




Discrimination & Harassment in the Workplace

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Harassment in the Workplace



- The *Workplace Health and Safety Act 1995*
- The *Prevention of Workplace Harassment Code of Practice 2004*

A person is subjected to 'workplace harassment' if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person's employer or a co-worker or group of co-workers of the person that:

- (a) is unwelcome and unsolicited
- (b) the person considers to be offensive, intimidating, humiliating or threatening
- (c) a reasonable person would consider to be offensive, humiliating, intimidating or threatening.

Harassment in the Workplace



Examples include:

- Repeated abuse (often publicly)
- Repeated threats of dismissal or other punishment without reason/ justification
- Constant ridicule
- Leaving offensive messages
- Sabotaging a person's work and deliberately causing a person to come under scrutiny or discipline
- Maliciously excluding or isolating a person
- Persistent, petty and unjustified criticisms
- Humiliation through gestures, sarcasm, criticism and insults (often publicly)
- Spreading gossip or rumours

Personal Consequences of Harassment



There are a range of psychological and physical illnesses and injuries that an individual who continues to be exposed to workplace harassment may experience. The effects of workplace harassment on a person may include:

- High levels of distress,
- Impaired ability to make decisions and poor concentration
- Loss of self-confidence and self-esteem
- Feelings of social isolation at work
- Panic attacks, anxiety disorders, depression, social phobia (withdrawal from usual social interaction)
- Deteriorating relationships with family and friends
- Reduced output and performance,
- Incapacity to work,
- Loss of employment
- Sleep disturbances, such as, insomnia or severe tiredness.

Employer Consequences of Harassment



Workplace harassment can have significant human and financial costs for a business and can lead to:

- the breakdown of teams and individual relationships
- poor worker health
- reduced efficiency, productivity and profitability
- bad publicity, poor public image – becoming 'known' as a difficult workplace environment
- increased absenteeism and staff turnover
- poor morale and erosion of worker loyalty and commitment
- increased costs associated with: counselling, employee assistance, mediation, recruitment and training of new workers
- increased legal costs and workers' compensation claims.

The David Jones Case



- Facts vs Rumour/ Media Misinformation
- Difference from usual cases – the Trade Practices Act
- The Result

Sexual Harassment



- A survey conducted by the Australian Human Rights Commission (AHRC) found that 22% of women and 5% of men had experienced sexual harassment in the workplace at some time during their employment life.
- 1 in 5 respondents stated that they did not experience sexual harassment in the workplace despite acknowledging being exposed to workplace behaviour that would constitute harassment.
- A culture that eliminates sexual harassment has a positive impact by reducing absenteeism, lost productivity, staff turnover and low morale.

Sexual Harassment in the Workplace



- The AHRC published a Code called "Effectively preventing and responding to sexual harassment: A Code of Practice for Employers" (the "**Code**") in 2008
- The Code, although not legally binding per se, embodies the provisions in the Sex Discrimination Act ("**SDA**"), so a breach of the Code will indicate a breach of the SDA.
- The SDA prohibits sexual harassment at the workplace during and outside of normal work hours for all work related activities including training courses, conferences, field trips, work functions, and office parties.

Employer Responsibilities



- The SDA adopts the concept of “vicarious liability” and makes the employer legally responsible for the sexual harassment committed by their employees, unless it can be shown that the employer has taken all reasonable steps to prevent the sexual harassment from taking place.
- At a bare minimum, an employer must take all reasonable steps to have an appropriate Sexual Harassment Policy effectively implemented, communicated, monitored and then take appropriate remedial action if sexual harassment is identified.

Sexual Harassment Defined



- The definition of sexual harassment includes such acts as:
- Unwelcome touching, hugging or kissing;
 - Staring or leering;
 - Suggestive comments or jokes;
 - Sexually explicit pictures, screensavers or posters;
 - Unwanted invitations to go out on dates or requests for sex;
 - Intrusive questions about an employee’s private life or body;
 - Unnecessary familiarity, such as deliberately brushing up against someone;
 - Insults or taunts of a sexual nature;
 - Sexually explicit emails or sms messages, accessing sexual explicit internet sites; and
 - Behaviour which would also be an offence under the criminal laws such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

Legal Test



- Sexual harassment does not include sexual interaction, flirtation, attraction or friendship which is invited, mutual, consensual or reciprocated (not as clear cut as would seem).
- The legal test for what constitutes sexual harassment under the SDA involves 3 essential elements:
 1. The behaviour must be unwelcome (subjective test);
 2. The behaviour must be of a sexual nature (subjective test); and
 3. The behaviour must be such that a reasonable person would anticipate in the circumstances that the harassed person would be offended, humiliated and/or intimidated by the behaviour (part objective part subjective test).

