



Restaurant
& Catering

National Inquiry into Sexual Harassment in Australian Workplaces

R&CA Submission

February 2019

RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the national industry association representing the interests of over 45,000 restaurants, cafes and catering businesses across Australia, who together employ over 630,000 people in a wide variety of diverse workplaces. R&CA advocates on behalf of a significant number of small businesses, who are disproportionately impacted by policy decisions and regulations that have a direct effect on the sector's operating environment.

R&CA is committed to ensuring the industry is recognised as one of excellence, professionalism, profitability and sustainability. This includes advocating the broader social and economic contribution of the sector to industry and government stakeholders, as well as highlighting the value of the restaurant experience to the public.

Cover images courtesy of Tourism Australia:

Top (left corner): Aqua Dining Restaurant, Milsons Point, Sydney, Anson Smart.

Top (right corner): Hutchings Camps Pty Ltd, Paperbark Camp, Jervis Bay, NSW.

Middle (centre): Pretty Beach House, Bouddi Peninsula, NSW, Anson Smart.

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Middle (bottom): Tourism Australia, Hunter Valley, SDP Media.

Bottom (right corner): Tourism Australia, Balmoral Beach, Sydney, NSW, Ellenor Argyropou.

Bottom (left corner): Tourism Australia, Byron Beach Café, Byron Bay, NSW, Hugh Stewart.



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INTRODUCTION

R&CA appreciates the opportunity to provide comment on the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces. R&CA acknowledges the importance of ongoing assessment in this area to ensure that the workplace remains a welcoming and inclusive environment where employees feel safe and protected from all forms of bullying and harassment. As social values in Australia progress it is important to ensure that the correct steps are taken to implement changes in support of that progress.

Sexual Harassment in the workplace, though based on seemingly simple concepts of respect and reasonableness, can become a very complex issue at the individual level. It is imperative that we remain mindful of the wider implications of any proposed changes and ensure that the need to eradicate sexual harassment is balanced against the need for a workable framework for all stakeholders.

R&CA argues that the current regulatory framework provides adequate remedy and support for victims of sexual harassment, however, there are cultural, psychological and circumstantial barriers to accessing those remedies. R&CA submits that a more inclusive approach to the way we define and address sexual harassment will result in the removal of negative connotations associated with making a complaint.

The desired outcome of these inquiries and recommendations is a workplace where employees feel secure, protected and certain that they will not be subjected to inappropriate conduct that makes them uncomfortable, but if they are, that there will be accessible remedies and appropriate points of escalation available to them.

Through these submissions, R&CA will advocate for a balanced and measured approach to workplace sexual harassment which provides victims with accessible remedies without creating undue burden on employers and unaware perpetrators.

SUMMARY OF SUBMISSIONS

R&CA's specific position can be summarised as follows:

CLARITY OF WHAT CONSTITUTES SEXUAL HARASSMENT

1. The current meaning of sexual harassment leaves a wide scope of interpretation, which is necessary in order to encompass such a wide variety of circumstances, however, this ambiguity can be mitigated and clarity provided through some minor amendments to the definition.
2. In addition to the lack of clarity, the definition contains elements that are entirely subjective to the feelings of the person harassed and relies only on the 'reasonable person' test to temper this unknowable factor.

DISTINCTION BETWEEN SEXUAL HARASSMENT AND INAPPROPRIATE CONDUCT

3. The term 'Sexual Harassment' is a broad term that encompasses a wide variety of behaviours, however the connotations associated with the term are usually geared to the more serious end of the spectrum regardless of the circumstances. This stigma and lack of understanding leads to a perception of seriousness which acts as a barrier to making complaints and an inhibitor of healthy social interaction.
4. A clear distinction needs to be drawn between conduct that involves aggressive pressure or intimidation and conduct that causes offence. This clarity would provide an accessible remedy to victims that allows them to express their feeling of offence freely without concern that the consequences will be too severe.
5. This distinction would also assist in removing the fear of being labelled which acts as a barrier to engagement from the perpetrator.

REQUIREMENT OF PERSISTENCE DESPITE DIRECTION TO CEASE

6. Notwithstanding serious cases of sexual harassment, which are obvious to a reasonable person, the subjective nature of the definition creates a barrier to proving wrongdoing.
7. Thresholds of offence differ greatly from person to person and workplaces bring together a wide range of people with a variety of differing personalities, backgrounds and cultures. There is no way to define a person's threshold for offence or intimidation as it can be

based on individual issues, circumstances, tones and a myriad of other factors that are not easily defined.

