

¹³¹ HREOC's publication *Sexual Harassment: A Code of Practices* has also been revised to assist employers and unions deal with sexual harassment in the workplace: Human Rights and Equal Opportunity Commission *Sexual Harassment in the Workplace: A Code of Practice for Employers* HREOC Sydney 2004.

¹³² Section 106 of the SDA provides:

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

See also Human Rights and Equal Opportunity Commission *Sexual Harassment in the Workplace: A Code of Practice for Employers* HREOC Sydney 2004, p24.

¹³³ This framework is discussed in more detail in the *Sexual Harassment in the Workplace: A Code of Practice for Employers* p50.

Chapter 5: Sexual Harassment and Public Policy

5.1 Introduction

Sexual harassment is unlawful under the SDA and complaints of sexual harassment are managed by HREOC under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("HREOCA"). This Chapter provides a short overview of the public policy framework which governs sexual harassment and examines some of the implications of the survey results for public policy, particularly in comparison with the findings from *A Bad Business*.¹³¹

5.2 Public Policy Framework

Sexual harassment is managed in a public policy framework which extends beyond the SDA. It is legally recognised as both a form of sex discrimination and an infringement of the rights of those in paid work. Broadly, the framework for government action provides individual redress and includes preventive and educative functions involving a number of agencies, including the courts. Government regulation does not extend specifically to requiring all private business to adopt policies for the prevention or redress of sexual harassment. Rather, the vicarious liability provisions of the SDA,¹³² as interpreted by the courts, require employers large and small to take all reasonable steps to prevent sexual harassment occurring in the workplace in order to avoid liability for sexual harassment committed by their employees and agents. State occupational health and safety and workers compensation regulation, and federal, State and Territory industrial or workplace relations systems may also apply to cases of sexual harassment in the workplace. The federal *Equal Opportunity for Women in the Workplace Act 1999* ("the *Equal Opportunity for Women in the Workplace Act*") also assists in regulating employer responses to sexual harassment.

5.2.1 Individual redress

While the SDA makes sexual harassment unlawful, HREOCA provides a complaints mechanism for the resolution of individual complaints of sexual harassment. Accordingly HREOC investigates and may attempt to conciliate disputes between complainants and respondents. Conciliated agreements may include agreement on financial compensation, the provision of appropriate references and reinstatement. HREOC is required to deal with complaints without determining whether or not sexual harassment occurred or publicly identifying the parties. The role of conciliator is as a neutral facilitator of discussions to resolve the complaint between the parties.

HREOC may terminate complaints on a number of grounds, including that there is no reasonable prospect of agreement between the parties. Complainants may then choose to pursue the complaint by making an application for hearing and determination before either the Federal Magistrates Court (the "FMC") or the Federal Court of Australia. These courts make enforceable decisions, award damages and publish judgments, in which the details, including the identity of the parties, are generally made public. Parties may appeal against decisions of the FMC to the Federal Court, or, against decisions of the Federal Court to the Full Court of the Federal Court.¹³³

Each State and Territory has complementary anti-discrimination legislation.

5.2.2 Preventative Regulation

In addition to court judgments dealing with each case, the jurisprudence that develops from each judgment also contributes to clarification and understanding of the nature of sexual harassment. Clarification and understanding of the SDA assists employees, employers, unions and others to better understand the circumstances in which conduct may be deemed to be unlawful sexual harassment. This jurisprudence also assists in the development of policies which would be useful to prevent sexual harassment.

The vicarious liability that may be incurred is an incentive for employers to draft and implement appropriate protocols for the management of sexual harassment complaints. The SDA's vicarious liability provisions require employers of whatever size to take all reasonable steps to prevent sexual harassment. In practice, this means that employers must, for example, implement preventative sexual harassment policies and grievance procedures and effectively communicate these policies and procedures to staff. Depending on the size of the organisation, they may also need to undertake regular sexual harassment education for staff and managers, and train contact officers.¹³⁴

The duty to prevent sexual harassment is reinforced by decisions in industrial and workplace relations jurisdictions that may permit employers to use a wide range of disciplinary measures including dismissal of those who have sexually harassed others in the workplace.¹³⁵

In addition, the *Equal Opportunity for Women in the Workplace Act* operates in parallel with the SDA by placing an emphasis on analysis of, and remedies for, the structural discrimination women experience in employment, including sexual harassment. The *Equal Opportunity for Women in the Workplace Act* requires employers with greater than one hundred employees to examine, and if necessary, alter organisational and institutional practices through the development of an equal opportunity for women in the workplace program and by reporting annually to the Equal Opportunity for Women in the Workplace Agency ("EOWA") on the program's effectiveness.¹³⁶ Equal opportunity programs are expected to address seven "employment matters", one of which is "arrangements for dealing with sex-based harassment",¹³⁷ including sexual harassment.