What is “Unwelcome”



- The unwelcome behaviour does not need to be repeated or continuous – a single incident is sufficient.
- Whether a perpetrator thinks that their conduct is welcome or inoffensive is irrelevant.
- Often an issue where there is a difference in age, racial or cultural background, seniority or personal power between those concerned.
- Is still unwelcome if a person feels they have to “join in” to avoid being further victimised, teased or excluded by the perpetrators.
- It is irrelevant that the behaviour may not have been unwelcome by others or has been an accepted feature of the work environment in the past.

What is “Unwelcome”



- A complaint of sexual harassment will not necessarily be dismissed because the person subjected to the offending behaviour did not directly inform the perpetrator that the behaviour was unwelcome.
- In *Aldridge v Booth & Ors (1986) EOC 92-177* a teenager obtained employment in a cake shop as part of a government training scheme. After her first week the owner began kissing her, touching her buttocks and requesting sex. Under pressure she consented to have intercourse. HELD His sexual acts and advances were “unwelcome” as she was in an extremely vulnerable position and had only endured the situation because she was afraid.

Consensual Relationships



- Sexual behaviour between employees arising from a mutual sexual or romantic relationship does not constitute sexual harassment HOWEVER inappropriate and unwanted sexual behaviour towards former partners must be dealt with in the same manner as any other sexual harassment complaint.
- Employers are warned that sexual behaviour between employees can create an unpleasant and sexualised workplace.
- Consent which is obtained by fear, intimidation, threats or force, will not rule out a complaint of sexual harassment.

Of A Sexual Nature



- Under the SDA, the conduct must be sexual in nature.
- Certain behaviour can be interpreted as being part of a pattern of sexual behaviour, such as making statements to co-workers that they are in love with them, requesting that the person visit their home "to talk" and commenting on the state of the victim's existing relationship *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81
- Oppressive sex based hostility involving physical pushing in conjunction with obscene language can also be caught. *Djokic v Sinclair* (1994) EOC 92-643
- Sexual harassment is prohibited regardless of the sex of the parties (*Lulham v Shanahan, Watkins Steel and Ors* [2003] QADT 11) or sexual preference (*Font v Paspaley Pearls* [2002] FMCA 142)

Reasonable Person Test



- The third aspect of the assessment is whether or not a "reasonable person" would have anticipated that the recipient would be offended, humiliated or intimidated.
- What is reasonable is assessed on the subjective circumstances of each case.
- Case law indicates that factors such as age of the complainant, their race or ethnicity, any disability, the context in which the harassment occurred and the nature of the relationship between the parties can all be relevant.

Reasonable Person Test



Examples

- *Horman v Distribution Group Limited [2001] FMCA 52* – horseplay
("I am not sure that a reasonable person would not anticipate that the Applicant would be offended, humiliated or intimidated by bad language solely because the Applicant herself also used it from time to time. "Giving as good as you get" is often the only way in which a person feels he or she can resist unpleasant language and would not to my mind indicate to a reasonable person the type of acceptance of the language which would relieve a Respondent of liability...")
- *Smith v Hehir and Financial Advisors Aust Pty Ltd [2001] QADT 11* – neck massages

Hostile Work Environments



- Employers must deal with entrenched group cultures and practices which may hinder women's equal participation in and enjoyment of their working life, especially sexualised or demeaning work cultures. Some previously recognised examples include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes.
- A person has the right to complain about the effects of a sexually hostile working environment even if the conduct in question was not specifically targeted at them.
- Employees may engage in sexual gossip, jokes and teasing in order to participate in the workplace culture without considering the consequences. Since they do not directly intend to offend or humiliate, employees may be ignorant of the fact that their actions constitute sexual harassment (remembering intent is irrelevant).

