

Tuesday 18 July 2023

# HR Perspective: Sexual Harassment from a Safety Perspective

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# CASE STUDY

## CASE STUDY

- A person conducting a business or undertaking (PCBU) provides accommodation and care services to young men with disabilities
- One resident had an ongoing interest in violent sexual acts and had previously been convicted of sexually offending against a female support worker
- Between 2015 and 2019, multiple psychologists and psychiatrists diagnosed the client with various mental disorders
- A risk plan was implemented however, it was largely deficient and was not provided to all staff

## CASE STUDY

- The PCBU had received reports from female support workers that the client had threatened and harassed them
- On 20 June 2020, the resident assaulted a female worker on night shift with intent to rape her
- PCBU was charged with breaching section 32 of the WHS Act
- It was held that the PCBU was aware the behaviour was escalating but failed to undertake an adequate hazard identification and risk assessment process
- Penalty of AU\$120,000, but discounted to AU\$72,000 due to the PCBU's early guilty plea and contrition



In that regard, I accept that this is not a case where the defendant took no steps at all... However, its measures were **seriously deficient**. A prime failure was not giving adequate consideration to **the safety of all the defendant's employees**, and in particular its female employees. **Informing all employees of the risk posed by the client was not onerous**. A focus on the risk to those employees supervising the client failed to protect other employees.



# PREVALENCE OF SEXUAL HARASSMENT

- 1 in 3 people experienced sexual harassment at work in the last 5 years (41% of women and 26% of men)
- Most sexual harassment in Australian workplaces is carried out by men
- 50% of incidents are repeated and, of those, half were ongoing for more than one year
- Only 18% of incidents were reported
- Around two-thirds of workers said their organisation has a sexual harassment policy
- 50% said that their organisation provided information to workers about how to report



*Employers are reminded that preventing and effectively dealing with sexual harassment in the workplace is their responsibility and that failing to protect workers is **a crime**.*

WorkSafe Victoria  
Executive Director  
**Julie Neilsen**  
9 March 2021

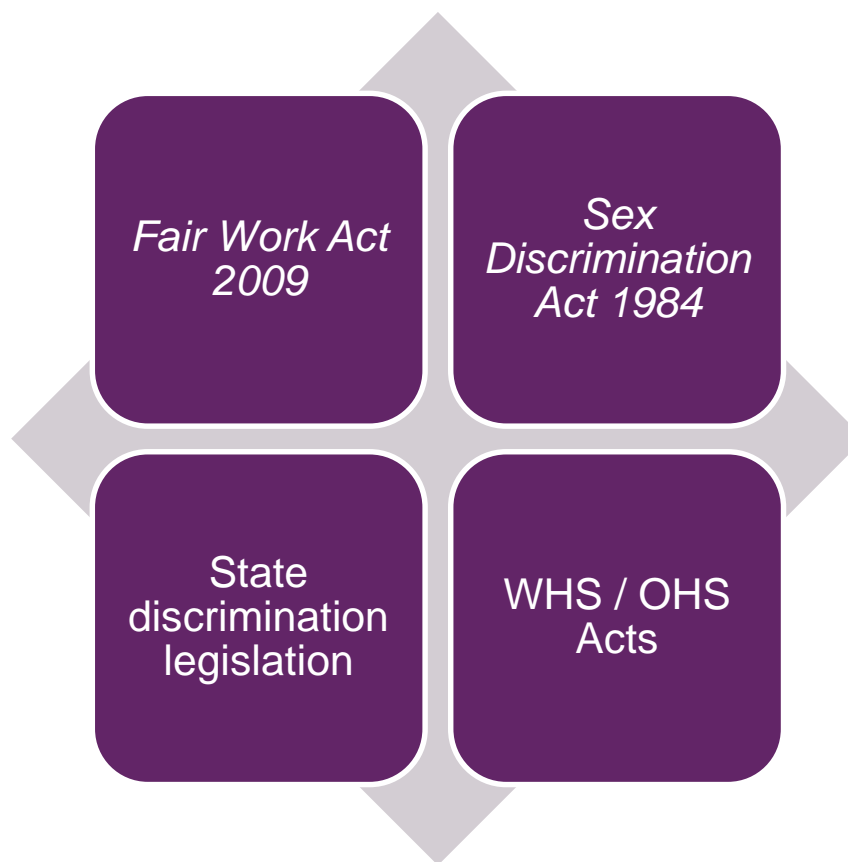






# EMPLOYER'S DUTIES

# INTERSECTION OF SAFETY AND 'EMPLOYMENT'



# RESPECT@WORK

- Significant reform to Federal legislation between 2021- 2022
  - Aimed at implementing recommendations from *Respect@Work: Sexual Harassment National Enquiry Report*
  - The Commission heard of the need to shift from the current reactive, complaints-based approach, to one which requires **positive actions from employers** and a focus on prevention



