

Australian Screen Industry Code of Practice

Discrimination, Harassment, Sexual Harassment and Bullying

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Key Points

- All workers have the legal right not to be discriminated against, harassed, sexually harassed or bullied in the workplace. Workplaces should be non-threatening, respectful, safe and free from all forms of harassment.
- This Code of Practice is a best practice guide for employers in the Australian screen industry. It has been developed as a joint initiative between Screen Producers Australia (**SPA**), the body representing employers in the screen industry, and Media Entertainment & Arts Alliance (**MEAA**), as the body representing employees.
- It is a voluntary industry Code of Practice. Although compliance with the Code of Practice is not mandatory for SPA members, the Code of Practice has been created to assist employers to develop and implement policies and procedures which will ensure consistency across the entire Australian screen industry. Further, SPA understands that commissioning platforms and screen agencies may require producers to comply with the industry Code of Practice. On this basis, SPA firmly recommends that its members comply with the Code of Practice.
- Employers, no matter how big or small, can be held legally responsible (i.e. vicariously liable) for acts of discrimination, harassment, sexual harassment or bullying that occur in the workplace or in connection with a person's employment.
- To minimise the risk of liability, employers need to demonstrate that they have:
 - Taken **all reasonable steps** to prevent discrimination, harassment, sexual harassment and bullying from occurring in their workplaces; and
 - **Responded appropriately to resolve incidents** of discrimination, harassment, sexual harassment and bullying.
- Reasonable steps to effectively prevent and respond to workplace discrimination, harassment, sexual harassment and bullying include:
 - Developing clear workplace policies and procedures on discrimination, harassment, sexual harassment and bullying, including a complaint handling and investigation procedure;
 - Regularly promoting, communicating and reviewing relevant workplace policies; and
 - Taking a proactive approach to creating and maintaining a positive, inclusive and respectful workplace culture that does not accept any form of discrimination, harassment, sexual harassment or bullying.

Part A: Code of Practice for the Screen Industry

1. About this Code of Practice

1.1 What is the purpose of this Code of Practice?

This Code of Practice has been prepared to support the prevention of workplace discrimination, harassment, sexual harassment and bullying in the screen industry. It affirms our industry's commitment to providing safe, respectful, inclusive and flexible workplaces.

This Code of Practice provides:

- An overview of the relevant legislative framework and obligations.
- Best practice guidance on steps your organisation can take to effectively prevent and respond to discrimination, harassment, sexual harassment and bullying in the workplace.
- Check-lists to assess your organisation's current policies and procedures.
- Templates to assist your organisation to develop the following policies and procedures:
 - Workplace discrimination, harassment, sexual harassment and bullying policy;
 - Complaint handling and investigation procedure;
 - Complaint form; and
 - Code of Conduct: workplace discrimination, harassment, sexual harassment and bullying.

1.2 What is the legal status of this Code of Practice?

This Code of Practice is not and does not seek to be a binding legal document. This Code of Practice is not incorporated in any term of any contract and creates no rights of enforceable by a worker against an employer. Further, nothing in this Code of Practice negates your obligations as an employer under any relevant Federal or State/Territory laws.

It provides general information only and is not intended to be legal advice. You should confirm the legal requirements that apply to your organisation and seek legal advice about your specific situation as required.

1.3 Who does this Code of Practice apply to?

This Code of Practice is intended to assist employers operating in Australia that employ or engage workers in the screen industry. This includes, but is not limited to, companies, organisations, individuals and entities that are directly or indirectly involved in the business of screen production and post production, broadcasting, distribution and exhibition.

These can range from small-medium and not-for-profit organisations to large commercial entities.

This Code of Practice is intended to cover workers in the entertainment industry which include:

- Company owners and board members;
- Leadership and management personnel (e.g. CEOs, executive directors, general managers, company managers, heads of department, human resources managers, managers and supervisors);
- Production personnel (e.g. producers, executive producers, production managers and line producers);
- Full-time, part-time, freelance, seasonal and casual employees;
- Student placements, apprentices and work experience students/interns;
- Contractors, sub-contractors and secondees; and
- Volunteers or anyone undertaking unpaid work (e.g. vocational placements).

1.4 Is it mandatory for SPA members to abide by this Code of Practice?

No, compliance with the Code of Practice is not mandatory for SPA members. Although the Code of Practice is not mandatory for SPA members, SPA strongly recommends that its members comply with the Code of Conduct in order to encourage collaborative, creative and positive workplaces which are free from sexual harassment, bullying and discrimination.

