Australian Chamber of Commerce and Industry

Respect@Work

Employer Guide

An employer guide to help navigate the Respect@Work legislation changes

Edition 1
Current as at 13 September 2021

Overview

The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth) (Respect at Work Act) commenced on 11 September 2021.

This forms part of the Government's response to the Sex Discrimination Commissioner's Respect@Work report. The Respect@Work report was the outcome of a world-first National Inquiry into Sexual Harassment in Australian Workplaces, and provided a comprehensive set of recommendations for addressing sexual harassment in the workplace.

The Respect at Work Act makes changes to the Fair Work Act, the Sex Discrimination Act and the Australian Human Rights Commission Act, and in doing so gives effect to a number of recommendations contained in the Respect@Work report. The Fair Work Amendment (Respect at Work) Regulations were also recently introduced, which made related changes to the Fair Work Regulations.

In addition, the Act provides that women who experience a miscarriage, and their partners, will have access to existing rights for up to two days of compassionate leave. This amendment was not put forward in the Respect@Work report, but has been identified by Government as an important measure to provide clarity and improved support to employees experiencing miscarriage.

The majority of the changes took effect on 11 September 2021, with the Fair Work Commission's new jurisdiction concerning 'stop sexual harassment orders' commencing two months later.

ACCI has prepared this guide on the Respect at Work Act, which seeks to explain and answer some of the more common questions employers may have around the changes and outlines what action employers may consider taking in order to both prevent sexual harassment in their workplace and ensure they are compliant with the amended laws.

This guide covers the recent changes to the law as a result of the Respect at Work Act (note it does not intend to cover employer obligations that were already in existence in legislation). Employers should at all times be conscious of their particular legal obligations applicable under the Fair Work Act, Sex Discrimination Act, their respective State and Territory WHS legislation, workers compensation legislation, and discrimination legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice where necessary.

The content of this publication has been prepared based on material available to date (13 September 2021). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

Summary

The Respect at Work Act was introduced by the Federal Government to strengthen the existing legal landscape for dealing with workplace sexual harassment and related conduct and extend the minimum entitlement for compassionate leave in relation to miscarriage.

It makes changes to the Fair Work Act (FW Act), the Sex Discrimination Act (SD Act) and the Australian Human Rights Commission Act.

Below is a summary of the key changes of the Respect at Work Act and Regulations that employers should be aware of, as well as the actions employers may consider taking in order to ensure they are taking appropriate action to prevent sexual harassment and are compliant with the new laws. Further detail is available in each of the relevant chapters.

SUMMARY OF THE KEY CHANGES EMPLOYERS SHOULD BE AWARE OF:

1. **Expansion of Application of Sex Discrimination Act:** The protection from sexual harassment under the Sex Discrimination Act has been expanded to include those not previously covered such as interns, volunteers, and self-employed workers. This is designed to align with the model Work Health and Safety law.

2. **Prohibition on Sex-Based Harassment:** Sex-based harassment is now prohibited under the Sex Discrimination Act. Sex-based harassment is unwelcome conduct of a seriously demeaning nature by reason of the person's sex, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimated. This is relevant to both employees, as well as employers who can be held liable (vicariously) for the conduct of their workers. Ancillary liability provisions also apply, meaning for example, a supervisor may be held liable as an 'accessory' to the sex-based harassment if they aided and permitted its continuation.

3. **Victimisation:** Victimising conduct (such as threatening or subjecting a person to detriment for taking action such as lodging a complaint) can now form the basis of a civil action for unlawful discrimination (in addition to a criminal complaint) under the Sex Discrimination Act.

4. **AHRC Complaints:** Instead of the current six months, a complaint under the Sex Discrimination Act can now only be terminated if it is made more than 24 months after the alleged unlawful conduct took place.

5. **Stop Sexual Harassment Order:** The existing anti-bullying jurisdiction in the Fair Work Act has been extended to also cover sexual harassment, meaning the Fair Work Commission can make an order to stop sexual harassment in the workplace (preventative rather than monetary).

6. **Unfair Dismissal:** The Fair Work Act has been amended to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable. The definition of 'serious misconduct' in the Fair Work Regulations has also been amended to include sexual harassment.

7. **Miscarriage leave:** Women who experience a miscarriage, and their current partners, now have access to up to two days of compassionate leave.

SUMMARY OF IMPORTANT PRACTICAL ACTIONS EMPLOYERS CAN CONSIDER IN RESPONSE TO THE CHANGES:

Below is a summary of key actions employers may consider taking in order to ensure they are taking appropriate action to prevent sexual harassment and are compliant with the new laws:

1. **Implement, or review and update policies and procedures:** Review any existing policies and procedures (or for employers without existing policies, develop and implement) to ensure they:
   - are updated to align with the broader coverage of the discrimination / harassment laws, to ensure they cover the wider range of individuals that can be subject to the laws (e.g. interns, volunteers, and self-employed workers)
   - address social media and out of work conduct involving sexual harassment and sex-based harassment
   - address the new prohibition against harassment on the ground of sex, and conduct constituting victimisation
   - make clear that if an employee engages in sexual harassment or harassment on the ground of sex, they may be subject to disciplinary action which may lead to the termination of their employment.

2. **Ensure awareness of the changes:** Ensure employees, managers and others in the workplace are aware of the changes, and of any related changes to policies and procedures. Employers should also talk and exchange information with other businesses they interact with to ensure they understand the expanded coverage and to ensure that adequate measures are put in place to prevent sexual harassment e.g. suppliers, commercial landlords, onsite food vendors or contractors.

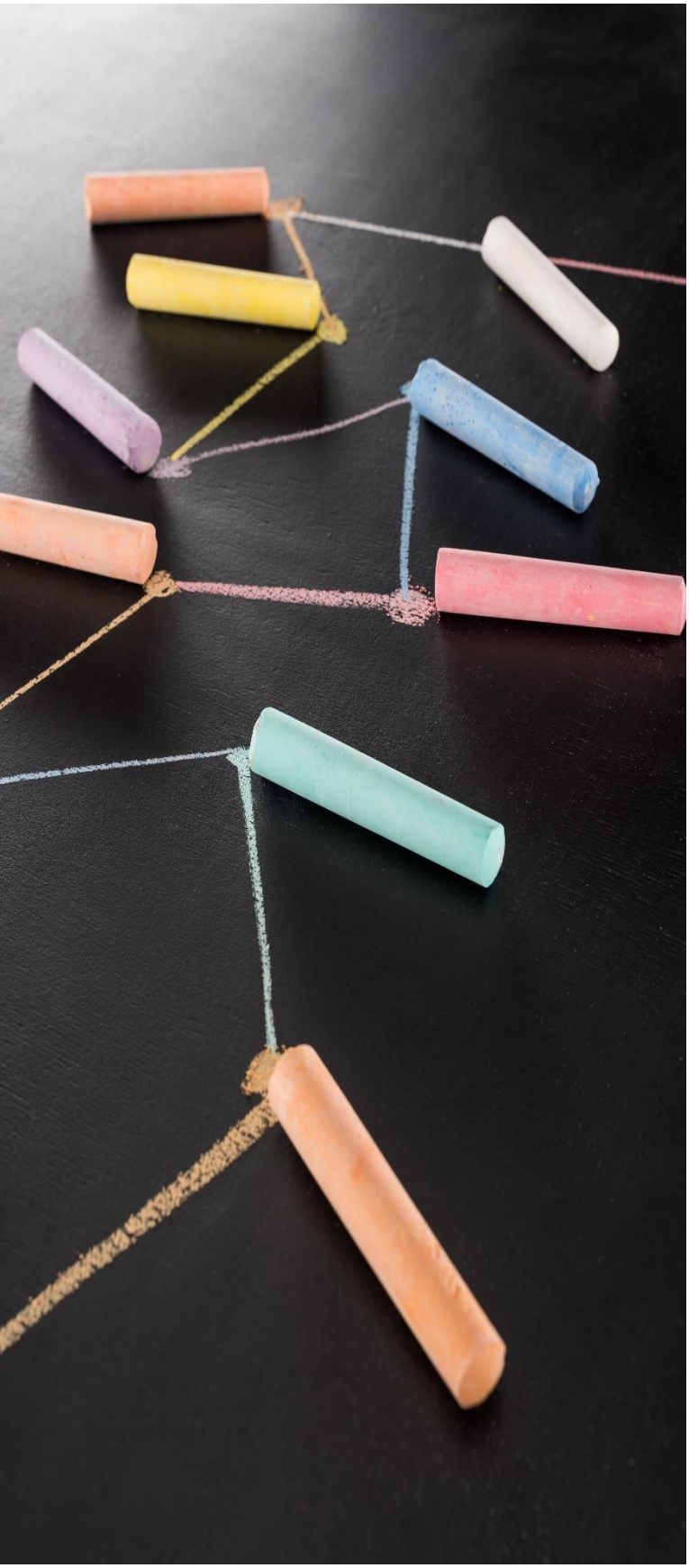
3. **Implement or review training programs and consider refreshed training:** Review training programs on acceptable workplace behaviours (or develop and implement one) to ensure they address the matters covered in item 1, above. Consider providing refreshed training to employees.

