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Guideline: Sexual harassment

> Complying with the Equal Opportunity Act 2010



Victorian Equal Opportunity & Human Rights Commission

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Contact us

Enquiry Line 1300 292 153 or (03) 9032 3583
Fax 1300 891 858
Hearing impaired (TTY) 1300 289 621
Interpreters 1300 152 494
Email information@veohrc.vic.gov.au
Website humanrightscommission.vic.gov.au

Guideline: Sexual harassment – complying with the Equal Opportunity Act 2010

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Message from the Commissioner

Sexual harassment is against the law.

Everybody has the right to feel safe at work. Yet, in Victorian workplaces, sexual harassment remains a significant issue that can, and does, result in serious harm.¹

Employers have a legal and ethical responsibility to create workplace cultures that do not tolerate sexual harassment. Employers are legally required to take swift and decisive action to stop harassment escalating and to address harassment effectively when it does happen. Under the *Equal Opportunity Act 2010*, employers are also legally required to take action to prevent sexual harassment before it occurs. This is called the 'positive duty'.

Both men and women can experience sexual harassment at work. However, statistics show that sexual harassment is a particular problem for women. Women experience sexual harassment more often than men do, and are also more likely to experience physical sexual harassment than men.²

Sexual harassment is a form of sex discrimination and can be a form of violence against women. It may consist of an isolated incident by an individual employee, or a pattern of behaviour that is entrenched in the cultural practices of the workplace.³ Sexist behaviour that is tolerated in the workplace, such as denigrating jokes, displaying sexual imagery, sexual banter and offensive social media interactions, can create an environment in which sexual harassment becomes normalised.

We also know that young people are most affected by sexual harassment, with those aged 18–24 most likely to have experienced it. Men are most often the people who sexually harass women and young people (both male and female).⁴ In addition, people are more likely to report they were harassed by someone in a more senior position. Those in junior positions, such as apprentices or people who are new to a workplace, are at greater risk of experiencing harm from sexual harassment and may feel less safe or confident to report or seek assistance.⁵

1 According to a 2012 report by the Australian Human Rights Commission, a quarter of women and one in six men aged 15 years and older has experienced sexual harassment in the workplace in the last five years. Australian Human Rights Commission, *Working without Fear: Results of the Sexual Harassment: National Telephone Survey* (2012) 4.

2 Ibid 1, 24.

3 Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules: The Experiences of Female Lawyers in Victoria* (2012) 38–9.

4 Australian Human Rights Commission, above n 1, 4.

5 A recent report found that amongst women lawyers, sexual harassment was likely to occur in the early stages of employment, with 63 per cent of incidents occurring within the first 12 months of working in the workplace. Victorian Equal Opportunity and Human Rights Commission, above n 3, 30.

About the guideline

This practice guideline, developed by the Victorian Equal Opportunity and Human Rights Commission (the Commission), is about making sure your organisation meets its legal obligations as an employer, under the Equal Opportunity Act. If you provide services you will also have obligations under the Act.⁶

This guideline provides practical advice on how to prevent sexual harassment, how to address it in your workplace and how to handle complaints appropriately and effectively.

Under section 148 of the Equal Opportunity Act, the Commission may issue practice guidelines on any matter relating to the Act. As required under the Act, the Commission consulted widely to make sure that this guideline is relevant and useful for you and your organisation. Industry bodies, industrial organisations, and employee advocacy organisations assisted the Commission by highlighting the issues and challenges of sexual harassment in the workplace.

Who is this guideline for?

This guideline is for all employers operating in Victoria, regardless of the size of their organisation.

The duties of an employer in relation to sexual harassment extend to all full-time, part-time and casual workers, agents and contractors, trainees and apprentices, job applicants, volunteers and unpaid workers.

These duties cover all stages of employment, including when people are applying for work in your organisation, serving probationary periods, returning to work after an absence, and those who may be facing dismissal or redundancy. It also applies to people who have left your organisation

(if they experienced the harassment in the course of their employment with your organisation). This reflects the scope of the obligations on employers in the Equal Opportunity Act.

Sexual harassment is also unlawful in other areas of public life. For example, in the provision of goods and services, within industrial organisations, educational institutions and qualifying bodies. This means that obligations can extend to clients and other people who may interact with your employees in the workplace.

Employers can be responsible when their employees sexually harass clients if they don't take steps to prevent this. Employers also need to ensure that they do not authorise or encourage clients to sexually harass their employees. More information about these areas can be found on the Commission's website, humanrightscommission.vic.gov.au.

Why do I need to follow this guideline?

There are a number of important reasons for applying this guideline in your workplace:

- under the Equal Opportunity Act, sexual harassment is against the law, whether this happens at work, at work-related events, between people sharing the same workplace or between colleagues outside of work. It is also against the law to authorise or assist sexual harassment in any way. This guide helps you to understand these legal obligations
- the Act specifically requires organisations to take proactive steps to eliminate sexual harassment in the workplace – simply responding to complaints that may arise is not enough. This is required to meet the 'positive duty' and ensure that your business is not held liable for the actions of your staff and agents

⁶ It is unlawful to sexually harass a person in the provision and receipt of goods and services. *Equal Opportunity Act 2010 (Vic)* s 99.

- while this guideline is not legally binding, a court or tribunal may consider whether a person has complied with it when hearing a complaint of sexual harassment
- business can suffer when sexual harassment happens in the workplace. Besides the hardship and real harm an employee can experience, your organisation runs the risk of hefty legal costs, reduced productivity and damage to the workplace environment and your organisation's reputation
- living free from harassment, violence and intimidation is a human right. Employers are in a unique position to prevent sexual harassment and effect change in the workplace to create a positive, productive and safe environment for everyone.

What does this guideline contain?

This guideline is in four parts:

- **Part 1: Understanding the law – the Equal Opportunity Act 2010** identifies key components of the law that relate to sexual harassment in the workplace.
- **Part 2: Preventing sexual harassment – the 'positive duty'** outlines your organisation's obligation to prevent sexual harassment from occurring in your workplace. It provides tips and strategies to create a workplace culture of zero tolerance for sexual harassment.
- **Part 3: Responding to sexual harassment – complaints processes** takes you through the process of what to do when someone makes a complaint of sexual harassment in your workplace and how to ensure a complainant is not victimised further by the process.
- **Part 4: Preventing and responding to sexual harassment – checklist.**

Where can I get more advice or information?

While this guideline may be used in a formal capacity by a court or tribunal, the Commission has simplified the language of the law to make it easier to understand and put into practice.

This information is intended as a guide only and does not cover every possible situation and circumstance that you may encounter.

If you have a matter you need to clarify, you may consider seeking legal advice.

You can also call the Commission's Enquiry Line on 1300 292 153, or download the Equal Opportunity Act, our Right Smart Employers Toolkit and other useful information from the Commission's website at humanrightscommission.vic.gov.au.

Right Smart Employers Toolkits

The Commission has created a suite of free online tools to help your organisation understand and comply with the Equal Opportunity Act.

Simply complete the self-audit to assess your organisation's compliance and find out if there are any areas you need to address. You can download templates and checklists to help manage specific employment issues, including sexual harassment.

Visit humanrightscommission.vic.gov.au/employerstoolkits to find out more and access the toolkits.

Training and consultancy

Our education, training and consultancy services will help you understand workplace rights and responsibilities, meet your organisation's legal obligations, and appreciate the benefits of promoting a culture of human rights and equal opportunity in the workplace.

For more information and to register online, visit humanrightscommission.vic.gov.au/training or call (03) 9032 3415.

Compliance review

The Commission has the ability, on request, to conduct compliance reviews of an employer's programs and practices to determine and give advice about their compliance with the Equal Opportunity Act. This is another tool that the Commission can use to help you meet your obligations in relation to sexual harassment, discrimination and victimisation.

For more information call the Commission's Enquiry Line on 1300 292 153 or email legal@veohrc.vic.gov.au.

Part 1: Understanding the law - the Equal Opportunity Act 2010

The *Equal Opportunity Act 2010* is Victoria's anti-discrimination law. The Act operates to prevent discrimination, sexual harassment and victimisation and also addresses systemic discrimination. There are also federal laws that apply in this area. These are discussed in section 1.7 (page 15).

1.1 What is sexual harassment?

The Equal Opportunity Act describes sexual harassment as unwelcome sexual advances, unwelcome requests for sexual favours, or any other unwelcome conduct of a sexual nature, in circumstances which could be expected to make a reasonable person feel offended, humiliated or intimidated.

The unwelcome sexual behaviour could be physical, spoken or written (including email, the internet and on social media). There are a range of behaviours that may constitute sexual harassment including unwanted:

- requests for sex
- intrusive questions about someone's private life or the way they look
- sexually suggestive behaviour, such as leering or staring or offensive gestures
- brushing up against someone, touching, fondling or hugging
- sexually suggestive comments or jokes
- displaying offensive screen savers, photos, calendars or objects
- repeated requests to go out
- sexually explicit messages in emails, text messages or on social networking sites using work equipment or personal equipment at work
- sexual assault, indecent exposure, physical assault and stalking.

The most common types of behaviours reported by people bringing complaints are sexually suggestive comments or offensive jokes, intrusive questions about personal matters and inappropriate staring or leering.⁷

Unwanted 'romantic' suggestions, or suggestions that people start a relationship, also fall within the definition of sexual harassment.

In one case, the Queensland Anti-Discrimination Tribunal found that a manager had sexually harassed an employee by telling her that he was falling in love and wanted her to move in with him. The Tribunal said this amounted to unwelcome conduct of a sexual nature:

"By telling someone that you are falling in love with them and that you want them to move in with you, you are telling them, by implication, that you want a sexual relationship with them, and that you are therefore implicitly requesting sexual favours of that person."