Please be aware that third parties (e.g. Federal and State funding bodies and broadcasters) may require that an employer adopt this Code of Practice before doing business with that employer.

This Code of Practice is presented in general terms so that it can be applied across a diverse range of organisations. Employers should tailor their workplace policies and procedures to suit their individual circumstances.

2. Legal framework and obligations

2.1 What is the law on discrimination, harassment, sexual harassment and bullying?

There are specific laws pertaining to discrimination, harassment, sexual harassment and bullying. These laws intersect with WHS laws, which cover both physical and psychological health.

Unless an exception applies, employers and workers must comply with both national and relevant state/territory laws that prohibit discrimination, harassment, sexual harassment and bullying in the workplace.

Federal Laws	State/Territory Laws
<ul style="list-style-type: none"> • <i>Sex Discrimination Act 1984</i> (Cth) • <i>Racial Discrimination Act 1975</i> (Cth) • <i>Fair Work Act 2009</i> (Cth) • <i>Disability Discrimination Act 1992</i> (Cth) • <i>Age Discrimination Act 2004</i> (Cth) • <i>Australian Human Rights Commission Act 1986</i> (Cth) 	<ul style="list-style-type: none"> • <i>Anti-Discrimination Act 1977</i> (NSW) • <i>Equal Opportunity Act 1995</i> (VIC) • <i>Anti-Discrimination Act 1991</i> (QLD) • <i>Equal Opportunity Act 1984</i> (SA) • <i>Equal Opportunity Act 1984</i> (WA) • <i>Discrimination Act 1991</i> (ACT) • <i>Anti-Discrimination Act 1992</i> (NT) • <i>Anti-Discrimination Act 1998</i> (TAS) • <i>Racial and Religious Tolerance Act 2001</i> (VIC) • <i>Work Health and Safety Act 2011</i> (NSW) • <i>Occupational Health and Safety Act 2004</i> (VIC) • <i>Work Health and Safety Act 2011</i> (QLD) • <i>Work Health and Safety Act 2012</i> (SA) • <i>Occupational Safety and Health Act 1984</i> (WA) • <i>Work Health and Safety Act 2011</i> (ACT) • <i>Work Health and Safety (National Uniform Legislation) Act 2011</i> (NT) • <i>Work Health and Safety Act 2012</i> (TAS)

Employers may also have obligations under other relevant laws, such as privacy, defamation, industrial and criminal laws.

2.2 What are employers' legal obligations?

The obligations imposed on employers are set out in the relevant legislation. However, in summary, the anti-discrimination legislation makes it unlawful for an employer to discriminate against a worker in their employment on the basis of their age, disability, race, gender, marital status and responsibilities as a carer. It is also unlawful for an employer to subject a worker to sexual harassment. There are also laws that deal with preventing bullying in the workplace.

In addition, the WHS laws impose a duty on an employer to protect the health (both physical and psychological), safety and welfare of all workers at work and of other people who might be affected by the work. WHS laws require a proactive and preventative approach to managing health and safety risks in the workplace.

Employers, no matter how big or small, can be held legally responsible for acts of discrimination, harassment, sexual harassment or bullying that occur in the workplace or in connection with a person's employment. This is known as **vicarious liability**.

The conduct for which an employer can be held vicariously liable includes but is not limited to:

- Incidents that occur:
 - at work – such as in the office, on set or on location;
 - during work-related travel;
 - at work-related functions – such as Christmas parties, opening nights, after parties, conferences, business trips, other industry related events; and
 - outside of work where there is a connection to the workplace; and
- Incidents involving the use of digital communication to harass a person, for example:
 - Text messages;
 - Social media posts and messages; and
 - Emails that have a connection to the workplace.

For an employer to be vicariously liable for the actions of a worker, the actions will usually need to have been authorised (whether expressly or impliedly) by the employer or so closely linked to an authorised act that it is considered part of the act. However, where the employer can demonstrate that they have taken 'all reasonable steps' to prevent the discrimination, harassment, sexual harassment or bullying from occurring, the employer may not be held vicariously liable.

An individual who discriminates against, harasses, sexually harasses or bullies others in the workplace will remain directly liable for their own actions.

As what constitutes taking 'all reasonable steps' will vary from organisation to organisation, there is no defined set of steps to take. However, as a guideline, it is expected that an employer would:

- Have appropriate workplace discrimination, harassment, sexual harassment and bullying policies, which are effectively implemented, monitored and communicated to all workers;
- Take appropriate action to eliminate or minimise, as far as is reasonably practicable, risks to health and safety before they occur; and
- Take appropriate remedial action if discrimination, harassment, sexual harassment or bullying does occur.

