Victorian Public Sector Commission

VICTORIA State Government

Prevention of sexual harassment

Sexual harassment is unlawful and prohibited. In the workplace, sexual harassment can take various forms and can be directed at all persons.

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1. About this guide

Developed by the Sexual Harassment in the VPS Working Group that was set up under the auspices of the Integrity and Corporate Reform Sub-committee (ICRS) of the Victorian Secretaries Board (VSB).

This guide has been published by the Victorian Public Sector Commission (VPSC). It was developed by the Sexual Harassment in the Victorian Public Service Working Group (Working Group) that was set up under the auspices of the Integrity and Corporate Reform Sub-committee (ICRS) of the Victorian Secretaries Board (VSB).

The guide is intended to apply to the Victorian Public Service (VPS) and the Victorian Public Sector (collectively 'organisations'). It has been prepared to assist organisations to implement their sexual harassment policy so that appropriate workplace behaviour is promoted and sexual harassment in the workplace is actively prevented and addressed. It seeks to provide clear guidance for human resource (HR) practitioners (or equivalent) and managers to consider in relation to sexual harassment so that processes can be prepared and consistently followed.

The Working Group has also prepared a Model Policy for the Prevention of Sexual Harassment in the Workplace (Model Policy) to assist organisations to either update or develop their sexual harassment policies. This guide should be considered in conjunction with the Model Policy.

This guide and the Model Policy are non-binding. They do not impose mandatory procedures that an organisation must follow when a report of sexual harassment is made, and an employee's conduct is called into question. However, the laws that inform this guide and the Model Policy are binding.

In the first instance, organisations should refer to their own policies and procedures in relation to sexual harassment. VPS employers can also refer to the Management of Misconduct Policy developed by Industrial Relations Victoria for additional guidance. Furthermore, when managing an employee in relation to misconduct, the reader should refer to relevant industrial instruments.

The VPSC recommends that readers also refer to the employment principles and

standards page and separate guidelines in relation to the 'fair and reasonable treatment' employment principle, issued by the Victorian Public Sector Commissioner.

2. Code of conduct and public sector values

Employees must adhere to the Victorian public sector values. In the context of sexual harassment, demonstrating the following values are particularly relevant.

The Code of Conduct for Victorian Public Sector Employees and the Code of Conduct for Employees of Special Bodies (Codes of Conduct) describe the behaviours that exemplify the values contained in the Public Administration Act 2004. Employees must adhere to the Victorian public sector values. In the context of sexual harassment, demonstrating the following values are particularly relevant:

- **Integrity –** using powers responsibly and reporting improper conduct;
- **Respect –** promoting an environment that encourages respect for colleagues and others by creating an environment that is free from discrimination, harassment and bullying;
- **Leading by example –** modelling behaviours based on the public sector values and acting in an ethical manner. For managers, providing a safe, encouraging and supportive work environment; and
- **Human rights –** seeking to protect the human rights of colleagues, public officials and the Victorian community by raising concerns regarding circumstances that could breach those rights and reporting any suspected breaches in accordance with procedures established by the employer.

Section 61(6) of the Public Administration Act 2004 states that a contravention of a code of conduct by a public official who is bound by the code, is capable of constituting misconduct.

3. Legislative framework

Sexual harassment is a specific and serious form of harassment that is unlawful and prohibited by both Victorian and Commonwealth legislation.

Sexual harassment is a specific and serious form of harassment that is unlawful and prohibited by both Victorian and Commonwealth legislation.

It can also constitute sex discrimination and/or a criminal offence.

3.1 Victorian legislation

Section 15 of the Equal Opportunity Act 2010 requires organisations to take reasonable and proportionate steps to eliminate sexual harassment in the workplace as far as possible. This means that positive action should be taken to prevent unlawful behaviour occurring in the workplace. This positive duty requires an employer to do more than just respond to reports of sexual harassment as and when they arise. The positive duty is about being proactive in identifying problems and taking reasonable and proportionate measures to eliminate the causes of sexual harassment, as far as possible, that may be part of the systems or culture in the workplace.

Section 92 of the Equal Opportunity Act 2010 provides that a person sexually harasses another person:

- 1(a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- 1(b) engages in any other unwelcome conduct of a sexual nature in relation to the other person

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

Conduct of a 'sexual nature' includes:

- 2(a) subjecting a person to any act of physical intimacy;
- 2(b) making, verbally or in writing, any remark or statement with sexual connotations to a person or about a person in their presence;
- 2(c) making any gesture, action or comment of a sexual nature in a person's presence.

Section 93 of the Equal Opportunity Act 2010 prohibits sexual harassment in the workplace. This covers employers, employees, any person seeking employment, contract workers and volunteers.

Section 94 of the Equal Opportunity Act 2010 prohibits sexual harassment between people in common workplaces, defining a workplace as the place a person attends for the purpose of carrying out functions in relation to their employment. It does not need to be the person's main place of business or employment.

Section 21 of the Occupational Health and Safety Act 2004 provides than an employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

The Gender Equality Act 2020 (Vic) commenced in March 2021. Sexual harassment in the workplace is a workplace gender equality indicator under section 3 of the *Gender Equality Act*.

Under section 7 of the Gender Equality Act, defined entities have a duty to promote gender equality. According to the Act, this means that a defined entity must — in developing policies and programs and in delivering services that are to be provided to the public, or have a direct and significant impact on the public:

- consider and promote gender equality; and
- take necessary and proportionate action towards achieving gender equality.

Section 10 of the Gender Equality Act requires defined entities to prepare a Gender Equality Action Plan based on the results of a workplace gender audit.

Section 11 of the Gender Equality Act provides that defined entities must undertake a workplace gender audit to access the state and nature of gender inequality in the workplace, with regard to the workplace gender equality indicators, which includes sexual harassment. Departments are encouraged to refer to the Commission for Gender

Equality in the Public Sector guidance materials located on their website for a detailed overview of employer obligations in relation to workplace gender audits, gender impact assessments and Gender Equality Action Plans.

