



Australian
Human Rights
Commission

Supporting workplaces to end workplace sexual harassment:

A GUIDE FOR SMALL BUSINESSES IN AUSTRALIA • 2015



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Australian Human Rights Commission

August 2015

Contents

1 What this guide covers	2
2 Summary	3
3 Understanding sexual harassment	5
4 Types of legal action	7
5 Preventing and redressing sexual harassment	9
Appendices	
Appendix 1: Template Policy for preventing and addressing sexual harassment in small businesses	11
Appendix 2: Good Practice Guidelines for internal complaint processes	16
Appendix 3: Sources of assistance and information	19

Supporting workplaces to end workplace sexual harassment: A guide for small businesses in Australia

Most small businesses and small business people would like to think that sexual harassment is not something that could happen in their workplace. Research carried out by the Commission found that sexual harassment in workplaces is quite common and 1 in 5 people have experienced workplace sexual harassment in the last five years.¹ Sexual harassment can occur across a broad range of occupations, workplaces and industries.²

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

Under the *Sex Discrimination Act 1984* (Cth), businesses, including small businesses, can be held legally responsible for sexual harassment unless they have taken all reasonable steps to prevent the harassment. An important part of ensuring compliance with the Sex Discrimination Act is regularly reviewing and (where appropriate) revising sexual harassment policies, procedures and training programs to ensure they remain current.

1 What this guide covers

This Guide is based on a resource produced by the Australian Human Rights Commission, *Ending workplace sexual harassment: A resource for small, medium and large employers* and has been specifically tailored for small businesses.

It provides an overview of obligations under the Sex Discrimination Act and, to a lesser degree, other federal laws. It also provides some guidance on obligations in this area under state and territory laws. However, small businesses are encouraged to consult state/territory resources and agencies when seeking to understand and implement their obligations under those laws (see Appendix 3 for contact information).

Small businesses and small business people are advised that this resource provides general information only and is not a substitute for legal advice. Small businesses should therefore seek their own legal advice, as needed.

Small businesses can contact the Commission's National Information Service for information about sexual harassment under the Sex Discrimination Act and the Commission's investigation and conciliation processes (see Appendix 3 for contact information).

2 Summary

What is sexual harassment

Under the Sex Discrimination Act 'sexual harassment' has three key elements:

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

It is unlawful to sexually harass a current or prospective employee, commission agent or a contract worker, colleague, partner, fellow commission agent or fellow contract worker, or any other workplace participant.

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

The term 'workplace' refers to 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant'.

Types of liability of the small business employer

- Personal liability
- Vicarious liability
- Accessory or ancillary liability

Complaints to the Australian Human Rights Commission

A person who alleges sexual harassment in the workplace can make a complaint to the Australian Human Rights Commission who can inquire into and attempt to conciliate the complaint.

If a resolution cannot be reached the Commission will 'terminate' the complaint and the matter can then be taken to the Federal Circuit Court of Australia or the Federal Court of Australia within 60 days of the complaint being 'terminated' by the Commission.

Other types of legal action:

- Criminal offences
- General protections claim based on exercise of a workplace right
- Unfair dismissal
- Work health and safety requirements

Steps for preventing and responding to sexual harassment

- Create a healthy and safe work environment based on respect
- Develop and implement a sexual harassment policy (see Appendix 1)
- Establish a specific procedure for discrimination and harassment complaints (see Appendix 2)
- Provide or facilitate education and training on sexual harassment

Small businesses have a duty to take all reasonable steps to prevent sexual harassment in the workplace, to actively minimise the risk of sexual harassment and respond appropriately when harassment does occur. It is therefore vital that small businesses develop and implement robust procedures for dealing with sexual harassment complaints.

