INTERNATIONAL LAWYERS NETWORK

SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

This guide offers an overview of legal aspects of sexual harassment in the workplace in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this paper in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Sexual Harassment in the Workplace: What Australian Companies Need to Know

What constitutes sexual harassment?

Sexual harassment is conduct of a sexual nature, a sexual advance or a request for sexual favours that is unwelcome, where a reasonable person having regard to all the circumstances would have anticipated the person harassed would be offended, humiliated or intimidated.

What body of law governs sexual harassment in your jurisdiction?

Sexual harassment is governed by both Federal and State/Territory laws.

At a Federal level:

- The *Sex Discrimination Act 1984* is the primary source of sexual harassment law in Australia. It defines sexual harassment and makes it unlawful in the context of employment, membership and professional organisations, clubs, education, provision of goods, services and accommodation, and Commonwealth laws or programs. The Australian Human Rights Commission deals with claims made under this Act.
- The *Fair Work Act 2009* prohibits workplace bullying, defined as repeated unreasonable behaviour towards a worker which creates a risk to health and safety. Repeated sexual harassment can constitute bullying. The Fair Work Commission deals with bullying claims (plus bullying-related victimisation or constructive dismissal claims).

At a State/Territory level:

- State and Territory Equal Opportunity laws also govern sexual harassment. For example, the Victorian *Equal Opportunity Act 2010* makes sexual harassment unlawful, and complaints under the Act are dealt with by the Victorian Equal Opportunity and Human Rights Commission. Each State/Territory has largely similar schemes.
- State and Territory work health and safety laws can apply where sexual harassment results in a physical or psychological injury. Victims can seek compensation for their injury where certain injury thresholds are met, and negligence can be established.

What actions constitute sexual harassment?

The types of conduct which constitute sexual harassment in each Australian jurisdiction are largely the same. Unwelcome conduct of a sexual nature which would reasonably be anticipated to offend, humiliate or intimidate can include isolated or repeated incidents of:

- staring or leering;
- unnecessary familiarity, such as deliberately brushing up against you or unwelcome touching;
- suggestive comments, jokes or innuendo;
- insults or taunts of a sexual nature;
- intrusive questions or statements about your private life (including at job interviews);

- displaying posters, magazines or screen savers of a sexual nature;
- sending sexually explicit emails or text messages;
- inappropriate advances on social networking sites;
- accessing sexually explicit internet sites;
- requests for sex or repeated unwanted requests to go out on dates;
- attempts at sexual intercourse or some other overt sexual connection;
- kissing;
- statements of a sexual nature, either verbal or written and either made to a person or in their presence;
- behaviour that may also be considered to be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

Mutual attraction, flirtation, friendship or relationships which are welcome do not constitute sexual harassment.

Can sexual harassment occur between two members of the same sex?

Yes. There is no requirement that the harasser and the person harassed be of different sexes or genders.

Are employers required to provide sexual harassment training for their employees?

There is no legal requirement to provide sexual harassment training, nor for an employer's sexual harassment policy to be legally binding. However, not doing so may render an employer vicariously liable for sexual harassment committed by its employees or agents.

What are the liabilities and damages for sexual harassment and where do they fall?

A perpetrator may be civilly liable; and may also be criminally liable if their conduct constitutes a criminal offence such as stalking or sexual assault. An employer may validly dismiss a perpetrator due to their sexual harassment, but procedural fairness must be afforded to avoid unfair dismissal claims against the employer.

Employers, prospective employers and contracting agencies can be held liable for:

- Sexual harassment by employees or agents; including where harassment occurs outside of the workplace but "in connection with a person's employment" - for example, at employer-sponsored events, work-related social functions or business trips.
- Failing to provide a safe working environment under the various State/Territory work health and safety Acts. Cases under this regime usually involve a serious psychological injury caused by the harassment, and there is a continuing trend of awarding high damages for pain, suffering and loss of enjoyment of life.
- Not properly investigating a sexual harassment complaint, including by victimising or taking adverse action against the complainant, failing to abide by their policies, or not affording the parties procedural fairness.

What does an employee who believes they've been sexually harassed have to prove for a successful claim?

The onus is on the person harassed to prove that the conduct occurred; was of a sexual nature; was unwelcome; and was such that a reasonable person, having regard to all the circumstances, would have anticipated the possibility the conduct would offend, humiliate and/or intimidate.

Is it different if a supervisor or a co-worker is the perpetrator of the sexual harassment?

The same laws apply regardless of who the perpetrator is. However, an employer is able to be held vicariously liable for harassment committed by supervisors or co-workers.

What are the potential defences employers have against sexual harassment claims?

