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The #MeToo Movement & Workplace Sexual Harassment:



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Overview

- Sexual harassment is a concerning prevalence occurrence in workplaces
- Sexual harassment will be assessed within the following contexts;
 - 1. What is the legal context of sexual harassment-
 - a) Governing legislation
 - b) Surrounding context to, and examples of sexual harassment
 - c) Definitions
 - d) How have courts interpreted the elements of *Sexual Harassment* in a workplace context?
 - 2. Who is Liable?
 - 3. Damages & Compensation
 - 4. What are some preventative measures that should be implemented?
 - 5. Positive complaint handling processes



1. Legal Context of Sexual Harassment – (a) *Governing Legislation*

- **2 legislative schemes relevant to sexual harassment**

1. *Sex Discrimination Act 1984* (Cth)

2. *Anti-Discrimination Act 1991* (Qld)

- **Sexual harassment as discrimination under the *Fair Work Act 2009* (Cth)**

- Sexual harassment is within the scope of the general protections provisions of the FWA
- It is specifically recognised as a form of sex discrimination prohibited under s351

- The main governing legislation remains the Commonwealth *SDA* and the State (Qld) *ADA*, accordingly, they will be the focus of the webinar rather than Fair Work provisions.

1. Legal Context- (b) *Examples of Sexual Harassment*

Examples of sexual harassment, according to the Australian Human Rights Commission, include

- Sending explicit or sexually suggestive emails or text messages
- Asking intrusive questions about someone's personal life– including their sex life
- Uninvited or unsolicited touching, kisses or embraces
- Smutty jokes or comments
- Repeated invitations to go out after prior refusal
 - As will be demonstrated, acts which are not inherently of a sexual nature, may constitute sexual harassment where they form part of a pattern of sexual conduct:
Shiels v James and Lipman Pty Ltd [2000] FMCA 2
- Insults, taunts, teasing or name calling of a sexual nature
 - *Horman v Distribution Group Limited* [2001] FMCA 52
- Unwelcome physical contact including massaging without invitation
 - *Smith v Hehir and Financial Advisors Australia Pty Ltd* [2001] QADT 11



1. Legal Context- (b) “*Me Too*” Movement

Me Too movement:

- Founded in 2006 to help survivors of sexual violence find pathways to healing
- Movement spread virally in October 2017 through social media and specifically the hashtag “#metoo”
 - This demonstrated the widespread prevalence of sexual assault and harassment with a specific emphasis on its common occurrence in the workplace
- Followed the sexual abuse allegations against Harvey Weinstein and the movement was subsequently supported by other high profile celebrities
 - Ashely Judd
 - Jennifer Lawrence
 - Uma Thurman



1. Legal Context- (c) *Sex Discrimination Act* (Cth)

“Sexual Harassment” defined:

- Section 28A *Sex Discrimination Act 1984* (Cth): A person sexually harasses another if, in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be **offended, humiliated or intimidated**, they:
 - (a) Make an unwelcome sexual advance, or an unwelcome request for sexual favours to the person or
 - (b) Engage in other unwelcome conduct of a sexual nature in relation to the person harassed
- Section 28A(2) further provides that conduct of a “sexual nature” includes:
 - Making of 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*



1. Legal Context- (c) *Anti-Discrimination Act 1991* (Qld)

“Sexual Harassment” definition under the Qld legislation:

- Section 119 (f) mirrors section 28A of the Commonwealth legislation, in its required assessment of how likely a “*reasonable person*” would be to consider their conduct as offending, humiliating or intimidating,
- Section 119(e) has the effect of **extending** its definition to apply to conduct which was ***intended to offend, humiliate or intimidate***.
- Section 119(a)-(d) outlines the nature of conduct which will constitute *sexual harassment* for the purposes of section 119 in light of sub-sections (e)-(f). Sexual harassment happens where a person;
 - (a) *subjects another person to an unsolicited act of physical intimacy; or*
 - (b) *makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person; or*
 - (c) *makes a remark with sexual connotations relating to the other person; or*
 - (d) *engages in any other unwelcome conduct of a sexual nature in relation to the other person*



1. Legal Context- (d) *Case Law surrounding Sexual Harassment*

1. “Unwelcome conduct” pursuant to section 28A(a) of the SDA (Cth) and substantially mirrored in s119(a)-(b) of the ADA (Qld).

- Unwelcome conduct refers to conduct which was “***not solicited or invited by the employee, and was considered undesirable or offensive***”



Legal Context- (d) *Unwelcome Conduct- Case example*

Case Study – Unwelcome Conduct

Aldridge v Booth & Ors (1988) 80 ALR 1, [5]

Facts:

An employer engaged in inappropriate physical behaviour with a young female employee. The employee believed the endurance of such conduct was required in order to keep her job.

