

Works Officers Association Queensland

**Workplace harassment, sexual
harassment and unlawful discrimination
in the workplace**

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At the end of this session, you should be able to ...

- Define the ‘Workplace’
- Identify what unlawful discrimination, sexual harassment and workplace harassment are and be able to identify examples
- Identify who is liable if an employee discriminates against or harasses a co-worker at work

At the end of this session, you should be able to ...

- Understand what duties an employer and employee owe under the *Workplace Health and Safety Act 1995* (Qld)
- Understand and identify victimisation
- Understand the impact of unlawful discrimination, workplace harassment and sexual harassment

Impact of Unlawful Discrimination, Workplace Harassment and Sexual Harassment

- Workplace accidents
- Low staff morale
- High staff turnover
- High employee stress levels
- Low productivity
- Reports of discrimination, harassment and bullying being made externally
- Proceedings being initiated against the employer and individuals

Costs to the workplace

- Productivity Commission 2010 Report estimates:
 - » Around 2.5 million Australians experience bullying at some point in their working lives;
 - » Direct annual costs to the economy of approx \$14.8 billion (i.e. compensation claims and time lost);
 - » Associated annual costs can increase the total figure to \$36 billion (these include “hidden costs” of workforce turnover, skills lost, further recruitment and training)

Costs on an individual basis

Identifiable costs:

- 12 weeks – average amount of time off for a workplace bullying or harassment compensation claim;
- \$13,500 – average compensation payments made for an accepted workplace harassment claim.

Hidden costs:

- Echontech Report - costs of “*presenteeism*” costs four times as much as absenteeism
- Average of 6 working days per year, per employee for a workplace bullying or harassment claim.

Where is the ‘Workplace’

- ‘Workplace’ may not just be the worksite or a persons time at work
 - » ‘Workplace’ can include
 - › after work social events
 - › lunches/sporting events
 - › site visits
 - › work related activities

Relevant Legislation

- State Laws
 - » *Anti Discrimination Act 1991 (Qld)*
- Commonwealth Laws
 - » *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)*
 - » *Disability Discrimination Act 1992 (Cth)*
 - » *Age Discrimination Act 2004 (Cth)*
 - » *Equal Opportunity for Women in the Workplace Act 1999 (Cth)*
 - » *Australian Human Rights Commission Act 1986 (Cth)*
 - » *Racial Discrimination Act 1975 (Cth)*
 - » *Sex Discrimination Act 1984 (Cth)*

Vicarious Liability & Other Liability

- Employer taken to be vicariously liable unless it takes all reasonable steps to prevent such behaviour, including
 - » EEO and harassment policies and grievance procedures
 - » All employees are educated in policies and grievance procedures
 - » Policies and procedures are used
 - » Fair investigation process
- Individual Liability

Grounds for Discrimination (or “attributes”)

Cth	Qld
» Age	» Race
» Disability	» Sex
» Sex (incl. pregnancy, marital status, family responsibility, sexual harassment)	» Relationship status
» Sexual preference	» Impairment
» Criminal record	» Sexuality
» Race	» Age
» Political opinion	» Gender Identity
» Religion	» Family’s responsibilities
» Social origin	» Trade union Activity
» Trade union activity	» Political belief or activity
	» Breast feeding
	» Lawful sexual activity
	» Parental status
	» Pregnancy
	» Religious belief or religious activity
	» Association with, or relation to, a person identified on the basis of any of the above attributes

Direct Discrimination

- Direct discrimination is where a person is treated less favourably:
 - » than another person, or not given the same opportunity as another person;
 - » in the same circumstances as the other person;
 - » because of a characteristic that is irrelevant in the circumstances (i.e. race, sex, pregnancy, age, etc.)

