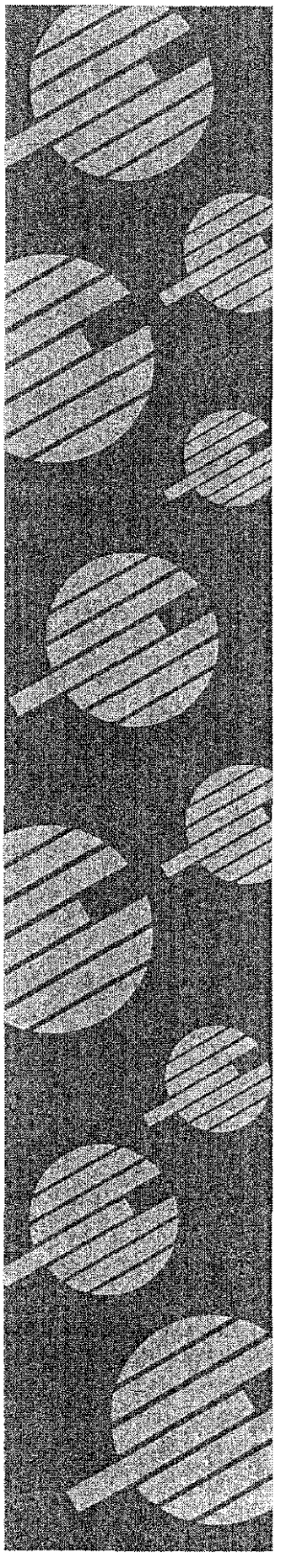
Basic Requirements of a Grievance Procedure

Regardless of the model adopted, any system for dealing with sexual harassment grievances should contain the following basic elements:

- a documented procedure which is easy for employees and students to access and use;
- offers informal and formal options for dealing with complaints;
- guarantees timeliness, confidentiality, fairness and protection from victimisation;
- provides clear guidelines on investigating complaints in accordance with the principles of natural justice;
- is administered by trained personnel;
- provides guidelines on record keeping procedures;
- provides an appeals mechanism.

Guidelines for Investigating a Formal Complaint

It is important to ensure that internal investigations of any complaints are handled with sensitivity and with due respect for the rights of both the complainant and the alleged harasser. The investigation should be seen to be independent and objective. Those carrying out the investigation should not be connected with the allegation in any way, and every effort should be made to resolve complaints speedily ...[2].



Natural Justice

The principles of natural justice (procedural fairness) must be observed when dealing with a formal complaint of sexual harassment. This has become particularly important in cases which could potentially result in dimissal of an employee (see p.65). Although a complex area of law, the basic principles of natural justice are as follows:

- a person who is the subject of a complaint must be fully informed of the allegations against them;
- a person who is the subject of a complaint must be given full opportunity to respond to the allegations and raise any matters in their own defence;
- the allegations should be properly investigated, all parties heard and relevant submissions considered;
- irrelevant matters should not be taken into account;
- a person who makes an allegation cannot be involved in determining it;
- the decision maker must act fairly and without bias.

Responsibility for ensuring that these requirements are met rests with the employer.

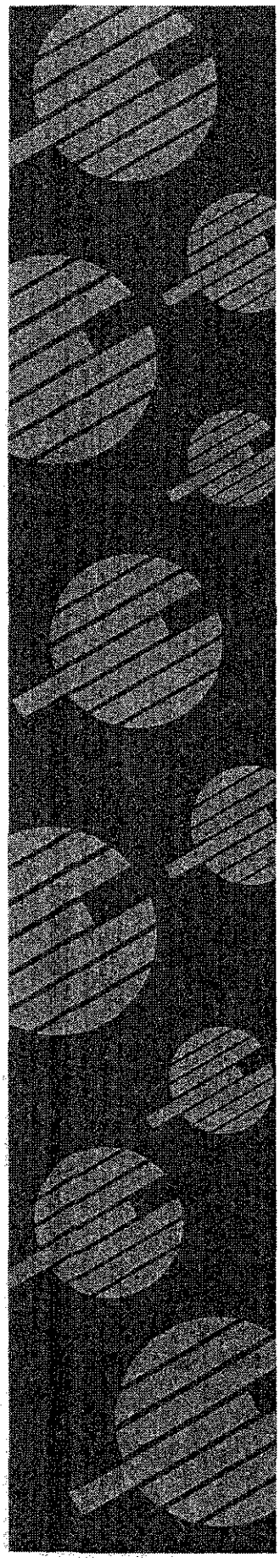
Following prescribed steps

To ensure consistency and fairness, prescribed steps which incorporate the principles of natural justice should be followed when dealing with a formal complaint of sexual harassment. The usual sequence of events is set out below:

Step 1. The complainant is interviewed and the allegations are particularised in writing

The initial interview with the complainant has a number of functions. It gives the investigating officer the opportunity to explain the process that will be followed and answer any questions the complainant may have. The investigating officer may also commence preliminary discussions on the effects of the alleged harassment on the complainant and the outcome they are seeking. This type of information will be of assistance when the investigating officer comes to making their final recommendations.

The complainant should be permitted to bring someone with them to the interview, for example a union official, legal representative, support person or other advocate.



At this first stage of the process, the allegations should be documented in writing. There are two ways this can be done:

- the complainant submits a written complaint after being told what information it should contain, ie. who the complaint is against, what specific act/s of sexual harassment are alleged, when it happened, where it happened and whether there are any witnesses or other evidence which could support their case. If a written complaint has been prepared before the investigating officer sees the complainant, the interview can be used to obtain any additional information that has not been provided and may be relevant; or

- a written statement setting out the allegations is prepared by the investigating officer which is then endorsed and signed by the complainant. It is important that the statement is accurate and uses the complainant's own words as far as possible.

Step 2. The allegations are conveyed to the alleged harasser in full

The alleged harasser must be told the details of the complaint. The alleged harasser should not be "sabotaged" with the complaint at a formal interview. They should be notified that a complaint of sexual harassment has been made against them and be fully informed of their rights before the interview takes place.

The alleged harasser should be permitted to bring someone with them to the interview, for example a union official, legal representative, support person or other advocate.

The interview gives the investigating officer the opportunity to explain the process to the alleged harasser, ensure that they understand the meaning of sexual harassment and clarify any incorrect assumptions.

Step 3. The alleged harasser is given the opportunity to respond

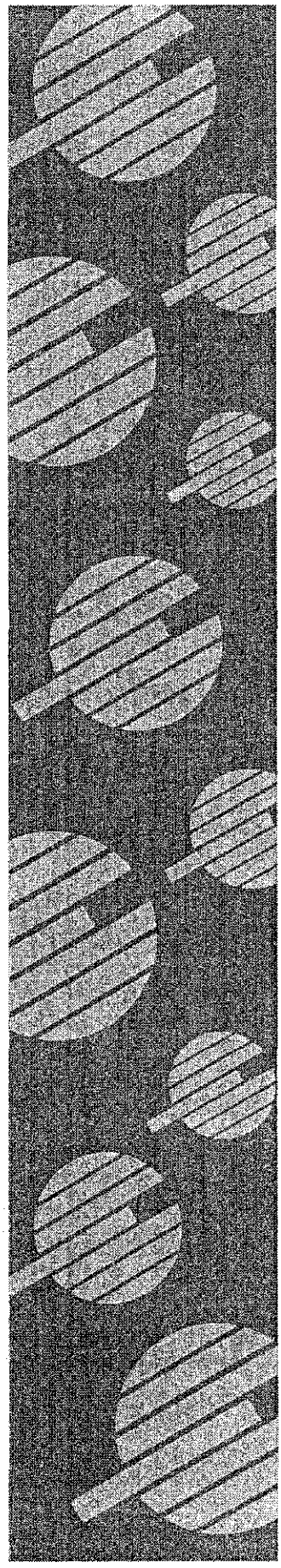
The alleged harasser must be given the opportunity to defend themselves against the allegations and raise any evidence in support of their case.

The alleged harasser may respond by:

- denying the allegations outright. Further investigation will be required; or

- admitting that the behaviour occurred but denying that it amounted to sexual harassment, eg. they claim the conduct was not unwelcome, that the complainant was a willing participant or that the complaint is vexatious or malicious. Further investigation will be required; or

- admitting that the behaviour occurred but claiming they did not realise it could amount to sexual harassment or that it offended the complainant. No further investigation is required and appropriate recommendations are made.



Step 4. If there is a dispute over the facts, statements from witnesses and other relevant evidence is gathered

The investigating officer should interview witnesses or other third parties who can support or deny the allegations. The parties to the complaint should be asked for the names of anyone who may be able to assist their case.

However, there are often no direct witnesses to alleged acts of sexual harassment. A complaint should not be rejected on the grounds that no one saw it happen. The job of the investigating officer is to make a finding on the basis of all available evidence, including any surrounding evidence. The investigating officer should explore the following types of questions:

- Did the complainant discuss the harassment with a medical practitioner, counsellor, family member, friend, co-worker or teacher?
- Did the complainant's supervisor notice a change in their demeanour after the alleged incident? Was there an unexplained decline in performance or requests for transfers or class changes?
- Has anyone else been treated in a similar way by the alleged harasser? Have there been any other complaints?
- Did the complainant keep any diary notes?
- Have the parties presented their evidence in a credible and consistent manner?
- Do personnel records or evidence from the alleged harasser's supervisor reveal any patterns of unacceptable behaviour?
- Is there an absence of evidence where it should logically exist?

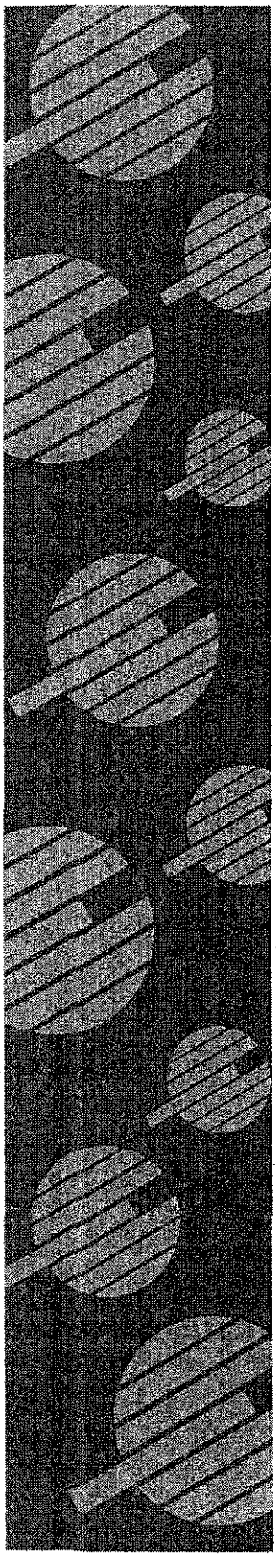
Step 5. A finding is made on whether the complaint has substance

On the basis of all available evidence, the investigating officer decides whether the complaint is substantiated. To ensure consistency with the legal principles which apply to sexual harassment cases, they should be satisfied that the complaint is proved "on the balance of probabilities" ("beyond reasonable doubt" is **not** the appropriate standard).