8. If the intention is to use the subjective perspective of the victim in finding whether sexual harassment has occurred, then there must be a counterbalance to address the issue of intent on the part of the perpetrator. In order to admonish a perpetrator and label them as a wrongdoer there must be some way that they, as a reasonable person, ought to have been aware that their behaviour would cause offence or intimidation.

ADDRESS UNDERREPRESENTATION OF MEN

9. Though gender statistics can be a useful tool in understanding the drivers and creating strategies to address sexual harassment, the issue itself is not the exclusive domain of any gender.
10. Engagement from all groups will be required to make progress in this area and statistics can have the unintended effect of apportioning blame. Blame can then often lead to hostility and disengagement.
11. By resisting the urge to blame and encouraging a constructive dialogue based on understanding, engagement and solutions, all stakeholders will feel comfortable to contribute and participate in improving this area.

EXPANDING THE SCOPE OF FUTURE SURVEYS TO ACHIEVE A BALANCED AND WELL-ROUNDED APPROACH

12. It is widely accepted that Australia requires its workplaces to be free from discrimination and all stakeholders are united in their support of this objective.
13. R&CA submits that the majority of research and work in support of this objective has been heavily victim focussed and has not properly considered the perspectives of other stakeholders.
14. As the aggrieved party, there should rightly be a primary focus on supporting and understanding the perspective of the victim, however, in order to address core issues and drivers of sexual harassment in the workplace regard must be given to the concerns and perspectives of employers, other colleagues, the perpetrators, legal experts and the finders of law and fact.
15. Only a fully informed strategy which neutrally considers data from the perspective of all stakeholders will arrive at a solution that is workable, sustainable and fair.

PROVIDE CLEAR, RELIABLE GUIDANCE WITH REGARDS TO VICARIOUS LIABILITY

16. It is accepted that employers are well placed to influence workplace cultures and behaviours and it is reasonable to expect that they provide the framework for a safe and welcoming environment, but the test for vicarious liability is too onerous, ambiguous and broad.
17. It would be unreasonable for the Governments of Australia to be held vicariously liable for any infringement of the laws they have made. It is equally unreasonable that an employer should have liability imposed upon them for the actions of their employees where those actions are in contravention to their employment based instructions.
18. Vicarious liability has been exploited by victims and lawyers who are unable to obtain any financial damages from the perpetrator and so unfairly target employers by ruthlessly scrutinising every detail under the very broad and undefinable tests laid out in the legislation.
19. There is certainly a point at which employers should be held liable and it is reasonable to place some burden on them to have the correct policies and framework in place, however, straight forward, plain English, concrete provisions must be used so that an employer may operate with impunity, certainty and security in the knowledge that they have fully discharged their obligations.

DETAILED SUBMISSION

CLARITY OF WHAT CONSTITUTES SEXUAL HARASSMENT

Legal Definition

The meaning of sexual harassment is outlined by the Sex Discrimination Act¹ as follows:

(1) *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.

(1A) *For the purpose of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:*

- (a) *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;*
- (b) *The relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;*
- (c) *Any disability of the person harassed;*
- (d) *Any other relevant circumstance.*

(2) *In this section:*

"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.

From this definition we can extrapolate the following elements:

- 1) That a person makes an advance, request for favours or engages in conduct with another person;
- 2) That the nature of the advance, request or conduct be sexual;
- 3) That the advance was unwelcome; and

¹ S28a, Sex Discrimination Act 1984

- 4) That a reasonable person, with regard to all circumstances, would anticipate the possibility that the advance, request or conduct would cause offence, humiliation or intimidation.

The first issue arises through the use of the term “unwelcome”. Though a crucial element in any harm-based offence, the decision of whether the advance, request or conduct was unwelcome is entirely subjective and can be applied retrospectively. The legislation attempts to address this through the inclusion of a “reasonable person” provision, however, the scope of reasonableness in this area is far too wide and nuanced to be correctly applied by a jurist in all situations, let alone a lay person acting in a colloquial situation.

