



**MAINTAINING A HARASSMENT-FREE WORKPLACE**



PUBLIC SERVICE & MERIT PROTECTION COMMISSION

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## FOREWORD

*T*his booklet is part of a new series titled *Working Together* issued by the Public Service and Merit Protection Commission (PSMPC), following the passage of the *Public Service Act 1999* (PS Act). There are complementary series, *Working with the Act*, which is designed to help agencies to work within the legal framework, and *Values and Conduct*, which gives guidance on managing values and conduct in the workplace.

The PS Act came into operation on 5 December 1999. This Act generally replaces the detailed prescription of the *Public Service Act 1922* by principles and broad heads of power. Responsibility for employment decisions has generally been devolved to Agency Heads, giving them greater flexibility to manage their own workplaces, within the framework of the Act and subordinate legislation, particularly the APS Values and the Code of Conduct.

*Maintaining a harassment-free workplace* is designed to assist agencies in their continuing responsibility to develop policies and programs aimed at preventing workplace harassment. Developing these policies and ensuring that they are understood by employees will contribute to a fair, flexible, safe and rewarding workplace, consistent with the APS Values. In addition, this booklet will assist employees to understand their obligations under the Code of Conduct, which requires them to treat everyone with respect and courtesy and without harassment

Ignoring workplace harassment, or what some might regard as bullying, can have serious consequences. A harassment-free APS is essential if we are to attract and retain talented employees from all backgrounds and if we are to maintain and enhance workplace morale.



Helen Williams  
Public Service Commissioner  
January 2001





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## WHAT IS WORKPLACE HARASSMENT?

**W**orkplace harassment is offensive, belittling or threatening behaviour directed at an individual worker or group of workers. Harassment is often focused on the sex, cultural or racial background or disability of the individual or group.

Harassment is behaviour that is unwelcome, unsolicited, usually unreciprocated and usually (but not always) repeated. It makes the workplace or association with work unpleasant, humiliating or intimidating for the individual or group targeted by this behaviour. It can make it difficult for effective work to be done.

Workplace harassment should not be confused with advice or counselling on the work performance or work-related behaviour of an individual or group which might include critical comments indicating performance deficiencies. Feedback or counselling on work performance or work-related behaviour differs from harassment, in that feedback or counselling is intended to assist employees to improve work performance or the standard of their behaviour. Feedback or counselling should always be carried out in a constructive way that is not humiliating or threatening.

The maintenance of courteous workplace behaviour is not intended to impose unnecessary rigidities on individual workplace styles or on workplace and work-related relationships and social activities. Rather, it is a recognition that people with different backgrounds, interests and friendship groups need to get along with each other in the workplace if an organisation is to be effective.

For harassment to occur, there does not have to be an intention to offend or harass. Moreover, harassing behaviour may be of a minor nature. Individual incidents may seem too trivial to warrant attention, or the person subjected to harassment may seem unaffected. Where the behaviour continues over a period and it is not addressed, however, such behaviour can undermine the standard of conduct within a work area.

Examples of harassing behaviour include:

- offensive physical contact, derogatory language or intimidating actions;
- insulting or threatening gestures or language (overt or implied) or continual and unwarranted shouting in the workplace;
- unjustified and unnecessary comments about a person's work or capacity for work;
- openly displayed pictures, posters, graffiti or written materials which might be offensive to some;

- phone calls or messages on electronic mail or computer networks which are threatening, abusive or offensive to employees;
- persistent following or stalking within the workplace, or to and from work or elsewhere; and
- disparaging remarks about malingering to employees who have made a claim for compensation.

## LEGAL FRAMEWORK

Workplace harassment runs counter to the APS Values and Code of Conduct, as well as Commonwealth anti-discrimination laws.

### APS Values

The Government's public sector reforms introduced in March 1998, and reinforced in the PS Act, aim to achieve a public service governed more by adherence to fundamental values than by reliance on prescriptive legislation and regulation. The APS Values set out in section 10 of the PS Act give public servants a framework in which to exercise discretion in decision making and to respond to emerging issues.

The Values provide for an inclusive environment that is directed at valuing people and their views and helping them to achieve their full potential. Some Values are particularly relevant here, e.g.

- the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace; and
- the APS provides a fair, flexible, safe and rewarding workplace.

### The APS Code of Conduct

All APS employees are subject to the Code of Conduct, set out in section 13 of the PS Act. The Code of Conduct directly prohibits harassment:

- An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.

It also provides directly that APS employees must comply with other Australian legislation:

- An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws.

An employee who fails to observe these requirements may be found to have breached the Code of Conduct and consequently be subject to a sanction under section 15 of the PS Act.

### Commonwealth anti-discrimination legislation

In addition to being a breach of the Code of Conduct, workplace harassment on the basis of race, sex or disability may also breach both the anti-harassment and the anti-discrimination provisions of Commonwealth anti-discrimination legislation.

