

## Sexual harassment laws in Australia: An overview

With a federal system of law, Australia has comprehensive legislative prohibitions against sexual harassment in every State and Territory jurisdiction, as well as federally. These laws are embedded in a broader anti-discrimination framework. With no bill of rights or Constitutional guarantee of equality, Australian anti-discrimination laws are our primary means of protecting equality rights.

Despite these laws, sexual harassment remains a pervasive problem in public life. Survey data shows a remarkably persistent level of sexual harassment of around 20 per cent for all respondents, and 33 per cent for women.<sup>1</sup> Sexual harassment data has been collected by the Australian Human Rights Commission through a dedicated telephone survey since 2002 and the latest survey is currently underway.

### 1. The Legal Framework

Sexual harassment is made unlawful (at the federal level) in the Sex Discrimination Act 1984, one of four federal anti-discrimination acts (with the Racial Discrimination Act 1975, Disability Discrimination Act 1992 and the Age Discrimination Act 2004). Sexual harassment has a stand-alone provision (s28A), but it is also considered to be a form of sex discrimination, and so additionally covered by the general prohibition on direct and indirect sex discrimination in the same legislation.

The key elements of sexual harassment in s28A are:

- That there is a sexual advance, request for sexual favours or other conduct of a sexual nature. “**Conduct of a sexual nature**” has been defined broadly to include, for example, declarations of love, telling jokes and flicking an elastic band at a colleague’s legs (in the context of other behaviour).
- That the behaviour is **unwelcome**. The case law on whether an applicant has shown that the behaviour is unwelcome is more complex. For example, the fact that a woman participated in a sexually charged workplace culture did not prevent a successful complaint in one case, while a woman responding to sexual comments in a “friendly” way undermined another.
- The test is that a reasonable person in the circumstances “**would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated**”. This was amended in 2011 to lower the threshold and require only that *the possibility* be anticipated. The earlier phrase was that a reasonable person *would have anticipated* the impact of the behaviour.
- In considering the **circumstances** in which the behaviour took place, s28A also gives a (non-exhaustive) list of what should be taken into account, including
  - (a) 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;
  - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
  - (c) any disability of the person harassed;
  - (d) any other relevant circumstance.

It is clear from case law that a **single incident** can constitute sexual harassment, and there is **no test of seriousness**.

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<sup>1</sup> <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/working-without-fear-results-sexual-harassment-national>

Sexual harassment is protected in **specified areas of public life**, including: employment; education; the provision of goods, services or facilities; accommodation; clubs; and the administration of Commonwealth laws and programs.

In employment, employers are **vicariously liable** for their employees' sexually harassing behaviour unless they took "all reasonable steps" to prevent it occurring (s106 Sex Discrimination Act)

- Reasonable steps must be active, preventative measures.
- The obligation to prove that all reasonable steps were taken rests with the employer.
- Lack of awareness that the harassment was occurring is not in itself a defence for employers. (Australian Human Rights Commission, *Sexual Harassment Code of Practice* 2008)

In practice, this means that all employers should have a sexual harassment policy, provide anti-harassment training to all workplace participants and have procedures for dealing with internal sexual harassment complaints, in order to demonstrate "all reasonable steps" and discharge liability.

## 2. Bringing a sexual harassment complaint

There is mandatory conciliation for anti-discrimination complaints, including sexual harassment. Complaints under the federal Sex Discrimination Act are brought to the Australian Human Rights Commission. If the complaint cannot be conciliated, the Commission can terminate it, and, once terminated, a case can be brought to the federal court.

## 3. Some limitations of the legislation:

- The separate acts (sex, race, disability, age) make it more difficult to bring complaints of intersectional or multiple discrimination, including sexual harassment.
- There are gaps in the "public areas of life" that are covered. Street harassment, for example, is not unlawful under the federal Sex Discrimination Act. However, two other Australian jurisdictions prohibit sexual harassment without restricting areas of protection. In Queensland, s118 of the Anti-Discrimination Act 1991 and in Tasmania, s17 of the Anti-Discrimination Act 1998, prohibit sexual harassment without any restriction to specified areas. The most recent comprehensive discrimination law reform reviews in other jurisdictions have recommended similar changes. In 2015, the Law Reform Advisory Council in the ACT recommended that the Discrimination Act should be amended to prohibit sexual harassment generally, in all areas of life (Recommendation 15.1). In 2012, a federal consolidation of anti-discrimination law project made the same recommendation.
- There is a six month time limit to lodge a complaint (albeit with discretion to hear out of time)
- There are no bystander responsibilities

## 4. Further reading

- Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* 3rd edition, Federation Press, Sydney 2018.
- Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction*, Cambridge University Press 2016.
- Australian Human Rights Commission, *Federal Discrimination Law*, 2016: <https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016>