Box 2: How will ‘all reasonable steps’ be determined?

Anti-discrimination laws do not define ‘all reasonable steps’ because what may be ‘reasonable’ for a large corporation may not be ‘reasonable’ for a small business. Instead, reasonableness is considered on a case-by-case basis.

The key point is that employers **must take active steps** to minimise the risk of discrimination, harassment, sexual harassment or bullying in their workplace.

When deciding what level of preventative action is reasonable, an employer should consider:

- The size, structure and available resources of the employer;
- The type and nature of the work undertaken by the employer;
- The mix of employees, including women, young and older workers, people with disabilities and people from culturally and linguistically diverse backgrounds – this is important because these workers may be more likely at risk;
- The culture of the workplace;
- Previous incidents of workplace discrimination, harassment, sexual harassment or bullying;
- Levels of employee supervision;
- Levels of training available to employees;
- Relevant provisions in industrial awards or agreements; and
- Any other relevant factors, such as working hours, geographic isolation, live-in arrangements, touring or duties which require working in close physical proximity with others.

For further information on how to take reasonable steps to effectively prevent and respond to discrimination, harassment, sexual harassment and bullying, refer to *Section 4*.

Under certain laws, an employer must report serious incidents to the regulator or police. In some jurisdictions there are mandatory reporting requirements if a criminal offence is committed against a child or young person¹ and WHS laws require employers to notify the regulator as soon as they become aware of a death, serious injury or illness, or dangerous incident.

If worker makes a complaint which may constitute a criminal offence, and there is no mandatory requirement for the employer to refer the matter to the police, as a matter of best practice, an employer should:

- a. Ask the worker if they wish to report the matter to the police;

¹ Mandatory reporting applies in Victoria when an adult has a reasonable belief that a sexual offence has been committed against a person under 16 years and in the Northern Territory when anyone who has reasonable grounds to believe that a child has suffered or is likely to suffer sexual, physical or psychological abuse.

- b. Enquire whether the worker would like access to counselling or other support services;
- c. If appropriate, consider whether it is necessary to implement any changes to the workplace to provide the employee with a safe work environment while the complaint is being investigated;
- d. Seek details of the complaint from the employee so that the complaint can be investigated in accordance with the usual process for investigating a complaint of unacceptable workplace behaviour; and
- e. Deal with the matter as promptly and confidentially as possible.

Please also refer to *Section 2.4* for further information on dealing with criminal offences.

Beyond the legal ramifications, failing to effectively deal with discrimination, harassment, or sexual harassment in the workplace can result in significant negative impacts for employers including increased absenteeism, poor performance and lack of motivation, negative workplace culture and relationships, and reputational damage.

A worker who has been discriminated against, harassed, or sexually harassed may be able to obtain an order for compensation against:

- The person who has engaged in the unwelcome behaviour;
- The person who has caused, instructed, induced, aided or permitted another person to discriminate, harass, sexually harass or bully another person; and
- The employer, unless it can establish that it took all reasonable steps to prevent the harassment from occurring.

Box 3: *Mathews v Winslow Constructors (Vic) Pty Ltd [2015] VSC 728*

- Ms Mathews was employed by Winslow Constructors as a labourer for two years. Ms Mathews claimed that during her employment she was subject to repeated sexual harassment and bullying from various Winslow Constructors workers and independent contractors.
- Some of the alleged incidents included being shown pornographic material, called names like “spastic”, “bimbo” and “useless” and being questioned on her sex life.
- Ms Mathews alleged that she was unable to complain to her foreman, as he was allegedly involved in the offending activity. In addition, when Ms Mathews telephoned a person at Winslow Constructors who she believed was responsible for Human Resources to report a colleague who stated that he would follow her home and rape her, the person responded by suggesting that Ms Mathews come to his place to have a drink and talk about it.
- Ms Mathews resigned from her role and was diagnosed with several psychiatric conditions, including depression and post-traumatic stress disorder. Further, a number of medical practitioners gave evidence that Ms Mathews’ psychiatric injuries meant that she was unlikely to ever work again.
- The Supreme Court of Victoria found that Winslow Constructors were negligent for failing to take action to protect Ms Mathews from workplace bullying and sexual harassment. The Court found that Ms Mathews had suffered chronic and significant psychiatric injury as a direct result of the bullying and harassment that she had been subject to in the workplace.
- **A total of \$1,360,027 in compensation was ordered, comprising \$380,000 in general damages for injuries, \$238,942 for economic loss suffered between 2010 – 2016 and \$696,085 for future loss of earning until retirement.**

Lesson: This decision shows that significant damages may be awarded against an employer that does not have the appropriate measures in place to deal with employee complaints. Employers should ensure they have appropriate policies that clearly state what amounts to bullying and sexual harassment, as well as policies detailing the complaints process.