This includes sexual harassment and discrimination under the *Sex Discrimination Act 1984*, disability harassment and discrimination under the *Disability Discrimination Act 1992* and racial discrimination under the *Racial Discrimination Act 1975*. While the Racial Discrimination Act does not use the term ‘racial harassment’, some types of workplace harassment could be unlawful discrimination under this Act.

In addition to an employee’s personal liability for harassing behaviour under the anti-discrimination legislation, agencies are vicariously liable for the acts or omissions of their employees, unless they can demonstrate they have taken all reasonable steps to prevent the acts from occurring. An agency may therefore be liable for damages awarded for harassment by one of its employees even though the employer is not directly involved in the harassing behaviour. The employer can seek to recover damages from the harasser.

Workplace harassment may also constitute discrimination under the *Human Rights and Equal Opportunity Commission Act 1986*.

### Other Commonwealth legislation

The *Workplace Relations Act 1996* aims to help prevent and eliminate discrimination in the making of awards and agreements and in the termination of employment. Aspects of this Act may be relevant to a workplace harassment allegation.

Under the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, employers must also take all reasonably practicable steps to protect the health and safety of employees at work

### Criminal law

There may be instances where harassment amounts to a criminal offence. Sexual harassment involving physical or indecent assault, stalking, sending offensive emails, sending obscene material through the mail and making nuisance phone calls, for example, may be criminal offences. The police should be contacted for advice and assistance on what matters should be reported and appropriate action in these circumstances.

### Whistleblowing

The PS Act (section 16) protects whistleblowers against victimisation or discrimination. This protection applies when people report a suspected breach of the Code of Conduct to the Agency Head, the Public Service Commissioner or the Merit Protection Commissioner, or to a person authorised by any one of them. Allegations of such breaches may include reports made by employees who believe that harassment is occurring, even where there is no formal complaint from the person(s) being harassed.

Further detail about the legal framework is at Appendix A.





## WHAT HARASSMENT COSTS

### COSTS TO INDIVIDUALS

For individuals, workplace harassment can take its toll in the form of mental and emotional stress. Their work performance could deteriorate and this could have a serious impact on their career prospects. The harasser may also face the cost of damage to their reputation and termination of employment (or other sanction).

### COSTS TO AGENCIES

Failing to educate employees and put in place adequate policies and programs to eliminate harassment and discrimination in the workplace can have serious consequences for agencies. Agencies which tolerate workplace harassment may have difficulty attracting and retaining high performing employees and the ideas and talents these people bring with them. This is the cost of lost opportunities.

Moreover, workplace harassment can affect an organisation's effectiveness through increased employee turnover, frequent sick leave, increases in workers' compensation claims, and reduced performance and morale. Workplace harassment prevents the achievement of an effective and high performing workplace.

There are also considerable costs in dealing with informal and formal complaints and handling litigation, which may include payment of damages.

The 1997-98 Australian National Audit Office Performance Audit Report: *Equity in Employment in the Australian Public Service* noted that damages awarded by the Human Rights and Equal Opportunity Commission (HREOC) are potentially high because they are not capped. The report indicated that the typical amount of damages awarded had been \$20 000 or less; however, the highest total damages awarded at the time of the report was \$135 000.

Most commentators agree that the inclination of equal-opportunity tribunals in Australia to award large compensation is increasing. Employees and the community at large accept increasingly that employers' decisions that offend EEO principles can affect people's lives dramatically and warrant compensation, not only for lost employment or opportunities, but also for stress, anxiety, humiliation and/or damage to reputation.<sup>1</sup>

As a result of the operation of the *Human Rights Legislation Amendment Act (No 1) 1999* HREOC no longer has the power to make an award of damages. This function is now exercised by the Federal Court. There is no 'cap' on the quantum of damages which the Federal Court may award. Legal and other costs of defending such cases add considerably to these costs.

<sup>1</sup> Australian National Audit Office Performance Audit: *Equity in Employment in the Australian Public Service*, Audit Report No. 16 1997-98





## GOOD PRACTICE

**A** PS agencies are responsible for ensuring they have systems in place to prevent and address workplace harassment.

Under anti-discrimination legislation the Commonwealth will generally be liable for the conduct of its employees unless it can establish that it has taken all reasonable steps to prevent the discriminatory conduct. To avoid liability, generally the Commonwealth will need to show that it had an effective system for preventing discrimination and that the system was monitored to ensure that it was achieving its purpose.

An agency's strategy for preventing workplace harassment should comprise the five elements discussed below.

