

Sexual Harassment

A Club has an obligation to provide, so far as is reasonably practicable, a working environment that is free from sexual harassment as well as looking to eliminate forms of discrimination and generally provide a safe working environment.

Clubs need to take steps to prevent sexual harassment from occurring on their premises and after a significant Bill was legislated in December 2022, some Clubs will now have a positive duty to prevent unlawful sexual harassment, discrimination and victimisation from occurring, requiring a proactive approach to be taken.

Club committees also have specific obligations in legislation to not sexually harass members or prospective members of their club and there are also laws prohibiting sexual harassment in the context of where goods, services and facilities are provided.

The following fact sheet gives a summary of what constitutes sexual harassment and will then detail Clubs obligations in preventing harassment from occurring and where claims can be made.

1. Definition

Under the *Sex Discrimination Act 1984 (Cth)* and the *Equal Opportunity Act 1984 (SA)* a person sexually harasses another person (the person harassed) if:

- The person makes an unwelcome advance, or an unwelcome request for sexual favours, to the person harassed, or
- Engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

in circumstances which a reasonable person, having regard for to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

“conduct of a sexual nature” includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

2. Legislation

In SA the two primary pieces of legislation that deal with sexual harassment are the *Sex Discrimination Act 1984 (Cth)* and the *Equal Opportunity Act 1984 (SA)*.

Under the *Sex Discrimination Act 1984 (Cth)* it is unlawful to sexual harass someone at work and this covers employees as well as volunteers who work at Clubs that will be considered as a “person conducting a business or undertaking” PCBU. In order to be considered as a PCBU the Club would need to have at least one employee.

Additionally section 28K specifically states that it is unlawful for a member of the committee of management of a club to sexually harass, or harass on the ground of sex, a member of the club or a person seeking to become a member of the club.

Section 28G also makes it unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to another e.g. staff harassing customers. This section also makes this unlawful by a person who is seeking, or receiving goods, services or facilities from another.

The *Equal Opportunity Act 1984 (SA)* also makes sexual harassment in the workplace unlawful and covers all employees and volunteers, including volunteers in purely volunteer run organisations.

Section 87(6g) also states that it is unlawful for a member of the governing body of an association to subject a member of the association, or a person applying to become a member of the association, to sexual harassment. There are also other provisions that deal with sex discrimination against members of an incorporated association which could mean that certain harassing conduct could also constitute unlawful discrimination.

Section 87(6)(a) & (b) also prohibit someone sexually harassing another in the course of offering or supplying goods, services or accommodation to another person. Section 87(6)(aa) also makes it unlawful for a person who is offered goods, services or accommodation to subject the person who is offering this to sexual harassment.

There are also other pieces of legislation that deal with sexual harassment or responses to it including the *Australian Human Rights Commission Act 1986 (Cth)* and the *Fair Work Act 2009 (Cth)*.

From 6 March 2023 the *Fair Work Act 2009 (Cth)* was also amended to now expressly prohibit (or ban) sexual harassment from occurring in the workplace. This will apply to employees, contractors, volunteers at a Club that has at least one employee and any one considered as PCBU.

The *Fair Work Act 2009 (Cth)* also states that sexual harassment in the course of employment can be considered as serious misconduct and be a valid reason for dismissal. When looking to dismiss someone for sexual harassment however it is important that a proper disciplinary process is followed and any necessary investigation is undertaken. A failure to do this could result in issues with the validity of any dismissal.

3. When Can Sexual Harassment Occur?

Sexual harassment is unwelcome conduct of a sexual nature in relation to a person. It happens when a reasonable person would perceive the conduct as offensive, humiliating or intimidating. It has nothing to do with mutual attraction or friendship between people and often results in communication breakdown, conflict, avoidable absenteeism and resignations.

Both men and women are provided with protection from sexual harassment in a broad range of work contexts, including by clients and colleagues or other organisations.

A wide range of behaviours can constitute sexual harassment depending on the circumstances. An action may be intentional or unintentional, but if a person feels (or there is a possibility that a person, even other than the person towards whom the action is directed, could feel) offended, humiliated or uncomfortable as a result, sexual harassment has occurred. These behaviours include (but are not restricted to):

- Staring or leering in a sexual manner.
- Unwanted physical contact or gestures.
- Making jokes or insinuations of a sexual nature.
- Inappropriate or repeated sexual invitations (especially when previous invitations have been refused).
- Displaying offensive or pornographic material such as posters, pin-ups, cartoons, graffiti, screensavers or calendars (discussed further later).
- Unwelcome comments or wolf-whistling.
- Intrusive questions about sexual activity.
- Subjecting a person to sex based insults or taunts.
- Explicitly or implicitly demanding to engage in sexual activity.
- Sending an offensive communication of a sexual nature by note, letter, telephone, computer or email or by other means.