5.2.3 Education

As part of the SDA, HREOC is able "to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting the objects" of the SDA.¹³⁸ These objects include to "to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity",¹³⁹ and to "promote recognition and acceptance within the community of the principle of the equality of men and women".¹⁴⁰ HREOC is also enabled to "promote an understanding and acceptance of, and compliance with..." the SDA.¹⁴¹ These broad educational functions enable HREOC to conduct research and to promote its results and conclusions. On-going education cannot be under-estimated as a public policy tool for the elimination of sexual harassment or the reduction in its incidence. This may be as simple as providing information about the nature of sexual harassment and legal developments in the area or engaging in more complex public debates around

¹³⁴ See Human Rights and Equal Opportunity Commission *Sexual Harassment in the Workplace: A Code of Practice for Employers* HREOC Sydney 2004, p24.

¹³⁵ See *Thomas v Westpac Banking Corporation* (1995) EOC 92-742; *Graincorp v Markham* Unreported AIRC Melbourne 29 October 2002; *Mason v Boyne Smelters Ltd* Unreported AIRC Brisbane 20 August 1999. See also Human Rights and Equal Opportunity Commission *Sexual Harassment in the Workplace: A Code of Practice for Employers* HREOC Sydney 2004, p47.

¹³⁶ The reporting requirement may be waived for those employers which are consistently compliant with the legislation and which have taken all reasonably practicable measures to address equal opportunity issues.

¹³⁷ See http://www.eowa.gov.au/Developing_a_Workplace_Program/What_is_a_Workplace_Program.asp and http://www.eowa.gov.au/Developing_a_Workplace_Program/Employment_Matter_Kits/Sex_Based_Harassment.asp

¹³⁸ See section 48(1)(e) of the SDA.

¹³⁹ See section 3(c) of the SDA.

¹⁴⁰ See section 3(d) of the SDA.

¹⁴¹ See section 48(1)(d) of the SDA.

¹⁴² The development of a Sexual Harassment Youth Challenge program for secondary schools is an example of an important educational tool open to HREOC. HREOC conducted several education programs called Youth Challenges, for secondary school students on sexual harassment in 2003 and is planning several more for early 2004. These programs bring together approximately two to four secondary school students (at years 9–12) from a number of schools in different regions to work through a day's activities related to sexual harassment in schools. See <http://www.humanrights.gov.au/youthchallenge2/index.html> for more information.

¹⁴³ See Figure 2.1.

¹⁴⁴ See Figure 2.1.

¹⁴⁵ Calculation based on an incidence rate of 2.42 per cent for 2002–03 (11 per cent have experienced sexual harassment at work in the last five years, 22 per cent of those in the 12 months prior to the telephone survey) multiplied by the number of employees aged 15 to 64 years in Australia as at December 2003 (9,653,000). See ABS 6202.0 *Labour Force, Australia* December 2003.

¹⁴⁶ See Figure 4.1.

the cultural underpinnings of harassment and the public, organisational and personal interests in its elimination.¹⁴²

Preventative policies within corporations and complaints processes have the capacity to reinforce one another in engendering cultural change. In combination with HREOC's public education role and engagement with sexual harassment cases and issues in the media, these may provide strong motivation for employers to regulate their own practices by implementing effective policies to eliminate and prevent sexual harassment.

5.3 The need for continued vigilance

The telephone survey clearly demonstrates that relatively few incidents (one per cent) of sexual harassment come to the attention of equal opportunity agencies including HREOC. Even fewer complaints are brought before the FMC or the Federal Court.

