



Good practice, good business

Eliminating discrimination and harassment from your workplace

SEX DISCRIMINATION AND SEXUAL HARASSMENT

The information provided is a guide only. Employers should obtain legal advice if they have specific questions about their obligations under sex discrimination legislation.

What is sex discrimination?

The *Sex Discrimination Act 1984* makes it unlawful to discriminate against a person because of their sex, marital status or because they are pregnant or might become pregnant. It is also against the law to dismiss a person from their employment because of their family responsibilities. The Act promotes recognition and acceptance within the community of the principles of equality for women and men.

Direct sex discrimination means being treated less favourably because of one's sex, marital status, pregnancy or the potential to become pregnant. It would be direct sex discrimination if a company paid men more than women who are doing the same work. It would also be sex discrimination if a bank refused to approve a loan because the applicant was an unmarried or divorced woman (direct discrimination on the basis of marital status).

Discrimination also happens when there is a condition, requirement or practice imposed which appears to treat everyone the same, but disadvantages a person because of their sex, marital status, pregnancy or potential pregnancy. If the requirement is unreasonable, it could be **indirect discrimination**.

For example, a policy that says only full-time workers will be promoted might disadvantage women, who are more likely to work part-time because of family responsibilities. If the requirement to work full-time to be promoted was not reasonable it would be indirect sex discrimination.

What is pregnancy discrimination?

Pregnancy discrimination occurs when a woman is treated less favourably than another person simply because she is pregnant or because she may become pregnant. Indirect pregnancy discrimination may also happen when someone imposes a requirement (a rule, practice or procedure) which appears to treat everyone the same, but disadvantages a woman because she is pregnant or may become pregnant in the future. This could be indirect pregnancy discrimination if it is not reasonable.

Pregnancy discrimination can occur if a woman is treated in any of the following ways because she is pregnant or might become pregnant:

- refused employment or promotion
- dismissed or retrenched
- excluded from a training course
- reduced hours of work
- transferred to another position when there are no valid safety or medical reasons for this
- demoted or reduced seniority
- refused accommodation or goods or services
- excluded from an educational institution.

What is sexual harassment?

Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances.

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The Sex Discrimination Act defines the nature and circumstances in which sexual harassment is unlawful. It is also unlawful for a person to be victimised for making, or proposing to make, a complaint of sexual harassment to the Australian Human Rights Commission.

Whether the behaviour is **unwelcome** is a **subjective test**: it looks at how the conduct in question 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**: it looks at whether a reasonable person would have anticipated that the behaviour would have this effect.

Examples of sexual harassment

Sexual harassment in the workplace can take various forms. It can involve:

- staring, leering or unwelcome touching
- suggestive comments or jokes
- sexually explicit pictures or posters
- unwanted invitations to go out on dates
- requests for sex
- intrusive questions about a person's private life or body
- unnecessary familiarity, such as deliberately brushing up against a person
- insults or taunts based on sex
- sexually explicit physical contact
- sexually explicit emails or SMS text messages

Both men and women can experience sexual harassment at work, however, it is most commonly experienced by women.

When is sexual harassment prohibited?

Sexual harassment is prohibited in all work-related activity. For example, sexual harassment is prohibited at the workplace, during working hours and at work-related activities such as training courses, conferences, field trips, work functions and office Christmas parties.

A working environment or workplace culture that is sexually 'hostile' will also amount to unlawful sexual harassment. Some of the factors which may indicate a potentially hostile environment include the display of obscene or pornographic materials, general sexual banter, crude conversation or innuendo and offensive jokes.

Criminal behaviour

Some types of sexual harassment may also be offences under criminal law. These include:

- physical molestation or assault
- indecent exposure
- sexual assault
- stalking
- obscene communications (telephone calls, letters, etc)

If an employer suspects that a criminal incident has occurred, the individual should be advised to report the matter to the police. There should be a person nominated in the organisation's harassment policy and procedures to whom the incident can be reported. This person should provide any necessary support and assistance to the individual who is the subject of the alleged criminal incident.

Who is responsible?

A person who sexually harasses is primarily responsible for the sexual harassment under the Sex Discrimination Act. However, in many cases, employers and others can be held responsible for acts of sexual harassment done by their employees or agents.

Employers may limit their liability if they can show that they took 'all reasonable steps' to prevent the sexual harassment occurring. Reasonable steps may include policies and procedures designed to create a harassment-free environment. It could also include procedures to deal with allegations of discrimination made by employees or customers. To be effective, policies must be well implemented, including through the provision of ongoing training, communication and reinforcement.

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What sexual harassment is not

Sexual harassment is not behaviour which is based on mutual attraction, friendship and respect. If the interaction is consensual, welcome and reciprocated it is not sexual harassment.

Case example: Alleged sexual harassment in employment

The complainant, who was employed by a large Commonwealth Government agency, alleged sexual harassment by her manager. The complainant also alleged that the department was vicariously liable for the actions of the manager. The complainant alleged that her manager told her that she was very attractive, asked her out on a few occasions and often acted inappropriately toward her. She also claimed that he told sexually explicit jokes, discussed sex shows that he said he frequented and had sexually explicit photos in the workplace. The complainant resigned from her position and claimed that when her personal belongings were returned to her the package contained sexually explicit photos belonging to the individual respondent.

The government agency claimed that the complainant had not advised anyone of her allegations at the time or when she left the agency and therefore it had been unable to deal with the allegations. The agency also claimed that it had comprehensive policies about sexual harassment and staff were trained in these policies during their initial induction. While the individual respondent denied the allegations, he conceded that the photos in the package sent to the complainant belonged to him.

The matter was resolved through a conciliation process. The complainant agreed to withdraw her complaint in return for payment of \$45,000 compensation, a statement of service from the agency and a work reference from the individual respondent.

Source: Human Rights and Equal Opportunity Commission Annual Report 2003–04