3 Understanding sexual harassment

Key elements of sexual harassment

Under the Sex Discrimination Act 'sexual harassment' has three key elements, these are:

- conduct that is *unwelcome*;
- conduct of a *sexual nature*;
- a *reasonable person* (aware of all the circumstances) would anticipate the possibility that the person subjected to the conduct would feel *offended, humiliated or intimidated*.³

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

3.1 Unwelcome conduct

Conduct is unwelcome if it is not solicited or invited and is regarded as undesirable or offensive by the person who is the target of the sexual harassment.⁴ It is irrelevant that the conduct may not have been unwelcome to others or if it has been an accepted practice in the workplace.⁵

3.2 Conduct of a sexual nature

'Conduct of a sexual nature' is broadly defined: it can include verbal, written and online conduct that is an unwelcome *sexual advance* or an unwelcome *request for sexual favours* or other unwelcome *conduct of a sexual nature*.⁶

Conduct likely to be considered sexual in nature includes:

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

Sexual harassment may occur where a work environment or culture is sexually charged or hostile.⁷ Factors that point to a sexually hostile workplace include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes.⁸

Sexual harassment is against the law regardless of the sex, sexual orientation or gender identity of the people involved.

Workplace participants may not always understand when they are engaging in conduct that could be found to be sexual harassment.

3.3 Reasonable person test

Sexual harassment can occur where in the circumstances, a reasonable person (aware of the circumstances) would *anticipate the possibility* that the recipient would feel offended, humiliated or intimidated by the conduct. Determining whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated is an objective test.⁹

3.4 Workplace participants and workplaces

Under the Act, it is unlawful to sexually harass a current or prospective employee, commission agent or a contract worker, colleague, partner, fellow commission agent or fellow contract worker, or any other workplace participant.

A 'workplace participant' includes employers (eg sole trader), employees, commission agents, contract workers and partners in a partnership.¹⁰ For example, it is unlawful for a staff member to sexually harass an owner/employer in a small business.

It is also unlawful for a workplace participant to sexually harass another person in the course of providing or receiving goods, [services](#) or facilities to/from that other person.¹¹

The term 'workplace' refers to 'a place at which a workplace participant works (eg Building site, supermarket, aircraft) or otherwise carries out functions in connection with being a workplace participant' (eg conferences, office parties, online environment).¹²

A small business's responsibility for sexual harassment extends to conduct that occurs beyond the normal workplace and normal working hours. This is particularly important at high-risk events, such as work functions involving alcohol.

4 Types of legal action

4.1 Under the Sex Discrimination Act

Sexual harassment in the workplace may give rise to various types of legal action under the Sex Discrimination Act.

A person who alleges sexual harassment in the workplace can make a complaint to the Australian Human Rights Commission who can inquire into and attempt to conciliate the complaint.

If a resolution cannot be reached the Commission will 'terminate' the complaint and the matter can then be taken to the Federal Circuit Court of Australia or the Federal Court of Australia within 60 days of the complaint being 'terminated' by the Commission.

Workplace participants who are subjected to sexual harassment may not be aware of their legal rights or what avenues of redress (eg through internal or external complaint mechanisms) they can access.

(a) Victimisation

Victimisation means subjecting, or threatening to subject, another person to a detriment if she or he has made or proposes to make a complaint, attend, has participated in a conciliation conference at the Commission or provided information to the Commission about a complaint or assert rights under the Sex Discrimination Act or the *Australian Human Rights Commission Act 1986* (Cth).

Examples of victimisation may include:

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

It is an offence under the Sex Discrimination Act to victimise another person.¹³ Victimisation is punishable by a fine and/or imprisonment.

(b) Sex discrimination

Conduct that may not be of a sexual nature, and falls short of sexual harassment, can still constitute sex discrimination under the Act if the conduct treats the person less favourably due to their sex.¹⁴

4.2 Small businesses' legal liability under the Sex Discrimination Act

There are a number of different ways that small businesses may be held liable under the Sex Discrimination Act for workplace sexual harassment.

(a) Personal liability

Employers (including small business people), individual managers and employees are liable for their own acts of sexual harassment.¹⁵

(b) Accessory or ancillary liability

This means that small businesses are liable under the Sex Discrimination Act if they cause, instruct, induce, aid or permit another person to engage in sexual harassment.