2.3 Shared Responsibility

The entertainment industry is highly collaborative, and it is common for workers from one organisation to work alongside workers from another organisation (e.g. production staff working with venue staff). In this context, there may be several people/employers who have the same responsibility to ensure the health and safety of workers. The WHS laws require those people/employers with shared responsibilities to work together to meet their responsibilities and obligations. For example, this may require employers with shared responsibility to:

- consult and cooperate with each other to agree on the standards of behaviour expected in the workplace; and
- develop an agreed approach for reporting and investigation if unacceptable or unlawful workplace conduct occurs between two (or more) workers from different organisations.

2.4 Criminal offences

Unacceptable or unlawful workplace conduct may also constitute a criminal offence:

What constitutes a criminal offence may vary from State to State, as it depends on the legislation in effect. However, some examples of conduct which will usually be considered to be a criminal offence include, but are not limited to: physical assault, sexual assault, stalking or cyber crime, which is where a carriage service is used to menace, harass or cause offence. This can include conduct that occurs over the phone, in text messages or online.

If you require specific information about whether unacceptable workplace conduct constitutes a criminal offence in a particular State, we recommend that you seek legal advice on this issue.

Employer obligations where a complaint is made which may involve a criminal offence:

- There is no mandatory requirement to refer a matter to the police when a person makes an allegation of workplace conduct that may also constitute a criminal offence. However, there are mandatory reporting requirements in some jurisdictions (i.e. in Victoria and the Northern Territory) when a criminal offence is committed against a child or young person.
- Where an worker makes a complaint and the behaviour could be considered a serious offence, you should enquire whether the worker wishes to refer the matter to the police in addition to dealing with the complaint internally.
- A worker should not in any way be discouraged from making a complaint to the police, as concealing a serious indictable offence can be a criminal offence in itself. If an worker wishes to report a matter to the police, the worker should be provided with the appropriate support to do so.
- Although there is no requirement to inform the police where a worker makes a complaint which may involve criminal conduct, there is still an obligation to protect the health and safety of the worker at work and deal with the worker's complaint.

Investigating a complaint if the conduct has been reported to the police or involves a potential criminal offence:

- While a complaint may have been made to the police about the behaviour, this does not mean that the employer has no more responsibility to deal with the complaint.
- A criminal investigation is separate and independent to any investigation conducted by the employer.
- A criminal investigation will also have a different standard of proof (i.e. beyond a reasonable doubt) for the conduct being investigated.
- If a complaint is made to the police and the police decide not to investigate the matter further, this does not mean that the employer should not proceed with their own investigation as there are many reasons why the police may decline to pursue a complaint.

- Where an employer is made aware of unacceptable workplace conduct, the employer should take steps to investigate the alleged conduct and, where appropriate, take action to address the conduct or put in place measures to reduce the risk of further conduct. This is consistent with an employer's obligation under WHS laws to, as far as reasonably practicable, provide a safe workplace and prevent risks to the health and safety of its workers.

2.5 Historical Information

There may be instances when an employer receives information about a worker asserting that the worker has previously engaged in inappropriate behaviour. In the absence of a complaint about the worker's conduct or a display of inappropriate behaviour during the course of their employment with the employer, an employer is not required to take any action in relation to the information and should not do so. Taking any action to investigate or speak with a worker, based on information the employer has received about a worker's previous employment, may result in the worker making a complaint against the employer.

Where an employer has in place proper policies and procedures, has provided all its workers with training on appropriate workplace behaviour and how to address any inappropriate behaviour and continues to monitor the workplace for risks to health and safety, this will assist in identifying and addressing any issues as they arise.

If an employer becomes aware that its workers are gossiping about another person in the workplace, the workers should be advised that gossiping is not acceptable in the workplace and may constitute bullying behaviour.