If the finding is based solely on an assessment of the credibility of the individuals concerned, this should be stated along with reasons for the conclusion.

Step 6. A report documenting the investigation process, the evidence, the finding and a recommended outcome/s is submitted to the decision-maker

There is a wide range of possible outcomes in a sexual harassment case and the investigating officer will need to exercise discretion when determining what is most appropriate. The investigating officer may decide to present a number of options for the decision-maker to consider.



Possible outcomes include:

- counselling of the harasser;
- disciplinary action against the harasser (eg. formal warnings that are recorded on the harasser's personnel file, demotion, transfer, suspension, probation or dismissal);
- disciplinary action against the complainant (if there is strong evidence that the complaint was vexatious or malicious);
- a written apology;
- conciliation/mediation conducted by an impartial third party where the parties agree on a mutually acceptable resolution;
- reimbursing any costs associated with the harassment;
- re-crediting leave taken as a result of the harassment;
- reassessment of papers or results;
- granting special consideration for assessment purposes;
- granting extensions;
- awareness-raising strategies for a particular group or area.

If any type of disciplinary action (other than termination of employment) is imposed on the harasser, they should be formally warned of the consequences that will result if there is a repetition of the behaviour.

Recommended outcomes will depend on factors such as:

- the severity and frequency of the harassment;
- the weight of the evidence;
- the wishes of the complainant;
- whether the harasser could have been expected to know that such behaviour was a breach of policy;
- whether the harassment may have been the result of a misunderstanding;
- the level of contrition;
- whether there have been any prior incidents or warnings;
- other mitigating factors arising from individual circumstances of a case.

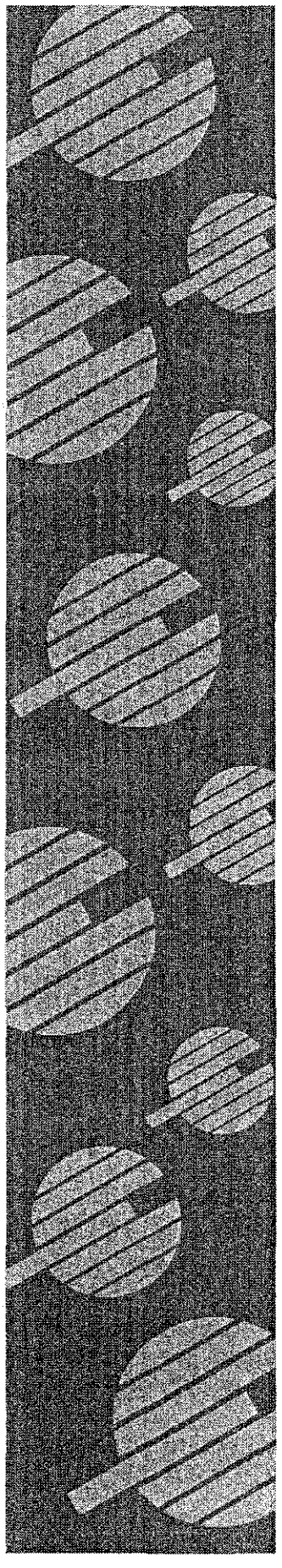
Step 7. Decision-maker implements recommended outcome or decides on alternative course of action

The decision-maker then determines whether the recommended course of action is appropriate. Alternatively, they may decide to impose a different outcome, or implement additional measures, based on the finding and their own assessment of the evidence.

The parties need to be informed of the outcome. If the complaint is substantiated and disciplinary action is decided upon, the harasser will need to be advised of any appeal mechanisms available to them. If the complainant is not satisfied with the outcome, they should be informed of other avenues of redress eg. the Human Rights and Equal Opportunity Commission or

the relevant State or Territory anti-discrimination agency.

Note: The steps outlined above may vary in some circumstances where industrial awards or by-laws contain specific dispute resolution clauses. For example, a formal investigation into alleged misconduct may have to be conducted by a panel, or responsibility for deciding appropriate action may reside with a particular senior manager (such as a Vice-Chancellor). In all cases however the principles of natural justice outlined on p.57 will apply.



Grievance procedures in awards

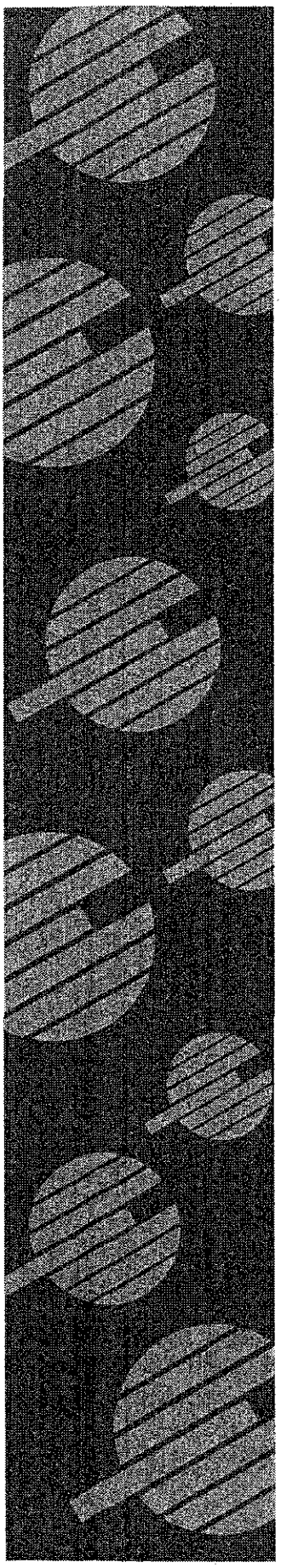
Case Example:

A male university lecturer was accused of sexually harassing two female students, including allegations of sexual intercourse under pressure. The case was dealt with under the *Australian Universities Academic Staff (Conditions of Employment) Award* 1988 which defined serious misconduct and set out detailed procedures for dealing with allegations against academic staff. A committee of investigation was convened in accordance with the Award procedure and a finding was made that the lecturer was guilty of serious misconduct. The committee recommended that the lecturer be dismissed. The recommendation was duly implemented by the Vice-Chancellor.

Judicial Registrar Boulton of the Federal Industrial Relations Court held that the dismissal of the lecturer was unfair and ordered reinstatement and compensation for lost earnings. This was because the committee of investigation:

(a) failed to construct the allegations in accordance with the definition of serious misconduct in the Award;
(b) denied the lecturer natural justice by not informing him precisely of the charges he had to meet;
(c) wrongly allowed the two complainants to give evidence at a common hearing;
(d) failed to properly relate its findings to the charges.

It was also noted that the University's sexual harassment policy did not prohibit consensual sexual intercourse between staff members and students. ***Dr Brian Chambers v James Cook University of North Queensland*, No. QI158 of 1994**



Record Keeping

Importance of keeping records

Educational institutions need to develop clear guidelines on how to document and record complaints and reports of sexual harassment. This will ensure that:

- the incidence of sexual harassment is monitored and particular problems areas are identified and targeted for further awareness-raising strategies. Statistical records will assist the institution to determine whether an incident is isolated or forms part of a pattern;
- informed and fair decisions can be made on the basis of accurate reports;
- evidence on how the institution dealt with the case can be submitted in any subsequent legal proceedings. For example, if a complaint is lodged with the Human Rights and Equal Opporunity Commission or another anti-discrimination agency, records of internal action will be useful in establishing that "reasonable steps" were taken to deal with the harassment and may assist in discharging the institution's liability.

The nature of the documentation to be collected and retained will depend on the level of formality of the complaint.

Records of informal complaints

If informal measures have been used to resolve a situation, only limited records are usually collected. Take, for example, a case where an individual has dealt with the situation themselves after receiving information and advice from a sexual harassment contact officer, manager or other designated officer. What records, if any, should be kept?

There are several competing considerations here. Some record of the contact is required for statistical purposes so that the institution can monitor the number of reports of sexual harassment and target particular problem areas. It also means that the officer can follow-up the case to ensure that the situation has been effectively resolved through informal action and that there have been no repercussions. At a practical level, keeping records also ensures that the officer can account for the amount of work time spent on sexual harassment matters.

However, information provided to an officer will be highly sensitive and will necessarily involve allegations against a particular individual. As no investigation occurs in an informal process, the allegations are likely to remain untested. It is therefore inappropriate to keep potentially damaging records containing unsubstantiated claims against an alleged harasser, particularly if they have no knowledge that the record exists and have not been given the opportunity to refute it.

A possible way of balancing these considerations is to develop a standard form which can be used for recording essential information without compromising an alleged harasser's rights. The name of the alleged harasser should not be recorded on the form, but the particular department or section where the incident occurred should be noted for monitoring purposes.

Recording the name of the individual who has been harassed should be optional. In some cases, an individual will want their name recorded so that if formal action is required at a later stage, they can show that informal attempts were made to resolve the situation. Alternatively, an individual

may be reluctant for any record to be retained which identifies them personally. As you do not want to discourage anyone from seeking help and advice, recording an individual's name on the form should only ever be done with their explicit consent. A brief summary of the alleged incident along with an agreed course of action should also be recorded. This means that the officer can follow up the case to ensure that informal measures have effectively resolved the situation.

If a manager has taken informal action on an individual's behalf, a brief diary entry noting the incident and the action taken should suffice. If the complaint is subsequently formalised (either internally or externally), this can be used to demonstrate that steps were taken to deal with the matter.

Records of formal complaints

If a formal complaint is lodged, the documentation collected is likely to be substantial and will include statements provided by the parties, records of interview with the investigation officer, personal notes and reports. All this information will be highly sensitive and strict guidelines are required to ensure that it is kept confidential and is not used for improper purposes.

The investigating officer will need to document all interviews with the complainant, alleged harasser and any witnesses. Records of interview should contain as much relevant, factual information as possible - times, dates, details of specific incidents and frequency of occurrences. It is desirable that the interviewees' own words are used as far as possible.

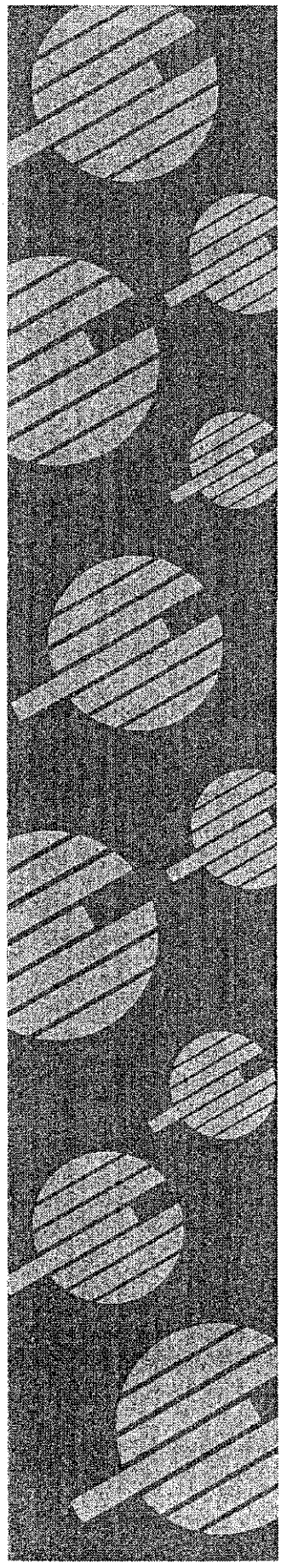
The parties to a complaint and any witnesses should be given the opportunity to peruse, correct and endorse their record of interview. The interviewee should be provided with a copy of their own record of interview if requested. To avoid any possibility of collusion, they should not be provided with anyone else's statement or record of interview.

