



Sexual Harassment
A CODE OF PRACTICE

SEXUAL HARASSMENT IN THE WORKPLACE
A Code of Practice for Employers



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Foreword



After twenty years of federal law outlawing sexual harassment you might expect that employers and staff would be getting the hang of how to prevent and manage incidents of sexual harassment in the workplace. It is certainly true that the community is generally aware that it is illegal and undesirable and in business circles attention is frequently drawn to the financial and productivity penalties faced by employers if found liable. The Human Rights and Equal Opportunity Commission ("HREOC") released its first Code of Practice to assist employers manage sexual harassment in 1996.

Yet the evidence from both HREOC's review of complaints, *A Bad Business*, and HREOC's 2003 national telephone survey reported in *20 Years On: The Challenges Continue...Sexual Harassment in the Australian Workplace* suggests that sexual harassment is frequently not well managed by employers or managers. Occasionally this embroils the organisation in legal action but more often results in workplace disharmony and staff turnover that benefits none concerned.

The telephone survey is the first national survey of sexual harassment in the Australian community. The results suggest ways in which employers could better manage both the prevention and incidence of sexual harassment at work. There is also a growing body of sexual harassment case law that defines the legal meaning of sexual harassment for the use of all those whose task it is to prevent sexual harassment in their workplaces. The case law is also useful for those who may be involved in sexual harassment policy development as well as in the education of the wider community.

For these reasons I thought it important that the Sex Discrimination Unit of HREOC update the Code of Practice. As well as updating the Code to reflect the experience of sexual harassment in the community, relevant case law has been included to clarify how the principles of sexual harassment are likely to be interpreted by the courts. This is particularly important for understanding what the courts believe are reasonable responses to sexual harassment as well as the limits of liability for employers.

The Code of Practice is based on a number of principles, including that sexual harassment is a form of sex discrimination and for this reason is included in the *Sex Discrimination Act 1984* (Cth). Results from the national telephone survey, for example, confirm that most sexual harassment involves men harassing women and in most of these cases, it is older men harassing younger women. A significant proportion involved older and more senior male workers harassing younger, more junior female workers. The Code of Practice reflects the importance of treating sexual harassment as a serious infringement of a person's right to work with dignity and respect and as a

reflection of the gender aspects of power in the workplace and not, for example, as mistaken courtship.

The survey also suggests that sexual harassment becomes more serious if left unchecked. Sexual harassment may begin with verbal abuse, innuendo or unwanted sexual comments but may go on to involve behaviour such as propositioning, asking sexual favours, unwanted touching, assault or even rape. The Code of Practice reflects this in its emphasis on prevention, the need for induction programs for new employees and early intervention by managers. The Code provides advice to employers or managers on how to manage complaints in such a way that other laws (including privacy, defamation or unfair dismissal) are not breached.

Managers and business owners function in a sometimes bewildering array of regulation, state and federal. It is the purpose of this Code to enable employers to develop appropriate mechanisms for the prevention and management of complaints with reference to a single document. A more fundamental purpose is to enable employers and managers to better understand how the law is meant to work and provide them with a framework for understanding the need for them to play a leadership role in providing a workplace culture that does not tolerate or condone sexual harassment.

All the legislation and case law in the world will not stamp out sexual harassment if employers do not ensure that there is no place for it in their workplaces. Prevention is a great deal more difficult than implementing grievance procedures but is also crucial to workplaces in which merit is rewarded, discrimination not tolerated and equality fostered. These guidelines should go some way in assisting Australia's employers large and small, to take up the challenge of sexual harassment. Prevention as well as grievance and complaints management are important leadership challenges for Australian bosses and employers.



Pru Goward
Sex Discrimination Commissioner
Human Rights and Equal Opportunity Commission

Preface

Status

This Code is issued under Section 48(ga) of the *Sex Discrimination Act 1984* (Cth) (the Sex Discrimination Act) which empowers the Human Rights and Equal Opportunity Commission (HREOC) to prepare and publish guidelines for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy, and discrimination involving sexual harassment.

This Code provides guidelines only for the avoidance of sexual harassment in the workplace and employers should seek their own legal advice as needed. The Code is not legally binding, however it incorporates mandatory requirements of the Sex Discrimination Act, established case law principles and accepted practice in the area.

Employers are encouraged to comply with this Code to minimise the risk of liability for unlawful sexual harassment.

Purpose

The purpose of this Code is to:

- provide employers with practical guidance on the sexual harassment provisions in the Sex Discrimination Act; and
- assist employers to implement policies and procedures which will eliminate and prevent sexual harassment at work.

Third edition

The Code updates the second edition that was published in 1997. The Code has been reorganised and some elements have been amended. This third edition represents the law as at January 2004 and should be preferred over the 1997 edition.

Scope

The Code deals with sexual harassment in the workplace. It applies to most workplace participants, depending on the particular facts of a case:

- the private sector (including small business);
 - unions;
 - non-government community organisations;
 - voluntary bodies;
 - clubs;
 - federal Government agencies;
 - federal Government business enterprises; and
 - educational institutions not under the control of State Government.
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Except where expressly stated, this Code does not apply to State Government instrumentalities or State Government employees.¹

Although this Code is a guide to the Sex Discrimination Act, sexual harassment is also prohibited by State and Territory anti-discrimination laws. Unless an exception applies, employers must comply with both the national legislation and the relevant State or Territory law. These are:

Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 1995 (VIC); Equal Opportunity Act 1984 (SA); Equal Opportunity Act 1984 (WA); Discrimination Act 1991 (ACT); Anti-Discrimination Act 1991 (QLD); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1998 (TAS).

Most of the general principles and procedures outlined in this Code are applicable at both a State and Territory and federal level. However, there are some differences in definitions and coverage. Employers are advised to contact the anti-discrimination agency in their State or Territory for further information.²

Using the Sexual Harassment Code of Practice

The Sexual Harassment Code of Practice has been structured as follows:

General principles: These are the basic principles of sexual harassment law summarised from the Sex Discrimination Act and case law, to give employers an overview of their legal obligations.

Explanatory notes: These give further explanation of the general principles, providing details and examples, including:

- *Case examples:* summaries of relevant decided cases to illustrate legal points;
- *Workplace examples:* "real life" situations and problems that employers may encounter in addressing sexual harassment in their workplaces.

Guidelines in Practice: These give practical advice on preventing or remedying sexual harassment.

Appendices: Additional useful information is included in the appendices on Complaints to the Human Rights and Equal Opportunity Commission and the Contact List for employers.

If you want a brief guide to the law on sexual harassment, see the "general principles" at the start of each chapter.

If you want to know how to prevent sexual harassment and minimize the risk of liability see Chapters 4 and 3.

If you are a small business employer, see "Guidelines for small business" at Chapter 6.

If you want practical guidance on preventing sexual harassment, writing a sexual harassment policy or establishing a complaints procedure, see Chapters 4 and 5.

If you need further assistance see Appendix B.

¹ State Government instrumentalities and State Government employees are exempt from the discrimination and sexual harassment provisions of the Sex Discrimination Act (Section 13) in relation to employment. The Act defines an "instrumentality of a State" as "a body or authority established for a public purpose by a law of a State and includes a technical and further education institution conducted by or on behalf of a State, but does not include any other institution of tertiary education" (Section 4). The breadth of the State exemption has not been fully tested but would seem to include State Government departments, statutory corporations, public authorities, local councils, State schools and State vocational education and training institutions. The exemption also applies to the Northern Territory and the Australian Capital Territory, which are defined as States in the Sex Discrimination Act. It should be noted that State Government instrumentalities and State Government employees are required to comply with all non-employment related areas of the Sex Discrimination Act, such as the provision of goods and services under Section 22 of the Sex Discrimination Act, and with State and Territory anti-discrimination laws, which include sexual harassment provisions.

² Contact details are at Appendix B.

A short guide: To the Sexual Harassment Code of Practice

What is sexual harassment?

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

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

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

For more information about sexual harassment see 1.2.

When is sexual harassment prohibited?

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

For more information on who is covered by sexual harassment laws see 2.2

What are my legal obligations as an employer?

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

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

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

First, to prevent sexual harassment an employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness. Secondly, if sexual harassment does occur, take appropriate remedial action.

How do I write a sexual harassment policy?

For information on how to write a sexual harassment policy see 4.2.2.

How do I implement and monitor a sexual harassment policy?

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

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

How do I deal with complaints?

For more information on establishing internal procedures for dealing with sexual harassment grievances or complaints see 5.2.

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

Other employer duties

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

For a brief overview of some of these obligations, see 8.1.

Are there any specific guidelines for small business?

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

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

For specific assistance for small businesses see 6.2.

Further assistance

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

1. What is Sexual Harassment

1.1 General principles

Sexual harassment

Sexual harassment is unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances.

Sexual harassment can take various forms. It can involve:

- unwelcome touching, hugging or kissing;
- staring or leering;
- suggestive comments or jokes;
- sexually explicit pictures, screen savers or posters;
- unwanted invitations to go out on dates or requests for sex;
- intrusive questions about an employee's private life or body;
- unnecessary familiarity;
- insults or taunts based on your sex;
- sexually explicit emails or SMS messages;
- accessing sexually explicit internet 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 is **not** sexual interaction, flirtation, attraction or friendship which is invited, mutual, consensual or reciprocated.

Sexual harassment is a legally recognised form of sex discrimination. Sexual harassment and sex discrimination are both unlawful under the Sex Discrimination Act.

The test for sexual harassment

The legal test for sexual harassment in the federal Sex Discrimination Act has three essential elements:

- the behaviour must be **unwelcome**;
- it must be of a **sexual nature**;
- it must be such that a **reasonable** person would anticipate in the circumstances that the person who was harassed would be **offended, humiliated and/or intimidated**.

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

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

The unwelcome behaviour need not be repeated or continuous. A single incident can amount to sexual harassment.

A complaint of sexual harassment will not necessarily be dismissed because the person subjected to the behaviour did not directly inform the harasser that it was unwelcome. However, there does need to be some indication from the person's conduct or the surrounding circumstances that the behaviour was in fact unwelcome.

1.2 Explanatory notes

1.2.1 What is “unwelcome” conduct?

According to case law, unwelcome conduct is conduct that was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive.³

Case example: Unwelcome conduct

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 the respondent 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 \$7,000 compensation.

Aldridge v Booth & Ors (1986) EOC 92-177 (at first instance)

Whether the behaviour was unwelcome is a subjective question and will depend on the response of the particular person alleging sexual harassment. It is irrelevant that the behaviour may not offend others or has been an accepted feature of the work environment in the past.⁴ Sexual interaction or flirtation which is

based on mutual attraction or friendship is not sexual harassment because it is not unwelcome.

Different individuals will often perceive and react to behaviour in different ways. This can make sexual harassment a complex area for employers to manage. For example, a person may think that their conduct is welcome or inoffensive, when in fact the recipient 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 workplace participants feel they have to join in to avoid being victimised, teased or excluded by their workmates. Relationships can sour or change, messages can be misread and the line between what is welcome and unwelcome can be crossed.