Box 3: *Sammut v Distinctive Options Ltd* [2010] VCAT 1375

- Distinctive Options (DO), a small not-for-profit organisation, employed Mr Sammut as a disability case manager. Mr Sammut claimed sexual harassment in relation to a colleague's persistent attempts to hug him. Although Mr Sammut did not lodge a formal complaint with DO, it was made clear to the colleague on a number of occasions that this physical contact was unwelcome. It was well known within DO that the complainant did not like to be touched because he felt that this would jeopardise his relationship with his wife. The colleague persisted with this behaviour and was not deterred until Mr Sammut told her to stop in front of another employee. Whilst the employer had sexual harassment policies and procedures in place, and employees were aware of them, VCAT found that this was not alone sufficient, as DO's management did not understand the policies properly, did not act in accordance with the policy and did not take complaints related to the policy seriously.
- The Tribunal's adjudicator said: 'My view is that it was not enough that DO had policies in place. It was reasonable to ensure that management understood them, acted in accordance with them, and took seriously complaints made about matters covered by the policies. Reasonable precautions would probably also include ensuring workers had a sufficient understanding, of what those policies meant in practice to recognise issues with their own conduct. Even in a small organisation, this is not too much to ask.'
- It was held that the employer had not taken reasonable steps and was vicariously liable for the sexual harassment committed by its employee – \$2,000 compensation ordered.

Lesson: It is inadequate simply to possess workplace policies. All workers and particularly managers must fully understand and adhere to them, even in small organisations.

3. Definitions

3.1 Discrimination

Discrimination is **treating, or proposing to treat, someone unfavourably** because of a **personal characteristic protected by the law**, such as sex, age, race or disability.

Protected personal characteristics under federal discrimination law include, but are not limited to:

- A disability, disease or injury, including work-related injury;
- Parental status or status as a carer;
- Race, colour, descent, national origin or ethnic background;
- Age;
- Gender, gender identity;

- Sexual orientation;
- Industrial activity;
- Religion;
- Pregnancy and breastfeeding;
- Marital status;
- Political opinion;
- Social origin;
- Medical record; and
- Associating with someone who has, or is assumed to have, one of these characteristics, such as being the parent of a child with a disability.

It is also against the law to treat someone unfavourably because you assume they have a protected personal characteristic or may have it at some time in the future.

Discrimination can be either direct or indirect.

Direct discrimination is usually easy to identify and occurs when a person or group of people with a particular protected characteristic (actual or assumed) are treated less favourably because of that characteristic.

Example: Direct discrimination

- An employer refusing to hire someone based on their age; or
- One employee harasses another because of their race.

Indirect discrimination is less obvious and occurs when a policy or practice appears neutral, yet has the effect of discriminating against those with a particular protected attribute.

Example: Indirect discrimination

- A policy of only offering bonuses to full time workers risks indirect discrimination on the basis of sex, as a greater proportion of part time workers are female.

What is not discrimination?

In certain circumstances it will not be unlawful discrimination to treat workers differently because of a protected personal characteristic. The main exceptions are where the discriminatory act or practice:

- Is necessary to comply with other legislation;
- Is taken because the complainant cannot perform the inherent (essential) requirements of their job, even where reasonable adjustments are made;
- Is a genuine occupational requirement (an exemption may be required, depending on the law in the relevant state or territory);
- Is necessary to protect health and safety; or

- Is permitted because an exemption or ‘special measure’ applies (e.g. affirmative action recruitment programs open only to Aboriginal and Torres Strait Islanders).

3.2 Harassment

Harassment is **unwelcome and unsolicited behaviour** that a **reasonable person would consider to be offensive, intimidating, humiliating or threatening**.

Harassment is prohibited by anti-discrimination legislation where the behaviour targets an individual or group because of a protected characteristic (such as age, sex or race, as outlined above). Harassment that is not related to a protected characteristic is still inappropriate in the workplace and should be dealt with accordingly.

Harassment can be physical, spoken or written. It can include, but is not limited to:

- Intimidation, verbal abuse, or repeated threats or ridicule;
- Sending offensive messages by text, email or other means;
- Derogatory comments;
- Display of offensive materials, pictures, comments or objects;
- Ridiculing someone because of their accent or English-speaking ability;
- Telling offensive jokes or practical jokes based on a protected characteristic;
- Belittling or teasing someone about their disability based on a protected characteristic; and
- Isolation, segregation or humiliation based on a protected characteristic.

3.3 Sexual harassment

Whilst the definition varies slightly according to the jurisdiction, generally sexual harassment occurs where a person engages in **unwelcome conduct of a sexual nature** in circumstances in which **a reasonable person would be offended, humiliated or intimidated**.