Criminal Conduct



- Although the SDA makes sexual harassment a civil offence, some types of harassment may constitute criminal offences, including molestation or assault, indecent exposure, sexual assault, stalking and obscene calls and messages.
- Criminal allegations can be more difficult to establish because they must be proved 'beyond reasonable doubt' but claims under the SDA need only be proved 'on the balance of probabilities' and can proceed even when police won't prosecute: - *Leslie v Graham* [2002] FCA 32

When is Sexual Harassment Prohibited



- Sexual harassment is prohibited in the workplace and associated circumstances (recruitment, business trips, social functions) and between most persons engaged in and by the enterprise. It is also unlawful by:
 - Members of bodies or authorities responsible for occupational qualifications who sexually harass a person seeking a qualification
 - Members or staff of registered organisations such as unions
 - Staff and adult students of educational institutions
 - A member of a committee of management of a club
- Some employees or contractors are vulnerable to sexual harassment by customers or clients. This is not covered by the SDA unless the harassment occurs in a context of the employee being treated less favourably - *Smith v Sandalwood Motel* (1994) EOC 92-577

When is Sexual Harassment Prohibited



- Employers should avoid putting employees in situations where they may be vulnerable to harassment by requiring them to wear provocative clothing to promote products or expecting them to behave flirtatiously with clients.
- In order to avoid vicarious liability for social/ Xmas functions, employers should remind staff that sexual harassment in employment will not be tolerated, employees are responsible for their inappropriate behaviour and being drunk is not a defence.

Liability



- Personal – the perpetrator's own acts of sexual harassment or causing, instructing, inducing, aiding or permitting sexual harassment ('accessory liability' - s105 SDA - *Elliott v Nanda & the Commonwealth* (2001) 111 FCR 240 – agency & doctor's surgery).
- Vicarious - The employer or principal, including a union (see *Horne*), unless 'all reasonable steps' were taken (determined on a case – by – case basis, but must be active, preventative measures – s106 SDA).
- The onus of proof rests with the employer. Lack of awareness is no defence.
- Even when there is vicarious liability, the individual perpetrator remains personally liable for their acts.
- s94 SDA prohibits the victimisation of anyone connected with a complaint (including lodging, providing information, assisting AHRC process). Victimisation can include demotion, redeployment, ostracising, denied promotion.

Employer Obligations



To take all reasonable steps (subjective) – consider the following

- The size and structure of the organisation
- Available resources
- History of harassment in workforce (or industry)
- Other specific factors at the workplace

There are effectively two broad actions that employers must take to avoid liability for sexual harassment:

1. Take all reasonable steps to prevent sexual harassment from occurring (implement a sexual harassment policy as fully as possible and monitor its effectiveness); and
 2. If sexual harassment does occur, take appropriate remedial action through an effective, timely and appropriate complaints procedure.
- A written policy on its own is insufficient; as a policy that is not implemented through communication, education and enforcement will not prevent liability.

AHRC 5 Step Process



- 1. Get high-level management support**
- 2. Write and implement a sexual harassment policy** (part of induction, signed acknowledgements, readily available, regularly communicated and re-educated, translate where necessary, review for necessary amendments/ deficiencies)
- 3. Provide regular training and information on sexual harassment to all staff and management** (consider case examples, distribute brochures)
- 4. Encourage appropriate conduct by managers** (part of interview, performance review, and kpi's)
- 5. Create a positive workplace environment** (remove sexist material, regular audits incl. computers)

Policies



Essential Elements

- A strong opening statement on the organisation's stance on sexual harassment.
- An outline of the organisation's objectives regarding sexual harassment.
- A clearly worded definition of sexual harassment. (emphasise "unwelcome" element and give examples)
- A statement of what is not sexual harassment. (consensual relationships)
- A statement that sexual harassment is against the law.
- The circumstances in which sexual harassment may occur. (inside and outside workplace, including socials)

Policies



Essential Elements cont.

- The consequences that can be imposed if the policy is breached. (apology, counselling, warnings, demotion, dismissal, prosecution)
- Detail the responsibilities of management and staff.
- Information on where individuals can safely and easily get help, advice or make a complaint. (appropriate staff member to receive complaint or provide support, external support, AHRC)
Shiels v James and Lipman Pty Limited [2000] FMCA 2
- A brief summary of the options available for dealing with sexual harassment. (direct, informal, formal, external complaint)

Remedial Measures



Important Strategies to Remedy Sexual Harassment

1. Implement an internal system for dealing with sexual harassment complaints (or adapt existing complaints procedures for this purpose) – informal and formal processes must allow for confidentiality, avoid victimisation, provide procedural fairness & natural justice.
2. Ensure that the employer’s sexual harassment policy provides employees with advice on what to do if they are harassed.
3. Employers can also encourage employees to assist in the prevention of sexual harassment in the workplace by highlighting concerns before a complaint is lodged.

