



## MCA INDUSTRY TOOLKIT

*The minerals industry is committed to eliminating sexual harassment in its workplaces and has adopted a national Industry Code that provides clear expectations on members to establish both preventative and response measures to address sexual harassment.*

*This document is part of the MCA Industry Toolkit that has been developed for our members and their employees and comprises a suite of Fact Sheets, Guidance and Templates.*

## FACT SHEET

## What laws apply?

Sexual harassment is against the law.

There are three key legal and regulatory schemes regulating workplace sexual harassment in Australia: anti-discrimination laws, the Fair Work system and work health and safety (WHS) laws. The Respect@Work Report<sup>1</sup>, this highlights that the right to be free from workplace sexual harassment is a human right, a workplace right and a safety right.

### Sex Discrimination

[Sex Discrimination Act 1984](#) (Cth) (Sex Discrimination Act) prohibits sexual harassment in the area of work. Similar prohibitions exist in State and Territory anti-discrimination laws.

The Sex Discrimination Act, together with state and territory anti-discrimination laws, provides the primary framework for understanding and addressing sexual harassment as a form of sex discrimination, and recognises the right to work in an environment free from sexual harassment as a basic human right. Employers can be held vicariously liable for sexual harassment committed by their employees or agents, if they failed to take 'all reasonable steps' to prevent the sexual harassment from occurring.

The Australian Human Rights Commission publishes guidance to help employers understand and meet their legal obligations under the Sex Discrimination Act and guidance for workers on anti-discrimination matters: [Recognising and responding to sexual harassment in the workplace: Information for employees](#) and [Getting to know the Sex Discrimination Act: A guide for young women](#).

### Fair Work

[Fair Work Act 2009](#) (Cth) (Fair Work Act)

The Fair Work Act does not expressly prohibit sexual harassment. However, it can be raised indirectly in matters brought to the Fair Work Commission and federal courts through a number of provisions:

- general protections against 'adverse action' on the basis of a workplace right
- general protections against 'adverse action' on the basis of sex
- the orders to stop sexual harassment and orders to stop bullying jurisdiction
- unfair dismissal

The *Fair Work Act 2009* and the *Fair Work Regulations 2009* provide a safety net of minimum entitlements, enable flexible working arrangements and fairness at work, and prevent discrimination against employees.

<sup>1</sup> Respect@Work: Sexual Harassment National Inquiry Report (2020)

The Fair Work Act does not explicitly prohibit sexual harassment. However, some protections against sexual harassment in the workplace may apply through other provisions, including general protections against adverse action on the basis of a workplace right, general protections against adverse action on the basis of sex, the anti-bullying jurisdiction and unfair dismissal.

An application can also be made for an "order to stop sexual harassment" through the Fair Work Commission.

The Fair Work system covers most Australian workplaces (generally excluding State public sector and local government employees who are covered by state legislation).

The [Fair Work Ombudsman \(Commonwealth\)](#) oversees the national system.

The Fair Work Ombudsman has also published [guidance](#) on protection from discrimination at work.

## Health and Safety

Sexual harassment is also regulated by work health and safety laws as it is a workplace hazard which is known to cause psychological and physical harm.

While there are a range of different work health and safety laws that apply in different Australian jurisdictions and in different contexts (such as the specific safety legislation for mining operations in Western Australia and Queensland) sexual harassment is a risk that falls within the scope of those laws. This includes sexual harassment between workers and from other people at the workplace like customers and clients.

While the exact wording of the obligation differs between jurisdictions, in general, businesses must take a systematic approach to managing risk with the aim of eliminating the risk of sexual harassment, or if this is not possible, minimising the risk as far as is reasonably practicable.

In addition to employers managing the risk of sexual harassment, work health and safety legislation also imposes duties on workers and others at the workplace have a duty to take reasonable care of their own health and safety, and not adversely affect the health and safety of themselves or others. This includes following any reasonable instruction given to comply with a health and safety duty.

Safe Work Australia has released a comprehensive guide on [Preventing workplace sexual harassment](#) and has a range of additional guidance related to workplace violence, bullying, and psychological wellbeing.

Additional guidance may be found on the websites of the safety regulators in each State and Territory. Contact details for each regulator can be found [here](#).

## Intersection with criminal laws

While sex discrimination and sexual harassment are unlawful, they are not criminal offences under the *Sex Discrimination Act*.

However, some behaviours that constitute sexual harassment under the *Sex Discrimination Act* may also amount to a criminal offence under criminal law. Each jurisdiction has its own legislation regulating sexual offences<sup>2</sup>.

### Sexual offences

There are differences in how civil and criminal laws relating to sexual harassment and sexual assault may overlap, but in general the following types of offences may be relevant to an incident of workplace sexual harassment (the exact description of the offence differs between jurisdictions):

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<sup>2</sup> *Crimes Act 1900* (NSW); *Crimes Act 1900* (ACT); *Criminal Code Act 1983* (NT); *Criminal Code Act 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Act 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act Compilation Act 1913* (WA)

- 'Sexual assault' or 'rape' are the legal terms for sexual intercourse or sexual penetration without consent, and there is an equivalent provision in each state and territory.
- 'Indecent assault' covers sexual acts other than a penetrative sexual offence. It can relate to the unwanted touching of a person's body by another person, for example, kissing or touching a person's breasts, bottom or genitalia.
- 'Stalking' involves a persistent course of conduct which is intended to maintain contact or exercise power and control over another person.

#### Technology, sexual harassment and the invasion of privacy

Sexual harassment that involves technology, including social media, may overlap with a range of civil and criminal offences relating to digital technologies.

Where workplace sexual harassment involves surveillance, surveillance and monitoring device laws may apply, which are generally state or territory based.

The following are examples of conduct involving the use of technology that may in some cases amount to an invasion of privacy and/or breach of laws on surveillance and monitoring as well as workplace sexual harassment:

- using surveillance devices, such as cameras, to monitor or harass someone
- reading private communication, such as emails or text messages
- publishing personal data as a means of harassment, for example, image-based abuse
- tracking someone's private activities or photographing them in private contexts without their permission
- persistently communicating with someone through the use of technology, for example frequent texts or phone calls.