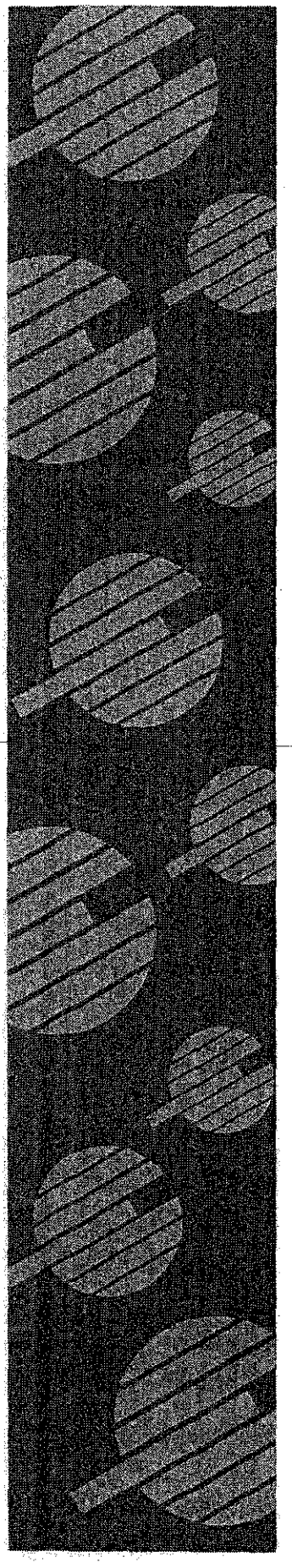
If a formal complaint against an employee is found to be substantiated, a summary of the complaint, the outcome and the action taken should be recorded in their personal file. This can be removed after a reasonable period to be determined by the employer if there has been no repetition of the behaviour. All other documentation relating to the investigation should be kept in a sealed, confidential file which can be accessed only with the authority of a specified senior management representative.

Once a case is finalised, records will still need to be retained for a reasonable amount of time. If a complaint is subsequently lodged with HREOC or a State or Territory anti-discrimination agency, the institution will need to access information relating to the complaint in order to demonstrate that steps were taken to deal with the matter. Evidence of any internal action that was taken may assist in reducing liability. Legislation such as Freedom of Information legislation may also require records to be retained for a certain period.

Security

Records of sexual harassment complaints will invariably contain highly sensitive and potentially damaging personal information. It is therefore imperative that they are protected by reasonable security safeguards. For example, any files or reports associated with an investigation should be kept in locked storage. Care should be taken when using technologies such as E-mail or facsimiles to ensure that information is not inadvertantly transmitted to the wrong person. Access should be restricted to authorised personnel





only. Records should not be placed on general or open access files.

Defamation

Defamation is an issue that often arises in sexual harassment complaints because of the potential damage that can be inflicted on a person's character, reputation and standing[3]. You may find that an individual is reluctant to pursue a complaint because they have unfounded fears of being sued. Alternatively, an alleged harasser who claims to have been falsely or vexatiously accused of sexual harassment may indicate that they intend to commence an action for defamation.

Protection of the parties

Defamation law is concerned with protecting a person's reputation in the eyes of others. It is therefore not defamatory for an individual to confront a harasser directly (either in person or by letter) to alert them to the fact that their behaviour is unwelcome. Private communications of this nature do not damage reputation.

Nor will it be defamatory for an individual to make a complaint to a person who has a legitimate and genuine interest in knowing about the incident. As long as the complaint is made in good faith through the proper channels it is unlikely to be defamatory.

This protection will be lost if an individual makes a complaint in bad faith without genuinely believing it to be true, is motivated by ill-will or malice or indiscriminately broadcasts the allegations.

The parties to a complaint should be warned of the legal risks associated with disclosing the allegations or counter allegations to all and sundry. They should be advised to maintain confidentiality and to discuss the complaint only with those with official responsibility for dealing with it.

Protection of designated personnel

Anyone with a recognised genuine interest in the resolution or investigation of a complaint of sexual harassment (either informal or formal) is protected by the defence of qualified privilege.

Statements which would ordinarily be defamatory may be made by a person in the performance of a moral, social or legal duty to another person who has a corresponding duty to receive that information. As sexual harassment is unlawful, a person who is reponsible for dealing with complaints can discuss the allegations where it is required for the performance of their duty.

Managers, sexual harassment contact officers, investigation officers and counsellors should maintain confidentiality at all times. Information concerning the complaint should only be discussed with other authorised personnel involved in the particular case. They should also take reasonable steps to deal with any gossip or rumours that may be circulating about the complaint.

Termination of Employment

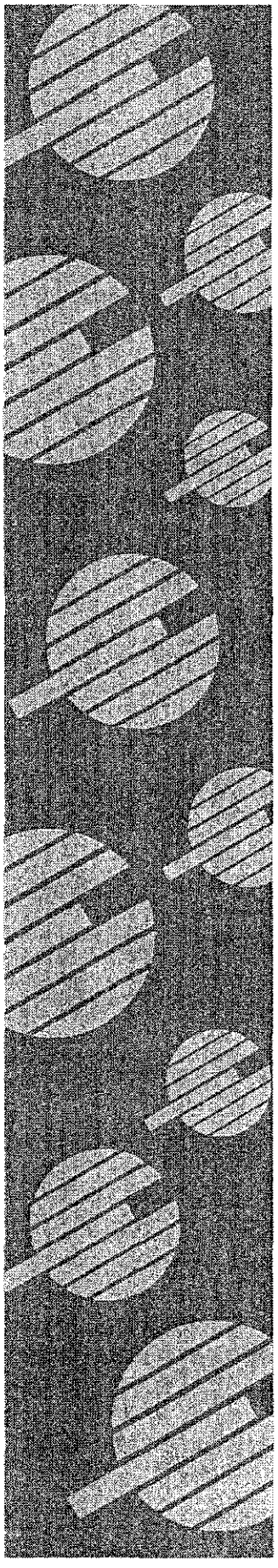
Employers have specific obligations under State and Federal industrial laws in relation to termination of employment. Following major amendments to the Federal *Industrial Relations Act* which commenced in March 1994, most Australian workers are now entitled to a minimum level of protection from "harsh, unjust or unreasonable" dismissals. The termination provisions are intended to give effect to internationally recognised standards in the Termination of Employment Convention and the Termination of Employment Recommendation, both of which are scheduled to the *Industrial Relations Act.*

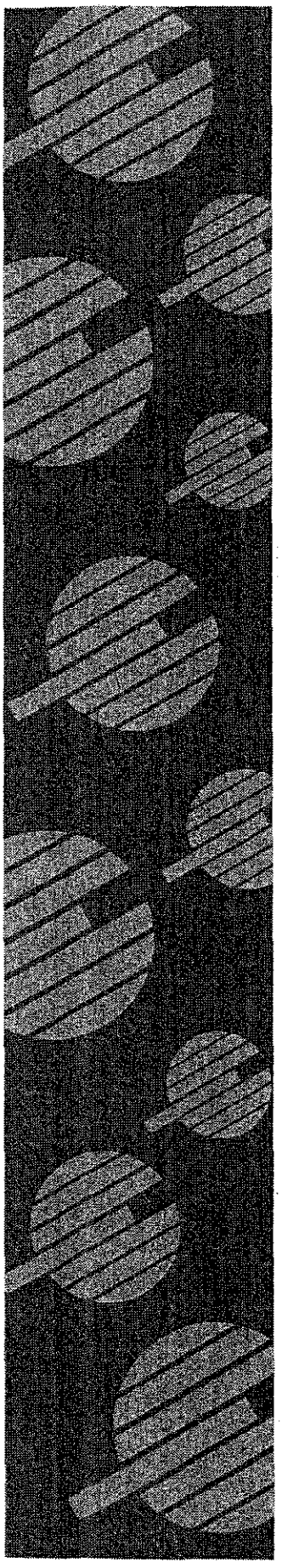
The legislation does not prevent an employer from dismissing an employee guilty of serious misconduct. Rather, it provides specific safeguards to ensure that dismissals are based on valid reasons and are conducted in a fair manner. Employment cannot be terminated because of work performance or conduct unless the employee has been given the opportunity to defend themselves against the allegations.

Any process which could lead to a dismissal must be conducted in a fair and impartial manner. There have been many cases where individuals have been reinstated or compensated because the principles of natural justice (procedural fairness) were not observed in the termination proceedings. Natural justice is discussed on p.57.

Dismissal is a possible outcome in a sexual harassment case. It is therefore important that any disciplinary action which could lead to dismissal is consistent with the obligations in the *Industrial Relations Act* in order to minimise the risk of employer liability for unjust dismissal. Measures that employers can take to do this include:

- defining sexual harassment as a form of misconduct which could result in termination in policy documents, codes of conduct and/or employment contracts;
- effectively communicating these documents to employees;
- ensuring that policies and codes on expected standards of conduct are enforced consistently;
- informing a person accused of sexual harassment of the precise details of the allegations;
- giving a person accused of sexual harassment the opportunity to defend themselves;
- giving a person accused of sexual harassment the opportunity to raise any mitigating factors;
- giving due consideration to any mitigating factors;
- giving a person accused of sexual harassment the right to be represented during the inquiry process;
- conducting a thorough investigation;
- interviewing any witnesses that can reasonably be expected to assist with the inquiry;
- conducting all interviews separately so there is no possibility of collaboration or undue support for a particular version of events.





Amendments to the *Industrial Relations Act* which came into effect in January 1996 may give employers more leeway in dismissal cases where procedural fairness was not strictly observed. When deciding whether to grant a remedy for harsh, unjust or unreasonable termination, the Industrial Court now has a discretion to consider all the circumstances of a particular case. This may mean that a termination is upheld where warranted, even though procedural fairness may not have been strictly observed.

Termination of employment

Case Example 1:

An employee was summarily dismissed for using company records to telephone women staff at home. He was reinstated and compensated because the employer had not observed procedural fairness. The employer had failed to communicate the specific allegations to the employee, had not given him an adequate warning over this particular incident (although he had received a prior warning for using computer records to contact a female passenger), and had never made it clear that misconduct of this nature would amount to a breach of company policy warranting dismissal. ***Haines v Qantas Airways Ltd* (No. NI 663 of 1994)**

Case Example 2:

A bank employee was dismissed over a single incident of sexual harassment that occurred at a work party. He had "goosed" a female co-worker whilst she was taking a photograph. The harasser lodged an unfair dismissal claim on the ground that he had been denied substantive and procedural fairness.