3.2 Commonwealth legislation

Section 28A of the Sex Discrimination Act 1984 provides that a person sexually harasses another person (the 'person harassed'):

- if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed;
- if the person engages in other unwelcome conduct of a sexual nature in relation to the person harassed; or
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Relevant circumstances to be taken into account may include, but are not limited to:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request, or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstance.

'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.

Section 28B provides that it is unlawful for:

- a person to sexually harass an employee of the person, or a person who is seeking to become an employee of the person;

- an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer;
- a person to sexually harass a commission agent[4] or contract worker of the person, or a person who is seeking to become a commission agent or contract worker of the person;
- a commission agent or contract worker to sexually harass a fellow commission agent or contract worker;
- a workplace participant[5] to sexually harass another workplace participant at a place that is a workplace of either or both of those persons.

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[4] The Sex Discrimination Act 1984 defines a commission agent as 'a person who does work for another person as the agent of that other person and who is remunerated, whether in whole or in part, by commission'.

[5] Workplace participant includes an employer or employee, a commission agent or contract worker, or a partner in a partnership.

4. Sexual harassment in the workplace

Sexual harassment is a systemic cultural issue, not just a matter of individual conduct.

4.1 Sexual harassment is a cultural issue

Sexual harassment is most commonly experienced by women and perpetrated by men. It can also be directed at, and perpetrated by, all persons including men, women, transgender people, and those who identify as non-binary.

Sexual harassment is a systemic cultural issue, not just a matter of individual conduct. People Matter Survey results show a strong association between the application of the public sector values and lower reported negative behaviours including bullying, discrimination and sexual harassment.

Attributes including age, gender identity, sexual orientation, being Indigenous, other cultural and linguistic diversity, disability, low income and job insecurity increase the risk that a person may experience sexual harassment. In addition, intersectional identities can compound the experience for some individuals.

In the VPS, few people who experience sexual harassment choose to report it. This is for different reasons including thinking that reporting it will not make a difference and believing it would have a negative impact on their career or reputation.

4.2 The various forms of sexual harassment

Sexual harassment in the workplace may take various forms. It may be physical, spoken or written (including on social media or via email or text message) and may include, but is not limited to:

- unwelcome physical contact of a sexual nature;
- comments or questions of a sexual nature about a person's private life or their appearance;
- sexually suggestive behaviour, such as leering or staring or offensive gestures;
- brushing up against someone, touching, fondling or hugging;
- sexually suggestive comments or jokes;
- displaying offensive screen savers, photos, calendars or objects;
- repeated requests to go out;
- unwanted displays or declarations of affection;
- requests for sex;
- sexually explicit emails, text messages or posts on social networking sites;
- sexual assault, indecent exposure physical assault and stalking (which are also criminal offences); and
- actions or comments of a sexual nature in a person's presence (even if not directed at that person).

4.3 A single incident can constitute sexual harassment

A single incident can constitute sexual harassment. Equally, an ongoing and broader pattern of behaviour can also constitute sexual harassment.

4.4 Intent

The Equal Opportunity Act 2010 and the Sex Discrimination Act 1984 provide that sexual harassment occurs in circumstances where the conduct is unwelcome and a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

Sexual harassment can still occur even when a harasser does not intend it. Motive is irrelevant; the test focuses on how the behaviour is experienced by the other person. It is

the responsibility of all staff to ensure that they do not engage in or ignore any behaviour that might be sexual harassment.

5. Prevention

The Equal Opportunity Act 2010 requires organisations to take proactive steps to eliminate sexual harassment from occurring in the workplace as far as reasonably practicable.

The Equal Opportunity Act 2010 requires organisations to take proactive steps to eliminate sexual harassment from happening in the workplace as far as is reasonably practicable. To avoid vicarious liability for the conduct of their employees and agents, employers and principals are also required to take reasonable precautions to prevent sexual harassment.

Both the Australian Human Rights Commission (AHRC) and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) have published guidelines highlighting key steps in the prevention of sexual harassment in the workplace.

Australian Human Rights Commission

Obtain high-level management support

In March 2018 and November 2019, the VSB released Sexual Harassment Statements making it clear that sexual harassment has no place in the Victorian public sector. Signed by all Departmental Secretaries, the Victorian Public Sector Commissioner and the Chief Commissioner Victoria Police, these statements were circulated to all staff and provided to portfolio agencies for distribution.

Write and implement a workplace sexual harassment policy

Building on the VSB statements on sexual harassment, the VPSC has issued a Sexual Harassment Model Policy (the Policy). The Policy promotes consistent practice across the Victorian public sector so that those who have experienced sexual harassment have the confidence to come forward.

Provide regular training for all staff

Effective implementation of sexual harassment process and procedures is supported by training for all staff. Training can be e-based and/ or face-to face and could be provided as part of induction, as regular training or as refresher training (or ideally all of the above). Training should be tailored to suit organisational requirements but should seek to:

- highlight relevant legislation;
- reference the organisation's sexual harassment policy;
- reference an employer's obligation to act;
- reference bystander interventions; and
- be available to all executives, managers and staff.

As part of training, organisations could provide employees with information on how to conduct themselves appropriately outside of the workplace in circumstances where there is a link to employment. It needs to be made clear that inappropriate conduct may result in a breach of the Codes of Conduct. Expected standards of behaviour should also be reinforced before a work-related social function, such as an office end-of-year party.

Encourage appropriate conduct by senior staff

The binding Codes of Conduct set out the behaviours that are expected of all Victorian Public Sector staff. Senior staff and those with management responsibilities have a particular responsibility to model the behaviours and to lead and promote workplaces that are grounded in respect and free from discrimination and harassment.

Create a positive workplace environment

Organisations have a range of policies and strategies in place that aim to support respectful workplaces. Developing and sustaining a culture of respect and equality is ongoing and requires regular consideration. While culture can be understood to be as simple as 'the way we do things around here', regular consideration of how an organisation is tracking is valuable. It allows an organisation to align its purpose to the public sector values and reinforce its workplace culture.

The AHRC 2020 Respect@Work Sexual Harassment National Inquiry report found that current approaches to preventing and responding to sexual harassment in workplaces are inadequate. They typically rely on people to come forward and report sexual harassment, often contributing to ongoing stress to staff. In response to the shortcomings of current approaches, the AHRC recommends that workplaces adopt a new framework that is:

- victim-centric;
- practical;
- adaptable for businesses of all sizes and in all industries; and
- designed to minimise harm to workers.

