

SEXUAL HARASSMENT AT WORK

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Two words seem to strike fear into the hearts of men, lumberjacks or hairdressers, politicians or pharmacists: 'sexual harassment'.

The reason seems to have something to do with their uncomfortable lack of certainty about what is and isn't allowed in exchanges between the sexes ('Can I say she looks gorgeous today?' 'Surely we can tell a dirty joke!' 'Of course I put my arm round her shoulders: we're like a family here!' 'But the other girls didn't mind that cartoon: why should she be such a wowser?').

Employers - especially small business operators - tend to panic when they get a harassment complaint, either over-reacting (sacking the 'accused' and then getting a complaint of unfair dismissal) or freezing, like a rabbit in the headlights. They may feel trapped between the duty to be 'fair' to someone accused of harassing, and to be responsive and sympathetic to the complainant. They don't know what to do. They do know it'll be expensive.

There is a better way to handle harassment: prevent it. It's a risk: minimise it. Make sure that everyone at work knows what sexual harassment is. Have a code of conduct. Training staff in the behaviour expected of them. Set up ways of dealing with grievances about bad behaviour, short of discipline and dismissal - and keep these distinct from discipline and dismissal processes.

First, understand the law.

'Sexual harassment' is unwanted, unwelcome conduct 'of a sexual nature in relation to the person' who is making a complaint. This conduct can be obvious - requests for sexual favours or demands for sexual services - and in my experience there is still plenty of it, in the workplace. It can include touching, pats, pinches or strokes. It can be words, pictures, faxes or photos, cartoons and emails, sighs and whispers, gift-giving and messages, so long as it is 'sexual'. Sometimes an 'innocent' act is not so blameless when the history or context is known. Giving someone flowers might be a

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powerful sexual message if it follows repeated invitations to socialise, and the subject's continued refusals.

This 'sexual' quality has to be objectively determinable. The 'unwanted' part of sexual harassment is *subjective*. A person who complains now, doesn't have to have said before, 'Stop it!' or repeatedly objected to offensive or frightening conduct. They might have felt that they had to put up with it, because it was 'the boss' who wanted to lark about, and they need his approval, and the job. Besides, in my experience, most powerful people just don't listen or can't 'hear' when a 'victim' asked them to stop doing 'it'. 'We're like a family, here,' - a common employer response to a complaint about chronic sexual bullying often means a patriarchal family, with a dominating head who is not as approachable as he (less commonly she) thinks she is.

This unwanted, sexual conduct is unlawful if it actually makes a person feel intimidated, offended or insulted: this is a *subjective* view. But there is an *objective* test as well: a reasonable person must have expected the person to respond by feeling intimidated or offended or insulted. Wouldn't you expect your mother, or your daughter to be offended if she heard an obscene joke at a business meeting? It doesn't matter that you weren't or other women or colleagues wouldn't be. If the conduct is sexual, we should always be prepared to expect someone might be offended by it. The jokester need not be punished: the conduct should simply be prevented or stopped quickly. There are, after all, some things that should never be said or done at work, and there is a duty on management to make the work environment safe and comfortable for all employees, not just those with thick skins or broad senses of humour.

This year, for example, I acted for a 'harasser' whose secretary had a major nervous breakdown. My client was, I honestly report, a very nice man who did not mean to distress her. But he had an unacknowledged problem with inappropriate sexual behaviour. His employer had an even greater problem, because they knew and had allowed him to 'get away with it', for years, because he was charming, charismatic, and (above all) earned them enormous revenue. What brought matters to a head was something minor: my client found fault with his secretary's work. Their relationship, in which bawdiness had been a strong theme, cooled. She got depressed and teary: he got angry, accused her of being 'on her rags', and she

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broke down in tears, and out came the whole story, and months of resentment which she had swallowed because she thought their relationship was 'special'. My client had told her filthy stories, virtually every day. He had sent her obscene email attachments - seriously pornographic, bestial video clips - and expected her to watch them and laugh at them (she was physically nauseated after seeing one, which he thought was funny). He had made her sit on his lap on office social occasions and flipped her bra-strap. He commented on her clothes, makeup, body and scent, asked her about her sex life, and once, when she was out on a date, rang her mobile repeatedly and asked her suggestive questions about 'how it was going'. He didn't have a clue why she couldn't carry on. She had laughed at his jokes, and she had said, at the job interview, she could 'take it'.

Well, she couldn't. She had tried to stop him, but he didn't take seriously her protests that he was 'foul', and asking him to stop it. His email use was illegal and against company policy; her complaint was clearly well founded. The only thing that saved my client's hide was his company's complicity, and his personal courage in being willing to apologise, compensate his former secretary, and undertake serious, on-going, professional counselling and be accountable for his improvement to his employer. Settlement cost him plenty. It probably saved his marriage as much as his job. Not many 'harassers' are as open to admitting their mistakes.