The Chief Justice of the Industrial Court held that the dismissal was justified. The allegations had been adequately and appropriately investigated and dismissal was the only available option in the circumstances given the specialised nature of the harasser's skills (which meant that transfer was not an option) and the seriousness of the misconduct (which also amounted to a criminal offence).

An important aspect of the case was that the bank had widely promoted its sexual harassment policy. It was always clear that sexual harassment would amount to a breach of company policy and would not be tolerated. It appears that the policy operated as a general warning to employees about expected standards of conduct. In effect, it put them on notice that compliance with the policy was a condition of their employment.

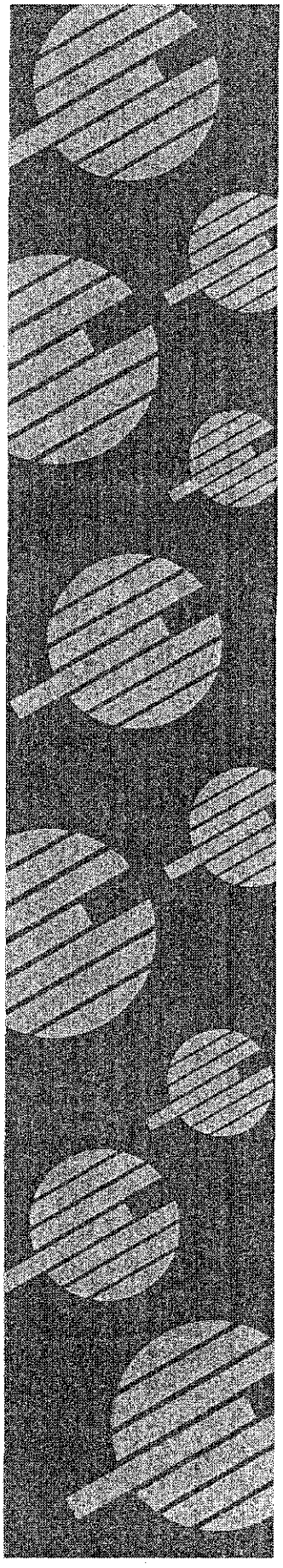
The case confirms that employers must take a firm stand against sexual harassment. In the words of the Chief Justice, "This was a serious act of sexual harassment...It is important that employers take a strong attitude about sexual harassment of employees." ***Thomas v Westpac Banking Corporation* No. NI1241 of 1994, IRC No. 339/95. See also (1995) EOC 92-742.**

Note: The Federal coalition government has proposed major changes to the current unfair dimissal regime in its *Workplace Relations and Other*

Legislation Amenment Bill 1996. However, it still appears that procedural fairness will be a relevant consideration in determining whether a termination was harsh, unjust or unreasonable. The Industrial Relations Commission must have regard to factors such as:

- whether there was a valid reason for the termination related to capacity, conduct or operational requirements;
- whether the employee was notified of that reason;
- whether they were given any opportunity to respond;
- whether they were warned about unsatisfactory performance;
- any other relevant matters.

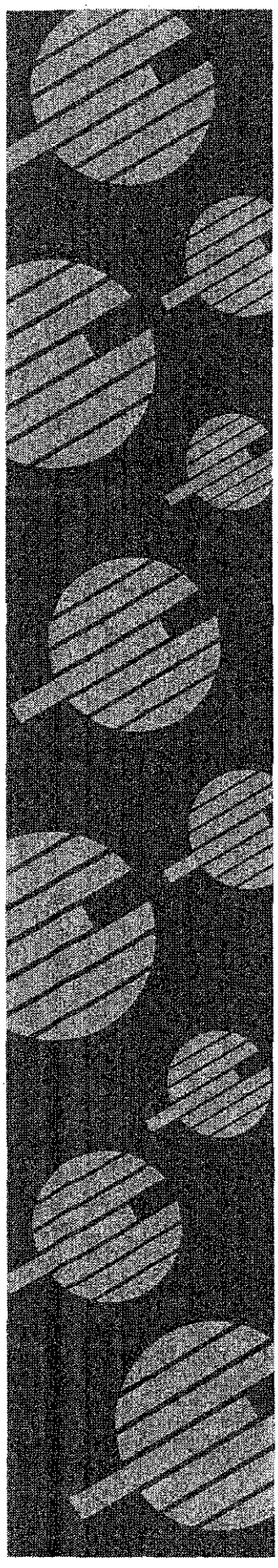
The categories of employees who will be protected by the proposed legislation are more limited. At the time of writing the Bill was before a Senate Committee, which is due to report in August 1996.



[1] This section draws on a paper titled *Grievance Procedures* by Corinne Carter, Senior Education Officer, NSW Anti-Discrimination Board. The paper is reproduced in the CCH Australian and New Zealand Equal Opportunity Law and Practice at 14-800.

[2] European Commission Code of Practice, Clause 5.B.11

[3] This section is adapted from Appendix B Public Service Commission, Personnel Management Guidelines *Eliminating Sexual Harassment*, AGPS, Canberra, 1990.



8. Complaints under the Sex Discrimination Act

Lodging a Complaint

Complaints under the *Sex Discrimination Act* can be lodged by:

- individuals on their own behalf;
- individuals on behalf of themselves and others with the same complaint;
- two or more people, on their own behalf or on behalf of others also;
- members of a particular class of people, on behalf of the class (called "representative complaints");
- a trade union on behalf of one or more of its members.

The person making the complaint must be an aggrieved party, unless it is a trade union acting on behalf of a member.

Complaints must be made in writing. The letter of complaint, which needs to be signed by the complainant, should include the following information wherever possible:

- name and contact details of the complainant;
- name and contact details of the person and/or organisation who is the subject of the complaint (the respondent/s);
- the type of discrimination or harassment being alleged;
- where and when the alleged discrimination or harassment occurred;
- names of any potential witnesses or third parties who could provide relevant information;
- details of any action that may have already been taken on the complaint (eg. with management, union etc);
- copies of any relevant documents.

A complaint will not be disregarded if it does not contain all the above information, but it does speed up the process if it can be provided at the outset.

Complaints should be made within 12 months of the harassment or discrimination occurring. If a complaint is made outside this timeframe, the Sex Discrimination Commissioner has a discretion not to accept it unless there is good reason.

Investigation

If the complaint is accepted, it is allocated to a Complaints Officer who notifies the respondent/s of the allegations and asks them to provide their response to the allegations.

If there is a dispute about the facts, the Complaints Officer will investigate the complaint and gather any supporting evidence (eg. statements from witnesses, relevant documents etc).

Conciliation

After all relevant information has been obtained and discussed with the parties, efforts will be made to resolve the complaint by conciliation. This usually involves holding a conciliation conference (either voluntary or compulsory) where the parties are given the opportunity to settle the complaint on mutually agreed terms.

A Complaints Officer presides over the conference and assists the parties to explore viable options for resolution. They cannot impose an outcome and must observe the principles of natural justice. The Complaints Officer is required by law to maintain confidentiality.

Anything said or done during conciliation is not admissible in any subsequent legal proceedings. However, evidence collected during the investigation phase is admissible.

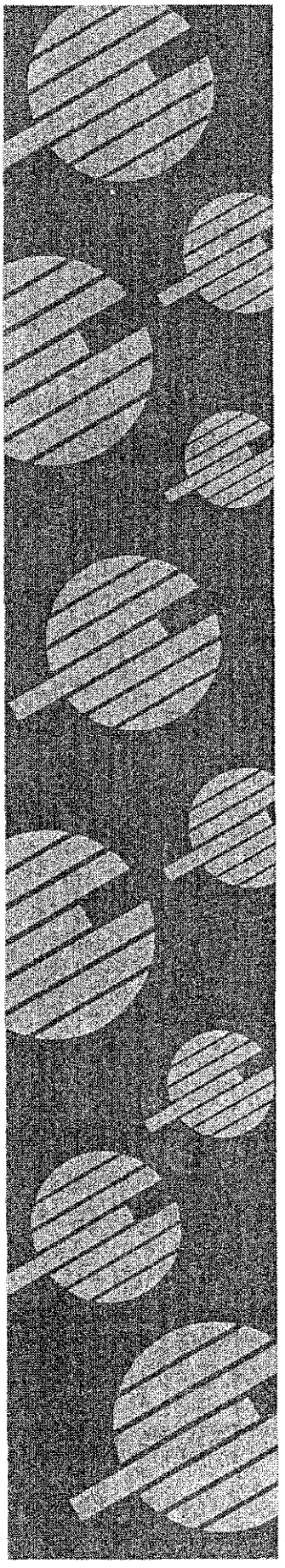
Conciliation can result in a variety of outcomes such as compensation, an apology, promotion, provision of a reference, introduction of equal opportunity or harassment policies, re-crediting leave, staff training, counselling or disciplinary action.

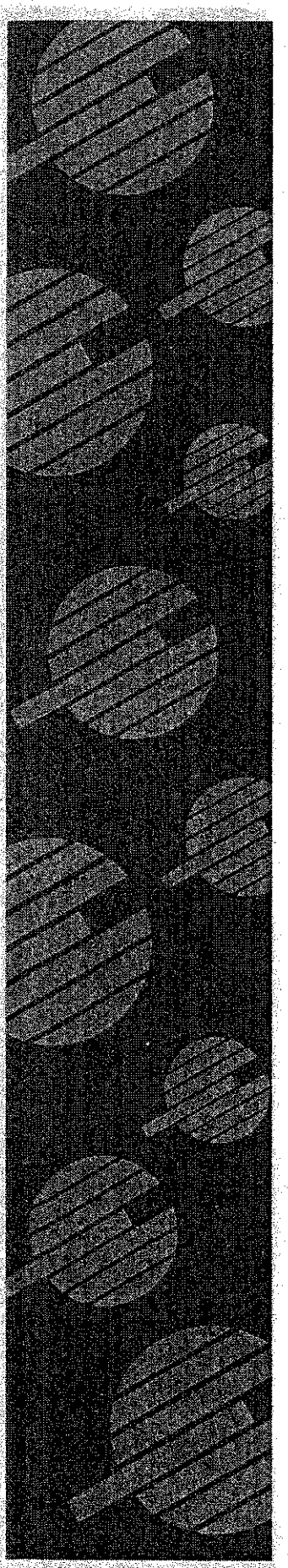
Rejecting Complaints

At any stage of the process, the Sex Discrimination Commissioner can refuse to inquire into a complaint or discontinue an inquiry which has already commenced if:

- she is satisfied that the act complained of is not unlawful;
- the complainant/s does not desire an inquiry;
- the act occurred more than 12 months ago;
- she forms the view that the complaint is frivolous, vexatious, misconceived or lacking in substance.

If a complaint is declined because the Commissioner believes that no unlawful act has occurred, the complainant still has the right to request that the matter be referred to a hearing for determination. If the complaint is declined on any other ground, the complainant can request that the decision be reviewed by the President of the Human Rights and Equal Opporunity Commission. The decision of the President is final.