Record Keeping



- Essential in order to develop strategies and responses over time.
- Assists in ready availability of history where regular allegations by or against certain staff.
- Must be done whilst also ensuring confidentiality.
- Encourages consistency of treatment
- Case by case assessment needs to be made to determine the application of the National Privacy Principles (NPPs) in the *Privacy Act 1988* (Cth) (the “**Privacy Act**”). Employers will also be covered by relevant state and territory privacy legislation.

Associated Issues



Defamation

It is not defamatory to confront an alleged harasser in private with a claim of sexual harassment or to make a complaint of sexual harassment in accordance with the employer's complaint procedure so long as the complaint is made in good faith.

The SDA gives protection against civil legal action who provide information or evidence to the AHRC if, by providing the information, they have caused injury or damage to another's reputation (s111 SDA).

Fair Work Act (Cwth) 2009 & Industrial Relations Act (Qld) 1999

Any termination as a result of sexual harassment must be in accordance with the FWA (or IRA in cases involving Qld government bodies).

Associated Issues (cont)



Occupational Health & Safety

Sexual harassment in the workplace may also constitute a breach of an employer's obligations under the Workplace Health and Safety Act (Qld) 1995.

Onus of Proof

The initial onus is on the complainant to establish that they have been subjected to sexual harassment.

Once the initial onus is established, the onus shifts to the employer to prove that it took reasonable steps to prevent the harassment.

Other Forms of Discrimination



Racial Discrimination Act 1975
Disability Discrimination Act 1992
Age Discrimination Act 2004

Each Act prohibits: -

1. Discrimination – an unlawful exclusion, distinction or preference made on the basis of an identified and protected attribute
2. Harassment – Unwelcome conduct related to an identified and protected attribute
3. Victimisation – subjecting a person to a detriment because they have complained under or otherwise cooperated and assisted with a complaint under a discrimination law

Recent Cases



Case #1:

- The complainant registered with the respondent recruitment agency and was offered a position as a receptionist.
- Prior to commencing work she found out she was pregnant and informed both parties.
- Offer of employment was withdrawn and the recruitment agency did not contact her further.
- Alleged she was discriminated against because she was pregnant.
- Company said the decision to withdraw the offer of employment was based on business and financial requirements.
- Recruitment agency said that it took all reasonable steps to obtain alternative employment for her.
- Resolved in conciliation with an agreement:
 - Company would pay \$10,000 general damages, provide her with a written apology and develop an Equal Employment Opportunity policy for the workplace.
 - The recruitment agency would pay \$2,000 general damages.



Case #2:

- The complainant claimed she was sexually harassed by the owner of the company she was employed by.
- She alleged that she refused the owner's advances so he would shout at her and find fault in her work and eventually terminated her employment.
- The company and the individual respondent denied the allegations of sexual harassment.
- The owner of the business said that he held discussions with the complainant about her poor performance and associated complaints from clients and that she resigned on her own accord.
- The complaint was resolved with an agreement that:
 - The complainant be compensated \$1,000 as an ex gratia payment;
 - the business owner would undertake anti discrimination/EEO training; and
 - the company would implement an anti-discrimination/EEO policy.



Case #3:

- The complainant was a 10+ year employee
- Claimed the majority of managers and senior personnel in the company were male.
- When she returned to work after a period of maternity leave she alleged she was required to work at a different store and was later made redundant.
- Further alleged that one week after her redundancy, a male employee was appointed to her previous role.
- Denied she was discriminated against on the basis of her sex.
- The complaint was resolved with an agreement that:
 - The complainant be compensated \$3,300 for economic loss and pain and suffering.

Case #4:

- The complainant was employed as a sales representative with the respondent company.
- Alleged that his female manager sexually harassed him and was victimised after he complained about her behaviour.
- Was not disputed that some that the behaviour constituted sexual harassment but denied that the complainant was victimised.
- The complaint was resolved with the agreement that:
 - The complainant be compensated \$15,000 for hurt and embarrassment.

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