For the most part, incidents of sexual harassment are either not pursued or left unresolved. Overall, 68 per cent of those who had experienced sexual harassment in the telephone survey did not make a complaint, including a complaint in the workplace. For a number of obvious reasons not all those who experience sexual harassment will pursue it and complaining to an equal opportunity agency or taking a case to court are serious measures. While the telephone survey found 31 per cent of those who did not make a complaint said they considered it was not serious enough, and 26 per cent said they handled the matter themselves, 42 per cent indicated a lack of faith in the complaints process as a reason for non-reporting.

In addition to this, the telephone survey's finding of a general rate of incidence of sexual harassment in public life of 28 per cent (people aged between 18 and 64) demonstrates that a large number of people each year consider they have experienced sexual harassment.¹⁴³ Approximately two thirds of this harassment occurs in the workplace, meaning a significant number of people are denied the right to work without feeling intimidated, offended or humiliated.¹⁴⁴ After twenty years of legislation, an incidence rate of 18 per cent throughout the workforce (translating to an estimated 230,000 employees in 2002–03 experiencing sexual harassment at work)¹⁴⁵ suggests the need to closely examine existing regulation, the role of education and public awareness and workplace policies.

The telephone survey also explored formal reporting rates. It found that less than one in three targets of sexual harassment made a formal report or complaint, the majority of those interviewees reporting to their manager or supervisor. Of those complaints analysed in *A Bad Business*, where the information was available, 78 per cent had first reported the harassment to their manager or employer.

Although only a third of those interviewees who experienced sexual harassment had reported the incident, where they did so over half stated that the harasser was dealt with, and just under half were satisfied or very satisfied with the reporting process.¹⁴⁶ This implies that most employers can manage complaints well when approached.

The telephone survey produced a number of other results which have implications for the management and regulation of sexual harassment.

5.4 Implications for Public Policy

Results of the telephone survey and the findings from *A Bad Business* have specific implications for existing public policy responses to sexual harassment. Further, the results suggest that ongoing educational and prevention strategies are required to address sexual harassment. Employer groups, unions, employers and complaints handling agencies such as State and Territory equal opportunity agencies and HREOC all have a part to play in these ongoing activities.

5.4.1 Workplace Policies

Although many employers believe they have effective programs for sexual harassment management in place, the survey results suggest prevention policies (such as education and awareness programs) are not as well implemented as strong grievance procedures. Although the sample size of formal complaints of sexual harassment was small,¹⁴⁷ the survey results enable us to draw some tentative conclusions about the apparent contradiction between the lack of employee confidence in complaints processes and the relatively satisfactory outcomes for those who did make formal complaints.

Less than one in three interviewees who experienced sexual harassment in the workplace in the last five years formally reported it to their employer or to an external agency.¹⁴⁸ Of those interviewees who did not make a formal complaint, about half stated as reasons for not formally reporting the harassment a belief that (apparently) the complaint process was too difficult, too embarrassing, would not change anything, or would have a negative impact on the person harassed.¹⁴⁹

Concerns about negative consequences were strong despite the telephone survey data which suggested that many employers manage formal complaints of workplace sexual harassment more than satisfactorily. For example of the 32 per cent of interviewees to the telephone survey who formally reported the sexual harassment, just under half rated their satisfaction with the process of dealing with the harassment as a four or five on a scale of one to five (where one equals "not at all satisfied" and five equals "extremely satisfied").¹⁵⁰

In addition, 59 per cent of interviewees to the telephone survey who formally reported the sexual harassment stated that the outcome of the formal complaint involved the discipline or dismissal of the harasser, 13 per cent stated that the employer made changes to the workplace to prevent sexual harassment from occurring in the future, 17 per cent stated that the harasser and/or the employer apologised to the interviewee for the conduct, and three per cent stated that the harassment ceased. All these outcomes are positive for the target of the harassment.

Nevertheless, a significant minority of interviewees said that nothing was done as a consequence of their formal complaint (13 per cent) and 16 per cent stated that the outcome of their formal complaint was a negative consequence for them, including four per cent resigning and one per cent being dismissed. These findings suggest that, although many employers manage formal complaints adequately, there is significant room for improvement in the grievance procedures of some employers.

The results suggest that the effectiveness of prevention strategies in the workplace is not in keeping with the success of many employers' complaints procedures. This conclusion is borne out by the incidence rate of sexual harassment in companies required to have

¹⁴⁷ Sample size of 68 interviewees with a margin of error of plus or minus 12 per cent.