K v S and N Company [2006] QADT 11

Sometimes it can be difficult to link sexual harassment to a specific incident, because it is part of a broader pattern of behaviour (for example, through workplace culture). It may be a one-off incident or a pattern of harassment against someone or a group of people, such as women in the workplace or apprentices, which would be expected to be intimidating, humiliating or offensive.

⁷ Australian Human Rights Commission, above n 1, 21.

The motivation or understanding of the harasser is irrelevant. Sexual harassment can still occur when the harasser believes their behaviour is welcome. However, if it is of a sexual nature, is unwelcome and is likely to make a person feel offended, humiliated or intimidated, it is sexual harassment.

1.2 Who does the law apply to?

In Victoria, sexual harassment is against the law in a range of contexts, including in employment. This includes:

- an employer harassing an employee, job applicant, or an employee of someone else who shares their workplace
- an employee harassing a fellow employee, job applicant, or their employer
- a person harassing another person who shares a common workplace with them.⁸

An employer can also be held responsible for the conduct of an employee if the sexual harassment has taken place in the course of their employment and the employer has not taken steps to prevent the conduct. This is discussed in section 1.5 (page 10).

When this guide refers to 'employees', it means all employees regardless of whether they are paid, unpaid or volunteers; or whether they are employed under a Federal award, enterprise agreement or common law contract. It also includes contractors, people appointed to a statutory office or under the *Public Administration Act 2004* (Vic) and commission workers.

A 'common workplace' is any place where an employee is located in order to carry out their employment. It does not need to be the person's main place of business or employment and covers situations such as secondments, locums, and when contractors or other staff are working in another employer's workplace.

This means, for a person to bring a complaint of sexual harassment in the area of employment under the Equal Opportunity Act, the conduct must amount to sexual harassment and it must occur within the employment relationships outlined above.

1.3 How do I recognise sexual harassment?

If you identify behaviour in your workplace that you think may be sexual harassment, it probably is.

The Equal Opportunity Act requires employers to take action to prevent sexual harassment, and to address it when it occurs.⁹

Employers are often worried about taking action to address sexual harassment unless they have 'hard evidence'.

Because it is a civil law, the threshold in the Equal Opportunity Act differs from criminal matters. For example, while it must be established that harassment has occurred, it does not need to be proven beyond reasonable doubt. Rather, it needs to be proven 'on the balance of probabilities'. This means that it must be more likely than not that the conduct occurred as alleged.

The test for whether sexual harassment has occurred is also an objective one, considering all the circumstances. The motivation or understanding of the person engaging sexual harassment is irrelevant under the Equal Opportunity Act.

Employers should be aware that claims against your organisation can be made if your organisation fails to take action to address or prevent sexual harassment from occurring.

It is always important to remember that your organisation may be held accountable by other bodies, such as the Commission, or a court or tribunal, for how complaints of sexual harassment are managed in your workplace.

It is not an excuse for you or someone in your business to claim that a complaint of sexual harassment is a result of 'personality clashes'; to assume that the person complaining is overreacting or oversensitive, or that there is too much on the line because someone's job may be at stake.

⁸ *Equal Opportunity Act 2010* (Vic) ss 93–94.

⁹ *Equal Opportunity Act 2010* (Vic) s 15.

Consider each of the following questions to see if the conduct is likely to fall in the definition of sexual harassment in the Equal Opportunity Act:

- is the behaviour a sexual advance, a request for sexual favours, or other conduct of a sexual nature?
- is the behaviour unwelcome to the person?
- would a reasonable person think that the person who was harassed would be offended, humiliated or intimidated?

These questions are considered in more detail below.

Is the behaviour of a sexual nature?

The Equal Opportunity Act defines this as conduct that includes: 'subjecting a person to any act of physical intimacy, or making any remark orally or in writing that has sexual connotations to or about a person in their presence.'¹⁰ It also includes making any gesture, action or comment of a sexual nature in a person's presence.

Whether behaviour is of a sexual nature depends on the circumstances and the context of the conduct. Do not look at the behaviour in isolation, consider it in the context of surrounding circumstances. Courts have tended to take a broad view of conduct that falls within the definition of 'a sexual nature'. The test of whether conduct is of a sexual nature is an objective one, that is, would the reasonable observer consider it to be of a sexual nature? The intention of the harasser is irrelevant.

'Behaviour of a sexual nature' depends on the circumstances

The Federal Magistrates Court held that flicking rubber bands at a fellow employee was conduct of a sexual nature because, looking at the circumstances, it formed a pattern of behaviour. The circumstances in this case included a series of incidents that took place over time – comments of a sexual nature about the applicant's appearance and personal life, and inappropriate touching.

Shiels v James and Lipman Pty Ltd [2000] FMCA

Someone making sexually explicit or denigrating jokes in your organisation's lunchroom could be making a number of people uncomfortable, and is inappropriate.

If you become aware of situations like this, do not let them go unchecked. Allowing this behaviour to continue can affect workplace culture – making your workplace intimidating for some people. This type of hostile workplace culture can, in some circumstances, amount to sex discrimination.

Jokes like this can also contribute to an environment where attitudes towards women that are unhealthy or potentially violent are allowed to proliferate. You should remember that sexual harassment may start out as something small or seemingly harmless and may escalate into serious behaviour (see the cases of *Ewin v Vergara* and *Lee v Smith & Ors* on page 9) or create a harmful workplace culture.

Is the behaviour unwelcome to the person?

This means that the employee to whom the conduct is directed considers the behaviour unwelcome. This is based on the particular perceptions, thoughts, feelings and experiences of the person experiencing the harassment. It does not depend on what a particular harasser, manager or employer thinks is acceptable, reasonable or harmless and funny. It is also irrelevant if the harasser thinks the behaviour is welcome.

Case study

Sarah is the only woman in an office with four male colleagues who take phone calls from the public. Her colleagues regularly make 'thumbs up' gestures to each other if they are speaking to a young woman on the phone they think might be attractive. This makes Sarah feel uncomfortable and excluded from the team.

In this case, the behaviour is unwelcome to Sarah, whether or not her colleagues think of it as harmless fun.

It is important to remember that even if the person experiencing the harassment does not speak up or complain about it, the conduct might still be unwelcome.

¹⁰ *Equal Opportunity Act 2010 (Vic)* s 92(2).

Sarah's colleagues also comment on her phone manner, and suggest that she should try and sound 'huskier'. Sarah may never have responded or made comment on this behaviour for a variety of reasons, including fear of being seen to 'overreact' or because she is intimidated or embarrassed. The fact that her colleagues may not know she feels uncomfortable does not matter.

"...the fact that a recipient of a comment or a gesture is silent does not automatically mean that the comment is welcome. Again, the fact that the maker of the comment has not been told in advance by the potential recipient or someone else that the comment or gesture would be unwelcome to the potential recipient does not automatically make the comment welcome."
Styles v Murray Meats Pty Ltd [2005] VCAT 914

A workplace environment that is 'fun' or casual is not an excuse for allowing behaviour that may intimidate or offend employees to go unchecked.

It is important to remember that the fact that an employee may have taken part in exchanges of sexual comments, banter or jokes does not mean they are not a victim of sexual harassment.

The employee may have been coerced into 'playing along', and may have been trying to protect themselves or avoid escalation of the harassment by participating. In other circumstances, they may have consented up to a point, prior to behaviour becoming intimidating, humiliating or offensive.

It may still be sexual harassment if it seems like the person was participating in the behaviour

In one case, the complainant alleged that she had been subjected to sexual comments at work. Her body had been written on with texta, her bra strap pulled, and her buttocks pinched. The Federal Magistrates Court found that the applicant had initiated and encouraged some of the behaviour, although 'she had asked that it stop at a certain point'. The Court upheld her complaint stating that even where a complainant has initiated, participated in, or encouraged some behaviour, this does not prevent other behaviour from being unwelcome and constituting sexual harassment.

Horman v Distribution Group Ltd t/as Repco Auto Parts [2002] FCA 219

In another case from Queensland, a complainant was found to have used her participation in sexual banter with a colleague as a coping mechanism for the harassment. While the Queensland Anti-Discrimination Tribunal considered this was not the most ideal way of dealing with the conduct, it did not prevent the complainant from succeeding in her claim relating to serious sexual harassment by the colleague (involving intrusive questions about her sex life and sexually explicit comments about the complainant and sexually explicit actions directed to the complainant).

Nunan v Aaction Traffic Services Pty Ltd [2013] QCAT 565

Would a reasonable person think that the person who was harassed would be offended, humiliated or intimidated?

You need to ask yourself whether a reasonable person would think that the complainant's reaction to the conduct is likely in the circumstances. The Equal Opportunity Act does not define factors to be considered when assessing this. However, the overall circumstances are important when deciding whether the complainant was likely to be offended, humiliated or intimidated. Consider things such as:

- the nature of the alleged harassment
- when and where the harassment took place
- gender
- experience
- the relationship between the people involved
- any power imbalance such as seniority or age.

As a general rule, behaviour that is based on mutual attraction, friendship or respect is not sexual harassment if the interaction is welcome, consensual and reciprocated.

The overall context is considered for every claim of sexual harassment

A telemarketer complained of sexual harassment when her manager came up from behind and massaged her shoulders when she was on the phone. On another occasion, her manager put his arm around her when she was upset, and massaged her a second time.

The Queensland Anti-Discrimination Tribunal held that conduct such as this is sexual harassment.

‘Whether an action is compassionate or reprehensible will depend on the overall context in every case. In this case the actions were not between long-standing friends, but between a young female employee who had just started a new role and a middle-aged, male manager’.
Smith v Hehir and Financial Advisors Aust Pty Ltd [2001] QADT 11

Remember, if you identify behaviour in your workplace that you think may be sexual harassment, it probably is. If you are aware of sexual harassment, you must take steps to address it, even if no complaint has been made (see section 2.1 on page 17).

