



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

Effectively
preventing and
responding to sexual
harassment:

A Quick Guide



Senate Legal and Constitutional Affairs Committee
Supplementary Budget Estimates 2012, 15 & 16 October 2012

Tabled Document 1

By: *Senator Brandis*

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This publication can be found in electronic format on the Australian Human Rights Commission's website at www.humanrights.gov.au/sexualharassment

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This document provides:

- an overview of the law on sexual harassment
- a summary of the legal obligations for employers in relation to sexual harassment
- the basic principles for effectively preventing and responding to sexual harassment in the workplace.

This Guide should be used together with *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers*, a comprehensive set of guidelines for employers, which can be found at

www.humanrights.gov.au/sexualharassment

What is sexual harassment?

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

Sexual harassment can take various forms. It can involve conduct such as:

- unwelcome touching, hugging or kissing
- staring or leering
- suggestive comments or jokes
- sexually explicit pictures, screen savers or posters
- unwanted invitations to go out on dates or requests for sex
- intrusive questions about an employee's private life or body
- unnecessary familiarity, such as deliberately brushing up against someone
- insults or taunts of a sexual nature
- sexually explicit emails or SMS messages
- accessing sexually explicit internet sites
- inappropriate advances on social networking sites
- behaviour which would also be an offence under the criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

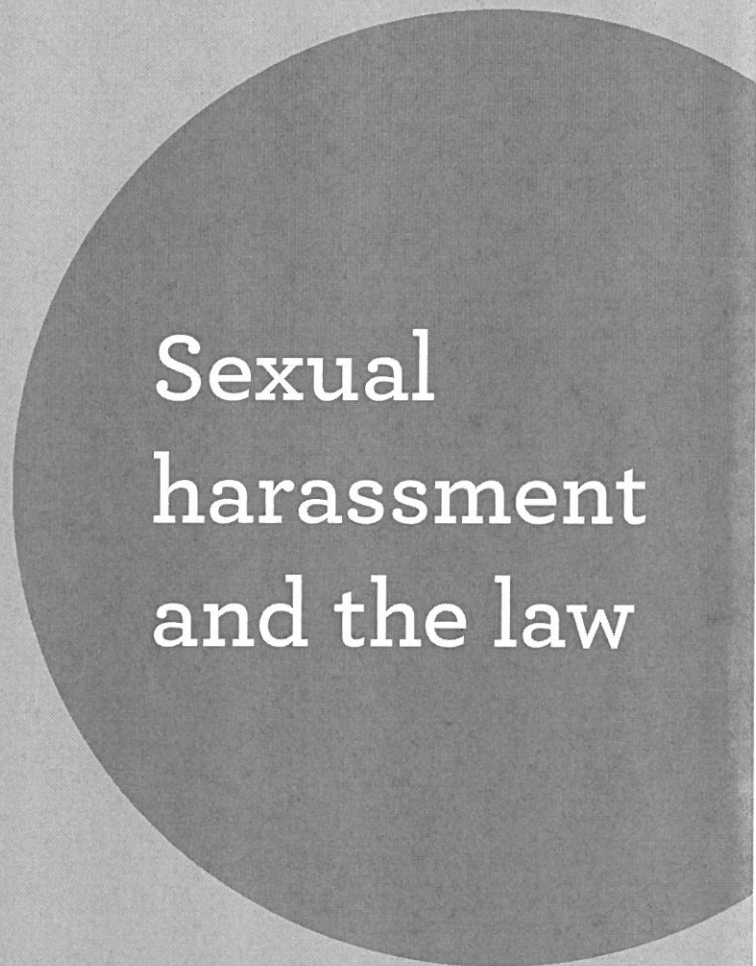
Sexual harassment does not have to be repeated or continuous to be against the law. It can be a one-off incident.

Both men and women can experience sexual harassment at work. However, it is most commonly experienced by women. A survey released by the Australian Human Rights Commission in November 2008 found that 22% of women and 5% of men have experienced sexual harassment in the workplace at some time.

Sexual harassment is not sexual interaction, flirtation, attraction or friendship which is invited, mutual, consensual or reciprocated.

When is sexual harassment unlawful?

Sexual harassment is unlawful in almost every employment situation and relationship. For example, sexual harassment is unlawful at the workplace, during working hours, at work-related activities such as training



Sexual harassment and the law

courses, conferences, field trips, work functions and office parties. It is also unlawful between almost all workplace participants.

What are my legal obligations as an employer?

There are good business reasons for preventing sexual harassment in the workplace.

As an employer, you may be held legally responsible for acts of sexual harassment committed by your employees. This is called 'vicarious liability'. The Sex Discrimination Act makes employers liable for acts of sexual harassment unless they have taken **all reasonable steps** to prevent it from taking place.

While there is no uniform standard expected of employers in taking all reasonable steps, at a minimum employers would usually be expected to:

1. **have an appropriate sexual harassment policy which is effectively implemented, monitored and communicated to all workplace participants.**
2. **take appropriate remedial action if sexual harassment does occur.**

Policies and procedures preventing harassment assist employers in maintaining positive workplace relationships and can improve employee motivation and performance.