Public Hearings

If conciliation has failed, or if the case is not appropriate for conciliation, it can be referred to an inquiry (also called "hearings") conducted by the Human Rights and Equal Opportunity Commission for a decision. Hearings have the following features:

- like a court, they are usually open to the public and the press. However, private hearings are possible and sometimes orders are made to prevent publication of the complainant's and/or respondent's identity or the evidence;
- the hearing is presided over by the President of the Human Rights and Equal Opportunity Commission or an Inquiry Commissioner. A Commissioner is not permitted to preside over an inquiry if the complaint involves their portfolio area. For example, the Sex Discrimination Commissioner cannot hear any complaint which has been made under the *Sex Discrimination Act*;
- any information about attempted conciliation of the complaint is not admissible at the hearing;
- the Commission is not bound by the rules of evidence and the process is meant to be conducted with as little formality and technicality as possible;
- parties must get permission to be legally represented at a hearing;
- evidence can be taken under oath, witnesses can be summoned to appear and parties can be examined, cross-examined and re-examined;
- after holding an inquiry, a range of decisions can be made. These include an award of compensation, dismissing the case, a declaration that the complainant should be hired, re-hired or promoted, a declaration that unlawful conduct has occurred and that it should not be repeated or some other appropriate redress.

The procedure for hearing complaints is likely to change following a major decision handed down by the High Court in 1995. The implications of this case are discussed in the section on enforcement on p.73.

HREOC Practice Note 1
Nature of the Inquiry

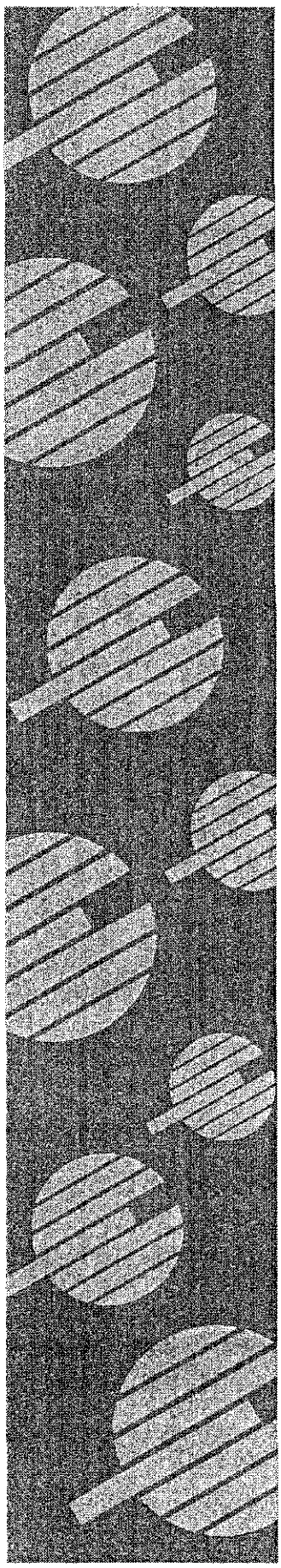
An inquiry by the Human Rights and Equal Opportunity Commission is not an adversarial proceeding. It is more properly viewed as an informal proceeding in which the parties do their best to help the Hearing Commissioner discover the true facts and identify where the answer to an issue lies. Experience has shown, however, that inquiries are most successful in achieving these ends when proceedings generally follow the process of examination, cross-examination and re-examination of witnesses.

Each of the Acts administered by the Commission provides that for the purposes of the inquiry the Commission is not bound by the legal rules of evidence. In practice, however, the rules of evidence are normally followed so far as is helpful to assist the fair conduct of the matter. The Commission is required to conduct the inquiry with as little formality and technicality and with as much efficiency as justice permits.

The Commission may inform itself on any matter in such an inquiry as it thinks fit; for example, the Commission may take evidence by telephone, or accept the evidence of a previous hearing on a similar matter, or consider textbooks, articles or cases from interstate and foreign jurisdictions. However, only evidence relevant to the issues in the inquiry will be received by the Commission.

Onus of Proof

The onus of proving unlawful discrimination or harassment rests with the complainant. For a complaint to be upheld, the case must be proven on the balance of probabilities. In a number of cases, Inquiry Commissioners have applied the principles relating to the standard of proof set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336 which says that persuasive proof of the complainant's allegations is required of a degree that reflects the seriousness of the accusation.



Damages

Although the Human Rights and Equal Opportunity Commission has the power to grant a range of different remedies, the most common outcome in cases upheld at a public hearing is monetary damages.

Section 81(1)(b)(iv) of the *Sex Discrimination Act* states that the Human Rights and Equal Opportunity Commission can make "a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent." The *Sex Discrimination Act* offers no further guidance on how damages should be calculated, however some general principles have developed through the case law. In general, they are the same as those which apply to tort law.[1]

In the earlier cases, a global sum of damages was usually awarded to compensate the complainant for any economic and emotional loss. It is now becoming more common for damages to be itemised under specific heads. These include:

- lost income or wages

This applies in cases where the complainant may have resigned or was dismissed because of the harassment and expected earnings have not been received. Damages are usually calculated to cover the period between separation from employment and the date of commencement in a new job or some other event. The amount awarded may be offset against any unemployment benefits the complainant received.

- lost income earning capacity

This covers lost earning capacity because of reduced employment opportunities. In the case of W v Abrop Pty Ltd and Schoonens[2]. The complainant was awarded damages because her fear of working for a man reduced the range of employment opportunities available to her.

- cost of medical care or psychological counselling

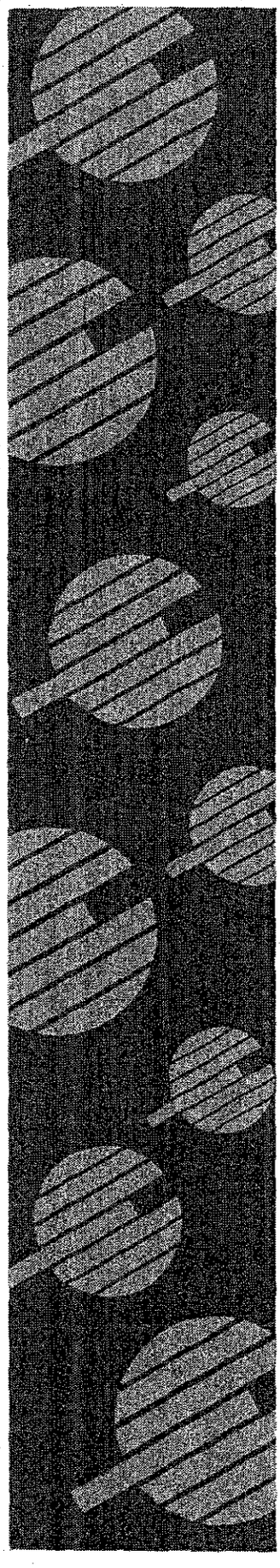
This covers any medical expenses that a complainant incurred as a result of the harassment.

- future treatment costs

An amount may be included to cover the cost of future counselling sessions or medical treatment that the complainant may require.

- emotional injury ("general" damages)

In sexual harassment cases, an amount is usually included to cover injury to feelings, humiliation, hurt, pain and suffering, loss of dignity etc. A component may also be included to cover loss of enjoyment of life.



- lost opportunity costs

This covers things such as lost promotional opportunities and future career opportunities due to the ongoing impact of the harassment.

- legal costs

In some cases a small amount has been awarded towards the complainant's legal costs.

- interest

An award of interest up to the date of the decision may also be awarded to cover the delay in payment of money owed to the complainant.

Damages which are intended to "punish" the respondent for engaging in unlawful conduct (called punitive or exemplary damages) are not available. Punitive damages are not compensatory in nature and therefore do not fall within the terms of s81(1)(b)(iv).

Damages in federal sexual harassment cases have tended to be very moderate, lagging behind compensation awarded under some of the State anti-discrimination laws. In the majority of cases the complainant has received less than $8000. However, there has recently been a substantial increase in amounts of financial compensation as illustrated by the table on the following page.

Table F: Highest annual award of damages in Federal sexual harassment cases since 1986

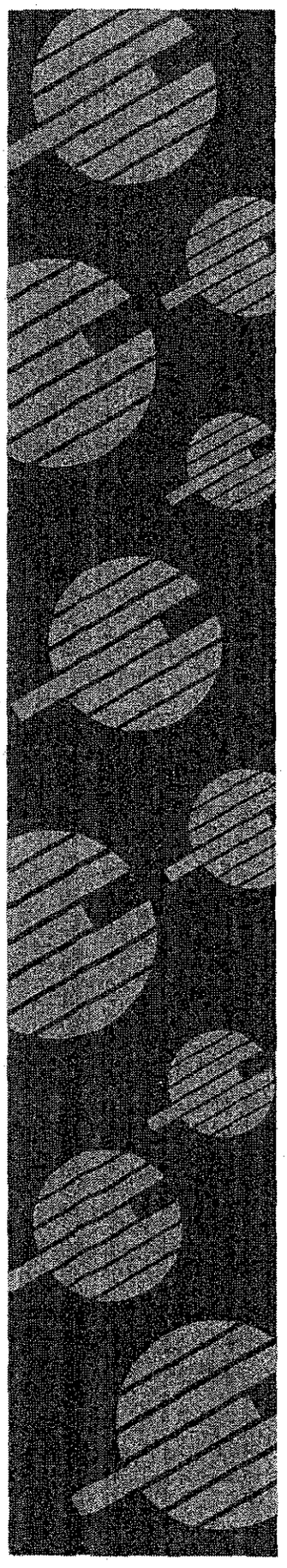
Year	Case Name	Amount
1986	Aldridge v Booth	$7500
1987	Kiel v Weeks	$5500
1988	Bennett v Everitt (two complainants)	$7000 & $6000
1989	Freestone v Kozma	$5500
1990	all cases dismissed	nil
1991	A v Caboolture Shire Council	$6020
1992	Henderson v Miller	$8000
1993	Gordon v Davis	$12 000
1994	Watkins v Fryer	$35 000
1995	Dobrovsak v AR Jamieson Investments Pty Ltd & Alan Jamieson	$21 840
June 1996	Tenuyl v Delaney & Calcium Nominees Pty Ltd	$23 285

In addition, two awards of $20 000 and one of $19 000 were made in Federal sexual harassment cases during 1994/5 and an award of $22 599 was made in May 1996.

Enforcement

Prior to January 1993, the Human Rights and Equal Opportunity Commission had no power to enforce its own decisions. If a respondent refused to comply with a particular order, the complainant (or the Human Rights and Equal Opportunity Commission on behalf of the complainant) would have to inititate separate enforcement proceedings in Federal Court. The whole case had to be heard again and the cost, stress and inconvenience involved placed a heavy burden on a complainant.

In order to overcome this cumbersome state of affairs, more streamlined enforcement procedures were introduced in late 1992. Under the new provisions, all the Human Rights and Equal Opportunity Commission decisions were registered by the Federal Court. The respondent was given



21 days to indicate whether they would seek a review of the Human Rights and Equal Opportunity Commission decision. If no review application was received, the decision automatically became a binding and enforceable order.