### 1. POLICY STATEMENT

A written policy statement on the organisation's commitment to positive working relationships and practices in the workplace, including refusal to tolerate any form of workplace harassment should include:

- endorsement by the Agency Head;
- a clear definition of harassment, including unfair discrimination on the basis of gender, disability, cultural background, race etc., and noting that behaviour can be considered as harassment even if no harassment was intended;
- a statement that an agency's objectives in eliminating harassment are:
  - to have a workplace that upholds the APS Values;
  - to ensure all employees are treated with courtesy and respect and without harassment;
  - to promote appropriate standards of conduct; and
  - to help everyone to perform to their full potential;
- a commitment to prompt action when harassment is alleged;
- a clear statement that suspected harassment may be dealt with under the misconduct procedures;
- a statement that all employees have a responsibility to ensure that their own behaviour cannot be seen as harassment; and
- encouragement for staff to take action when confronted with behaviour which breaches the harassment policy.

## 2. PROCEDURES

Effective procedures for dealing with incidents of alleged workplace harassment include:

### Involvement of senior management

Accountability for people management, including the prevention of harassment, lies with Agency Heads, managers, and supervisors. They share the legal and managerial responsibilities for detecting and dealing with behaviour which constitutes harassment or has the potential to develop into harassment.

When workplace harassment does occur, it has a serious and sustained impact on both the complainant and the agency. It is important for all managers and supervisors to be familiar with, and to actively promote and support, the agency's policy and strategies for dealing with harassment. Managers and supervisors should advocate and explain the standards of behaviour expected of employees and be mindful of the need to model these standards in their own behaviour. Managers should also provide support for their staff when they seek advice about dealing with workplace harassment, including providing information about review and complaint mechanisms.

Managers and supervisors must take action when they become aware of harassment (even without a complaint necessarily being lodged). Failure by managers and supervisors to act, when they become aware of harassment, to investigate complaints or to take prompt and effective remedial action to deal with such complaints may be perceived as condoning or tolerating such behaviour. Where no such action is taken, the agency may be vicariously liable.

### Involvement of individual employees

Individual employees also have responsibilities for preventing workplace harassment and contributing to a productive work environment, and should ensure that their behaviour meets acceptable standards.

Employees should be encouraged to speak out against harassment when they are witness to it. An assertive and critical response to harassment by witnesses ensures that 'victims' are not isolated and harassers are not left with the impression that their behaviour will be approved or condoned by others.

### Workplace harassment contact officers

Agencies need to establish mechanisms to allow workplace harassment to be reported and addressed. This can be done through a network of workplace harassment contact officers (WHCOs) who can provide advice and support for staff as an alternative to reporting the matter direct to management.

WHCOs have a role in providing information to managers, supervisors and employees on:

- processes available to resolve complaints, including through external bodies such as the HREOC; and

- types of behaviour which are inappropriate at work, in line with the APS Code of Conduct.

*It is not the role of WHCOs to resolve harassment complaints. Their role is to provide information and support to anyone who may be involved in a harassment case. In most circumstances it would be inappropriate for a contact officer to advise both the alleged harasser and the complainant in the same case.*

*It is the responsibility of management to address complaints involving harassment or workplace conduct that may amount to harassment.*

It is important that WHCOs have the skills and qualities to carry out the role successfully. Desirable attributes for contact officers are:

- approachability and ability to communicate with a wide range of people at all levels;
- an understanding and acceptance of the need for confidentiality;
- an understanding of the basic principles and processes of the agency's policy and procedures relating to the elimination of harassment;
- objectivity in approach to harassment cases; and
- appreciation of the sensitivity and complexity of harassment issues.

WHCOs and employees with relevant human resources management responsibilities should receive training in counselling and handling conflict to support their role in advising on workplace harassment issues and alleged incidents. They should also receive information and training in the provisions of the policy and legislation, e.g. they must be advised of their general responsibilities under the Privacy Act to treat personal information they are given as confidential as far as possible.

In general, information provided to WHCOs should not be passed on without the person's consent. There may be occasions, however, where WHCOs have a responsibility to advise management when they become aware of harassment occurring, if the agency is to avoid vicarious liability. Situations may arise where the safety and well-being of other employees is at risk, e.g. where staff have been physically threatened or assaulted or where a number of people have complained about one person. It would be appropriate for it to be made generally known that a WHCO could be considered negligent if such incidents are not referred appropriately, and that an absolute guarantee of confidentiality cannot be made by WHCOs when dealing with harassment. The behaviour in question may be part of a broader pattern. Whenever it becomes apparent that a person is discussing a matter that may require being referred, the WHCO should raise with the person the issue of confidentiality and the possibility of being obliged to pass on the information. Taking into account the relevant Information Privacy Principles, the WHCO should advise how information is passed on in such circumstances, who may have access to it, and the extent to which the staff member will be identified.