The new framework is structured around seven domains. It recognises that improving workplace prevention and responses requires a new and more holistic approach that looks beyond policies, training and procedures.

To better prevent sexual harassment, the AHRC recommends action in the following areas:

- Leadership – develop and display strong leadership that contributes to cultures that prevent sexual harassment.
- Risk assessment and transparency – focus on identifying and assessing risk, learn from past experience and be transparent about sexual harassment, both within and outside of workplaces, to mitigate the risk it can pose to businesses. This can help improve understanding of these issues and encourage continuous improvement in workplaces.
- Culture – build a culture of trust and respect, that minimises the risk of sexual harassment occurring and, if it does occur, ensure it is dealt with in a way that minimises stress to staff. This includes the role of policies and human resources practices in setting organisational culture.
- Knowledge – develop new and better approaches to workplace education and training, to demonstrate a commitment to addressing sexual harassment and initiate change by developing a collective understanding of expected workplace behaviours and processes.

To better respond to sexual harassment, AHRC recommends action in the following

areas:

- Support – prioritise staff well-being and the provision of support to staff before they make a report, after they report and during any formal processes.
- Reporting – increase the options available to staff to report workplace sexual harassment and address barriers to reporting. Create new ways for your organisation to intervene to address sexual harassment, other than launching a formal investigation. Adopt a victim-centric approach to the way investigations are conducted when a report is made to minimise unnecessary pressure on staff.
- Measuring – collect data at a workplace-level and industry-level to help improve understanding of the scope and nature of the problem posed by sexual harassment. This includes understanding the prevalence, nature and impacts of workplace sexual harassment as well as the effectiveness of workplace initiatives designed to address it.

Victorian Equal Opportunity and Human Rights Commission

Understand the employer obligations under the Equal Opportunity Act 2010 and have up-to-date knowledge about workplace sexual harassment

Organisations must understand the law relating to sexual harassment, including their positive duty and the drivers and impacts of sexual harassment. Leaders and supervisors should be equipped with the knowledge to identify and respond to sexual harassment in the workplace.

Develop and implement an effective sexual harassment prevention plan

Organisations must assess what steps they will take to prevent sexual harassment, including measures in compliance with the six minimum standards outlined in the VEOHRC guideline, and have documented the plan. Staff and their representatives should have the opportunity to contribute to the development or revision of the plan. Staff should know where to find the prevention plan, including any relevant policies and

procedures. Leaders must implement the plan and are accountable for the commitments within it.

Drive a culture of respect by building organisational capability

Organisations must set and clearly communicate the expectations of respectful workplace behaviour to staff. Steps should be taken to ensure that staff understand that sexual harassment and victimisation are against the law and will not be tolerated. Bystanders should be encouraged to act safely to respond to sexual harassment.

Manage risks factors for sexual harassment

Organisations must regularly identify and assess risk factors for sexual harassment, including by seeking feedback from staff. Staff should understand and be encouraged to use systems in place to address risk. Organisations must also recognise and treat sexual harassment as a work health and safety (WHS) risk, using existing systems and processes for managing WHS risks or hazards to eliminate or control the risk of sexual harassment occurring, so far as reasonably practicable.

Address sexual harassment consistently and confidentially to hold harassers to account

Organisations must develop a fair and confidential reporting procedure in consultation with staff. The well-being of the people who have made reports is a priority. Employers should ensure that staff know how and where to make a report and are supported to do so. Responses to reports should be timely and consistent, with appropriate disciplinary outcomes. Employers should ensure that staff are supported throughout the reporting process, including through identifying and preventing victimisation and prioritising staff well-being.

Regularly review, evaluate and improve outcomes and strategies

Organisations should regularly collect and assess reporting and data for trends,

patterns and lessons to drive continuous improvement. Employers should regularly review and update sexual harassment prevention plans (e.g. annually) to drive continuous improvement. Employers should also ensure they are transparent about trends, patterns and lessons with staff, boards and key stakeholders. Staff should have confidence that sexual harassment is being eliminated in their workplace.

5.1 Calling out inappropriate behaviour

Improving the ability of all staff to call out inappropriate behaviour that they hear or see, promotes a positive workplace culture free of sexual harassment. Calling out poor behaviour in a respectful way also supports those who may be experiencing sexual harassment and reinforces other strategies to address sexual harassment in the workplace.

Any organisation looking to encourage staff to call out inappropriate behaviour, and thereby promote and implement bystander strategies, needs to ensure that staff are empowered to do so. Bystander action is supported by broader culture change activities. This includes training and education, so that staff know that they are protected from reprisal or victimisation should they speak up.

Responding to sexual harassment or knowing how to react when witnessing inappropriate behaviour may be challenging. Organisations can refer to the VEOHRC sexual harassment support and response tool. It's designed to help people navigate difficult conversations about sexual harassment in the workplace.

It is recognised that in many instances people will not feel confident to report the behaviour. If employees feel that they are able to respond, some suggested opening lines from comebacksatwork.com include:

- "I don't think that joke was very funny."
- "For people who respect each other, we seem to be a bit off course today."
- "This seems like a good time to take a break and reflect upon what you just said/what just happened."
- "I am just taking a moment to be sure I heard/saw you right and to ask, did you really just say/do that?"
- "Can we please pause for a moment? I just want to make sure we are being

respectful."

Staff can also be an active, helpful bystander by assisting a victim/survivor immediately after they have witnessed a sexual harassment incident. For example, the staff member can acknowledge the unacceptable behaviour and ensure the victim/survivor knows about reporting and support mechanisms available to them. Bystanders can also report an incident they have witnessed.

6. Reporting sexual harassment

It is acknowledged that organisations will have a range of approaches to managing reportds of sexual harassment.

The VPSC acknowledges that organisations will have a range of approaches to managing reports of sexual harassment. Some organisations will have a specific process for sexual harassment. Others will use existing reporting processes designed to manage a range of workplace matters including misconduct, performance and sexual harassment.

