Article Information

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Webinar Q&As: 2023 'Beat the Clock' Series: Practice management & business skills | Respect@Work: Manage the risks associated with the new laws'

Throughout the seminar we addressed a number of questions from participants. Below are answers to questions that we didn't get the time to address directly, and elaborations on answers that we felt are worth repeating. Thank you to everyone who attended the presentation. To view the recording of the on demand webinar, please register here.

There is still a great deal of change to come in relation to the issue of sexual harassment in the workplace with the recent commencement of the new Fair Work Act jurisdiction prohibiting sexual harassment in the workplace.

Q1: How crucial do you think it is to have a standalone sexual harassment policy?

A1: We recommend that employers adopt a standalone sexual harassment policy that is separate to other workplace policies. This could mean a separate policy within an employee handbook, which could be adjacent to (but still separate from) other like policies (i.e. discrimination, and harassment).

What is important is that wherever the policy is contained, it should unequivocally states that sexual harassment is against the law and will not be tolerated. You must also be sure that you specifically identify all types of sexual, and sex-based harassment that the policy prohibits, and provides for an accessible and effective grievance procedure taking into account the idiosyncrasies presented by sexual harassment complaints. It is also essential that an organisation is able to demonstrate how the policy is understood including in relation to consequences for employees if the policy is breached. A clearly worded definition of sexual harassment should be included as well as an explanation about what sexual harassment is not.

We find that standalone policies allow for organisations to achieve these ends with more clarity – which will form an essential aspect of fulfilling an employer's obligation to do all that is *reasonably possible* to prevent sexual harassment. It is also likely that if your sexual harassment policy is 'muddied' by other topics, a court will look unfavourably as it would normally be *proportionate* to implement a standalone policy that would clarify the issue.

We referred to the Respect@Work website during the seminar, you can find their information about policies here. If you are concerned about the potency of your organisation's policy framework, it might be time to have them reviewed.

Q2: Where can we find data about sexual harassment incident rates etc?

A2: We received a number of specific questions regarding data on instances of sexual harassment, such as "what percentage of men sexually harass". A variety of sources are available, but we consider that the Australian Human Rights Commission (**AHRC**) is likely one of the more reputable sources. In the seminar, we referred to information contained in the Time for Respect: Fifth National Survey on Sexual Harassment in Australian workplaces, which can be found here.

Q3: How do you assess whether the risk assessment methodology used is robust?

A3: An organisation must be methodical in identifying the hazards, assessing the risks, controlling the risks, and reviewing control measures. Ultimately, if you are unsure about whether your methodology is robust, it is worthwhile having it externally reviewed by a work health and safety expert.

Q4: How do you manage people dating within the office?

A4: Given that sexual harassment must be unwelcome, an office relationship may make assessing whether such conduct was welcome especially difficult. One way to manage this is to oblige employees to proactively declare office relationships as part of your conflict of interests policy.

Q5: What are the limits of work? Can it include social media, instant messaging, after work drinks at a pub, or other worker organised social events?

A5: The short answer is that the work place could include all of the above – it just depends on the circumstances.

The *Sex Discrimination Act 1984* establishes that where an employee sexually harasses another employee "*in connection with* (their) *employment*", the employer may be vicariously liable as though they were the perpetrator, unless they can prove that they took all reasonable steps to prevent the employee from so harassing.

The courts have found that conduct away from the workplace during lunchtime has this connection, along with conduct at a social gatherings of work colleagues.[1]

Q6: Isn't the definition of "hostile work environment" somewhat more subtle than gross sexual misconduct? My understanding is that it might relate also to conduct that makes one sex feel sidelined, more than the other.

A6: A working environment that is hostile on the ground of sex can be any one where the working environment demonstrates an entrenched group culture or practices that may hinder people of one gender, sex, or sexuality from equal participation and enjoyment of their working life.

As explored in the seminar, this may include sexual banter, the sharing of sexual images, or the telling of sexist jokes. It may also include more subtle practices such as an expectation that one sex clean up after office events (such as a birthday), despite this not being in their job description, or other behaviours that result in members of one sex feeling unwelcome or excluded.

Q7: Can complimenting someone's appearance be sexual harassment?

A7: This would depend on the circumstances – the *Sex Discrimination Act 1984* provides the definition of sexual harassment at section 28A.

In short, if the compliment can be characterised as a *sexual advance*, it is *unwelcome*, and a *reasonable person* would have *anticipated* the recipient of the compliment would be offended, humiliated or intimidated, then yes – this could constitute sexual harassment.

An assessment will need to be had of what is said, the dynamics between the two employees, any associated body language or other surrounding circumstances.

Q8: How do you deal with a situation where you witness sexual harassment, but the victim does not want to report it?

A8: Managers and officers will likely be required to report sexual harassment that they witness and to implement a reasonable response to manage the WHS risk arising. This includes balancing the risk to the complainant's psychological health, whether they are a willing participant or not.

Q9: Do you need to provide the details of the complainant to the alleged harasser in order to afford her/him the right to natural justice?

A9: We recommend a sexual harassment policy that provides for a clear and accessible avenue for reporting. Allowing for anonymous reporting is one way to achieve this. However, the policy must also be transparent in stating that once a report is made, if the employer considers that it reveals a WHS risk it may be obliged to investigate regardless of the complainant's participation or their desire to remain anonymous.

The policy should also explain that if the complainant seeks disciplinary action, natural justice dictates that the alleged perpetrator has the allegations put to them with sufficient particularity. This may include naming the complainant, or describing the circumstances with sufficient clarity so that the alleged perpetrator is likely going to be able to identify them.

