

PIGOTTSTINSON

LAWYERS SINCE 1863

Changing Laws & Impacts for Clubs

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Lots & Lots of New Law

- Sexual harassment laws;
- Flexible Work;
- WHS Obligations on psychosocial harms;
- Fixed Term Contracts;
- No confidentiality;
- New Leave provisions.





What is Sexual Harassment?

A person sexually harasses another person if:

- they make an **unwelcome sexual advance**, or an **unwelcome request for sexual favours**, to the person harassed; or
- they engage 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**.

The intention of the alleged harasser is not relevant.

Sexual harassment can involve conduct by one or more people and can be a single incident, or repeated conduct/part of a course of conduct.

Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties.

Examples of Sexual Harassment

Physical Harassment:

- unwanted or unnecessary physical contact (pinching, jostling, pressing against)
- unnecessary familiarity, such as deliberately brushing up against someone, greeting a colleague by kissing them
- behaviour considered to be an offence under criminal law, (physical assault, indecent exposure, sexual assault, stalking or obscene communications)



Examples of Sexual Harassment

Verbal Harassment:

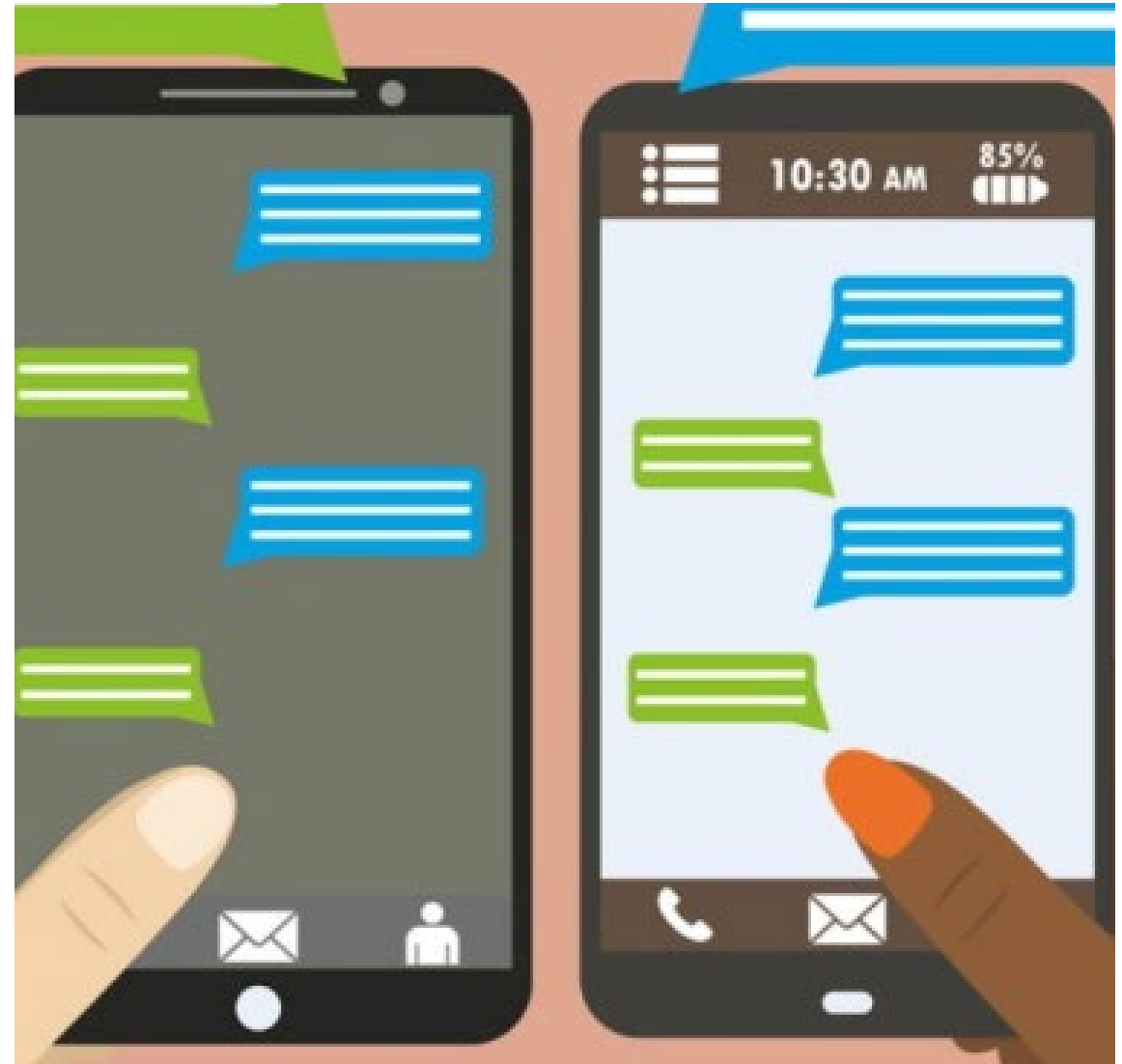
- insults or taunts of a sexual nature;
- sexual innuendos;
- offensive jokes;
- making intrusive enquiries into someone's private life (for example, questions like "do you have sex with your boyfriend often?")
- inappropriate statements about your own private life;
- requests for sex or repeated unwanted requests to go out on dates