Second, if you do get a complaint, act quickly, and expect everyone to be upset.

We resolved this complaint because we acted quickly: from the complaint being made to the resolution meeting, less than 2 months. Sexual harassment demands not only an immediate, sensitive response to complaints, but preventive action. It also requires a sensitive, but firm, approach to those who are accused of the harassment.

More often than not, these days I act for men accused of being harassers, who are themselves genuinely angry and upset. They do not feel culpable, and feel victimised. Their sense of self-worth has been assailed. They feel misunderstood and persecuted. Many would like to run what would be, virtually, a 'rape trial' against their accuser in defence of their own rights to 'due process'. They almost invariably deny that it happened, or that it is serious, and often threaten to 'sue for defamation' or make personal attacks on the complainant. (You can only sue for defamation if

the claims are false, or the complaint is malicious and made to a person who is not under a duty to do something to stop it, so it isn't privileged.)

Third, be fair, but remember that not all harassment deserves a punitive response. It simply needs to be stopped.

Some of the most frightened commentators suggest that anti-harassment laws are biased in favour of women, and presume men to be guilty, and deprive them of their 'rights' to natural justice. They don't, and shouldn't, but these laws demand that any employer should minimise the risk of complaints. They should educate themselves and their people on the law, and the anti-social effects of harassment. It destroys confidence and trust, self-esteem and workplace harmony.

The rules of conduct need to be clear. When I tell some of my clients' stories to employer groups the response is quite often, 'There but for the grace of God.' This reflects the changed road rules for communication and manners between women and men, workers and employers. It is important to have a code of work conduct, and workable ways for dealing with discomfort or embarrassment, so misunderstandings don't fester.

Men can, for example, misread a woman's friendliness as a 'come on' and fail to hear or observe her disquiet if they act on it. This is significant, given that sexual harassment is defined as an *unwelcome* sexual advance, an *unwelcome* request for sexual favours or *unwelcome* conduct of a sexual nature, the criticised 'subjective element' of harassment law.

There are some 'rules' of engagement. Touching is not okay. 'Leering' is a grey area - it actually means staring at a woman's breasts. Unconscious habits, such as fiddling with your fly and so on may cause embarrassment, and there should be ways of making the person aware of it and stopping this. Personal remarks about a person's bodily characteristics are never okay. A complimentary remark about someone's new clothing or jewellery or perfume is probably fine, but about the 'fit' or length of a skirt or its transparency, which could make the person feel uncomfortable or aware of scrutiny of their body, not, and not if it's associated with a request for a social outing or a physical intimacy of a sexual kind. Courtesy is always okay, so old-fashioned gentlemen need not be worried about opening doors for women or otherwise trying to be polite, even if 'liberated' women don't like it much. Leaving

sexual material in sight anywhere at work is not okay, ever. Gossiping about sexual matters can always be overheard, and should not take place at work. Condescending or trivialising remarks based on gender are not 'harassment', which is, essentially, misusing relative power in a sexual way; bullying with a sexual element. Courtesy may be patronising, sexist or irritating, but it is not courteous if it is 'sexual'. Dirty, lavatory, sexual or sexist jokes (both sexes) may always be overheard, and will offend someone: they should not be told at work. Sexual or offensive material should not be emailed, faxed or photocopied at work. It is not a defence that nobody said anything, you didn't mean it, or 'how could I know' that someone would be upset. If it's sexual, it doesn't feature at work.

'Harassment' comes from an old French word describing hunting hounds pulling down a trapped quarry. A code of conduct should prevent anyone being 'hounded'. There are several levels of harassment, each requiring different educational, disciplinary or dismissal responses.

Just because something is 'sexual harassment' within a legal definition does not necessarily require that the person be punished. Most harassment is best dealt with by discussion, acknowledgement and, if necessary, authoritative direction. Any harassment observed should be acted upon, by a manager or supervisor, without waiting for the person to complain. Harassment is a breach of the employee's duty to create a harmonious and safe workplace.

The worst sexual harassment is the most obvious and the least complained of: blackmail, or threats that if someone doesn't 'come across' or refuse to allow themselves to be manhandled they will suffer in some way - express or implied.

Only slightly less severe is touching another person in a sexual way, or threatening to. Touching another person without their consent is an assault anyway. Touching them in a sexual way, even as a joke - especially on the bottom, breasts or genital areas - in a work environment, particularly, is a very serious matter indeed. It can *never* be justified. It is *always* misconduct.

