



Me Too Movement & Sexual Harassment: Preventing and responding to complaints of sexual harassment

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1. #MeToo Movement

- October 2017 – sexual harassment allegations against Hollywood producer Harvey Weinstein made public
- Following this, the #MeToo went global via social media – it was used as a tool for people to reveal the prevalence of sexual harassment
- This caused many employers to review their sexual harassment policies and institute prevention and complaint handling strategies
- Sexual harassment is not just a secular issue – it can happen in Christian workplaces too

- **What we will cover today:**
 - What is sexual harassment?
 - Preventative measures
 - Complaints handling process



2. What is sexual harassment?

- Sexual harassment is prohibited by:
 - the *Anti-Discrimination Act 1991* (Qld) (State legislation);
 - the *Sex Discrimination Act 1984* (Cth) (Commonwealth legislation); and,
 - the *Criminal Code Act 1899* (Qld).
 - Usually only for more serious offences



2. What is sexual harassment?

- S119 *Anti-Discrimination Act 1991* (Qld) (emphasis added):

"Sexual harassment" happens if a person—

- (a) subjects another person to an **unsolicited act of physical intimacy**; or
- (b) makes an **unsolicited demand or request** (whether directly or by implication) for sexual favours from the other person; or
- (c) makes a remark with **sexual connotations** relating to the other person; or
- (d) engages in any other **unwelcome conduct** of a sexual nature in relation to the other person;

and the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so—

- (e) with the **intention of offending, humiliating or intimidating** the other person; **or**
- (f) in circumstances where a **reasonable person** would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.



2. What is sexual harassment?

Reasonable person test

- Considerations for whether a reasonable person could have anticipated the harassed person would be **offended, humiliated or intimidated**:
 - the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour or ethnic origin of the harassed person;
 - the relationship between the person harassed and the person who engaged in the conduct in issue;
 - any disability of the person harassed; or,
 - any other circumstances that might be a relevant consideration.



2. What is sexual harassment?

- The simplest definition: any conduct done towards someone else, which could be construed by a reasonable person as being of a sexual nature, could amount to sexual harassment
- For example: patting, fondling, pinching, touching, embracing or hugging, grabbing, repeated requests for dates, deliberately brushing against a person, suggestive comments about a person's appearance or body, smutty jokes and comments, leering and staring, offensive telephone calls, indecent exposure, asking about someone's sex life, and so on.
- Yes – this could also include hugging or the laying on of hands in the Christian context
- Does not include mutual attraction
- Doesn't have to be intentional, deliberate or repeated to be illegal
- Sexual harassment could also amount to a criminal offence



2. What is sexual harassment?

Sexual harassment in the workplace (*Sex Discrimination Act 1984 (Cth)*):

- It is unlawful to sexually harass:
 - Your own employees or prospective employees
 - Your colleagues or peers within the workplace
 - A current or prospective commission agent or contract worker, either as their boss or as their colleague
 - A partner cannot sexually harass another partner or prospective partner
 - A workplace participant cannot sexually harass another workplace participant at a place that is a workplace of either or both of those persons

Who is liable?



2. What is sexual harassment?

When is an employer responsible for an employee's sexual harassment?

- Perpetrators of workplace sexual harassment can be held personally liable; and,
- Employers can be liable through the principles of *vicarious liability*

- Determining vicarious liability:
 - Was the conduct 'in the course of the employment'?
 - Was the conduct sufficiently connected to the employment?
 - and*
 - Did the employer take all reasonable steps to prevent the sexual harassment?



2. What is sexual harassment?

“In the course of employment”

- *Keenan v Leighton Boral Amey Joint Venture* [2015] FWC 3156
- Conduct at the Christmas party- asking a colleague for her number, intimidating behaviour, rude comments
- Conduct after the Christmas party – crude comments to a female colleague; name calling; and, he kissed a female colleague and told her he ‘would go home and dream about her’
- The perpetrator was subsequently fired

Was this conduct ‘in the course of employment’?

