

THE WEINSTEIN EFFECT : JUST WHAT IS INAPPROPRIATE BEHAVIOUR?

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CLAYTON UTZ

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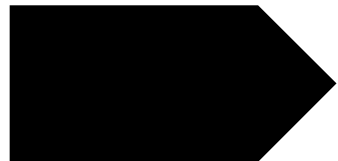
WHAT WE WILL BE COVERING TODAY



#MeToo and context



What is and is not sexual harassment



The legal consequences of sexual harassment in the workplace



Prevention and Responses - policies culture and complaints

THE WEINSTEIN EFFECT...AND THE ENSUING SOCIAL MOVEMENT



Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades

By JODI KANTOR and
MEGAN TWOHEY OCT. 5, 2017



Harvey Weinstein apologized for behavior that he said "has caused a lot of pain."
Jean Baptiste LaCroix/Agence France-Presse — Getty Images



SEXUAL HARASSMENT IS NOT NEW SO WHY IS IT A PROBLEM NOW?



WHY IS SEXUAL HARASSMENT AN ISSUE YOUR BUSINESS NEEDS TO WORRY ABOUT?

Fourth national survey on sexual harassment in Australian workplaces,
AHRC, September 2018

1 in 3 people have
experienced sexual
harassment in the
workplace in the last
5 years

52% of LGBTI workers
have experienced
sexual harassment at
work

In the last 12 months,
23% of women have
been sexually
harassed at work

Sexual harassment in
the workplace is most
often perpetrated by a
co-worker employed at
the same level (27%)

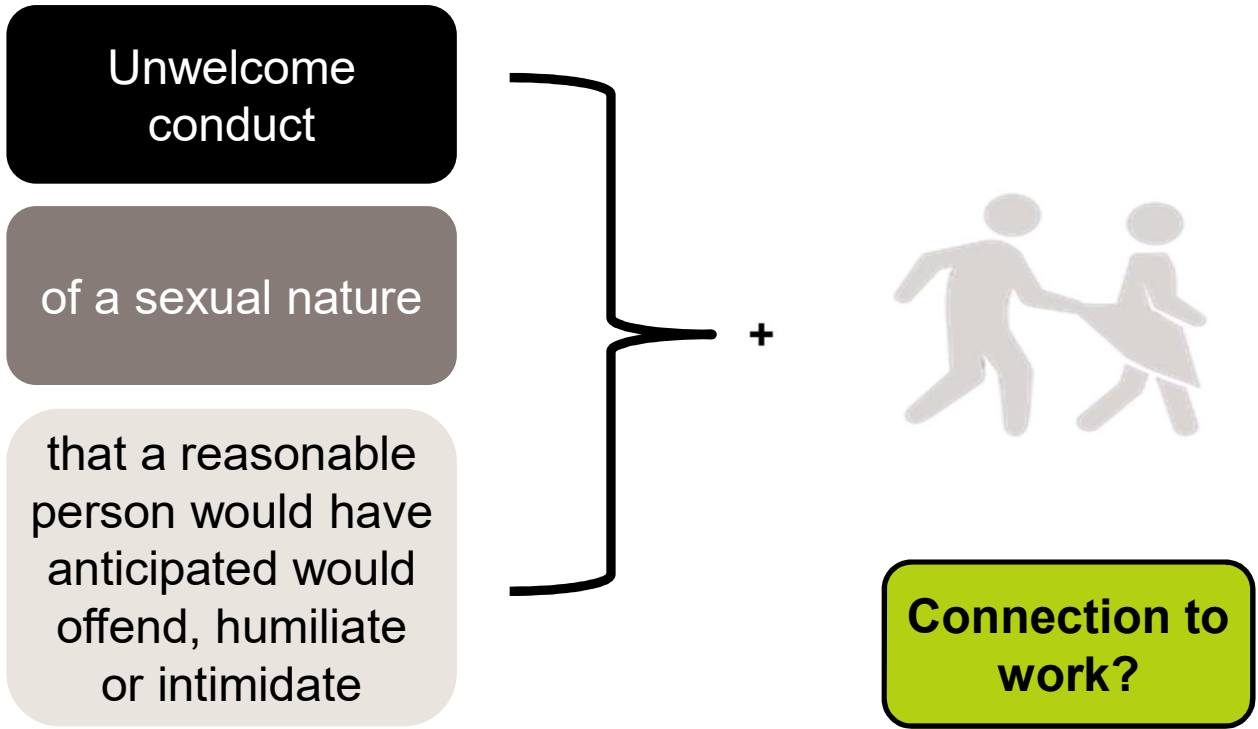
In the last 12 months,
16% of men have been
sexually harassed at
work

