



Sexual Harassment in the Workplace

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Gabrielle Craig, Senior Solicitor, Women's Legal Service NSW

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars

This factsheet looks at:

- What is Sexual Harassment?
- When is sexual harassment against the law?
- Employer obligations
- When is sexual harassment a criminal offence?
- How to make a complaint

Legislation

Protection against sexual harassment can be found in:

- Sex Discrimination Act 1984 (Cth); and
- Anti-Discrimination Act 1977 (NSW)

What is Sexual Harassment?

Sexual harassment is unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances.

The Legal Test explained

The law says that in order for sexual harassment to have taken place the behaviour:

- must be **unwelcome**;
- it must be of a **sexual nature**;
- it must be such that a **reasonable** person would anticipate in the circumstances that the person who was harassed would be **offended, humiliated and/or intimidated**.

Whether the behaviour is **unwelcome** is a subjective test: that is how the conduct was perceived and experienced by the recipient rather than the intention behind it.

Whether the behaviour was **offensive, humiliating or intimidating** is an objective test: whether a reasonable person would have anticipated that the behaviour would have this effect.

What is unwelcome behavior?

It includes things like:

- unwelcome touching, hugging or kissing;
- staring and leering;
- suggestive comments or jokes;
- sexual comments and jokes;
- inappropriate questions about your private life or your body;
- sexual or physical contact such as slapping, kissing, touching, hugging and massaging;
- circulating or displaying emails, texts, posters, magazines and screen savers of a sexual nature.

Note: the applicant does not have to be the intended target. For example, a statement might be made in front of them but may not be directed towards them or be about them or an employee might be sent an email by mistake. This could still be unlawful sexual harassment.

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Case example:

In *G v R and Department of Health, Housing and Community Services* the Hearing Commissioner stated that:

...the presence in a workplace of sexually offensive material which is not directed to any particular employee may still constitute sexual harassment where a hostile or demeaning atmosphere becomes a feature of the workplace environment.

What is a reasonable person?

What is reasonable will depend on the circumstances of a particular case.

A number of factors may be taken into account when determining whether a person in the complainant's position would have been offended, humiliated or intimidated. These include but are not limited to a person's:

- sex;
- age;
- sexual orientation;
- gender identity;
- intersex status;
- marital or relationship status;
- religious belief;
- race, nationality or ethnic origin
- relationship with the alleged harasser;
- disability status

Case example: Reasonableness

A woman was employed by a financial services company as a telemarketer. She complained of sexual harassment by the company manager in three incidents where he came up behind her while she was on the telephone and massaged her shoulders; put an arm around her when she was upset at work; and massaged her a second time while making sexual remarks and otherwise touching her in an unwanted manner.

The Queensland Anti-Discrimination Tribunal found that all of these incidents constituted sexual harassment. In finding that putting an arm around a co-worker could be sexual harassment, tribunal member Tahmindjis stated:

Whether an action is compassionate or reprehensible will depend on the overall context in every case. The context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female employee who had only worked in the office for two weeks. It occurred not long after another incident when distress due to a phone call had been used as an excuse to massage the complainant. The action was more than just a touch, such as placing a comforting hand on the distressed person's arm or shoulder: it was more in the form of a cuddle. In my opinion, in this instance in the overall context, a reasonable person should have anticipated that there was the possibility that [the woman] would have found this action offensive, humiliating or intimidating.

Smith v Hehir and Financial Advisors Aust Pty Ltd [2001] QADT 11

<https://www.humanrights.gov.au/publications/sexual-harassment-code-practice-what-sexual-harassment>

When is it against the law?

It is against the law for a person to sexually harass an:

- employee of the person; commission agent or contract worker;

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- Prospective employee; commission agent or contract worker;
- Colleague, partner, fellow commission agent or contract worker;
- Any other workplace participant.

Employer Obligations

An employer has an obligation to take all reasonable steps to prevent sexual harassment occurring in the workplace.

Things that they could do to prevent sexual harassment include:

- clear sexual harassment policy;
- clear complaint process; and
- training for staff and management.

Employer liability for sexual harassment that occurs outside of the office

- Sexual harassment is unlawful if it occurs in the workplace.
- The definition of “workplace” can be quite broad and includes a place where a person carries out functions connected to work
- There needs to be a nexus or sufficient connection to the place and the persons employment and this will depend on the situation.

Is Sexual Harassment a criminal offence?

Some forms of sexual harassment may also be a criminal offence for example:

- Unlawful sexual intercourse (sex without consent);
- Indecent assault;
- Physical assault; and
- Indecent exposure
- Image-based abuse

These types of offences can be reported to the NSW Police immediately.

How do I make a complaint?

If someone is experiencing discrimination or sexual harassment in the workplace they may be able to make a complaint to the:

- Australian Human Rights Commission (AHRC) (**6 month time limit**); or
- NSW Anti-Discrimination Board (ADB) (**12 month time limit**)

In some circumstances, the conduct may constitute a criminal offence and should be reported to the police. For example, conduct that involves a physical/ sexual assault is a crime.

Other options

If an employee has been discriminated against in the workplace or treated adversely as a consequence of making a complaint or exercising their workplace rights, then they may alternatively be able to make a:

- General Protections complaint to the Fair Work Commission; or
- Unfair Dismissal complaint to the Fair Work Commission (where the complainant is terminated).