Sexual harassment can also include jokes based on gender, race, marital status, sexuality, disability or age (where the content is sexually related), and initiation ceremonies involving unwelcome sexual or sexist behaviour (which may also constitute assault where sexual contact occurs).

Breastfeeding is established as its own separate ground of discrimination.

It is important to recognise that:

- Sexual harassment may not be deliberate – it can occur unintentionally and still be harassment.
- It is possible to be harassed by a person with whom the victim once had a relationship or was sexually or personally intimate.
- Some types of seemingly mild behaviour can still be offensive and constitute sexual harassment (particularly if the behaviour occurs in a manager/supervisor/employee relationship, where one person has authority over the other person), and
- Sexual harassment also occurs in situations where the people involved have equal status, or where the person who is harassed has authority over the alleged perpetrator.

4. Offensive Images and Material

There is a range of material that can cause offence to people for different reasons. People can be subject to isolation, humiliation and harassment for objecting to the presence of such material. Anti-discrimination laws make it an offence to display or circulate material or graffiti of an offensive nature.

Examples of material that are offensive include (but are not limited to):

- Pornographic images from the Internet or from software used as screensavers on computers.
- Email messages with sexual references and suggestions, including reports of sexual messages.
- E-mail messages that spread rumours about another employee.
- Posting, printing out or passing on scanned cartoons, photographs, videos or movie clips.
- Posting sexual innuendos or personal information about employees on home pages or other websites.
- Networking of jokes with derogatory content and images of an offensive nature around the Club.

- Sexual suggestions on voice mail, message banks or SMS.
- Posting or passing on material containing threats or violent fantasies.

5. Offensive Behaviours & Reporting

The *Sex Discrimination Act* states one of its aims is:

- “To eliminate so far as possible...sexual harassment in the workplace.”

The fact that people have not complained about sexual harassment does not necessarily mean that it is not occurring. In a workplace often only an anonymous staff survey will reveal the presence of and the true extent of the problem but even then there may be some who don't wish to divulge what they have been subjected to.

It is not unusual for employees to say that they have been harassed at work with research often finding a significant number saying that they have suffered severe sexual harassment. Many employees fear victimization, or that as management knew about the problem but did nothing, they felt that there was little point in lodging a formal complaint. As such it is very important to have a workplace that will not only seek to eliminate harassment but make workers feel safe in bringing a complaint.

Additionally it is possible that some patrons or members of a club will engage in unacceptable behaviour which is not reported or raised properly and it is important for a club to look to create a welcoming and inclusive environment.

Many employees and members may be confused about whether a behaviour may or may not be socially acceptable, or what constitutes unlawful behaviour. Courts apply a “subjective” test to determine whether a particular behaviour or conduct is unwelcome, to see how the conduct was perceived by the recipient rather than the intention behind it.

Whether the perpetrator intended to harass is irrelevant under the law, and a “one-off” incident can constitute sexual harassment. Under relevant legislation, the significant factor taken into consideration is whether, given the circumstances, a reasonable person (as distinct from the particular person involved) would have anticipated that the harassed person would be offended, humiliated or intimidated by the behaviour.

6. Hostile Work Environments

Amendments made to the *Sex Discrimination Act 1984 (Cth)* by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* have now also prohibited workplace environments that are hostile on the grounds of sex.

This means for example, it would prohibit workplace environments that have hostile natures towards a particular gender such as by the prevalence of inappropriate jokes being made, images and material present etc. In terms of assessing whether an environment is hostile, it would firstly need to have conduct being

undertaken that could reasonably be anticipated as being offensive, intimidating or humiliating to someone based on their sex (characteristics that generally appertain or are imputed to persons of their sex).

The circumstances that will be considered when assessing whether conduct is unlawful includes:

- the seriousness of the conduct;
- whether the conduct was continuous or repetitive;
- the role, influence or authority of the person engaging in the conduct; and
- any other relevant circumstance

7. Victimisation

As well as sexual harassment being unlawful, clubs also need to be aware of the prohibition on victimisation. This is where someone is treated unfairly or subjected to detriment as a result of making a complaint about discrimination or harassment. As such a person who made a complaint regardless of the outcome should never be punished for doing so. Both the *Sex Discrimination Act 1984* (Cth) and *Equal Opportunity Act 1984* (SA) cover this point.