Direct Discrimination - Example

- *Ian does not offer Gerry a job because Gerry is a Roman Catholic and Ian does not like Roman Catholics (i.e. direct discrimination based on the ground of religion/attribute of religious belief).*

Indirect Discrimination

- Where a person is required to comply with a requirement, policy or a condition, which on the face of it seems neutral but
 - » has the effect that a substantially higher proportion of persons with a particular trait are unable to comply with the policy;
 - » with which a person with the trait does not or is not able to comply;
 - » is not reasonable having regard to the circumstances

Indirect Discrimination - Example

- *A female accountant with a family, Condoleeza, cannot comply with a condition requiring her to work full time, and as a result Condoleeza loses her practice and does not have her contract renewed. A substantially higher proportion of men on the other hand can comply with this condition (i.e. indirect discrimination based on the ground of sex/attributes of sex and parental status).*

Vilification

- Public act which incites others to hate, or have serious contempt for, or severely ridicule a person or group of persons on the basis of their race, sexuality or religion, etc.
- Public acts include written or oral communication, public conduct, distribution or dissemination of material or knowing participation in public conduct promoting hatred, serious contempt or severe ridicule of a person or persons

(See for example Ch 4, Pt 4 of Anti-Discrimination Act, and s18C of the Racial Discrimination Act)

What is Sexual Harassment?

- Section 28A(1) of the *Sex Discrimination Act 1984* states that a person sexually harasses another person if:
 - » the person makes an unwelcome sexual advance or an unwelcome request for sexual favours, to the person harassed;
 - » engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
 - » in circumstances in which a reasonable person, having regard to all circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated

What is Sexual Harassment? - Cont

- The *Anti-Discrimination Act 1991 (Qld)* provides that sexual harassment happens when a person:
 - » subjects another person to an unsolicited act of physical intimacy; or
 - » makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or
 - » makes a remark with sexual connotations relating to the other person; or
 - » engages in any other unwelcome conduct of a sexual nature in relation to the other person;

What is Sexual Harassment? - Cont

and the person engaging in the conduct described above does so:

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

Examples of Sexual Harassment

- Unwelcome sexual or offensive comments, invitations, phone calls, letters, or intimidation (either indirect or explicitly);
- Staring or leering at a person or parts of their body;
- Unnecessary/unwanted physical contact such as touching, embracing, patting, pinching, massaging, touching someone's clothing or brushing up against a person, standing too close to someone;
- Physical assault, flashing or sexual gestures;
- Displaying sexually suggestive material including posters, cartoons, graffiti or messages left on notice boards, desks or common areas;
- Displaying any pornography where another employee, customer, client or visitor to the workplace can see it;
- Stalking another employee; or
- Other inappropriate behaviour of a similar nature

Everyday examples of Sexual Harassment

- **Example 1:**

Ben tells Ashley a “blue” joke. Ben and Ashley are young men who previously worked on the wharves and quite often attend comedy festivals together. It is unlikely that a reasonable person having regard to these matters would anticipate the possibility that Ashley would have been offended, humiliated or intimidated by Ben’s conduct

- **Example 2:**

Ben tells Mary the same “blue” joke. Mary is offended. Mary is a 54 spinster who is involved with a church. In the circumstances it is likely that a reasonable person would anticipate the possibility that Mary would have been offended, humiliated or intimidated by Ben’s conduct

Everyday examples of Sexual Harassment - Cont

- Even if behaviour does not offend the person to whom it is directed, others overhearing or present whilst such behaviour is occurring may take offence and consider that they are being harassed
- **Example:** *Ben tells Ashley the same “blue” joke in the open plan section of the office, and Mary walks past. She hears the joke and is offended. In the circumstances it is likely that a reasonable person would have anticipated the possibility that Mary would have been offended, humiliated or intimidated by Ben’s conduct*

Frazer-Kirk v. David Jones, McInnes & Ors

- Allegations of:
 - » McInnes engaging in inappropriate touching, indirect requests for sexual intercourse, and using inappropriate language of a sexual nature
 - » regular text messages, emails and telephone calls by McInnes to Frazer-Kirk associated with this conduct
 - » failure by management to address Frazer-Kirk's complaints
- Matter settled for \$850,000 (incl costs)

Modern Technology

- Tools used for and examples of harassment (both sexual and workplace) can include
 - » Offensive emails
 - » SMS messages
 - » Computer screen savers of a sexual nature or other IT images
 - » Downloading pornography or other offensive material from the internet

What is Workplace Harassment (including Bullying)?