4. **Implement or review internal complaints procedures:** Establish and implement an internal complaints procedure (or reviewing existing complaints procedures) to ensure there is a clear process in place for sexual harassment and sex-based harassment complaints to be dealt with appropriately and promptly, and that records are kept appropriately. Ensure this is clearly communicated to employees, so employees are aware of how to make a complaint about both other employees and those who are not employees or workers (e.g. customers, suppliers or members of the public).

5. **Take steps to create a healthy and safe work environment:** Employers should ensure they are taking appropriate steps to prevent sex-based harassment and sexual harassment, which will not only encourage a productive and harmonious workplace, but will go some way to protecting employers from vicarious liability. This could include, for example, distributing communications that sexual and sex-based harassment is against the law and will not be tolerated in the workplace, and ensuring senior leaders model appropriate behaviour. See *Practical Guidance For Employers – Steps to Prevent Sexual and Sex-Based Harassment,* on page 18 for more information.

6. **Update leave policies to include miscarriage leave:** Update any policies and procedures in relation to leave entitlements to ensure they reflect the new grounds for compassionate leave in relation to miscarriages.

Given the sensitive nature of this topic and the potential exposure to employer liability, employers may also wish to seek advice that is tailored to their specific circumstances.



Contents

A. Expansion of Application of the Sex Discrimination Act

The Respect@Work Act has expanded the operation of harassment laws (sexual harassment and the new harassment on the grounds of sex, see *Section B - Prohibition on Sex-Based Harassment*) to all who participate in the workplace.

This means the application of harassment laws has been broadened to now also include:

1. persons previously not covered, including volunteers, interns and the self-employed. This is done by adopting the definition of "Persons Conducting a Business or Undertaking" (PCBU) and "Workers" from the model Work Health and Safety laws;

2. places not previously covered, where harassment occurs 'in connection' with one of the persons being a 'worker' or a 'person conducting a business or undertaking', meaning that the person being harassed does not actually need to be performing work in the workplace when the harassment occurs for harassment laws to apply; and

3. all members of parliament, judges and public servants for both Federal and State Governments.

Each of the above expansions of coverage is covered in further detail below.

1. EXPANSION TO PERSONS CONDUCTING A BUSINESS OR UNDERTAKING (PCBU) AND WORKERS

The operation of sexual harassment laws has been expanded to cover some types of people not previously covered by picking up the terminology or workers and persons conducting a business or Undertaking (PCBU) from work health and safety law.

A '**worker'** is anyone who carries out work in any capacity for a business, including employees, contractors, subcontractors, outworkers, apprentices, trainees, work experience students, interns, volunteers who carry out work and self-employed persons.

A '**person conducting a business or undertaking'** (PCBU) is a broad concept that extends beyond the traditional employer/employee relationship to include all types of modern working arrangements including partnerships, franchisors, head contractors, unincorporated associations, and sole traders (but not volunteer associations).

The Respect@Work changes make it unlawful for:

- a 'person conducting a business or undertaking' to sexually harass or harass on the grounds of sex, a 'worker' in the business or undertaking; or a person who is seeking to become a worker in the business or undertaking. There is no requirement that the conduct occur in connection with work where such a relationship exists.
    - This is intended to capture sexual harassment and sex-based harassment that occurs between people who do not fall within the definition of employer and employee (who were not previously protected), but who nevertheless have a workplace relationship.

> **EXAMPLE: Expanded coverage to conduct between PCBU's and workers**
>
> Tony runs a small medical practice. His receptionist is currently on maternity leave so he has arranged through a labour hire agency, Taylor Temporary Staffing, to have Rosalia, a labour hire temp to work in the practice in the interim. Tony and Rosalia bump into each other at the local dog beach one weekend and Tony invites Rosalia out for a drink and suggestively implies that he would be happy to help her find a permanent employee position in the medical practice "if there was something in it for him" in return. After Rosalia declines and states that she is uncomfortable about the requests, Tony begins spreading false rumours about Rosalia in the medical practice and asks the labour hire agency, Taylor Temporary Staffing to find her a new replacement because Rosalia is incapable of performing the necessary functions of her role. As Tony is a PCBU and Rosalia is a worker (labour hire worker) of the same medical practice, they are both covered by the sexual harassment changes under the Sex Discrimination Act. The physical location and time that the conduct occurred is not relevant as this provision is focused on whether a relationship exists.

- A worker in a business or undertaking to sexually harass, or harass on the ground of sex, a fellow worker; or a person who is seeking to become a worker in the business or undertaking. Similarly, this is intended to capture sexual harassment and sex-based harassment that occurs between people who are not necessarily employees, but are nevertheless working for the same business or undertaking. Again, so long as the relationship is established, there is no requirement that the conduct occurs in connection with work.

> **EXAMPLE: Expanded coverage to conduct between workers and fellow workers**
>
> Rashford is a policy officer and works remotely from his home under a flexible work arrangement. Charles, an intern undertaking a research project for the same business also works from his home under a flexible work arrangement. One evening Rashford sends Charles suggestive and inappropriate messages via social media out of work hours. Charles advises Rashford that the messages are unwelcome and 'blocks' him on his social media. Rashford then sends Charles a number of emails via their work email portal which includes sexualised and derogatory comments. As Rashford and Charles are both 'workers' (Rashford an employee, Charles an intern) of the same organisation they are workers covered by the sexual harassment provisions under the changes to the Sex Discrimination Act. The physical location (home-based work) and time (out of hours) that the conduct occurred is not relevant as the sexual harassment provisions are focused on whether a relationship exists.

2. EXPANSION TO CONDUCT WHERE THERE IS A 'CONNECTION' WITH ONE OF THE PERSONS BEING A WORKER OR PCBU

Where there is no working relationship between the person and a PCBU or worker, the Respect@Work changes have expanded the coverage of the sexual harassment provisions so that such conduct may nevertheless be captured by the harassment laws as long as there is a "connection" with one of the persons being a worker or a PCBU. This is intended to ensure that people are not exposed to sexual harassment by reason of engaging in activities in connection with their work, and workers do not use their position to engage in sexual harassment.

For example this could apply to:

- A PCBU or worker against another person (e.g. a customer, a supplier, or other member of the public) or visa versa;
- An employee or an employer against another person (or visa versa).

The term 'in connection with' does not mean that a 'worker' or 'PCBU', or 'employee' or 'employer' must be actually performing their work duties at the time the conduct occurs. Instead, the term 'in connection with' requires that they are engaged in some form of conduct or activity, or are visiting a particular place, as a result of being a 'worker' or 'PCBU', or 'employee' or 'employer'. This may include the following:

- Attending a pub as part of an organised working activity.
- A vehicle used to travel to work, a conference or meeting, or to meet clients.
- Visiting the workplace out of hours because of a connection to work, for example.
- To check the roster, collect payslips or collect belongings from a locker.
- Conduct that occurs out of work hours, such as through text message, if the communication arises out of working matters.
- Remaining in their workplace on a lunch break or after their shift has finished.

EXAMPLE: A worker in connection with their work against another person

Brett is a defence barrister working on a high-profile trial. While waiting for a hearing to commence, Brett initiates a conversation with Tammy, who is a junior solicitor working on a separate matter, and his client, Inga. Brett makes lewd and suggestive comments to both Tammy and Inga about their clothing and appearance. He also intentionally brushes against Inga's thigh and attempts to kiss her. Given that Brett is a self-employed barrister, he would now fall within the meaning of a worker and can therefore be liable for conduct prohibited under the Sex Discrimination Act. As he is attending the courthouse 'in connection' with his employment, both Tammy and Inga are protected under the sexual harassment provisions under the Sex Discrimination changes and could initiate a complaint.

EXAMPLE: A person against a worker in connection with their work

Meghan is a lawyer at a large legal firm. While attending an after-hours legal function at a court house which she was directed to attend by her employer, Meghan is sexually harassed by another attendee, Ian. Meghan and Ian have no prior relationship. Given that Meghan was attending the event 'in connection with' her employment, despite the event occurring after hours, she is protected under the sexual harassment provisions under the Sex Discrimination changes and could initiate a complaint.

EXAMPLE: A person against a worker in connection with their work

Anna is a part-time barista in a small café. Anna stops by the café on one of her rostered days off to collect her payslips and lodge a request for overtime. While in the café, two regular customers make a series of derogatory remarks about her appearance and attempt to grope her breasts. Given that Anna was attending the café 'in connection with' her employment, despite not performing work duties at the time, she is protected under the sexual harassment provisions under the Sex Discrimination changes and could initiate a complaint.

