

Sexual Harassment in the Workplace: Prevalence, Regulations and Reporting

6 May 2022

Associate Professor Kantha Dayaram



Acknowledgment of Country (Boodja)

I would like to acknowledge the Whadjuk Noongar people whose land we are standing on and recognise the strength, resilience and capacity of the Noongar people where Curtin University is situated.

I pay my respect to their vibrant and endless culture and the leadership of the Elders past, present and future. This country (boodja) where Curtin University is situated has belonged to the Whadjuk Noongar people for thousands of years and is a place of learning for all people now and Curtin University is very proud to continue on this very long tradition.

SH in the workplace

Workers who complain need access to fair, effective and efficient complaints mechanisms. Complaints processes are too complex and costly.
ACTU, 2018

The 2018 National Survey showed that rates of workplace sexual harassment have increased significantly since the 2012 survey. AHRC, 2020

Reasons for not reporting included that employees did not feel confident their concerns would be taken seriously; they would experience repercussions; and, in some cases, that they were not aware of the appropriate reporting mechanism".
(Rio Tinto Report, 2021)

Many do not complain at all for fear of victimisation or lack of faith in the process. (Hart, 2019)

Prevalence



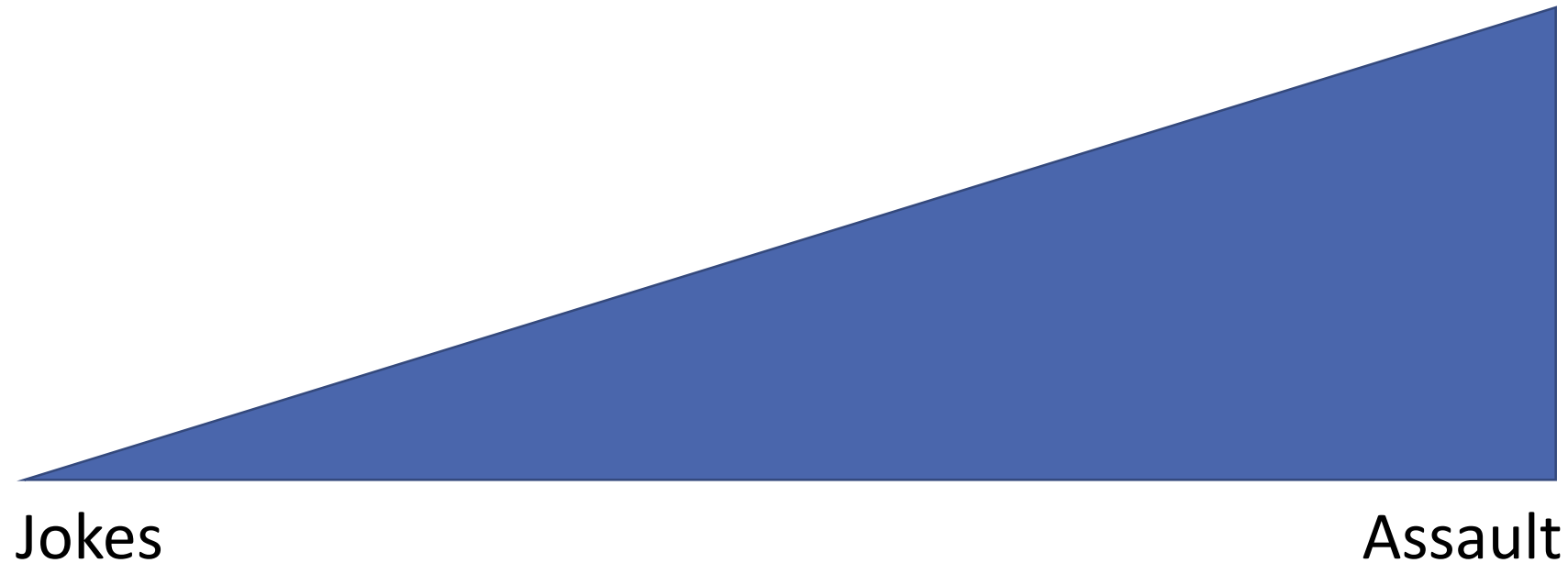
slido



Sexual harassment may include:

ⓘ Start presenting to display the poll results on this slide.