At the other end of the spectrum is the sexually permeated, unsettling or uncomfortable work environment, which makes a person defensive or tense or miserable because of chronic under- or over-tones of sexist or sexual innuendo. This might be sexual or suggestive screen-savers, or pictures or posters showing women

as objects of sexual fantasy, or a culture of sexually suggestive or coarse joking (even if it isn't directed at a particular person, because it can be overheard), or where derogatory remarks about women are made, or about gay men, a growing class of complainants.

The issue here is the public nature of a workplace. Anything that happens there is 'public', because an employer has the right and duty to make the workplace safe and to maintain discipline, and everyone needs to work: it's not a choice. Nobody's office is sacrosanct, and sexual conduct at social events, Christmas parties, after-hours drinks and celebrations, and even hen's nights arranged for work colleagues, are also an employer's responsibility to control.

If low-level sexual conduct is not prevented there is, very often, a kind of 'sacks on the mill' response, an escalation of 'trivial' harassment, to seriously problematic behaviour: topping crude jokes, teasing, and turning on people who don't want to participate. If it is ignored or left unchecked, it becomes sexual bullying, and the workers can turn into a kind of mob.

In a Western Australian case about 6 years ago the first-ever women to work on a construction site asked (nicely) for the men's porn posters to be removed. The 'men' took offence, and their revenge, backed by their Union. Anger and resentment resulted in plastering up pictures of hard-core bestiality and sodomy, toilet graffiti, naming and threatening the women. They were eventually driven away from the workplace entirely, and the company did nothing to stop it. The women were eventually awarded \$95,000 in damages, divided equally between the employer and the union that didn't bother to protect them, siding with 'the men'.

A good code of conduct will specify what isn't acceptable, will be enforced by managers, and will spell out that women and men have the right to ask for unacceptable conduct to stop, without being sent to Coventry or blamed for being 'over-sensitive' if they do.

Why don't the victims just tell the perpetrators - not always men, women sometimes get involved in it too, especially the 'joking' - to stop it?

As the WA case shows, usually they just can't. Often it's hard to, because the bullies are either numerically, or hierarchically, superior. It's close to impossible to say or do anything if the harasser is your boss or supervisor. Besides, the usual reaction, if

someone does object, is to trivialise or personalise the complaint and attack their place in 'the team', or their work standards, work record, 'rigid' personality or poor sense of humour. Quite often, other workers turn on them as well. They are making waves. So they say nothing, and the tension builds.

This has to be taken seriously because the duty not to discriminate is an integral part of our industrial relations, as well as State and Commonwealth anti-discrimination laws, which require 'due process' if disciplinary action is taken. On the other hand, courts have started to award very considerable damages against employers for proven harassment by their staff, even if they didn't know about it, and even if they strongly disapprove of it, and punish the offenders after the event. They are vicariously liable for what occurred, unless they took every reasonable step to prevent it.

Damages awards have soared, now averaging \$40,000. Often, a sexual harassment complaint is coupled with an even more serious complaint, that the victim was further victimised when they raised the matter. Senior Constable Narelle McKenna won all-time record damages against Victoria Police in 1998, after she was disciplined because she complained of sex discrimination at her station, and of being manhandled by a male colleague on night duty: \$125,000.

Women working in businesses in which they have traditionally put up with a sleazy or suggestive atmosphere - in other words, putting up with sexual harassment - often try to survive by becoming 'one of the lads'. But they are far less likely, now, to accept the old standards of behaviour. Some women have even argued successfully that having to work under such conditions is indirect discrimination, too; that they are forced to tolerate conditions of employment that most men don't have to put up with. They're not taking it any more.

The best way of dealing with sexual harassment in the workplace is to stop it before it happens. It is definitely second-best to wait until someone complains, and then make a choice between disciplining or sacking one worker, or losing a valued employee and risking a discrimination complaint. Sometimes a choice has to be made between formal discipline and dismissal proceedings and stopping a dangerous practice. Essentially, harassment in the workplace is dangerous as well as illegal practice, and it should not be tolerated. We don't have 'hearings' before we

insist that an irresponsible crane driver get out from behind the wheel, if they are caught 'teasing' workmates with their equipment. Nor should we fail to act to stop a harasser. Any workplace where harassment - bullying - is endemic is potentially dangerous as well as unproductive.