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

Developing and implementing a sexual harassment policy

Why should I have a sexual harassment policy?

The key to preventing sexual harassment is for employers and management to make it clear to every employee and workplace participant that sexual harassment is unacceptable in the workplace. Employers should ensure that they have in place a clear sexual harassment policy, which is effectively communicated to each workplace participant and is understood. In addition, it is important that appropriate behaviour be modelled by management throughout the workplace.

A written policy on its own is not enough. A policy that is not implemented through communication, education and enforcement will be of little or no use in avoiding liability.

What are the essential elements of a sexual harassment policy?

A sexual harassment policy should include the following:

- 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
- specific examples of sexual harassment that may be relevant to the particular working environment
- a statement of what is not sexual harassment
- a statement that sexual harassment is against the law
- examples of places and times where unlawful sexual harassment may happen e.g. in the office, work conferences, work field trips etc.
- the consequences for employees if the policy is breached
- responsibilities of management and staff
- information on where individuals can get help, advice or make a complaint
- a brief summary of the options available for dealing with sexual harassment

Tips for employers: getting your employees to understand your sexual harassment policy

- Officially launch the sexual harassment policy at a full staff meeting.
- The chief executive officer or a senior management representative should endorse the policy and emphasise the fact that all staff are required to comply with it.
- Email copies of the policy to employees, put a copy on the intranet and place an automatic shortcut on employee desktops.
- Provide the policy to new staff as a standard part of induction.
- Display the policy on notice boards and include it in induction manuals.
- Ask employees to sign a copy of the policy acknowledging they have received and understood it.
- Assign responsibility for the circulation and review of the policy to a specific position or area to ensure that it is widely promoted and regularly updated.

How do I take appropriate remedial action when sexual harassment happens?

As part of the legal responsibility to deal with sexual harassment, all employers must implement effective and accessible complaint procedures for employees and other workplace participants. A good complaint procedure:

- conveys the message that the organisation takes sexual harassment seriously
- can prevent escalation of a case and maintain positive workplace relationships
- ensures that complaints are dealt with consistently and in a timely manner
- reduces the likelihood of external agency involvement which can be time consuming, costly and damaging to public image
- alerts an organisation to patterns of unacceptable conduct and highlights the need for prevention strategies in particular areas
- reduces the risk of an employer being held liable under the Sex Discrimination Act and other anti-discrimination laws
- can help to minimise the harm suffered by the person harassed
- reduces the risk of the employer being held to have treated the alleged harasser unfairly, such as in an unfair dismissal claim.

Internal complaints

Employers should establish internal procedures for dealing with sexual harassment complaints or grievances to enable in-house resolution. The Sex Discrimination Act does not prescribe any particular type of complaint procedure so employers have the flexibility to design a system that suits the organisation's size, structure and resources.

Employers can establish a specific procedure for sexual harassment complaints or, alternatively, use the procedure that is already in place for other types of work-related 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.

Employers should ensure that their complaint procedures:

- are clearly documented
- are explained to all employees
- offer both informal and formal options
- address complaints in a manner which is fair, timely and confidential
- are based on the principles of procedural fairness¹
- are administered by trained personnel
- provide clear guidance on internal investigation procedures and record keeping
- advise a complainant that they can pursue the matter externally with the Australian Human

Rights Commission, a state or territory anti-discrimination body or, if it appears to be a criminal matter, the police

- give an undertaking that no employee will be victimised or disadvantaged for making a complaint
- are regularly reviewed for effectiveness.

External complaints

A person who has experienced sexual harassment can make a written complaint to the Australian Human Rights Commission (or the relevant state or territory anti-discrimination agency). The complaint will be investigated and the Commission will generally endeavour to settle it by conciliation. If conciliation is unsuccessful or inappropriate in the circumstances, the complaint may be terminated and the complainant can then apply to the Federal Magistrates Court or Federal Court of Australia for a decision.

A person is not required to attempt to resolve a complaint within the workplace before approaching the Commission or the relevant state or territory anti-discrimination agency. Criminal acts such as assault may also be reported directly to the police.

Complaints Procedures

¹ Principles of procedural fairness and natural justice require that the alleged harasser be fully informed of the complaint made against them and given an opportunity to respond. Likewise, the person harassed should be fully informed of that response or allegations made against them by the alleged harasser and given an opportunity to respond. What is fair and just may differ between different circumstances, but there are three basic requirements:

- The parties must be given notice of the complaint or allegations against them, and the process by which it is proposed the matter will be resolved.
- The parties must be given the opportunity to be heard and respond to the complaint or allegations.
- The decision-maker must act impartially, honestly and without bias.

Does the law apply equally to employers regardless of size?