Awareness and Continuum of Behaviours



Varying implications that include civil and criminal laws relevant to SH

Frequency and Occurrence

- **One in three** Australian workers experienced sexual harassment with perpetrators/harassers ranging from co-workers to clients¹.
- **One in two** people have been exposed as either victim or bystander.³
- More than 50% of repeated experiences, goes on **for more than six months**.³
- Women were more likely to be sexually harassed at work than men (39% and 26% respectively)²
- Aboriginal and Torres Strait Islander people were more likely to experience workplace sexual harassment than non-Indigenous workers (53% and 32% respectively)².
- Other high risk categories include workers under the age of 30, LGBTQI workers, culturally and linguistically diverse workers and workers with a disability².

1. Foley M, Oxenbridge S, Cooper R & Baird M. (2021). 'I'll never be one of the boys' : Gender harassment of women working as pilots and automotive tradespeople. Gender Work & Organisation. <https://doi.org/10.1111/gwao.12443>.
2. Australian Human Rights Commission (2020) Respect @Work: National Inquiry into Sexual Harassment in Australian Workplaces.
3. https://www.safeworkaustralia.gov.au/sites/default/files/2022-01/Stats%20workplace%20sexual%20harassment_infographic.pdf

Prevalence rate:

Workplace sexual harassment was notably higher than the national prevalence rate (33%) in the following industries:



81%

Information,
media and tele-
communications



49%

Arts and
recreation services



47%

Electricity,
gas, water and
waste services



42%

Retail trade



40%

Mining

Health Outcomes

- Stress, depression, anxiety and post-traumatic stress disorder
- Stress related illness –cardiovascular disease, musculoskeletal disorders, immune deficiency and gastrointestinal disorders
- Suicide

Economic Costs

In 2018, workplace sexual harassment was estimated to cost:

- \$2.6 billion in lost productivity.
- \$0.9 billion in other financial costs and
- Four working days of lost output per harassment case.

Individual
organizational level

- High turnover rates
- Reputational damage
- Absenteeism

Regulations



The Legal Framework – Employer’s Duty of Care

- Work health and safety obligations can be found in both the common law, for example, an employer’s duty of care to their employee(s) in negligence, and in legislation, such as the *Work Health and Safety Act 2020* (WA).
- They do overlap considerably. In relation to the employer’s duty of care at common law, the Western Australian Court of Appeal has recently held:

The duty of care in a case such as the present arises from the employment relationship between the appellant and the respondent and obliged the appellant to take reasonable steps to provide a safe working environment. It is a non-delegable duty of care involving 'a special responsibility or duty to see that care is taken'. The description of the duty as being non-delegable in the employment context is a proposition of law concerning the nature or content of the duty. The employer's duty at common law extends to giving the employee directions in the performance of the work where directions might reasonably be thought to be required to secure the employee from danger or injury.

Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44, [97]-[102] (Quinlan CJ, Murphy and Vaughan JJA).

The Legal Framework – Employer’s Duty of Care

‘First, an employer's obligation, in discharging its duty to take reasonable care, 'is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system’.

Secondly, and relatedly, in devising a safe system of work, the employer must have regard to the possibility of error, and even carelessness, on the part of its employees. Similarly, the employer is bound to have regard to the risk of misjudgment by the employee in performing the allocated task.