Workplace example: Consensual relationships

Sexual behaviour between employees arising from a mutual sexual or romantic relationship is not sexual harassment. However, managing this situation can become particularly difficult for employers where the relationship later breaks down and a complaint of sexual harassment is made.

In *Wong v Su* [2001] FMCA 108 the applicant’s claim of unlawful sexual harassment against her employer was unsuccessful. Federal Magistrate Driver found that the sexual harassment allegations were untrue, motivated by malice as a result of the breakdown of the personal and financial relationship between the applicant and respondent.

While a person cannot change their mind about a consensual relationship and then call it sexual harassment, employers still need to deal with complaints arising out of consensual relationships with care. Sexual harassment may occur if, following the relationship breakdown, one party behaves in an inappropriate and unwanted sexual manner towards their former partner. In this case, the situation should be dealt with as any other sexual harassment complaint.⁵

Employers also need to take care to ensure that sexual behaviour between employees, even if reciprocated, does not create an unpleasant and sexualised workplace for other employees.

³ *Aldridge v Booth & Ors* (1988) 80 ALR 1 at 5.

⁴ In *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) 85 ALR 503 at 526 Justice Lockhart stated that:

“In principle, advances by an employer, particularly if there is a series of them, all of which may have been tolerated by an employee out of sympathy or out of lack of choice, and each of which or all of which may have been tolerated by the majority of women, may nevertheless contravene s. 28 [at the time the section of the Sex Discrimination Act prohibiting sexual harassment] if they otherwise “vex and annoy” so as to amount to sexual harassment.”

⁵ See Chapter 5 for guidelines on dealing with sexual harassment complaints.

What may be acceptable socially or in private life could well be inappropriate in a work context. Employers should be careful to ensure that professional standards are maintained in the workplace and that a culture of inappropriate behaviour does not develop. For further direction, see the discussion at 4.2.1.

Consent or participation which is obtained by fear, intimidation, threats or force will not preclude a complaint of sexual harassment.

A complaint of sexual harassment should not be rejected just because the complainant did not tell the harasser that their behaviour was unwelcome. The case law takes into account the reasons why someone may feel unable to confront a harasser directly.

Case law indicates that factors that might be relevant include the youth and inexperience of the complainant, fear of reprisals and the nature of the power relationship between the parties.⁶ However, even if the complainant did not say anything to the harasser there still needs to be some indication from their reaction or the surrounding circumstances that the conduct was unwelcome.

1.2.2 What is “conduct of a sexual nature”?

The unwelcome behaviour must have a sexual element, overtone or implication. 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."

The sexual element of sexual harassment is rarely contentious: in most complaints received by HREOC the alleged harassment is clearly of a sexual nature.

Courts have also interpreted “conduct of a sexual nature” broadly. Conduct that may not, in isolation, appear to be sexual in nature, may become so because of the surrounding circumstances. For example, in *Shiels v James and Lipman Pty Ltd*⁷ the Federal Magistrates Court found that flicking rubber bands at a co-worker’s legs was conduct of a sexual nature because it was part of a pattern of sexual behaviour.

Case example: Conduct of a sexual nature

A woman worked for the respondent company as an administrative assistant and later as a logistics controller. She learned that a co-worker had told others that he was in love with her, and later was approached by the co-worker, who told her that he wanted to speak to her alone at his house. The woman refused to go to the man’s house. The next day the co-worker attacked her verbally, blaming her for his feelings and criticising her partner, who worked at the same company. The woman became upset and was sent home by her supervisor. She made a complaint of sexual harassment and was told not to return to work until after a conciliation meeting dealing with the harassment was held. After that meeting the woman was told that her position was redundant.

The woman’s co-worker argued that his behaviour may have been unwanted but was not conduct of a sexual nature.

Federal Magistrate Raphael found that that declarations of love for a woman, suggesting that she spend time with him at his home and commenting on her relationship with her partner was conduct of a sexual nature.

Aleksovski v Australia Asia Aerospace Pty Ltd [2002] FMCA 81

Case example: Conduct of a sexual nature

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 generally aggressive treatment by her supervisor, who had also occasionally used obscene language or gestures, sworn at her and told her “I’ll bring you to your knees.” 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 (1994) EOC 92-643

⁶ Such as the youth and vulnerability of the complainant in *Aldridge v Booth* (1986) EOC 92-177.

⁷ [2000] FMCA 2.

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. Harassment that is based on a person's sex may still be unlawful as a form of sex discrimination, even if there is no sexual element.⁸

1.2.3 What is a "reasonable person"?

The definition of sexual harassment in the Sex Discrimination Act also requires that a "reasonable person" must have anticipated that the person who was harassed would be offended, humiliated or intimidated.

Case example: Reasonableness

A woman employed by the respondent company claimed that during her employment she was subjected to sexual harassment in the form of inappropriate language and comments from fellow workers; texta writing on her body; pulling of her bra straps and touching of her buttocks. The respondent acknowledged that there was some "horseplay" in the workplace, but argued that the woman was a willing participant in the activities and that she also used crude language and engaged in similar behaviour.

Federal Magistrate Raphael found that a reasonable person in the woman's position would have been offended, humiliated or intimidated by the actions and remarks despite the fact that the woman had participated in some of them. For example, with regard to the woman's use of crude language he stated:

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...

Horman v Distribution Group Limited [2001] FMCA 52

The reasonableness part of the legal test for sexual harassment 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?

What is reasonable will depend on the circumstances of a particular case. Although the Sex Discrimination Act does not specify the sort of circumstances that may be relevant, 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 could all be taken into account.

Case example: Reasonableness

A woman was employed by a financial services company as a telemarketer. She complained of sexual harassment by the company manager in three incidents where he came up behind her while she was on the telephone and massaged her shoulders; put an arm around her when she was upset at work; and massaged her a second time while making sexual remarks and otherwise touching her in an unwanted manner.

The Queensland Anti-Discrimination Tribunal found that all of these incidents constituted sexual harassment. In finding that putting an arm around a co-worker could be sexual harassment, tribunal member Tahmindjis stated:

Whether an action is compassionate or reprehensible will depend on the overall context in every case. The context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female employee who had only worked in the office for two weeks. It occurred not long after another incident when distress due to a phone call had been used as an excuse to massage the complainant. The action was more than just a touch, such as placing a comforting hand on the distressed person's arm or shoulder: it was more in the form of a cuddle. In my opinion, in this instance in the overall context, a reasonable person should have anticipated that there was the possibility that [the woman] would have found this action offensive, humiliating or intimidating.

Smith v Hehir and Financial Advisors Aust Pty Ltd [2001] QADT 11

⁸ See discussion at 1.2.5.

1.2.4 Sexually hostile work environments

In some circumstances, a working environment or workplace culture that is sexually permeated or hostile may also amount to unlawful sexual harassment. A sexually hostile workplace is one in which one sex is made to feel uncomfortable or excluded by the workplace environment, by, for example, persistent comments in a male-dominated workplace that women do not belong or by display of sexual material. 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."⁹

One of the clearest examples of a hostile environment case is a 1994 decision of the Equal Opportunity Tribunal of Western Australia - *Horne v Press Clough Joint Venture*¹⁰ (see case example opposite). 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 because of their working environment. The Tribunal stated that:

*[I]t 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.*¹¹

The case law on hostile working environments demonstrates the need to deal with entrenched group cultures and practices which may hinder women's equal participation in and enjoyment of their working life.

More recent cases do not refer explicitly to a "hostile working environment", but make it clear that sexualised or demeaning cultures are unacceptable in the modern workplace.¹² 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 Hostile environments can be a particular problem for women working in non-traditional jobs or in male-dominated workplaces, where they are employed on isolated work sites or with live-in arrangements.

Case example: Sexually hostile environment

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 where there was 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. Rather, they were advised that their attitude made them unpopular on the site and were warned not to be troublemakers.

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

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 were required to pay a total \$92,000 damages.

Horne v Press Clough Joint Venture (1994) EOC 92-556; (1994) EOC 92-591

⁹ (1988) EOC 92-244 at 77,280.

¹⁰ (1994) EOC 92-556; (1994) EOC 92-591.

¹¹ *Horne v Press Clough Joint Venture* (1994) EOC 92-591 at 77,175.

¹² See, for example, *Coughran v Public Employment Office/Attorney General's Department* [2003] NSWIRComm 181, a case where a man was dismissed for his behaviour towards junior female staff. The NSW Industrial Relations Commission said: "...this is a case about culture as much as about an individual...The culture...was one that seemed to have a preoccupation with sex – ribald jokes, sexual innuendo, the sex lives of officers, inappropriate behaviour with sexual connotations and, of course, sexual harassment and discrimination." [65 and 66] per Boland J.

¹³ As the Human Rights and Equal Opportunity Commission stated in *Freestone v Kozma* (1989) EOC 92-249 at 77,377: "[t]he 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..."

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. In *G v R and Department of Health, Housing and Community Services* the Hearing Commissioner stated that:

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

Workplace example: Sexual banter

In some workplaces, sexual gossip, jokes and teasing are part of daily working life. Often employees who work in such environments take on this behaviour in order to participate in the workplace culture without thinking about the consequences to others.

Since they do not directly intend to offend or humiliate, employees who tell sexual jokes, circulate offensive material or use inappropriate nicknames for co-workers may be surprised to find out that some of their behaviour could constitute sexual harassment. Employers also need to be aware that they could be vicariously liable for any sexual harassment case arising from such behaviour.

A particular danger arises when comments move from the generalised to the particular, and individuals are targeted for comments, teasing or abuse. However, even generalised comments can offend co-workers, who have a right to work in an environment that is not permeated with sexual banter.

Employers should discourage any workplace behaviour that is sexist or potentially offensive to others. An atmosphere of respect in which employees are careful of each others' sensitivities will be least likely to foster sexual harassment complaints.

1.2.5 Sexual harassment is sex discrimination

In Australia sexual harassment is a legally recognised form of sex discrimination against women.¹⁵ This is because, although men can be harassed, sexual harassment is generally experienced by women.¹⁶ This means that in many cases an act of sexual harassment against a woman will also be an act of sex discrimination.

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

*...when a woman is subjected to sexual harassment...she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the discrimination is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman.*¹⁷

Recent case law has supported the view that sexual harassment is a form of sex discrimination against women.¹⁸

1.2.6 Criminal conduct

Although the Sex Discrimination Act makes sexual harassment a civil not criminal offence, some types of harassment may also be offences under the criminal law.¹⁹ These include:

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

In a criminal case the victim appears as a witness for the Crown and the offender can be prosecuted. If the prosecution is successful the outcome may be a fine or a jail sentence. In civil proceedings, cases are brought by victims themselves. If they win the case they may be awarded damages. The two types of proceedings are not mutually exclusive. However, criminal allegations 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".²⁰

If an employer suspects 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.

¹⁴ [1993] HREOCA 20.