A small business could have accessory or ancillary liability for sexual harassment if it was aware or should have been aware that sexual harassment was occurring or there was a real possibility that sexual harassment was occurring and it failed to act.¹⁶

(c) Vicarious liability

Small businesses can be held liable under the Sex Discrimination Act for sexual harassment by their employees in connection with their employment and by their agents in connection with their duties as agents. In practice the expression 'in connection with' in this context under the Act has had a broad practical application in the courts, being wider than wider than the familiar expression 'in the course of'.¹⁷

Small businesses will be found vicariously liable for sexual harassment by one of their employees or agents if they failed to take 'all reasonable steps' to prevent the sexual harassment from occurring.¹⁸

What constitutes 'all reasonable steps' can change with the size of the business – the courts have recognised that large organisations will be expected to do more than small businesses in order to be held to have acted reasonably.¹⁹ The courts have found that a very small business needs to have at least a simple written policy on sexual harassment to demonstrate that all reasonable steps were taken to prevent harassment occurring.²⁰

4.3 Other types of legal actions

Small businesses should be aware that they may be held liable for workplace sexual harassment under other federal laws as well as state and territory laws related to sexual harassment.

(a) Criminal offences related to sexual harassment

Some types of sexual harassment may also be offences under criminal law. Relevant criminal offences include: physical assault; indecent exposure and sexual assault. Small businesses should be aware that a single incident of sexual harassment in the workplace may give rise to both civil and criminal proceedings.

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

- advise the target to report the incident to the police as soon as possible
- provide the target with the necessary support and assistance

(b) General protections claim based on exercise of a workplace right

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

- has a 'workplace right';
- has or has not exercised a workplace right; or
- proposes or proposes not to exercise a workplace right.²¹

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

(c) Unfair dismissal

Where a small business is a national system employer²² and decides to dismiss an employee because it is satisfied that he or she engaged in sexual harassment, the small business must ensure that any subsequent action complies with:

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

Failure to comply with the instruments above may give rise to a claim for unfair dismissal.²³

(d) Work, health and safety requirements

Small businesses must ensure, so far as is reasonably practicable, the health and safety of their workers. A small business who fails to maintain a safe workplace may be held liable under the common law or under work health and safety legislation.²⁴

Small businesses who fail to take reasonable steps to prevent the foreseeable risk of harm arising from sexual harassment may be in breach of the obligation to ensure a healthy and safe work environment and safe systems of work.

5 Preventing and redressing sexual harassment

5.1 Preventing sexual harassment

Small businesses have a duty to take all reasonable steps to prevent sexual harassment in the workplace, to actively minimise the risk of sexual harassment and respond appropriately when harassment does occur.

Small businesses should adopt a number of essential measures to prevent sexual harassment from occurring in the workplace.

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

The key to preventing sexual harassment is for small businesses to send an unequivocal message to every workplace participant that sexual harassment is unacceptable in the workplace. Permitting or ignoring sexist, intimidating or offensive behaviour creates a chilly or hostile environment. This can increase the risk of sexual harassment and have a significant and ongoing negative impact on employees and business as a whole.

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

- distributing communications from owners/operators that sexual harassment is unlawful and will not be tolerated in the workplace
- setting expectations for owners/operators to model appropriate behaviour and respond swiftly and effectively to sexual harassment complaints
- supporting and encouraging bystanders to report any inappropriate or sexist behaviour and responding promptly to any concerns raised
- ensuring all relevant workplace policies (eg acceptable use of technology, OHS, Codes of Conduct etc) address sexual harassment
- distributing and displaying posters and other information that explain rights and obligations around sexual harassment
- conducting regular audits to monitor the incidence of sexual harassment and effectiveness of the complaint process.

(b) Develop and implement a sexual harassment policy

A crucial aspect of prevention is the development and implementation of a written workplace policy that makes it clear that sexual harassment is unlawful and will not be tolerated under any circumstances. Whilst policies vary between workplaces, there are a number of key elements that should be included in any sexual harassment policy:

- Recognise that sexual harassment will not be tolerated
- Recognise that sexual harassment is unlawful
- Clearly define sexual harassment
- Identify the strategy for addressing sexual harassment
- Explain the consequences of breaching the policy
- Identify the responsibilities of management and staff
- Outline the internal and external options for dealing with sexual harassment

See the template policy in Appendix 1.