Management should assist WHCOs by:

- clearly articulating the role of WHCOs;
- ensuring that they have access to, and the support of, management;
- allowing adequate time for them to undertake their role;
- nominating a senior executive responsible for supporting contact officers as well as providing strategic direction;
- providing them with appropriate training;
- giving them access to a telephone and a private interview space for use in connection with this role;
- giving them secure storage space for confidential papers; and
- maintaining confidentiality, subject to other obligations to disclose.

### Harassment of employees by non-employees

If a person who is not an employee and not on official business in the agency harasses an employee on Commonwealth premises, the matter should be reported to a supervisor or manager. The supervisor or manager may, if considered appropriate, ask this person to leave the premises. If this person remains (especially if they continue to harass employees), the matter should be reported to a person authorised to give directions in accordance with section 12 of the *Public Order (Protection of Persons and Property) Act 1971* (the Public Order Act).

In such circumstances a person authorised for the purposes of the Public Order Act will:

- produce evidence that they are duly authorised to make a direction that the person leave the premises;
- direct the person to leave;
- advise the person that they will be liable to prosecution if they refuse to comply with the direction; and, if necessary,
- contact the police.

The authorised officer should, where necessary, contact the police as well as discuss the matter at the appropriate level within the agency.

### Directions to staff

As in any situation where an employee is causing concern either for work performance or personal conduct, and informal discussions with the supervisor have not rectified the problem, the employee's manager can give the person a written direction about the standards expected and the possible consequences if those standards are not reached. Where an agency gives such written direction and this direction is not complied with, the issue could be dealt with under the agency's misconduct procedures.

This could apply in cases of harassment, including where one employee is harassing another outside the workplace and outside working hours. A Federal Court judgement of October 1996<sup>2</sup> held that it was reasonable and appropriate to direct

an employee not to make contact with a another employee, apart from in the course of official duties, at any time, inside or outside working hours. In that case, after-hours harassment was having an adverse effect on working relationships and on the work performance of the officer being harassed. Managers and APS employees generally should be aware of the legal ramifications of ignoring workplace harassment as well as the costs to performance.

### Complaint handling procedures

It is strongly recommended that agencies develop practical guidelines on complaint handling procedures. Often the internal handling of a complaint has been poor due to the lack of written procedural guidance on issues such as who to contact, how complaints are investigated, gathering and assessing relevant evidence, applying the principles of procedural fairness and the correct standard of proof and record keeping.

It is important to identify both the workplace-based processes and the formal reporting mechanisms available for dealing with complaints and to advise the complainant of these as well as other possible avenues of review, such as the HREOC, as soon as the complaint is brought to attention.

Employees should be aware that if they experience harassment they should:

- seek advice and support through agency procedures established to deal with work-related concerns and complaints; and
- ask the person concerned to stop the offending behaviour. (The employee might wish to seek support before taking this step.)

### Resolution in the work area

In the first instance, both the person alleging harassment and management are encouraged, where possible, to seek to resolve the matter in the immediate work area through discussion, possibly involving mediation and an apology, or at least the cessation of the unacceptable behaviour.

In many instances, such direct measures are a desirable way to resolve cases.

- They allow the case to be addressed without an employee necessarily being labelled a troublemaker (the complainant) or as a harasser (the person against whom harassment has been alleged). This is particularly important where the behaviour was unintentional or misguided.
- They allow for positive action to be taken to correct or alter behaviour.
- They allow management to develop preventive measures throughout a work area without attributing blame to one person or another. This can be important when the harassment is the result of group behaviour or when what has been regarded as 'normal' behaviour in the work area is perceived as harassment by someone new to the area.
- They focus effort on putting future working relationships onto a proper basis by clarifying what is regarded as acceptable behaviour and what is not.

Complaints must be taken seriously and mutually agreed outcomes sought. The complaint should be discussed only with those who are involved in the resolution of the case. If an employee alleges harassment by a supervisor, another senior manager should seek to resolve the issue.

Supervisors should take care not to resolve the situation in such a way as to leave employees with no option other than to accept continuing offensive behaviour.

At the same time, the supervisor should ensure that the person alleging harassment is acting in good faith and not out of malice. It is important that any investigation complies with principles of procedural fairness, which include informing the alleged harasser(s) of the substance of the allegations made and giving them an opportunity to put their case. It should be noted that procedural fairness does not necessarily require the identification of the person alleging harassment.

The outcome sought through discussion should be the cessation of any offensive behaviour and, if appropriate, an apology from the harasser(s). Nevertheless, management may take misconduct action against the harasser as a means of reinforcing the principle that harassment in the workplace will not be tolerated. This action is open to management at any time, regardless of whether or not the complainant is satisfied with the outcome of the discussions in the immediate work area.

If the employee who has complained of harassment is satisfied with the outcome of the informal process, he or she should inform their supervisor promptly so that normal working relationships can resume.