1.4 Why is it important to prevent sexual harassment?

Sexual harassment is against the law and employers who don't take steps to prevent sexual harassment in the workplace can risk legal liability.

Sexual harassment can significantly affect a victim's emotional and psychological wellbeing – this isn't good for the person or the workplace. This can include stress, distress, adverse impacts on their health, and financial hardship. Sexual harassment can put a victim's personal safety at risk, including the risk of physical harm in some circumstances. The situation can also affect their relationships with partners and family.

Reporting sexual harassment also has the potential to take a substantial toll on victims if it is not treated appropriately. Recent research suggests that there has been a significant increase in the number of people who have experienced negative consequences (for example, victimisation) as a result of making a formal report or complaint of sexual harassment.¹¹

There is also strong evidence to suggest that bystanders (such as co-workers) who witness or otherwise hear about sexual harassment in workplace contexts, can experience negative health and occupational outcomes similar to those experienced by the direct victims. This phenomenon is known as ‘bystander stress’.¹²

It is important to remember that sexual harassment may start in a way that seems harmless, but when left unchecked can escalate into very serious harm. In the case of *Lee v Smith & Ors* [2007] FMCA 59, an employee who unlawfully sexually harassed a fellow employee on many occasions in the workplace later committed rape. The court stated that the rape itself was ‘a culmination of a series of sexual harassments that took place in the workplace’.

This is similar to the case of *Ewin v Vergara (No.3)* [2013] FCA 1311 where the complainant was persistently harassed and sexually pursued by a contractor engaged by her employer over a number of days, culminating in an unwanted sexual incident at the office after-hours. The court agreed that conduct that took place outside the work premises and outside work hours was part of the same course of sexual harassment which began in the office (at [228]).

See section 1.5.3 (page 12) for information on what to do in this circumstance.

1.4.1 Business risks of sexual harassment

Sexual harassment can be a significant risk for businesses, including having negative impacts on your organisation's morale and productivity (for example absenteeism or loss of valuable employees), as well as risks associated with potential legal action and associated costs, and injury to your organisation's reputation and finances (for example, customer loyalty or shareholder confidence).

11 Australian Human Rights Commission, above n 1, 39.

12 Australian Human Rights Commission, *Encourage, Support, Act! Bystander Approaches to Sexual Harassment in the Workplace* (2012) 16.

A majority of sexual harassment complaints are settled and often include some form of financial compensation.¹³ One high-profile sexual harassment case is *Kristy Fraser-Kirk v David Jones*, which reportedly settled for a payment of around \$850,000¹⁴ Outcomes may contain a range of other remedies, including training and other public accountability measures. In *Ewin v Vergara (No.3)*, the complainant was awarded a financial compensation payment of \$476,163 comprising a combination of loss of past and future earnings, past and future expenses, and an award of \$110,000 for hurt and humiliation.

Some sexual harassment may also be an offence under criminal law, including indecent exposure, stalking, sexual assault and obscene or threatening phone calls, letters, emails, text messages or postings on social networks.

1.5 What are the duties of an employer?

Employers have a duty not to sexually harass their employees, job applicants, or employees of other organisations in their workplace. Employers are legally responsible on a personal basis for this sexual harassment.

Employers are also legally responsible for acts of sexual harassment by their employees or agents that occur in the workplace or in the course of a person's employment, unless they can show they have taken reasonable precautions to prevent such acts. This is called 'vicarious liability'.

In Victoria, employers also have a legal obligation to take reasonable and proportionate measures to eliminate sexual harassment as far as possible. This is called the 'positive duty'.

Part 2 of this guideline provides detailed information on how your organisation can meet the positive duty of preventing sexual harassment. Part 3 provides guidance on responding effectively to any complaints you may receive.

1.5.1 What is vicarious liability?

Vicarious liability simply means that employers could be liable for the actions of others. Employers can be responsible for the action of someone acting in the course of their employment with your organisation or if they are acting on your organisation's behalf or as an agent.

For example, if one of the employees in your organisation sexually harasses a co-worker or a client, the employer can also be held responsible for sexual harassment under the Equal Opportunity Act.¹⁵

In cases like this, while the harasser still bears individual liability for their actions, the employer may also have to pay compensation if they are found to be vicariously liable.

In determining an employer's vicarious liability for the actions of its employees, courts have considered whether the event where the sexual harassment has taken place is 'in the course of employment', or in other words, is 'closely connected to work' and whether the person is acting as an employee at the time the incident occurs.

Courts have made a distinction between social events that are closely connected to employment and events that are not connected to employment. Instances where sexual harassment has a strong link to employment are at social functions sponsored and paid for by the employer, at after-parties to such events and in hotel rooms paid for by the employer. However, as the following case study shows, a connection to employment might be shown where the harassment is an extension of workplace behaviour, even if it happens at an event not sanctioned by the employer.

Sexual harassment has also been found by the court to have occurred where there has been a series of instances of sexual harassment in the workplace, culminating in a further serious instance of sexual harassment outside of the workplace (in this case, rape) at an after work dinner at a private residence. The court considered that the connection with the employee's workplace was not broken, because the harasser's behaviour was 'an extension or continuation of his pattern of behaviour that had started and continued to develop in the workplace he shared with the Applicant'.¹⁶

13 Sara Charlesworth et al, 'Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions: 1 July 2009 – 31 December 2009' (University of South Australia, 2012), 28–9.

14 Patricia Easteal et al, 'Sexual Harassment on Trial: The DJs Case' (2011) 36(4) *Alternative Law Journal*, 232.

15 *Equal Opportunity Act 2010 (Vic)* s 109.

16 *Lee v Smith & Ors* [2007] FMCA 59 (23 March 2007). See also *Ewin v Vergara (No.3)* [2013] FCA 1311 (5 December 2013).

To avoid vicarious liability, the employer must be able to show that they took reasonable precautions to prevent their employee or agent from engaging in sexual harassing.¹⁷ These precautions include making sure that your organisation has up-to-date policies dealing with sexual harassment, setting out what constitutes sexual harassment, that it is against the law, and that breaches of the policy will be dealt with through appropriate disciplinary action. It will also involve ensuring that employees familiarise themselves with the policy through initial and refresher training on the policy, so that the policies are put into practice.

Employers also need to show that they took appropriate remedial action to address the sexual harassment if a complaint was made or they became aware of a culture of sexual harassment. This may include, for example, having contact officers trained in the workplace to deal with harassment, or policy and procedures on complaint handling. It will also include ensuring your complaint handling procedures are fair and are followed properly, to ensure that complaints are taken seriously and dealt with appropriately.

For example, a male employee was found to have sexually harassed a female colleague by repeatedly making offensive and humiliating sexual remarks to her during team meetings, and repeatedly asking her to go out with him and suggesting that they should go away for a “dirty weekend”, which she refused. The employer was found to be vicariously liable for this employee’s conduct, and ordered to pay the female employee \$18,000 in damages.

The Federal Court considered that the employer had failed to take all reasonable steps to prevent the conduct and avoid vicarious liability despite the employer providing a copy of its code of conduct to all new employees (which set out a prohibition on sexual harassment), and ensuring all employees undertake sexual harassment training every two years. This was because the training was online and was based on ‘global standards’ of workplace behaviour, developed in the United States of America. The training made no reference to the law in Australia relating to sexual harassment, and did not clearly state that sexual harassment was unlawful and a breach of policy, and that the employer could be vicariously liable. These were key steps the Court considered could have been reasonably in place to prevent the sexual harassment.

Richardson v Oracle Corporation Australia Pty Ltd [2013] FCA 102 (20 February 2013)

¹⁷ *Equal Opportunity Act 2010* (Vic) s 110.

1.5.2 Who is the employer responsible for?

The duties of an employer in relation to sexual harassment extend to all full-time, part-time and casual workers, agents and contractors, trainees and apprentices, volunteers and unpaid workers.

1.5.3 What is the extent of the employer’s responsibility?

The prohibition of sexual harassment extends to sexual harassment in all stages of employment, including when people are applying for work in your organisation, serving probationary periods, returning to work after an absence and those who may be facing dismissal or redundancy. It also applies to people who have left your organisation (if they experienced the harassment in the course of their employment with your organisation).

As outlined in section 1.2, the Equal Opportunity Act sets out that employers and employees must not commit sexual harassment against each other, other employees, prospective employees. The law applies to these people because of the work relationship. The Equal Opportunity Act also says that a person, including an employer, must not sexually harass a person in a common workplace.

Employers are responsible and liable for their own conduct against employees, job applicants and employees of other organisations in the common workplace, as well as any conduct by their employees where the conduct is ‘in connection with employment’.¹⁸ This includes conduct that occurs at the work premises, at work-related events, or between people sharing the same workplace.

What is a common workplace?

As noted in section 1.2, a common workplace is any place where a person attends for the purpose of carrying out functions in relation to their employment, occupation, business, trade or profession.

The ‘workplace’ is also not confined to the actual physical location used by the employees. It also extends to common areas such as lifts, entrances, reception areas, corridors, kitchens and toilets of the premises.¹⁹ For example, it is possible for an employee to be sexually harassed by an employee of another company while visiting that office, such as when an accountant comes into the workplace to conduct the annual financial audit or an electrician comes into the workplace to fix the lighting.

¹⁸ *Equal Opportunity Act 2010* (Vic) ss 93–4.

¹⁹ *Ewin v Vergara* (No. 3) [2013] FCA 1311 [43].

Responsibility outside the workplace or outside working hours

An employer's responsibility for sexual harassment extends beyond the normal workplace and outside normal working hours. For example, instances where sexual harassment has a strong link to employment are at social functions sponsored and paid for by the employer, at after-parties to such events (regardless of their location), in hotel rooms paid for by the employer and of course any sexual harassment which takes place at work premises outside working hours or while employees are not performing their duties.