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

A written policy can only be effective in addressing sexual harassment if it is implemented effectively. Small businesses should distribute the sexual harassment policy widely and conduct regular information sessions which support employees to understand what behaviours and situations constitute sexual harassment, encourage bystander action if employees see or hear about sexual harassment and outline the internal and external options for dealing with sexual harassment. Small businesses should also ensure that sexual harassment training forms part of the organisation's core training, including workplace induction.

5.2 Responding to sexual harassment

Small businesses are required to provide a safe workplace for their employees and, accordingly, must respond effectively to sexual harassment in the workplace. It is therefore vital that small businesses develop and implement robust procedures for dealing with sexual harassment complaints. For guidance on how to develop an effective sexual harassment process for responding to complaints of sexual harassment in a small business (see Appendix 2).

Appendices

Appendix 1:

Template Policy for preventing and addressing sexual harassment in small businesses

Sexual harassment policies can vary between workplaces. However, there are a number of key elements that should be included in any sexual harassment policy, whether it's a stand-alone document or the information is incorporated into other

relevant policies and procedures, outlined in the table below. The suggested content can be incorporated into existing sexual harassment policies, or organisations can use the 'key elements' section to develop their own content.

Section	Key elements	Suggested content
1. Who this policy applies to	Include a list of all individuals/roles that the policy applies to.	<i>This policy applies to current or prospective employees, colleagues, partners, commission agents, sole traders, clients, contractors, managers/supervisors, customers and other workplace participants.</i>
2. When does this policy apply	Include a list of all places and contexts that the policy covers.	<i>This policy applies to any place where the above people work or carry out functions related to work. For example, this can include offices, building sites, supermarkets, aircrafts or at conferences, events and functions or work functions off-site.</i>
3. Statement of commitment	<p>Broad statement of the organisation's commitments around preventing and responding to sexual harassment.</p> <p><i>Tip: This statement could be supported by the inclusion of a quote from the organisation's CEO to show leadership commitment to this issue.</i></p>	<p><i>This sexual harassment policy outlines our organisation's commitment to:</i></p> <ul style="list-style-type: none"><i>• Creating a workplace culture which is focused on equality and respect, which supports people to take bystander action and takes a zero tolerance approach to sexual harassment</i><i>• The prevention of sexual harassment</i><i>• The establishment of a safe, supportive and fair complaints procedure</i>

Section	Key elements	Suggested content
<p>4. How our organisational commitment will be achieved</p>	<p>Outline the steps your organisation will take to ensure that it achieves the aims listed in the 'statement of commitment'.</p>	<p><i>For example:</i></p> <ul style="list-style-type: none"> • <i>Actively promote this workplace sexual harassment policy and ensure that all staff are encouraged to make a formal complaint if they experience sexual harassment</i> • <i>Establish a fair complaints procedures and treat all complaints in a sensitive, timely and confidential manner</i> • <i>Implement training and awareness raising strategies (such as Know Where the Line Is www.knowtheline.com.au to skill staff in understanding workplace sexual harassment and the importance of bystander action</i> • <i>Ensure that staff who make a complaint about sexual harassment or take bystander action in response to sexual harassment will be protected from victimisation or negative consequences.</i>
<p>5. Definition of sexual harassment</p>	<ul style="list-style-type: none"> • <i>Legal definition of workplace sexual harassment.</i> • <i>Note that workplace sexual harassment is illegal under state/territory and Federal legislation.</i> • <i>Define what workplace sexual harassment is not.</i> • <i>Examples of the sorts of behaviour that could constitute workplace sexual harassment.</i> 	<p><i>Sexual harassment is any unwanted, unwelcome or uninvited behaviour of a sexual nature in circumstances in which a reasonable person would have anticipated the possibility that the person being harassed would be humiliated, intimidated or offended. Sexual harassment can take many different forms – it can be obvious or indirect, repeated or one-off – and may include physical contact, verbal comments, jokes, propositions, the display of offensive material or other behaviour which creates a sexually hostile working environment. Just because someone does not object to inappropriate behaviour in the workplace at the time, it does not mean that they are consenting to the behaviour.</i></p> <p><i>Sexual harassment is not only inappropriate in the workplace, it is also illegal.</i></p> <p><i>Sexual harassment is not behaviour which is based on mutual attraction, friendship and respect. If the interaction is consensual, welcome and reciprocated then it is not sexual harassment.</i></p> <p><i>The following behaviours could be considered sexual harassment in the workplace:</i></p> <ul style="list-style-type: none"> • <i>Sexually suggestive comments or jokes</i> • <i>Intrusive questions or inappropriate comments about your private life or physical appearance</i> • <i>Inappropriate staring or leering</i> • <i>Unwelcome touching, hugging, cornering or kissing and other forms of inappropriate physical contact</i> • <i>Sexually explicit text messages, images, phone calls or emails</i> <p><i>Displays of sexually graphic material including posters, pinups, cartoons, graffiti or messages left on notice boards or desks</i></p>