**Respect@Work:**  
National Inquiry into  
Sexual Harassment in  
Australian Workplaces

AUSTRALIAN HUMAN RIGHTS COMMISSION • 2020

# CHANGES ARISING FROM RESPECT@WORK



Positive duty to “*take reasonable and proportionate measures*” to eliminate, as far as possible, unlawful sex discrimination, sexual harassment and victimisation at work



Prohibition on workplace environments that are hostile on the ground of sex



Stop sexual harassment orders

# CHANGES ARISING FROM RESPECT@WORK



Sexual harassment at work is serious misconduct



New and expanded claims for sexual harassment, including harassment on the ground of sex, hostile work environments and victimisation



**From 12 December 2023:** New powers of the Australian Human Rights Commission (AHRC) to enforce compliance with the positive duty, including via inquiries and compliance notices

# PROHIBITION ON SEXUAL HARASSMENT UNDER THE *FAIR WORK ACT 2009*

- Commenced on 6 March 2023
- A person (the first person) must not sexually harass another person (the second person) who is:
  - a) A worker in a business or undertaking; or
  - b) Seeking to become a worker in a particular business or undertaking; or
  - c) A person conducting a business or undertaking,  
if the harassment occurs in connection with the second person being a person of the kind mentioned in (a), (b) or (c).

# PROHIBITION ON SEXUAL HARASSMENT UNDER THE *FAIR WORK ACT 2009*

## Vicarious liability

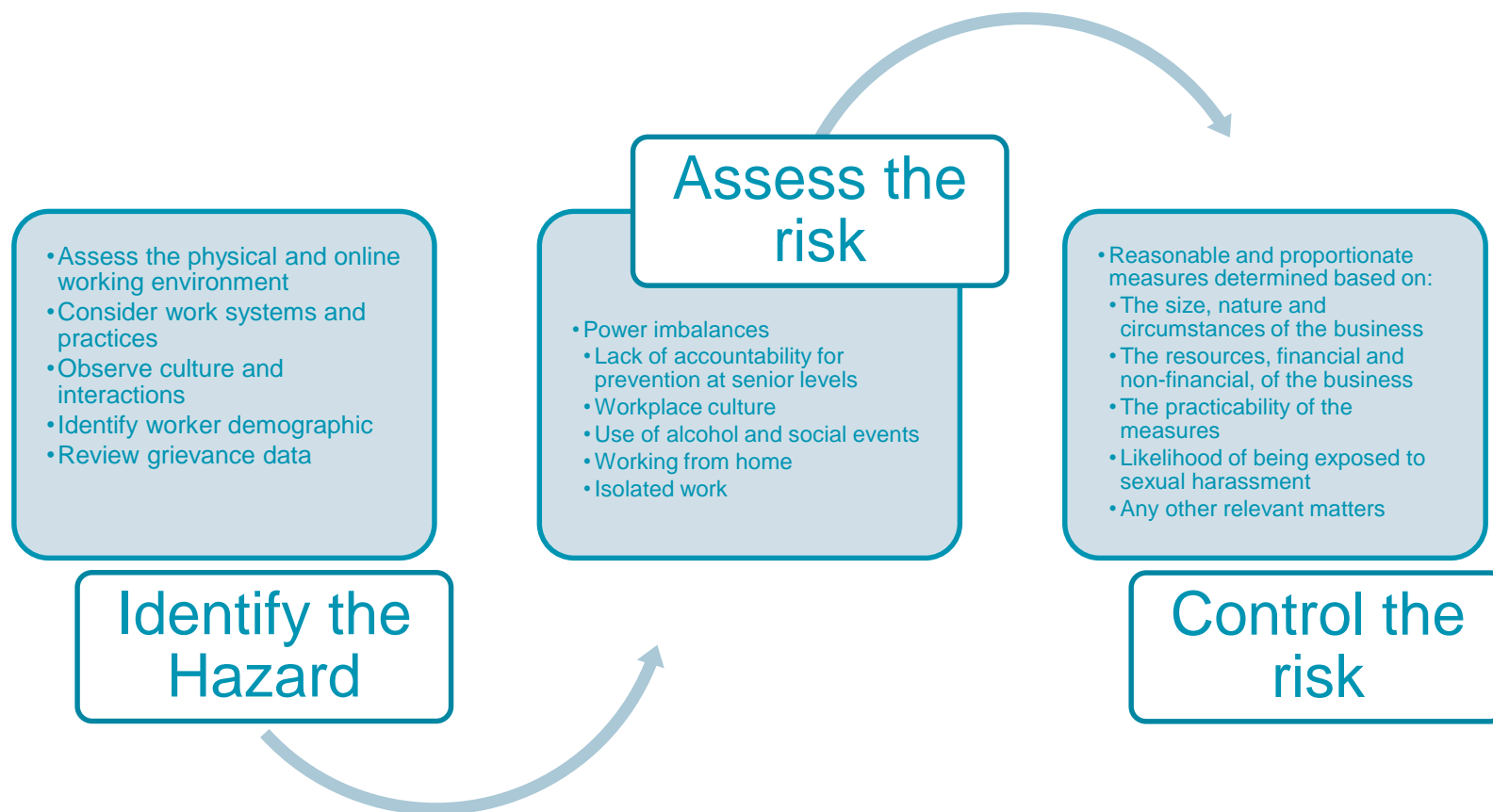
- If an employee of a person does, in connection with the employment of the employee, an act that contravenes s.527D(1), the Act applies in relation to the employer as if the employer had also done the act
- BUT, the employer is not liable if it proves that they took all reasonable steps to prevent the employee from doing acts that would contravene s.527D(1)