Staff in your organisation need to understand this, as work occasions, particularly where alcohol is consumed, may lead to increased risk of sexual harassment occurring.

Outside the normal workplace

A woman attends a work conference and stays in a hotel room paid for by her employer. In the evening a fellow employee who has been drinking heavily enters her room uninvited and despite being asked to leave, remains in the room. The woman falls asleep and wakes to find the other employee lying on top of her.

The court found that this conduct was sexual harassment because it was in the course of employment. That is, the employees were placed in the situation as a result of their work-related duties.

Leslie v Graham [2002] FCA 32

Outside normal work hours

An employee made sexually harassing phone calls to the applicant (a co-worker) after hours. It was found that the sexual harassment was the consequence of the employment relationship, and it also had significant adverse effects in the workplace.

Graham George Clive McManus v Robin Scott-Charlton [1996] FCA 1820

Outside normal work hours in a common workplace

A contractor was found to have sexually harassed an employee who worked in the same office as him, in circumstances where he made sexual advances and sexual comments to her over a number of days and at various locations on- and off-site, culminating in an unwanted sexual incident. These included at her desk during the day and after-hours, after work at various bars, at a work meeting off-site, at a work function after-hours at Melbourne Aquarium, and after the function when the contractor and employee found themselves back at the office in a corridor of the common workplace.

Ewin v Vergara (No 3) [2013] FCA 1311

The implication here is that an employer in this situation may be vicariously liable if it was found they failed to take reasonable steps or precautions to prevent the sexual harassment from occurring.

When a tribunal or court is considering an employer's vicarious liability there is a requirement to consider if an act was committed 'in the course of employment'²⁰ and will therefore consider whether there was a connection to the workplace. However, the extent to which the conduct in question must be connected to the workplace will depend on the particular facts.

In this context, it is in the best interest of employers to provide clear guidance to employees, contractors and volunteers that sexual harassment against other employees or anyone associated with the workplace, whether at work, at a work-related event or after-hours or in their own time, is not acceptable.

Technology and social media

Employees' use (or misuse) of technology is an area of concern as the workplace becomes more mobile. Increasingly, people are working remotely and using work phones or laptops for private use as well. This means that people often have access to people's contact details outside of the work context, and that people may sexually harass colleagues outside of work hours.

Social media is also an emerging area of concern for employers in the areas of discrimination, sexual harassment and misconduct because employers can be held responsible for the conduct of their employees outside work hours and the physical workplace.

²⁰ *Equal Opportunity Act 2010* (Vic) s 109.

Sexual harassment can occur through electronic means such as emails, text messages or by viewing pornographic websites in the workplace and through social media by employees and employers (this is the case for use of social media professionally or personally, in the workplace and after-hours).

While this area of law is still being tested, employers have a duty to provide clear guidance to employees to ensure that they use technology and social media responsibly in the workplace, and in relation to anything or anyone associated with the workplace.

Employees should be aware that they are subject to the same rules about sexual harassment in the virtual world as they are in the real world.

At work

A workplace may have a culture of people using social media during work hours to communicate with one another. One employee posting comments of a sexual nature about a fellow employee on their social media page, or requesting sexual favours from another employee through a social media site, may well constitute sexual harassment for which the harassing employee will be held liable. If the employer has failed to take steps to prevent this occurring, and the conduct occurred in connection with the employment, the employer may also be held liable.

Employers who use social media in their business operations, who sanction employees' use of social media in the workplace, or who provide work equipment or access to IT (such as mobile phones) to employees must be able to show that they have taken reasonable steps to prevent and respond to the risk of sexual harassment.

Case study one – work-sanctioned use of social media

A sales company in central Melbourne uses Facebook and Twitter to promote their products. To support this strategy, they encourage employees to use online media in a private capacity to build their capabilities and networks. The company has provided training in the appropriate use of social media, including expectations and obligations under anti-discrimination laws, making it clear that the company will not condone or defend behaviour that discriminates, harasses or bullies other co-workers whether it occurs in a personal or professional context.

The company promotes and supports a process of reporting inappropriate social media use to its employees.

Outside work hours

When employees use social media or work equipment for private purposes, they may still be found to have committed sexual harassment for which they, and the employer, are liable.

This could occur where there is the required employment relationship between the people involved, where there is a sufficient connection with their employment, or where their conduct is an extension or continuation of a pattern of behaviour that started in the workplace. If the employer has failed to take reasonable action to prevent it from occurring, they may be liable.

As with other out-of-work-hours conduct, each case will depend on whether the requisite relationship and whether the connection to the workplace was sufficient.

Case study two – where it is an extension or continuation of the pattern of behaviour that had started and continued to develop in the workplace

Alexa and Ben work for the same employer on different projects in different buildings but have regular contact in relation to their work. Ben has asked Alexa out a few times at work. She has repeatedly turned him down. Other employees are aware of this. Ben asks Alexa to be his 'friend' on Facebook one night after work. Alexa declines the request. Ben posts notifications on his Facebook page that Alexa is 'a stuck-up bitch' who 'has nice legs and nice boobs, but is crap at her job'. A number of Ben's colleagues see the posts and 'like' them.

In this scenario, it may be shown that the employer is vicariously liable for Ben's behaviour, which is a consequence of their work relationship, if they have failed to take reasonable steps to prevent the sexual harassment from Ben towards Alexa from occurring.

Case study three – use of work equipment for private use

David has been given a smartphone for use in the course of his employment as a project manager for a number of construction sites around outer Melbourne. Jim is a contracted plumber that works on one of the sites that David manages. David regularly contacts Jim about work that needs to be done, and recently met with him to discuss the progress of work on-site. Over the course of a couple of weeks following that meeting, Jim has been receiving sexually explicit picture texts from David.

David's employer may be vicariously liable for the sexual harassment of Jim by David if it can be shown they facilitated the harassment through the provision of the phone, allowing it to be used for personal use, and for failing to take steps (such as clear guidance) to prevent harassment of this type from occurring.

1.6 Who else is liable and what are they liable for?

1.6.1 Personal liability

If a person sexually harasses another person they are individually (and directly) liable. This means they will be held responsible for their conduct and may be ordered to personally pay compensation to the person they harassed. Where that person is acting in the course of their employment, a complaint can be made directly against their employer – the organisation and any relevant management personnel – as well.

Individuals are liable for their own behaviour

Steve and Robert are bank tellers. Steve continually asks Robert out on a date, despite Robert repeatedly telling him that he is not interested. Robert makes a formal complaint of sexual harassment to his manager and to the Victorian Equal Opportunity and Human Rights Commission. A complaint may be made directly against their employer, and Steve may also be individually directly liable for sexually harassing Robert.

An employee was found personally liable for sexual harassment when, during staff training, he handed a folded piece of paper to another staff member which she read later on that day. The note was an excerpt of an email, containing graphic descriptions of sexual acts in very explicit sexual language. He was ordered to pay \$10,000 damages to the other employee. However, their employer was not found vicariously liable, as the Tribunal found it had taken all possible steps that could have been taken to ensure its employees were aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they do not comply. This included being required to commit to the Code of Conduct, and attending training on bullying and harassment prevention.

Cooper v. Western Area Local Health Network [2012] NSWADT 39 (9 March 2012)

1.6.2 Authorising or assisting sexual harassment

It is against the law for a person to request, instruct, induce, encourage, authorise or assist someone to sexually harass another person. That is, employers could be liable for actions or decisions that could result in one of their employees sexually harassing another.

Authorising or assisting does not require a legal relationship to exist. For example, if you are a recruitment agent, you could be found to be assisting sexual harassment if you refer an applicant to an employer, despite knowing complaints of sexual harassment having been made against that employer by previous employees. A colleague who 'eggs on' a male counterpart to sexually harass another employee could also be found to be encouraging sexual harassment.

Employers can be liable for authorising or assisting sexual harassment

Laura, a sales representative, reports to her manager that a client has been sexually harassing her by sending her sexually explicit 'joke' emails and repeatedly commenting on her legs. Her manager says that he has noticed some of the behaviour and will deal with it. However, during the quarterly budget review, the manager notes how much revenue comes from this particular client and doesn't want to rock the boat. The manager says to the client that Laura has made a complaint, but she'll just have to grow up and deal with it. The sexual harassment continues. Laura's manager could be liable for authorising and assisting the sexual harassment by the client in the receipt of goods and services.

1.6.3 Victimisation

Victimisation is subjecting, or threatening to subject, someone to detriment because they spoke up about their rights, made a complaint, or helped someone else to make a complaint. Victimisation is against the law.

For example, an employee could claim victimisation if they are demoted, ostracised or denied a promotion in your organisation because they raised concerns about sexual harassment occurring, even if they are not the person who was the direct victim of the sexual harassment.

The Equal Opportunity Act defines detriment to include humiliation and denigration.²¹

Victimisation does not require a particular relationship to exist between the people concerned. For example, a client who refuses to give a commission to an employee in your organisation because they have heard that the employee made a complaint of sexual harassment about someone else, could be unlawfully victimising your employee.

1.7 What other laws relate to sexual harassment?

Meeting your organisation's duty to prevent and address sexual harassment in the workplace may also help employers to address the risk of separate claims brought under other laws. You may need to seek legal advice if the sexual harassment has also breached any of the following laws.

1.7.1 Discrimination

Sexual harassment may also meet the definition of discrimination under the Equal Opportunity Act. This will depend on the circumstances in each case.

Direct discrimination is when you treat, or propose to treat someone unfavourably because of a personal attribute that is protected in the Equal Opportunity Act, including their sex, sexual orientation, and lawful sexual activity.

Indirect discrimination is when an unreasonable requirement, condition or practice either actually, or potentially, disadvantages someone with a personal attribute protected by the law.