Examples of Sexual Harassment

Non-verbal harassment:

- displaying offensive material such as displaying magazines or phone pictures of a sexual nature
- sending sexually explicit emails or text messages
- posting social media posts about a person of a sexual nature
- Sharing sexual explicit material via social media or text to work colleagues
- staring or leering



New Prohibition in Fair Work Act

A person (the first person) must not **sexually harass** another person (the second person) who is:

- a worker in a business or undertaking, or
- seeking to become a worker in a particular business or undertaking, or
- conducting a business or undertaking
- if the harassment occurs in connection with the second person being a worker or seeking to become a worker in a particular business or undertaking, or being a person conducting a business or undertaking.



Changes to the Fair Work Act 2009

Part 3-5A of the Fair Work Act applies to sexual harassment **‘in connection with’** work.

For example:

worker is sexually harassed by another worker;

worker is sexually harassed by a member;

worker is sexually harassed by a supplier;

Worker is sexually harassed by a visitor to the Club.



Changes to Fair Work Act: New Disputes Process

Any of the following parties can now apply to the Fair Work Commission:

- a worker in a business or undertaking, or
- a person seeking to become a worker in a particular business or undertaking, or
- a person conducting a business or undertaking.
- An industrial association that is entitled to represent the industrial interests of an aggrieved person can also apply for the Commission to deal with a sexual harassment dispute.

A **worker** is an employee, a contractor or subcontractor, small business owner who works in the business, an employee of a contractor or subcontractor, an employee of a labour hire agency, an outworker, an apprentice or trainee, a student on work experience, or a volunteer.

Applications must usually be made within 2 years of the last alleged contravention.

Changes to Fair Work Act

Where an application is granted, the types of orders that may be made include:

- payment of compensation;
- payment of an amount for remuneration lost in relation to the dispute, and
- requiring the performance of any reasonable act or course of conduct to redress loss or damage suffered.

The Commission may also express an opinion, including that:

- a respondent has sexually harassed one or more aggrieved person(s)
- a respondent has contravened the prohibition on sexual harassment through the vicarious liability provisions
- it would be inappropriate for any further action to be taken.



Changes to SDA: Big Ticket Items

Positive duty to prevent sexual harassment in the workplace

Introduction of a new positive duty for employers and persons conducting a business or undertaking to take “reasonable and proportionate” measures to eliminate, as far as possible, the following discriminatory conduct:

- discrimination on the ground of sex;
- sexual harassment and harassment on the ground of sex (the difference between the two is that sexual harassment is defined as unwelcome conduct of a sexual nature, while harassment on the ground of sex is unwelcome conduct based on the sex of the individual, but is not necessarily sexual in nature);
- conduct that is unlawful under the new prohibition on subjecting another person to a workplace environment that is hostile on the ground of sex (discussed below); and
- acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to points (a) to (c) above.





Changes to SDA: Big Ticket Items

Positive duty to prevent sexual harassment in the workplace

The meaning of “reasonable and proportionate measures” will vary between parties subject to:

- (a) the size, nature and circumstances of the business or undertaking;
- (b) the duty holder’s resources, whether financial or otherwise;
- (c) the practicability and cost of measures to eliminate the relevant conduct; and
- (d) any other relevant matter.

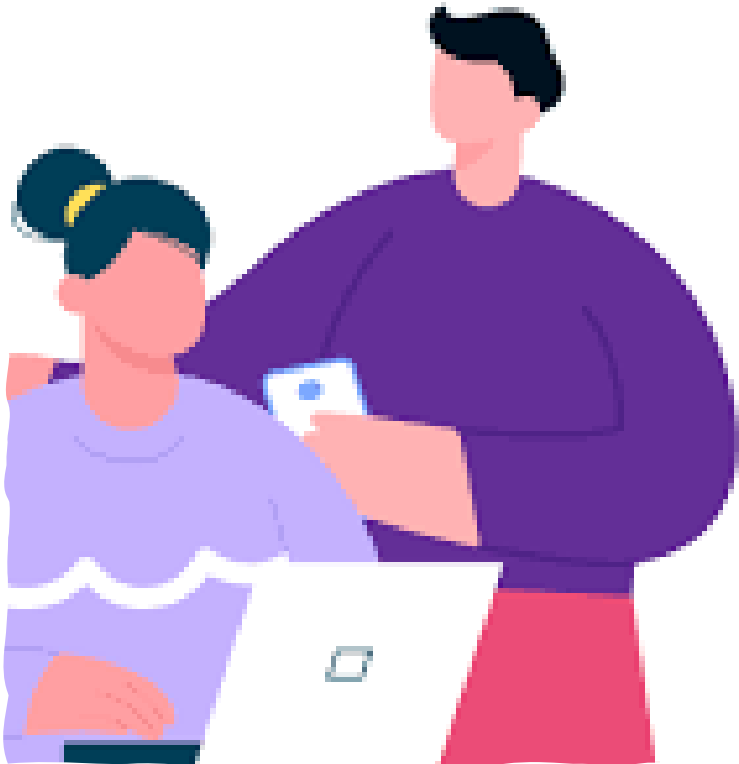
Changes to SDA: Hostile Work Environment