Sexually suggestive
comments or jokes are
the most common form
of sexual harassment
at work

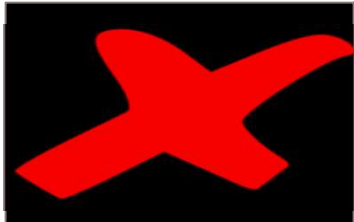
REVISITING SOCIAL VIEWS AND REACTION

	Old view/reaction	New view/reaction
Alleged victim	<ul style="list-style-type: none"> • Not credible • Deserved/wanted • Character judgment 	<ul style="list-style-type: none"> • Those in power are seriously listening to allegations • Recognition of serious impact on victim
Alleged perpetrator	<ul style="list-style-type: none"> • Does their financial value offset the poor/unlawful behaviour? 	<ul style="list-style-type: none"> • Justification not acceptable
Result	<ul style="list-style-type: none"> • Avoidance strategies • Only very serious allegations considered • Silent victims 	<ul style="list-style-type: none"> • Allegations afforded due and proper treatment

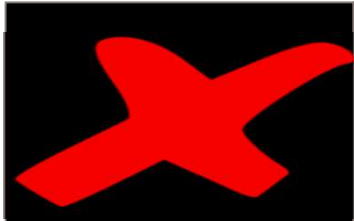
SEXUAL HARASSMENT IS...



WHAT IS NOT SEXUAL HARASSMENT?



Behaviour based on mutual attraction, friendship and respect



Interaction that is welcome, invited, reciprocated or consensual



Conduct outside the "workplace"

THE EVER-BROADENING WORKPLACE

Section 28B(7) (SD Act)

A place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.



Section 94(3) EO Act

In this section "workplace" means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.

MOST COMMON TYPES OF SEXUAL HARASSMENT

Sexually suggestive comments or jokes	Intrusive questions about a person's private life or physical appearance	Inappropriate staring or leering	Unwelcome touching, hugging, cornering or kissing
Inappropriate physical contact	Repeated or inappropriate invitations to go out on dates	Being followed, watched or someone loitering nearby	Sexual gestures, indecent exposure or inappropriate display of the body
Sexually explicit pictures, posters or gifts	Requests or pressure for sex or other sexual acts	Repeated or inappropriate advances on social media and email	Indecent phone calls and voicemails

BANTERS, JOKES AND CULTURE

Just joking is not an excuse...

Sexual jokes

Comments
about interstate
trips

Gossip about
colleagues

Insinuations
about weekend
activities

Racy photos
(including The
Bachelor!)



Ask yourselves:

What is our culture?

Are we condoning this conduct?