If your workplace culture is sexually hostile to women, your organisation is open to claims of both sexual harassment and sex discrimination. This is because harassing conduct may result in a woman being subject to unfavourable treatment in employment.

For more information about what constitutes discrimination, see the Commission website at humanrightscommission.vic.gov.au.

1.7.2 Occupational health and safety

Under the *Occupational Health and Safety Act 2004* (Vic), employers have a general duty to maintain a workplace that is safe and without risks to health as far as is reasonably practical. Evidence shows that a work environment where a person experiences unwanted sexual conduct puts them at risk of stress and physical and psychological harm, including depression and anxiety.²² If your organisation has not met the positive duty to prevent sexual harassment, your organisation may also not be complying with its duty under the Occupational Health and Safety Act, and may be at risk of claims being made against it.

For information about obligations under the Occupational Health and Safety Act, visit the Victorian WorkCover Authority website at www.vwa.vic.gov.au.

21 *Equal Opportunity Act 2010* (Vic) s 4.

22 Joe Catanzariti, 'Discrimination Can be Costly' (2009) 47 *Law Society Journal*, 42.

1.7.3 Federal laws

Sexual harassment in your workplace may also be against the law under the federal *Sex Discrimination Act 1984*. Sexual harassment is covered directly under the Sex Discrimination Act and can in some circumstances also fall within the definition of sex discrimination.

For more information about the Sex Discrimination Act, visit the Australian Human Rights Commission website at hreoc.gov.au/sex_discrimination/index.html.

Employers also have a duty to comply with the federal *Fair Work Act 2009*. The Fair Work Act deals with discrimination and prohibits any adverse action against employees and prospective employees on a number of grounds including race, sex (relevant where sexual harassment also constitutes sex discrimination), age, disability, pregnancy or parental status.

For information about the Fair Work Act, go to the Fair Work Ombudsman website at fairwork.gov.au.

1.7.4 Contract or tort

Sexual harassment can also amount to a breach of the common law duty of care as an employer, or a breach of an implied term of mutual trust and confidence in a contract of employment. As such, your organisation could face claims of breach of the employment contract or negligence.

1.7.5 Criminal law

Some types of sexual harassment are also offences under criminal law. As noted earlier, this can include indecent exposure, stalking, sexual assault and obscene or threatening phone calls, letters, emails, text messages or postings on social networks.

In these instances, you could report the matter to the police, or encourage the employee to report it and provide any necessary support and assistance to employees complaining of the behaviour or to employees alleged to have engaged in the behaviour. For example, you may need to refer employees to counselling, a medical practitioner or legal assistance. Employers also have an obligation to provide a safe workplace and can seek advice from relevant agencies, such as the Victorian WorkCover Authority and Victoria Police.

Part 2: Preventing sexual harassment – the ‘positive duty’

2.1 Why do employers have to be proactive?

The law requires employers to ‘act’, not just to ‘react’. That is, employers must take active steps to prevent sexual harassment in their workplace, not just respond to complaints if they arise.

Employers must examine their organisation and then identify and put into place measures that will prevent sexual harassment occurring. This includes having sexual harassment policies and complaints procedures in place, and providing staff with adequate information and training. This requirement is called the positive duty.

Both the positive duty and the defence to vicarious liability require employers to be ‘proactive’ in addressing the causes of sexual harassment. The question of whether an employer is vicariously liable only arises after sexual harassment has already taken place. However, the positive duty applies all the time. Taking proactive steps will help to ensure your organisation can meet the positive duty, prevent and address sexual harassment in your workplace and defend any future vicarious liability claims.

In the same way that occupational health and safety laws require employers to provide a safe working environment, and to take steps to improve procedures, policies and practices to avoid workplace injuries occurring, the positive duty requires employers to take steps to prevent sexual harassment from occurring. You can't simply wait until there is a complaint of sexual harassment (or an accident in the case of occupational health and safety), and then take action.

Employers need to consider the drivers of sexual harassment and take steps to address them, including acknowledging that some people are more vulnerable to sexual harassment, such as young people or people who are new to the workplace. Employers also need to consider where additional barriers to reporting may exist (for example, for

junior staff or those with less influence in the organisational culture), as well as the gendered nature of sexual harassment (explained below).

You should also acknowledge the role of bystander intervention and reporting when developing workplace tools. Encouraging bystanders to speak up when they hear or see inappropriate and sexist or sexual behaviour can be a powerful tool in building a positive and equitable workplace culture free from sexual harassment.

2.2 What are the drivers of sexual harassment?

Sexual harassment is a form of sex discrimination. Evidence shows that women are most likely to experience sexual harassment, and it is usually perpetrated by men.

Allowing or ignoring behaviours that devalue the role of women in the workplace, or are intimidating or offensive, encourages poor attitudes towards women. This in turn can create a working environment that is hostile towards women. This can contribute to the occurrence of sexual harassment and can have serious and ongoing effects on individuals and on your organisation's business.

Setting expectations in the workplace that sexual harassment will not be tolerated is important in reducing the likelihood of incidents occurring.

Figure 1. Workplace culture

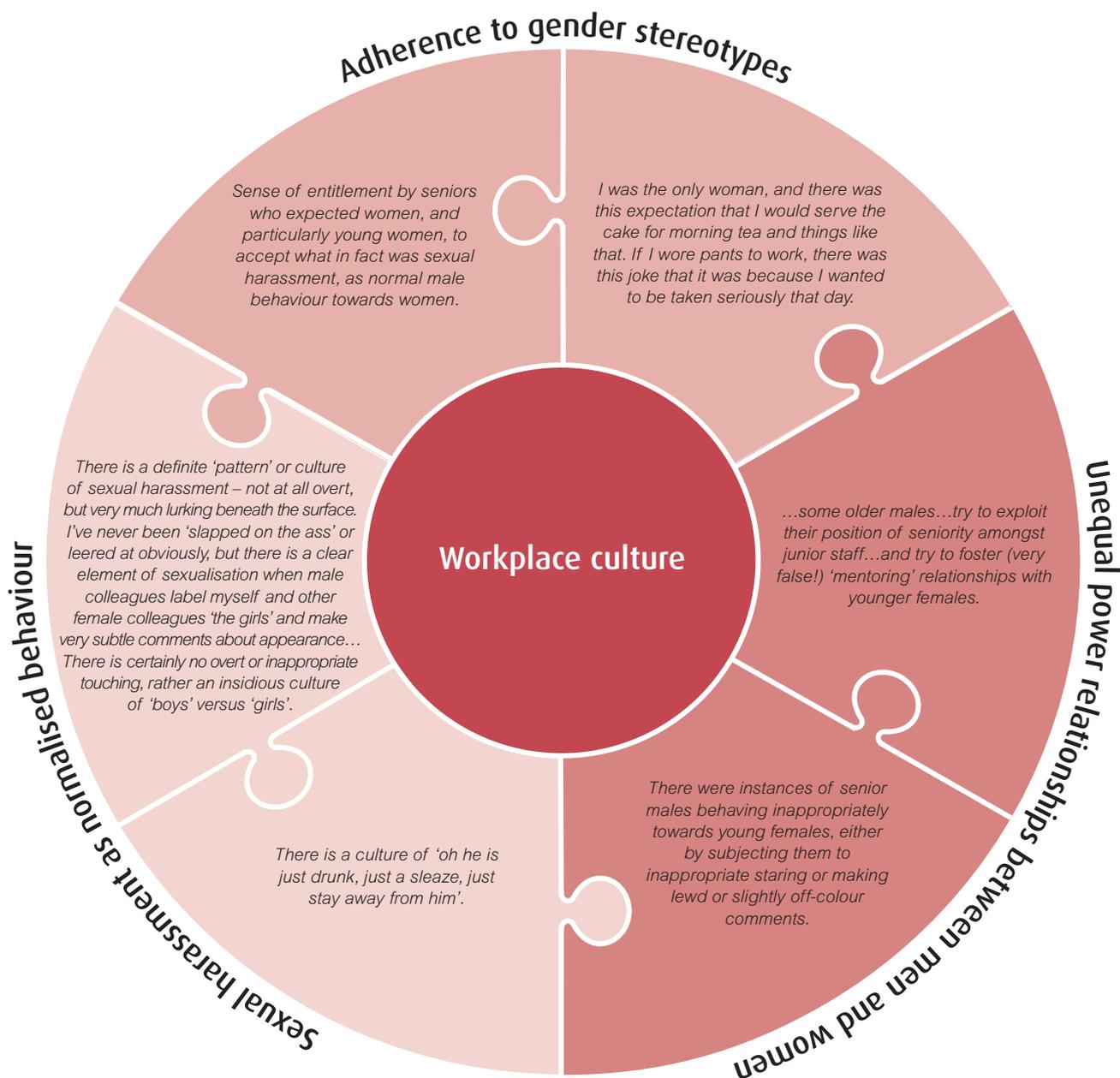


Figure 1 (above) includes quotes from women in real workplaces that show how entrenched cultural practices can encourage sexual harassment and discrimination.²³

2.3 Who do these obligations apply to?

All businesses and organisations are required to take measures to prevent, reduce and respond to sexual harassment as far as practicable. The measures you undertake to prevent sexual harassment will depend on factors such as:

- the size of the business operations
- the resources of the business
- the nature of the business
- the business and operational priorities
- the practicability and cost of the measures.

This does not mean that smaller employers have less responsibility to prevent and respond to sexual harassment in their workplace. Employers are required to prevent and respond to sexual harassment in their workplace **to the best of their ability** within the context of the factors listed above.

²³ Victorian Equal Opportunity and Human Rights Commission, above n 3, 38–39.

Examples of the positive duty in practice

A small, not-for-profit community organisation drafts an action plan for meeting its positive duty obligations under the *Equal Opportunity Act 2010* (Vic). A key part of the action plan is an induction program for new starters. The induction program includes an interactive learning module which helps new employees understand what sexual harassment is and how to report sexual harassment if they experience it or witness it.