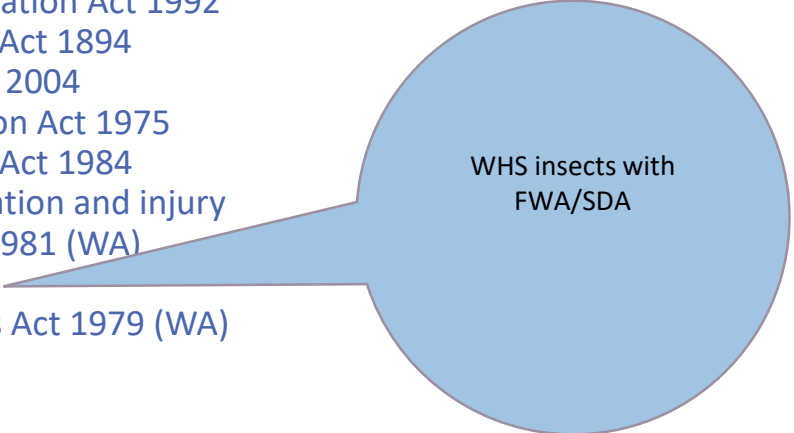
Thirdly, it bears repeating that, as with any common law duty of care, the employer's duty is a duty to take reasonable care; it is not a duty to safeguard employees from all perils, or some more stringent requirement of prevention.’

Gregory Spencer Ward trading as Ward's Stock Transport v Watson [2021] WASCA 44, [97]-[102] (Quinlan CJ, Murphy and Vaughan JJA).

Overlapping Regulatory Framework

- Whereas OHS Act included, section 19(1) duty. Duty about exposure to hazards that may result in injury to the person or harm to the health of the person.
- WHS Act is explicit that health includes mental health In 2022, the Work Health and Safety Act 2020 (WA) is explicit
- It set out the regulations and extended enforcement powers for psychosocial hazards which covers sexual harassment.

- Disability Discrimination Act 1992
- Equal Opportunity Act 1894
- Age Discrimination 2004
- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Workers Compensation and injury Management Act 1981 (WA)
- **Fair Work Act 2009**
- Industrial Relations Act 1979 (WA)
- Common Law
- Breach of Contract
- Duty of Care



WHS intersects with
FWA/SDA

‘Stop Sexual Harassment Orders’

slido



Are you aware of a 'Stop Sexual Harassment Order' where and to how to access one if needed?

ⓘ Start presenting to display the poll results on this slide.

Stop SH Orders

- In response to the increasing prevalence of workplace sexual harassment, in 2021 the Fair Work Act 2009 (Cth) was amended to include the provisioning of 'Stop Sexual Harassment Orders'.

FWC must be satisfied that harassment has occurred and there is a risk of future occurrence.

This could render once-off harassment ineligible for remedy.