¹⁵ Early cases establishing this link include: *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) 85 ALR 503.

¹⁶ See Human Rights and Equal Opportunity Commission *A Bad Business: Review of sexual harassment in employment complaints 2002* HREOC Sydney 2003, p17 and Human Rights and Equal Opportunity Commission *20 Years On: The Challenges Continue - Sexual Harassment in the Australian Workplace* HREOC Sydney 2004, p30.

¹⁷ (1988) 80 ALR 1 at 16-17.

¹⁸ See for example *Elliot v Nanda & Commonwealth of Australia* (2001) 111 FCR 240; *Horman v Distribution Group* [2001] FMCA 52; *Wattle v Kirkland & Kirkland* [2001] FMCA 66; *Johanson v Blackledge Meats* [2001] FMCA 6 and *Wattle v Kirkland & Anor* (No.2) [2002] FMCA 135. Wilcox J did not support this interpretation in *Gilroy v Angelov* (2001) ALR 57 but his approach has not been followed.

¹⁹ This is confirmed by the case law. In *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989) ALR 503 at 572 Justice French said: "[t]he concept of sexual harassment does not exclude criminal behaviour. Indeed, it may be the case that such conduct often occurs in connection with it."

If HREOC receives a sexual harassment complaint which involves allegations of criminal conduct, the complainant is informed of their right to report the matter to the police and an appropriate referral is provided. HREOC may nevertheless deal with a case that involves criminal allegations, particularly if the matter has not been pursued by law enforcement agencies or if the complainant is unwilling to report the matter to the police.²¹

Case example: Complaint involving criminal conduct

A woman alleged that while attending a work conference she was sexually assaulted by a co-worker. The company she worked for was a small family business and the alleged assault was committed by the son of its directors. The woman reported the incident to the alleged assailant's mother, who was also the office administrator and a director of the company. A few months later the woman's employment was terminated. She reported the matter to the police but it was not pursued as a criminal case. However, her sexual harassment complaint under the Sex Discrimination Act was upheld and she was awarded \$16,000 damages.

Leslie v Graham [2002] FCA 32

1.2.7 Single incidents

Sexual harassment does not have to be repeated or continuous to be against the law. The legal definition is drafted in the singular (i.e. "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.²² In *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* Justice Lockhart of the Federal Court of Australia 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."²³

1.2.8 Same-sex harassment and sexual preference

Sexual harassment is prohibited regardless of the sex of the parties, so a person can make a complaint if they are harassed by someone of the same sex. For example, a recent sexual harassment case involved a male apprentice boiler-maker who was subjected to comments about his sex life by male co-workers.²⁴

Sexual preference is also irrelevant to a complaint of sexual harassment. If lesbians or gay men are subjected to unwelcome conduct which is sexual in nature they can make a sexual harassment complaint. For example, if a group of workers makes offensive sexual jokes or comments about a homosexual colleague it is likely to be unlawful sexual harassment. It is also not relevant that the harasser had no sexual interest in the complainant. In *Font v Paspaley Pearls*,²⁵ allegations of sexual harassment were made by a young saleswoman against the male retail manager. The fact that the manager was homosexual and had no sexual designs on the woman was irrelevant to the case.

²⁰ That it is more probable than not that the alleged behaviour took place.

²¹ See Appendix A for a discussion of HREOC's complaints processes.

²² *Johanson v Blackledge Meats* [2001] FMC 6; *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11 at 28: "Even though this was the first alleged incident of touching, this does not mean that it cannot amount to sexual harassment as the incidents do not have to be repeated and the law in Australia does not allow a harasser a first attempt to test the complainant's reaction."

²³ (1989) 85 ALR 503 at 514-515. In the same case, Justice French also held that sexual harassment need not involve repetition. He stated at 568 that "... circumstances, including the nature and relationship of the parties may stamp conduct as unwelcome the first and only time it occurs".

²⁴ *Lulham v Shanahan, Watkins Steel and Ors* [2003] QADT 11. The apprentice successfully argued that he had been sexually harassed and was awarded \$26,000 compensation.

²⁵ [2002] FMCA 142.

2. When is sexual harassment prohibited?

2.1 General principles

The Sex Discrimination Act prohibits sexual harassment in employment. This will include recruitment and selection processes as well as harassment occurring in the course of employment. For example, sexual harassment is prohibited at the workplace, during working hours, at work-related activities such as training courses, conferences, field trips, work functions and office Christmas parties.

Sexual harassment is prohibited within most employment relationships involving employers, employees, commission agents, contract workers and partners. Table 2.1 sets out who is covered by federal sexual harassment legislation.

Sexual harassment 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 who sexually harass a member of the organisation;
- staff and students of educational institutions;
- a person providing goods, services and accommodation;
- a person disposing of or acquiring land;
- a member of a committee of management of a club; and
- a person administering Commonwealth laws and programs.

2.2 Explanatory notes

Sexual harassment is prohibited in most workplace situations and relationships. The key to understanding who is covered by federal sexual harassment legislation is the relationship between the harasser and the harassed. The table below shows which relationships are covered by the Sex Discrimination Act.

Note that sexual harassment does not necessarily have to take place in the workplace to be unlawful. Sexual harassment in employment may also take place in locations associated with work, such as conferences and training centres, restaurants for work lunches, hotels for work trips or office parties.

Table 2.1: When sexual harassment is prohibited

Workplace participant	Responsibility to employees	Responsibility to workplace participants	Responsibility to clients and customers	Responsibility in administering Commonwealth laws and programs
Employers must not sexually harass	A current or prospective employee; a current or prospective contract worker or commission agent	A workplace participant carrying out duties in the same workplace as the employer	A client, customer or any other person in the course of providing goods, services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program
Employers must not sexually harass	A co-worker or prospective co-worker	A workplace participant carrying out duties in the same workplace as the employee	A client, customer or any other person in the course of providing goods, services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program
Contract workers/ commission agents must not sexually harass	A fellow contract worker or commission agent	A workplace participant carrying out duties in the same workplace as the contract worker or commission agent	A client, customer or any other person in the course of providing goods, services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program
Partners must not sexually harass	A co-partner or prospective partner	A workplace participant carrying out duties in the same workplace as the partner	A client, customer or any other person in the course of providing goods, services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program
Union employees must not sexually harass	A co-worker or prospective co-worker	A workplace participant carrying out duties in the same workplace as the union employee	A union member or a person seeking to become a union member; A client, customer or any other person in the course of providing goods services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program
Union members must not sexually harass	A fellow union member or a person seeking to become a union member			
Employment agency operators and staff must not sexually harass			A client, customer or any other person in the course of providing goods, services and facilities	A person in the course of performing any function, exercising any power or carrying out any responsibility in the administration of a Commonwealth law or program

In addition, each of these workplace participants is also covered by the general prohibitions in the Sex Discrimination Act against victimising complainants or causing or permitting sex discrimination, including sexual harassment. This is discussed at 3.2.3 and 3.2.2.

Workplace example:**Sexual harassment by customers or clients**

Some employees or contractors, such as those working in the entertainment or hospitality industries, are vulnerable to sexual harassment by customers or clients.

The sexual harassment provisions of the Sex Discrimination Act do not cover employees or contract workers if they are sexually harassed by customers or clients. However, depending on the circumstances, an employer may be found liable for sex discrimination if they treated an employee or contract worker less favourably than they would have treated someone of the opposite sex by failing to protect them from harassment.

For example, in the case of *Smith v Sandalwood Motel* (1994) EOC 92-577 a motel owner was found to have discriminated against two women he engaged to perform as singers in his motel. The Western Australian Equal Opportunity Tribunal found that the motel owner did nothing to prevent the women being subjected to sexualised and offensive behaviour by bar patrons "in an atmosphere close to violence." The Tribunal found that the motel owner's neglect meant that the women were subjected to less favourable treatment than a male contractor would have received.

In order to protect themselves from liability employers should avoid putting employees in situations where they may be vulnerable to harassment: for example, not requiring women to wear sexy clothing to promote products or expecting them to behave flirtatiously with clients. When they see clients or customers harassing staff, employers should take steps to stop the behaviour.

Workplace example:**Social functions and alcohol**

Sexual harassment between employees is unlawful at social functions that are connected to work. The fact that the work party takes place at a venue outside of the workplace or even outside of working hours will not affect employees' liability for their actions. Employers will also remain vicariously liable for the behaviour of their staff at work social functions, unless they took all reasonable steps to prevent sexual harassment occurring.

When drinking, people will often act in ways they otherwise would not. Sometimes people view drinking and socialising as an opportunity to behave towards co-workers in a sexual or offensive way.

In order to protect themselves from vicarious liability for sexual harassment, employers may want to remind their employees that:

- sexual harassment in employment will not be tolerated wherever and whenever it takes place;
- employees are responsible for their inappropriate behaviour at a work social function; and
- being drunk is not a defence to sexual harassment.

Employers should also remind managers to model appropriate behaviour and be mindful that alcohol is served in a responsible way.

3. Liability

3.1 General principles

Personal liability

Persons or organisations covered by the sexual harassment provisions of the Sex Discrimination Act are personally liable for:

- their own acts of sexual harassment;
- any act of victimisation; or
- causing, instructing, inducing, aiding or permitting sexual harassment (this is called "accessory liability").

Vicarious liability

- The Sex Discrimination Act states that an employer or principal, including a union, is liable for acts of sexual harassment committed by employees or agents in connection with their duties unless "all reasonable steps" were taken by the employer or principal to prevent sexual harassment occurring. This is called "vicarious liability".
- Reasonable steps must be active, preventative measures.
- The obligation to prove that all reasonable steps were taken rests with the employer or principal.
- Lack of awareness that the harassment was occurring is not in itself a defence for employers or principals.
- Even when an employer or principal is found to be vicariously liable for sexual harassment committed by individual employees or agents the individual remains personally liable for their acts.
- However, in practice, employers who are vicariously liable for sexual harassment are generally more likely to end up paying compensation to a complainant, because of their greater capacity to pay than the individual harasser.

Agents

Depending on the particular facts of a case, agents in the area of employment could include:

- volunteer workers;
- holders of unpaid honorary positions;
- members of the board of directors;
- contractors and consultants; and
- business partners.

Depending on the particular facts of a case, agents of a union can include shop stewards and workplace delegates.

3.2 Explanatory notes

3.2.1 Personal liability

Any individual will be personally liable for their own unlawful acts under the Sex Discrimination Act, and in particular for acts of sexual harassment and victimisation. In these circumstances, the individual can be held responsible for their behaviour through an internal complaint process, by being the subject of a complaint to HREOC or a State or Territory anti-discrimination agency, or through legal proceedings before the Federal Court of Australia or Federal Magistrates Court.

3.2.2 Accessory liability

Individuals and employers 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. For example, a manager who is aware that an employee is being sexually harassed and does nothing about it may be held liable as an accessory to the harassment. There is no defence available for this type of liability.