New section of SDA which makes it **unlawful** for a person to subject another person to a **workplace environment that is hostile on the ground of sex**.

A workplace environment will be considered hostile on the ground of sex if a **reasonable person**, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being **offensive, intimidating or humiliating** to a person, either **because of the sex of that person or because of characteristics that generally appertain or are imputed to persons of the sex of that person**.

When considering what a reasonable person may have anticipated in the circumstances, the following factors will be considered:

- (a) the seriousness of the conduct;
- (b) whether the conduct was continuous or repetitive;
- (c) the role, influence or authority of the person engaging in the conduct; and
- (d) any other relevant circumstance.



Changes to SDA: Hostile Work Environment

Prohibit workplace environment is sexually charged or hostile, even if the specific conduct is not directed at a particular person.

EG:

- displaying obscene or pornographic materials,
- general sexual banter, or innuendo
- offensive jokes
- Other conduct which makes people feel uncomfortable because of their sex.



Example

Risk: patrons making lewd comments to female wait staff

- What is the likelihood of this causing harm?
- Can you eliminate this risk?
- If not, why not?
- What can be done to minimize risk and reduce potential for harm?
- Who should you consult with?

Practical Points to Comply with New Laws:

Develop	Develop code of conduct for members, policies for workers and detailed ad up to date risks register
Reporting	Require regular reports on safety which include consideration of sexual harassment, discrimination, bullying
Check in	Check in with workers – hear their concerns – consider regular check-ins. Make sure you hear from different workers at different levels in your Club
Introduce	Safety practices: have a clear procure in place for reporting events
Know	Know the risks associated with your core business: make sure (in consultation with Board and staff) you identify the risks and develop a response to them
Train	Train Train Train Train Train (and make a record of who attended when)
Record	Record every single safety incident and respond to it

Flexible Work Arrangements

What is it?

Part of the NES so it applies to all employees.

Section 65(1) of the FWA:

If:

- *any of the circumstances referred to in subsection (1A) apply to an employee; and*
- *the employee would like to change his or her working arrangements because of those circumstances;*

then the employee may request the employer for a change in working arrangements relating to those circumstances.

This is reflected in clause 6 of the Registered and Clubs Award.



Flexible Work – Existing Laws?

So, what are the circumstances?

- Parental responsibility for school age children
- Being a carer
- Having a disability
- 55 years old or older



Flexible Work - New Laws



From 6 June 2023, it now includes:

- Being pregnant
- An employee experiencing family and domestic violence and
- An employee providing care or support to a member of their immediate family or household who requires care or support because the member is experiencing family and domestic violence
- Prior to the changes, the FWA did provide for violence from a family member – these provisions have been expanded.

Who can Apply?



Full time and part time employees – 12 months continuous service

Casuals ?

- A regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
- has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

How will it work?

The request must:

When can a request be refused?

- the employer has discussed the request with the employee; and
- genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances in the request; and
- the employer and the employee have not reached such an agreement; and
- the employer has had regard to the consequences of the refusal for the employee; and
- the refusal is on reasonable business grounds

Reasons Business Grounds

They can include that

- the new working arrangements would be too costly;
- there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
- the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- the new working arrangements requested would be likely to have a significant negative impact on customer service.

The FWA notes that specific circumstances of the employer, including nature and size are relevant in considering reasonable business grounds

Requirements for Refusing Requests

Include:

Set out the
rights of the
employee to
dispute the
decision.

FW Act: New Dispute Resolution Procedure

This will apply if the employer has:

- refused the request; or
- not respond in 21 days.

The first step is for the parties to try to resolve the dispute at workplace level.

If this does not happen, either party can refer the matter to the FWC.

The FWC must firstly deal with the dispute “by means other than arbitration” eg conciliation, mediation, recommendations. If the dispute is still not resolved, the FWC can deal with it by arbitration and make various orders.