Sexual harassment can be physical, spoken or written. It can include, but is not limited to:

- Staring or leering at a person or parts of their body;
- Excessive or unwelcome familiarity or physical contact, such as touching, hugging, kissing, pinching, massaging and deliberately brushing up against someone;
- Suggestive comments, jokes, conversations or innuendo;
- Insults or taunts of a sexual nature or obscene gestures;
- Intrusive questions or comments about someone’s private life;
- Displaying or disseminating material such as posters, magazines or screen savers of a sexual nature;
- Making or sending sexually explicit phone calls, emails or text messages;
- Inappropriate advances on social networking sites;

- Accessing sexually explicit internet sites in the presence of others;
- Inappropriate or persistent unwanted gifts;
- Unwelcome flirting, requests for sex or repeated unwanted requests to go out on dates; and
- Behaviour that may also be considered to be an offence under criminal law, such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.



If someone does not object to inappropriate behaviour in the workplace at the time, it does not mean that they are consenting to the behaviour.

Behaviour can constitute sexual harassment even if:

- **it is a one-off incident;**
- **the person engaging in the behaviour does not intend for the other person to be offended, humiliated or intimidated;**
- **some people in the workplace are not offended by the behaviour;**
- **the behaviour was previously an accepted practice in the workplace.**

What is not sexual harassment?

Sexual interaction, flirtation, attraction or friendship which is invited, mutual, consensual or reciprocated is not sexual harassment.

3.4 Workplace bullying

Workplace bullying is where an individual or group of individuals **repeatedly behave unreasonably to another person** or group of persons **at a workplace**, which creates a **risk to health and safety**.

Bullying can take many forms. It can be physical, spoken, written, overt or covert. Behaviours that may constitute bullying include, but are not limited to:

- Physical intimidation or abuse;
- Aggressive or intimidating conduct or threatening gestures;
- Manipulation, intimidation or coercion;
- Threats, abuse, offensive language, shouting or belittling;
- Innuendo, sarcasm and other forms of demeaning language;
- Ganging up;
- Public humiliation or belittling;

- Initiation activities;
- Practical jokes, teasing, or ridicule;
- Isolation, exclusion or ignoring people;
- Inappropriate blaming, emails/pictures/text messages;
- Unreasonable accusations or undue unconstructive criticism;
- Allocating unpleasant, meaningless or impossible tasks;
- Placing unreasonably high work demands on selected workers;
- Deliberately withholding information, equipment, resources or support services that a person needs to do their job or access their entitlements;
- Unreasonable refusal of requests for leave, training or other workplace benefits;
- Setting unreasonable timelines or constantly changing deadlines for a specific individual or group of individuals;
- Withholding access to opportunities;
- Deliberately changing hours of work for a person or group to inconvenience them; and
- Unreasonable timelines or constantly changing deadlines targeted at a specific person or group.

Bullying may also constitute unlawful harassment or discrimination if it is connected to a protected characteristic, such as age or race.

What is not bullying?

Bullying is not:

- Single incidents of inappropriate behaviour (although it may still constitute harassment or worker misconduct).
- Reasonable management action undertaken in a reasonable manner, such as:
 - Employer directions (e.g. providing instructions on the way work is to be carried out);
 - Performance management processes (e.g. providing feedback on a worker's performance);
 - Disciplinary action;
 - Maintaining reasonable workplace standards or
 - Differences of opinion or disagreements (e.g. differences of opinion on the artistic interpretation or direction of a production).

3.5 Vilification

Vilification is any **public act that incites hatred, serious contempt, or severe ridicule** against another person or group of people due to their race (including ethno-religious origin), homosexuality, transgender status or HIV/AIDS status.

Vilification is unlawful in all States and Territories other than the Northern Territory.

3.6 Victimisation

Victimisation is **subjecting or threatening to subject someone to a detriment** because they have asserted their rights under equal opportunity law, made a complaint, helped someone else make a complaint, or refused to do something because it would be discrimination, harassment, sexual harassment, or bullying.

It is also victimisation to threaten someone (such as a witness) who may be involved in an investigation of a complaint.

Victimisation is unlawful in all States and Territories.

Box 4: *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102

- A senior male employee of Oracle Corporation was found to have sexually harassed a female colleague over a period of several months.
- Comments included:
 - ‘Gosh, Rebecca, you and I fight so much ... I think we must have been married in our last life.’
 - ‘So, Rebecca, how do you think our marriage was? I bet the sex was hot.’
 - ‘We should go away for a dirty weekend sometime.’
- The comments resulted in the victim withdrawing from a project she was working on at the time in order to distance herself from the perpetrator.
- Ultimately, the victim was unsatisfied with HR’s resolution of the complaint and resigned.
- Oracle was found vicariously liable for the sexual harassment. While it had policies and procedures relating to sexual harassment and even provided training, there was no reference to the relevant legislation prohibiting sexual harassment, nor even a clear statement that sexual harassment was against the law.
- **\$18,000 compensation was ordered, which was increased to \$130,000 on appeal.** This increase was partly to reflect changing community expectations of the hurt and humiliation caused by sexual harassment.