Section 105 differs from the vicarious liability provisions discussed below in several ways. Unlike vicarious liability, an organisation can be an accessory to sexual harassment even if there is no legal relationship between the organisation and the harasser such as that of employer/employee. However in contrast to vicarious liability, an organisation must have knowingly contributed to the sexual harassment in order to be liable as an accessory.

*[A] person can, for the purposes of s105, permit another person to do an act which is unlawful, such as discriminate against a woman on the grounds of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a situation where there is a real, and something more than a remote, possibility that the unlawful conduct will occur.*²⁶

In effect, a person will be an accessory to harassment if they were aware that sexual harassment was occurring, or were aware that there was a real possibility of it occurring, did nothing to address it and thereby allowed the harassment to take place.

Case example: Employment agency's accessory liability

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

The Federal Court of Australia found that the agency had permitted the sexual harassment to take place. Justice Moore found that the caseworker who referred Ms Elliot to the doctor's employment did not have to actually know of the past complaints of sexual harassment, as the collective knowledge of the agency officers was sufficient. Justice Moore went on to explain what actions could have been taken.

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

This case it is particularly important for employment agencies, as they can be found liable for sexual harassment that takes place in workplaces not under their control, if they are aware that there is a real risk of sexual harassment occurring and they take no steps to reduce that risk. However, any private sector business may be liable as an accessory to sexual harassment if it permits the harassment to occur.

Elliott v Nanda & the Commonwealth (2001) 111 FCR 240.

²⁶ *Elliott v Nanda & the Commonwealth (2001) 111 FCR 240 at 259 [163] (Moore J).*

3.2.3 Victimisation

Section 94 of the Sex Discrimination Act prohibits the victimisation of anyone connected with a complaint. Victimisation means subjecting a person to some detriment if he or she has:

- lodged, or is considering lodging a complaint under the Sex Discrimination Act;
- provided information or documents to HREOC; or
- attended a conciliation conference or appeared as a witness.

Examples of victimisation may include:

- an employee being moved to a less responsible position while her complaint is being considered;
- a staff member being ostracised by other employees because of providing information to HREOC about inappropriate material being circulated in the workplace; or
- an employee being denied the opportunity of a promotion after unsuccessfully lodging a sexual harassment complaint against several of her supervisors.

If a person is subjected to some detriment because of a being involved in a sexual harassment complaint, they can make a complaint of victimisation to HREOC, using the usual complaints procedures.²⁷ In some cases, such as physical molestation or assault, victimisation may also be a criminal matter and the victim can report the behaviour to police.

3.2.4 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 also be held liable for wrongs committed by their employees in the course of work. 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. This means that if an employee sexually harasses a co-worker, client, customer or other protected person the employer can be held legally responsible and may be liable for damages unless they took all reasonable steps to prevent the harassment occurring.²⁸

In practice, in most sexual harassment complaints conciliated through HREOC or cases determined by courts, compensation is paid by the employer, rather than the alleged harasser.²⁹ Although the individual harasser will still be liable for their behaviour, and can be ordered by a court to pay compensation, employers are more likely than individuals to have the means to pay compensation.

Section 106 also makes a person 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, implied or ostensible authority conferred on them, the principal is bound by their actions and can be held vicariously liable for their wrongs. Volunteer workers, board directors, consultants or contractors, including recruitment agents, are likely to be considered agents of an employer.

In *Horne v Press Clough Joint Venture* (see case example at page 14) 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 was held liable for the role played by the union shop stewards, even though they were not union employees. It was found that the shop stewards were acting as agents of the union when the harassment occurred, as they spent most of their time on union business and "...were perceived by both workers and management as representing both the workers and the Union..."³⁰

²⁷ See Appendix A.

²⁸ See below at Chapter 4.

²⁹ Human Rights and Equal Opportunity Commission *A Bad Business: Review of sexual harassment in employment complaints* 2002 HREOC 2003, p 31.

³⁰ *Horne v Press Clough Joint Venture* (1994) EOC 92-591 at 77,177.

Workplace example: Contract workers

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

A woman is recruited by an employment agency to carry out a short-term project with a media company. She alleges that she is sexually harassed by a male co-worker on her project team. He argues in response that the woman is lying and that she in fact sexually harassed him.

If the woman's complaint is substantiated, the man will be liable for the sexual harassment because it is unlawful for an employee to sexually harass another workplace participant carrying out duties in the same workplace, even if she is the employee of the employment agency and not the media company.

The media company, as the man's employer, will be vicariously liable for his sexual harassment, unless it took all reasonable steps to prevent the harassment.

If the man's complaint is substantiated, the woman will be liable for sexual harassment, because a contract worker cannot sexually harass another workplace participant carrying out duties in the same workplace.

It is likely that the employment agency, not the media company, will be vicariously liable for the woman's sexual harassment, unless it took all reasonable steps to prevent it, because the agency is the woman's employer.

See also *Elliott v Nanda & the Commonwealth* (2001) 111 FCR 240 and case study at page 21.

3.2.5 Reducing or discharging vicarious liability

The vicarious liability provisions in the Sex Discrimination Act also provide employers with a defence. Vicarious liability can be reduced or avoided altogether if the employer can show that they took "all reasonable steps" to prevent the sexual harassment or discrimination. This means that employers are required to take active steps to minimise the risk of unlawful behaviour occurring in the workplace. Chapter 4 discusses how employers can prevent being held vicariously liable for acts of sexual harassment.

4. Preventing sexual harassment: All reasonable steps

4.1 General principles

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

Under the Sex Discrimination Act, an employer may be held vicariously liable for sexual harassment when the employer has not taken all reasonable steps to prevent sexual harassment in the workplace.

What constitutes all reasonable steps is not defined in the Sex Discrimination Act and is determined on a case by case basis. **What is reasonable for a large corporation may not be reasonable for 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 and gender hostility: employers may have to take particularly strong steps to combat harassment in such circumstances.
- Any other relevant factor, including geographic isolation of the work location, duties which require employees to work in close physical proximity or where there are "live-in" arrangements.

There are two main actions that employers must take to avoid liability for sexual harassment.

- Take steps to prevent sexual harassment from occurring: in order to prevent sexual harassment an employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness.
- If sexual harassment does occur, take appropriate remedial action: in order to remedy sexual harassment an employer should have appropriate procedures for dealing with complaints once they are made.

4.2 Explanatory notes

It is not possible to guarantee employers that they will not be vicariously liable for sexual harassment, even if they take particular steps to prevent harassment. This is because liability is decided by courts on a case-by-case basis. However, the case law does provide some guidance for employers on how they can meet their legal obligations.

In short, there are two main actions that employers must take to avoid liability for sexual harassment:

1. take steps to prevent sexual harassment from occurring; and
2. if sexual harassment does occur, take appropriate remedial action.

To prevent sexual harassment an employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness.

In order to remedy sexual harassment an employer should have appropriate procedures set up for dealing with complaints once they are made.

The next sections give practical advice to employers on how to prevent and remedy sexual harassment. Small businesses should also refer to Chapter 6.

4.2.1 Preventative measures

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. This can be done by developing a clear sexual harassment policy, communicating it to each workplace participant and making sure that it is understood. In addition, it is important that appropriate behaviour be modelled by management throughout the workplace.

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

Page 26 has a checklist on the general steps necessary to prevent sexual harassment, followed by guidelines specifically on writing a sexual harassment policy.

Workplace example: Internet and e-mail

Use of Internet and e-mail has transformed the way that workplaces communicate, but they can also be used, intentionally or otherwise, as a form of sexual harassment.

Deliberate harassment using the Internet may include downloading offensive screen savers and loading them onto a colleague's computer, sending derogatory e-mails or e-mailing pornographic material.

A particular problem with e-mail is that people tend to think of it as a private form of communication. Nothing could be further from the truth: once an e-mail is sent it can be passed on to any number of people, all with the person's or organisation's name attached. The practice of e-mailing "jokes", offensive material and pornography to workmates, or using workplace computers to e-mail this material externally, is fraught with problems since there is no way of guaranteeing that the material will not offend at least one of its recipients.

In addition, use of the Internet and e-mail to access or communicate sexual material can contribute to a hostile working environment, where employees are exposed to offensive material in shared offices, on printers or walking past others' desks.

In order to prevent sexual harassment by the Internet and e-mail employers should:

- make it clear to employees, through an Internet policy that is clearly communicated to all staff, that inappropriate use of Internet and e-mail will not be tolerated;
- direct staff not to forward offensive e-mails from another source; by doing so they make themselves responsible for the material;
- warn employees that e-mail communications are not private: one way of doing this is to suggest to employees that they not send any e-mail that they would not be happy to see displayed on a company notice board;
- warn employees that evidence of e-mails sent and web sites accessed remains on a computer system even after they have been deleted by individual users; and
- explain that what is a joke to one person may well be offensive to another and that sexual or offensive material does not belong in the workplace.³⁷

³⁷ For further information on harassment and new technologies see Joe Catanzariti "Online and staying in line" *Occasional Paper* Western Australian Commissioner of Equal Opportunity, July 2000.

Guidelines in Practice:

How to prevent sexual harassment

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

Get high-level management support

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

Write and implement a sexual harassment policy

- Develop a written policy which prohibits sexual harassment in consultation with staff and relevant unions. A suggested format is discussed at 4.2.2.
- Regularly distribute and promote the policy at all levels of the organisation.
- Translate the policy into relevant community languages where required so it is accessible to employees from non-English speaking backgrounds.
- Ensure that the policy is accessible to staff members with a 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.
- Provide the policy and other relevant information on sexual harassment to new staff as a standard part of induction.
- Periodically review the policy to ensure it is operating effectively and contains up to date information.

Provide information and training

- Display anti-sexual harassment posters on notice boards in common work areas and distribute relevant brochures (these may be obtained from HREOC, State and Territory anti-discrimination agencies and/or relevant unions).
- Train all line managers on their role in ensuring that the workplace is free from sexual harassment.
- Conduct regular awareness raising sessions for all staff on sexual harassment issues.

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.

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.
-

4.2.2 Writing a sexual harassment policy

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 employers incorporate information on sexual harassment into a general workplace harassment policy which covers other forms of unlawful harassment (such as harassment on the grounds of race, disability, sexual preference or age). Others decide there is a need for a stand alone sexual harassment policy, particularly if sexual harassment is a common or recurring problem within the workplace. Both options are valid and it is up to employers to decide what is most appropriate for them. If a general policy is adopted, however, it is important that the different types of harassment are well-defined and addressed comprehensively. If the policy is too broad or generic its impact and clarity may be compromised.

It is recommended that an organisation officially launch its sexual harassment policy at a full staff meeting. In a large organisation, 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.

An effective means of ensuring that the policy is promoted on an ongoing basis is to periodically put a copy in pay slips. Policies can also be promoted by e-mailing copies to employees and putting a copy on the company Intranet. The policy should also be displayed on notice boards and included in personnel manuals. Employers should provide the policy to new staff as a standard part of induction. Employers may want employees to sign a copy of the policy acknowledging that they received and understood it.