Some public sector employers are bound by mandatory reporting of suspected workplace misconduct. This includes sexual harassment. Reporting suspected workplace misconduct can constitute a Public Interest Disclosure (PID) under the Public Interest Disclosures Act 2012.

Neither the Equal Opportunity Act 2010 nor the Sex Discrimination Act 1984 specifies how a reporting process should be structured. However, a reporting process should allow for flexibility to deal with reports in line with an organisation's size, structure and resources. The reporting process should also prioritise staff well-being and support. All Victorian Public Sector reporting processes must link to relevant industrial and contractual instruments.

Regardless of the structure of the reporting process, it is recommended that organisations ensure that multiple avenues are available to address barriers to reporting. For example, via email, phone, in person, or anonymously through assigned workplace contact officers.

To comply with minimum standard 5 in the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) sexual harassment guideline, employers should implement a reporting procedure that commits to the following fundamental principles of fair and sensitive report handling:

- Confidentiality – during the process, only those who need to know should know.
- Timeliness – action should be taken as soon as reasonably possible, but definitely within two weeks. All parties should be kept updated.

- Supported – the process should be victim-centric, while including the right to a support person for both the person who has made a report and the respondent, and providing referrals for additional support.
- Right of reply – parties should be provided with sufficient details of any allegations against them, and can make representations and counter-claims during the process and appeal decision.
- Fairness – the process should be impartial and any workplace action (both disciplinary and non-disciplinary action) should be reasonable and proportionate, with the respondent held to account.

Organisations can also refer to VEOHRC's step-by step guide to responding to reports.

6.1 Reporting sexual harassment at work

Those who have experienced sexual harassment can make a report in a number of ways. This includes making a report internally, to their manager, a HR practitioner (or equivalent), or to an external body. Making an internal report at work does not preclude a person from also making an external report and vice versa.

External bodies that can consider a report of sexual harassment include:

- Victorian Equal Opportunity and Human Rights Commission
- Victorian Civil and Administrative Tribunal (VCAT)
- The Federal Court of Australia
- Australian Human Rights Commission.

A person may also make a report to WorkSafe or through internal safety reporting mechanisms as sexual harassment can constitute occupational violence. A claim of sexual harassment may also form part of a sex discrimination claim under the Fair Work Act 2009's general protections provisions, or as part of a negligence/personal injury claim.

A person may also make a report to Victoria Police if the sexual harassment constitutes criminal conduct, such as sexual assault or stalking. Victoria Police may not always be the relevant agency to contact when making a sexual harassment claim. For example,

should sexual harassment occur on an interstate trip, it may (but not always) be more appropriate for the complainant to contact the relevant police agency in that state or territory.

6.1.1 Responding to sexual harassment

The tone of the first response to a report of sexual harassment is very important. It is paramount that the person who has made a report is supported and treated with respect, understanding and concern. This approach ensures that experiences are not trivialised or downplayed, and that victim blaming is avoided. Employee and well-being support services (such as an organisation's Employee Assistance Program) should be offered to a person who has made a report to ensure they have independent professional support during the process.

People who have made a report may be deterred from reporting sexual harassment due to fears of severe consequences for the respondent. Employees should be made aware that coming forward and making a report may not necessarily result in launching a formal investigation, and that the organisation will strongly consider the wishes of the person who has made a report. Additionally, should an investigation be conducted, there are a range of potential disciplinary outcomes available under the Management of Misconduct provision in the Victorian Public Service Enterprise Agreement and the consequences for the respondent are not necessarily severe. Knowing that there are a range of disciplinary outcomes may encourage employees to come forward and make a report.

Given the highly sensitive nature of sexual harassment, organisations are encouraged to consider the processes listed in the checklist for managers and practitioners in the Appendices.

This checklist provides prompts to support managers and HR practitioners (or equivalent) to respond appropriately and consistently when approached with a report of sexual harassment. These steps have been designed to be followed regardless of whether the report is made to the person who has made a report direct manager, a different manager or any other designated officer i.e. HR practitioners (or equivalent).

Certain aspects from the table (such as those that relate to natural justice and confidentiality) are further explained in other sections in this guide. Refer to sections 7.2 Natural justice and 7.3 Confidentiality respectively.

7. Key considerations

All Public Sector organisations are covered by enterprise agreements.

7.1 Industrial Instruments

7.1.1 Public sector enterprise agreements

All Public Sector organisations are covered by enterprise agreements. Organisations should look to their enterprise agreement in the first instance for direction on the key considerations and any other procedural obligations that may be set out, for example in a misconduct clause, when developing policies and procedures to manage reports of sexual harassment.

7.1.2 Management of misconduct under the Victorian Public Service (VPS) Agreement

The key considerations set out in this guide are not intended to supersede the process for managing misconduct established by the Management of Misconduct provision in the VPS Agreement. Supervisors and managers, in consultation with HR practitioners (or equivalent), will be required to treat all allegations of sexual harassment against employees covered by the VPS Agreement in accordance with the VPS Agreement process, including any investigation or determination of a disciplinary outcome.

While the VPS Agreement covers the majority of employees, there are other enterprise agreements that cover VPS employees and these agreements will also contain misconduct provisions that set out the process for responding to allegations made against employees covered by those enterprise agreements.

7.2 Natural justice

When considering a report, one of the primary aims is to ensure that all procedures are followed correctly, and industrial obligations met. This prevents, as far as practicable, the possibility of an employee being treated unfairly or unreasonably, and having to seek an avenue of redress, such as an internal review or an unfair dismissal claim.