3. EXPANSION TO MEMBERS OF PARLIAMENT, JUDGES AND PUBLIC SERVANTS

The Act has removed a long- standing anomalous exemption that prevented parliament, judges and public servants from making claims of discrimination or harassment under the Sex Discrimination Act. No such exemption had existed in other federal discrimination laws and it has now been removed.

REMINDER: What is sexual harassment?

Sexual harassment is:

- an unwelcome sexual advance, or an unwelcome request for sexual favours, or
- unwelcome sexual behaviour which a reasonable person would anticipate that the person harassed would be offended, humiliated or intimidated.

It has nothing to do with mutual attraction or consensual behaviour.

Examples

- staring, leering or unwelcome touching, including deliberately brushing up against a person
- suggestive comments or jokes
- unwanted repeated invitations to go out on dates or unwanted requests for sex
- intrusive questions about a person's private life or body
- emailing pornography or sexually explicit jokes
- displaying posters, magazines or computer screen savers of a sexual nature
- communicating content of a sexual nature via social media.

Sexual harassment is prohibited in all work-related activity, including at the workplace and at work-related activities such as training courses, conferences, field trips, work functions and office Christmas parties. It is also prohibited between employees and customers.

REMINDER: What is harassment on the grounds of sex?

See *Section B – Prohibition on Sex-Based Harassment* which covers and explains this new ground.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

- Employers should ensure that their policies and training programs are updated to align to the expanded range of individuals and circumstances that can be subject to harassment laws.
- Employers should update their policies to ensure they contain clear mechanisms for complaints to be made against persons who are not employees or workers (e.g. customers, suppliers or members of the public).
- Employers should talk and exchange information with other businesses they interact with to ensure they understand the expanded coverage and to ensure that adequate measures are put in place to prevent sexual harassment e.g. suppliers, commercial landlords, onsite food vendors or contractors.
- Employers should talk to other businesses that share any worksite or premises about how to manage shared areas such as bathroom and kitchen facilities to ensure these areas are safe for workers.
- Employer should talk to workers about when and where they feel at risk of experiencing sexual harassment when they perform their work e.g. serving customers at night or working at a client's home and what steps could be taken to control any risks identified such as security personnel, video surveillance, refusal of service, lighting, furniture, barriers etc.

NOTE: While the above sets out specific action employers can take in light of the changes concerning the expanded coverage of the SD Act, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the *Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

B. Prohibition on Sex-Based Harassment

The Respect at Work Act introduced a new express prohibition on sex-based harassment in the Sex Discrimination Act (SD Act).

This is in addition to sexual harassment and sexual discrimination, which are already expressly prohibited in the SD Act.

What is sex-based harassment?

Sex-based harassment is any unwelcome conduct of a seriously demeaning nature because of a person's sex, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

This means, a person harasses another person on the ground of sex if:

- A person engages in unwelcome conduct of a seriously demeaning nature in relation to another person by reason of the person's sex (or a characteristic that appertains generally or is generally imputed to that person's sex); **AND**
- The person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The prohibition on sex-based harassment has a number of elements which will be covered in this section as follows:

A. **'BY REASON' (BECAUSE) OF A PERSON'S SEX**
B. **UNWELCOME CONDUCT**
C. **SERIOUSLY DEMEANING NATURE**
D. **REASONABLE PERSON TEST**
E. **OFFENDED, HUMILIATED OR INTIMIDATED**

A. 'BY REASON' (BECAUSE) OF A PERSON'S SEX

Harassment on the ground of sex only relates to harassment that occurs by reason of (because of):

- The sex of the person harassed
- A characteristic that relates generally to that person's sex (e.g. anatomical attributes), or
- A characteristic that is generally attributed to that person's sex (e.g. gendered stereotypes, including characteristics generally attributed by society to one sex or the other, such as caring responsibilities being the domain of women).

This will involve a consideration of the reason or reasons why the person engaged in such conduct. Importantly, it does not matter whether the particular reason (such as sex) is the dominant or sole reason for the conduct – it just has to be one of the reasons for the conduct.

Unless the harassment was taken 'by reason of' (because of) the person's sex (or characteristic that relates generally or is generally attributed to that person's sex), there will be no breach of the sex-based harassment provisions.

EXAMPLE – By reason of a person's sex

Dale works as a bartender at the Bottomless Tavern where he serves drinks to customers. Dale's manager at the Bottomless Tavern on a number of occasions has said to Dale that he is not as 'attractive and attentive' as the female bar staff and does not offer the same 'customer experience' because he is a male. Assuming all the other elements can be established, this conduct would amount to harassment on the grounds of sex.

EXAMPLE – By reason of characteristics that appertain generally to a person's sex

Brian is an intern at a sporting club. During his first week of work he is belittled by his colleagues for having an "excessively high-pitched voice" and "sounding more like a girl than a boy". Assuming all the other elements can be established, this conduct would amount to harassment on the grounds of sex.

EXAMPLE – By reason of a characteristic that is generally imputed to persons of that sex

Mary is an administrative officer in an accounting firm. Her supervisor, James, harassed her on the basis she "should be at home taking care of her husband and children" and "is a selfish and terrible mother" for remaining in the workforce. Assuming all the other elements can be established, this conduct would amount to harassment on the grounds of sex.

B. UNWELCOME CONDUCT

'Conduct' includes making a statement orally or in writing, and is not limited to just physical acts such as gestures or physical contact. For example, 'conduct' may include spoken statements or written letters, text messages, jokes, social media messages or emails.

The term ***unwelcome conduct*** gets its meaning from case law and will depend on the facts of the matter at hand. The key consideration is the allegedly harassed person's attitude to the conduct at the time.

Some examples where the courts have described conduct as being 'unwelcome' include in relation to conduct that is:

- Not solicited or invited, and the individual regards that conduct as undesirable or offensive.
- Disagreeable to the person to whom it is directed.

A complainant does not need to have explicitly addressed the behaviour or informed the perpetrator that the conduct is unwelcome. However, where the parties voluntarily and consensually enter into a pattern of conduct, this is more likely to indicate that conduct of that nature is not unwelcome.

C. SERIOUSLY DEMEANING NATURE

The concept of a ***seriously demeaning nature*** is a new concept that is yet to be interpreted by the courts. Some clarity can however be gained by the dictionary definition of demeaning: to 'demean' is to debase or degrade another person. More guidance may also become available as the case law develops.

Depending on the circumstances, unwelcome conduct of a seriously demeaning nature may include:

- Asking intrusive personal questions based on a person's sex
- Making inappropriate comments and jokes to a person based on their sex
- Displaying images or materials that are sexist, misogynistic or misandrist
- Making sexist, misogynistic or misandrist remarks about a specific person
- Requesting a person to engage in degrading conduct based on their sex.

The new provision is not intended to capture mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature.

EXAMPLE – Not sufficiently serious

Sarah visits the mechanic to get her car fixed. The mechanic provided her with an overly simplistic and condescending explanation about the car repairs he had undertaken on her car. This would not likely meet the threshold of offensive, humiliating or intimidating simply because it was irritating for Sarah. As such, it would not constitute sex-based harassment.

D. REASONABLE PERSON TEST

In order to amount to sex-based harassment, the 'reasonable person' test must also be satisfied.

What is the reasonable person test?

The reasonable person test is: Whether a reasonable person (the hypothetical, reasonable, average person in our society), having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

This does NOT mean you need to assess what the actual person who engaged in the conduct would have anticipated, nor does it require any assessment of what the person who experienced the conduct would have anticipated. All you need to consider is the hypothetical, reasonable bystander and whether they would have anticipated that the person harassed would be offended, humiliated or intimidated by the unwelcome conduct.