Every employer, regardless of size, must take all reasonable steps to prevent sexual harassment in the workplace to avoid liability. The meaning of 'all reasonable steps' is not defined in the Sex Discrimination Act and is determined on a case-by-case basis. For example, what is reasonable for a large corporation may not be reasonable for a small business. When deciding what level of preventative action is reasonable, employers should consider the nature of their workplace, including the following:

- **The size and structure of the organisation.** Large organisations may need to organise formal information and training sessions to ensure that all employees are aware of and understand the organisation's sexual harassment policy. In a small business it may be reasonable to provide copies of the policy to employees and have an informal discussion with employees to ensure they understand the policy.
- **Available resources.** In a large organisation, it might be reasonable that a budget be allocated to sexual harassment training and all employees attend the training. In a small business where finances are limited it may not be reasonable to send each employee to sexual harassment training, but instead the employer could ask that each employee read the sexual harassment policy and fill out a questionnaire designed to ensure that the employee understands the policy.
- **A history of sexual harassment.** Employers may have to take particularly strong steps to combat harassment where there has been a previous history of sexual harassment.
- **Other relevant factors.** These may include geographic isolation of the work location, duties which require employees to work in close physical proximity or where there are 'live-in' arrangements.

What should small business do to prevent and respond to sexual harassment?

Sexual harassment policies

Recent case law suggests that small businesses will need to have a written policy on sexual harassment to demonstrate that all reasonable steps were taken to prevent harassment occurring. However, this need only be a simple written policy effectively communicated to all staff.

The policy should include:

- a definition of sexual harassment
- a statement that sexual harassment will not be tolerated in the workplace
- how sexual harassment complaints will be dealt with
- sanctions that will attach to sexual harassment if it occurs
- contact numbers for external complaints agencies such as the Australian Human Rights Commission.

To implement the policy, management must ensure that all employees are aware of the policy and understand it. This can be done by, for example, orally informing all employees of the policy, displaying the policy on notice boards, distributing brochures and displaying posters on sexual harassment. Training for general and supervisory staff should incorporate information on sexual harassment.

If it is difficult or impractical for a small business to develop its own policy, employer organisations, small business associations, industry associations or state or territory anti-discrimination agencies may be able to assist. Some organisations will be able to provide a generic model sexual harassment policy or examples of policies which can be adapted for use in the enterprise.

Small businesses in a particular industry sector may wish to consider developing a joint policy for implementation throughout the industry. Interested businesses may approach the relevant industry association for assistance in co-ordinating the process.

Complaints procedures

Owners and employers in small business should nominate themselves or a responsible senior employee as a sexual harassment complaints officer. This person should be provided with any training or resources offered by employer organisations, small business associations, industry associations, the Australian Human Rights Commission or state or territory anti-discrimination agencies. Small businesses should follow the general principles that apply to complaints procedures as outlined in the Complaints procedures section of this document.

If assistance is required to deal with a complaint, advice should be obtained from employer organisations, small business associations, industry associations, the Commission or state or territory anti-discrimination agencies.

It is recommended that employers take the following steps to prevent sexual harassment.

1. Get high-level management support

- Get high level support from the chief executive officer and senior management for implementing a comprehensive strategy to address sexual harassment.

2. Write and implement a sexual harassment policy

- Develop a written policy which prohibits sexual harassment in consultation with staff and relevant unions.
- Regularly distribute and promote the policy at all levels of the organisation.
- Provide the policy and other relevant information on sexual harassment to new staff as a standard part of induction.
- Translate the policy into relevant community languages where required so it is accessible to employees from culturally and linguistically diverse.
- Ensure that the policy is accessible to staff members with disability.
- Ensure that managers and supervisors discuss and reinforce the policy at staff meetings. Verbal communication of the policy is particularly important in workplaces where the literacy of staff may be an issue.
- Review the policy to ensure it is operating effectively and contains up to date information.

3. Provide regular training and information on sexual harassment to all staff and management

- Conduct regular training sessions for all staff and management on sexual harassment and the organisational policy. Ensure that the training is specific about the types of behaviours that may amount to sexual harassment. Regular refresher training is recommended.
- Train all line managers on their role in ensuring that the workplace is free from sexual harassment.
- Display anti-sexual harassment posters on notice boards in common work areas and distribute relevant brochures.

4. Encourage appropriate conduct by managers

- Line managers should understand the need to model appropriate standards of professional conduct at all times.
- Include accountability mechanisms in position descriptions for managers.
- Ensure that selection criteria for management positions include the requirement that managers have a demonstrated understanding of and ability to deal with discrimination and harassment issues as part of their overall responsibility for human resources.
- Check that managers are fulfilling their responsibilities through performance appraisal schemes.

5. Create a positive workplace environment

- Remove offensive, explicit or pornographic calendars, literature, posters and other materials from the workplace.
- Develop a policy prohibiting inappropriate use of computer technology, such as e-mail, screen savers and the Internet.
- Periodically conduct workplace audits to monitor the incidence of sexual harassment.

Five simple steps to prevent sexual harassment in your workplace

Further information

Effectively preventing and responding to sexual harassment: A Code of Practice for Employers, can be found at www.humanrights.gov.au/sexualharassment

For further assistance on sexual harassment issues, employers can contact the Australian Human Rights Commission or their state or territory anti-discrimination agency.

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Employers can also refer to the *Good Practice, good business* resources from the Australian Human Rights Commission at www.hreoc.gov.au/info_for_employers/index.html



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