

GUIDE FOR THE  
PREVENTION OF  
SEXUAL HARASSMENT  
IN THE WORKPLACE

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VPSC

Victorian Public Sector Commission

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# 1. ABOUT THIS GUIDE

This guide has been published by the Victorian Public Sector Commission (VPSC).<sup>[1]</sup> 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 Subcommittee (ICRS) of the Victorian Secretaries Board (VSB).

The guide is intended to apply to the Victorian Public Service 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. 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.<sup>[2]</sup> 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' and separate guidelines in relation to the 'fair and reasonable treatment' employment principle, issued by the Victorian Public Sector Commissioner.<sup>[3]</sup>

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[1] This guide, along with the **Model Policy for the Prevention of Sexual Harassment in the Workplace**, is available from the [Prevention of Sexual Harassment in the Workplace](#) resource page at <https://vpsc.vic.gov.au/resources/prevention-sexual-harassment-workplace/>

[2] Industrial Relations Victoria is currently leading work on developing a standard set of procedures for managing misconduct through the cross-departmental Towards Common Practice Project's Misconduct Working Group. This work relates to those employed under the **Victorian Public Service Enterprise Agreement 2016** (VPS Agreement).

[3] These documents are available from [Employment Principles and Standards](#) page at <https://vpsc.vic.gov.au/ethics-behaviours-culture/employment-principles-and-standards/>

## 2. CODE OF CONDUCT AND PUBLIC SECTOR VALUES

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.

It can also constitute a criminal offence.

### 3.1 Victorian legislation

Section 15 of the *Equal Opportunity Act 2010* requires agencies to take reasonable and proportionate steps to eliminate sexual harassment in the workplace as far as possible.

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

- if he or she makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person;
- if he or she engages in any other unwelcome conduct of a sexual nature in relation to the other person; or
- 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.

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.

Conduct of a 'sexual nature' includes:

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

### 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 following:

- 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<sup>[4]</sup> 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<sup>[5]</sup> 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

### 4.1 The various forms of sexual harassment

Sexual harassment in the workplace may take various forms and can be directed at, and perpetrated by, all persons including male, female, transgender and gender diverse. 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).

### 4.2 A single incident can constitute sexual harassment

A single incident can constitute sexual harassment; there is no requirement that unwelcome conduct be repeated. Equally, a broader pattern of behaviour can also constitute sexual harassment.

### 4.3 Intent

The *Equal Opportunity Act 2010* and the *Sex Discrimination Act 1984* provide that sexual harassment occurs in circumstances in which the conduct was 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 received by the other person. It is the responsibility of all staff to ensure that they do not engage in any behaviour that could amount to 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. 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<sup>[6]</sup> and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)<sup>[7]</sup> have published guidelines, highlighting key steps in the prevention of sexual harassment in the workplace. These include:

### Australian Human Rights Commission

- **Obtain high-level management support** – In March 2018, the VSB released a Sexual Harassment Statement 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, this statement was circulated to all staff and provided to portfolio agencies for distribution.
- **Write and implement a workplace sexual harassment policy** – Building on the VSB statement 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 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 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 Christmas 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 nurture 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.

### Victorian Equal Opportunity and Human Rights Commission

- **Have contact officers available to provide information** – Organisations must have processes and procedures in place to deal with sexual harassment. This may include having contact officers who can provide information to staff about relevant policies, processes and procedures, and their options and responsibilities under those documents.
- **Promote bystander strategies** – Organisations should acknowledge the role of bystander intervention and reporting when developing workplace tools. Encouraging bystanders to speak up when they hear or see inappropriate and sexist or sexual behaviour can be a powerful tool in building a positive and equitable workplace culture free from sexual harassment. Bystander training could also be considered. This would increase recognition of sexual harassment, sex discrimination, challenges and myths, and equip bystanders with a range of strategies to use if/when needed. Section 5.1 and 6.1.1 provide some suggested approaches for discussing sexual harassment.
- **Take all reasonable steps to eliminate gender inequality in the workplace** – Organisations should consider the importance of



eliminating the drivers of sexual harassment that occur in workplace culture, such as: adherence to gender stereotypes; sexual harassment as normalised behaviour; and inequality in the workplace.