When 'having regard to all the circumstances' you should considering things like the following:

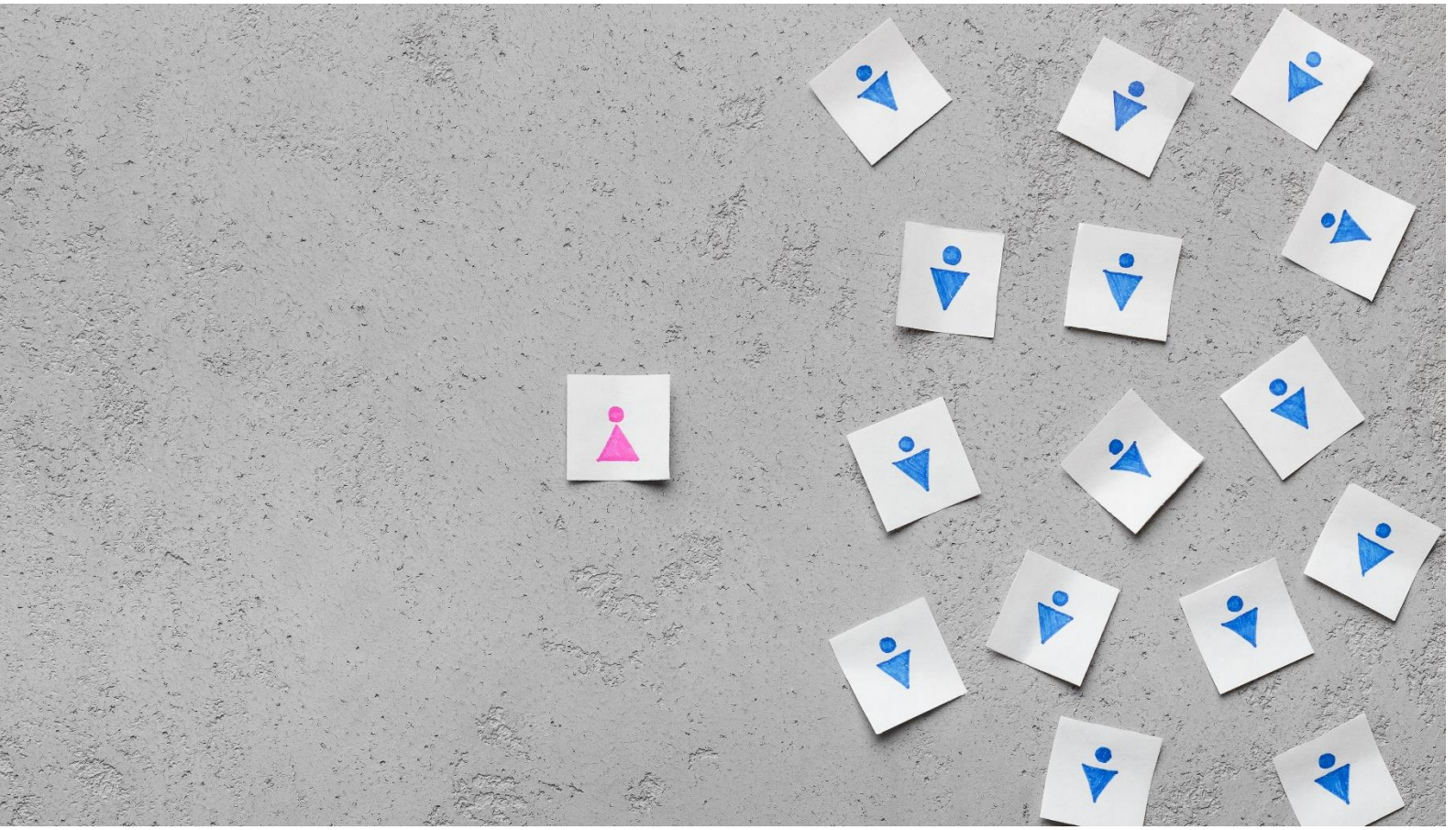
- The sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed
- The relationship between the person harassed and the person who engaged in the conduct
- Any disability of the person harassed
- Any power imbalance in the relationship between the person harassed and the person who engaged in the conduct
- The seriousness of the conduct
- Whether the conduct has been repeated
- Any other relevant circumstance.

E. WHAT DOES 'OFFENDED, HUMILIATED OR INTIMIDATED' MEAN?

The words 'offended, humiliated or intimidated' bear their ordinary meaning:

- Offend: to "offend" can mean to hurt or irritate the feelings of another person.
- Humiliate: the meaning of "humiliate" is closely connected to a loss of or lowering of dignity for the person who the conduct is directed towards.
- Intimidate: the word "intimidate" is used to describe conduct that frightens, overawes, subdues or influences/induces by another person by fear.

Whether a person's conduct has the possibility of offending, humiliating or intimidating in each case depend on the particular facts and circumstances in which the conduct occurs.



CASE EXAMPLES – Offensive, humiliating or intimidating

The following examples relate to court decisions which illustrate the level of conduct that previously has met the threshold of being offensive, humiliating or intimidating. While these cases related to sexual harassment or sex discrimination, they may provide some level of guidance in relation to what may be considered to be offensive, humiliating or intimidating in relation to sex-based harassment.

- The cumulative effect of numerous petty acts, including nuisance telephone calls, heavy handed jokes, and threatening jokes, was considered sufficiently offensive, humiliating and intimidating as to constitute sex discrimination *(Hill v Water Resources Commission (1985) EOC 76, 290).*
- It was considered to be intimidating when a male employee turned off the lights and walked up behind a female employee while she was seated, touched her hand and demanded that she agreed to "come and talk to [him] about something". The court found this conduct would raise a reasonable apprehension in a woman in the complainant's circumstances of the likelihood of an impending sexual advance *(Ewin v Vergara (No 3) (2013) 307 ALR 576).*
- Displaying pornography in the workplace was considered to be offensive, and constituted an ongoing act of sexual harassment to those to whom the material was unwelcome *(Lee v Smith [2007] FMCA 59, 198).*
- It was considered to be offensive and humiliating for a male co-worker to request sexual favours from a female co-worker by email and text message. The court specifically noted that the complainant had 'indicated her attitude quite clearly' that these requests were unwelcome and that she would be offended if the requests continued. Further, the court found that a reasonable person would have anticipated that the complainant would be humiliated by this conduct because it suggested that she was prepared to have a sexual relationship with the respondent, despite her clearly expressing her attitude to the contrary *(Poniatowska v Hickinbotham [2009] FCA 680, 289).*
- In another matter, it was found that a male co-worker slapping another male co-worker on the buttocks did not constitute sexual harassment. Based on the relationship between the two workers and the broader workplace culture (among other factors), the court found this conduct was not 'of a sexual nature'. It found that the weight of evidence before the court in that matter is that a person slapping a friend on the buttocks as a joke to startle him, or as a sign of friendship or camaraderie, would not be expected to be offensive, humiliating or intimidating *(Ford v Inghams Enterprises Pty Ltd (No 3) [2020] FCA 1784).*

HOW DOES THE NEW PROHIBITION ON SEX-BASED HARASSMENT INTERACT WITH SEXUAL HARASSMENT AND SEX DISCRIMINATION, WHICH ARE ALREADY UNLAWFUL?

The new prohibition on sex-based harassment is intended to capture conduct which falls into the gap between sexual harassment and sex discrimination. That is, conduct which is not of a sexual nature (and therefore not sexual harassment), and does not meet the legal test for sex discrimination.

In practice there is likely to be overlap, and harassment on the ground of sex may itself constitute sexual harassment and/or sex discrimination.

Currently complaints can be raised as a matter of sexual harassment, sex discrimination, or both. Given this it is likely that some future complaints may encompass all three types of unlawful conduct if they all apply.

WHEN CAN EMPLOYERS BE HELD LIABLE?

Putting to one side employers who may themselves engage in unlawful conduct and therefore be personally liable, employers can also be held legally responsible for the actions of their employees or agents in two ways:

1. **Vicarious liability:** Where conduct occurs in connection with a person's employment or duties in certain circumstances. This is known as 'vicarious liability'.
2. **Accessory liability:** Where an employer is considered to have 'caused, instructed, induced, aided or permitted' another person to engage in sex-based harassment. This is known as a form of 'accessory' or 'ancillary' liability. Note that other individuals, such as supervisors and managers can also be held liable under these provisions.

Note that employers can also be held to be liable for victimisation of a person in connection with a complaint of sex-based harassment (or sexual harassment), see *Section C – Victimisation*.

1. VICARIOUS LIABILITY: EMPLOYEE/AGENT CONDUCT THAT OCCURS 'IN CONNECTION WITH' A PERSON'S EMPLOYMENT OR DUTIES

Where an employee or agent does, in connection with their employment or duties, an act that would be unlawful under the sex-based harassment provisions, the law will treat an employer as if they have also done the act, unless an employer can prove they had taken all reasonable steps to prevent the employee or agent from engaging in conduct of the kind that occurred.

In practice this means employers will now need to demonstrate that they have taken all reasonable steps to prevent their employees or agents from engaging in sex-based harassment (as well as sexual harassment and sex discrimination if relevant) in order to avoid liability if any such incidents occur.

If an employer cannot demonstrate that they have taken 'all reasonable steps' to prevent the harassment from occurring, then both the perpetrator and the employer could be jointly liable for the behaviour.

Connection to a person's employment or agency

A person complaining of sex-based harassment must establish that there is a relationship of employment or agency and that the alleged unlawful act occurred 'in connection with' their employment, or their duties (if they are an agent).

The courts have interpreted the phrase 'in connection with' generously in the context of employer liability (vicarious liability). Some examples include sexual harassment of an employee by another employee while off-duty in staff accommodation quarters, at accommodation attended by employees while attending a work-related conference, and sexual assault that occurred in a home, after a work event.

What does 'all reasonable steps' mean?

The Sex Discrimination Act does not provide a definition of 'all reasonable steps', rather, the court will consider it on a case by case basis. This is because what might be considered 'reasonable' will depend on the facts of the particular matter including the size, structure and resources of a particular employer.