The revised enforcement procedures came under challenge in the High Court case of *Brandy v Human Rights and Equal Opportunity Commission and ors*[2]. The plaintiff in the case, Mr Harry Brandy, had been a respondent in complaint under the *Racial Discrimination Act*. The complaint was upheld and Brandy was ordered to pay $2500 damages. Mr Brandy challenged the decision on the ground that the new registration and enforcement process was unconstitutional.

In a unanimous decision handed down on 23 February 1995 the High Court declared that the registration process was invalid. It held that enforcement of decisions through registration amounted to an exercise of judicial power. As the Human Rights and Equal Opportunity Commission was not constituted as a court under the Australian Constitution, it could not legitimately exercise such powers.

As a result, the old system has been restored on an interim basis while the government explores a more satisfactory longterm solution. At the time of writing, the most likely outcome is that all Federal discrimination cases will be heard from the outset by a new Human Rights Registry in the Federal Court.

Note: The High Court's decision has no affect on determinations made against Commonwealth government departments or agencies. The *Sex Discrimination Act* provides that they must comply with any determination, although an application for review can be made to the Adminstrative Appeals Tribunal with the permission of the Minister.

Victimisation

Section 94 of the *Sex Discrimination Act* prohibits the victimisation of anyone connected with a complaint. It is unlawful to subject the following categories of people to any detriment:

- a person who has lodged, or is considering lodging a complaint under the *Sex Discrimination Act*;
- a person who has provided information or documents to the Human Rights and Equal Opportunity Commission;
- a person attending a conciliation conference or appearing as a witness.

If a person is victimised because of a complaint, there are two possible options for dealing with it. The matter can be dealt with as a criminal offence or, alternatively, a complaint of victimisation can be made through the Human Rights and Equal Opportunity Commission's usual complaint process.

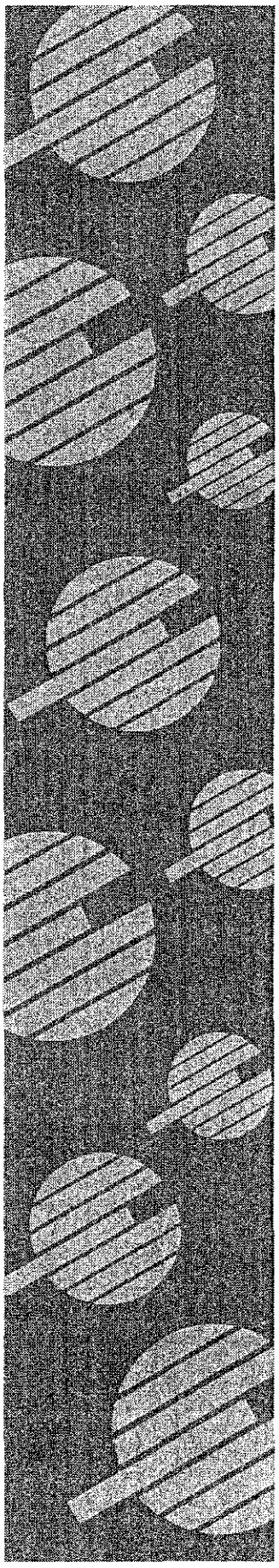
Protection from Civil Action

Section 111 (2) of the *Sex Discrimination Act* states that legal action for any loss, damage or injury cannot be taken against a person if they have:

- made a complaint to the Human Rights and Equal Opportunity Commission;
- made a submission, provided documents or information or given evidence in relation to a complaint.

This provision has a protective function. It is not uncommon, for example, for a person alleging sexual harassment to be threatened with a counter action for defamation. In the experience of the Human Rights and Equal Opportunity Commission, this can be used as a tactic to pressure the person into withdrawing their allegations. Section 111(2) aims to ensure that individuals are not discouraged by threats, fear or intimidation from making a complaint or providing assistance.

However, it should be noted that it is an offence under the *Sex Discrimination Act* to provide false or misleading information. The penalties for doing so are a fine of $2500 or three months imprisonment for an individual or a fine of $10 000 for an organisation.



Some common questions...

- ***Does it cost anything to make a complaint?***

No. There is no charge for having a complaint investigated, conciliated or heard by the Human Rights and Equal Opportunity Commission.

Lawyers are not necessary at any stage of the process. However, if a party wants independent legal advice or wishes to be represented by a lawyer they are required to pay their own expenses.

If a complaint is is referred to a public hearing, each party is responsible for their own legal costs. Although the Human Rights and Equal Opportunity Commission has no power to award costs to either party, it can make a recommendation to the Attorney-General that financial assistance be provided to help cover expenses, such as legal fees, childcare or travel.

Parties can also independently apply for legal aid at any stage.

- ***Can a complaint be made in a language other than English?***

Yes. The Human Rights and Equal Opportunity Commission will arrange and pay for translation.

- ***What type of support services does the Human Rights and Equal Opportunity Commission provide?***

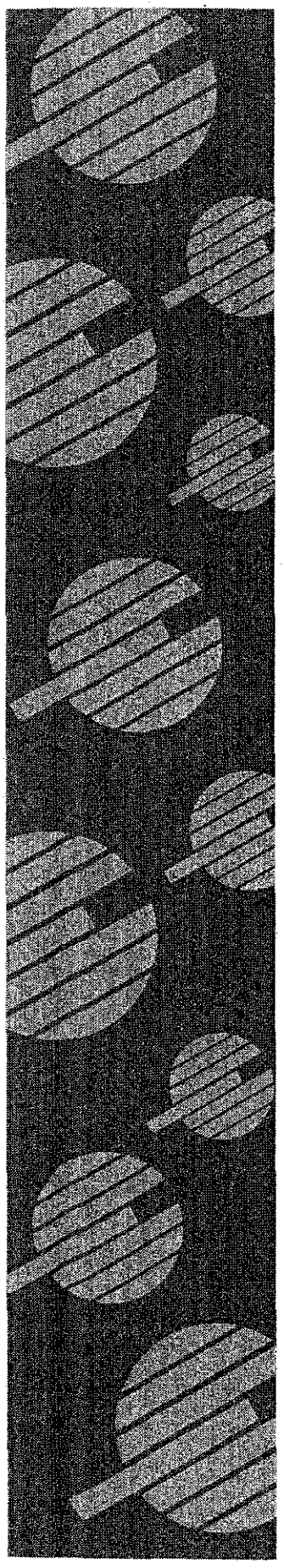
If a party to a complaint needs to use an interpreter, hearing loop, Auslan interpreter or other support service the Human Rights and Equal Opportunity Commission will make the necessary arrangements.

- ***Where can complaints be lodged?***

Complaints under the *Sex Discrimination Act* can be lodged with the Human Rights and Equal Opportunity Commission offices in Sydney, Brisbane, Cairns, Rockhampton, Hobart, Canberra and Darwin. *Sex Discrimination Act* complaints can also be lodged with the State equal opportunity agencies in Melbourne, Perth and Adelaide which have co-operative arrangements with the Human Rights and Equal Opportunity Commission. See Appendix C for contact details.

- ***What if a person is not sure whether their complaint is legitimate?***

All the Human Rights and Equal Opportunity Commission offices have Enquiries Staff who can provide information and confidential advice concerning a potential complaint. You can either telephone or visit in person (it's advisable to make an appointment if possible). See Appendix C for contact details.



- ***How much time does a person have to make a complaint?***

Complaints should be lodged within twelve months of the discrimination or harassment occurring. However, the Sex Discrimination Commissioner has a discretion to accept complaints outside this timeframe if there are good reasons to do so.

- ***What is needed to prove a complaint?***

Unlawful discrimination and sexual harassment are civil offences. This means that a lower standard of proof is required than for criminal offences. Under the *Sex Discrimination Act*, a complaint only needs to be proved "on the balance of probabilities" and not "beyond reasonable doubt."

As the formal rules of evidence don't apply, a range of evidence can be considered by the Human Rights and Equal Opportunity Commission to assist its decision. This is particularly important in sexual harassment cases where there are usually no witnesses. Some decisions have been based on the comparative credibility of the parties alone, in the absence of any independent evidence.

- ***How long do complaints take to resolve?***

The length of time a complaint will take depends on factors such as delays, case loads, the complexity of the investigation and the level of co-operation from the parties. Some matters can be resolved in a few weeks while others may take well over 12 months. If the case is not conciliated and is referred to a hearing, it usually takes around three months before proceedings commence.

- ***Are names made public?***

The investigation and conciliation stage is confidential and it is an offence for the Human Rights and Equal Opportunity Commission staff to publicly discuss any details of the complaint or the identities of those involved.

However, if the case is referred to a public hearing, names of the parties will be mentioned at the hearing, may be reported by the media and will be set out in the final decision which is publicly released. If requested to do so, the Inquiry Commissioner may make orders suppressing the names of the parties.

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[1] In *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) EOC 92-250 at p.77,395 Justice Lockhart of the Federal Court said,

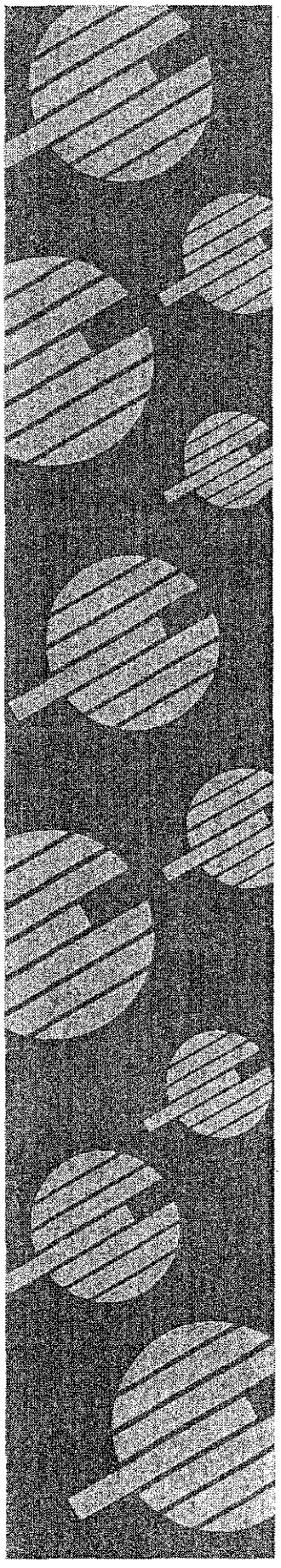
> *Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most forseeable cases be a sensible and sound test.*

[2] Unreported decision of the Human Rights and Equal Opportunity Commission, 27 May 1996

[3] (1995) EOC 92-662

Appendix A

Summary of sexual harassment provisions in State and Territory anti-discrimination laws



South Australia

Equal Opportunity Act 1984

Section 87(11) makes the following acts unlawful if they make a person feel offended, humiliated or intimidated:

- an unsolicited and intentional act of physical intimacy;
- demands or requests (whether directly or by implication) for sexual favours;
- making remarks with sexual connotations about a person on more than one occasion.

The Act also requires that it was reasonable, in all the circumstances, for the person subjected to the behaviour to feel offended, humiliated or intimidated.

Sexual harassment is unlawful in various circumstances including:

- harassment by an employer;
- harassment by a fellow employee;
- harassment of students by employees of an educational authority.