Secondly, the scope of the term “sexual” requires further clarification in so far as it pertains to what can be widely considered as inappropriate. E.g. Sex in the context of fair discussion:

Scenario – Colleagues discuss the changing approach to sex education in primary schools over the lunch break. One party disagrees with the other and becomes offended by the opposing opinion. They have retrospectively decided that this conduct was unwelcome and of a sexual nature and are now in a position to make a complaint in accordance with the act. This complaint, if made, will likely trigger a formal investigation whereby, regardless of the circumstances, the perpetrator will suffer a loss of reputation and risk to their career while the employer will be forced to meet the expense of carrying out an investigation while also being subject to the uncertainty of their liability and how best to manage the situation. In most situations’ employers will err on the side of caution and take action against the accused to minimise their risk of being held vicariously liable.

This scenario portrays a common situation in many workplaces whereby individuals seek empowerment through “victim status” from nothing more than engagement in challenging discussions. This outlines the basis for a need to clarify what is meant by “sexual” in the context of harassment and also the need to provide appropriate classifications for the different levels of seriousness.

Finally, it could be said that the inclusion of a reasonable person requirement would act as a safeguard and address any concerns of subjectivity or ambiguity because the definition cannot be made out unless a reasonable person’s perspective is applied. It is important to highlight that this safeguard is further diluted by the inclusion of “anticipated the possibility”. Not only is everybody held to the very broad and generalised standard of the reasonable person, but they are further

required to govern their conduct based on the “anticipation” of a “possibility” that someone might be offended, humiliated or intimidated.

If the rights created by this definition are to apply to everybody, as written, then there is no conceivable way that all behaviours in all contexts can be judged fairly and consistently with regards to the listed circumstances.

The ambiguity in this definition provides complainants with unchecked discretion and creates an enormous potential for abuse by individuals seeking to exploit victim status as a source of power.

Expansion of Definition in National Survey

The definition provided in the National Survey reads as follows:

“Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which, in the circumstances, a reasonable person, aware of those circumstances, would anticipate the possibility that the person would feel offended, humiliated or intimidated.”²

This definition is in keeping with the legislation, however, it was stated in the survey report that:

“Existing research has found that questions based on a specific definition of sexual harassment may lead to underreporting of this behaviour.”³

The report then goes on to state that the Commission’s own research over four separate surveys since 2003 have consistently found that a “significant number” of people say that they have not been sexually harassed based on the legal definition but go on to report experiencing behaviours contained in the list. The language is then changed to “behaviours that are likely to constitute sexual harassment”.

Further scrutiny of this issue is required as there is a significant risk that this approach could improperly skew the data and result in misleading results.

Are the findings of this survey based on whether the respondents have experienced sexual harassment (which is a broad and meaningless claim without proper context) or whether they have experienced “behaviours that are likely to constitute sexual harassment”? Moreover, who has defined these behaviours as “likely to constitute sexual harassment”?

² *Everyone’s business:Fourth national survey on sexual harassment in Australian workplaces, Australian Human Rights Commission 2018, p108.*

³ *Ibid, p12*

It is apparent, *prima facie*, that the results of the survey were not compatible with the objectives of the Commission and so an arbitrary extension of the definition was created in a manner so vague that it would encompass almost all working Australians.

Despite sweeping changes in the moral and ethical landscape of Australia, how is it possible that sexual harassment is on the rise?

Are the number of successful sexual harassment claims increasing, or only the number of people who have experienced behaviours which are likely to constitute sexual harassment?

It is important to be very clear in the language used when assessing data in such a complex area.

DISTINCTION BETWEEN SEXUAL HARASSMENT AND INAPPROPRIATE CONDUCT

Contained in the legal definition of sexual harassment are the three levels of offence, humiliation and intimidation. Offence can best be characterised as an annoyance or resentment brought about by a perceived insult; Humiliation can be characterised by making someone feel ashamed or foolish by injuring their dignity and pride; and intimidation can be characterised by frightening or overawing someone, especially in order to make them do what one wants.

These three separate experiences of a victim are arbitrarily determined by a claimant without any requirement of reasonableness and can be imposed post fact. Moreover, these three distinct experiences represent three very distinct levels of harm and seriousness, despite their being no mechanism for properly classifying this harm.