Still be employed at that workplace

SH - Vicarious Liability

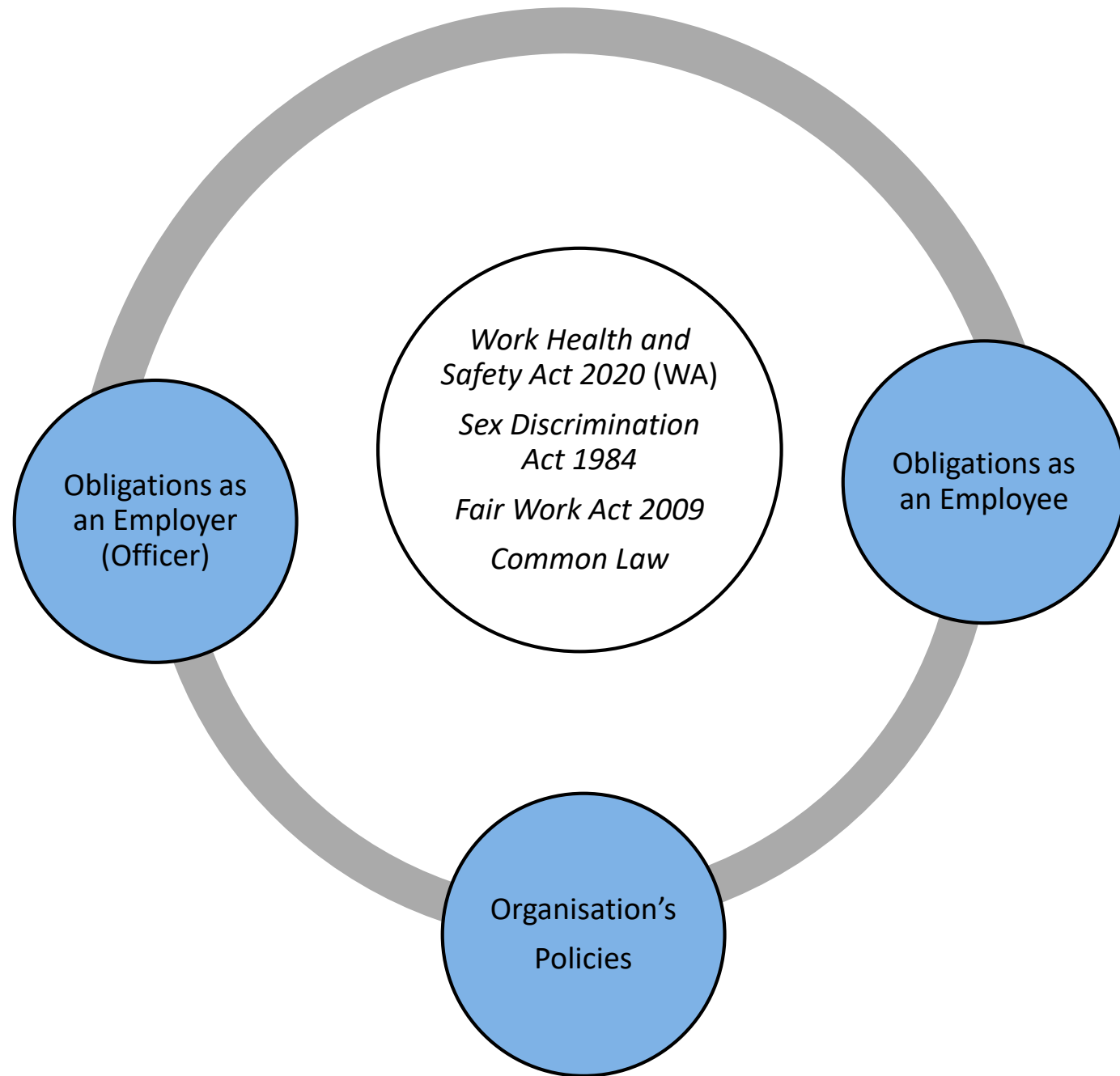
Clarity on who bears vicarious liability for gig work and shared economy.....

- SH falls under Federal and State jurisdictions and takes its definition from the Sex Discrimination Act 1984 (Cth) Section 28A (SDA).
- Although the SDA places vicarious liability onto the employer for failure to act and confers powers to the Australian Human Rights Commission to refer matters to the Federal Court, two key challenges remain:
 - The pursuit of a claim through the Federal court is complicated and seeking remedy is costly.
 - Since 1984 the world of work and employment conditions have drastically changed. There is an increase in precarious, insecure and non-standard work, with some sectors more exposed to sexual harassment/violence such as the care, hospitality, engineering, medical and legal sectors.¹
- The HCA has arguably provided considerable clarity in that respect through the very much contractual-focused *Personnel Contracting* and *Jamsek* cases.
- Work Health and Safety Act 2020 (WA) - PCBU - officer
- Change from employee to worker

“The definition of ‘worker’ provided in section 7 of the WHS Act, includes ‘a volunteer’ at (h).

The term ‘volunteer’ is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a ‘volunteer’ for the purposes of the WHS Act is a question of fact that will depend on the circumstances of each case.

1. (AHRC, 2018; Foley et al, 2021)



Reporting

- Only 5-30 percent of those who experience sexual harassment file formal complaints within their organizations, and
- Less than 1 percent pursue legal action.

Low reporting ??”

- There is a reluctance to report workplace SH for reasons such as:
- Career ‘suicide’, structural barriers, lack of knowledge, economic loss and gendered work cultures amongst others.¹
- Lay understanding
- Self blame if they do not react assertively
- Anticipate being blamed, or fear retaliation, or being dismissed
- Power differentials – perpetrator and victim
- Bleak expectations of organizations’ responses to sexual harassment reports are not baseless²
- Workplace Cultural bias against SH targets
- Stereotypes can result in inequitable treatment through either status discrimination or normative discrimination
 - Status discrimination occurs when people are considered ill-suited for a task because a stereotype casts them as less competent at it.
 - Normative discrimination occurs when a person fails to enact stereotypically expected behaviour and is therefore viewed less positively on interpersonal qualities

“Just 1.9% of men and 4.7% of women reporting their experience of sexual harassment

Reasons for not reporting included that employees did not feel confident their concerns would be taken seriously; they would experience repercussions; and, in some cases, that they were not aware of the appropriate reporting mechanism”.