Having said the above, unfavourable treatment where a clear false allegation has been made or someone has not acted in good faith may not constitute victimisation. In any case clubs should be very cautious in this area.

8. Prevention and Response

A Club has an obligation to prevent harassment in the workplace and generally to provide a safe environment for anyone who visits their premises whether they are a member or not.

As of December 2022, changes to the *Sex Discrimination Act 1984* (Cth) implemented a positive duty on those covered (in the context of clubs this is those with at least one employee) to take reasonable and proportionate measures to eliminate unlawful sex discrimination, harassment and victimization as far as possible.

In terms of what will be considered as reasonable and proportionate, this will depend on a number of factors including:

- the size, nature and circumstances of the business or undertaking;
- the duty holder's resources, financial and otherwise; and
- the practicability and costs associated with the steps.

Fulfilling this obligation will require proactive approaches to be taken in order to eliminate harassment as much as possible and will likely require more than just an adequate policy to be in place (although such a policy should still be implemented).

In determining if an organisation or business is meeting the requirements, the Australian Human Rights Commission (AHRC) sets out what they considered to be "seven standards":

1. Leadership
2. Culture

3. Knowledge
4. Risk Management
5. Support
6. Reporting & Response
7. Monitoring, Evaluation & Transparency

More information on this and what they all mean can be found in the AHRC's "[Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 \(Cth\)](#)". Clubs are advised though that this guide is lengthy.

Action that could be considered by a club in order to meet the positive duty (or by purely volunteer run clubs who want to be more proactive as well) could include:

- Taking steps to stop inappropriate behaviour, and taking reasonable steps to prevent it from occurring
- Directing that offensive material (screen savers, posters, etc.) is to be no longer displayed
- Looking at implementing long term goals to eliminate harassment
- Responding appropriately to any complaint of sexual harassment
- Ensuring that any policies and procedures are in place and adequate
- Training workers appropriately on sexual harassment
- Having measures in place for vulnerable people to notify others when they are being made to feel uncomfortable by patrons

Whilst the positive duty is not included in other legislation, legislation such as the *Equal Opportunity Act 1984* (Cth) still require steps to be taken to prevent harassment, victimisation and discrimination from occurring. Approaching the issue from a more proactive approach is also still recommended.

Failure to act in cases where sexual harassment is observed or reported can be viewed as "assisting or authorising" the harassment, and may render a person jointly liable with the perpetrator.

Legislation such as the *Fair Work Act 2009* (Cth) also states that a business can be held jointly liable for a convention unless they can show they took all reasonable steps to prevent sexual harassment from occurring.

An employer can also be held vicariously liable for sexual harassment between co-workers when it occurs outside work hours. The scope of this vicarious liability for sexual harassment is wide, and an example of an extreme case is a judgement that found an employer vicariously responsible for the rape of an employee by a fellow employee at a private residence following a social dinner party.

Vicarious liability could also extend to a Club where a member or customer harasses another patron or one of their employees or volunteers. This can occur where the Club is held to have not done enough to prevent the sexual harassment from occurring.

It is important that Clubs take an active role in preventing sexual harassment from occurring on their premises.

Clubs can also access some useful resources on the [Respect@Work](#) site and the Fair Work Commission has created a module on sexual harassment which can be accessed [here](#).

9. Confidentiality

Maintaining strict confidentiality about any sexual harassment claims is essential. There should be a clear process for any complaints and a policy should clearly explain this to workers at the club in particular.

The person who has complained and the person who it is against should be advised of the appropriate manner in which it will be dealt with and that throughout this the matter will be kept as confidential as possible.

Only those persons who need to know about any allegations or counter allegations should be told what is happening. Matters should be dealt with as discreetly as possible, and confidentiality maintained in the keeping of records of incidents and complaints.

Where an employee makes a claim of sexual harassment, any changes to workplace structures (e.g. transfers etc.) or supervisory arrangements following the claim should be carried out in a manner that protects the identities of those involved. People may need to be informed that a change has been made, but it is not essential that they need to the specific reason(s) for the change.

Where confidentiality is breached this can lead to all types of potential issues such as a failure of procedural fairness in any investigation and give rise to possible victimisation and defamation claims. In the context of committee members it is also arguable it is a failure of their duties to act with due diligence, in the best interest of the clubs etc.