Section	Key elements	Suggested content
6. Roles and responsibilities	<ul style="list-style-type: none"> • Include dot point roles and responsibilities of staff, management, human resources, contact officers and complaints officers. • Where possible, include names and contact details for key workplace sexual harassment contacts. 	<p><u>Staff will:</u></p> <ul style="list-style-type: none"> • Comply with the workplace sexual harassment policy • Model equitable, respectful and ethical behaviours at all times • Take action to ensure they are aware of their rights and responsibilities around workplace sexual harassment • Participate in training provided by the organisation around workplace sexual harassment and bystander action • Take bystander action (if safe to do so) if they see or hear about sexual harassment in the workplace <p><u>Managers/supervisors will:</u></p> <ul style="list-style-type: none"> • Model equitable, respectful and ethical behaviours at all times • Proactively monitor the workplace environment and culture to ensure that staff are treated equitably and respectfully • Promote the sexual harassment policy in their work areas, ensuring that all staff know how to access the policy • Promote strategies that support the prevention of workplace sexual harassment and encourage staff to take bystander action (for example www.knowtheline.com.au) • Treating all complaints and incidents of workplace sexual harassment seriously and take immediate action where a complaint is made • Ensure all staff (including bystanders) have access to support if required <p><u>Owners/operators will:</u></p> <ul style="list-style-type: none"> • Monitor the effectiveness of the sexual harassment policy • Ensure the information within the policy is relevant and up to date • Ensure that staff are provided with training to support them to know what sexual harassment looks like and how to take bystander action • Ensure managers are provided with training on the sexual harassment policy, complaints process and mechanisms to support staff to take bystander action • Promote the policy throughout the organisation

Section	Key elements	Suggested content
6. Roles and responsibilities (cont.)		<p><i>Contact officers are available to support staff who are experiencing workplace sexual harassment or who need support to take bystander action. Contact officers are staff members who have been trained to provide confidential and impartial information and support to help staff make an informed decision about how to try to resolve an issue. Contact officers cannot provide legal advice or resolve complaints, however they can act as a support person to someone experiencing harassment or a bystander, and can provide information relating to external support services and organisational policies and procedures. Contact officers are also able to attend mediation sessions or complaints meetings as a support person.</i></p> <p><i>Complaints officers are responsible for investigating all complaints of workplace sexual harassment, including conducting interviews with staff and providing advice to Human Resources or managers/supervisors on the outcome of the complaint and any disciplinary measures in response to a complaint. Complaints officers are impartial and will not have any direct relationship with the staff members involved in the complaint, either as a line manager or otherwise.</i></p>
7. Supporting bystander action	<ul style="list-style-type: none"> • Encourage staff to take bystander action if they see or hear about workplace sexual harassment. • Include practical suggestions about the types of bystander action staff can take. • Note that victimisation as a result of taking bystander action is illegal and will not be tolerated. 	<p><i>In order to promote a safe, equitable and respectful workplace, this organisation encourages all staff to take action if they witness or hear about workplace sexual harassment.</i></p> <ul style="list-style-type: none"> • <i>See: Know where the line is. If you see something or hear something that makes you feel uncomfortable, don't ignore it.</i> • <i>Talk: It takes courage to speak up. Talk with your boss, your colleagues or with the person who is crossing the line.</i> • <i>Support: Don't underestimate the power of support. It can help a colleague stand up and take action.</i> <p><i>For information about the sorts of bystander action staff can take, see www.knowtheline.com.au</i></p>

