

INDUSTRY ADVISORY – Sexual Harassment (Vol 2, 2023)

The purpose of an Industry Advisory is to provide APTIA members with an understanding of industrial issues which may impact upon their businesses.

Sexual harassment, following the release in 2019 of the ‘Respect at Work’ report, prepared by Kate Jenkins, the Sex Discrimination Commissioner with the Australian Human Rights Commission, has become an important part of employment law at a level likwork health and safety laws.

On 12 December 2022, the “Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022”, introduced significant powers to the Australian Human Rights Commission and the Fair Work Commission to deal with the effects of sexual harassment in the workplace.

As with all legislation, several issues are yet to be evaluated, either in the FWC, the Commercial Tribunals or Federal Courts, including:

- What are ‘reasonable and proportionate’ measures which an employer can rely to argue that they have eliminated sexual harassment in their workplaces?
- To what extent does implementing policies and procedures, collecting, and monitoring data, providing appropriate support, and delivering regular training and education meet these criteria?
- What is the scope of, and what constitutes ‘offensive or humiliating behavior of a demeaning nature’ to give rise to a sexual harassment liability?’
- What are the circumstances in which an employer may be considered ‘vicariously’ liable for the actions of an employee?
- What are the basis upon which the AHRC would launch an investigation into a business for failure to comply with their obligations with respect to harassment in the workplace and also with respect to providing substantive equality between men and women?

SEXUAL HARASSMENT – A detailed analysis

	Changes to the SDA and FWA	Employers' duty	Rights of Employees	Powers of the FWC/AHRC/FCC
FAIR WORK COMMISSION	The Fair Work Act has been amended to extend to employees who are protected by the sexual harassment provisions in the FWA. It is now unlawful to sexually harass a worker carrying out work for an employer or PCBU or a person seeking to become a worker. Harassment will also include issues around 'breastfeeding', 'gender identity', and 'intersex status'. The new laws apply to all parties and the jurisdiction is not limited to constitutional corporations	Employers will be vicariously liable for any contravention by their employees or agents unless they can prove they have taken all reasonable steps to prevent the contravention from occurring. The employer's liability is similar to a protected action claim where there is a reverse onus of proof. The duty to provide a safe place of work, free from sexual harassment, now falls within the FWA, SDA and WHS laws.	A person who alleges sexual harassment can bring an action by themselves or through their trade union in the FWC, within a 24 month period. The application can seek prohibition orders or seek remuneration for loss. The FWC is required to seek to resolve the claim through conciliation. If the FWC is unable to resolve a claim then it is possible for an aggrieved person or the representative/s to bring proceedings in the Federal Courts.	The FWC can make a 'stop sexual harassment order'. The FWC can also make orders that an aggrieved person receive compensation or lost remuneration or such other action to redress the loss or damage suffered. If the matters end up in the federal courts then sanctions may apply i.e., \$66,000 for corporations and \$13,340 for individuals. The FWC is required to conciliate to seek a resolution before making any orders. The FWC is yet to determine the extent to which they will follow the definitions and direction in the SDA as the basis for accepting the offence of sexual harassment.
AUSTRALIAN HUMAN RIGHTS COMMISSION/ STATE JURISDICTIONS	The Sex Discrimination Act 1984 (SDA) outlines a range of issues to be considered for breaches of the SDA, including the seriousness of the conduct, whether it is continuous or repetitive and the role and position of the perpetrator in the business.	The obligation on an employer under the SDA is to prevent conduct that may be considered by a reasonable person as offensive, humiliating or intimidating, which can include: a display of pornographic material, general sexual banter or innuendo or offensive jokes. The positive duty under the SDA requires employers to	An employee who considers that they have been subjected to sexual harassment can bring an action in the AHRC or a State jurisdiction, which might include a State Civil and Administrative Tribunal. The action can include the failure of an employer to meet their obligations	The AHRC will have wide powers to investigate compliance by employers of their positive duty to eliminate sexual harassment. These powers include the power to conduct inquiries if they reasonably suspect a business is not complying, provide recommendations to employers on how to prevent a continued failure to comply or to give

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	<p>The conduct of sexual harassment no longer needs to be ‘seriously demeaning’, but only demeaning in nature. The SDA has also amended its objects to include the objective to achieve ‘substantive equality’ between men and women.</p>	<p>take proactive steps to prevent sexual harassment. These steps will include an assessment of the businesses’ size, nature of the business, the businesses’ resources, costs, and practicalities of eliminating the problems.</p>	<p>to avoid sexual discrimination in the workplace. An employee can also make application to the state work, health and safety regulator with respect to sexual harassment on the basis that the employer has failed to provide a safe place to work. Trade Unions are now entitled to make applications to Federal Courts on behalf of their members provided the AHRC has failed to resolve the matter.</p>	<p>compliance notices on matters that must be addressed in relation to their non-compliance. The AHRC also has the power to investigate systematic unlawful discrimination which may include allegations of victimization.</p>
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