(Rio Tinto Report, 2021)

1.Patty, A (2018). 'Classic no-win situation': Harassment can mean career suicide for workers, reputational damage for companies. The Sydney Morning Herald. <https://www.smh.com.au/business/workplace/classic-no-win-situation-harassment-can-mean-career-suicide-for-workers-reputational-damage-for-companies-20181109-p50f0p.html>
Hart, G. (2019). The Penalties for self-reporting sexual harassment, Gender and Society 33(4), pp534-559.

Bystander Reporting - Intervention

- HSR – health and safety representatives
- HR managers or line managers,
- Equity/harassment contact officers,
- Co-workers or customers to whom SH is reported

I employed a junior trainee who was 18. He started with the company in March. In the first two months I would hear him trying to defend me. He would say to the males in the office, "You guys have no respect for women". They would quickly shoot him down in flames saying, "Are you gay?" or similar taunts. He stopped trying to stand up for me.¹

Promoting bystander intervention strategies, rests on assurances of safety and protection



Cases and Rulings

[Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber \(No 2\) \[2020\] FCAFC 13](#)

Did the employer take “all reasonable steps” to prevent employees from sexually harassing another employee?

Employee made allegations of discrimination in breach of the *Sex Discrimination Act 1984* (Cth) (**SD Act**).

- sexually harassed by another employee,
- discriminated against on the basis of her sex by other employees
- victimised by other employees because she made a sexual harassment complaint.
- alleged the employer was vicariously liable for the discriminatory and harassing conduct of its employees.

Full court examined the workplace policies and the training provided to employees

- employer relied upon presentation slides from refresher training which only included the definition of SH
- employees were instructed that disciplinary action would be taken if an employee was found to have engaged in SH
- employees were instructed during training that SH was against the law and employer could be held liable for breaches

Employer was found to be vicariously liable for the conduct of the employee



REFERENCES:

- Australian Human Rights Commission (2020) Respect @Work: National Inquiry into Sexual Harassment in Australian Workplaces.
- FWO, [fairwork.gov.au/employment-conditions/bullying-sexual-harassment-and-discrimination-at-work/sexual-harassment-in-the-workplace](https://www.fairwork.gov.au/employment-conditions/bullying-sexual-harassment-and-discrimination-at-work/sexual-harassment-in-the-workplace)
- Safe Work Australia (2022) Workplace sexual harassment statistics. <https://www.safeworkaustralia.gov.au/doc/workplace-sexual-harassment-statistics-infographic>
- Australian Council of Trade Unions (2018). Sexual Harassment in Australian Workplaces, Survey Results. 200/2018.
- Foley M, Oxenbridge S, Cooper R & Baird M. (2021). 'I'll never be one of the boys' : Gender harassment of women working as pilots and automotive tradespeople. *Gender Work & Organisation*. <https://doi.org/10.1111/gwao.12443>.
- Deloitte Access Economics (2019). The economic costs of sexual harassment in the workplace. <https://www2.deloitte.com/au/en/pages/economics/articles/economic-costs-sexual-harassment-workplace.html>
- Patty, A (2018). 'Classic no-win situation': Harassment can mean career suicide for workers, reputational damage for companies. The Sydney Morning Herald. <https://www.smh.com.au/business/workplace/classic-no-win-situation-harassment-can-mean-career-suicide-for-workers-reputational-damage-for-companies-20181109-p50f0p.html>
- McDonald, et al (2016). Action or inaction: Bystander intervention in workplace SH, *The International Journal of HRM* 27(5).
- <https://www.commerce.wa.gov.au/worksafe/modernisation-work-health-and-safety-laws-frequently-asked-questions-faq>
- Hart, G. (2019). The Penalties for self-reporting sexual harassment, *Gender and Society* 33(4), pp534-559.