- Conduct *after* the Christmas party – not sufficiently connected to employment, it was instead ‘private activity’
- Conduct *during* the Christmas party – sufficiently connected to employment but not serious enough to warrant dismissal



2. What is sexual harassment?

“In the course of employment” and vicarious liability

- STU v JKL (Qld) Pty Ltd and Ors [2016] QCAT 505
- Guest services agent alleged she was sexually assaulted by the hotel’s night caretaker
 - He entered the bedroom of her unit, which was provided by the employer, and propositioned her
 - The agent and caretaker had separate bedrooms within the one unit

Was the conduct ‘in the course of employment’? Yes

- Considerations:
 - the accommodation was provided by the hotel (employer);
 - The caretaker’s role required him to be available between 10pm and 6am

Vicarious liability?

- The hotel had not taken reasonable steps to educate workers on sexual harassment or provide training
- The hotel was vicariously liable
- Damages = \$313,316.00



2. What is sexual harassment?

“In the course of employment” and vicarious liability

- *Kordas v Ruba & Jo Pty Ltd t/a Aztec Hair & Beauty* [2017] NSWCATAD 156
- The complainant was an apprentice hairdresser at the Aztec Hair and Beauty salon
- Sexual harassment included: being called gay in front of customers, having his trainer slap him on the bottom and call him “bitch”
- The Tribunal found: there had been sexual harassment and the employer was vicariously liable because:
 - The employer failed to take preventative action; and,
 - They failed to respond appropriately to the complaint.
- Damages = \$30,000



3. Preventing and responding to allegations of sexual harassment

Our recommendations:

- A. Adopt clear workplace policies for sexual harassment;
- B. New staff are given training on appropriate behaviour in the workplace;
- C. Regular repeat training;
- D. Tailored training for owners, managers and supervisors;
- E. Complaints management policies – quick, private and serious;
- F. Posters and brochures are displayed in the workplace (available from Anti-Discrimination Commission);
- G. Staff encouraged to report concerns; and
- H. Annual review of workplace policies.



A. Workplace policies

- Policies provide the foundation for workplace standards
- Your sexual harassment policy should be easily accessible
- Templates available on the *Australian Human Rights Commission* website



A. Workplace policies

Staff rights and responsibilities:

- Employees are entitled to certain rights in the workplace, for example:
 - Entitlement to a workplace free from discrimination, bullying and sexual harassment; and
 - The right to make a complaint without retaliation.

- Employees have certain responsibilities in the workplace, for example:
 - Obligation to follow standards of behaviour; and,
 - To maintain confidentiality.



A. Workplace policies

- There are additional responsibilities for managers and supervisors including (but not limited to):
 - Educating staff on their rights and obligations;
 - To act fairly in resolving issues;
 - Modelling and enforcing standards for appropriate workplace conduct;
 - Intervention and response to sexual harassment in the workplace;
 - To assist in the resolution of complaints informally or formally;
 - To refer formal complaints to the appropriate complaint handling officer; and,
 - To ensure that staff who raise complaints don't suffer backlash or victimisation.



A. Workplace policies

Define unacceptable conduct (sexual harassment) and include specific examples to be used as a guide:

- comments about a person's private life or the way they look
- sexually suggestive behaviour, such as leering or staring
- brushing up against someone, touching, fondling or hugging
- sexually suggestive comments or jokes
- displaying offensive screen savers, photos, calendars or objects
- repeated unwanted requests to go out
- requests for sex
- sexually explicit posts on social networking sites
- insults or taunts of a sexual nature
- intrusive questions or statements about a person's private life
- sending sexually explicit emails or text messages
- inappropriate advances on social networking sites
- accessing sexually explicit internet sites
- other offences which may also be considered a criminal offence: physical assault, indecent exposure, sexual assault, stalking or obscene communications.



A. Workplace policies

Unacceptable conduct includes conduct which...

- Occurs in the workplace or at work related events
- Occurs between people sharing the same workplace
- Is between colleagues outside of work (in some circumstances)

Also...

- What might not offend one person, could be very offensive to another
- A single incident could amount to sexual harassment
- Sexual harassment does not include mutual relations



A. Workplace policies

- Policy should address the resolution process
 - Employers and managers should respond to all complaints quickly
 - Encourage employees to undertake the internal complaints process as a first step
- Consider an Employee assistance program (“EAP”)
 - Provides free and confidential counselling to staff
 - Detail how to access the EAP in your policy
- If you haven’t already, view the policy template provided by the Australian Human Rights Commission.