Where allegations of harassment are found to be unsubstantiated, the person alleging harassment should be advised of other possible avenues to follow, should she or he wish to pursue the matter further.

### Reporting outside the work area

In some instances, an individual may choose to lodge a complaint outside the immediate work area, by reporting the situation to a person authorised to receive such complaints. This would be appropriate where lodging a complaint within the immediate work area is not considered to be appropriate, or where resolution in the workplace has not been achieved.

The employee or group can lodge a request for a review of action in accordance with the agency's procedures under section 33 of the Act, or a complaint in accordance with any relevant clause of their agency's Certified Agreement. It is also possible to report the conduct to an authorised person in management as a possible breach of the Code of Conduct.

Possible outcomes of an investigation could include:

- the cessation of offensive behaviour;
- an apology from the perpetrator;

- counselling or education on discrimination and harassment for the perpetrator and, if appropriate, the work group or whole organisation;
- professional counselling for the person subject to harassment;
- determining/recommending that the matter should be the subject of a misconduct process (**note:** if misconduct action is taken and it is determined that the alleged harassment is a breach of the Code of Conduct, a sanction under section 15 of the PS Act may be imposed on the perpetrator);
- transfer to an alternative work site for the perpetrator or the complainant (only if this is the complainant's preference and if this is not seen to further discriminate against the complainant); or
- compensation for the person subject to harassment.

A request for review of actions can be lodged with the Merit Protection Commissioner if the matter has been investigated within the individual's own agency under section 33 of the Act or under its Certified Agreement and the complainant is not satisfied with the outcome. In addition, where the alleged harassment is based on the employee having lodged a complaint within their own agency, or where a matter is so serious or sensitive that it is inappropriate that it be investigated within the agency, a request for review can be lodged direct with the Merit Protection Commissioner. A complaint of sexual harassment involving a senior officer of the agency would be an example of such a matter.

Complainants should be made aware, as soon as they notify the appropriate person in their agency of their request for review, that where the alleged harassment is based on attributes including sex, race or ethnic origin, disability, marital status, sexual preference or age (for full list see Appendix A), a complaint can be lodged, usually in writing, with the HREOC.

In addition to Commonwealth laws, States and Territories have laws that prohibit discrimination, including harassment. In situations which are covered by both Commonwealth and State or Territory laws, a complainant can generally select the body they wish to deal with their complaint.

*It is important to remember that, whether or not an individual complains about harassment, it is possible for management to commence misconduct action in response to any reports or observation of harassment.*

### 3. INFORMATION AND TRAINING

A policy statement by management supporting positive working relationships and committing the agency to measures to combat workplace harassment should be distributed to all employees. Other materials, such as posters or pamphlets, could be used to reinforce the message. The following actions may be helpful:

Information about workplace harassment and agency policy and procedures should be provided in:

- material supplied to all new employees;
- orientation training programs;
- general staff training in workplace harassment issues;
- training related to occupational health and safety; and
- training in the application of the Values and Code of Conduct, recognising that good practice in this area will enhance workplace performance.

Training for supervisors should include:

- awareness raising and discussion of their responsibility for maintaining a workplace free of harassment;
- information about management liability and the performance and financial costs of workplace harassment; and
- material on conflict resolution and case studies on dealing with incidents of harassment.

#### 4. RECORD KEEPING AND CONFIDENTIALITY

It is important to document any action taken to address complaints. Records enable recurring patterns of behaviour or continuing problems in a particular work area to be identified and corrective action to be taken. In addition, adequate records will be essential if the matter leads to formal misconduct action, i.e. to determine whether the behaviour is a breach of the Code of Conduct and a sanction is subsequently imposed. Should there be questions as to whether a harassment claim was properly handled, adequately maintained records may be vital in any later review of the processes undertaken. Further advice about recording counselling discussions is available in the PSMPC/Comcare publication *Counselling for Better Work Performance*.

Records must be handled confidentially in accordance with the agency's procedures, and consistent with the *Privacy Act 1988* and the Administrative Functions Disposal Authority (published by National Archives of Australia, February 2000), which provides information on retention and disposal of written records.

It is important that investigations of allegations of workplace harassment maintain confidentiality with information provided only on a 'need to know' basis. Because of the sensitivity of material relating to workplace harassment, special care should be taken to protect the confidentiality of any records relating to complaint processes. Requirements in this regard should be communicated within agencies.

The *Privacy Act 1988* has requirements in relation to these matters and specifies a number of Information Privacy Principles which regulate the way government agencies collect, store, use and disclose personal information.

The *Freedom of Information Act 1982* provides for individuals, including employees, to gain access to documents which may contain personal information held by an agency. Employees who wish to make a Freedom of Information request should be

advised of who to contact for Freedom of Information enquiries. Since records relating to alleged harassment are likely to contain personal information about the complainant and the alleged harasser, consideration of the exemptions concerning personal information will be an important step in any decision relating to access. Other exemptions may also be relevant.