Lesson: Workplace policies must clearly state that all forms of discrimination, harassment, sexual harassment and bullying are against the law, outlining the relevant legal standards.

Any form of reprisal taken against a worker who has made a complaint should be reported and investigated immediately, with appropriate disciplinary action taken where the conduct is proven.

Box 5: *Vergara v Ewin* [2014] FCAFC 100

- Ms Ewin, the Group Financial Controller of Living and Leisure Australia (LLA), was found to have been sexually harassed in four separate incidents (both verbal and physical in nature) by Mr Vergara, an accountant who was employed by a labour hire firm to perform work at LLA.
- A number of the incidents occurred outside the LLA office, including at a hotel across the road from the office and on the street near the hotel.
- At first instance, it was found that the incidents had occurred in the “workplace” and that sexual harassment had been demonstrated in accordance with the legislation.
- Mr Vergara appealed the decision on the basis that both the hotel and the street did not constitute a “workplace”.
- The majority of the Full Court upheld the decision, finding that the hotel and street did constitute a “workplace” for the purposes of legislation, as the purpose of both parties in visiting the hotel ‘was to deal with what had commenced in the workplace’ - **\$476,163 compensation ordered.**

Lesson: The Courts may interpret a “workplace” broadly to include “a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant”.

4. Preventing and responding to discrimination, harassment, sexual harassment and bullying

4.1 Develop a discrimination, harassment, sexual harassment and bullying policy

All employers, whatever their size, need to develop a written policy that:

1. States their commitment to providing a safe, respectful, inclusive workplace free from discrimination, harassment, sexual harassment and bullying;
2. Makes clear that any form of discrimination, harassment, sexual harassment and bullying is unlawful in the workplace;
3. Clearly outlines their procedure for dealing with complaints in a fair, timely, confidential and responsive manner;
4. Includes abridged versions of the Code of Practice and other related policies in poster form that are displayed in prominent places in the workplace.

Tips and resources

If you already have a policy in place, the checklist in the appendix is a useful tool to gauge whether it meets current best practice standards.

If you don't have a policy in place, a template is available in the Best Practice Templates and Resources in Part B.

4.2 Develop a complaint handling and investigation procedure

A complaint handling and investigation procedure should outline a process for dealing with complaints that is:

- *Fair* – This means that both the person complaining (the complainant) and the person being complained about (the respondent) have the opportunity to present their version of events, provide supporting information and respond to any potential negative decisions. The complainant and the respondent should have the opportunity to bring a support person to any meetings associated with the complaint handling and investigation process. In addition, the person investigating and/or making decisions about the complaint should be impartial – they should not favour the complainant or the respondent or prejudge the complaint in any way.
- *Confidential* – This means that information about a complaint is only provided to those people who need to know about it in order for the complaint to be actioned properly.
- *Transparent* – The complaint process, and the possible outcomes of the complaint, should be clearly explained and those involved should be kept informed of the progress of the complaint and the reasons for any decisions.
- *Accessible* – The complaint process should be easy to access and understand, and everyone should be able to participate equally.
- *Efficient* – The complaint process should be conducted without undue delay. As time passes, information relevant to the complaint may deteriorate or be lost, which will impact on the fairness of the process. In addition, unresolved complaints can have a negative and ongoing impact on a workplace.
- *Supported* - if the complainant or respondent request the assistance of a support person during the complaint process, such a request should be carefully considered by the employer and only refused if the employer considers the request to be unreasonable, for example, the support person is a witness to the complaint.

The complaint process should have the following elements:

- Protects workers from being victimised because they have made a complaint;
- Protects workers from vexatious and malicious complaints;
- Offers both informal and formal options;
- Provides clear guidance on internal investigation procedures and confidential record keeping;
- Advises a complainant that they can pursue the matter externally with the Fair Work Commission (bullying), Australian Human Rights Commission, a state or territory anti-discrimination body or, if it appears to be a criminal matter, the police; and
- Undergoes a regular review for effectiveness.

4.3 Implement discrimination, harassment, sexual harassment and bullying policies

Written policies on their own are not enough. A policy that is not implemented through communication, education and enforcement will be of little or no use in minimising risk and avoiding liability.