7.2.1 What are the rules of natural justice?

The rules of natural justice ensure that investigations, and any related decisions, are fair and reasonable. Natural justice can have a particular meaning under different industrial instruments and these should be referred to as appropriate. Notwithstanding this, natural justice can include that:

- The respondent is informed of the specific allegations made against them, so they have a fair opportunity to respond. It is important the respondent is provided with as much information as possible in writing – i.e. dates, names and details of the alleged conduct, as appropriate. Providing the respondent with generalised allegations of behaviour may be in breach of the principles of natural justice and may not give the respondent the best opportunity to respond.
- The process to be followed is explained to the respondent (e.g., that the allegations will be put to them and they will be given adequate time to respond; that any relevant witnesses will be interviewed in due course; and that the investigator will then make a finding based on the evidence).
- The respondent is informed that they may be represented by their union representative, or other support person, at each stage of the process.
- The respondent is informed of the purpose of any meetings that may be held.
- The respondent is provided with an opportunity to respond via documentation, an interview or a combination of both.
- The investigator and then in turn, the decision-maker, must act in good faith and without bias. To act without bias means the person conducting the investigation has no preconceived opinions, vested interests or prior personal involvement in the matter. This does not necessarily exclude a person from the same organisation as the respondent, from conducting an investigation or making a decision. However, there must not be any actual or perceived bias.

A decision is based on the facts presented by the parties. To base a decision on the facts requires the decision-maker to consider only the information that is relevant to the matter. The onus of proof will generally lie with the party asserting a fact and the matter will be considered on a balance of probabilities.

7.2.2 What if the rules of natural justice are breached?

It is important to remember that a finding may be called to review if there are flaws in the reporting process or decision-making process. This may be because the investigator and/or decision maker:

- fails to comply with proper procedures;
- acts for the wrong purpose;
- exercises power in bad faith;
- fails to take into account relevant information; or
- considers irrelevant information or acts unreasonably.

Having to conduct another investigation because the first investigation was flawed, is not only traumatic and stressful for the parties involved, but also costly in terms of time and resources.

If breaches of the natural justice rules are identified before the investigation is completed and/or the outcome is decided, it may be possible to remedy the situation. For example, if new information emerges, this can be provided to the respondent for an opportunity to respond.

It should also be noted that review of actions, or dispute processes, may be available to the person aggrieved (unless the matter has been dealt with by a disciplinary process resulting in termination, in which case this may be dealt with through an unfair dismissal application to the Fair Work Commission).

7.3 Confidentiality

Disclosures of sexual harassment will be treated in confidence in order to protect personal privacy to the greatest extent possible. It is important that the wishes of the

person who has made a report and others involved in the reporting process are considered when making decisions concerning confidentiality. The person who has made a report should be advised that their matter may need to be discussed, escalated or referred to other relevant persons. Only those who have a direct need to know should have access to information.

These people might include (but are not limited to):

- HR (or equivalent) who are managing the report;
- the respondent to whom the allegation relates to;
- external bodes such as police or WorkSafe;
- the relevant decision-makers;
- an investigator engaged to investigate the allegations; and
- the person who has made a report support person or representative.

Advice may be sought from local privacy contacts prior to the release of material that may contain personal details.

Organisations should use non-disclosure agreements (NDAs) or deeds of separation sparingly – for example, when a person who has made a report has requested confidentiality around their experience. When a decision is made to use an NDA, it should be carefully tailored.

Employers should consider drafting NDAs in such a way that:

- provides 'carve-outs', which permit the person who has made a report to speak to some third parties, such as a medical professional, or a relevant regulator or authority (such as VEOHRC); and
- tailors the confidentiality clause to only prohibit certain disclosures.

Read more

- Page 81 of the Victorian Equal Opportunity and Human Rights Commission's Guideline: preventing and responding to sexual harassment
- AHRC 2020 Respect@Work Sexual Harassment National Inquiry report

7.3.1 Can people who have made a report or witnesses remain anonymous?

In some situations, a person who has made a report or witnesses may express a wish to remain anonymous. The need for anonymity may be reduced once the person who has made a report and/or witness is informed of:

- the processes to be followed in handling their concerns;
- the principles of confidentially which apply; and
- any organisational policies and practices in place to protect them from victimisation.

It is important to note that disclosures of sexual harassment will be treated in confidence to the extent it is appropriate to do so. As allegations of sexual harassment or potential criminal conduct are serious, they may need to be escalated or referred without agreement of those involved, particularly in circumstances that may:

- constitute a criminal offence;
- constitute an occupational health and safety risk; and
- require disciplinary action.

The Victorian Equal Opportunity and Human Rights Commission's Guideline: preventing and responding to sexual harassment outlines steps employers can take when responding to anonymous reports.

These include:

- recording the report in a de-identified way while ensuring the confidentiality of the person who has made a report;
- reiterating to all staff the organisation's sexual harassment policy, reporting procedure and available supports, and inviting staff to make reports;
- monitoring the alleged respondent's behaviour and intervening if new issues arise;
- speaking with other members of the alleged respondent's team to identify whether there is a cultural issue or pattern of conduct, or surveying staff more broadly;
- monitoring closely to ensure victimisation does not occur and intervening where

issues arise;

- having a system to collect de-identified information and data provided by disclosures, while maintaining confidentiality; and
- implementing new procedures or work systems that reduce the likelihood or opportunity for further harassment.

7.4 Conflict of interest and perception of bias

In the first instance, organisations should refer to their organisational policies for guidance on conflict of interest and management of misconduct policy.

The principles of natural justice require that a person handling a misconduct report must act in good faith and without bias. It is important to ensure there is no reasonable perception of bias or a conflict of interest that could prejudice the final decision. This could arise where the person handling the report has a vested interest, a prior involvement in a matter or a personal relationship with either the person who has made a report or respondent.

Where a conflict of interest or reasonable perception of bias is identified, appropriate steps should be taken to manage the conflict. This may include that all parties are informed of the circumstances giving rise to the conflict, through to arranging for another person to undertake the investigation, and/or to be the decision-maker in relation to the report.

7.5 Victimisation

In the first instance, organisations should refer to their organisational policy on management of misconduct which may provide guidance on victimisation.

Employers have a responsibility to ensure that employees are not victimised or treated unfairly because they have made a report of sexual harassment or have participated in a reporting process (such as a witness).

Victimisation occurs when a person is subjected to, or threatened with, any harm or damage for their involvement in the matter. It can include:

- bullying or intimidation by co-workers;
- being denied a promotion or being moved to a position with lower responsibility;
- dismissal from employment; and
- being refused further contract work.