Factors emphasised by Court:

Court noted the employees “extremely vulnerable position” along with her belief that she keeping her job necessitated her endurance of the inappropriate interaction in finding that such interactions constituted **unwelcome conduct**.

Employee was awarded \$7,000 in compensation for the unwelcome conduct



1. Legal Context- (d) *Case Law surrounding Sexual Harassment*

2. “Conduct of a sexual nature” pursuant to section 28A(b) of the SDA (Cth) and substantially mirrored in s119(c)-(d) of the ADA (Qld).

- The sexual nature of conduct alleged to constitute sexual harassment is generally obvious and not in contention.
- “*Sexual nature*” has been interpreted **broadly**, and not in isolation. Courts will consider the conduct in the context of **all surrounding circumstances**.
- Conduct which is not inherently sexual may still be considered of a *sexual nature* where it forms part of a **pattern of sexual behaviour**: *Shiels v James and Lipman Pty Ltd* [2000] FMCA 2.



Legal Context- (d) Sexual Nature- Case example

Case Study (1) – Sexual Nature- *pattern of sexual behaviour*

Shiels v James and Lipman Pty Ltd [2000] FMCA 2

Takeaway Point:

Court found that the act of flicking rubber bands at a co-workers legs constituted conduct of a **sexual nature** because it formed part of a **pattern of sexual behaviour** when considered in the **overall context of the surrounding circumstances**.



Legal Context- (d) Sexual Nature- Case example

Case Study (2) – Sexual Nature- Statements

Aleksovski v Australia Asia-Aerospace Pty Ltd [2002] FMCA 81

Facts:

A co-worker had been declaring his love for another employee. She was approached by him and told that he wanted to speak to her alone at his house. The next day, following her refusal, he was verbally aggressive in a confrontation and made additional comments in relation to her partner, whom also worked at the same company.

Factors emphasised by Court:

Court found that the combination of both, the declarations of love and the comments made about her relationship in addition to the request to spend time alone at his home, constituted **conduct of a sexual nature**.



1. Legal Context- (d) *Case Law surrounding Sexual Harassment*

3. “Reasonable Person” pursuant to section 28A(1) of the SDA (Cth) and substantially mirrored in s119(e)-(f) of the ADA (Qld).

- These provisions require that a reasonable person would have anticipated that the harassed person would be *offended, humiliated or intimidated*
- This involves assessing whether a reasonable person would consider the complainant’s reaction to the behaviour as being understandable in the circumstances.

Consider: *Horman v Distribution Group Limited* [2001] FMCA 52

- A woman’s co-workers were consistently using inappropriate language directed at her, writing with texta on her body, pulling her bra straps.
- **The court found that a reasonable person in the woman’s position would have been *offended, humiliated or intimidated by the actions.***



Legal Context- (d) Reasonable Person- Case example

Case Study – Reasonable Person- Effect of existing relationship

Smith v Hehir and Financial Advisors Australia Pty Ltd [2001] QADT 11

Facts:

A company manager was found to have sexually harassed a co-worker on 3 occasions including, approaching her while she was on the phone and proceeding to massage her shoulders.

Court Emphasis:

*“Whether an action is **compassionate** or **reprehensible** will depend on the overall context in each case”*

They noted the fact that this was not an interaction between friends, but rather, took place between a middle aged employer to a newly employed young female.

The court concluded determined that a reasonable person *should have anticipated that there was the possibility that the woman would have found this action **offensive, humiliating or intimidating.***



1. Legal Context- (d) *Case Law surrounding Sexual Harassment*

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- Conduct which is not inherently sexual may still be considered of a *sexual nature* where it forms part of a **pattern of sexual behaviour**: *Shiels v James and Lipman Pty Ltd* [2000] FMCA 2.



1. Legal Context- (d) *Case Law surrounding Sexual Harassment*

4. “Single Incidents”

- a one off incident is **not precluded** from constituting sexual harassment under the relevant legislation.
- *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 85 ALR 503, [514]-[515]
 - *The definition of sexual harassment “clearly is capable of including a single action and provides no warrant for necessarily importing a continuous or repeated course of conduct.*
 - The relevant test involves consideration of circumstances as a whole— accordingly, the nature and relationship of the parties may demonstrate the conduct as being unwelcome **despite its single occurrence.**



2. Who is Liable?

Section 28B Sex Discrimination Act 1984 (Cth):

- It is unlawful for a person to harass others in the workplace. This provision applies to a variety of employment relationships including
 - Employer-employee
 - Prospective employees-employer
 - Employee-other co-workers
 - Commission agents
 - Contract workers
- Both individual's who are involved in sexual harassment and their employers can be held liable.