Harassment of a student by a fellow student is not covered by the Act.

Western Australia

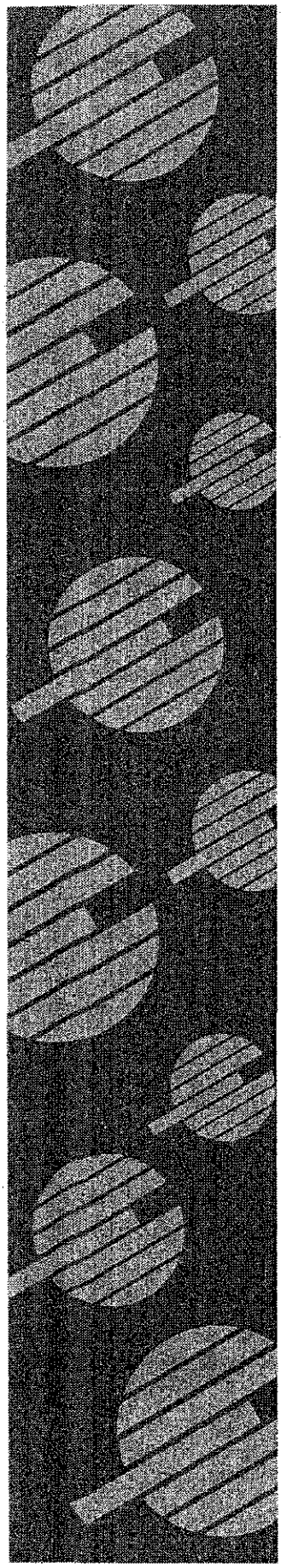
Equal Opportunity Act 1984

The definitions of sexual harassment in employment and education are found in sections 24(3) and 25(2) respectively. In both areas sexual harassment is defined as:

- an unwelcome sexual advance;
- an unwelcome request for sexual favours;
- other unwelcome conduct of a sexual nature.

The Act also requires that a person who is harassed either:

- has reasonable grounds for believing that they will be disadvantaged if they reject the advance, refuse the request or object to the conduct; or
- is actually disadvantaged in any way because of their rejection, refusal or objection.



The definition of sexual harassment includes making verbal or written statements of a sexual nature either directly to the person or in their presence.

Sexual harassment is unlawful in various areas of activity including:

- employment;
- education (but only covers sexual harassment of students by staff).

Victoria

Equal Opportunity Act 1995

The new *Equal Opportunity Act* which came into effect in 1995 contains the same definition of sexual harassment as the Federal *Sex Discrimination Act*. Sexual harassment is defined in section 85(1) as:

- an unwelcome sexual advance;
- an unwelcome request for sexual favours; or
- other unwelcome conduct of a sexual nature.

The definition also contains a "reasonableness" test. A reasonable person, having regard to all the circumstances, must have anticipated that the person subjected to the behaviour would be offended, humilated or intimidated.

Section 85(2) says that "conduct of a sexual nature" includes:

- subjecting a person to any act of physical intimacy;
- making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence;
- making any gesture, action or comment of a sexual nature in a person's presence.

The Act now prohibits sexual harassment in a broad range of circumstances including:

- employment (by employers and employees and in "common workplaces". This covers situations where the parties may be working in the same place but have different employers);
- education (by employees, members of the educational authority administering the institution or students. There is no age requirement applied to students.).

New South Wales

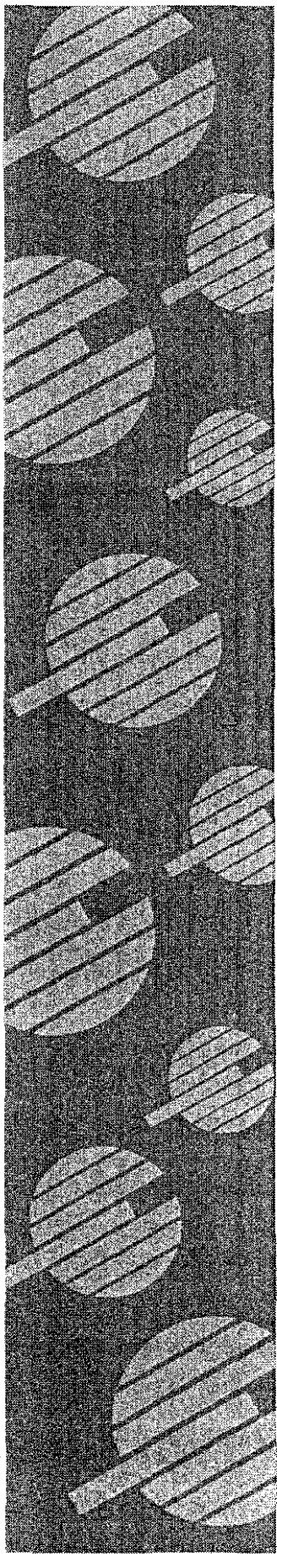
Anti-Discrimination Act 1977

The *Anti-Discrimination Act* does not contain an express prohibition on sexual harassment. However, it has been held in the NSW case law that sexual harassment is a form of unlawful sex discrimination.

The NSW Equal Opportunity Tribunal in *O'Callaghan v Loder & Anor* (1984) EOC 92-023 held that:

...a person is sexually harassed if he or she is subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her. (at 75,497)

At the time of writing, proposed amendments will specifically prohibit sexual harassment.



Australian Capital Territory

Discrimination Act 1991

Sexual harassment is defined in section 58 of the *Discrimination Act*. A person subjects another to sexual harassment if they:

- make an unwelcome sexual advance;
- make an unwelcome request for sexual favours; or
- engage in other unwelcome conduct of a sexual nature. This includes making a statement of a sexual nature to a person or in their presence. The statement can be either oral or written.

It is also necessary that the recipient reasonably feels offended, humiliated or intimidated by the unwelcome conduct.

Sexual harassment is prohibited in a number of areas including:

- *employment;*
- educational institutions (ie. sexual harassment of students by staff, staff by students and students by students).

Unlike the *Sex Discrimination Act*, there is no age requirement for potential student complainants and respondents.

Queensland

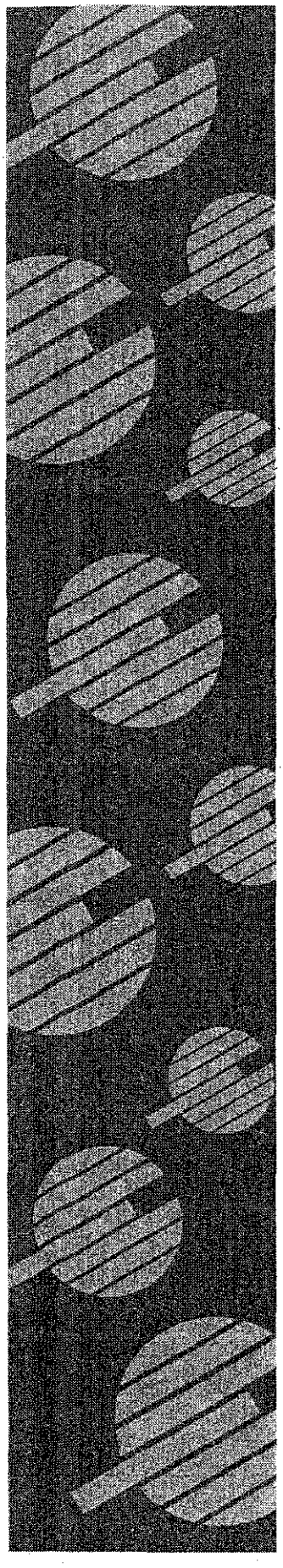
Anti-Discrimination Act 1991

The *Anti-Discrimination Act* contains a general prohibition on sexual harassment in any area (including employment and education). The Act says that sexual harassment occurs if a person:

- subjects another person to an unsolicited act of physical intimacy; or
- makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
- makes a remark with sexual connotations relating to the other person; or
- engages in other unwelcome conduct of a sexual nature in relation to the other person;

and the person engaging in the conduct described above does so -

- with the intention of offending, humiliating or intimidating the other person; or
- in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or



intimidated by the conduct. The circumstances to be taken into account include the age, sex and race of the person harassed, any impairment they may have and the nature of the relationship between the two parties.

Northern Territory

Anti-Discrimination Act 1992

Section 22 (2) of the *Anti-Discrimination Act* defines sexual harassment as:

- an unwelcome act of physical intimacy;
- an unwelcome demand or request (whether directly or by implication) for sexual favours;
- an unwelcome remark with sexual connotations; or
- any other unwelcome conduct of a sexual nature.

It is also necessary that:

- the person engaging in the behaviour intends to cause offence, humiliation or intimidation; or
- the circumstances are such that a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated by the conduct. The circumstances which are relevant include the sex, age or race of the complainant, any impairment they may have, the nature of their relationship with the alleged harasser or any other circumstance; or
- the person harassed is (or reasonably believes that they are likely to be) subjected to some detriment if they object to the act, demand, request, remark or conduct.

Sexual harassment is prohibited in various areas of activity including:

- work; and
- education (which would appear to cover harassment of students by staff and other students).

Tasmania

Sex Discrimination Act 1994

Sexual harassment is prohibited in section 17(2) of the *Sex Discrimination Act*. Section 17(3) says that sexual harassment occurs if a person:

- subjects another person to an unsolicited and unwelcome act of physical contact of a sexual nature;
- makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person;
- makes any unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence;
- makes any unwelcome gesture, action or comment of a sexual nature;

- engages in conduct of a sexual nature in relation to another person.

The definition also contains a "reasonableness" test. It is necessary that a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

In addition, section 17(1) prohibits any conduct which reasonably offends, humiliates, intimidates, insults or ridicules a person on the basis of certain attributes, including gender. This provision would prohibit sex-based harassment which is not explicitly sexual in nature.

Sexual harassment and other unlawful conduct is prohibited in various areas of activity including:

- employment
- education and training

The Act would appear to prohibit sexual harassment by both staff and students of any age.

Which Law?

Sexual harassment is prohibited by anti-discrimination laws which now exist in all States and Territories. These laws operate concurrently with the Federal *Sex Discrimination Act*. Whether a complaint is made under State or Federal law will depend on questions such as:

- Did the harassment occur in an area which is covered by the legislation?

eg. some of the State anti-discrimination Acts do not cover sexual harassment by students.

- Does an exemption apply?