Victimisation for making a report of sexual harassment is unlawful under the Equal Opportunity Act 2010 and federal anti-discrimination laws. Victimisation can constitute detrimental action and create an offence under the Public Interest Disclosures Act 2012. Related remedy for detrimental action is available through Fair Work Australia. Such behaviours may also be misconduct under the relevant industrial instrument.

7.6 Standard of proof

In the first instance, organisations should refer to their organisational policy on management of misconduct which may provide guidance on the standard of proof.

When determining whether a report of sexual harassment has been proven, a finding must be based on the conclusion that it is more probable than not that the alleged matter did in fact occur. This is known as the 'balance of probabilities' and is the standard of proof required in civil cases. It is important to note the distinction that the person handling the report does not need to be satisfied 'beyond reasonable doubt' which is the standard of proof for criminal matters.

It should be noted that the standard of evidence required to meet the 'balance of probabilities' test will increase in accordance with the seriousness and consequences of the allegations. Where a serious allegation is made, reasonable satisfaction should not be produced by inexact proofs, indefinite witness statements or indirect inferences (*Briginshaw v. Briginshaw* [1938] 60 CLR 336).

7.7 Investigating allegations with no independent witnesses

By its nature, sexual harassment may often occur where there are no independent witnesses.

An organisation's decision to not conduct or substantiate an allegation should not solely be on the basis that there was no independent witness.

Where allegations of sexual harassment are made, without independent witnesses, they should be treated as seriously as other allegations and with the same respect, understanding and concern for the well-being of the person who has made a report as other allegations.

Those responsible for investigating reports should consider all available evidence and sources of information that may corroborate that the incident did or did not occur. Evidence that may be relevant includes:

- evidence that the person who has made a report discussed their concerns with a family member, friend, co-worker, medical practitioner or counsellor;
- supervisor's reports and personnel records (for example, unexplained requests for transfer or shift changes, sudden increase in sick leave);
- reports or information provided by other employees about the behaviour of the alleged respondent;
- records of the alleged harassment kept by the person who has made a report;
- whether the evidence was presented by the parties in a credible and consistent manner; and
- the absence of evidence where it should logically exist.

While each of the above elements of themselves does not substantiate an incident actually occurred, it may build a picture that corroborates the person who has made a report account to the requisite standard of proof outlined in 7.6.

Even if the matter cannot be substantiated, continuing to investigate matters may identify behaviours or actions (short of misconduct) that warrant further investigation or remedial action to prevent incidents of sexual harassment occurring in the future and demonstrate to employees that the organisation takes matters seriously and will act on inappropriate workplace behaviours.

Where an allegation of sexual harassment cannot be substantiated, it is paramount that the organisation actively takes steps to promote the well-being of the person who has made a report. How the person who has made a report feels throughout and at the conclusion of an investigation, particularly if the allegation is not substantiated, may

impact future reporting behaviour and the person who has made a report's long-term well-being and intention to stay at the organisation. It is important that the person who has made a report's well-being is prioritised, and they are offered support with services such as the EAP.

7.8 Sharing information at the conclusion of an investigation

What and how much information can be provided to parties at the conclusion of an investigation requires organisations to weigh the rights and interests of the person who has made a report against that of the respondent.

During a reporting process, privacy of all involved is paramount. At the beginning of the reporting process all persons involved in the process should be made aware of how the matter will be dealt with and what information can and will be provided throughout the process to relevant persons.

Organisations may also provide the person who has made a report with other information as is reasonably practicable, while observing confidentiality and privacy obligations. The interests and rights of the person who has made a report to know that their report has been dealt with appropriately should be balanced against the interests and rights of the respondent.

Generally, if reasonably practicable and appropriate, the following information should be provided to the person who has made a report:

- whether an investigation was conducted
- if the matter was not investigated, why not.

If the matter was investigated, they should be given information about:

- the nature of the report investigated;
- any allegations substantiated in relation to the report;
- whether a discipline outcome was applied;
- where reasonable and appropriate, what, if any, discipline outcome was applied;

and

- any further recommendations/action taken.

A decision on the types of information provided should have regard to the organisation's privacy obligations, the need to treat allegations confidentially (for the sake of both the respondent and the person who has made a report), occupational health and safety obligations, and to ensure other investigations (for example an investigation being undertaken by Victoria Police or the Independent Broad-based Anti-corruption Commission (IBAC)) are not prejudiced. Any information shared must also be consistent with the relevant obligations in industrial instruments. Where criminal or external investigations are on foot the organisation should seek advice from the external agency about what can be shared and the types of information that can or should be provided.

At the conclusion of any investigation, where the organisation communicates the outcome to a person who has made a report, they should also advise the person who has made a report the spirit in which the information has been provided to them as well as any confidentiality obligations that exist for the person who has made a report.

Organisations should also avoid excessive disclosures of personal information, and only share what is necessary for the purposes of handling and resolving the report. For more information, read Privacy in the Workplace from the Office of the Victorian Information Commissioner.

7.9 Behaviour outside the workplace

Under the Codes of Conduct, Victorian public sector employees must avoid conduct in their private life that may adversely affect their standing as a public official, or which may bring their public sector employer into disrepute.

As such, conduct that is apparently unrelated to the performance of duties may be a breach of the Codes of Conduct, if there is a clear and relevant connection between the employee's out-of-hours conduct and its effect on the workplace. Of course, this must be balanced against the principle that a public sector employee has an entitlement to a private life outside of work.

Sexual harassment can extend beyond the usual workplace and outside normal working

hours. For example, workplace sexual harassment can occur where there is a link to employment. This includes (but is not limited to) at social functions with the team/workplace; on social media platforms; on the telephone via call or text; via internet or fax; in vehicles while on the way to work functions or meetings or at after-parties to such events (regardless of their location).

For more detailed information read the Victorian Equal Opportunity and Human Rights Commission's Guideline: preventing and responding to sexual harassment.

7.10 Record keeping

In the first instance, organisations should refer to their organisational policy on management of misconduct or other applicable policy which may provide guidance on record keeping.

All correspondence with an employee/s in relation to a report of sexual harassment should be recorded. It is extremely important to keep all correspondence, and document all conversations and action taken to avoid any dispute between the parties, if a disagreement between versions of events arises.