To ensure that the policy is widely promoted and regularly updated, responsibility for circulation and review should be allocated to a specific position or area.

See the *Guidelines in Practice* on pages 28 -30.

Case example: Employees in remote locations

Where employees are located in remote areas employers will need to be particularly careful that they have been made aware of sexual harassment policies and have access to any complaints procedures.

The respondent company had distributed a sexual harassment policy to staff that included details of sexual harassment contact officers. However, the policy was not explained to staff in any way and it was difficult, in practice, to make a complaint. Both of the contact officers listed were based in the head office, while the alleged harassment took place in a regional office. A complaint would have to be made by telephone during office hours when the complainant did not have the privacy to make such a call. The company was found to be liable for the sexual harassment of one of their employees by another.

Shiels v James and Lipman Pty Limited [2000] FMCA 2

Guidelines in Practice:**How to write a sexual harassment policy**

A sexual harassment policy should include the following.

A strong opening statement on the organisation's attitude to sexual harassment

This should state that the organisation is committed to ensuring that the working environment is free from sexual harassment, that it will not be tolerated under any circumstances and that disciplinary action will be taken against any employee (or agent) who breaches the policy. To give the policy credibility and maximum impact, the opening statement should appear above the signature of the chief executive officer.

An outline of the organisation's objectives regarding sexual harassment

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

This organisation aims to:

1. *create a working environment which is free from sexual harassment and where all members of staff are treated with dignity, courtesy and respect;*
2. *implement training and awareness raising strategies to ensure that all employees know their rights and responsibilities;*
3. *provide an effective procedure for complaints based on the principles of natural justice;*³²
4. *treat all complaints 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; and*
7. *promote appropriate standards of conduct at all times.*

A clearly worded definition of sexual harassment

There is no single, universally accepted definition of sexual harassment. However, the definition adopted should be consistent with the legal definition to avoid any confusion. The most important element to emphasise in any definition is that sexual harassment is *unwelcome* behaviour of a sexual nature. For example, sexual harassment can be defined 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 environment.

Some examples of sexual harassment that are relevant to the particular working environment

The policy should identify specific examples of sexual harassment, such as:

- uninvited touching;
- uninvited kisses or embraces;

³² See the discussion of natural justice at 5.2.

- smutty jokes or comments;
- making promises or threats in return for sexual favours;
- displays of sexually graphic material including posters, pinups, cartoons, graffiti or messages left on notice boards, desks or common areas;
- repeated invitations to go out 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 including lifting up skirts or shirts, flicking bra straps, or putting hands in a person’s pocket;
- requests for sex;
- sexually explicit conversation;
- persistent questions or insinuations about a person’s private life;
- offensive phone calls or letters;
- stalking; and
- offensive e-mail messages or computer screen savers.

What sexual harassment is not

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

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 federal, State or Territory anti-discrimination laws that apply to the organisation. Staff need to know that legal action could be taken against them for sexual harassment and that they could also be exposing the company to liability.

The circumstances in which sexual harassment may occur

The policy should state that a person may be sexually harassed by a supervisor or manager, co-worker, contractor, service provider, client or customer. Although not all these situations would necessarily give rise to a complaint under the legislation, it makes good sense to provide an internal procedure for dealing with any sexual harassment which could affect the welfare of employees. The policy should also state that sexual harassment is not just unlawful during working hours or in the workplace itself and not only between co-workers. The behaviour is unlawful in any work-related context, including conferences, work functions, office Christmas parties and business or field trips and includes interactions with clients and customers.

The consequences that can be imposed if the policy is breached

The policy should operate as a general warning to all employees of the consequences they can expect if they do not comply. Depending on the severity of the case, consequences can include an apology, counselling, transfer, dismissal, demotion or other forms of disciplinary action. Employees should also be informed that immediate disciplinary action will be taken against anyone who victimises or retaliates against a person who has complained of sexual harassment.

Responsibilities of management and staff

The policy should state that the organisation has a legal responsibility to prevent sexual harassment, otherwise it can be liable for the behaviour of its employees. This means that managers and supervisors have a responsibility to:

- monitor the working environment to ensure that acceptable standards of conduct are observed at all times;
- model appropriate behaviour themselves;
- promote the organisation's sexual harassment policy within their work area;
- treat all complaints seriously and take immediate action to investigate and resolve the matter;
- refer complaints to another officer if they do not feel that they are the best person to deal with the case (for example, if there is a conflict of interest or if the complaint is particularly complex or serious).

All staff have a responsibility to:

- comply with the organisation's sexual harassment policy;
- offer support to anyone who is being harassed and let them know where they can get help and advice (they should not, however, approach the harasser themselves);
- maintain complete confidentiality if they provide information during the investigation of a complaint. Staff should be warned that spreading gossip or rumours may expose them to a defamation action.

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

The policy should tell employees where they can get help if they are sexually harassed. Depending on the size of the organisation and the system that is in place for dealing with sexual harassment, employees can be advised to approach their manager or supervisor, sexual harassment contact officer, equal employment opportunity officer, human resources manager, industrial relations manager and/or their union delegate. Where possible a number of different contact people of both sexes should be provided so that staff can approach someone they feel comfortable with. It is not appropriate to only give staff the option of approaching their line manager because there may be cases where the manager is the alleged harasser or is perceived to be closely associated with the harasser and therefore not impartial.

A brief summary of the options available for dealing with sexual harassment

Employees 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 feels confident enough to do so), making a formal complaint to a manager or using the organisation's internal complaints procedures. The way that complaints will be handled should be documented in the policy or in a separate complaints procedure. Staff can be referred to this if they require more information. Employees can also approach their union, HREOC or the relevant State or Territory anti-discrimination agency for information and confidential advice.

4.2.3 Remedial measures

Even with the most effective and fully implemented sexual harassment policy, harassment can still occur. Employers need to know in advance how they will approach a complaint of sexual harassment in their workplace, and have procedures in place to deal with the harassment.

Advice on developing internal complaints procedures is provided below at Chapter 5.

Employers can also encourage employees to assist in the prevention of sexual harassment in the workplace. For example, employees will often be aware of inappropriate behaviour before management. Staff can be encouraged to report early concerns about unwelcome behaviour before it becomes a serious sexual harassment complaint.

Case example: Employer not vicariously liable

The respondent was a lawyer who, in connection with his employment, sexually harassed a client of his employer.

The employer, an Aboriginal corporation, was a small organisation and Federal Magistrate Rimmer accepted that it had made its expectations of employees in relation to harassment clear and so did not find the employer to be vicariously liable. The employer discharged its liability by:

- *establishing an appropriate complaint handling process;*
- *directing senior field officers to orally inform all field officers that sexual harassment would not be tolerated in any circumstances and severe action would be taken in response to its occurrence;*
- *organising workshops for staff on sexual harassment and discrimination.*

In addition, the employer had given a number of warnings to the respondent about his behaviour in relation to a previous complaint of sexual harassment against him.

McAlister v SEQ Aboriginal Corporation for Legal Services [2002] FMCA 109

Case example: Employer vicariously liable

A woman worked as a catering attendant for a food services company in a canteen at which employees of the respondent company regularly ate. One evening an employee of the company exposed his genitals to her and then grabbed her vagina for a second or two before he walked away. The woman lodged a complaint of sexual harassment against the company.

In the action before the Victorian Civil and Administrative Tribunal the issue was whether the company could be held vicariously liable for the actions of its employee. The Tribunal found that the company's actions, which included investigating the assault and recommending disciplinary action against the employee, were insufficient to discharge its vicarious liability.

The following strategies were suggested by the Tribunal to prevent sexual harassment in line with avoiding vicarious liability.

The preventive measures to be taken would ordinarily include the implementation of adequate educational programmes on sexual harassment issues and monitoring of the workplace to ensure compliance with its sexual harassment policies...Educational programmes might include the dissemination of literature and the provision of seminars. There might be re-education programmes to ensure that employees received disseminated materials and understood sexual harassment policies.

The Tribunal emphasised the need for employers to communicate policies to all employees to ensure that they become aware of what may constitute sexual harassment and that it is unlawful. The Tribunal held that it is not enough to distribute materials only to managers, supervisors and contact officers.

Coyne v P&O Ports [2000] VCAT 657

Guidelines in Practice:**How to remedy sexual harassment**

It is recommended that employers take the following steps to deal with the occurrence of sexual harassment.

Implement an internal system for dealing with sexual harassment complaints or adapt existing complaints procedures for this purpose. More information on setting up a complaints procedure is at Chapter 5.

Ensure that the organisation's policy on harassment provides employees with advice on what to do if they are sexually harassed.

Employees should be given information on:

- how to deal with the harassment themselves (employees should not be pressured into pursuing this option and should only confront the harasser directly if they feel confident enough to do so);
 - speaking to their supervisor, manager or other officer who has responsibility for dealing with sexual harassment;
 - lodging a formal complaint through the organisation's complaint/grievance procedure; and
 - approaching an external organisation such as their union, HREOC or a State or Territory anti-discrimination agency.
-

Case example: Large employer vicariously liable

A female client of a bank was sexually harassed by the manager of her local branch in the course of accessing banking services.

In trying to establish that it had taken all reasonable steps to prevent sexual harassment, the bank gave evidence that it had circulated a code of conduct on sexual harassment, as well as a video, letters, an instruction, a brochure and an article. There was also a system of auditing managers to check their compliance with a requirement that they discuss sexual harassment with their staff every six months.

However, direct evidence from staff showed that there had been no recent training on sexual harassment. There were also indications from staff that they did not feel that they could or should take any action against inappropriate behaviour. The Commissioner found that there was virtually no focus on sexual harassment at the bank and that no training or auditing had been undertaken at the branch office where the harassment had taken place.

The Commissioner said that, as a large organisation, the bank has a responsibility:

...to ensure that its policies are communicated effectively to its executive officers, and that they accept the responsibility for promulgating the policies and for advising of the remedial action when breached.

Evans v Lee and Anor (1996) EOC 92-822

5. Complaint procedures

5.1 General principles

Internal complaints

Employers should establish internal procedures for dealing with sexual harassment complaints or grievances to encourage 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 organisation's 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 natural justice;
- 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 HREOC, 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; and
- are regularly reviewed for effectiveness.

External complaints

A person who has been subjected to sexual harassment can make a written complaint to HREOC (or the relevant State or Territory anti-discrimination agency). The complaint will be investigated and HREOC 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 apply to the Federal Magistrates Court or Federal Court of Australia for judicial determination. See Appendix A for more information about complaints to HREOC and the courts.

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

5.2 Explanatory notes

As part of the legal responsibility to deal with sexual harassment, all employers must implement effective, 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;
- 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; and
- reduces the risk of an employer 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 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 in place for other types of employee complaints. 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.

Sexual harassment complaints may be against a senior member of staff who has managerial or supervisory authority over the complainant, or they may involve a co-worker at the same or a more junior level. 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.