- No statutory definition
- *Prevention of Workplace Harassment Code of Practice 2004* (the Code):
 - » A person is subjected to ‘workplace harassment’ if the person is subjected to repeated behaviour, other than behaviour amounting to sexual harassment, by a person, including the person’s employer or a co-worker or group of co-workers of the person that:
 - › is unwelcome and unsolicited;
 - › the person considers to be offensive, intimidating, humiliating or threatening;
 - › a reasonable person would consider to be offensive, humiliating, intimidating or threatening
- WH&S laws capture workplace harassment

What Behaviours Constitute Workplace Harassment

- repeated threats of dismissal or other severe punishment for no reason
- constant ridicule and being put down
- leaving offensive messages on email or the telephone
- sabotaging a person's work, for example, by deliberately withholding or supplying incorrect information, hiding documents or equipment, not passing on messages and getting a person into trouble in other ways
- maliciously excluding and isolating a person from workplace activities
- persistent and unjustified criticisms, often about petty, irrelevant or insignificant matters
- humiliating a person through gestures, sarcasm, criticism and insults, often in front of customers, management or other workers
- spreading gossip or false, malicious rumours about a person with an intent to cause the person harm

[From Page 1 – *Prevention of Workplace Harassment Code of Practice 2004* – “Meaning of ‘Workplace Harassment’”]

What Behaviours Do Not Constitute Workplace Harassment

- “Reasonable management action taken in a reasonable way”
 - » Setting reasonable workplace goals and standards, including work deadlines
 - » Reasonable supervisory practices
 - » Reasonable work performance assessment, counselling and disciplinary practices, including performance management

Victimisation

- Equal Opportunity legislation protects a person who makes a complaint or intends to make a complaint from being victimised
- It encourages people to make complaints where they have a valid claim
- Victimisation is an unlawful activity
- It protects the person bringing the complaint and witnesses or officers hearing the complaint

What relevance does the WHS Act have?

- Primary duties under the *Workplace Health and Safety Act 1995 (Cth)* (“WHS Act”)
- Duty on person who conducts business or undertaking (the “relevant person”):
 - » To ensure workplace health and safety (i.e. that persons are free from death, injury or illness (and the risk thereof) created by workplaces etc.)
- Obligation on “relevant person” applies whether or not:
 - » Relevant person conducts business/undertaking as an employer, self-employed person or otherwise
 - » Business/undertaking is conducted for gain or reward
 - » Person works on a voluntary basis

What relevance does the WHS Act have? - Cont

- “Relevant Persons” have an obligation to ensure:
 - » workplace health and safety of their workers and others is not affected by conduct of relevant person’s business/undertaking
 - » their own workplace health and safety
- Three ways to meet obligations:
 - » following regulation or ministerial notice
 - » following Code of Practice (or following another way that gives same protections against risk, taking reasonable precautions and exercising proper diligence)
 - » If no regulation, ministerial notice or Code of Practice, by choosing an appropriate way to manage exposure, taking reasonable precautions and exercising proper diligence

How should management deal with a claim for harassment or unlawful discrimination? - Cont

- If employee says that they do not want to make a formal complaint, advise them of the implications
- Always record any discussions with employees in writing
- Offer support person to be present during any discussions
- Give prior notice of meetings and purpose of meeting, i.e. allegations made
- Refer to policies potentially breached if allegations substantiated and consequences for alleged perpetrator

New Policy

- Be particularly aware of Complaints Procedure

Questions?