A sexually permeated workplace, or one which allows victimisation, is not a productive one: people are not working efficiently, when they are trying to avoid a bully. In 1997 I resolved a complaint made by 5 individual workers against 22 individual respondents and the national company that employed them all. Over the year it took to resolve, the company was afflicted by chronic threats of industrial action (mostly targeted at the unpopular complainants), 'stress' absences from work by those who complained and those who were complained about; workers' compensation claims from all of them (including one defended hearing); extra complaints of victimisation and disability harassment (because of the insurance company's surveillance of the complainants), ongoing industrial unrest over health and safety, and the ever-present threat of bad publicity at a sensitive time (the company was about to be taken over). The harassment was chronic; the history of relations between the parties was complicated, and the victimisation was ongoing. It was a very expensive nightmare for the company. It had to be resolved, pragmatically. Legally, it had to be resolved as well. Tribunals dealing with sexual harassment complaints look at the whole history of relations between the complainant and the 'perpetrator' and the employer's attempts to prevent it from happening. Sexual harassment complaints are not assessed by analysing each particular or a precipitating event and seeing whether or not this could fall within the definition in the **Sex Discrimination Act** 1984. In that context, who would have enjoyed having their workplace management failures publicly discussed?

Do formal complaints processes stop this kind of behaviour? Regrettably, probably not. The incidence of significant, chronic harassment outstrips the numbers of formal complaints, because there is a real fear of the repercussions - 'reputation' damage, victimisation and ostracism in the workplace. So there is good reason to take steps to prevent not just complaints of harassment and discrimination, but harassment and discrimination itself. Most companies act to protect property and premises from accidental or malicious damage, and to make their premises and

workplaces safe, and to avoid prosecution. It astonishes me that they don't do the same to comply with anti-discrimination law.

Complaints are costly:

- in the time it takes to handle them;
- in the loss of productivity associated with responding to an investigation by an external body;
- in sick leave and workers compensation payments, and
- in legal costs let alone damages awards.

Discrimination and harassment is costly too, causing:

- loss of productivity, efficiency and effectiveness;
- disputes,
- dangerous behaviour,
- lack of attention to work on hand,
- the excessive use of sick or recreation leave, and
- loss of good staff in whom the employer has made a huge investment in training and experience.

Once complaints are formally made the cost really mounts. Some years ago one of my bigger corporate clients reviewed the cost of discrimination throughout its operations, before it had introduced our training and policy recommendations. One complaint alone - of chronic, low-level sexual harassment that led to a young woman's nervous breakdown - cost the company more than \$100,000 in lost productivity, sick leave, staff hours used to investigate and respond to her complaint. That was before the Human Rights and Equal Opportunity Commission received her complaint, and without including any compensation or legal costs.

Yet many businesses choose to take no action until after a complaint has been made, when the disruption and distress it caused forces them to review the wisdom of their policies.

The solutions are relatively simple. Prevent it from happening through good people management, and effective risk management: prevent foreseeable harm, and

protect yourself against vicarious liability by taking every reasonable step to prevent them.

To avoid liability for sexual harassment:

- Check your own culture. There may be a few issues in the workplace that no one has raised with you, either because you're the 'boss', or because nobody wants to make waves. It may take an outsider to find out, often through a training program, whether this is the case, and what needs to be rectified. Get an expert in, and give them the authority to advise you on what they find.
- Develop a code of conduct, and make sure everyone knows what it means.
- Issue a clear policy statement, backed up with the threat of dismissal or demotion if it is breached, that sexual harassment will not be tolerated, and distribute it widely, and make sure that it is understood to be a fundamental policy.
- Back it from the top. Make sure that this is supported and promoted by the owner of the business or the top of the management hierarchy. There is nothing like the proper use of authority for ensuring that codes of conduct and prohibitions on bullying are taken seriously by middle managers and staff - even those who think it doesn't really apply to them. Many a policy has failed because senior staff have applied it to their own inferiors, and not bothered to apply the same standards to, or questioned, their own behaviour. Don't bother to issue a policy statement without being sure that there is nothing in current practices that might make employees cynical about your sincerity.
- Communicate the policy so that all existing and future employees know about it
- Conduct regular workplace checks for offensive material and behaviours
- Introduce regular staff training to address codes of conduct
- Set up a grievance mechanism for dealing with complaints. No, 'My door is always open', is not good enough: what if the 'offensive behaviour' is yours? There should always be a choice about who to complain to, and there should be a range of ways of dealing with harassment, from discipline and possible dismissal, to conciliated apologies, and informal mediation ensuring that offensive behaviour is stopped quickly, and nobody is victimised.

- Review the effectiveness of your actions, at least once every couple of years. There is no point in having a policy if you can't find it, when that big complaint hits your desk in a year's time. And there's no point in swiping someone else's grievance process, and not use it, because it's not right for your business.

Sexual harassment is nothing to be afraid of. It's just something nobody has to work with, best prevented rather than punished, and quite easily prevented, too.