Meaningful implementation of workplace policies could be achieved by undertaking a combination of the following actions:

1. Explain the policies at employee inductions and at other relevant meetings;
2. Email copies of the policy to all workers or make copies of the policies available for all workers in the workplace;
3. Provide regular and appropriate training to employees, including workers responsible for implementing and enforcing the policy;
4. Display policies and posters in the office and on notice boards, green rooms, dressing rooms and rehearsal spaces;
5. Make workers aware that senior management endorse the policies and are required to comply with them;
6. 'Check in' with workers to provide a refresher or reminder them of who the Contact Person is and their rights and obligations, standards of expected behaviour, and how complaints will be handled under the policy;
7. Keep clear and accurate records relating to safety, including employee training and the implementation of this policy;
8. Review policies regularly to ensure they are operating effectively and contain up to date information; and
9. Develop a flow chart of the complaints process, which includes the details of the Contact Person and external support services, for display in the office and on notice boards, green rooms, dressing rooms and rehearsal spaces.

Tips and resources

Practical tips on how to implement policies are available in the Best Practice Templates and Resources in Part B.

4.4 Create and maintain a positive workplace environment

To provide for the safety and wellbeing of workers, it is imperative for employers to proactively create, lead and maintain a positive, inclusive and respectful workplace culture that does not accept any form of discrimination, harassment, sexual harassment or bullying. It is also imperative that employers take actions, as reasonably practicable, to eliminate or mitigate risks.

Creating a safe, respectful and inclusive workplace culture takes commitment, leadership and clear strategy.

Tips and resources

Ideas on how to create a safe, respectful and inclusive workplace are available in the Best Practice Templates and Resources in Part B.

5. Sources

- Live Performance Australia:
 - Australian Live Performance Industry Code of Practice: Discrimination, harassment, sexual harassment and bullying.
- Australian Human Rights Commission:
 - Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008 edition);
 - Good practice guidelines for internal complaint processes.
- Safe Work Australia
 - Guide for preventing and responding to workplace bullying (May 2016);
 - How to manage work health and safety risks: Code of practice (December 2011);
 - Work health and safety consultation, co-operation and co-ordination: Code of practice (December 2011).
- Australian Screen Industry Code of Conduct: Sexual Harassment and Bullying Screen Australia:
 - Code of conduct to prevent sexual harassment.

6. Useful links and resources

6.1 Factsheets and Guidelines

Australian Human Rights Commission

- Workplace discrimination, harassment and bullying
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/workplace-discrimination-harassment-and-bullying>
- Vicarious liability
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/vicarious-liability>
- Good practice guidelines for internal complaint processes
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/good-practice-guidelines-internal-complaint>
- A step-by-step guide for preventing discrimination in recruitment
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/step-step-guide-preventing-discrimination>

- Racial discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/racial-discrimination>
- Sex discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/sex-discrimination>
- Sexual orientation, gender identity and intersex status discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/sexual-orientation-gender-identity-and-intersex>
- Age discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/age-discrimination>
- Disability discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/disability-discrimination>
- Other areas of workplace discrimination
<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/other-areas-workplace-discrimination>
- Recognising and responding to sexual harassment in the workplace: Information for employees
<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/recognising-and-responding-sexual-harassment-workplace>
- Ending workplace sexual harassment: a resource for small, medium and large employers
www.humanrights.gov.au/publications/ending-workplace-sexual-harassment-resource-small-medium-and-large-employers
- Effectively preventing and responding to sexual harassment: a code of practice for employers
www.humanrights.gov.au/publications/effectively-preventing-and-responding-sexual-harassment-code-practice-employers-2008
- Effectively preventing and responding to sexual harassment: A Quick Guide
<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/effectively-preventing-and-responding-sexual-harassment>
- Supporting workplaces to end workplace sexual harassment: A Guide for Small Businesses in Australia
<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-workplaces-end-workplace-sexual-harassment-guide>

Fair Work Ombudsman

- Workplace discrimination

<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/workplace-discrimination>

- Bullying and harassment

<https://www.fairwork.gov.au/employee-entitlements/bullying-and-harassment>

Safe Work Australia

- Guide for preventing and responding to workplace bullying

<https://www.safeworkaustralia.gov.au/doc/guide-preventing-and-responding-workplace-bullying>

6.2 Other resources

- Know the Line

www.knowtheline.com.au

- Heads up

<https://www.headsup.org.au/supporting-others/workplace-bullying>

Part B: Best Practice Templates and Resources

Templates

- Workplace discrimination, harassment, sexual harassment and bullying policy
- Complaint handling and investigation procedure
- Complaint form
- Code of Conduct: workplace discrimination, harassment, sexual harassment and bullying

Other resources

- Check-lists to assess your current policies and procedures