However, all employers should adopt a number of preventative measures, including:

1. Creating a healthy and safe work environment based on respect
2. Developing and implementing a sexual harassment / sex-based harassment policy
3. Providing or facilitating education and training on sexual harassment / sex-based harassment
4. Considering any complaints seriously when they arise and take prompt action to investigate and address improper conduct to ensure it does not re-occur.

See *Practical Guidance for Employers – Steps to Prevent Sexual and Sex-Based Harassment*, below, for further information and practical examples of specific actions employers can take. Employers may also wish to seek advice that is specific to their particular circumstances, given that what is considered to be 'reasonable' will depend on a range of factors that will vary from workplace to workplace.

Note that it is not necessary for an employer to be aware of an incident of harassment for in order for them to be found liable for the conduct. In practice, this means employers should take proactive steps regardless of whether sex-based harassment (or sexual harassment / sex discrimination) is a live issue in the particular workplace or not.

PRACTICAL GUIDANCE FOR EMPLOYERS – STEPS TO PREVENT SEXUAL AND SEX-BASED HARASSMENT

Below are some practical steps employers may wish to consider when taking proactive steps to prevent sexual harassment in the workplace.

1. Creating a healthy and safe work environment based on respect

Taking steps to create a work environment that is healthy, safe, based on respect and that takes sexual harassment seriously can reduce the instances of sexual and sex-based harassment in the workplace. Some key steps towards creating a healthy and safe work environment include:

- Distributing communications from senior leaders that sexual and sex-based harassment is against the law and will not be tolerated in the workplace and ensuring senior leaders model appropriate behaviour.
- Supporting and encouraging bystanders to report any inappropriate behaviour.
- Conducting regular audits to monitor the incidence of sexual and sex-based harassment and effectiveness of the complaint process.

2. Develop and implement a sexual harassment policy

A key element of preventing sexual and sex-based harassment is developing and implementing a written policy that makes clear that sexual and sex-based harassment is unlawful and will not be tolerated.

Sexual harassment policies can be stand-alone policies or incorporated as part of a broader policy on workplace harassment or discrimination. Employers may also wish to consider addressing sexual and sex-based harassment in other relevant policies, such as social media policies.

A sexual harassment policy should include the following key elements:

- **Recognise that sexual harassment and sex-based harassment will not be tolerated under any circumstance**, and the employer is committed to ensuring a safe work environment free from sexual and sex-based harassment.
- **Recognise that sexual harassment and sex-based harassment is unlawful**, and that legal action can be taken against individual employees and the employer for workplace sexual harassment.
- **Clearly define sexual harassment and sex-based harassment** to ensure that workplace participants have a clear understanding of what it means. It may also be useful to provide examples of the types of behaviours that may constitute sexual or sex-based harassment.
- **Identify the organisation's strategy for preventing and addressing sexual and sex-based harassment**, for example, implementing training and awareness-raising strategies to ensure all employees know their rights and responsibilities, encouraging the reporting of behaviour that breaches the policy, providing an effective complaints procedure, guaranteeing protection against victimisation.
- **Explain the consequences of breaching the policy**, which depending on the severity of the case might include things like making an apology, counselling / additional training, transfer, demotion or dismissal.
- **Identify the responsibilities of management and staff**, and information about the role, rights and responsibilities of bystanders should also be included.
- **Outline the available options for dealing with sexual or sex-based harassment**, so workplace participants know where they can go to get help if they are sexually harassed or harassed on the basis of their sex in the workplace or witness such behaviour. At a minimum the policy should refer to the organisation's sexual harassment / sex-based harassment complaint process.

3. Ensure workplace participants receive ongoing training on sexual harassment

All workplace participants should be made aware of the policy and their rights and obligations in relation to sexual harassment and sex-based harassment. Employers may wish to include sexual and sex-based harassment training as part of any workplace induction. Ongoing education and training is also important in effectively implementing a sexual and sex-based harassment policy.

4. Consider complaints seriously when they arise and promptly investigate and address them

Cases have identified that, even where sexual harassment policies have been implemented properly, a failure to take prompt response action once sexual harassment has occurred can result in an employer failing to take all reasonable steps to prevent sexual harassment (*Johanson v Michael Blackledge Meats* [2001] FMCA 6 at [106]; *Hughes v Narrabi Bowling Motel Limited* [2012] NSWADT 161 at [72]).

Accordingly, it is important that businesses react promptly when issues are identified to initially investigate and then appropriately address any inappropriate behaviours. The reactive measures taken must be sufficiently proportionate to ensure (as far as possible) that the kind of behaviour that has occurred will not be repeated.

CASE EXAMPLE – Vicarious liability

Note: The following example relates to Federal Court decision which illustrates what a court may consider to be 'all reasonable steps'. While this case relates to sexual harassment, it may provide some level of guidance as to what might be considered to be 'all reasonable steps' in relation to preventing sex-based harassment.

Ms R and Mr T were both employed as sales representatives of a software company. They worked closely together on a project. Ms R claimed that over a period of six months she was subjected to repeated and numerous sexual comments and advances by the individual respondent, which resulted in a psychological injury. As a result of Mr T's behaviour, Ms R resigned. Ms R subsequently commenced legal proceedings against the employer alleging that she had been unlawfully sexually harassed by Mr T.

Employer's liability

The court found that Ms R had been sexually harassed by Mr T. In considering the employer's liability, the court considered the sufficiency of the employer's policies, training and investigation process.

The employer argued that it had taken sufficient 'reasonable steps' to prevent the sexually harassing conduct. At the time of the sexual harassment, the employer had in place:

- a Global 'Code of Ethics and Business Conduct' (Code), which included a prohibition of sexual harassment, and
- compulsory online sexual harassment training, to be completed by employees every two years.

The court found that the employer did not take all reasonable steps to prevent the sexual harassment. In particular, this was because the training package:

- Did not state in clear terms that sexual harassment is against the law
- Did not identify the source of the legal requirement
- Did not include any clear statement that an employer might be vicariously liable for sexual harassment by an employee.

The court held that these elements were necessary 'to bring to the attention of the employees', in addition to a statement that sexual harassment is against company policy.

Ms R was awarded $100,000 in general damages in addition to $30,000 for economic loss.

Reference: Richardson v Oracle Corporation Australia [2013] FCA 102 [163] and [2014] FCAFC 82.

2. 'CAUSING, INSTRUCTING, INDUCING, AIDING OR PERMITTING' SEX-BASED HARASSMENT

Employers and individuals (such as managers) can be held liable for the conduct of another if they cause, instruct, induce, aide, or permit the harassment of another person on the ground of sex. This is known as acting as an 'accessory' or 'ancillary'.

The effect of this amendment is to prohibit a person from assisting another person (as well as actually engaging themselves) in sex-based harassment (or sexual harassment).

To be liable, an organisation or individual must have contributed to the sexual or sex-based harassment either knowingly, recklessly or through wilful blindness.

EXAMPLE – Ancillary liability

Steven is a supervisor at a real estate agency. Steven is informed that a junior employee, Jamie, is harassing another employee on the basis of their sex, including by saying on numerous occasions that they shouldn't be working on particular sales projects as "females are too soft to negotiate", both directly to the employee and publicly in meetings. Steven does not take any action, and instead jokes and encourages the conduct. In these circumstances, the supervisor Steven may be held liable as an accessory to the harassment as he aided and permitted its continuation.

EXAMPLE – Sex-based harassment

Jimmy and Olivia work together in a small grocery store. Jimmy has a close relationship with the owner of the business, Roy. Jimmy frequently makes belittling comments to Olivia about her appearance, both in private and in front of customers, such as "couldn't you pop on a dress for work, you don't look very feminine in those pants" and "why don't you put some lipstick on and look nice for the customers?" On occasions when Olivia raises an issue with Jimmy, for example where he leaves split milk in the aisle or comes to work late, Jimmy makes inappropriate comments, telling her to "relax and stop being hormonal". During lunch breaks, Jimmy frequently tells Roy he should "get Olivia to fetch them a sandwich, it's what women are for after all". Roy is aware of the conduct but takes no action to prevent it or address it.

Olivia initiates a complaint against Jimmy on the basis that his conduct is unwelcome and seriously demeaning, and causes her to feel humiliated and offended. Olivia also lodges a complaint against Roy on the basis that he did not take reasonable steps to prevent Jimmy from engaging in the harassing conduct.

EXAMPLE – Sex-based harassment

Genevieve is a supervising partner in a law firm and Adam is a student lawyer on his final placement of supervised legal training that he must satisfy in order to be admitted to practice as a lawyer. Genevieve is Adam's supervisor and is responsible for approving his placement.

Genevieve initially gave Adam positive feedback about his performance. A few weeks later, Genevieve asks Adam whether he would like to go out for a drink with her – which Adam politely declined. From then onwards, Genevieve frequently provided highly critical feedback and suggests she will not approve Adam's placement. In particular, Genevieve makes comments about the limits of Adam's ability to prepare briefings given he is male and "lacks attention to detail", and that he cannot relate to clients given that "males lack empathy and compassion". Adam's confidence is undermined by Genevieve's conduct to the point where he cannot conduct client meetings and stops coming to work.