Given the sensitivities and complexities around sexual harassment complaints, they can be difficult for employers to manage, whatever their size or level of resources. However, there are sensible steps that employers should take in advance to manage complaints and minimise potential liability. This section sets out some of those steps.

This section refers to principles of natural justice. Natural justice and procedural fairness are concepts of administrative law. Employers should observe these concepts in devising and implementing sexual harassment policies. Principles of natural justice and procedural fairness require an employee to be fully informed of a complaint made against them, and to be given an opportunity to respond to the complaint. What is fair and just may differ between different circumstances, but there are three basic requirements.

- An employee 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 employee 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.

External complaint procedures are further discussed at Appendix A.

Small businesses should refer to Chapter 6.

5.2.1 Informal complaint procedures

Informal procedures emphasise resolution rather than factual proof or substantiation of a complaint. Informal ways of dealing with sexual harassment can include the following actions.

- The individual who has been harassed wants to deal with the situation themselves but may seek advice on possible strategies from their supervisor or another officer such as the sexual harassment contact officer, EEO officer, industrial relations manager or human resource personnel.
- The individual who has been harassed asks their supervisor to speak to the alleged harasser on their behalf. The supervisor privately conveys the individual's concerns and reiterates the organisation's sexual harassment policy to the alleged harasser without assessing the merits of the case.

- A complaint is made, the harasser admits the behaviour, investigation is not required and the complaint is resolved through conciliation or counselling of the harasser.
- A supervisor or manager observes unacceptable conduct occurring and takes independent action even though no complaint has been made.

Informal action is usually appropriate where:

- the allegations are of a less serious nature but the individual alleging to the behaviour wants it to cease nonetheless; or
- the individual alleging the behaviour wishes to pursue an informal resolution; or
- the parties are likely to have ongoing contact with one another and the complainant wishes to pursue an informal resolution so that the working relationship can be sustained.

An employee should not be required to exhaust informal attempts at resolution before formal action commences. Employees have the right to formalise their complaint or approach an external agency, such as HREOC, at any stage.

5.2.2 Formal complaint procedures

Formal procedures focus on proving whether a complaint is substantiated. They usually involve:

- investigation of the allegations;
- application of the principles of natural justice;
- making a finding as to whether the harassment occurred;
- submitting a report with a recommended course of action to the appropriate decision-maker (senior management); and
- implementation of an appropriate outcome.

Formal procedures are usually appropriate where:

- informal attempts at resolution have failed;
- the complaint involves serious allegations of misconduct and informal resolution could compromise the rights of the parties;
- the complaint is against a more senior member of staff;
- the person alleging sexual harassment also alleges victimisation;

- the allegations are denied, the person who claims to have been harassed wishes to proceed and investigation is required to substantiate the complaint; or
- the person alleging sexual harassment wishes to make a formal complaint.

To ensure consistency and fairness, employers should document the steps involved in a formal complaint and clearly inform the parties about the processes involved in considering a complaint in advance. The usual sequence of events is that:

- the complainant is interviewed and the allegations are particularised in writing;
- the allegations are conveyed to the alleged harasser in full;
- the alleged harasser is given the opportunity to respond and defend themselves against the allegations;
- if there is a dispute over facts, statements from any witnesses and other relevant evidence are gathered;
- a finding is made as to whether the complaint has substance;
- a written report documenting the investigation process, the evidence, the finding and a recommended outcome/s is submitted to the decision-maker; and
- the decision-maker implements the recommended outcome/s or decides on an alternative course of action.

The parties should be permitted to have a union official, support person, advocate or other representative accompany them to any interviews or meetings.

A formal complaint should not be dismissed on the ground that no one saw or heard the incident/s occur. Given the nature of the conduct, there are often no direct witnesses to acts of sexual harassment. Those responsible for investigating complaints should consider all available evidence, including any surrounding evidence, and *make their finding on the balance of probabilities*, that is, that it is more probable than not that the harassment did or did not occur. It is important to note that even if there is not enough evidence for a complaint to be substantiated, it does not mean that the discrimination did not occur or that the complainant is a liar. Findings may be that harassment did or did not occur, or that it was not possible to make a conclusive finding.

Evidence that may be relevant includes:

- evidence that the person alleging harassment discussed his or her concerns with a family member, friend, co-worker, medical practitioner or counsellor;
- supervisor's reports and personnel records (for example unexplained requests for transfer or shift changes, sudden increase in sick leave);
- complaints or information provided by other employees about the behaviour of the alleged harasser;
- records kept by the person claiming to have been harassed;
- whether the evidence was presented by the parties in a credible and consistent manner; and/or
- the absence of evidence where it should logically exist.

Outcomes can include any combination of the following:

- counselling;
- disciplinary action against the harasser (such as demotion, transfer, suspension, probation or dismissal);
- official warnings that are noted on the harasser's personnel file;
- disciplinary action against the person who complained if there is *strong* evidence that the complaint was vexatious or malicious;
- formal apologies;
- conciliation/mediation conducted by an impartial third party where the parties to the complaint agree to a mutually acceptable resolution;
- reimbursing any costs associated with the harassment; and/or
- re-crediting any leave taken as a result of the harassment.

Outcomes will depend on factors such as:

- the severity or frequency of the harassment;
- the wishes of the person who was harassed;
- whether the harasser could have been expected to know that such behaviour was a breach of policy;
- the level of contrition; and
- whether there have been any prior incidents or warnings.

If there is insufficient proof to decide whether or not the harassment occurred employers should nevertheless:

- remind those involved of expected standards of conduct;
- conduct further training and awareness raising sessions for staff; and
- monitor the situation carefully.

Employers must ensure that the outcome of a complaint, substantiated or not, does not disadvantage the person who made the complaint in any way, in the absence of strong evidence that the complaint was vexatious or malicious.

If a complainant does not want to proceed with a formal or informal complaint, this does not mean that management should take no action. As with unsubstantiated complaints, it is a good time to consider the internal processes for preventing and responding to sexual harassment, provide training and remind employees of their general obligations not to sexually harass others. In addition, management should follow up with the person who reported their concerns a few months later, to check whether their concerns remain, and to monitor the relationships involved.

5.2.3 Developing sexual harassment complaint procedures

Employers may develop complaints procedures to suit their particular workplace. In HREOC's experience, the most effective complaint procedures for large organisations offer a range of options for dealing with sexual harassment. For example, a person can complain to their own supervisor, another manager or a designated complaints officer. The individual is then able to select the option which best suits the particular circumstances of their case.

Smaller businesses have less capacity to offer a range of options, but as a minimum should ensure that managers have the knowledge and training to deal with sexual harassment complaints and should inform staff that complaints may be made to HREOC or State and Territory anti-discrimination bodies. Depending on their size, small or medium-sized businesses may also consider training an additional staff member to deal with complaints. More information for small businesses is at Chapter 6.

Reporting to management

Most organisations encourage a person with a complaint to raise it with their immediate supervisor (or another manager if the supervisor is the alleged harasser). In a small business there may only be one manager, but in a larger organisation the complainant can report the situation to another manager, an EEO officer, human resources or industrial relations manager.

Sexual harassment complaints frequently involve sensitive or embarrassing information and in some cases an individual may be reluctant to discuss the details with the management hierarchy. Given this sensitivity and the prevalence of sexual harassment against women, this model is unlikely to be suitable if the management hierarchy is predominantly male. It may also be difficult for a person to make a complaint to management if the alleged harasser is part of the chain of responsibility. The approach also depends on supervisors and managers at all levels possessing the necessary complaints handling skills and knowledge about sexual harassment.

Complaints officers

Larger organisations may overcome some of these difficulties by designating particular employees as sexual harassment complaints officers. This could be an EEO officer, human resources manager or other nominated management representatives. Complaints officers are selected on the basis of their skills, experience and sensitivity. They take an active role in the resolution of complaints and should have relatively senior status in the organisation to ensure that their role is respected and they can operate with the necessary level of authority.

Some large organisations contract out formal complaints procedures to professional consultants. This may be an effective way of dealing with complaints as it promotes the objectivity of the procedures.

Sexual harassment contact officers

Many large organisations have also appointed sexual harassment contact officers. Sexual harassment contact officers provide the first point of contact for a person who complains of sexual harassment. If that person then decides to proceed with a formal complaint, the case is referred to a nominated complaints officer or management representative.

Contact officers are selected from various areas and levels of the organisation to provide information and support to a person who makes a complaint of sexual harassment. Contact officers are *not* involved in the formal investigation or resolution of a complaint. The role of the contact officer is to listen to the complaint; provide information on sexual harassment and the internal options that are available to deal with sexual harassment complaints; inform the individual of their rights; discuss possible strategies the individual can use to deal directly with the harasser, if this is the individual's preferred course of action and provide general information on sexual harassment and the organisation's policy and procedures to any interested member of staff.

6. Guidelines for small business

6.1 General principles

There is no exemption in the Sex Discrimination Act for small business.

Employers in all small businesses, whatever the size, may be vicariously liable for acts of sexual harassment committed by employees unless all reasonable steps were taken to prevent it occurring.

Recent case law suggests that even very 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; and
- contact numbers for external complaints agencies such as HREOC.

To implement the policy, management must ensure that all employees are aware of the policy and understand it. In a small business this can be done by orally informing and regularly reminding each employee about the policy.

Small business enterprises are encouraged, where necessary, to adapt particular recommendations in this Code according to their needs, circumstances and resources. However, many of the recommendations contained in this Code can and should be adopted by businesses of all sizes.

6.2 Explanatory notes

6.2.1 Small business

A significant number of sexual harassment complaints received by HREOC involve small businesses. Employers should be aware of the potential for sexual harassment to occur in the context of close working relationships where staff are on familiar terms with one another and should take appropriate precautions to avoid this risk.

Policies

It is recommended that small businesses have a written policy on sexual harassment.

The employer should ensure that all employees are aware of the sexual harassment policy and that sexual harassment is unlawful. 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.

Complaints

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, HREOC or State or Territory anti-discrimination agencies. The general principles that apply to informal and formal complaint procedures outlined in Chapter 5 should be observed.

Assistance with sexual harassment issues for small business

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 should approach the relevant industry association for assistance in co-ordinating the process.

Brochures, posters and other educational material on sexual harassment can be obtained from HREOC, State or Territory anti-discrimination agencies and/or relevant unions and employer organisations.

If assistance is required to deal with a complaint, advice should be obtained from employer organisations, small business associations, industry associations, HREOC or State or Territory anti-discrimination agencies.³³

6.2.2 Very small business

Policies

The case law suggests that even very small businesses should have a simple written sexual harassment policy.³⁴

In very small businesses where the owner or employer has direct contact with all employees and is responsible for overseeing all aspects of daily operations, steps to address sexual harassment and implement the sexual harassment policy may include:

- orally informing all employees that sexual harassment will not be tolerated under any circumstances and that disciplinary action will be taken against an employee who sexually harasses a co-worker, client or customer, contractor or other workplace participant;
- providing all staff with brochures and displaying information on noticeboards regarding sexual harassment;³⁵
- informing new staff that it is a condition of their employment that they do not sexually harass a co-worker, client or customer, contractor or other workplace participant; and
- keeping a diary note, which may later be useful as evidence, when staff are informed of the employer's policy on sexual harassment and when information is displayed and updated.