2. Who is Liable? *Individuals*

Personal Liability:

- Persons or organizations covered by the sexual harassment provisions of the Sex Discrimination Act are personally liable for:
 - (a) Their own acts of sexual harassment
 - (b) Any act of victimisation
 - (c) Causing, instructing, inducing, aiding or permitting sexual harassment (accessory liability)



2. Who is Liable? *Employer Liability*

Vicarious Liability

- Employers will be held liable where sexual harassment takes place, and they failed to take **all reasonable steps** to prevent it from happening: **S106 Sex Discrimination Act (Cth); s133 Anti-Discrimination Act 1991 (Qld)**
- Courts will consider the implementation or lack thereof, of relevant sexual harassment procedures and policies in assessing whether an employer has taken **all reasonable steps**.

2. Who is Liable- Case Example

Case Study – *Vicarious Liability*

STU v JKL (Qld) Pty Ltd and Ors [2017] QCAT 505.

In this case the court rejected the notion that reasonable steps were taken with specific reference to the absence of any anti-discrimination policy or education programs. It also concluded that had the hotel “*taken steps to inform its workers of their legal obligations and to provide the education and training necessary to ensure compliance, then it may have avoided responsibility for the unlawful acts of its worker.*”

The employer was held jointly liable with the employee and had \$313,316 in damages awarded against them.



2. Who is Liable? *Employer Liability*

Accessorial Liability:

- Employers will be held liable where they “*caused, instructed, induced, aided or permitted an individual to perform an unlawful act*”: **s105 SDA (Cth)**
- **It arises where the employer either:**
 - *Knew or had reasonable grounds to believe that the complainant was at risk of sexual harassment or*
 - *Had been **wilfully blind or reckless** in known circumstances where the risk was **real and possible**:*
Elliot v Nanda (2001) 111 FCR 240
- Employment agencies will be liable under section 105 for sexual harassment taking place in workplaces **not under their control**, provided, they were **aware that there is a real risk of sexual harassment occurring, and they fail to take steps to reduce that risk**



2. Who is Liable? Victimisation

- Section 94 of the SDA (Cth) prohibits the victimization of anyone connected with the complainant. Victimisation means subjecting a person to some detriment if he or she has:
 - (a) Lodged, or is considering lodging a complaint under the Sex Discrimination Act
 - (b) Provided information of documents to the Commission
 - (c) Attended a conciliation conference or appeared as a witness
 - (d) Reasonably asserted any rights under the Sex Discrimination Act of themselves or someone else
 - (e) Made an allegation that a person has done an act that is unlawful under the Sex Discrimination Act



3. Damages & Compensation

- Under the *Sex Discrimination Act* courts will **compare**
 - 1. The position the complainant **might** have been in had the conduct **not taken place** and;
 - 2. The position in which the complainant **was** placed as a result of the conduct: *Hall v Sheiban* (1989) 20 FCR 217



3. Damages & Compensation

- Courts have demonstrated a sharp **shift in favour of complainants** in their compensation awards:
Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82.
 - the courts drew a comparison between the principles governing damage awarded for loss suffered by victims of workplace bullying and other harassment instances which lack a sexual element and sexual harassment.
 - **Noted** → in both types of case, the victim may suffer psychological injuries and distress of a comparable kind.
 - Significantly, the original award of \$18,000 in damages was considered “***manifestly inadequate***” and was subsequently increased to **\$130,000** to account for the physical, psychological and other non-economic loss and damage suffered by the claimant.

3. Damages & Compensation- Case Example

Case Study – Compensation

Green v State of Queensland, Brooker and Keating [2017] QCAT 008

A prank was played on the complainant in which he was led to believe that he was to clean up an area where two co-workers had previously had intercourse in. He subsequently suffered acute anxiety and PTSD which prevented his return to work. QCAT found that his symptoms were genuine and awarded \$70,000 in damages for non-financial loss.

It was noted that such awards are unlikely to be given in cases where there is **no recognisable personal injury**. Specifically, there may be a lesser award where the sexual harassment results only in offence, embarrassment, humiliation or intimidation. The prevailing consideration however, is to ensure that the level of compensation awarded is consistent with the standards of the community.



3. Other potential causes of action

- Breach of employment contract (against employer)
- Possible claim in tort (against employer)
- Conduct may constitute a criminal offence by the accused
- Easiest path (from a legal perspective) for a complainant is generally to allege that that the accused breached the *Sex Discrimination Act* and that the employer is vicariously liable for that breach.