Adam initiates a complaint against Genevieve on the basis that her comments were unwelcome and seriously demeaning, and he was humiliated by her conduct.

What are the consequences for breaching sex-based harassment laws?

An employee may lodge a complaint about sex-based harassment to the Australian Human Rights Commission (AHRC). Complaints will be subject to the AHRC's investigation and conciliation processes (this is the same way as sex discrimination or sexual harassment complaints are dealt with). If the complaint is not resolved at that stage, complainants may then bring a civil claim for damages in court.

While there is no case law in relation to the new legislative provision relating to sex-based harassment as yet, in relation to sexual harassment cases damages awarded by courts and tribunals in favour of complainants have been increasingly rising to reflect the psychological damage sexual harassment can have on individuals, and to align with prevailing community standards.

As mentioned above, employers can be held to be vicariously liable for the actions of their employees or agents, and individuals could also be subject to personal liability if breaches are proven.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

In response to the new express prohibition on sex-based harassment, employers should consider taking the following action:

- **Policies:** Employers should review any existing policies to ensure that they address the new prohibition against harassment on the ground of sex. Any employers who do not yet have a policy addressing unacceptable workplace behaviour should consider developing and implementing one.

- **Training:** Employers should review their training programs to ensure they address the new prohibition against harassment on the ground of sex and consider providing refreshed training to employees. Any employers who do not yet conduct training on acceptable workplace behaviour should consider developing and implementing such a program.

- **Creating a healthy and safe work environment:** Employers should ensure they are taking appropriate steps to prevent sex-based harassment (as well as sexual harassment), which will not only encourage a productive and harmonious workplace, but will go some way to protecting employers from vicarious liability. This could include, for example, distributing communications that sexual and sex-based harassment is against the law and will not be tolerated in the workplace, and ensuring senior leaders model appropriate behaviour. See *Practice Guidance For Employers – Steps to Prevent Sexual and Sex-Based Harassment,* above, for more information.

NOTE: While the above sets out specific action employers can take in light of the changes concerning sex-based harassment, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the *Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

C. Victimisation

The Respect at Work Act has introduced a new provision which provides that it is unlawful to victimise a person if they have taken (or propose to take) action in relation to a discrimination or harassment claim. This is considered to be unlawful discrimination. An employer can also be held liable for victimisation of an employee by another employee.

While victimisation is already a criminal offence, this change makes clear that victimisation under the Sex Discrimination Act (SD Act) can also form the basis of a civil action, meaning a person can make a complaint to the Australian Human Rights Commission (AHRC), and if necessary, initiate civil proceedings against the alleged perpetrator.

WHAT IS VICTIMISATION?

Victimisation involves threating or subjecting a person to detriment because they took certain action, such as:

- Making or proposing to make a complaint or bring proceedings under the SD Act or AHRC Act
- Taking (or proposing to take) action relating to the making of a complaint or bringing of proceedings, including giving information, producing documents, attending a conference, or appearing as a witness
- Reasonably asserting their rights, or supporting someone else's rights under the SD Act or AHRC Act
- Making an allegation that a person has acted unlawfully under the SD Act.

Victimisation may include, for example:

- Moving an employee to a position with lesser responsibilities while their complaint is being considered.
- Denying an employee the opportunity of a promotion because they made a sexual harassment complaint.
- Providing a critical reference to an employee because they made a sexual harassment complaint.
- Dismissing an employee or refusing further contract work because they made a complaint of sexual harassment.

WHEN WILL A PERSON / ORGANISATION NOT BE LIABLE FOR VICTIMISATION?

A person / organisation will not be liable for victimisation if they can prove that the allegation was false and not made in good faith. This is intended to ensure that people are protected from vexatious or opportunistic complaints.

EXAMPLE – Victimisation conduct

Hayley is a junior architect at Snowy River Architecture Company. Will is a senior architect in the company, and Jamie and Matt are Will's administrative assistants. Hayley has lodged a number of internal complaints alleging that Will sexually harassed her on multiple occasions. The matter was not resolved through the internal human resources process, so Hayley lodges a complaint with the AHRC against Will. In her complaint she mentions that Jamie and Matt are witnesses. Will then pressures Jamie and Matt to lie during the conciliation process conducted by the AHRC by threatening to reduce their work hours if they support Hayley in her complaint. Both Jamie and Matt then lodge a separate complaint under the new victimisation provisions of the SD Act against Will.

WHAT HAPPENS IF SOMEONE EXPERIENCES VICTIMISATION?

This change means that people who experience victimisation conduct for the purposes of the SD Act are able to make a complaint to the Australian Human Rights Commission (AHRC) using the normal complaints procedure. If necessary, they can initiate civil proceedings in the Federal Court or the Federal Circuit Court.

The criminal offence provision remains as a separate mechanism for the Australian Federal Police to address particularly egregious forms of victimisation conduct. This means that victimisation can form the basis of two causes of action – civil and criminal.

CASE STUDY – Victimisation of a bystander

Below is an example of a complaint that was resolved in conciliation at the Australian Human Rights Commission, which was resolved without admission of liability.

The complainant worked as consultant at the company (respondent company). He claimed that he was victimised because the respondent company terminated his contract after he raised allegations of sexual harassment on behalf of his colleague.

The respondents denied victimisation, and claimed that his contract was instead terminated due to loss of confidence in his ability to perform his role.

The complaint was resolved with an agreement that the respondents pay the complainant $7,500 and provide him with a statement of regret.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

In light of the recent changes in relation to victimisation, employers may wish to consider:

- Reviewing any existing policies and procedures to ensure they address victimisation. Any employers who do not yet have a policy addressing unacceptable workplace behaviour should consider developing and implementing one (that also addresses victimisation).
- Ensuring victimisation is included as part of any refreshed training that employers may be looking to provide in response to the wider changes regarding sexual harassment.
- Ensuring complaints procedures make clear that no employee will be victimised or disadvantaged for making a complaint.

NOTE: While the above sets out specific action employers can take in light of the changes concerning victimisation, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the *Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

D. AHRC Complaints

HOW LONG DOES A PERSON HAVE TO MAKE A COMPLAINT UNDER THE SEX DISCRIMINATION ACT TO THE AHRC?

There is no specific time frame in which a complaint must be lodged with the AHRC. However, the AHRC President has the power to terminate a complaint if the complaint was lodged more than 24 months after the alleged act or practice took place. Prior to this amendment, the President had the power to terminate a complaint lodged more than 6 months after the alleged events.

WHAT DISCRETION DOES THE AHRC HAVE TO TERMINATE A COMPLAINT?

The President of the AHRC must undertake an initial assessment of a complaint under the Sex Discrimination Act to determine whether it should be terminated before commencing an inquiry or attempting to conciliate a complaint.

There are two types of termination grounds: discretionary and mandatory.

The **mandatory termination grounds** include where the President is satisfied that:

- the complaint is trivial, vexatious, misconceived or lacking in substance;
- there is no reasonable prospect of the matter being settled by conciliation; or
- there would be no reasonable prospect of success in court.

There are also **discretionary termination grounds** under which the President **may** terminate a complaint, where satisfied that in all the circumstances an inquiry, or a continuation of an inquiry, is not warranted where:

- the President is satisfied that the alleged acts, omissions or practices are not unlawful discrimination;
- the complaint was lodged more than 24 months after the alleged acts, omissions or practices took place;

  This is an increase from six months under the Respect@Work Act changes, in recognition that complaints initiated under the Sex Discrimination Act, including for sexual harassment, may be difficult for a person to lodge within six months
- the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;
- in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
- the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
- in a case where the subject matter of the complaint has already been dealt with by the AHRC or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
- the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
- the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court.

IS THE BASIS ON WHICH A COMPLAINT IS TERMINATED IMPORTANT?

Yes, when a matter is terminated, an application can only be made to the Federal Court or Federal Circuit Court if the court concerned grants leave for the complainant to do so, unless the complaint was terminated by the President on one of the following grounds:

- The subject matter of the complaint involves an issue of public importance that should be considered by the courts; or
- There is no reasonable prospect of the matter being settled by conciliation.

If a complaint is terminated on either of these grounds, there is no requirement to seek leave of the court concerned. For all other termination grounds, leave of the court is required before any application can be made.

COMMENCING AN INQUIRY AND NOTIFICATION OBLIGATIONS

If the President decides not to terminate a complaint at the initial assessment stage, the President is then required to inquire into and attempt to conciliate the complaint.

If the President has decided to inquire into a complaint, the President must notify:

- The respondent(s) to the complaint (unless to do so would prejudice the safety of a person); and
- People who are the subject of an adverse allegation (unless to do so would prejudice the safety of a person or it is not practicable to do so).