Club employees could already use the dispute clause in the Award – however, it may be easier to use the new FWA provisions.

The FWC will be holding hearings to determine the interaction between the new provisions and already existing Award provisions.





Practical Tips for Flexible Work Requests

An employer will need to consider for individual requests:

- What is the employee's role and duties ?
- What interaction is needed with other employees ?
- How much interaction is required for productivity ?
- Are there set times for the role ? Individual duties and tasks?
Can technology help?
- Consequences ? Both in granting and refusing the request?

WHS: Duty to Prevent Psychosocial Risks

New WHS obligations

Organisations must consider and review approaches to **managing psychosocial risks** to foster **mentally healthy workplaces**



Duty to Prevent Psychosocial Risks: Start by identifying the likely Hazards

Bullying

Harassment
including sexual
harassment

Violence and
aggression

Poor support

Lack of clarity in
role

Traumatic events

Conflict in
workplace

Excessive job
demands

Low job control

Remote or isolated
work

Poor organisations
change
management

Poor physical
environment

Next Steps: Psychosocial Risks

Safe work NSW has a new code of practice

Clubs should:

Lots of Other Laws: No Fixed Term Contracts

From 7 December 2023, fixed term contracts are prohibited if:

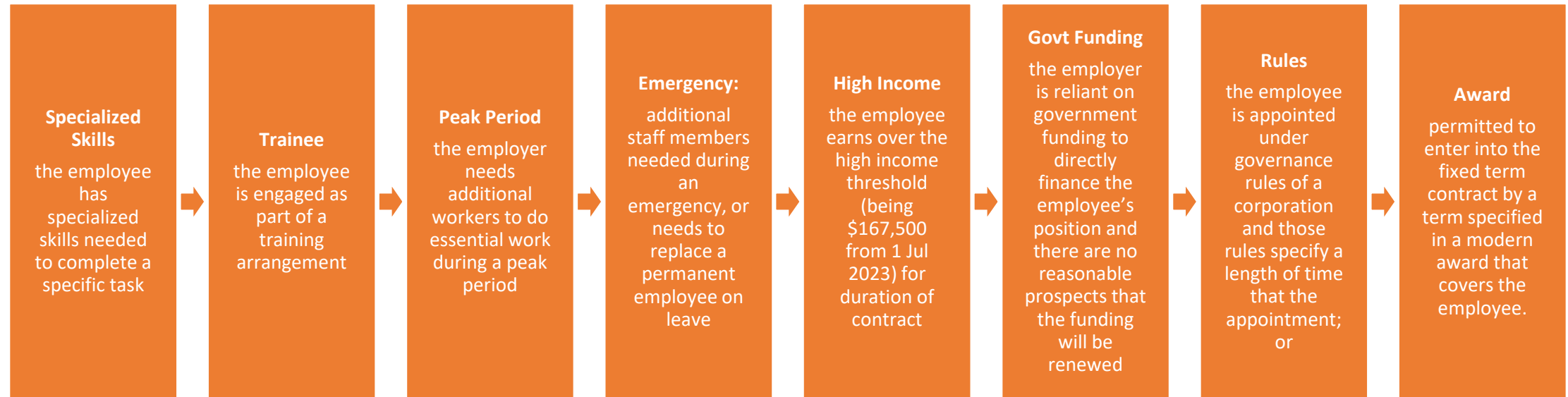
1. the contract is for two or more years;
2. the term of the contract and the period of any option for renewal and extension in the contract exceeds 2 years; or
3. the contract provides an option or right to extend or renew the contract more than once.

The prohibition also applies to:

- (a) new contracts if there was a previous fixed term contract.
- (b) maximum term contracts, *“whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period”*.

Existing fixed term contracts remain valid until except any provision that terminates the contract at the end of the identified period, which provision is taken to have no effect.

Fixed Term Contract Prohibition: Exceptions





No Pay Secrecy

1. Employees are not subject to pay secrecy

- Employee may disclose, or not disclose, their pay as well as any terms and conditions of their employment that are reasonably necessary to determine their pay (such as their hours of work) to any other person.
- Employees are protected if they choose to ask others about their pay, and the protections extend beyond the end of the employment period.
- This means that everyone is free to discuss their pay with any other person under the law.

2. Pay secrecy terms have no effect

- The new law also has the effect of treating any term of an employment contract that purports to impose pay secrecy or would violate an employee's right to discuss their pay as having no effect.

3. Prohibition and penalties for breach of pay secrecy laws

- Heavy penalties for employers who try to enforce such illegal terms.
- The section is a 'civil remedy provision', meaning that the maximum penalty for violating this section is \$82,500 or up to \$825,000 for serious contraventions.

New Leave Entitlements