B. Staff training

Training is critical because:

- It plays a key role in fostering a zero tolerance culture
- It helps in understanding of what is and isn't sexual harassment

Training should:

- Cover all relevant legislation and potential issues
- Be tailored to suit your particular workplace
- Cover how to make a complaint and what will happen when a complaint is made
- Encourage victims and bystanders to report sexual harassment
- Discuss the impact of sexual harassment on victims
- Encourage all employees to be part of creating a harassment free workplace

You may wish to consider engaging a third party to conduct the training



C. Regular training

- Training should be regular because:
 - Laws change
 - Staff turnover
- Training should occur every 1 to 2 years
- Whether there has been regular training will be considered by a court in determining vicarious liability



D. Tailored training for owners, managers and supervisors

- Owners, managers and supervisors have additional responsibilities
 - The standard of conduct is higher for such employees
- Additional training should be provided for them which addresses added responsibilities
- Emphasise the importance of their role in creating a harassment free workplace



E. Complaints management procedures

- A good complaint procedure will:
 - Alert an organisation to patterns of unacceptable conduct;
 - Highlight the need for prevention strategies in particular areas
 - Ensure complaints are dealt with consistently and efficiently
 - Conveys the seriousness of sexual harassment
 - Seek to prevent the escalation of issues
 - Help to minimise harm suffered by the victim
 - Help to minimise risk to the employer for vicarious liability
 - Reduce the risk of matters being taken to external agencies (such as a court or commission)



E. Complaints management procedures

Internal Complaints:

- Employer's have the flexibility to design a system that suits their size, structure and resources
- The process should be clearly documented and discussed in training
- When appointing an employee(s) who will deal with complaints:
 - Ensure they have a level of expertise and/or appropriate training; and,
 - Are aware that complaints are often complicated, sensitive and volatile



E. Complaints management procedures

Informal and formal complaint options:

- Informal Resolution:
 - Focus on resolution (as opposed to fact finding)
 - Carried out by discussion or mediation (rather than by formal investigation)
 - Use discretion in determining if an informal process is suited to a particular complaint
- Formal Resolution:
 - Formal complaints should be made in writing
 - Appoint multiple people (depending on the size of the organisation), who a formal complaint can be made to
 - This avoids the situation where the only complaints handler is the alleged perpetrator
 - Gives employees alternative options they may be more comfortable with
 - The employer should take steps to ensure there is no retaliation against the complainant



E. Complaints management procedures

Informal and formal complaint options:

- Formal Resolution (continued):
- Carry out a thorough investigation to determine the merit of the allegations
- The accused person should be notified a complaint has been made and that it is being investigated
- The accused person should be given an opportunity to respond to the allegation
- When interviewing witnesses, ask open-ended questions

- **When a finding has been made:**
- Determine appropriate disciplinary action (if it is required)
- Notify relevant parties of the outcome

E. Complaints management procedures

Informal and formal complaint options:

- Formal Resolution (continued):
 - Disciplinary measures:
 - Apology
 - Demotion
 - Transfer
 - Suspension
 - Probation
 - Termination

- Use every complaint situation as an opportunity to review policy and procedure – does your organisation need to make changes to their process or carry out additional training?



E. Complaints management procedures

When can an employer dismiss an employee because of sexual harassment?

- *Applicant v Respondent* [2016] FWC 7077:
- the Applicant employee was a Cabin Crew Supervisor
 - The Applicant had multiple sexual encounters with other cabin crew
 - Had sexually explicit photos of crew members which they shared with colleagues
 - Made inappropriate sexual comments
- The employee was dismissed

- Fair Work Commission finding: the conduct was 'serious misconduct' warranting dismissal



E. Complaints management procedures

When can an employer dismiss an employee because of sexual harassment?

- *Ellison v State of Queensland (Department of Health – Queensland Ambulance Service)* [2015] QIRC 191
- the Applicant was a senior paramedic
 - Junior female officer alleged the Applicant had sent her inappropriate text messages, made inappropriate comments and had inappropriately touched her
 - The complainant had asked that the Applicant stop the behaviour
- Commission finding: the conduct was 'serious misconduct' warranting dismissal



E. Complaints management procedures

When can an employer dismiss an employee because of sexual harassment?