An employer will escape vicarious liability under the *Sex Discrimination Act* where it took "**all reasonable steps**" to prevent sexual harassment. Merely having a sexual harassment policy is insufficient: an employer should implement the policy, train its employees on how to identify and deal with sexual harassment, and take appropriate action to handle instances of sexual harassment to demonstrate all reasonable steps were taken. Whether steps were "reasonable" will depend on the nature of the employer - for example, small businesses may not be held to the same standard as large companies.

An employer may also be able to argue in claims brought under the *Fair Work Act* that the harassment was **not in connection with employment**, and therefore the employer is not vicariously liable. Harassment occurring outside of work must have a sufficient connection with employment for an employer to be liable. For instance, conduct occurring while a manager is at an employee's house for a social occasion is unlikely to be in connection with employment; but the same conduct during a work-sponsored business trip would likely be connected with employment.

Who qualifies as a supervisor?

Regardless of the role title of the person who harasses an employee in the workplace or in connection with work, that person will be held liable. There is a broad concept of the harasser in Australian legislation, and the law does not treat supervisors any differently. However, the various Commissions may look less favourably on a sexual harassment claim against a senior or supervisory employee, for example by awarding higher damages.

Furthermore, the *Sex Discrimination Act* requires the relationship between the two persons to be taken into account when determining if conduct was harassment. This may include considering their power dynamic, hierarchy or working relationship.

How can employers protect themselves from sexual harassment claims?

The most important protection is to take "all reasonable steps" to prevent sexual harassment in the workplace. The best way of so doing is to put in place a comprehensive sexual harassment policy, train employees in that policy, state that the employer will not tolerate sexual harassment, and discipline or terminate those who breach the policy.

Does sexual harassment cover harassment because of pregnancy?

Pregnancy-based complaints more commonly fall under anti-discrimination law. However, it is possible for sexual harassment to occur in the context of pregnancy. Such claims would proceed the same way as any other sexual harassment claim.

Does sexual harassment protect gay, lesbian, bi-sexual, and transgender persons?

Yes. The law does not distinguish as to who is protected based on sexual orientation or gender identity.

What is prohibited retaliation?

The *Sex Discrimination Act* prohibits "**victimisation**": where a person subjects, or threatens to subject, the person harassed to any detriment because they have lodged or propose to lodge a complaint with the Australian Human Rights Commission. A defence is available if the allegation is proved to be false and not made in good faith. State/Territory equal opportunity laws contain similar provisions.

Further, the *Fair Work Act* prohibits "**adverse action**" against an employee because they have made a complaint or claim about sexual harassment to the Fair Work Commission. Adverse action includes dismissing the employee, discriminating against them, or otherwise altering the employee's position to their detriment. If an employer does take or threaten to take adverse action, a person can bring a claim under the "general protections" provisions of the Fair Work Commission, and potentially be reinstated or compensated.

Can a consensual relationship between a supervisor and subordinate be considered sexual harassment?

Conduct is only sexual harassment where it is unwelcome. Consensual, welcome relationships - even between a supervisor and their subordinate - are unlikely of themselves to constitute sexual harassment.

Can an employer be liable for the actions of a third party (e.g. the public, clients, vendors)?

Yes. Employers can be vicariously liable for the actions of agents. Agents include people who work on the same premises but have a different employer, contractors, partners, and representatives of the employer or trade unions. For example, if John – a cleaner at the cleaning company which is contracted to clean your office – sexually harasses your employee Sarah while he is at your office, you as the employer can be held vicariously liable if you have not taken reasonable steps to prevent harassment.

What is the #MeToo movement?

The #MeToo movement is a social, cultural and political women's rights movement centred on sexual harassment and assault. As in many other countries, the #MeToo movement in Australia continues to impact the professional world. There has been a marked increase in seminars, training sessions, media coverage and awareness of rights and responsibilities under sexual harassment laws. Hall & Wilcox has experienced an increase in employers seeking up to date advice on their obligations, and also continues to witness the trend of increasing damages for victims' compensation for pain, suffering & loss of enjoyment of life.

How is the #MeToo movement impacting the law in your jurisdiction?

Although no laws have yet been changed as a direct result of #MeToo, several law reform topics are receiving attention in the mainstream media. These include: reform to defamation laws to enable victims to more easily "name and shame" their perpetrator, increasing the time limit to lodge complaints with the Australian Human Rights Commission, reviewing the 30-year-old *Sex Discrimination Act,* creating a process for urgent interventions to stop harassment, special protections for sexual harassment whistleblowers and much more. Of particular relevance is the debate around streamlining Australian sexual harassment laws – including the *Fair Work Act* and *Sex Discrimination Act* – to ensure accessibility, efficiency and clarity for both victims and employers.

For more information, contact Mark Dunphy at ILN member, Hall & Wilcox at Mark.Dunphy@hallandwilcox.com.au.