When access is granted under the Act, there are protections for those who grant access as well as for authors and suppliers of documents.

## 5. MONITORING AND EVALUATION

Monitoring the incidence of workplace harassment, including complaints which are resolved informally, will also assist in evaluation of agency strategies, policies and procedures. Agencies may wish to consider developing a standard form to be used by WHCOs and other officers responsible for dealing with cases of workplace harassment to enable them to gather general information on complaints. The data could cover the type of complaint, number of employees involved, relevant dates, information and advice provided and resolution outcome. The names of parties involved in the complaint process or other information which could identify them should not be used on the form.

The 1997-98 Australian National Audit Office Performance Audit Report: *Equity in Employment in the Australian Public Service* suggests that in preparing their annual reports, agencies could consider including statements on the level of discrimination and harassment in the workplace, the level of formal and informal complaints and the results of any investigations. Although this is not a requirement of the guidelines on annual reporting approved by the Joint Committee of Public Accounts and Audit and issued by the Department of the Prime Minister and Cabinet, agencies may wish to consider such reporting as a matter of good practice.

### Conclusion

The above elements 1 to 5 should be in place to enable a Commonwealth agency to demonstrate that it had taken all reasonable steps to prevent harassment occurring and therefore avoid vicarious liability.

Good practice indicates that agencies need to demonstrate a genuine commitment to preventing harassment above and beyond documenting policies and providing training.

Involving both employees and managers in developing a workplace harassment strategy helps to gain commitment to the process. Such an approach also assists in tailoring strategies to meet agency and employee needs. In addition, consultation with members of EEO groups allows special needs to be identified and accommodated.

The 'Frequently Asked Questions' which follow gives further guidance on implementing procedures designed to minimise harassment in the workplace.





## FREQUENTLY ASKED QUESTIONS

The following questions and answers seek to address some of the most common issues raised by supervisors and WHCOs.

### QUESTIONS FROM SUPERVISORS

*I've warned one of my employees a number of times about harassing a colleague in the work group. The employee persists in this behaviour, and the colleague has now asked to be transferred out of the area. What do I do?*

Transferring the colleague to another area may bring a short-term remedy, but it does not solve the problem. Management must make its standards known and take action against those who engage in harassment, and not just 'rescue the victim'. Where the harasser has not followed instructions, the supervisor should initiate action to determine whether there has been a breach of the Code of Conduct, in accordance with the agency's procedures under section 15 of the Act. It may be appropriate to assign the alleged harasser to other duties while determining the outcome of the investigation.

*One of my employees seems to be having trouble with excessive attention from a colleague in the next work area. The employee has not made any type of complaint. Should I interfere?*

As a supervisor, you are to ensure your employees have a safe workplace where they can work effectively and efficiently. There are various reasons why people do not complain about harassment: fear of retaliation, lack of confidence, fear of ridicule, embarrassment or belief that it is normal behaviour in the agency. When talking to your employee, you might express your concern about ensuring that everyone has a harmonious work environment and ask if there are any difficulties with the work colleague. The colleague's supervisor should be made aware of the possibility of harassing behaviour. If you sense that there is a problem and do nothing at all, the situation may develop to the point where there are regular absences, work-related stress and lowered work output. There is also the possibility that your organisation will be liable if no action is taken.

*Our long established workgroup has a new employee who seems unable to cope with teasing from the other members of the team, who have all worked together very harmoniously for over a year. Should the new employee seek a transfer?*

The members of the workgroup are required by the Code of Conduct to treat colleagues with respect and courtesy and without harassment. Where behaviour causes offence or humiliation, or is a threat to the employee, it may constitute

harassment. If the behaviour includes unwelcome conduct of a sexual nature, it may constitute harassment under the *Sex Discrimination Act 1984*.

Members of the workgroup should be informed about the effect of their behaviour on their new colleague. If the offensive behaviour persists, there may be grounds for taking action against individuals within the group, to determine whether there has been a breach of the Code of Conduct. Moving the new employee out of the area may appear to be condoning the group's behaviour. Such action might encourage repetition of the behaviour and would be likely to cause distress to the new employee as they would appear to have been moved because they could not 'fit' the workplace culture.

*How do I know when a harassment situation requires police action?*

Some forms of workplace harassment may be criminal offences, e.g. actual or attempted assault (including indecent assault). Sending obscene items through the mail and making nuisance phone calls may also be criminal offences. The police should be contacted for advice and assistance on appropriate action in these circumstances.