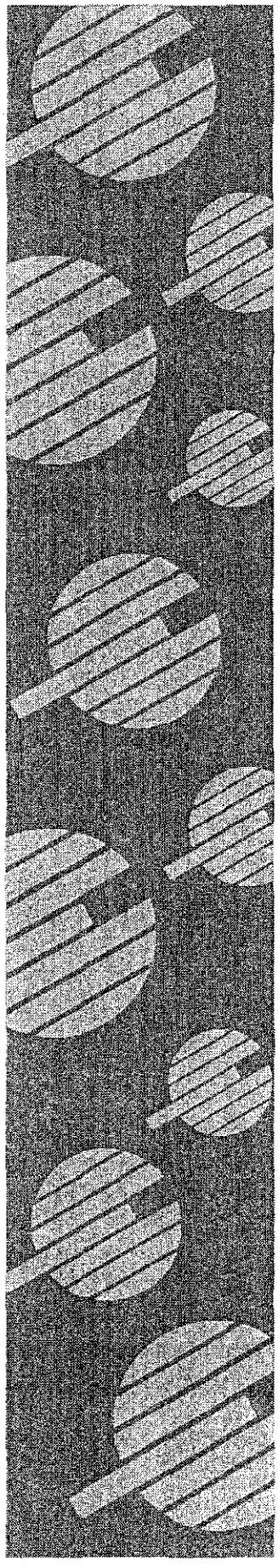
eg. State government employees are generally ineligible to complain under the Federal *Sex Discrimination Act* and therefore need to rely on their State anti-discrimination law.

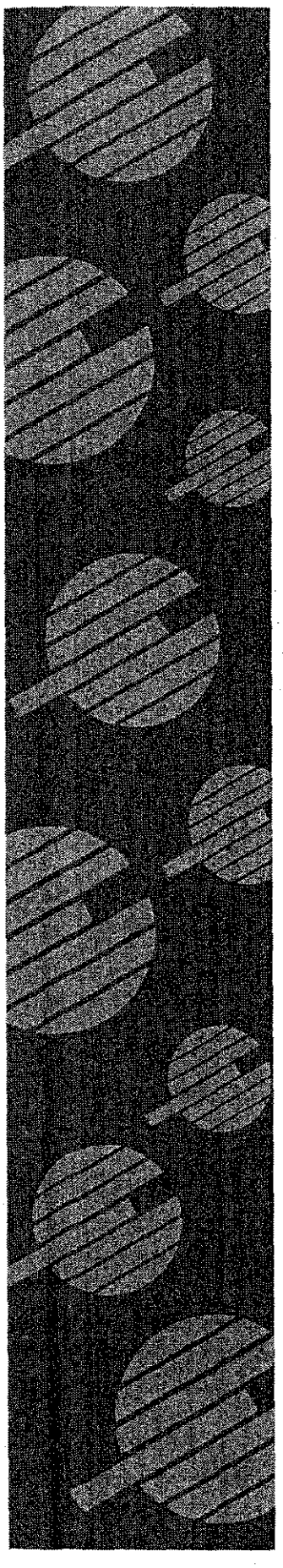
eg. some of the State laws do not cover workplaces with fewer than a certain number of employees. For instance, the *Anti-Discrimination Act* (NSW) does not apply to employers who hire fewer than six employees. There is no such exemption in the *Sex Discrimination Act*.

- Are there any time limits?

eg. Under the NSW, South Australian and Northern Territory Acts, complaints are to be lodged within 6 months of the harassment occurring. In the other State and Federal jurisdictions the time limit is 12 months. However, under all the legislation there is a discretion to extend these periods if there is good cause.

Often a potential complaint could be made under either State or Federal law and the complainant has to make a choice. Their decision may be influenced by the following factors:





- whether there is an upper limit on the level of damages that can be awarded.

The *Anti-Discrimination Act* (NSW) sets an upper limit of $40 000. There is no upper limit in the *Sex Discrimination Act*, however the highest amount awarded to date is $35 000.

- enforcement

State and Territory tribunals can make enforceable decisions. Until a new court-based procedure is introduced, Federal decisions are not enforceable by the Human Rights and Equal Opportunity Comission (see p.73).

- second chances

You cannot make a complaint under the *Sex Discrimination Act* if any action has been taken on the same matter under a State law. The reverse does not apply, so if a complaint fails under the *Sex Discrimination Act* you still have recourse to State legislation.

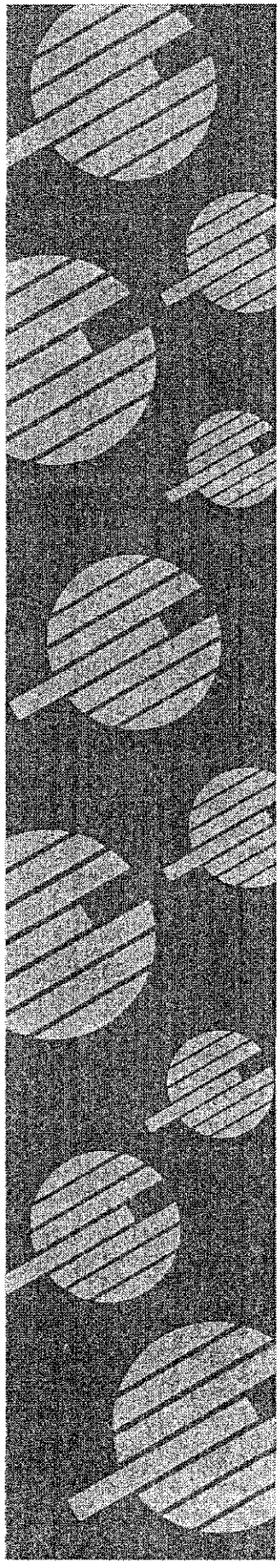
- costs orders

Unlike the *Sex Discrimination Act*, some State Acts allow for costs to be awarded against the unsuccessful party. Other Acts make parties responsible for their own costs, unless the circumstances warrant a costs order.

Complainants and their advocates are advised to contact the anti-discrimination agency in their State or Territory or the Human Rights and Equal Opportunity Comission for more information on the differences between State or Territory and Federal laws.

Appendix B

Glossary of Terms



Complainant
A person who makes a complaint under the *Sex Discrimination Act.*

Sometimes used to describe a person who has made a complaint through their organisation's internal grievance procedure.

Conciliation
A process under anti-discrimination law where an impartial third party assists two disputing parties to settle a complaint by mutual agreement.

Sometimes used as a method of grievance resolution within an organisation.

HREOC
Human Rights and Equal Opportunity Commission

Inquiry Commissioner
A permanent or part-time officer appointed by the Attorney-General to preside over public hearings into Federal discrimination complaints

Natural justice
The minimum standard of procedural fairness to be applied in the investigation and adjudication of a dispute

Respondent
A person or organisation against whom a complaint is made

Appendix C

Contact list

Human Rights and Equal Opportunity Commission (HREOC) National Office
Level 8, Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2000
GPO Box 5218
Sydney NSW 2001
Phone: (02) 284 9600
Charge free: 1800 021 199
Facsimile:(02) 284 9611
TTY: 1800 620 241
www.hreoc.gov.au/hreoc/

Queensland Anti-Discrimination Commission/HREOC Regional Office
Brisbane
Ground Floor, 27 Peel Street
South Brisbane QLD 4101
PO Box 5363
West End QLD 4101
Phone: (07) 3844 6099
Charge free: 1800 177 822 (Qld only)
TTY: (07) 3846 4123
Facsimile: (07) 3846 2211

Rockhampton
State Govt. Centre
First floor, 209 Bolsover Street
PO Box 1390
Rockhampton QLD 4700
Phone: (079) 226 877
Charge free: 1800 804 288
TTY: (079) 212 647
Facsimile: (079) 226 772

Cairns
Second floor, Aplin House
19 Aplin Street
PO Box 375
Cairns QLD 4870
Phone: (070) 317 399
Charge free: 1800 803 271
Facsimile: (070) 512 127

Tasmania
HREOC Regional Office
AMP Society Building
27 Elizabeth Street
Hobart TAS 7000
Phone: (002) 34 3599
Charge free: 1800 001 222
Facsimile: (002) 31 0773

Northern Territory
HREOC Regional Office
First Floor, TGC Centre
80 Mitchell Street
Darwin NT 0800
LMB 4 GPO
Darwin NT 0801
Phone: (089) 819 111
Facsimile: (089) 411 508

Northern Territory Anti-Discrimination Commission
National Mutual Building
7 - 11 Cavenagh St
Darwin 0800
Locked mail bag 22
GPO Darwin 0801
Phone & TTY: (089) 813 813
Charge free: 1800 813 846
Facsimile: (089) 813 812

Australian Capital Territory Human Rights Office
Level 2, Comcare Building
40 Allara Street
Canberra ACT 2601
PO Box 222
Civic Square ACT 2608
Phone: (06) 247 3002
TTY: (06) 247 4117
Facsimile: (06) 247 3358

Victoria
Equal Opportunity Commission
Level 3, 380 Lonsdale Street
Melbourne VIC 3000
Phone: (03) 928 17111
Charge free: 1800 134 142 (Vic only)
TTY: (03) 928 17110
Facsimile: (03) 928 17171

South Australia
Commissioner for Equal Opportunity
Ground floor, Wakefield House
30 Wakefield Street
Adelaide SA 5000
Phone: (08) 226 5660
Charge free: 1800 188 163
TTY: (08) 226 5692
Facsimile: (08) 223 3285

Western Australia
Equal Opportunity Commission
Westralia Square
141 St Georges Terrace
Perth WA 6000
PO Box 7370
Cloisters Square
Perth WA 6850
Phone: (09) 264 1930
Charge free: 1800 198 149
Facsimile: (09) 264 1960
Porta Printer: (09) 264 1936

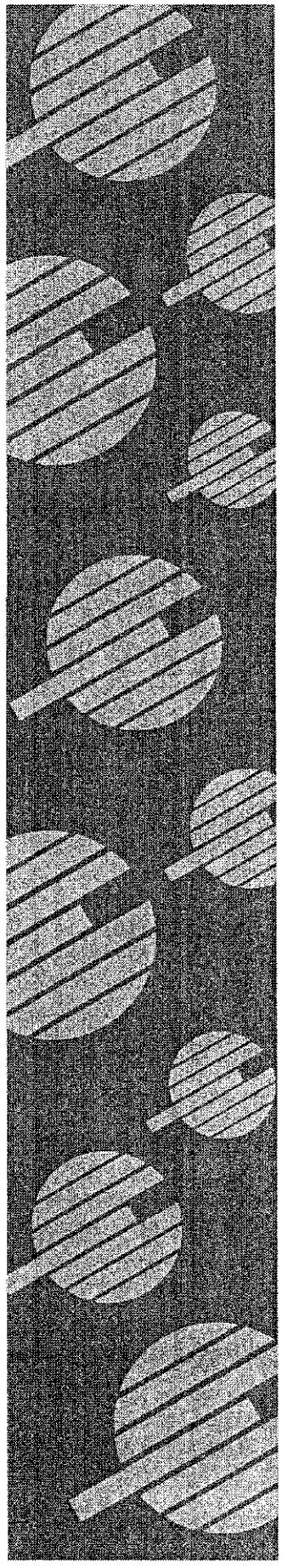
New South Wales
Anti-Discrimination Board
Sydney
Level 4, 181 Lawson Street
Redfern NSW 2016
Phone: (02) 318 5400
TTY: (02) 310 2376
Facsimile: (02) 310 2235

Wollongong
84 Crown Street
Wollongong NSW 2500
Phone: (042) 26 8190
Facsimile: (042) 26 1190

Newcastle
79 Hunter Street
Newcastle NSW 2300
Phone: (049) 26 4300
Facsimile: (049) 26 1376

Appendix D

References



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