Records should include:

- letters and emails (including any attachments);
- notes of telephone calls and conversations;
- the investigation report with all relevant evidence;
- any draft material provided to the employee for comment;
- the employee's response to correspondence; and
- file notes of action taken in the process.

7.11 Reporting allegations to external agencies/authorities

Some forms of sexual harassment are also criminal offences. Criminal offences include

stalking, sexual assault, common assault, indecent exposure, threatening conduct and using a telephone or communication medium to harass, threaten or annoy.

If an organisation suspects that a criminal incident has occurred, the organisation is required to report the matter to the appropriate external agencies/authorities (for example, Victoria Police). Organisations should have a checkpoint during the reporting process to determine whether the organisation needs to report the alleged sexual harassment to Victoria Police.

Where the person who has made a report expressly requests the organisation not report the potential criminal conduct to the police, the employer should carefully balance the wishes of the person who has made a report with its intent to ensure allegations of criminal matters are reported to the appropriate authority.

In instances that require mandatory reporting, for example, allegations involving minors, these cases must be reported in line with the relevant obligations on employers.

Further, some organisations are bound by specific mandatory reporting obligations. For example, the Victoria Police Act 2013 states that police employees must report suspected misconduct (including sexual harassment) by another police employee. Similarly, registered health practitioners must report sexual misconduct by another registered health practitioner. Organisations may wish to seek legal advice on mandatory reporting obligations.

Where reporting is not mandatory, a victim-centric approach that prioritises the wishes of the person who has made a report should be adopted. The person who has made a report should be reminded of their right to report the matter to the appropriate external agency/authority (for example, Victoria Police) and be provided with any necessary support and assistance to help them do so. This can extend to the employer providing notes, employee records and other relevant information that may provide evidence of the commission of a criminal offence. Advice may also be sought from Victoria Police or the relevant authority to help the person make a report in a supportive and confidential manner.

In the event that the organisation does not report a potential criminal matter to the appropriate authority, the organisation should also document the rationale for not referring potential criminal allegations to Victoria Police (or other appropriate body). Employers must also consider the risk to other workers and take action to eliminate, or

minimise, that risk as far as possible.

Upon making a report to an external agency, advice should be sought from the external agency/authority in relation to what level of information can be provided to the person who has made a report and at what stage.

When investigating matters which may also be criminal conduct, organisations must ensure that their actions will not prejudice any current or future criminal investigations, but also protect staff from further harassment.

Organisations or managers overseeing a sexual harassment report should speak with their HR area for advice on individual matters, as each matter must be considered on its merits. Organisations may also wish to consult with Victoria Police or obtain legal advice on whether the matter should be referred to Victoria Police.

An employment-related report does not prevent a person who has made a report from making a separate or later report to Victoria Police or an external agency, such as WorkSafe. Similarly, an organisation cannot stop or dissuade a person who has made a report from making a police report.

8. Monitoring and evaluation

It is important that organisations monitor and evaluate outcomes and strategies to ensure prevention strategies, frameworks and processes are effective.

It is important that organisations monitor and evaluate outcomes and strategies to ensure prevention strategies, frameworks and processes are effective.

Standard 6 of the Victorian Equal Opportunity and Human Rights Commission's Guideline: Preventing and responding to sexual harassment requires organisations to regularly review and evaluate outcomes and strategies to identify areas for improvement.

To comply with standard 6 organisations must:

- regularly collect and assess reporting (and other relevant) data for trends, patterns and lessons to drive continuous improvement;
- regularly review and update sexual harassment prevention plans (e.g. annually) to drive continuous improvement;
- share information about trends, patterns and lessons with staff, boards and key stakeholders; and
- ensure staff have confidence that sexual harassment is being eliminated in their workplace.

Review processes support continuous improvement and provide organisations with an opportunity to reflect on and celebrate the successes achieved so far.

Appendix - Guidance for managers

The information that follows does not impose mandatory procedures for organisations to follow when a report of sexual harassment is made or when an employee's conduct is called into question.

The information that follows does not impose mandatory procedures for organisations to follow when a report of sexual harassment is made or when an employee's conduct is called into question. Instead, it seeks to provide clear guidance for managers to consider when developing their own policies and procedures in relation to claims of sexual harassment. Any policy and procedure developed must be consistent with the employer obligations under the applicable enterprise agreement.

1. Treat the person who has made a report and respondent with respect

Explanation

People who have made a report usually find it very difficult to make allegations about sexual harassment. They worry about the consequences and the effect the report will have on others in the workplace. They may feel vulnerable and concerned about losing their jobs.

Action

- Thank the person who has made a report for raising the concern.
- Listen to the person who has made a report in an open and impartial way.
- Reassure the person who has made a report that raising the concern is the right

thing to do, that the organisation takes sexual harassment seriously, and that it has legal responsibilities and obligations for its employees under the Equal Opportunity Act 2010 and the Sex Discrimination Act 1984.

- Advise the person who has made a report that their report will be considered as a matter of priority.
- Advise the person who has made a report that a range of disciplinary actions are available if their claim is substantiated, which vary in severity.
- Remember that your response can set the tone for the management of the issue from the person who has made a report perspective.
- Ask the person who has made a report what they would like to happen next from a process reporting perspective as well as from a wellbeing perspective, such as taking the rest of the day off.
- Employers have a duty of care to respondents and must ensure the report is considered fairly.
- Follow up on and action any commitments made to the person who has made a report and report back to the person who has made a report.
- Prioritise the health and well-being of the person who has made a report throughout the process by regularly checking in with them to make sure they are ok.
- Offer support to the person who has made a report through professional support services such as the EAP or flexible working arrangements.

2. Confidentiality

See section 7 Key considerations for detailed information.

Explanation

To the extent it is appropriate to do so, disclosures or reports of sexual harassment must be kept in confidence in order to protect personal privacy. Employers are obliged to take appropriate action in this respect as they have a duty of care in providing a safe workplace for all employees.

Action

- Advise the person who has made a report that the information that they disclose regarding the incident will be kept in confidence to the extent it is appropriate to do so.
- Also advise the person who has made a report that there is a chance that their matter may need to be escalated or referred to other relevant persons within the organisation (e.g., HR or equivalent) who are managing the report, the respondent to whom the allegation relates to, or external bodies such as police or WorkSafe. Particularly, this may be the case in circumstances that constitute a criminal offence, present an occupational health and safety risk, or require disciplinary action.