An adverse allegation is defined in the AHRC to mean an allegation that acts, omissions or practices have occurred, and those acts, omissions or practices are unlawful discrimination.

CONCILIATION

If a complaint proceeds to a conciliation conference the AHRC Act provides that:

- the conciliation conference is to be conducted in private; and
- evidence of anything said or done by a person in the course of a conciliation is not admissible in any proceedings relating to the alleged acts or practices. With one exception, where court proceedings have been instituted against a respondent, in deciding whether to award costs in the proceedings, a court may have regard to any offers made by the complainant or respondent to settle the matter that have been rejected. This is intended to discourage clearly unmeritorious complaints from progressing to court and to deter recourse to courts where earlier settlement offers have been made that may be regarded as equivalent to court ordered remedies.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

- Employers should already be ensuring information relating to sexual discrimination complaints are recorded and protected by reasonable security safeguards.
- In light of the termination threshold change from 6 to 24 months under the Respect@Work Act, employers should ensure any files or reports associated with a complaint or an investigation are kept in secure storage for a minimum of 24 months. If a complaint is subsequently lodged with the AHRC it may request records as part of its investigation into the allegations. Records relating to the complaint may demonstrate that steps were taken to deal with the matter. Evidence of any internal action that was taken may also assist in reducing liability.

NOTE: While the above sets out specific action employers can take in light of the changes concerning the timeframe for complaints, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the *Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

E. Stop Sexual Harassment Order

The existing anti-bullying jurisdiction in the Fair Work Act has been amended to provide that the Fair Work Commission (FWC) can make an order to stop sexual harassment in the workplace.

This means that a worker may apply to the Fair Work Commission for an order to stop sexual harassment, bullying, or both.

Important note: not all workers will be eligible to apply for a stop sexual harassment order. Workers will be covered by the anti-bullying jurisdiction if they experience sexual harassment at work in a constitutionally covered business. This is the same coverage as under the FWC's anti-bullying jurisdiction. You can check eligibility using the FWC's Anti-Bullying Benchbook, available here.

The FWC's new jurisdiction concerning stop sexual harassment orders commences on 12 November.

WHEN CAN THE FAIR WORK COMMISSION ISSUE A STOP SEXUAL HARASSMENT ORDER?

The FWC is empowered to make a stop sexual harassment order in circumstances where a worker has made an application to the FWC and the FWC is satisfied that:

- The worker has been sexually harassed by one or more individuals while the worker is at work, AND
- There is a risk the worker will continue to be sexually harassed at work by the individual or individuals.

The conduct does not need to be repeated to qualify (i.e. it may be a single instance of sexual harassment).

WHO IS A 'WORKER' IN THIS CONTEXT?

For the purposes of a stop sexual harassment order, a 'worker' takes its meaning from the *Work Health and Safety Act 2011* (Cth) and broadly speaking is an individual who carries out work in any capacity for a person conducting a business or undertaking. This can include an employee, a contractor or subcontractor, an outworker, an apprentice or trainee, a student gaining work experience, or a volunteer.

WHAT DOES 'AT WORK' MEAN?

The expression 'at work' is not defined in the legislation. However, it has been considered by the FWC in the context of the anti-bullying jurisdiction so some parallels will be able to be drawn:

- A worker may be 'at work' even if required to perform work at a place other than the employer's premises. For example, an employee of a labour hire company may be considered to be 'at work' even though they are performing work at the host firm's premises.
- The alleged conduct does not necessarily have to occur while the worker is actively engaged in work so long as the activity is authorised or permitted by an employer. For example, it may include entering, moving about and leaving a workplace, being on a meal break or accessing social media while at work.

WHAT TYPE OF ORDERS CAN BE MADE?

The Fair Work Commission can order anything it thinks is appropriate to prevent the worker from being sexually harassed at work. However, the FWC is NOT empowered to make an order requiring a financial payment.

Some examples of orders the FWC may make could include orders requiring:

- The individuals or group to stop the specified behaviour
- Regular monitoring of behaviours by an employer
- Compliance with any policy the employer has addressing sexual harassment
- Requiring an employer to provide information and additional support and training to workers
- A review of the employer's sexual harassment policy (or other related policy).

Orders can apply to both an employer as well as others involved.

Considerations

In considering what order to make to prevent further sexual harassing conduct, the FWC is required to take the following things into account:

- The outcomes of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body
- Any procedure available to the worker to resolve grievances or disputes
- The outcomes of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes, and
- Any other matters that the FWC considers relevant.

WHO CAN A STOP SEXUAL HARASSMENT ORDER APPLY TO?

The existing case law relating to stop bullying orders (which is relevant in relation to stop sexual harassment orders) indicates that orders can apply to a broad range of persons, including co-workers, employers and also visitors to the workplace where appropriate.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

Where an incident of sexual harassment has occurred, employers should already be ensuring they have effective procedures in place for responding to matters involving sexual harassment.

In light of the Fair Work Commission's new role in this space, ACCI recommends employers review and if necessary enhance the effectiveness of their responses to workplace sexual harassment by:

- Establishing and implementing an internal complaints procedure (or reviewing existing complaints procedures) to ensure there is a clear process in place for sexual harassment complaints to be dealt with appropriately and promptly.
- Regularly informing workforce participants about the existence of complaint procedures and how they can be used to address sexual harassment in the workplace.
- Investigating sexual harassment complaints and taking appropriate remedial action.
- Keeping confidential records of complaints.

Effectively resolving matters internally will reduce the necessity for a third party such as the Fair Work Commission to get involved, and will likely play an important role in preventing other instances of sexual harassment in the future.

NOTE: While the above sets out specific action employers can take in light of the changes concerning stop sexual harassment orders, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the the *Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

F. Unfair Dismissal

The Respect at Work Act makes two key amendments to the unfair dismissal regime, which are particularly relevant for employers in assessing whether termination may be an appropriate response to an employee engaging in sexual harassment in connection with their employment, and understanding the risks relating to any potential unfair dismissal claims the employee may have in relation to the termination of their employment.

The two key changes in relation to the unfair dismissal provisions are as follows:

1. The Fair Work Act has been amended to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal.
2. Sexual harassment has been added to the list of conduct falling within the definition of 'serious misconduct' in the Fair Work Regulations.

Note that not all employees will be eligible to lodge an unfair dismissal application against their employer. You can check eligibility using the Fair Work Commission's Unfair Dismissal Benchbook, available here.

SEXUAL HARASSMENT AS VALID REASON FOR DISMISSAL

The Fair Work Act has been amended to include a 'legislative note' to clarify that conduct that can amount to a valid reason for dismissal includes where an employee sexually harasses another person in connection with their employment. Sexual harassment has the same meaning as it does in the Sex Discrimination Act, see page 10.

If you're currently thinking "I thought sexual harassment at work would already be a valid reason to terminate an employee's employment", you would be correct. Sexual harassment has already been found by the Fair Work Commission in numerous cases to amount to a valid reason to terminate an employee's employment. This legislative change simply confirms this position expressly in law.

WILL SEXUAL HARASSMENT ALWAYS BE A VALID REASON FOR DISMISSAL?

No. Whether sexual harassment will amount to a valid reason to terminate an employee's employment will depend on the facts of the matter at hand, including the seriousness of the sexual harassment. For example, the telling of a one-off joke with sexual overtones by an employee who has since been reminded of appropriate workplace behaviour, shown remorse and has undertaken to refrain from such behaviour in the future will likely not be deemed to be a valid reason to dismiss the employee.

Ultimately, the reason for dismissal must be 'sound, defensible or well founded' and must be 'defensible or justifiable on an objective analysis of the relevant facts'.

Where an incident of sexual harassment occurs out of work hours this will also raise questions an employer will need to consider around whether such conduct can be a valid reason for dismissal, see *Out of Hours Conduct,* below.

OUT OF HOURS CONDUCT

Whether sexual harassment that occurs outside of working hours can constitute a valid reason for dismissal again depends on the facts of the matter at hand and needs to be assessed on a case-by-case basis.

Generally, it is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees. In order for an employer to do so, the out of hours conduct must have a relevant connection to the employment relationship.

Conduct that may be found to have a relevant connection to an employment relationship:

- Conduct that, viewed objectively, is likely to cause serious damage to the relationship between the employee and employer
- Conduct that damages an employer's interests, or
- Conduct that is incompatible with an employee's duty as an employee.

In cases involving out of hours conduct, it is not sufficient for the employer to simply assert that the conduct will in some way affect the employer's reputation or compromise the employee's capacity to perform his or her duties, there needs to be evidentiary material upon which a firm finding may be made that there is or will be the necessary effect.

CASE STUDY – Out of hours conduct / social media

In a case before the FWC an employee was dismissed by his employer on the basis of serious and wilful misconduct in breach of his employer's harassment policy.