³³ Contacts for complaints assistance from HREOC and State and Territory anti-discrimination agencies are at Appendix B.

³⁴ See *Gilroy v Angelov* (2000) 181 ALR 57, case study at page 42. See discussion above at 4.2.2 on developing such a policy.

³⁵ These may be obtained from HREOC. See contact details at Appendix B.

Complaints

Employees in very small business should be advised to make a complaint to the owners or employer if they are subjected to sexual harassment. The general principles that apply to informal and formal complaint procedures outlined in Chapter 5 should be observed.

Employees should be advised that they also have the right to approach their union, HREOC or their State or Territory anti-discrimination agency.

Assistance with sexual harassment issues for very small business

If the owner or employer requires assistance to deal with a complaint, they should contact employer organisations, small business associations, industry associations, HREOC or their State or Territory anti-discrimination agency for advice.

Owners or employers in very small business are encouraged to attend relevant seminars or training sessions run by employer organisations, small business associations, industry associations, HREOC or their State or Territory anti-discrimination agency.

Owners or employers in very small business are encouraged to obtain any available resources on discrimination, harassment and their legal responsibilities from employer organisations, small business associations, industry associations, HREOC or their State or Territory anti-discrimination agency.

Case example: Small business

A woman was employed in a photographic laboratory by the respondent company. She alleged that she was sexually harassed by her supervisor and that the behaviour also constituted sex discrimination for which the company was liable.

The respondent company argued that it took reasonable steps to prevent sexual harassment, pointing to the general instructions given to new employees to treat others with courtesy and respect.

Federal Magistrate Driver found that sex discrimination had occurred, and that the company was liable. He said:

[t]he [Sex Discrimination Act] does not distinguish between large and small employers, in terms of [the meaning of "reasonable steps"]...however, it would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. ["Reasonable steps"] has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably.

In this case, the steps that had been taken were, even for a small business, found to be "insufficient and ineffective".

Cooke v Plauen Holdings [2001] FMCA 91

Another case, *Gilroy v Angelov*³⁶ demonstrates the importance of a written policy, even for small business. Note that a written policy still needs to be implemented effectively, through communication to all employees, for employers to feel confident that they will not be vicariously liable for employees' harassing behaviour.

³⁶ See *Gilroy v Angelov* (2000) 181 ALR 57, case study at page 42.

Case example: Small business

A woman made a sexual harassment complaint against a male co-worker in a small cleaning business. She told her employer about the harassment but it continued.

Since her employer had actual knowledge of the harassment, it was not necessary for the court to determine whether all reasonable steps had been taken. However, Justice Wilcox made important comments indicating what a small business must do to establish that it took all reasonable steps to prevent harassment. He said:

[I]t may be more difficult for a small employer, with few employees, to put into place a satisfactory sexual harassment regime than for a large employer with skilled human resources personnel and formal training procedures. But the Act does not distinguish between large and small employers, and the decided cases show that many sexual harassment claims concern small businesses, often with only a handful of employees. A damages award against such an employer may have devastating financial consequences; so there is every reason for such an employer to be careful to prevent claims arising.

Justice Wilcox said that there was a "simple procedure" that would go "a long way" towards allowing a small business employer to argue that all reasonable steps had been taken to prevent sexual harassment. This was:

...to prepare a brief document pointing out the nature of sexual harassment, the sanctions that attach to it and the course that ought to be followed by any employee who feels sexually harassed. ...[S]uch a document could be provided to each employee on recruitment, as a matter of routine and before there was, or could be, any suggestion that the employee had done anything wrong or was the victim of inappropriate conduct.

Gilroy v Angelov (2001) 181 ALR 57

7. Record-keeping

7.1 General principles

Sexual harassment complaints are often very sensitive and involve personal information about employees. Employers should develop guidelines on dealing with such information, in order to comply with privacy laws and maintain staff confidence.

Information relating to sexual harassment complaints should be protected by reasonable security safeguards. For example, any files or reports associated with an investigation should be kept in locked storage.

7.2 Explanatory notes

7.2.1 Importance of keeping records

Employers should develop, and make known to employees, clear guidelines on how to document and record complaints and reports of sexual harassment. This has a number of benefits.

- The incidence of sexual harassment is able to be monitored and particular problem areas identified and targeted for further awareness-raising strategies. Statistical records will assist the organisation to determine whether an incident is isolated or forms part of a pattern.
- It allows informed and fair decisions to be made on the basis of accurate reports.
- Evidence on how the organisation dealt with the case can be submitted in any subsequent legal proceedings. For example, if a complaint is lodged with HREOC or State or Territory anti-discrimination agency or there is subsequent litigation, records of internal action will be useful in establishing whether reasonable steps were taken to deal with the harassment and may assist in discharging the organisation's liability.
- Ensuring employees are aware of how personal information will be handled when an allegation or complaint is made in the workplace. This will help to reduce the likelihood of complaints by parties regarding a breach of privacy, avoid discouraging workplace participants from seeking assistance and advice, and assist in assuring workplace participants accused of harassment that they will be treated fairly. Employees should be aware of what information will be collected, why, how it will be used and to whom it may be given.

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

7.2.2 Obligations of organisations and agencies under the *Privacy Act 1988* (Cth)

Organisations with an annual turnover above \$3 million, as well as some small businesses, are covered by the National Privacy Principles (NPPs) in the *Privacy Act 1988* (Cth) (“the Privacy Act”). More information about which private sector organisations are covered by the NPPs, and how the NPPs operate, is available from the Office of the Federal Privacy Commissioner.³⁷

However, there is an exemption in the Privacy Act in relation to workplace privacy in the private sector. This “employee records” exemption operates so that an organisation is not bound by the NPPs if it is a current or past employer of the individual, and the data handling activity it is carrying out is directly related to the current or past employment relationship with the individual and to a record about that individual.³⁸ As the operation of the exemption will need to be determined in the particular circumstances of a case, the advice below assumes that an organisation is subject to the Privacy Act.

Commonwealth and ACT public sector agencies are covered by the Information Privacy Principles (IPPs) in the Privacy Act.³⁹ The handling of personal information about Commonwealth and ACT public sector employees by agencies is subject to the IPPs.

Organisations will also be covered by relevant State and Territory privacy legislation. For more information about State laws, contact the Office of the Federal Privacy Commissioner.⁴⁰

7.2.3 Records of informal complaints

If informal measures have been used to resolve a situation, only limited records are usually collected. For example, in a case where an individual has dealt with the problem themselves after receiving information and advice from a sexual harassment contact officer, manager or other designated officer there are several competing considerations around which records should be kept.

Some record of the contact is required for statistical purposes so that the organisation can monitor the number of reports of sexual harassment and target particular problem areas. A record

of the contact also allows the contact officer to follow-up the case to ensure that the situation has been effectively resolved through informal action and that there are no potential repercussions for either party or the organisation. At a practical level, keeping records also ensures that the contact 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 the allegation.

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. Recording an individual’s name on the form should only ever be done with their explicit consent to avoid discouraging any workplace participant from seeking advice and assistance. A brief summary of the alleged incident along with an agreed course of action should also be recorded. Again, this allows the contact officer to 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 would 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 when it was first raised.

³⁷ See www.privacy.gov.au.

³⁸ *Privacy Act 1988* (Cth).

³⁹ More information about how the IPPs operate can also be found at the website www.privacy.gov.au.

⁴⁰ Links to information on State and Territory privacy laws is available at www.privacy.gov.au.

If an organisation collects personal information identifying any individual in a record, including in the course of handling an informal complaint, reasonable steps need to be taken by the organisation to notify the respective individuals about why it has collected their personal information, what it will do with that information, and to whom (if anyone) it may disclose that information. The individuals also need to be told that they have a general right of access to the information about them that is held in the organisations records. These obligations are set out in NPPs 1.3 and 1.5.

7.2.4 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 investigation 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. A complainant's support person should not also be a witness as this may compromise their evidence.

If a formal complaint against an employee is found to be substantiated, a summary of the complaint, the finding and the action taken should be recorded in their personnel file. This can be removed after a reasonable period of time 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. However, the "primary purpose" for which the information was collected, in this case to deal with a complaint, will continue to limit the use of that information.⁴¹

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 it will request records as part of its investigation into the allegations. Records relating to the complaint will demonstrate that steps were taken to deal with the matter. Evidence of any internal action that was taken may assist in reducing liability. Freedom of information legislation may also require records to be retained for a certain period.

7.2.5 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. Also, organisations and agencies have legal obligations to protect this data under NPP 4 or IPP 4. For example, any files or reports associated with an investigation should be kept in locked storage. Access should be restricted to authorised personnel only. Records should not be placed on general or open access files.

Care should also be taken to ensure the security of transmission of information by e-mail or facsimile and storage of electronic information.

⁴¹ Subsequent use and disclosure of the information under NPP 2 or IPP 10 and 11 is determined with reference to this primary purpose, so that it can also be used:

- for a related purpose, if the individual (to whom the information relates) would reasonably expect it;
- for other secondary purposes if the individual gives consent; or
- for other purposes as specified in the exceptions to NPP 2.

8. Other duties of employers

8.1 General principles

Defamation

Defamation laws protect a person's reputation. It is not defamatory to confront an alleged harasser in private with a claim of sexual harassment, or to make an individual complaint of sexual harassment to someone who has a legitimate and genuine interest in knowing about the incident, such as a manager, sexual harassment contact officer, complaints officer or counsellor, so long as the complaint is made in good faith.

The Sex Discrimination Act protects from civil legal action people who provide information or evidence to HREOC if, by providing the information, they have caused injury or damage to another. This includes injury or damage to reputation.

Managers, sexual harassment contact officers, complaints 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.

Termination of employment

If an employee is dismissed because of sexual harassment, the dismissal must be consistent with the obligations in the *Workplace Relations Act 1996* (Cth) (the Workplace Relations Act) and State and Territory laws in relation to termination of employment. The Workplace Relations Act entitles many employees to protection against unfair or unlawful dismissal. Any dismissal should also comply with the terms of any relevant award or enterprise agreement.

Occupational health and safety

Sexual harassment in some cases can be a breach of an employer's common law duty to take reasonable care for the health and safety of employees.

Sexual harassment can also be a breach of occupational health and safety legislation.

8.2 Explanatory notes

8.2.1 Defamation

Defamation is an issue that often arises in sexual harassment complaints because of the potential damage that can be inflicted to a person's character, reputation and standing. 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. However, the application of defamation law in the context of sexual harassment allegations is limited.

Each Australian State and Territory has its own defamation laws, with a mixture of legislation and case law applying.