The term sexual harassment encompasses a wide range of behaviours from slightly inappropriate all the way up to sexual assault. The rhetoric commonly used is most commonly aimed at the latter forms of behaviour. The term conjures images of helplessness, predatory behaviour, bullying, creepiness and other negative associations. The common understanding of the complaints process is that it is intense and will require a full investigation and court proceedings. These issues act as a barrier to reporting and also deter victims from addressing the unwelcome behaviour.

Less than 1 in 5 people who have experienced behaviour that is likely to constitute sexual harassment reported that conduct.⁴

⁴ Ibid, p67

R&CA submits that the reason that reporting statistics are so low is because the threshold for sexual harassment has been monopolised by the more serious end of the spectrum and there is not an obvious option for dealing with inappropriate conduct which does not rise to the level where the average person would consider it to warrant the severe consequences of a formal complaint.

By drawing a clear distinction between the three levels of seriousness, namely offence, humiliation and intimidation, as well as providing a framework for an escalation matrix that advocates proportionate, positive action to address unwelcome behaviour, victims will have a wider range of options available to proportionately deal with the varying levels of behaviour.

REQUIREMENT OF PERSISTENCE DESPITE DIRECTION TO CEASE

The most common forms of behaviour experienced which are “likely to constitute sexual harassment” were comments or jokes (59% of women and 26% of men), physical contact (54% women and 23% men) and touching, hugging or kissing (51% of women and 23% of men). More than half (52%) of this behaviour was experienced at the respondent’s work station with 40% being witnessed by at least one other person and 69% resulting in no intervention by those witnesses.⁵

Mindful that these statistics do not pertain to proven or even alleged incidents of sexual harassment, rather they pertain to experiences of behaviour which the commission has deemed as likely to result in sexual harassment, it is likely that the perpetrator, witnesses and indeed the victim did not consider the behaviour referred to as constituting sexual harassment, rather this is an inference of the commission based on an arbitrarily expanded meaning of what is “likely to constitute sexual harassment”.

With more than 52% of this behaviour occurring at a work station and 40% of it being witnessed, it is unlikely that a perpetrator would be aware that their conduct was “likely to constitute sexual harassment”. It is also likely, with 69% of cases resulting in no intervention from witnesses, that those witnesses did not believe the behaviour was “likely to constitute sexual harassment”. Finally, with less than 1 in 5 incidents being reported by the victim it is also likely that they did not believe the behaviour was “likely to constitute sexual harassment”.

⁵ Ibid, p9

There is an inherent confusion surrounding what behaviour constitutes sexual harassment and this is largely because a person's threshold for offense, humiliation and intimidation varies greatly. Add to this the subjective and arbitrary element of "unwelcome" and we are now left with a definition that is incapable of being applied with any certainty by anyone in any situation.

In order to fairly apply culpability to a perpetrator they must be aware of their offending conduct or reckless/negligent with regard to it. The reasonable person test addresses the reckless and negligent element, however, in order to address the awareness component there must be a requirement that the perpetrator be informed of the person's threshold and that the conduct is unwelcomed. This need not be from the victim directly. It is very difficult to justify persistence of any kind following a clear direction to cease the offensive conduct. Basic human compassion will ensure that the majority of cases are stopped at this point and the only cases that will proceed will be those requiring third party intervention.

ADDRESS UNDERREPRESENTATION OF MEN

The conversations around a number of humanitarian issues have been transformed into gender issues resulting in apportionment of blame and disengagement from groups who feel unwelcome to engage in discussion or contribute their perspective. In particular, men feel unwelcome to contribute perspectives on issues such as domestic violence, gender pay gap and gender equality. The conversation around sexual harassment requires all stakeholders to be engaged and participating.

The statistical data should be used only in so far as it informs how best to develop strategies for addressing emerging trends and not to apportion blame. Sexual harassment, like the aforementioned issues, are humanitarian issues and not gender issues.

By addressing the underrepresentation of men in these conversations, it is possible to arrive at a more balanced solution that considers a wider range of perspectives and is both fit for purpose and sustainable.