Section	Key elements	Suggested content
8. Consequences of breaching the policy	Outline the possible consequences for staff who breach this policy, ensuring that this section refers to the complaints process.	<i>Depending on the severity of the case, this might include making an apology, counselling, transfer, dismissal or demotion.</i>
9. How to make a complaint	Outline each stage of the complaints process, including timelines and contact details for relevant staff (if required).	<i>For advice about developing an effective complaints procedures, see Ending workplace sexual harassment: A resource for small, medium and large businesses which outlines key steps employers should take when developing a fair and effective complaints process.</i>
10. Additional information, support and advice	Include list (including websites, hard copy resources and external organisations) where staff can seek advice or support if required.	<p>Australian Human Rights Commission <i>If you believe you have experienced workplace sexual harassment, you can make a complaint to the Australian Human Rights Commission. Contact the Commission's National Information Service on 1300 656 419 or email infoservice@humanrights.gov.au</i></p> <p>State/territory human rights/equal opportunity or anti-discrimination board <i>[Insert contact details for relevant state or territory organisation including information about the service, information or support the organisation can provide. See http://www.humanrights.gov.au/links-human-rights-organisations-and-resources#ad]</i></p> <p>Union <i>[Insert contact details for relevant union, including information about the service, information or support the union can provide]</i></p> <p>Employee assistance program <i>Staff are entitled to a certain amount of free, professional counselling from our employee assistance program. To access the employee assistance program, contact [insert contact details].</i></p>

Appendix 2:

Good Practice Guidelines for internal complaint processes

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

Characteristics of a good internal complaint process

A good complaint process will be:

- **Fair** (all parties present their version of events, provide supporting information and respond to any potential negative decisions, and the person investigating and/or making decisions is impartial)
- **Confidential** (information about a complaint is only provided to those people who need to know about it)
- **Transparent** (process and possible outcomes clearly explained, and those involved kept informed of the progress and reasons for any decisions)
- **Accessible** (easy to access, easy to understand and everyone should be able to participate equally)
- **Efficient** (conducted without undue delay)

Key actions for small businesses

Small businesses should:

- establish a staged complaints procedure in line with the above characteristics or as outlined in the relevant award or agreement
- keep on file (as these can be used in legal proceedings) a confidential record of all reports and complaints of sexual harassment which should:
 - » clearly document the process by which the complaint was made
 - » clearly document all steps taken to resolve this complaint

- » include statements from the alleged target, the alleged harasser, alleged witnesses and any other relevant individuals, which have been reviewed and endorsed by the relevant person²⁵
- » include notes interviews conducted by the investigation officer, using the interviewee's own words as far as possible
- appoint and train contact officers who can provide support to the person making a complaint but does not have a role in investigating complaints
- appoint and train complaint officers (in small businesses this should be an owner, senior employee or union delegate, provided they are not the alleged harasser) to manage the complaints process
- establish safeguards to protect individual staff against victimisation
- be aware that if a small businesses is aware of an allegation or incident of sexual harassment but does not take any action, they may be found to have neglected to take all reasonable steps to prevent future acts of sexual harassment, even if the complainant did not want the respondent to take any action at the time of making the complaint²⁶
- ensure ongoing follow up with the person who reported their concerns to check whether their concerns remain and to monitor the relationships involved.

Stages in a complaint process

Initial contact point

An organisation's discrimination and harassment policy should explain how to make a complaint and, identify an initial contact person. The contact person should not be the same person who is responsible for investigating or making decisions about a complaint.