On a rostered day off work the employee sent a pornographic video to 19 of his colleagues via Facebook messenger. One particular female responded to him with *"Are you serious? Mate don't send me that s**t".* The employee posted an apology on his Facebook page the following day. None of the employees that had received the video complained to the employer about it, however the employer subsequently became aware of the conduct.

Importantly, over the years the employer had taken steps to foster a safe and inclusive environment to encourage more females to work in a traditionally male dominated industry and had introduced workplace policies addressing workplace bullying and harassment, as well as training for employees including the individual concerned.

The employee argued there was no valid reason for his dismissal because his conduct was not sufficiently connected to his employment. In particular, the employee relied on the fact that the video was sent outside of work hours and did not involve any work-related IT equipment.

The FWC found that there was a valid basis for dismissal and there was a sufficient nexus to the workplace, as the colleagues were his Facebook friends because of their professional relationships.

Reference: Colwell v Sydney International Container Terminals Pty Ltd [2018] FWC 174

CASE STUDY – Out of hours conduct

In a case before the FWC a team leader was dismissed for conduct at and following his work Christmas party. During the function, the employee swore at multiple senior managers and directors and made inappropriate comments to a female employee. Following the official conclusion of the function, a large group moved upstairs to the public bar area (which had not been hired by the employer) to continue socialising. The employee continued to engage in inappropriate conduct, including unexpectedly kissing another female colleague on the mouth and saying he was going to go home and "dream" about her.

The FWC found that it was "abundantly clear" that kissing his colleague fell within the Sex Discrimination Act's definition of sexual harassment. However it found that it did not occur "in connection" with the team leader's employment, having occurred in a private social setting (i.e. after the conclusion of the official work function) which was not in any sense organised, authorised, proposed or induced by the employer. On this basis, this conduct was held not to constitute a valid reason for dismissal.

Reference: Keenan v Leighton Boral Amey NSW Pty Ltd [2015] FWC 3156

INCLUSION OF SEXUAL HARASSMENT AS SERIOUS MISCONDUCT

Sexual harassment has been added to the list of conduct explicitly falling within the definition of 'serious misconduct' in the Fair Work Regulations.

Generally, employers may respond to serious misconduct engaged in by an employee by dismissing them without notice (also known as 'summary dismissal').

While sexual harassment can already be considered to be serious misconduct, this change is intended to provide clarity to assist in ensuring that sexual harassment is understood as conduct that is potentially serious enough to be inconsistent with the continuation of employment and warrant summary dismissal.

WILL SEXUAL HARASSMENT ALWAYS AMOUNT TO SERIOUS MISCONDUCT?

No, sexual harassment will not always constitute serious misconduct, as it will depend on the seriousness of the conduct, including whether the specific conduct engaged in was conduct that made employment in the period of notice unreasonable.

This is the case for other conduct already expressly outlined as serious misconduct in the regulations, such as theft and intoxication.

This means that if challenged, the validity of the grounds for termination without notice will be independently assessed by the Fair Work Commission.

ARE THERE ANY DIFFERENCES FOR SMALL BUSINESS EMPLOYERS?

In the case of dismissal by a small business employer (those with fewer than 15 employees), a person will not be considered to have been unfairly dismissed if the FWC is satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code. This can be found on the Fair Work Commission's website, available here.

CAN A DISMISSAL STILL BE FOUND TO BE UNFAIR IF THERE IS A VALID REASON FOR DISMISSAL / SUMMARY DISMISSAL?

Yes, the FWC will continue to exercise its existing discretion in considering whether a valid reason is established and whether a dismissal was harsh, unjust or unreasonable in all the circumstances.

In addition to whether there was a valid reason for the dismissal (including its effect on the safety and welfare of others), the FWC must consider:

- Whether the person was notified of that reason
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal
- If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal
- Any other matters that FWC considers relevant.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

Most employers will already have policies and procedures in place in relation to appropriate workplace behaviour including sexual harassment and the consequences for such inappropriate behaviour.

In light of the recent changes and additional clarification in relation to conduct which may constitute a valid reason for dismissal, ACCI recommends employers consider:

- Ensuring that employees are aware that sexual harassment and sex-based will not be tolerated, and are put on notice about the consequences of engaging in harassment in connection with their employment.

- As part of any review and update of policies and procedures in response to the wider changes regarding sexual harassment, ensuring it is made clear that if a worker engages in sexual harassment, they may be subject to disciplinary action which may lead to the termination of their employment.

- In addition to a policy addressing sexual harassment and sex-based harassment, employers may wish to consider putting policies in place expressly dealing with social media and out of work conduct.

NOTE: *While the above sets out specific action employers can take in light of the changes concerning unfair dismissal, it is beneficial for employers to take a holistic approach in preventing and responding to sexual harassment. ACCI therefore recommends employers review the Summary of Important Practical Actions Employers Can Consider in Response to the Changes* on page 4.

G. Miscarriage Leave

Currently, employees who experience miscarriage and need to take time off work need to access personal (if they are unfit for work) or annual leave.

Under the changes in the Respect at Work Act full-time and part-time employees (or their current spouse or de facto partner) who experience a miscarriage are allowed to take two days of paid compassionate leave. Casual employees can take two days of unpaid compassionate leave in recognition of their bereavement.

Note: Compassionate leave is not available under the changes where a person's former spouse or former de facto partner experiences a miscarriage.

Miscarriage: defined as a spontaneous loss of the embryo or fetus before 20 weeks' gestation. This is based on the general medical meaning of miscarriage.
This includes the spontaneous loss of an embryo or fetus, for example, where a non-viable embryo stops developing. It also includes a spontaneous loss of an embryo or fetus where a subsequent medical procedure is needed to remove tissue associated with the miscarriage (such as a 'dilation and curettage' procedure).

WHAT ELSE CAN EMPLOYEES CURRENTLY TAKE COMPASSIONATE LEAVE FOR?

Currently employees can take paid compassionate leave (unpaid for casuals) when a member of the employee's immediate family or household contracts or develops a personal illness or sustains a personal injury, that poses a serious threat to their life, or dies. Compassionate leave is also available where a child is stillborn, if the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive.

The changes expand this to include miscarriage as an additional reason that employees may take two days compassionate leave.

DO EMPLOYEES NEED TO PROVIDE ANY NOTICE AND/OR PROOF IN ORDER TO TAKE COMPASSIONATE LEAVE FOR REASONS RELATED TO MISCARRIAGE?

To access compassionate leave an employee is required to provide to their employer notice of taking the leave as soon as practicable (this may be after the leave has started).

If required by the employer, the employee must provide evidence that would satisfy a reasonable person that the leave is taken after a miscarriage experienced by the employee or their spouse or de facto partner. This could include, for example a medical certificate.

PAYMENT FOR COMPASSIONATE LEAVE FOR MISCARRIAGE

Full-time and part-time employees are paid at their base pay rate for the ordinary hours they would have worked during the leave.

This doesn't include separate entitlements such as incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates.

HOW CAN COMPASSIONATE LEAVE FOR MISCARRIAGE BE TAKEN?

Compassion leave for the purposes of miscarriage is the same as for all other reasons for compassionate leave, therefore it can be taken as:

- a single continuous 2 day period, or
- 2 separate periods of 1 day each, or
- any separate periods the employee and the employer agree.

Employees do not accumulate compassionate leave and it doesn't come out of their sick and carer's leave (or annual leave) balance. It can be taken any time an employee needs it.

If an employee is already on another type of leave (for example, annual leave) and needs to take compassionate leave, the employee can use compassionate leave instead of the other leave.

IMPORTANT PRACTICAL THINGS FOR EMPLOYERS TO CONSIDER

- Most employers will already have policies and procedures in place in relation to accessing various forms of leave, including compassionate leave.
- Employers should consider updating any policies and procedures in relation to leave entitlements to ensure they reflect the new grounds for compassionate leave in relation to miscarriages.

Who to contact for further assistance?

KEY CONTACTS

Have a question or situation that isn't covered by this guide? The Australian Chamber of Commerce and Industry is here to help and answer any questions you might have. A list of ACCI member organisations in each state and territory and representing major industries can be accessed here, or you can call ACCI on (02) 6270 8000 or email us at info@australianchamber.com.au to be referred to our members.

Key ACCI Contacts for the Guide

Ingrid Fraser
Associate Director – Workforce Policy

Tamsin Lawrence
Deputy Director – Workplace Relations

KEY RESOURCES

The following are links to government websites and information on topics covered by this Respect@Work Employer Guide.

Australian Human Rights Commission (AHRC) – Sex Discrimination

AHRC – Ending Workplace Sexual Harassment: A Resource for Small, Medium & Large Employers

Workplace Gender Equality Agency – Sex-based Discrimination & Harassment

Safe Work Australia – Workplace Sexual Harassment

Fair Work Commission – Unfair Dismissal

This guide was written and edited by Ingrid Fraser and Tamsin Lawrence.

Australian
Chamber of Commerce
and Industry