- *Torres v Commissioner of Police* [2017] NSWIRComm 1001

- the Applicant was a senior special constable
 - The Applicant would regularly boast about sexual conquests
 - Perform lewd acts with bananas
 - Make lewd comments to colleagues
 - Make reference to his genital piercings

- Commission finding: the Applicant's misconduct as so serious that, despite the significant mitigating factors (such as the loss of the Applicant's career), dismissal was reasonable in the circumstances.



E. Complaints management procedures

When can an employer dismiss an employee because of sexual harassment?

- *Keenan v Leighton Boral Amey Joint Venture* [2015] FWC 3156
- Misconduct during and after a Christmas party
- Commission finding: because the main offending conduct was deemed ‘private activity’, the employer should have considered alternatives to dismissal before making a decision to terminate
- *Mr Vincent Wilson v Anglo Coal (Moranbah North Management) Pty Ltd T/A Anglo American* [2017] FWC 4386
- Allegations that a technician had ‘patted, slapped or touched’ a trainee in the confined space of a “man basket”
- Allegations of sexually explicit conversations with the same trainee
- The employer conducted an investigation but there was no corroborating evidence
- The employee was dismissed anyway
- Commission finding: with no clear proof that the sexual harassment occurred, there was no valid reason for dismissal and re-instatement was ordered



E. Complaints management procedures

When can an employer dismiss an employee because of sexual harassment?

- Cases suggest that where allegations have been proven through investigation, dismissal may be appropriate
- **Employers beware:** you still have obligations to ensure dismissals are fair and in accordance with the Fair Work Act and other agreements or contracts governing the employment relationship
- Unfair dismissal claims arise where the dismissal was 'harsh, unjust or unreasonable'



F. Posters and brochures displayed in the workplace

Sexual harassment information posters and brochures displayed in the workplace:

- Can be used as a positive preventative measure
- Reinforces a harassment free workplace
- Will hopefully minimise the risk of sexual harassment via the raising of awareness
- Posters are available through humanrights.gov.au
- **Remember to also:** ensure any existing posters and decorations are not offensive or sexually explicit



G. Encourage staff to report concerns

- This should be a part of policy and training but also reinforced in the workplace
- Foster an environment where reporting is encouraged by embedding strong values of 'zero-tolerance' for harassment and misconduct

H. Annual review of workplace policies and procedures

- This ensures relevance and currency
- Consider this: an outdated policy might not contemplate sexual harassment via social media or text
- Policy should be continually reviewed and updated to reflect any legislative changes



What if a complaint ends up in court?

- There is no way to completely ensure that a complaint of sexual harassment arising in your workplace will never end up in court
- Complaints can be made to the Anti-Discrimination Commission Queensland or the Australian Human Rights Commission
- Time limitation to make a complaint: generally 12 months from the date the conduct occurred

- **Some case examples:**
- *Green v the State of Queensland* [2017] QCAT 008
- The complainant was a school cleaner
 - His colleague pranked him into thinking two staff members had used a school room for a sexual encounter
- A formal complaint was made to the employer and the complainant remained off work for 2 years as a result of the incident
- Compensation awarded: \$156,051.00



What if a complaint ends up in court?

- **Some case examples:**
- *Collins v Smith* [2015] VCAT 1992 and *Collins v Smith* [2015] VCAT 1029
- Complainant worked in a small post office
- She made allegations of continual sexual harassment by her manager (approximately 47 incidents) including:
 - The manager attempting to kiss her
 - Unwanted verbal and physical advances
 - Unwanted physical groping
 - Crude text messages
- Ms Collins was awarded \$332,280 in damages
- Vice President Judge Jenkins quoted the principle from *Burke v Greater Geelong*, saying: *“If an employer does engage in the sexual harassment of an employee, it is not appropriate to criticise the employee on the basis that she should have handled the sexual harassment better or should have stormed out of the room or escaped from the harasser earlier. It is enough if the respondent’s conduct constitutes sexual harassment under the Act.”*

What if a complaint ends up in court?

- **Some case examples:**
- *Bell v State of Queensland (No 1)* [2014] QCAT 297
- the complainant was asked by her female boss at a Christmas party to join a threesome because the boss “wanted to experiment with people she knew”.
- Damages awarded: \$9,000
- Interestingly, the Commissioner held that earlier comments made about not wearing underwear, and the manager showing her employee her breasts during a conversation about cosmetic surgery, were not sexual harassment as they did not have sexual connotations

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