10. Legal Action

Australian Human Rights Commission

An employee who has been sexually harassed can make a claim to the Australian Human Rights Commission (AHRC). Members or prospective members can also make complaints where they feel they have been harassed by a committee or committee member. The AHRC will speak to the complainant and gather more information and decide whether to progress with investigating the incident. Should the complaint be investigated then the AHRC will usually look to resolve the matter via conciliation. Claims can be made within 24 months of when the harassment occurred.

As well as being able to conciliate issues brought to it, the AHRC's powers have been increased by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Respect at Work Bill)* allowing them to enforce the positive duty that was introduced in the *Sex Discrimination Act 1984 (Cth)*. These powers came into effect on 13 December 2023. This allows the AHRC to conduct inquiries into a person's compliance with the Act and the positive duty and allow them to issue compliance notices specifying action that needs to be taken to address non-compliance. An inquiry can be initiated by the AHRC where they "reasonably suspect" there has not been compliance.

Where claims can't be resolved by the AHRC a complainant can then make a claim in the Federal Court or the Federal Magistrates Court. Employees who make claims in the Federal Court could also make other claims in relation to their employment in addition to the claim of sexual harassment where the claim is made under the *Sex Discrimination Act 1984 (Cth)*. This can include claims for damages (and civil penalties in some cases) for

adverse action under the Fair Work Act, for deceptive and misleading conduct under the Competition and Consumer Act and for breach of employment contract.

Claims of this nature cannot be made in connection with sexual harassment or sex discrimination claims made under State or Territory anti-discrimination laws.

Some volunteers can also make claims to the AHRC under the *Sex Discrimination Act 1984* (Cth) where the Club is a 'person conducting a business or undertaking' (PCBU). This occurs where the Club has at least one employee.

Equal Opportunity Commissioner of SA

Complaints of sexual harassment can also be made in South Australia to the Equal Opportunity Commissioner SA with complaints needing to be made within 12 months of the alleged harassment taking place. Later complaints can be accepted however, provided a good reason can be shown for the delay and it would generally be fair for it to be taken up despite its late lodgement.

Complaints to the Equal Opportunity Commissioner can be made under the *Equal Opportunity Act 1984* (SA) and this will cover all volunteers, including those who work at purely volunteer run associations.

Someone can also make complaints to the Equal Opportunity Commissioner SA where the discrimination occurred in public life which includes those who believe they have been sexually discriminated against in regards to membership of an organisation.

Where a complaint is made a conciliation will be held with measures explored on how to resolve the issue. If the matter can't be resolved then the Commissioner can refer the matter on to the South Australian Civil and Administrative Tribunal (**SACAT**) or the complainant can opt to continue their complaint before SACAT.

SACAT can seek to try and assist both parties towards coming to a resolution / agreement. If the matter progresses to a hearing though then the Tribunal can make an Order. These Orders can require such things as:

- require the respondent (person the complaint is made about) to perform specified acts with a view to redressing loss or damaging arising from the contravention or remedy a discriminatory or unlawful act
- require the respondent to refrain from further contravention of the Equal Opportunity Act
- require the respondent to pay compensation to a person for loss or damage arising from the contravention

Fair Work Commission (FWC)

As of late 2021, employees, apprentices and trainees and volunteers who work at a PCBU can apply to the FWC for a stop sexual harassment order, which orders the perpetrator to stop any harassing conduct.

If someone can apply for a stop sexual harassment order then it will often firstly go to a conciliation, although some may go straight to a hearing. If the matter is not solved at conciliation or one doesn't occur then a hearing is held and a decision will be made once this hearing has concluded.

Further amendments were made to the Fair Work Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* and on 6 March 2023 this sexual harassment in connection with work was strictly prohibited. The FWC is now able to deal generally with disputes via conciliation or mediation and also be able

to make non-binding recommendations. If the matter remains unresolved then both parties can agree for the FWC to arbitrate where a binding order will be made and they can order compensation and/or for someone to do something in order to remedy the issue.

If both parties don't agree and the employee wants the matter to progress further then they can take the matter to the Federal Court or Federal Circuit Court within 60 days of the FWC issuing a certificate.

Applications to the FWC can be made by an individual or group of people who are alleging harassment and it can also be brought by a union on behalf of their member or members.

Where someone believes adverse action has been taken against them for a discriminatory reason e.g. they were terminated on the basis of their sex, they can also look to make a General Protections Claim. In this instance it will firstly go to conciliation where a resolution will be sought. If no resolution can be reached then it can continue either to arbitration before the FWC if both parties agree or the applicant can decide to take the case to the Federal Court or Federal Circuit Court.