# THE NEW POSITIVE DUTY

- Section 47C of the *Sex Discrimination Act 1984* (Cth)
- Employers and PCBUs (duty holders) must take **reasonable and proportionate measures** to eliminate, as far as possible, sexual harassment
- Duty also applies to eliminating as far as possible:
  - a) Discrimination on the ground of a person's sex;
  - b) Conduct which subjects a person to hostile workplace environments; and
  - c) Acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to any of the above.



# THE NEW POSITIVE DUTY





# PSYCHOSOCIAL REGULATION

# A NATIONWIDE FOCUS

## Commonwealth

- Work Health and Safety Amendment (Managing Psychosocial Risk and Other Measures) Regulations 2022 (*from 1 April 2023*)
- Code of Practice on Managing psychosocial hazards at work, 2022

## WA

- Work Health and Safety (General) Regulations 2022
- Code of Practice on Psychosocial Hazards in the Workplace

## NT

- Work Health and Safety (National Uniform Legislation) Regulations 2011 (*from 1 July 2023*)
- To adopt the Commonwealth Code of Practice (*from 1 July 2023*)

## QLD

- Work Health and Safety (Psychosocial Risks) Amendment Regulation 2022 (*from 1 April 2023*)
- Code of Practice on Managing Psychosocial Hazards at Work (*from 1 April 2023*)

## NSW

- Work Health and Safety Amendment Regulation 2022
- Code of Practice on Managing Psychosocial Hazards at Work

## SA

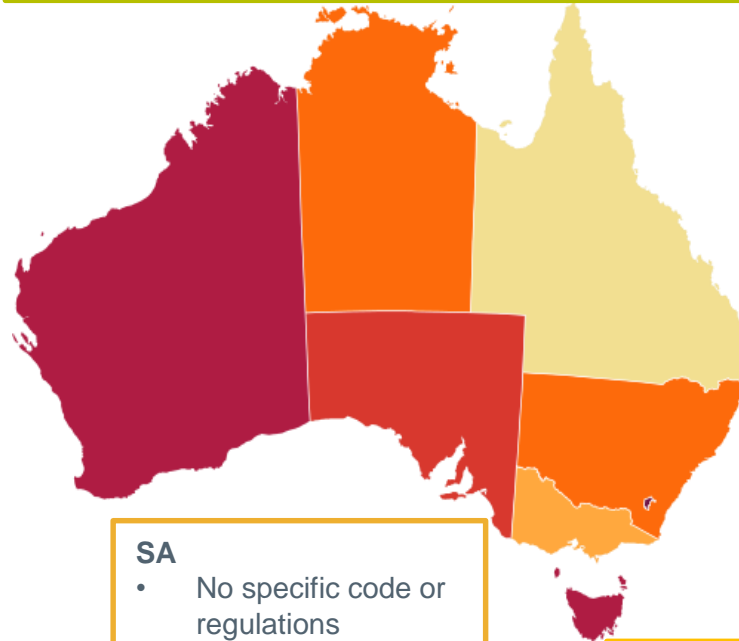
- No specific code or regulations

## TAS

- Adopted the Commonwealth Code of Practice
- Work Health and Safety Regulations 2022