Early resolution

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

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

Early resolution may involve:

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

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

Formal resolution

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

a. Obtain information from the complainant

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

- provide information about the complaint process, potential outcomes, options for assistance/support and protections from victimisation
- ensure the allegations are documented, either by the complainant or the complaint officer
- explain that the process is confidential, what this means and why it is important
- explain what records of the complaint will be kept, for how long and where

- explain the action that may be taken if the complaint is found to be vexatious or malicious
- ask the complainant to provide relevant documents or details of witnesses that may support the allegations.

b. Advise the respondent about the complaint

The complaint officer should:

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

c. Assess the information

If the respondent confirms that he or she did what is alleged to have occurred, and if this behaviour would be considered discrimination or harassment as defined in the organisation's policy, the next step is to consider an appropriate outcome (see below).

If there is disagreement about what happened, it is generally understood that the person making the decision should be satisfied that it is 'more probable than not' that sexual harassment occurred. Given the nature of discrimination and harassment, there may often be no direct witnesses or documents to support the complainant's version of events. This does not mean that the allegation is untrue. In these situations the complainant should be given the opportunity to comment on the information that has been provided by the respondent and to provide any other information to support his or her allegations before a final decision is made.

Outcomes from the process

a. Where the allegations are admitted or substantiated

Outcomes for the respondent may include:

- disciplinary action or counselling
- an official warning
- a requirement to attend discrimination and harassment awareness training
- a requirement to provide a formal apology to the complainant
- participation in mediation to restore relationships in the workplace.

Outcomes for the complainant may include:

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

b. Where the allegations are not admitted or substantiated

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

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

Appendix 3:

Sources of assistance and information

Assistance

Australian Human Rights Commission

Telephone

National Information Service: 1300 656 419
(local call)

TTY: 1800 620 241 (toll free)

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

Fax: (02) 9284 9611

Post

Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Online

Email: infoservice@humanrights.gov.au

Website: www.humanrights.gov.au

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

Other federal agencies

Fair Work Commission

1300 799 675

<https://www.fwc.gov.au/>

Fair Work Ombudsman

13 13 94

<http://www.fairwork.gov.au>

State and territory agencies

ACT Human Rights Commission

(02) 6205 2222 or (02) 6205 1666 (TTY)

www.hrc.act.gov.au/

Anti-Discrimination Board of New South Wales

(02) 9268 5544 or 1800 670 812

www.lawlink.nsw.gov.au/adb

Anti-Discrimination Commission Queensland

1300 130 670

www.adcq.qld.gov.au

Equal Opportunity Commission (South Australia)

1800 188 163 or (08) 8207 1911 (TTY)

www.eoc.sa.gov.au

Equal Opportunity Commission – Western Australia

1800 198 149 or (08) 9216 3963 (TTY)

www.equalopportunity.wa.gov.au

Northern Territory Anti-Discrimination Commission

1800 813 846 or (08) 8999 1466 (TTY)

www.adc.nt.gov.au/

Office of the Anti-Discrimination Commissioner – Tasmania

(03) 6233 4841 or 1300 305 062

www.antidiscrimination.tas.gov.au

Victorian Equal Opportunity and Human Rights Commission

1300 891 848 or 1300 289 621 (TTY)

www.humanrightscommission.vic.gov.au

Information

Australian Human Rights Commission, *Know Where the Line Is workplace sexual harassment awareness raising strategy*:
www.knowtheline.com.au

Australian Human Rights Commission, *Information for People Making Complaints*:
<http://www.humanrights.gov.au/information-people-making-complaints>

Australian Human Rights Commission, *Federal Discrimination Law*:
www.humanrights.gov.au/legal/FDL/index.html

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

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

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

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

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

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

- Fair Work Ombudsman, *General Workplace Protections Factsheet* (2013)
www.fairwork.gov.au/complaints/someones-made-a-complaint-about-my-business/pages/default.aspx
- Fair Work Commission, *General Protections Guide* (2013)
www.fwc.gov.au/documents/factsheets/GeneralProtectionsGuide.pdf