A large corporation conducts a comprehensive review of its policies to see how it is meeting its positive duty. As part of the policy review, all staff complete a survey about their understanding of sexual harassment and about any challenges in meeting their obligations.

The corporation decides to develop a positive duty action plan. The action plan aims to outline clear goals, objectives, outputs, activities, expected outcomes and accountabilities. It clearly states the organisation's commitment to meeting the positive duty to eliminate discrimination, sexual harassment and victimisation.

Up-to-date training on the practical use of the plan is scheduled, and an internal diversity working group, with high-level support, is set up to monitor the progress and to report on its implementation to the business and shareholders.

Staff are reminded about the business's policy at induction, and then on an annual basis, and undertake face-to-face training every two years.

2.4 How can I meet the positive duty?

An Australian Research Council Project found that in order to prevent sexual harassment there needed to be a comprehensive, whole of organisation approach.²⁴

This approach involves:

- developing and monitoring good policies on sexual harassment. A good policy is one that is visible, raises awareness of rights, is presented to new employees at induction, is regularly refreshed and has clear grievance processes
- dissemination and communication of the policy. You may consider whether you will provide updates to staff on the implementation of the policy
- ensuring that your organisation has a clear, accessible complaints process in place and that the process is adhered to when complaints are made

²⁴ Victorian Equal Opportunity and Human Rights Commission, above n 3, 39.

- effectively training staff (including management) on sexual harassment, with a secondary focus on bystander education
- promoting standards of behaviour through discussion, leadership and modelling of behaviour
- having key contact officers
- promoting bystander responses
- having a responsive, assertive grievance handling process.

Bystander strategies

Evidence suggests that bystanders can play an important role in preventing sexual harassment in the workplace. Including strategies to encourage bystander action and reporting into your organisation's plan to prevent and respond to sexual harassment and discrimination can be invaluable in achieving workplace change.

Bystander education in the workplace can 'teach people to interrupt incidents of sexual harassment or the situations which lead to harassment, to challenge harassers and potential harassers, to provide support to potential and actual victims and to speak out against the social norms and the inequalities supportive of sexual harassment'.²⁵

Some strategies worth considering include:

- implementing training, including for all new staff, that increases recognition of sexual harassment and sex discrimination, challenges myths around sexual harassment, and offers practical assistance and demonstration of a range of strategies bystanders (either individually or collectively) can use to respond when they think anything is happening
- allowing employees to assist in the design of complaints procedures
- actively encourage reporting in the workplace (for example giving managers credit for taking action to encourage reporting and managers modelling appropriate behaviour)²⁶
- having readily available information on how to intervene when you suspect or witness sexual harassment in your workplace, including on your intranet if you have one.

²⁵ Australian Human Rights Commission, above n 12, 35.

²⁶ Ibid 40.

The Commission can help you to design tailored resources and training and prepare an action plan to address your organisation's positive duty in an effective way.

2.4.1 Scan

Understand the law

- Familiarise yourself with your obligations under the Equal Opportunity Act.
- Familiarise yourself with this guideline.

Gather relevant information

- Read about sexual harassment and about occupational health and safety and workers compensation. For example, the Australian Human Rights Commission regularly reports on the prevalence of sexual harassment in the workplace. More information can also be found on the Victorian Commission's website at humanrightscormission.vic.gov.au.
- Use workplace surveys or data to understand any issues around sexual harassment in your workplace, including whether people understand what it is, whether people know what to do if they experience or witness it, and whether there are any potential barriers to reporting both for direct victims, and for those who have witnessed it.
- Compile information from exit interviews.

Look at your workplace to understand its culture and detect potential problems

- What is the make-up of your workplace? Is your workplace gender equitable? Are you more likely to find women in certain jobs or at certain levels in your organisation? Do you have an uneven turnover of female staff compared to male staff? If so, why?
- Is it common to hear banter and comments of an inappropriate nature when staff gather together? Does anyone speak up about it? If not, why might this be?
- Are women and young people encouraged and confident to actively participate in meetings and forums? If not, why? Is there a power imbalance between men and women, or young people?
- Are there offensive materials or posters in the workplace?
- Are there areas in your workplace that may be isolated, or intimidating to enter?
- Look out for signs and symptoms of problems. Is an employee performing differently, suddenly taking more sick leave, isolating themselves, or not attending work functions? Is there an awkwardness or lack of communication between employees?

- Consider the experiences of people who have recently started in your workplace – are they appropriately supported?

Reflect on your organisation's systems of work

- Look at your organisation's formal policies, programs, practices and procedures.
- Consider the 'unwritten' ways in which your workplace operates.

Use staff to identify issues in your workplace

GO-LO conducted forums, surveys and interviews with staff, and identified that not all employees were aware of the sexual harassment-free workplace policy.²⁷

By holding exit interviews and focus groups, Country Road learnt that it needed to improve employee understanding of how to make a sexual harassment complaint.²⁸

A Melbourne-based company undertook an anonymous survey to find out if their employees had ever witnessed sexual harassment, and if so, what they did in response. The aim of the survey was to find out if there were barriers to people intervening or reporting sexual harassment. They found that people in their workplace did not feel that managers encouraged reporting and that they felt they may be victimised by co-workers if they reported, or be 'picked on' if they spoke up. People also expressed the belief that there was 'no point' because the harasser would probably 'get away with it' and that 'nothing would really be done'.

2.4.2 Plan

Determine your plan of action

- Review and analyse data and information you have collected in your scan, such as information from workplace surveys and exit interviews – use this to help you to identify issues and set priorities.
- Outline the objectives you want to achieve to prevent sexual harassment.
- Identify policies and procedures that you need to update or develop.

²⁷ Reported in Australian Government Workplace Gender Equality Agency, http://www.wgea.gov.au/Reporting_And_Compliance/Steps_to_Reporting/Step_4/Employment_Matter_Guidelines/Sex_Based_Harrassment.asp.

²⁸ Ibid.

- Develop a training plan and strategy – for practical advice on what to include in the training sessions contact the Commission or other organisations such as the Victorian WorkCover Authority, industry bodies or trade unions who may be able to help.
- Seek and ensure high-level managerial support and leadership.
- Make a sufficient budget allocation to implement policies and training about sexual harassment.

Develop a policy on sexual harassment

- Consider the impact gender has on women's experiences of sexual harassment, and the power imbalance between men and women, especially in male-dominated workplaces. Also consider the experiences of junior or new employees with less influence in the organisation. Think about this when drafting policies, designing training programs and complaints processes so your organisation can properly address the causes and consequences of sexual harassment.
- Remember that use of technology creates an added dimension in sexual harassment and can contribute to a hostile working environment. Include in your policy how you will regulate use of emails, text messages, the internet and social networking sites and what your expectation is about outside use of these platforms.
- Consult with employees and relevant contacts such as the relevant trade union, your industry body, Victorian WorkCover Authority or the Commission when developing your organisation's policy.
- Consider bystander strategies – evidence shows that these can be the most effective in encouraging reporting in workplaces, and in preventing sexual harassment from occurring in the first place. See page 26 for more information.

What should go in the anti-harassment policy?

- A clear opening statement that sexual harassment is against the law, and that your organisation will not tolerate any inappropriate behaviour.
- Your organisation's objectives regarding sexual harassment.
- A clear definition of sexual harassment under the Equal Opportunity Act.
- Case studies illustrating examples of sexual harassment in the workplace, work conferences, field trips, work functions, and out-of-hours.
- A clear message about employee's use of technology, including social media in relation to work, including interactions with other employees.
- Individual responsibilities and rights – the duty to treat others with respect and the right to be free from harassment.
- Managers' responsibility to proactively prevent and stop sexual harassment.
- Information about effective bystander strategies – so that employees know what sexual harassment is, how to recognise it, as well as how and when to report it and so support their colleagues.
- A clear statement that the anonymity of bystanders who disclose sexual harassment will be protected as far as possible, along with an explanation of how confidentiality will be managed for alleged harassers and people subject to harassment.
- The consequences for employees if they breach the policy.
- Information about your organisation's informal and formal complaints processes, and where individuals can get help and advice, or make a complaint.
- Information about the options available for dealing with sexual harassment.

For a useful sexual harassment policy template, visit The Workplace tab on the Commission's website at humanrightscommission.vic.gov.au.

Set up a complaints process

- Decide whether you will set up a specific complaints process for sexual harassment, or use an existing complaints process. Keep in mind the sensitivity of sexual harassment complaints, and consider whether an existing process can deal effectively with them, this includes the need for multiple channels for complaints wherever possible.
- The Equal Opportunity Act does not define what a complaints process should involve, so you are free to develop a flexible process that suits your organisation's size, structure and resources. See section 3.3 on page 25 of this guideline for advice on effective complaints processes.
- Consider the gender aspect of sexual harassment when you design a complaints process and that harassers are often in a superior relationship to the complainant.²⁹ It helps to be aware that people are reluctant to bring a complaint for reasons such as embarrassment or shame and fear of victimisation or potential damage to career and reputation.³⁰ Bearing this in mind, you need to make sure that appropriate support and confidentiality for the complainant are essential features of your complaints process.
- Base your organisation's complaints process on the principles of procedural fairness. Plan how your organisation will deal with complaints in a way that is fair, transparent, timely and confidential, as far as possible.
- Include a clearly outlined appeals process.
- Appoint appropriate staff to deal with complaints.
- Ensure employees have other avenues to make sexual harassment complaints other than through their direct supervisor:
 - larger organisations may use trained contact officers or health and safety officers
 - smaller organisations may train a senior officer to deal with complaints and provide an external contact point like the Victorian Equal Opportunity and Human Rights Commission.
- Include the complaints process in your organisation's sexual harassment policy.