- **Have a responsive, assertive grievance handling and complaints process** – Organisations should plan how to deal with complaints in a way that is fair, transparent, timely and confidential, as far as possible. Organisations should ensure that clear and accessible complaints processes are in place and adhered to when complaints are made. Appropriate support and confidentiality for the complainant are essential features of the complaints process.

## 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 bearing witness to inappropriate behaviour can be challenging. It is recognised that in many instances people will not feel confident to respond. Should staff feel that they are able to respond, some suggested opening lines include:<sup>[8]</sup>

- “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.”

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[6] Australian Human Rights Commission guideline source – **Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008)** | Australian Human Rights Commission. [ONLINE] Available at: <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/effectively-preventing-and-responding-sexual-harassment-0>

[7] VEOHRC guideline source – **Guideline: Sexual harassment – Complying with the Equal Opportunity Act 2010**. [ONLINE] Available at: <http://humanrightscommission.vic.gov.au/home/our-resources-and-publications/ea-practice-guidelines/item/562-guideline-sexual-harassment-complying-with-the-equal-opportunity-act-2010>

[8] Informed by Comebacks at Work, Kathleen Kelley Reardon at [www.comebacksatwork.com](http://www.comebacksatwork.com)

## 6. REPORTING SEXUAL HARASSMENT

It is acknowledged that organisations will have a range of approaches to managing complaints of sexual harassment. Some organisations will have a specific process for sexual harassment. Others will use a generalised complaints process designed to manage a range of workplace matters including misconduct, performance and sexual harassment.

Neither the *Equal Opportunity Act 2010* nor the *Sex Discrimination Act 1984* specifies how a complaints process should be structured. However, a complaints process should allow for flexibility to deal with complaints in line with an organisation's size, structure and resources. All Victorian Public Sector complaints processes must link to relevant industrial and contractual instruments.

Regardless of the structure of the complaints process, it is recommended that organisations ensure that multiple avenues are available for complaints to be made including via email, phone or in person.

### 6.1 Reporting sexual harassment at work

Those who have experienced sexual harassment can report in a number of ways. Complainants are able to make a complaint internally, to their manager, a HR practitioner (or equivalent), or to an external body. Making an internal complaint at work does not preclude a complainant from also making an external complaint and vice versa. External bodies that can consider a complaint of sexual harassment include:

- Victorian Equal Opportunity and Human Rights Commission;
- Victorian Civil and Administrative Tribunal<sup>[9]</sup>; and
- Australian Human Rights Commission.

A person may also make a complaint to WorkSafe or through internal safety reporting mechanisms if they feel that sexual harassment has caused them to feel unsafe in the workplace. 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.<sup>[10]</sup>

A person may also make a complaint to Victoria Police<sup>[11]</sup> if the sexual harassment constitutes criminal conduct, such as sexual assault or stalking.

#### 6.1.1 Responding to sexual harassment

The tone of the first response to a complaint of sexual harassment is very important. It is paramount that the complainant is treated with respect, understanding and concern. This approach ensures that experiences are not minimised and that victim blaming is avoided. Employment support services (such as the EAP) should be provided to a complainant to ensure they have independent professional support during the process.

Given the highly sensitive nature of sexual harassment and because instances can range from minor to criminal offence, 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 complaint of sexual harassment. These steps have been designed to be followed regardless of whether the complaint is made to the complainant's 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 section 7.2 and 7.3 respectively).

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[9] Complaints in relation to the *Equal Opportunity Act 2010* can also be made directly to the Victorian Civil and Administrative Tribunal.

[10] See *Mathews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728.

[11] 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.

## 7. KEY CONSIDERATIONS

### 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 Clause 21 of the VPS Agreement

The key considerations set out in this Guide are not intended to supersede the process for managing misconduct established by clause 21 of the VPS Agreement (clause 21 process). Supervisors and managers, in consultation with HR advisers, will be required to treat all allegations of sexual harassment against employees covered by the VPS Agreement in accordance with the clause 21 process, including any investigation or determination of a disciplinary outcome.