Example scenario

Issue

A person who has made a report approaches their manager to advise that a team member has been making unwelcome sexual advances and that this is causing them distress. The person who has made a report also advises that, despite this, they do not want the matter to be taken any further as they are concerned this will negatively impact their career. The person who has made a report expresses that they are sure the behaviour will stop.

Response

The manager should empathise with the person who has made a report and acknowledge that:

- sharing their experience must be difficult;
- no-one should feel distressed at work; and
- the matter raises serious concerns.

The manager should then advise that these concerns will be discussed with HR (or equivalent) to identify the path forward and will be kept confidential to the extent it is

appropriate to do so.

3. Seek guidance

Explanation

HR practitioners (or equivalent) are experienced in managing sexual harassment.

Action

Seek guidance from HR practitioners (or equivalent) on next steps and how to ensure that both a person who has made a report (and if applicable, a respondent) are provided with appropriate guidance and/or support.

Appendix – Guidance for Human Resource practioners (or equivalent)

The information that follows does not impose mandatory procedures for organisations to follow when a report of sexual harassment is made or when an employee's conduct is called into question.

Instead, it seeks to provide clear guidance for HR practitioners (or equivalent) to consider when developing their own policies and procedures in relation to claims of sexual harassment. Any policy and procedure developed must be consistent with the employer obligations under the applicable enterprise agreement.

HR practitioners can also refer to the Victorian Equal Opportunity and Human Rights Commission's step-by-step guide to responding to complaints.

1. Natural Justice

See section 7.2 Key Considerations for more detail.

Explanation

The rules of natural justice ensure that investigations and related decisions are fair and reasonable.

Your industrial agreement or misconduct policy is likely to have an explanation of relevant principles of natural justice which apply to your organisation.

Natural justice rules will help prevent employees being treated unfairly or unreasonably. They will also mitigate the risk of matters escalating.

Action

When considering an allegation, it is important that an organisation:

- act in good faith and without bias.
- base decisions on the facts presented by both parties.
- be sure to give the employee the opportunity to present all relevant evidence.
- comply with organisational record-keeping policies and procedures.

When managing a report, organisations should consider:

- informing the person who has made a report and the respondent under which policy the matter will be considered as that the report will be considered promptly and fairly.
- inform the respondent of the specific allegations made against them and provide them with an opportunity to respond.
- explain the process to be followed (e.g., that the allegations will be put to them and they will be given a certain number of days to respond in line with an organisation's report process and provide a copy of this process).
- inform the person who has made a report and the respondent that they may be represented (noting that this could be a union representative and/or other support person).
- inform the person who has made a report and the respondent of the purpose of any meetings that may be held.
- provide the person who has made a report and the respondent with sufficient information to allow them a reasonable basis to respond.

Note: Should any of the above information be provided via face-to-face meeting, it is recommended that it be reiterated in writing via email.

2. Initial assessment

Explanation

Organisations should consider all complaints (including those which may initially appear to have no merit). This gives appropriate consideration to the sensitive nature of the subject area and affords respect to those involved.

Failure to treat all complaints seriously may exacerbate the problem and the liability.

Section 4 Sexual harassment in the workplace provides detail on the various forms of sexual harassment. Relevant legislation and industrial instruments should also provide guidance.

Action

When considering an allegation, it is important that an organisation:

- act in good faith and without bias.
- base decisions on the facts presented by both parties.
- be sure to give the employee the opportunity to present all relevant evidence.
- comply with organisational record-keeping policies and practices.

When managing a report, organisations should consider:

- informing the person who has made a report and the respondent under which policy the matter will be considered as that the report will be considered promptly and fairly.
- inform the respondent of the specific allegations made against them and provide them with an opportunity to respond.
- explain the process to be followed (e.g., that the allegations will be put to them and they will be given a certain number of days to respond in line with an organisation's reporting process) and provide a copy of this process.)
- inform the person who has made a report and the respondent that they may be represented (noting that this could be a union representative and/or other support person).
- inform the person who has made a report and the respondent of the purpose of

any meetings that may be held.

- provide the person who has made a report and the respondent with sufficient information to allow them a reasonable basis to respond.
- Prioritise the health and well-being of the person who has made a report and the respondent throughout the process by regularly checking in with them to make sure they are ok, and referring them to support services if required.

Should any of the above information be provided via face-to-face meeting, it is recommended that it be reiterated in writing via email.

3. Formal Investigation

Explanation

Should sufficient evidence be gathered to prompt a formal investigation, the relevant policy and procedure must be followed. Generally speaking, it is recommended that during the investigation, separate face-to-face interviews be conducted with the person who has made a report, respondent and any witnesses, to gather pertinent information.

Action

In line with an organisation's policy and procedures, the following steps should be considered, noting that each case should be considered on its merits and some variation may be appropriate. It is also important to recognise that the provisions within the relevant industrial instrument should be followed.

In the first instance, contact all parties to set up times and meeting locations. In doing so:

- choose an appropriate location;
- be flexible with scheduling to accommodate, within reason, the interview subject;
- explain up-front what the discussion is about and why.

Gather pertinent information and ensure the you store it securely. Ask all parties to

provide any:

- emails, memos and other relevant communications
- notes, physical evidence or other documentation regarding the incidents.

4. Changes in the workplace while a complaint is considered

Explanation

A person who has made a report is likely to feel vulnerable when making a report of sexual harassment. Organisations should ensure that a person who has made a report is not required to have contact with a respondent while a matter is being considered, if this is likely to create a risk to health and safety.

Action

Determine, in accordance with the applicable enterprise agreement and misconduct policy, whether the following changes need to be implemented while considering the allegation:

- change to operational reporting lines and team composition;
- change to seating arrangements;
- change to physical work location;
- taking periods of approved annual or long service leave (if requested); or
- suspension on pay.

Ensure that these changes do not result in any detriment to the person who has made a report (as this may amount to victimisation, which is unlawful).