2.4.3 Act – implement the action plan

Distribute and communicate your organisation's sexual harassment policy and complaints process

- Distribute the policy to everyone at your workplace, including senior management. You might also ask staff to sign a copy acknowledging that they have read and understand the policy.
- Provide new employees with a copy of the policy as part of their induction. Take the time to explain the policy and to identify clearly how to make a complaint.
- When people are promoted in your organisation, ensure that they are aware of the organisation's policy on sexual harassment, and that any changing responsibilities they take on in relation to acting to prevent or intervene in sexual harassment, are clearly explained.
- Communicate the policy at staff meetings – managers may wish to include sexual harassment and discrimination as a regular item on the agenda, this should happen at least once a year.
- Display your organisation's policy and other anti-sexual harassment materials in common rooms and noticeboards, and on the intranet if you have one.
- Make the policy accessible to everyone: that is, ensure it is accessible to employees from different cultural and language backgrounds, employees with disability, or those who work off-site or in remote locations.

Employ a range of strategies to advertise the policy message

An employee complained of sexually offensive language. The employer responded by putting up a notice warning that sexual harassment was unacceptable, but did nothing more. The employee was sexually assaulted. The court decided that the employer had not taken reasonable practicable steps to prevent the incident. Putting up a policy notice was not enough. "People need to be told in the plainest terms if the employer is to get the message across."³¹

²⁹ Victorian Equal Opportunity and Human Rights Commission, above n 3, 32.

³⁰ Ibid 35.

³¹ Equality and Human Rights Commission (UK), *Sexual Harassment Guidance for Managers and Supervisors* (2006) 6.

Provide training

- Take positive steps to train all employees, including all executives, managers and senior staff, investigators and contact officers.
- Check that the training forms part of performance appraisal schemes, or is part of your organisation's core training, including workplace induction.
- Provide regular refresher training around sexual harassment – face-to-face training at least once every two years is recommended.
- Shape the content of your training and deliver it in a way that is engaging and easy to understand.
- Consider behavioural-based training – by witnessing behaviours through demonstrations or role-playing or reading case studies, people can more easily understand and retain information and ideas.
- Consider online training for staff in remote locations, or for refresher training – keep in mind, however, that face-to-face training on these issues is more effective.

Get the message across with training

World Vision Australia provided intensive training to its staff and contact officers as part of its overall strategy to prevent harassment and discrimination issues in its workplace – individual staff and the organisation as a whole reported improvements.³²

Make the workplace safe and free from harassment

- Set expectations of your managers for modelling appropriate behaviour, and give them credit for taking action to encourage reporting.
- Have senior staff discuss the issue with managers, staff and volunteers – make it clear that violence against women, including sexual harassment is not acceptable. Illustrating the link between the two can be a powerful tool for discouraging the use of sexist or denigrating language or behaviour in your workplace.
- Think about ways to hold meetings and functions in a way that is inclusive of all employees, and encourages engagement and positive interaction from all staff. Remember that functions where alcohol is consumed may lead to increased risk of sexual harassment occurring and timely reminders for employees to re-familiarise themselves with the policy before events occur may be useful.

- Remove offensive materials and posters. You may even consider doing an organisational scan of your IT systems, including emails and storage, for inappropriate materials, such as pornography.
- Distribute posters and pamphlets that explain rights and obligations.

2.4.4 Review

Check your results

- Identify potential hot spots or opportunities to further stamp out sexual harassment by using data collected from exit interviews or complaints.
- Seek periodic feedback and information from employees by conducting workplace surveys.

Check the effectiveness of the plan

- Monitor what happens with the plan and revisit your approach if necessary – this should be part of the normal business planning cycle. This should include reviewing the complaints process, including strategies for supporting those who are harassed and bystanders who disclose harassment
- Check manager and staff compliance with the policies.
- Make any necessary changes to your organisation's policies and procedures that will prevent sexual harassment.

Employers need to take reasonable and proportionate measures to eliminate sexual harassment to meet the positive duty under the Equal Opportunity Act. What is reasonable and proportionate will depend on the circumstances in your organisation (see section 2.3 on page 18).

³² Australian Government Workplace Gender Equality Agency, above n 27.

Part 3: Responding to sexual harassment – complaints processes

As discussed earlier in this guide, taking proactive steps, such as implementing a robust complaints process, will help employers ensure they can meet their positive duty, potentially prevent sexual harassment from occurring in their workplace, and ensure that they have taken adequate steps to address any sexual harassment that may occur.

Remember that if someone is experiencing sexual harassment or has witnessed sexual harassment, they are doing your business a service by coming forward and ensuring that you can put a stop to any further harassment or discrimination.

3.1 How big a problem is sexual harassment?

The Australian Human Rights Commission's 2012 Prevalence Study on sexual harassment revealed that over one in five (21 per cent) people aged 15 years and older has experienced sexual harassment in the workplace in the past five years.³³

The study also showed that one in four women (25 per cent) have experienced sexual harassment in the workplace in the same period.³⁴

Twenty per cent of respondents who were sexually harassed had made a formal report or complaint, and one-third of respondents sought support or advice.³⁵

Despite an upward growth in reporting, there are many reasons why people may not speak up about sexual harassment within their workplace.³⁶ These vary depending on individual circumstances and the broader organisational culture. These may

include fear of retribution, fear of publicity, lack of awareness, drawing adverse attention to themselves, which may result in harassers not being reported and problems continuing or escalating, and ineffective responses and remedies, which may increase the likelihood that complaints will be pursued externally.

Reporting sexual harassment can be a daunting and confronting experience for complainants. Complainants may be concerned that they may not be believed or they may have feelings of embarrassment, guilt, shame, trauma and stigma. In many cases, workplace targets of sexual harassment often respond passively to the conduct by avoiding the harasser, trivialising the behaviour or denying it altogether within the workplace.³⁷

Victims often have to take a 'leap of faith' to come forward. People who do make a complaint are often subject to unfair treatment and victimisation.

Victimising someone, or subjecting them to unfair treatment for making a complaint, is against the law.

An Australian Human Rights Commission survey found that a majority of bystanders (51 per cent) took action to prevent or reduce the harm of sexual harassment where they witnessed it. This included talking to, listening to and offering advice to targets, as well as reporting the harassment to their employer or confronting the harasser directly. Where bystanders do not report, it is often because they do not know what sexual harassment is, or it may be for similar reasons direct victims do not report, including fear of victimisation.

³³ Australian Human Rights Commission, above n 1, 4.

³⁴ Ibid.

³⁵ Ibid 5.

³⁶ Australian Human Rights Commission, above n 12, 4.

³⁷ Ibid.

3.2 What are the benefits of a robust complaints process?

An effective complaints process helps you to deal with complaints quickly, fairly, impartially and transparently. This is good practice.

Evidence suggests that implementing effective complaints processes offers organisations significant protection because they enable targets and bystanders to report misconduct internally rather than outside the organisation.³⁸ There are significant risks to organisations that ignore, or minimise the need to deal effectively with complaints of sexual harassment. Research shows that poor handling of complaints is a major reason for internal complaints escalating to legal proceedings.³⁹

Never dismiss complaints before they are thoroughly investigated.

If your organisation has its own complaints process, employees should know how to raise their concerns, and can be confident that the matter will be resolved as soon as possible. There are obvious benefits for everyone in having a comprehensive and effective internal complaints mechanism.

In formulating your organisation's complaints process, it is important to note that a complaint of sexual harassment under the *Equal Opportunity Act 2010* (Vic) may be brought in a number of ways. A victim of harassment may make a complaint internally informally or formally to a workplace contact (for example Human Resources), they may go directly to the Victorian Equal Opportunity and Human Rights Commission, or directly to the Victorian Civil and Administrative Tribunal.

In each instance, the person is entitled to seek legal advice about their options.

3.3 What should be in a complaints process?

The Equal Opportunity Act does not prescribe what a complaints process should include, but the following will strengthen your internal complaints process:

- include an outline of the complaints process in your organisation's policy on sexual harassment
- make sure all employees and managers have read the policy, and understand how to raise a complaint in your organisation, whether they are a direct victim or have witnessed sexual harassment occurring

- deal with complaints in a way that is fair, transparent and confidential to the people who need to know. As a guide, try to deal with complaints within five days if possible or try to keep everyone informed if it will take longer. More complex complaints may take longer to resolve and the person making the complaint should be kept informed of timeframes if this is the case
- listen to the complainant in an open and impartial way. The complainant should have the opportunity to talk to someone without it immediately meaning that the alleged harasser will be informed. This is one of the benefits of harassment contact officers
- let employees know that they can have their complaint dealt with externally by the Victorian Equal Opportunity and Human Rights Commission, the Victorian Civil and Administrative Tribunal and in some circumstances by their union, the Victorian WorkCover Authority, Fair Work Australia or the Australian Human Rights Commission. Give them support in approaching these bodies if they wish to do so
- if it appears to be a criminal offence, advise the employee that they can contact Victoria Police and give them support to do so if they wish. You may also want to advise them of any relevant support services (for example, in Victoria, the Centres Against Sexual Assault)
- if workplace action is being considered, including disciplinary action, ensure that the alleged harasser is provided with 'procedural fairness'. This means allowing them to respond to the complaint, letting them know what any potential disciplinary action may include, and following complaints policies in your workplace and any workplace procedures relating to disciplinary matters
- take action that holds the harasser accountable for their behaviour and that minimises the effects of the harassment on the victim (such as requiring the harasser to move offices or roles, rather than the victim)
- be unbiased when speaking with both parties to the complaint. Take notes as appropriate and let them know that your organisation takes sexual harassment seriously
- let both parties know that victimisation is not tolerated in your workplace. You have a responsibility to ensure the alleged harasser and anyone else in your organisation does not victimise anyone who may have reported harassment
- keep both the alleged harasser and the victim informed while the complaint is being resolved

38 Ibid 39.

39 Ibid.

- provide any necessary support including referrals to counsellors or medical practitioners or to your employee assistance program if your organisation has one
- keep information confidential – you should only share information with those who need to know to manage the complaint including the person in your organisation who monitors complaints like this over time. Sometimes information will be required by law, or by an external complaints body, or, if there is a criminal offence, it may need to be released to police. Sometimes you will also be required to act on the information to ensure workplace safety. Let the parties to the complaint know that, unless it is required in these circumstances, you will keep the information confidential
- make sure complaints are clearly documented and recorded.