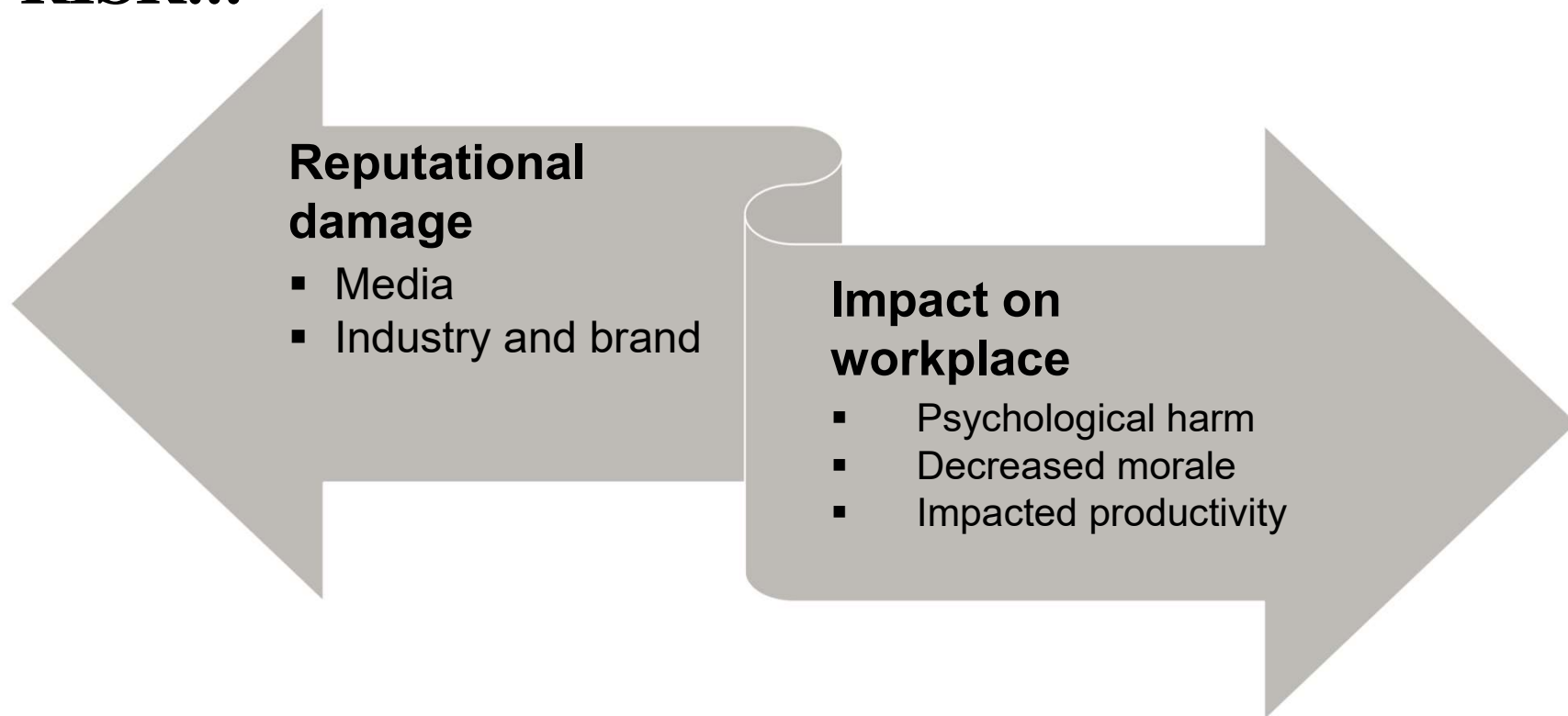
POTENTIAL LEGAL EXPOSURE



SOME TYPICAL COMPENSATION

2014	<i>Richardson v Oracle</i>	\$130,000 (increased from \$18,000 by appeal)
	<i>Vergara v Ewin</i>	\$476,163
	<i>Trolan v WD Gelle</i>	\$733,723
2015	<i>Collins v Smith</i>	\$332,280
	<i>Mathews v Winslow</i>	\$1,360,027
2016	<i>STU v JKL (Qld)</i>	\$313,000
2017	<i>Green v Qld</i>	\$150,000

BUT THERE'S MORE TO IT THAN LEGAL RISK...



VICARIOUS LIABILITY

Employers can be held vicariously liable for unlawful conduct of their employees/agents where an employee or agent of a person engages in the conduct in connection with the employment of the employee or with the duties of the agent as an agent.



Unless - can establish that the employer took all reasonable steps to prevent the employee or agent from doing the unlawful acts.

SEXUAL HARASSMENT AND THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004

Section 21 Duties of employers to employees

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1800 penalty units for a natural person; 9000 penalty units for a body corporate.

(2) ...

(a) ... provide or maintain...systems of work that are, so far as is reasonably practicable, without risks to health.

...

SEXUAL HARASSMENT AND THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004 (ANALOGIES WITH BULLYING)