¹⁴⁸ See 4.1.

¹⁴⁹ See Table 4.4.

¹⁵⁰ See Figure 4.1.

¹⁵¹ *Small Business in Australia 2001* (1321.0) in ABS 1301.0 Year Book Australia 2003 2003, p412.

¹⁵² See Human Rights and Equal Opportunity Commission *Sexual Harassment in the Workplace: A Code of Practice for Employers* HREOC Sydney 2004, p33.

¹⁵³ Five per cent of formal complaints were finalised by legal representatives, five per cent by agencies such as HREOC and four per cent by the courts.

¹⁵⁴ Fourteen per cent of those interviewees who formally reported the harassment finalised their complaint by resorting to legal processes, translating to less than five per cent of all those who experience sexual harassment in the workplace.

sexual harassment policies under the *Equal Opportunity for Women in the Workplace Act*. This Act does not apply to organizations with fewer than one hundred employees. Thirty-seven per cent of the interviewees who experienced sexual harassment at work in the last five years worked for employers with more than one hundred employees. Yet these organisations also constituted 38 per cent of the workforce.¹⁵¹ In other words, the incidence of sexual harassment in large companies is consistent with their overall contribution to the workforce. The operation of effective sexual harassment prevention policies might have been expected to reduce this incidence rate for large employers and it may be that large employers have effective grievance procedures for dealing with sexual harassment when it occurs in the workplace, but poor prevention strategies for stopping its occurrence in the first place. This is of particular concern to large employers, as the courts have interpreted the vicarious liability provisions of the SDA as requiring more of larger employers than smaller employers in satisfying the requirement to “take all reasonable steps” to prevent sexual harassment in the workplace.¹⁵²

Financial risk effects for employer policies

Of those interviewees to the telephone survey who formally reported the sexual harassment, fewer than one in six stated that their formal complaint was finalised by an external legal process involving a conciliated, negotiated or imposed outcome.¹⁵³

Taking a purely financial cost benefit approach to sexual harassment, employers might calculate the overall risk of legal action to be sufficiently low¹⁵⁴ for it to be more cost effective for them not to focus on eliminating sexual harassment in their workplaces but instead to invest in strong grievance procedures and run the low risk of an imposed outcome, including the payment of a financial settlement and the costs of staff turnover.

Inadequate sexual harassment prevention and awareness programs might explain the apprehension of such a significant majority of those interviewees who did not formally complain: the belief that the matter was not serious enough (31 per cent), the process was difficult or embarrassing and it was easier to keep quiet (28 per cent) or that they did not think anything would be done (13 per cent) or that a formal complaint would have a negative impact on them (16 per cent). Again, the outcomes and satisfaction ratings of the formal complaints process of those interviewees who did formally report the harassment do not necessarily bear out these apprehensions.

Sexual harassment must be challenged if it is to be eliminated. Targets of sexual harassment must be assured that their complaint will be taken seriously and dealt with appropriately, or, as these survey results imply, they will not formally complain. Recognising that many targets of sexual harassment will not make a formal complaint, employers are encouraged to run strong prevention strategies and awareness campaigns in addition to providing strong complaints handling mechanisms.

Employers need to be mindful of the social and organisational costs of sexual harassment.

The nature of the relationship between workplace sexual harassment and staff turnover, particularly of the targets of harassment requires further research. One of the most striking findings in *A Bad Business* was the large number of complainants who had resigned from their employment, or were dismissed, or were absent from the workplace where the sexual harassment occurred. The telephone survey did not ask interviewees whether they were still employed with the same employer where the harassment occurred. Further research on

this topic would form an integral part of estimating the financial costs of sexual harassment for employers.

The telephone survey did find that two thirds of workplace sexual harassment continued for more than one month, and that one in five cases continued for more than 12 months. These findings suggest that another financial cost of sexual harassment may be loss of productivity over a significant period of time. Other financial costs of sexual harassment, including loss of staff morale for example, were not identified in the telephone survey. These other costs also need further investigation.

A high percentage (87 per cent) of those who witnessed sexual harassment in their workplaces took action when it occurred; ranging from comforting the victim to confronting the harasser.

Employers may be able to harness these supportive employee relationships in their workplace policies. It certainly does not suggest that other employees are inured to sexual harassment or unwilling to become involved in protecting their co-workers.