Bystander reporting

Many of the same principles that apply to encouraging victims to report apply to encouraging bystanders (such as co-workers) to report or advocate on behalf of victims. For example, timely responses and investigations, and an open and supportive environment where bystanders are encouraged to report and feel confident their complaint will be acted on.⁴⁰

Key strategies that have been found to encourage bystanders to act on behalf of victims include:

- ensuring that bystanders are acknowledged in your organisation's complaints process. This should include appropriately supporting bystanders through any complaints process, including acknowledgement of the need to ensure they are not victimised and that they are appropriately supported during and after any action
- ensuring that bystanders do not experience victimisation or retaliation when they report sexual harassment
- keeping their identity anonymous as far as possible, in ways such as requiring the recipient of the informant (for example manager, sexual harassment officer) to keep it confidential – although note that anonymity may limit how you can use the information
- applying appropriate sanctions or penalties when sexual harassment has occurred.⁴¹

This demonstrates to employees that your organisation takes sexual harassment seriously and this can have a profound impact on the likelihood of further reporting (a perceived lack of penalties has been found to be one of the most significant reasons for under-reporting sexual harassment).

3.4 What are the options for dealing with complaints internally?

Sexual harassment complaints can be complex, sensitive and potentially volatile. As such, make sure that staff that deal with complaints have appropriate training and support. Information on courses that deal with sexual harassment, investigating complaints, and training for contact officers is available on the Commission's website at humanrightscommission.vic.gov.au.

You may deal with complaints of sexual harassment internally by informal or formal processes. It is important to remember that employers may be held accountable in other forums if a complaint is brought externally as well, for example, to a court or to the Commission.

It is up to the complainant which avenue they wish to pursue.

3.4.1 Informal process

An informal process focuses on resolving the conflict in consultation with the complainant and does not involve an investigation, a final report or official decision. An informal process is forward-looking – the emphasis is on solving the problem and supporting working relationships, rather than on proving that something inappropriate happened.

Informal ways of dealing with sexual harassment complaints can include:

- the complainant deals with the situation themselves but seeks advice about how to do so from another person, such as their manager or a contact officer
- the complainant asks their manager to speak to the other party for them. The manager privately speaks to the other party about the matter, and reaffirms the organisation's policy on sexual harassment without assessing whether the sexual harassment actually occurred
- the harasser admits to their conduct. An investigation is not needed, and the complaint can be resolved by mediating between the two parties, or by counselling the harasser
- a manager observes unacceptable behaviour and independently intervenes even though no-one has made a complaint.

⁴⁰ Ibid.

⁴¹ Ibid 39–41.

Advantages of informal processes

Informal complaint resolution is:

- the best way to reach non-disciplinary outcomes
- adaptable to a wide variety of complaints
- usually less intimidating for parties to the complaint
- potentially quicker, with a more immediate outcome
- provides an opportunity to inform the alleged harasser of workplace policies, or of how their behaviour is affecting others, if you and the complainant think this may be effective in changing the behaviour
- more likely to encourage open communication and a better working relationship between the parties.

Disadvantages of informal processes

Handling a complaint informally may not effectively resolve the issue if any of the following apply:

- the power dynamics between the parties unfairly influences the outcome
- the alleged sexual harassment is so serious that formal discipline would be appropriate
- it is carried out in a way that makes the alleged harasser feel they have been treated unfairly
- is carried out in a way that puts the complainant at risk of further harassment or victimisation
- complaints are less easily monitored and may not be dealt with in a step-by-step process or show patterns of behaviour
- repeat offenders may not be tracked or identified
- corporate knowledge about the process and outcome may be easily lost
- formal documented records that may be required in future processes may not be kept.

In these cases, attempting to undertake direct mediation between parties by someone who is not trained can potentially be more damaging than helpful.

Informal processes can also become 'hidden' in an organisation, so you need to think about how you will pick up on systemic or workplace culture issues. The material in section 2.4.1 (page 20) on scanning your workplace provides you with some tips.

3.4.2 Formal process

A formal process should be followed for more serious matters.⁴² You should consult with the complainant on the decision about whether to use a formal process.

A formal process involves investigating the complaint, making a finding as to whether the sexual harassment occurred, and deciding on an appropriate outcome. Dealing with a formal complaint usually involves these steps:

- interviewing the complainant and documenting their complaint in detail
- informing the alleged harasser about the complaint
- giving the alleged harasser the opportunity to respond to the complaint
- informing both parties that they may have a union official or other support person with them throughout the course of the investigation
- gathering statements from witnesses or any other relevant information if the complaint is refuted
- keeping parties abreast of any allegations made during the course of the investigation and allowing them to respond
- making a finding as to whether the complaint has substance, e.g. is it more likely than not that sexual harassment has occurred
- compiling a written report that includes all details of the complaint, the investigation, the finding and the recommended outcome
- consider the report and any related workplace rules about behaviour, and disciplinary action, and either implement the recommended outcome or decide on an alternative – this step must be taken by an appropriate senior decision-maker in your organisation.

⁴² The right to a formal process depends on the laws and policies governing the workplace. Regardless of which the person has a right to make a formal external complaint to the Commission or Victorian Civil Administrative Tribunal under the Equal Opportunity Act.

Advantages of formal processes

Your organisation or the individuals involved may benefit from a complaint being handled through a formal process, because:

- complaints can be dealt with in a consistent, step-by-step process that applies to everyone and is understood by all
- outcomes of the investigation are clear, well-documented and more easily monitored and enforced
- a complainant is more likely to feel the complaint is being taken seriously
- the harasser is more likely to understand the seriousness of the allegations and that they have an opportunity to explain their views
- a formal record kept throughout the process can be used if it is needed in the future, such as if similar complaints are made or in use in formal disciplinary proceedings.

Disadvantages of formal processes

Formal processes may not be the best option if:

- the time and resources required and the possibility of a punitive outcome are out of proportion to the seriousness of the complaint
- it is important to the complainant that they keep some control over the process
- the complainant indicates that they want the issue to be addressed but they do not wish to use a formal process
- an informal approach is likely to be quicker or more effective
- the complainant might be severely demoralised or suffer emotional damage if they go through the full process and the complaint is dismissed.

Part 4: Preventing and responding to sexual harassment – checklist

This checklist summarises the advice given in this guideline and can help your organisation to meet the positive duty to prevent sexual harassment and respond effectively to complaints.

Remember, if you need more information or assistance, contact the Commission on 1300 292 153 or visit humanrightscommission.vic.gov.au.

Preventing sexual harassment – positive duty

- Educate yourself and others about sexual harassment and sex discrimination, as well as on obligations under the *Equal Opportunity Act 2010*.
- Plan your organisation's approach for meeting the positive duty to eliminate discrimination, sexual harassment and victimisation in your systems of work – this will also help you address any claims of vicarious liability.
- Look at your workplace to understand its culture and detect potential problems. Take time to observe interactions in your workplace, and use data from staff surveys or exit interviews to identify the needs of your workplace about sexual harassment.
- Make sure there is strong leadership at a senior level for a harassment-free workplace and create a respectful culture toward all employees.
- Draft a written sexual harassment policy, involving employees in the process and developing it in consultation with senior management.
- Include a complaints process in your organisation's sexual harassment policy.
- Make the policy available to all staff – translate it and make it accessible for all employees, including those with disability.
- Distribute it to existing staff and new employees on induction, and ensure people understand their changing responsibilities if they are promoted.
- Communicate it regularly so all staff understand that non-compliance is against the law. Consider reminders at key times, such as before work functions, and at least on an annual basis.
- Give management credit for taking regular action to encourage reporting and for modelling appropriate and inclusive behaviour.
- Provide regular training and refresher training on sexual harassment policies and make it available to all managers and staff. Include training on bystander interventions.
- Put up posters in the workplace that state that sexual harassment is not tolerated and that it is against the law. The Commission can send you materials.
- Review, monitor and update your policy and complaints processes regularly, and use this information to rectify systemic issues that contribute to sexual harassment.

Responding to sexual harassment – complaints processes

- Have a clear policy around any complaints and investigation processes.
- Take all complaints of sexual harassment seriously and communicate this to all parties.
- Tell complainants that they also can take their complaint externally to other bodies.
- Follow the complaints process outlined in your organisation's sexual harassment policy and consult with the complainant whether to make the complaint informal or formal.
- Follow complaints processes that are transparent, fair and timely.
- Take steps to ensure that the complainant or witness is not victimised as a result of reporting.
- In non-criminal cases, provide the alleged harasser with 'procedural fairness' if a complaint is made before disciplinary action is taken. This may mean allowing the alleged harasser to respond to the complaint, providing support and following complaints policies in your workplace.
- Keep records of complaints and decisions.
- Keep information confidential as far as possible. Let the parties know you will do this.
- Provide ongoing training for staff who deal with complaints, including occupational health and safety officers, contact officers and managers.
- Provide support to both complainants and alleged harassers through referrals through employee assistance programs depending on the size of your organisation or through referral to services that can help.
- Apply appropriate sanctions or penalties when sexual harassment has occurred.
- Implement any necessary changes to ensure similar incidents do not happen again.



**Victorian Equal Opportunity
& Human Rights Commission**

Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	information@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au