WorkSafe Victoria, *Your guide to workplace bullying - prevention and response*

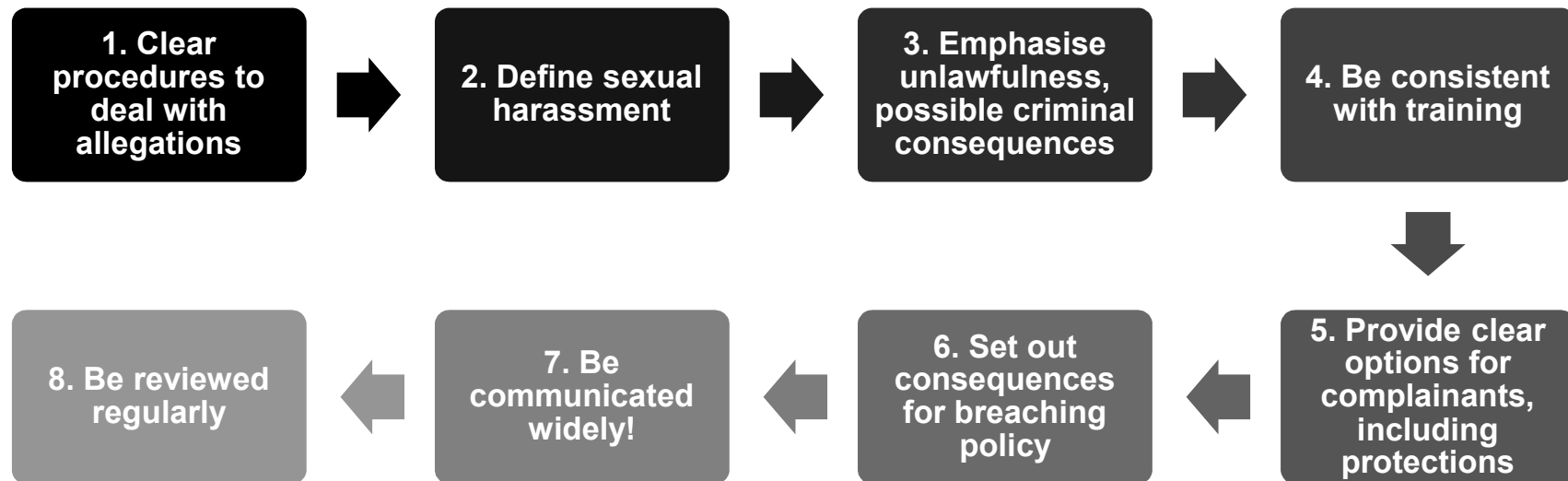
▶ Prevention

- » Policies and procedures
- » Information, instruction, training and supervision
- » Monitor and review

▶ Response

- » Early intervention
- » When and how to investigate
- » After an investigation

ARE YOUR POLICIES AND TRAINING UP TO SCRATCH?



COMMON PROBLEMS WITH MANAGING SEXUAL HARASSMENT IN THE WORKPLACE

Failure to assess sexual harassment risk factors

Absence of clear leadership and clear policies

Not intervening early

Using email to manage rather than speaking to staff directly

Creating the impression of "untouchables" in your organisation

Fear of reprisal or adverse action for raising concerns

Waiting for a complaint to be made

THE ROLE OF HR IN LEADERSHIP AND CULTURE

- Multiple legal obligations that flow from:
 - » It's not what we say, its what we do
 - » "Come to Work Expectations"
- Legal requirements: Safety / harassment / Discrimination
- Code of Conduct / policies
- Contracts
- ▶ And the:
 - » Impact of leadership / managers / supervisors conduct
 - » Extended liability for individuals

WHAT YOU WALK PAST IS WHAT YOU ACCEPT

COMMON ISSUES



WHAT SHOULD YOU DO IF YOU RECEIVE A COMPLAINT?

- ▶ Take complaints seriously
- ▶ Listen without judgement
- ▶ Comply with your policies
- ▶ Paper trail
 - » Act promptly, but with a plan
- ▶ Lead by example and support others to:
 - » Not condone / ignore bad behaviour
 - › emails
 - › overhearing / witnessing conduct
 - › failing to act
- ▶ Investigate and take appropriate action
- ▶ Even if "no complaint", intervene early:
 - » Educate, paper trail and follow up



INVESTIGATIONS

Tips/key considerations

1. Take complaints seriously - listen without judgement
2. Does the matter need to be investigated?
3. Ensure compliance with policies and agreements
4. Analyse the complaint and plan the investigation
5. Procedurally fair investigation process
6. Provide/offer support to all parties
7. Ensure confidentiality
8. Clear communication
9. Appropriate actions
10. Keep appropriate records

COMMON ISSUES AND RISKS



Complaints & confidentiality

- ▶ Victim trauma
- ▶ Whistleblower protections
- ▶ Presumption of innocence
- ▶ Procedural fairness

QUESTIONS?



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