5.4.2 Gender and sexual harassment

The telephone survey results show the overwhelming majority of the targets of sexual harassment were female, confirming understandings of the gendered nature of sexual harassment. However, men form a significant minority of targets of sexual harassment in the community. Twenty eight per cent of targets were male and two thirds of those complained of harassment by females. Few made an official complaint and even fewer complained to independent complaint handling agencies such as HREOC.¹⁵⁵

It is also true that the telephone survey results showed that men tended to find the sexual harassment they experienced as less intimidating and offensive, and were less likely to make a formal complaint than women.¹⁵⁶

Owing to the small sample size of male targets of sexual harassment it is difficult to draw firm conclusions about the reasons men under-report the sexual harassment they experience. Further research to explore this dynamic is required. An understanding of the male experience of sexual harassment is particularly important given the changing gender pattern of the workforce, with more women moving into management and supervisory roles.

Nevertheless, the fact remains that greater efforts need to be made to encourage men to complain of the sexual harassment they experience.

5.4.3 Inept romance is no excuse for sexual harassment

The relationship of harassers with their targets suggests the harasser is exploiting the capacity to intimidate, offend or humiliate, by virtue of either their position or their relative age or sex. The results demonstrate that over a third of cases involve managers, supervisors, bosses or employers, that is, those in positions of power relative to the target. Conversely, those employees who are relatively new to the workplace are more likely to be harassed than those who had been with the employer for more than a year. There is also a significant difference in the personal profiles of harassers and their targets, with targets of harassment younger and female while harassers were predominantly older and male.

¹⁵⁵ Only five per cent of complainants of sexual harassment in *A Bad Business* were male. See Human Rights and Equal Opportunity Commission *A Bad Business: Review of sexual harassment in employment complaints 2002* HREOC Sydney 2003, p18.

¹⁵⁶ See 2.3.2.

¹⁵⁷ If the conduct in question meets the legislative definition of sexual harassment, there is no defence for the harasser in saying that the conduct was a clumsy attempt at romance.

The power relations inherent in sexual harassment cannot be explained away as merely mistaken or mishandled courtship.¹⁵⁷ With female workforce participation continuing to increase it is important that there be no misunderstanding about the nature of sexual harassment. Any misapprehension that sexual harassment only arises if the conduct is the result of inappropriate male courtship or mere flirtation will only ensure that supervisor harassment by women will go unchecked and, more significantly, that sexual harassment will be, more generally, indulged. Sexual harassment policies must be premised on the understanding that the behaviour is offensive, intimidating and humiliating and is not intended to court, woo or charm. Certainly the intention of the harasser to do so is irrelevant to a finding of sexual harassment. A greater awareness of this dynamic may mean sexual harassment in employment is taken more seriously by employers and managers.

5.4.4. The progression of sexual harassment

The telephone survey did find that targets of physical sexual harassment were more offended and intimidated than targets of exclusively non-physical harassment, suggesting that physical sexual harassment is perceived as more severe or serious than non-physical harassment. Moreover, the telephone survey suggests that sexually harassing conduct may progress across a spectrum of different behaviours beginning with verbal, non-physical sexual harassment but developing to include more direct physical sexual harassment. Further investigation of this phenomenon is needed. A greater understanding of how sexual harassment progresses may provide employers with the incentive to intervene earlier in episodes of less serious sexual harassment in order to stop more serious conduct from occurring.

5.5 Conclusion

A significant percentage of the community and in particular the workforce is affected by sexual harassment, despite twenty years of legislation making such conduct unlawful. Continued efforts to inform all workplace participants of their rights and responsibilities and of the economic costs of harassment, is necessary to reduce its incidence.

The survey's results also make clear that sophisticated awareness and prevention campaigns targeting the cultural and attitudinal causes of harassment are also required.

To assist employers to understand and meet their obligations under the various regulatory frameworks pertaining to sexual harassment in the workplace, HREOC has reviewed its guidelines for employers entitled *Sexual Harassment in the Workplace: A Code of Practice for Employers*.

Of course, HREOC and the State and Territory equal opportunity agencies also have a role in keeping sexual harassment in public consciousness. This paper is one part of the strategy to foster interest in, and discussion of, the prevalence and nature of workplace sexual harassment and strategies for reducing its incidence.