### 7.2 Natural justice

When considering a complaint, 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 complaints 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 or complaints of sexual harassment will be treated in confidence in order to protect personal privacy to the greatest extent possible. It is important that the complainant 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 complaint;
- the respondent to whom the allegation relates to;
- external bodies such as police or WorkSafe;
- the relevant decision-makers;
- an investigator engaged to investigate the allegations; and
- the complainant's support person or representative.

### 7.3.1 Can complainants or witnesses remain anonymous?

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

- the processes to be followed in handling their concerns;
- the principles of confidentiality 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.

## 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 complaint 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 complaint has a vested interest, a prior involvement in a matter or a personal relationship with either the complainant 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 complaint.

## 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 complaint of sexual harassment or have participated in a complaint 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 complaint of sexual harassment is unlawful under the *Equal Opportunity Act 2010* and federal anti-discrimination laws.

## 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 complaint 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 complaint 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).<sup>[12]</sup>

## 7.7 Behaviour outside the workplace

Under the Codes of Conduct, 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).<sup>[13]</sup>

## 7.8 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 complaint 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.

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[12] As previously referenced, Industrial Relations Victoria is currently leading work on developing a standard set of procedures for managing misconduct through the cross-departmental Towards Common Practice Project's Misconduct Working Group. When confirmed this work will provide further detail on standard of proof.

[13] For further detail the Model Policy for the Prevention of Sexual Harassment in the Workplace, is available at <https://vpssc.vic.gov.au/resources/sexual-harassment-model-policy-vps-organisations/>

# 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. 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 complainant and respondent with respect

### Explanation

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

### Action

- Thank the complainant for raising the concern.
- Listen to the complainant in an open and impartial way.
- Reassure the complainant 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 complainant that their complaint will be considered as a matter of priority.
- Remember that your response can set the tone for the management of the issue from the complainant's perspective.
- Employers have a duty of care to respondents and must ensure the complaint is considered fairly

## 2. Confidentiality

(See [section 7.3 of the Guide for Prevention of Sexual Harassment in the Workplace](#) for detailed information)

### Explanation

To the extent it is appropriate to do so, disclosures or complaints 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 complainant 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 complainant 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 complaint, 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 complainant approaches their manager to advise that a team member has been making unwelcome sexual advances and that this is causing them distress. The complainant 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 complainant expresses that they are sure the behaviour will stop.

**Response** – The manager should empathise with the complainant 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 complainant (and if applicable, a respondent) are provided with appropriate guidance and/or support.

# APPENDIX - GUIDANCE FOR HUMAN RESOURCE PRACTITIONERS (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.

## 1. Natural Justice

(See [section 7.2 of the Guide for Prevention of Sexual Harassment in the Workplace](#) for detailed information)

### 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.

When managing a complaint, organisations should consider:

- informing the complainant and respondent under which policy the matter will be considered as that the complaint 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 complaint process) and provide a copy of this process.
- inform the complainant and respondent that they may be represented (noting that this could be a union representative and/or other support person).
- inform the complainant and respondent of the purpose of any meetings that may be held.
- provide the complainant and 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 of the [Guide for Prevention of 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.

When managing a complaint, organisations should consider:

- informing the complainant and respondent under which policy the matter will be considered as that the complaint 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 complaint process) and provide a copy of this process.
- inform the complainant and respondent that they may be represented (noting that this could be a union representative and/or other support person).
- inform the complainant and respondent of the purpose of any meetings that may be held.
- provide the complainant and 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.

## 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 complainant, 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.

1. 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.

2. Gather pertinent information:

- ask all parties to provide any emails, memos, and other relevant communications i.e. any notes, physical evidence, or other documentation regarding the incident(s) – ensure that you store this information securely.

## 4. Changes in the workplace while a complaint is considered

### Explanation

A complainant is likely to feel vulnerable when making a complaint of sexual harassment. Organisations should ensure that a complainant 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 complainant (as this may amount to victimisation, which is unlawful).