During any investigation process, the employer may seek to implement quarantine procedures to keep the complainant and alleged perpetrator separate. Much will depend on the individual facts and circumstances.

Q10: What are the penalties for employers that do not comply with the positive duty measures?

A10: The s*ex Discrimination Act 1984* does not prescribe set penalty amounts that a court or regulator can impose on an organisation for not complying with its positive duty. However, as of November 2023, the AHRC will have a variety of compliance and enforcement powers such as:

- Ability to conduct an inquiry into an employer's compliance with the positive duty and to provide recommendations to the employer to achieve compliance;
- Issue a compliance notice on the employer specifying the actions that they must take, or not take, in order to comply;
- Seek a court order that the employer comply with the compliance notice and any other order the court considers appropriate; and
- Enter into enforceable undertakings in circumstances where the employer remains non-compliant.

Additionally, if an organisation does not comply with its positive duty, a variety of legal risks emerge – including discrimination claims and worker's compensation by the workers themselves. These claims risk a compensation order being made against the employer.

Q11: Do you think unions and plaintiff lawyers will start seeking discovery of data collated by organisations for risk management purposes as a fishing expedition to use it to find holes/inconsistencies to discredit a specific employee's disciplinary treatment in a particular case?

A11: While we may be tempted to speculate about this, the underlying recommendation is that organisations are conducting thorough risk assessments regarding sexual harassment in the workplace that are robust in their process. Any reporting of data within an organisation should be done on an anonymous basis and this would lessen the risk that this information is later used against an employer down the track.

Essentially, organisations are required to implement all reasonable and proportionate control measures to prevent identified risks from materialising and should not be put off from doing this by the threat the information may be used against the employer at a later stage.

Q12: If you run a membership type business (e.g. a sporting club) would you have responsibility to train members in the same way as employees?

A12: The employer is required to do all things that are reasonably possible and proportionate to prevent sexual harassment, including a hostile working environment. Clearly, club members could harass or create hostility and we have seen extremely serious instances of sexual harassment in a club environment. While this will depend on the specific circumstances, generally we would recommend clubs have in place terms and conditions of membership whereby club members agree to abide by the sexual harassment policy (provide the policy with the other membership documents), and depending on the risk assessment (including past experience), it may be necessary that they undertake training as a membership pre-requisite.

Q13: How do you balance dealing with complaints quickly vs giving the person complained about reasonable opportunities to respond to allegations?

A13: It is always possible to deal with complaints in a timely manner while affording a respondent procedural fairness and an adequate opportunity to genuinely respond to allegations. Sometimes for employers, this comes down to a resourcing issue. An external investigator will be able to advance the investigation process quickly, and relieving the accused of duties will allow the accused the time to respond.

Q14: What would your survey look like if we were sending this out to all employees on sexual harassment – what kind of questions would we ask?

A14: Each organisation will need to tailor any survey and training to their immediate needs, identified risks, and unique idiosyncrasies. However, the Time for Respect: Fifth National Survey on Sexual Harassment in Australian workplaces, which can be found here – provides for a great starting point of relevant questions to include in a sexual harassment survey.

Q15: What are your views on historical complaints of sexual harassment (i.e. from former employees) that cannot be substantiated for lack of probative evidence – is it best practice to provide an "outcome" to the complainant stating complaint cannot be substantiated or does that risk more trauma to the complainant?

A15: This will depend on the specific circumstances and may turn on the desires of the complainant. Clearly, a workplace

does not have any power to subpoena former employees into an investigation process. But there might be a case for investigating nonetheless, as this may reveal an adjacent work health and safety risk in the health of the complainant.

We recommend that employers do not prejudge whether any *probative evidence* is available – the testimony of the complainant could certainly be probative, and may well be credible, reliable and compelling.

If you are unsure about your organisation's legal risks and obligations in relation to a specific complaint, particularly those that are historic, we recommend seeking specific advice.

Q16: During workplace investigations – how do you make concluded findings if there is no documentary evidence, or there is only testimony evidence, or where both the complainant and alleged perpetrator both appear credible and reliable?

A16: A workplace investigation involving allegations of sexual harassment is a serious investigation. Where misconduct is alleged, though the standard of proof remains the *balance of probabilities,* the investigator must bear in mind the 'Briginshaw standard' which says:

> *"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the [investigator]. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

Very often an investigator is asked to determine whether conduct occurred based on 'he said, she said' evidence. It is not correct to say that this is *not evidence*. Both the complainant and alleged perpetrator will be able to give direct testimony evidence. If the investigator considers that both are credible and reliable, both have a ring of truth, and neither has the benefit of corroborating circumstance or other evidence – then it is likely that the accused will wear the benefit of the Briginshaw standard and the allegations will not be able to be substantiated.

Q17: Should vexatious complainant be punished/cautioned? Will this deter legitimate complaints?

A17: It is generally appropriate to discipline an employee for making a complaint that is genuinely a vexatious complaint.

However, a vexatious complaint is not merely a complaint that is not substantiated.

A vexatious complaint is one that is designed to harass, irritate or falsely punish the alleged perpetrator – it is a serious allegation – and an organisation must be satisfied on the *Briginshaw* standard that the complaint was in fact false and intended to cause such harm and detriment.

Just as we answered question 16, the alleged vexatious complainant may wear the benefit of this standard if the investigator cannot reach reasonable satisfaction that the complaint was in fact vexatious.

[1] *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130, [106].