3. Key legal principles

- Reasonable in the circumstances
- The standard of proof
- Procedural fairness
- Substantive fairness

3. Damages & Compensation- Case Example

Case Study – Compensation

STU v JKL (Qld) Pty Ltd [2016] QCAT 505 (6 December 2016)

A young woman was sexually harassed when she woke to find an older man naked in her bedroom. He touched her upper thigh and groin, and tried to remove her underpants. She told him to leave and broke down crying. The woman's employer had arranged for her to share the work-provided accommodation with the man. They each had their own room, and the woman had moved in the night before the sexual harassment.

The tribunal found that the personal injury to the woman caused by the sexual assault on her was severe and prolonged.

The tribunal awarded compensation of \$328,316.



3. Damages & Compensation- Case Example

Case Study – Compensation

Nunan v Aaction Traffic Services Pty Ltd [2013] QCAT 565.

A female traffic control worker, who was sexually harassed by a male co-worker, made a complaint against the worker as well the private company that employed them and the company that contracted the employer.

For five months the woman was subjected to personal comments, questions, noises, and gestures — all of a sexual nature — on a daily basis and throughout each shift. When the male co-worker inadvertently saw a picture of the woman's breasts on her phone, for the rest of the day he made comments and sucking noises and rubbed the stop/slow stick on his groin area while sticking out his tongue.

The tribunal found that the sexual harassment was a substantial cause of the woman's condition, the effects of which would continue over a period of three years, including an inability to work. The tribunal awarded compensation of \$40,000 for non-financial damages, and \$102,217 overall.



3. Damages & Compensation- Case Example

Case Study – Compensation

KW v BG Limited, DP & DF [2009] QADT 7 (21 April 2009)

Employer responsibility to provide harassment-free workplace

The complainant was awarded damages of \$24,425 which included general damages and economic loss.



4. Preventative measures

- Prevention – Beyond procedures and training
 - Reputational damage.
 - Harm to all.
 - Awareness of environmental factors that may increase the likelihood of inappropriate conduct
 - Create a culture where harassment is not tolerated.
 - Respond when inappropriate behavior is identified
 - Train managers and supervisors to respond



4. Preventative measures

- Prevention requirements
 - Every employer, regardless of size, must take all reasonable steps to prevent sexual harassment in the workplace to avoid liability.
 - **What is reasonable for a large corporation may not be reasonable for a small business.**



4. Preventative measures

When deciding what level of preventative action is reasonable, employers should consider the nature of their workplace, including the following:

- The size and structure of the organisation
- Available resources
- A history of sexual harassment and gender hostility
- Any other relevant factor



4. Preventative measures

Preventative actions to avoid liability

- Employers must take all reasonable steps to prevent sexual harassment from occurring.
- An employer should have a sexual harassment policy, implement it as fully as possible and monitor its effectiveness and if sexual harassment does occur, take appropriate remedial action.
- In order to remedy sexual harassment an employer should have appropriate procedures for swiftly dealing with complaints once they are made.



4. Preventative measures

Five simple steps to prevent sexual harassment

- (1) Get high-level management support*
- (2) Write and implement a sexual harassment policy*
- (3) Provide regular training and information of sexual harassment to all staff and management*
- (4) Encourage appropriate conduct by managers*
- (5) Create a positive workplace environment*



4. Preventative measures

Essential elements of a sexual harassment policy

- (1) A strong opening statement on the organisation's stance on sexual harassment*
- (2) An outline of the organisation's objectives regarding sexual harassment*
- (3) A clearly worded definition of sexual harassment*
- (4) Examples of sexual harassment that may be relevant to the particular working environment*
- (5) What sexual harassment is not*
- (6) A statement that sexual harassment is not*



4. Preventative measures

Essential elements of a sexual harassment policy

- (7) The circumstances in which sexual harassment may occur*
- (8) The consequence that can be imposed if the policy is breached*
- (9) Responsibilities of management and staff*
- (10) Information of where individuals can get help, advice or make a complaint*
- (11) A brief summary of the options available for dealing with sexual harassment*



5. Complaints handling processes

When to investigate alleged sexual harassment?

- An investigation is mandatory under a policy or EBA
- Termination of employment is anticipated due to serious misconduct
- A complaint of discrimination or sexual harassment or bullying has been made
- A breach of work health and safety laws has occurred or is suspected



5. Complaints handling processes

What to do when a complaint is received?

- Assess as to its seriousness and required response
- Respond to in accordance with any enterprise agreement provisions and internal procedures
- Complaint should be dealt with at all times in accordance with procedural fairness principles



5. Complaints handling processes

How do we deal with sexual harassment cases?

- Early assessment of risk and liability
- Properly proof witnesses
- Early settlement of most importance for reputational risk and where loss of income (past and future) a significant issue
- Assume non-economic loss will be high where psychiatric injury
- Private mediation
- Applicant's with psychiatric illness – capacity and settlement

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