Protection of the parties

Defamation is the publication or making of a statement about someone, which lowers their reputation with people or leads other people to avoid or shun them. Everyone involved in communicating a defamatory statement is liable, including those who repeat its publication. For a statement to be defamatory it may either be intentional or negligent. Examples would include spreading a story about an alleged harasser, either orally or by email, around the workplace, or by carelessly leaving a file containing such information where inappropriate people could read it. However it is not defamatory for a person with a complaint of sexual harassment to confront the alleged harasser directly and in private, or to send them a private letter outlining the offensive behaviour, as this does not damage their reputation with others.

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, such as a sexual harassment contact officer, a complaints officer or management. 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 malice or indiscriminately broadcasts the allegations.

People making sexual harassment complaints or providing information to HREOC are protected from civil actions, including defamation, under s111 of the Sex Discrimination Act.

The parties to a complaint should be warned of the legal risks associated with disclosing the allegations or counter-allegations generally. They should be advised to maintain confidentiality and to discuss the complaint only with those who have 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 responsible for dealing with complaints can discuss the allegations where it is required for the performance of their duty.

Employers can protect their line managers and other staff likely to receive complaints of sexual harassment from allegations of defamation by formally appointing and training them as sexual harassment complaints or contact officers. In that way, the employer will not only have good processes in place for dealing with sexual harassment complaints, but the officers will be more likely to attract the defence of qualified privilege.

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.

8.2.2 Termination of employment

Prior to terminating the employment of an employee in connection with harassment allegations, it is important to have a good understanding of the relevant legislation in respect of termination, as well as employers' obligations in regard to process. At a federal level, termination of employment is covered by the Workplace Relations Act. However, most States have their

own legislation that may also be applicable.⁴² Both federal and State legislation make unfair dismissal - the "harsh, unjust or unreasonable" dismissal of an employee – unlawful. Any dismissal should also comply with the terms of any relevant award or enterprise agreement.

This is a complicated area of the law and it is beyond the scope of this publication to provide a guide to termination and the relevant federal and State legislation. However a check-list is provided below of some of the standards of procedural fairness that all employers should follow when considering terminating an employee's employment (as well as following their own policies on termination).

- If the termination is for a reason other than serious misconduct (see the discussion of serious misconduct below), the employee should be warned and counselled about the issue in accordance with law and practice.
- An investigation should be conducted by the employer concerning the allegations and written notice of the allegations given to the employee.
- The employee should be interviewed before the decision to terminate is made. The employee should be given reasonable notice of the interview and it should be made clear to them in advance that:
 - termination is under consideration and that the outcome of the interview could be termination; and
 - they should have a witness of their choosing present with them at the interview.

At the interview, the employee should be given full opportunity to:

- reply to any reasons/accusations put;
 - be heard about any matters the employer should be aware of when deciding whether to dismiss the employee; and
 - be heard about whether they should be terminated, if the employer finds the allegations against the employee are true.
- The employer should carefully consider all matters raised by the employee at the interview, prior to making a decision to dismiss the employee.

- The employer should keep careful notes of each step in the process.

If an employer wishes to terminate the services of an employee, the employer must give the employee notice of their termination, or payment in lieu of notice, as well as all other applicable payments such as outstanding wages, pro-rata annual leave and, in some cases, long service leave.

The legislation recognises there are some instances where it would be inappropriate for an employer to give notice or pay in lieu of notice upon termination. This is what is known as "summary" or instant dismissal, and occurs in the case of serious and wilful misconduct by an employee. If the termination is for reasons of serious misconduct and the employer gives no notice, there is a reverse onus of proof in subsequent proceedings. This means that the employer would have to prove the fairness of the termination, rather than the employee having to prove that it was unfair as in other unfair dismissal matters. If there is some doubt in the employer's mind that the misconduct was not serious and wilful, the employer should give consideration to a payment in lieu of notice.

Summarily dismissing an employee is a serious step for an employer to take. It is still essential for an employer to investigate all issues thoroughly, and to give the employee a chance to respond to allegations before making the decision to terminate. If the need arises, an employer can suspend the employee on full pay until the facts have been established and a decision made. If, after carefully investigating a situation, an employer decides to summarily dismiss an employee, there is still a requirement to make all applicable payments such as outstanding wages, pro-rata annual leave and, in some cases, long service leave to the employee.

Following these guidelines will not prevent an employee from commencing an unfair dismissal application in the Australian Industrial Relations Commission (AIRC), or other relevant State tribunals, but will put an employer in a better position to defend a claim. Each case is considered by the AIRC or State tribunal on its individual merits. It is recommended therefore that employers seek their own independent advice prior to terminating an employee's employment.

⁴² Victoria, Australian Capital Territory and Northern Territory do not have their own legislation, but are covered by the *Workplace Relations Act 1996* (Cth).

Case example: Termination of employment

An employee was dismissed on the grounds of misconduct after making phone calls of a sexual nature to a woman whilst at work. The employee also made phone calls of a sexual nature to a work contact both during and out of work hours. The woman receiving the phone calls complained about the nature of the phone calls and that she had not provided the employee with her home telephone number.

The employee lodged proceedings in the Australian Industrial Relations Commission alleging that his dismissal was harsh, unjust or unreasonable. The Commissioner stated that:

...objectively such behaviour amounted to sexual harassment, was unprofessional, was contrary to the interests of his employer, was embarrassing to his employer, had potential to reflect badly on the reputation and effective functioning of his employer.

He held that the misconduct in itself was a valid reason for termination of his employment and found that the dismissal was not harsh, unjust or unreasonable. The Commissioner noted that "HREOC should have regard to the fact that (he) has shown no remorse for his actions."

Vaticano v Commonwealth Services Delivery Agency Australian Industrial Relations Commission No. 40187 of 1997 Print P9223.

Case example: Termination of employment

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 in the process of dismissing him. 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 Australian Industrial Relations Commission No. NI 663 of 1994

8.2.3 Occupational health and safety

Employers have a common law duty to take reasonable care for the health and safety of their employees.⁴³ This common law duty is reinforced by occupational health and safety legislation in all Australian jurisdictions.

An employer can be liable for foreseeable 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 foreseeable risk if practicable precautions are not taken to eliminate or minimize sexual harassment in the workplace.⁴⁴

Failure to fulfil the duty of care can 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 contract or tort.

⁴³ Note that this is a complex area of law and it is beyond the scope of this publication to address occupational health and safety issues in any detail. Employers should seek independent legal advice on these issues.

⁴⁴ Therese MacDermott "The Duty to Provide a Harassment-Free Work Environment" (1995) 37(4) *Journal of Industrial Relations* 495 at 505-506.

Appendix A: Complaints to the Human Rights and Equal Opportunity Commission

This section describes how complaints of sexual harassment are dealt with under the Sex Discrimination Act by HREOC. A person who makes a complaint is called “the complainant” and a person or organisation against whom a complaint is made is called “the respondent”.

Lodging a complaint

Complaints under the Sex Discrimination Act can be lodged by:

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

The person making the complaint must be an aggrieved party, unless it is a 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 wherever possible:

- the name and contact details of the complainant;
- the 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 alleged;
- details of the allegations;
- where and when the alleged discrimination or harassment occurred;
- the 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 (for example, with management, union etc.); and
- 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 can be made in languages other than English. HREOC will arrange and pay for accredited translation.

Complaints should be made within 12 months of the harassment or discrimination occurring. If a complaint is made outside this time frame, the President of HREOC has discretion not to accept it, and generally will not do so unless there is a 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 a response. Investigation also involves obtaining copies of relevant documents such as internal investigation reports, medical records or witness statements.

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 possible options for resolution. The complaints officer does not make determinations of fact, cannot impose an outcome and must observe the principles of natural justice. They are 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 of the complaint is admissible.

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

Terminating complaints

Complaints may be terminated for a variety of reasons including that they relate to events more than 12 months old, they are lacking in substance, the alleged conduct is not unlawful or there is an adequate alternative remedy. If there is enough evidence to support the complaint, it is covered by the legislation and it is appropriate to do so, HREOC will generally attempt to conciliate the matter. If the complaint cannot be conciliated, the President of HREOC may also terminate the complaint.

In some cases, conciliation will not be appropriate, including: where the subject of the complaint is such that attempting a face-to-face conciliation would be inappropriate; where the parties have entrenched positions; or where there is no room for a negotiated outcome. In these cases, the President of HREOC may terminate the case without attempting conciliation.

A case may also be administratively closed⁴⁵ if HREOC determines that it does not have jurisdiction or the complaint relates to employment with a State instrumentality.

Proceeding to court

When the complaints are terminated for whatever reason, the complainant or the person on whose behalf the complaint was lodged (the "affected person") can apply to the Federal Court of Australia or Federal Magistrates Court to have the original allegations heard and determined. The affected person must apply to one of these Courts within 28 days of the date of the notice of termination. Further information about this process can be obtained from the Federal Court Registry in each State and Territory.

A complainant may not apply to the Federal Court of Australia or Federal Magistrates Court for a full hearing into the matter if the case was administratively closed by HREOC, but may be able to apply for judicial review of HREOC's decision by the Federal Court of Australia.

Decisions of the Federal Court of Australia and Federal Magistrates Court are binding.

Costs

There is no charge for having a complaint dealt with by HREOC.

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 terminated and the affected person decides to proceed with an application to the Federal Court of Australia or Federal Magistrates Court, each party is initially responsible for their own legal costs. The judge or magistrate may make an order that one of the parties pay the other's costs.

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

Support services

HREOC has enquiries staff who can provide information and confidential advice concerning a potential complaint. Individuals can telephone or e-mail their inquiries.

If anyone needs to use an interpreter, hearing loop, Auslan interpreter or other support service HREOC will make the necessary arrangements.

HREOC contact details are at Appendix B.

⁴⁵ Administrative closure is a way of finalising a case that cannot be dealt with as a complaint by HREOC.

Timeframes

The length of time a complaint will take to determine depends on factors such as HREOC's decision as to how the complaint should be dealt with, 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 over 12 months. Currently the average time taken to investigate and conciliate a sexual harassment complaint is around 7.6 months.⁴⁶ If the complaint is terminated and the complainant proceeds to court, the timeframe for hearing in the Federal Court of Australia or Federal Magistrates Service will depend on court caseloads and the length and complexity of the case.

Confidentiality

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

However, if the complaint is terminated and proceeds to court, 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 of the court, which is publicly released. If requested to do so, the judge or magistrate may make orders suppressing the names of the parties.

⁴⁶ This figure is from a review of sexual harassment in employment complaints finalised by HREOC in 2002: Human Rights and Equal Opportunity Commission *A Bad Business: Review of sexual harassment in employment complaints* 2002 HREOC Sydney 2003, p32.

Appendix B: Contact List

Federal Anti-discrimination Agency

Human Rights & Equal Opportunity Commission

Sex Discrimination Unit

Level 8 Piccadilly Tower

133 Castlereagh Street

Sydney NSW 2000

Complaints Info line:

1300 656 419 (local call)

TTY: 1800 620 241 (free call)

Website: www.humanrights.gov.au

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