*When a harassment problem in my work group seems to have been resolved through discussion and the behaviour has stopped and there has been an apology, do I need to keep any written record of the incident and the ensuing discussions?*

When a harassment problem has been resolved within the work area, it is appropriate to keep only limited records such as brief diary notes. Comprehensive notes are not necessary. However, where the matter is dealt with outside the work area, a greater degree of documentation is likely to be required. All notes and records must be stored in a confidential manner, in accordance with the Privacy Act and the Administrative Functions Disposal Authority of the National Archives of Australia.

*A contractor engaged to install a new software system is harassing a female employee in my work group. What can I do about it?*

Sexual harassment by a contractor or an employee of a contractor is unlawful under the *Sex Discrimination Act 1984*. You should remind the contractor of this. If the harassment recurs, then you may wish to seek legal advice with a view to termination of the contract. Legal advice should be sought before taking action as the contractor's behaviour may not be a breach of the contract or there may be a requirement for notice. It would also be open to the employee to make a complaint to the HREOC.

Perhaps the most effective way of ensuring that contractors are aware that they are under an obligation not to engage in harassing behaviour is to include a clause in the contract which requires contractors to observe agency and APS requirements and policies in relation to workplace harassment and acceptable behaviour. This would address situations where contractors harass APS employees as well as situations where harassment of their own employees has an adverse impact upon others around them if they are working in APS workplaces.

*An employee in my team is concerned about some of the material she has been receiving by email which she finds offensive. Is this harassment?*

Yes. If email is used in an offensive, humiliating or threatening manner, whether on a sexual, racial, or other basis, for example sending unacceptable jokes or graphics, it could constitute harassment and should be dealt with as such.

Agencies should ensure that employees are aware of the Code of Conduct requirements about use of Commonwealth resources as well as agency policies on accessing and using email and information from the internet in an acceptable manner. In some circumstances, sending offensive emails could also constitute an offence under the Crimes Act.

## QUESTIONS FROM WORKPLACE HARASSMENT CONTACT OFFICERS

*I am a Workplace Harassment Contact Officer. Am I expected to solve rather serious conflict situations? What exactly is my level of responsibility?*

Your main function is to provide information and support to individuals who believe they are being harassed. Employees can approach you even if they do not want to make a formal complaint. WHCOs have a role in providing information to managers, supervisors and employees on the processes available to resolve complaints, clarifying what types of behaviour are acceptable at work in line with the Code of Conduct and raising awareness that views on acceptable behaviour can differ between individuals. *It is not your role to resolve harassment complaints*, only to provide information and support, ensuring that confidentiality is maintained as appropriate. Management has a responsibility to resolve workplace problems, and WHCOs should encourage people to seek solutions to harassment problems by reporting the matter to the appropriate person. In some circumstances it will be appropriate for the WHCO to inform management.

*A person working as an Executive Assistant to one of our SES employees has complained of being under pressure to work long hours. What do I suggest?*

It is important here to be able to distinguish between an industrial issue and a harassment issue. The SES employee may well believe that, so long as the arrangements in the agency's Certified Agreement have not been breached and the work needs to be done, then it is justifiable to request the EA to work long hours. You might, with the EA's agreement, approach the SES employee, or the issue might be more effectively dealt with by bringing it to the attention of management through the agency's workplace consultative arrangements. You may wish to put the EA in touch with workplace representatives or raise the matter with them yourself. The long-term solution may be the implementation of workplace policies that recognise family responsibilities.

If, on the other hand, the requests to work long hours are accompanied by threats or bullying, then the SES employee may be breaching the Code of Conduct. While you could offer the EA advice on the processes that are available to combat this type of harassment, for example requesting a review of actions, it may be useful to

consider other strategies, including raising the matter with a senior manager responsible for supporting contact officers.

*Is it really harassment if an employee makes no personal contact but sends regular gifts, flowers or letters to another employee?*

Behaviour which is unwelcome and/or unreciprocated could be considered harassment if it has reached the point of being offensive. If the person receiving the gifts finds them unwelcome, they must make this clear and request the person to stop. Ignoring the matter may not terminate it and it is possible the person sending the items may take silence as a positive response.

# APPENDIX A

## THE LEGAL FRAMEWORK

### APS Code of Conduct

All APS employees must comply with the APS Code of Conduct. Harassment of colleagues is likely to be a breach of the Code.

The Code, which is set out in section 13 of the PS Act, includes a requirement for APS employees, when acting in the course of APS employment, to:

- treat everyone with respect and courtesy and without harassment; and
- comply with all applicable Australian laws.

Employees who fail to observe these requirements may be found to have breached the Code of Conduct and may be subject to a sanction under section 15 of the Act.

### Commonwealth anti-discrimination legislation

Workplace harassment on the basis of a number of attributes including race, sex or disability may be a breach of both the anti-harassment or anti-discrimination provisions of Commonwealth anti-discrimination legislation.