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

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

Endnotes

- 1 Australian Human Rights Commission, *Working without fear: Results of the 2012 sexual harassment national telephone survey* (2012). At <https://www.humanrights.gov.au/working-without-fear-results-sexual-harassment-national-telephone-survey-2012> (viewed 20 November 2013).
- 2 Australian Human Rights Commission, *Working without fear: Results of the 2012 sexual harassment national telephone survey* (2012). At <https://www.humanrights.gov.au/working-without-fear-results-sexual-harassment-national-telephone-survey-2012> (viewed 20 November 2013).
- 3 Sex Discrimination Act, s 28A(1). Section 28A(1) provides:
- 4 For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
 - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
- 5 *Aldridge v Booth* (1988) 80 ALR 1 at 5.
- 6 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.
- 7 Sex Discrimination Act, ss 28A(1), 28A(2).
- 8 *G v R and Department of Health, Housing and Community Services* [1993] HREOCA 20.
- 9 *Freestone v Kozma* (1989) EOC 92-249 at 77,377. See also: *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hopper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebbington v Dove* (1993) EOC 92-543; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health & Community Services* [1993] HREOCA 20; *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127.
- 10 *Johanson v Blackledge* (2001) 163 FLR 58, 75 [84]-[85]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [24]-[25]; *Horman v Distribution Group Ltd* [2001] FMCA 52, [50]; *Wattle v Kirkland* [2001] FMCA 66, [46]; *Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83]; *Elliott v Nanda* (2001) 111 FCR 240, 277 [109]; *Kennedy v ADI Ltd* [2001] FCA 614; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [67]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [134]; *San v Dirluck Pty Ltd* (2005) 222 ALR 91.
- 11 Above, s 28B(7) (defining ‘workplace participant’ as (a) an employer or employee; (b) a commission agent or contract worker; (c) a partner in a partnership’).
- 12 Sex Discrimination Act, s 28G.
- 13 Sex Discrimination Act, s 28B(7).
- 14 Sex Discrimination Act, s 94(1).
- 15 *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91
- 16 Sex Discrimination Act, s 28A(1).
- 17 Sex Discrimination Act, s 105. Strictly speaking, section 105 only applies to liability for unlawful sex discrimination, not sexual harassment. However, the courts have accepted that sexual harassment is a form of sex discrimination. Accordingly, section 105 can still operate to render a person liable as an accessory to sexual harassment.
- 18 *Lee v Smith* [2007] FMCA 59, [205].
- 19 Sex Discrimination Act, s 106.
- 20 *Cooke v Plauen Holdings* [2001] FMCA 91.
- 21 *Gilroy v Angelov* (2000) 181 ALR 57, case study at pages 53-54.
- 22 *Fair Work Act 2009* (Cth), s 340.
- 23 See *Fair Work Act*, s 14.
- 24 *Fair Work Act*, s 385.
- 25 *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (QLD); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (TAS); *Occupational Health and Safety Act 2004* (VIC); *Occupational Safety and Health Act 1984* (WA).
- 26 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.
- 27 See *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 [169]-[172].

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: **www.humanrights.gov.au**

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or call: (02) 9284 9600 fax: (02) 9284 9611
or e-mail: **publications@humanrights.gov.au**

Make a complaint

The *Sex Discrimination Act 1984* (Cth) (the SDA) makes it against the law to treat a person unfairly because of their sex, family responsibilities or because they are pregnant. The SDA can also provide some protections to people wanting to return to work after parental leave. If you would like more information about what might be covered by the SDA or you would like to make a complaint to the Australian Human Rights Commission, you can contact our National Complaint Information Service on:

Phone: 1300 656 419 or 02 9284 9888
Email: **infoservice@humanrights.gov.au**
Fax: 02 9284 9611
TTY: 1800 620 241 (toll free)
NRS: 133 677

If you need an interpreter you can call 131 450 and ask to be connected to the Australian Human Rights Commission.

To make a complaint online [click here](#).

More information is also available at the [Complaints Section webpage](#).