EXPANDING THE SCOPE OF FUTURE SURVEYS TO ACHIEVE A BALANCED AND WELL ROUNDED APPROACH

The report fails to provide an accurate picture of the current state of Australian workplaces with regards to sexual harassment. Dissatisfied with the responses after using the legal definition, the commission has instead relied on whether respondents have experienced any behaviours which have been deemed as “likely to constitute sexual harassment”. The list of behaviours is broad and in many cases provides no context that infers actual sexual harassment has occurred. The intention of this is to expand the scope of the test groups understanding of sexual harassment so as to encompass enough of the group to ensure the findings are compatible with the objectives of the Commission’s Inquiry. An inquiry should not have objectives as its purpose is to find facts and provide reliable, balanced answers.

The data gathered, and the subsequent report appears to be almost solely victim focussed and has made little effort to engage with the perspective of any other stakeholders. The report reads as though the Commission have started with their position and worked their way backwards from it.

Since all stakeholders are required to affect change in this area, it is important to consider the perspectives of all stakeholders, some of whom may include:

- The employers who [should] act as a first point of escalation and are responsible for enforcing policies, investigating allegations, engaging in preliminary processes and also influencing workplace culture;
- Employees who feel that the existing framework curtails their ability to engage with their co-workers and express themselves freely;
- The exploited and falsely accused who have suffered at the hands of those seeking to exploit the protections of the regulations. Some consequences include loss of reputation, loss of employment, barriers to career progression, family issues and mental health issues.
- The families of victims who are required to provide emotional, financial or moral support.

The issues and problems that result from sexual harassment are further reaching than this report has been able to identify and a significant more data will be required before any assessments can be made as to whether Australia is experiencing an epidemic of sexual harassment or whether we simply need to improve the way we navigate the diversity that is inherent in our culture.

PROVIDE CLEAR, RELIABLE GUIDANCE WITH REGARDS TO VICARIOUS LIABILITY

Section 106 of the act deals with vicarious liability and states that:

"(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

In cases of sexual harassment, this provision means that an employer will be held liable for the conduct of their employees as if they had been the perpetrator themselves.

This provision creates a presumption of vicarious liability against the employer which is both unjust and impractical.

Subsection 2 does provide a defence which may allow the employer to rebut this presumption, however it is so broad and ambiguous that they are quite literally at the mercy of what is often referred to as "what the judge had for breakfast that morning". That is to say that the interpretation of what "reasonable steps" ought to be taken in order to discharge their liability is left entirely to the discretion of the judiciary, who are only able to give guidance on specific circumstances, post fact. The provision of concrete guidance in this area ought to be pre-incident and delivered by the makers of law so that employers are at least given a chance at discharging their obligations to avoid liability. This legislation creates a constant, indefinable threat looming over every employer across Australia and stifles their ability to properly deal with sexual harassment in the workplace.

Placing vicarious liability on employers is lazy policy making which unfairly transfers the onus of lawmaking and standard setting to the employer.

The intention of this approach appears to be to ensure that complainants have a remedy against someone capable of paying damages.

If it is the intention of lawmakers to make employers responsible for the conduct of others then at a minimum, clear, concise and reliable guidance must be given.

A fair and workable framework for vicarious liability can be achieved by replacing Section 106 with the following:

“ (1) (a) A person will not be liable for the actions of their employee or agent that are:

- (i) unlawful under Division 1 or 2 of Part II; or*
- (ii) an act that is unlawful under Division 3 of Part II;*

Unless the person has failed to provide any form of policy, instruction, guidance or training to their employee or agent in relation to the matters contained in Division 1, 2 or 3 of Part II.

This provision removes the presumption of liability and provides clear, concise guidance on how to discharge liability. A responsibility is also imposed on employers to properly educate their staff on the matters contained in the legislation.

CONCLUSION

R&CA strongly supports the overarching objective of this Inquiry in sustaining a safe and welcoming work environment and believes that the café and restaurant sector has a critical role to play in achieving this outcome. As part of this process, R&CA argues that it is necessary to have a policy and regulatory environment which provides certainty and fairness to all parties. To achieve this, R&CA believes strong consideration should be given to the inclusion of a direction to cease requirement and greater distinction between the different levels of conduct based on seriousness.

R&CA acknowledges the need for vigilance with regards to this issue and submits that further education and support for small businesses will greatly increase their capacity to deal with complaints fairly and justly. In addition to the absolute need for greater clarity in the legislation for vicarious liability, the creation of an escalation matrix based on proportionality of behaviour may provide greater clarity to employees and employers with regard to how incidents of sexual harassment or inappropriate conduct should be addressed.