### Sexual harassment

The *Sex Discrimination Act 1984* provides that:

A person sexually harasses another person if:

- the person makes an unwelcome sexual 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; and
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Workplace sexual harassment includes a wide range of behaviour of a sexual nature, from subtle suggestions about, to explicit demands for, sexual activity—or even indecent assault.

Such behaviour includes making a statement of a sexual nature either to the harassed person or in his or her presence. It applies to verbal, non-verbal and written statements. Behaviour that may be acceptable or even welcome in other situations, for example between friends in a social context, may be inappropriate at work.

Sexual harassment may be an isolated incident or a series of incidents. Both men and women can be subjected to sexual harassment from persons of the same or the opposite sex. A person need not actually intend to offend for conduct to amount to sexual harassment.

## Disability discrimination

The *Disability Discrimination Act 1992* outlaws any discrimination or harassment in employment due to disability. A person discriminates against another person on the ground of disability if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than the discriminator would treat a person without the disability. This Act makes harassment in employment unlawful and describes harassment as a form of discrimination. Harassment that is based upon a person's relative or associate having a disability is also unlawful.

Harassment on disability grounds may occur when a person is treated less favourably than others because he/she uses a palliative or therapeutic device or aid, uses a wheelchair or needs a loud speaker telephone, or uses a guide dog, a hearing dog, or other trained animal. Another form of harassment on disability grounds is overbearing or abusive behaviour towards employees with intellectual disabilities, or disparaging remarks about malingering to employees who have made a claim for compensation.

## Racial discrimination

While the *Racial Discrimination Act 1975* does not use the term 'racial harassment', that Act defines as unlawful any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin of a person which has the purpose of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Clearly some types of workplace harassment could be seen as unlawful behaviour under the Act.

## Human Rights and Equal Opportunity Commission Act

Workplace harassment may constitute discrimination under the *Human Rights and Equal Opportunity Commission Act 1986*. This Act defines discrimination to mean any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation made on the basis of race, colour sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference, or trade union activity.

## Commonwealth workplace relations legislation

The *Workplace Relations Act 1996* aims to help prevent and eliminate discrimination in the making of awards and agreements and in the termination of employment. The Act makes it unlawful to terminate the employment of an employee on certain grounds including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

In addition, the Freedom of Association provisions in section 298A describe one of the objects of Part XA of that Act as to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.

### Commonwealth occupational health and safety legislation

Employers have to take all reasonably practicable steps to protect the health and safety of employees at work under the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. An employer who fails to take reasonably practicable precautions to prevent workplace harassment from occurring, or who fails to deal promptly and effectively with any complaint of harassment, may be in breach of an employer's duty of care to employees.

### Criminal law

There may be instances where harassment amounts to an offence under criminal law. Incidents involving physical or indecent assault, stalking, sending obscene material through the mail and making nuisance phone calls or sending offensive emails, for example, may be offences under criminal law and should be reported to the police.

## APPENDIX B

### USEFUL REFERENCES

#### Legislation

*Disability Discrimination Act 1992*

*Human Rights and Equal Opportunity Commission Act 1986*

*Occupational Health and Safety (Commonwealth Employment) Act 1991*

*Privacy Act 1988*

*PS Act* <http://www.psmpc.gov.au/psact.htm>

*Racial Discrimination Act 1975*

*Sex Discrimination Act 1984*

*Workplace Relations Act 1996*

Administrative Functions Disposal Authority (2000) (National Archives of Australia). <http://www.naa.gov.au/recordkeeping/disposal/authorities/GDA/AFDA/summary.html>

Public Service Regulations 1999 <http://www.psmpc.gov.au/psact.htm>

Public Service Commissioner's Directions 1999 <http://www.psmpc.gov.au/psact.htm>

#### Material containing 'good practice' advice

*Counselling for Better Work Performance*, a joint PSMPC/Comcare publication, December 2000 <http://www.psmpc.gov.au/publications00/counselling.htm>

*Equity in Employment in the Australian Public Service*, Australian National Audit Office, Audit Report No.16, 1997–98 <http://www.anao.gov.au/rpts98.html>

Review of employment-related actions in the Australian Public Service, PSMPC, 2000 <http://www.psmpc.gov.au/mpc/reviewactions.htm>

*Guidelines on Official Conduct of Commonwealth Public Servants*, PSC, 1995 (currently being updated) <http://www.psmpc.gov.au/publications96/conduct.pdf>

*The Employer's Duty of Care Under the Occupational Health and Safety (Commonwealth Employment) Act 1991*, Comcare Australia <http://www.comcare.gov.au/publications/dutyofcare/fs-doc.html>

*Sexual Harassment—A Code of Practice*, Human Rights and Equal Opportunity Commission, 1998 [http://www.hreoc.gov.au/pdf/S7\\_2\\_1.pdf](http://www.hreoc.gov.au/pdf/S7_2_1.pdf)