

Issues paper - Definition of 'sexual harassment'

It is an object of the Act to eliminate, so far as is possible, sexual harassment in the workplace, in educational institutions and when it is related to accommodation.

The Act provides that sexual harassment is unlawful in the areas of employment, education and accommodation only. A person is taken to 'harass sexually' another person if they make an unwelcome sexual advance, make a request for sexual favours, or engage in other unwelcome conduct of a sexual nature. In order to prove sexual harassment, the person must have reasonable grounds for believing that a rejection of or objection to the alleged harassment would disadvantage them in connection with employment, education or accommodation; or as a result of their rejection of or objection to the alleged harassment they were disadvantaged in any way in connection with one of those areas of life.

There are at least two issues to consider in relation to the definition. The first is whether it should be broadened to include all areas of life. The second is whether the applicant should have to prove disadvantage or a reasonable belief that they will be disadvantaged if they object.

In relation to the first issue, the *Sex Discrimination Act 1983* (Cth) (SDA) and some other Australian jurisdictions, extend the prohibition against sexual harassment to all areas of life covered by the Act.

In relation to the second issue, an argument in favour of the retention of the current test is that it is not unreasonable to require an applicant to show that they have suffered a disadvantage or have a reasonable belief that they will do so as a result of the unlawful behaviour.

An argument in favour of removing the current test is that it fails to acknowledge that sexual harassment itself causes real and often significant disadvantage to the person being harassed.

In its 2007 Review, the EOC recommended that the current definition in the Act be repealed and replaced with the definition in section 28A of the SDA, namely:

For the purposes of this Division, a person sexually harasses another person (the person harassed) if: (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed; 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.

This definition accords with the definitions in the NSW, South Australian, Tasmanian and Victorian Acts. The Queensland Act adopts the above definition and adds an intention element. The inquiry is whether the harasser engaged in the conduct 'with the intention of offending, humiliating or intimidating the person' or 'in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct'.

The Commission invites submissions in relation to whether:

- 1. the protections from sexual harassment should be extended to all areas of life referred to in the Act and, if not, whether and why certain areas should not be included; and**
- 2. the definition of sexual harassment should be amended to remove the current test for disadvantage and, if so, whether there is a more suitable test.**

A discussion of these issues is in the Discussion Paper at pages **24 [3.4.3]** and **139 [6.4.4]**.