## Victoria

- Proposed OHS Amendment (Psychological Health) Regulations, 2022



# SEXUAL HARASSMENT AS A PSYCHOSOCIAL HAZARD



## Hazard

Sexual harassment is recognised as a common psychosocial hazard in workplaces



## Duties

Duty holders must treat the risk of sexual harassment just as they would any other workplace hazard



## Approach

This means applying a risk management approach to eliminate or minimise risks so far as is reasonably practicable

# THE EVOLVING UNDERSTANDING OF PSYCHOSOCIAL RISK

THE  
OLD  
PARADIGM

*Individual focus on 'at risk' employees*

## Traditional focus

- Psychological health as:
  - "private"
  - a matter of individual resilience
- Psychological injury as secondary to physical injury

*Reactive management - respond to illness / injury*

## Traditional management tools

- EAP / counselling referrals
- Sick leave, compassionate leave, special leave
- Investigation of incidents



*Systems focus on inherent risks of work*

## Emerging focus

- Looking at systematic factors in work that may cause stress
- A risk based approach
- Recognising the impact of the work environment & culture

*Proactive management - prevent harm*

## Emerging management tools

- Risk assessments
- System standards, e.g. ISO
- Role design and redesign
- Workplace culture programs

THE  
NEW  
PARADIGM



# PREVENTION BASED STRATEGY

# PREVENTION BASED STRATEGY

- Active 'buy in' from the most senior levels of leadership
- Review / implement a sexual harassment policy
- Provide regular training and information on sexual harassment to all staff and management
- Identify hazards in particular parts of the organisation / particular settings
- Require appropriate conduct by managers
- Imposing appropriate consequences on those engaging in sexual harassment

# IDENTIFYING HAZARDS

Assessing the  
workplace  
environment

Considering  
work systems  
and practices

Observing the  
culture of your  
workplace and  
leadership

Confidential  
anonymous  
worker surveys

Identifying the  
worker  
demographics

Identifying high  
risk scenarios  
(e.g. events and  
alcohol)



# CONTROLLING RISKS



# WHAT MAKES A GOOD POLICY?

- *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2)* [2020] FCAFC 13
  - State that sexual harassment is against the law
  - Cite the source of the law
  - State that the employer is vicariously liable for the acts of its employees.
- Clear definition of sexual harassment with practical examples
- Identification of responsibilities of management and workers
- Standard legalistic complaint procedure may not be fit for purpose
- Nomenclature is important
- Regularly review and update

# EFFECTIVE TRAINING

- “Just don’t do it” training is not always effective
- **Peer group specific training –**
  - Convey the seriousness and potential consequences of sexual harassment – be clear that it is unlawful
  - Educate all staff on the policies and procedures in place
  - Training should not be ‘one size fits all’
  - Consider the group you are presenting to and tailor content appropriately
  - For managers - provide tools to identify concerning behaviour, solve problems and reinforce that they are required to model appropriate behaviour
- **Bystander intervention training –**
  - Make it everybody's job to call out misbehaviour
  - Help workers know what to do when they see signs of a problem

# GRIEVANCE HANDLING PROCESS

“The process for investigating or responding to reports, complaints or incidents involving psychosocial hazards should be proactive, fair, objective, conducted in a timely and impartial manner, applied consistently to all workers, and ensure procedural fairness for all parties involved.”

*Managing the risk of psychosocial hazards at work Code of Practice 2022*

1. Act promptly
2. Ensure immediate safety
3. Treat all matters seriously
4. Use a trauma-informed approach
5. Maintain confidentiality
6. Be neutral
7. Support all parties
8. Do not victimise
9. Communicate process and outcomes
10. Keep records



QUESTIONS?

# PRESENTERS



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