

Australian Labour Law Association
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Preventing and investigating sexual harassment in the
workplace - The good, the bad and the ugly

Investigating sexual harassment in the workplace

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Principal

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Instructions

- **Casey** does not report to **Rebb**, but they work closely together, and **Rebb** is more senior
- Rebb gives feedback on Casey for the annual appraisal process, and feedback is due next Friday
- There have been rumours about **Rebb**'s behaviour towards women for some time
- One incident involving **Rebb** was previously reported to the CEO, and the CEO gave **Rebb** counselling

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Instructions

- **Rebb** can be aggressive when he feels he needs to defend himself
- **Casey** is known to be honest, but is vulnerable at the moment
- **Casey** has not spoken to anyone else about the incident
- **FC** has not yet spoken to anyone about meeting with **Casey**
- **FC** wants you to carry out an investigation

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Advice to Client

Lawyers = legal professional privilege

Planning is crucial

1. Response to complaint
2. Support for those involved in process
3. Immediate actions
4. Potential evidence

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Advice to Client

Planning is Crucial

6. Communications & confidentiality
7. Timing
8. Anticipating outcomes
9. Choosing & briefing an investigator
10. Acting on findings

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Advice to Client

1. Response to complaint

- Take complaint seriously
- **Casey** wants the behaviour towards her to stop, as well as the prevention of behaviour towards others
- **Casey** is open to facilitated conversation with Rebb, if she must, but is worried about victimisation and confrontation
- **Casey's** preference is to not work with Rebb in future
- Does **Rebb's** seniority warrant investigation?

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Advice to Client

2. Support for Complainant, Respondent & others involved

- Support person/counselling/EAP
- Internal or external resource
- Cultural sensitivity
- Paid time off work
- Working remotely or at another location
- Medical expenses
- Reassurance re victimisation

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Advice to Client

3. Immediate actions

- Steps to stop **Casey & Rebb** working together?
- Regulatory reporting?
- Criminal/illegal conduct?
- Whistle-blower protection?
- Reputational risks/media interest?
- Evidence to be secured?
- Confidentiality/cooperation/victimisation agreement
- **Casey's** confidentiality during investigation?
- Related/ongoing investigations?

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Advice to Client

4. Roles & Responsibilities

- (a) Investigation manager
- (b) Investigator –
 - not you if you are to advise FC
 - internal or external investigator?
- (c) Decision-maker
- (d) Adviser to Decision-maker
- (e) Media liaison
- (f) Electronic Records Manager

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Advice to Client

5. Potential Evidence

- **Casey's** allegations in writing
- Witnesses
- Documents
- Electronic communications
- Video evidence
- Medical or other experts, e.g. document examiners, accountants
- Relevant codes, policies, values, standards, contracts of employment

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Advice to Client

6. Communications & Confidentiality

- Contacting potential witnesses
- Arranging interviews in manner that does not signal who is involved in investigation.
- Confidentiality, Cooperation & Victimisation Agreement
- Anticipate gossip
- Communication with those who **Need to Know**. What? By whom? When?
- CEO, Board, Chief Legal Officer, Chief HR Officer, C's manager?

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6. Communications & Confidentiality

- Communication with **Rebb**. What? By whom? When?
- Rebb's agreement re confidentiality
- Witnesses' agreement re confidentiality
- Confidentiality does not stop when matter finalised
- Internal statements?
 - at commencement of investigation. If so, what? By whom?
 - at conclusion of investigation/after outcome known. If so, what?

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Advice to Client

7. Timing

Estimate a realistic timeframe to outcome, noting time needed:

- For initial internal and (any) external communications,
- For investigation set up: finding and instructing investigator, contacting witnesses, setting up interviews, securing evidence
- Re witness availability

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Advice to Client

7. Timing

- If more complainants to come forward
- For trauma-informed interviews
- To write a safe investigation report
- For DM to make decision as to outcomes
- To communicate outcomes to relevant persons/organisations

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Advice to Client

8. Instructing Investigator

- Obtain confidentiality agreements from persons involved
- Decide if Investigator is required to prepare factual allegations
- Provide Investigator with relevant documents – organisation charts, policies/values, code of conduct, EAP details, confidentiality agreement
- Discuss trauma-informed matters such as:
 - Location of interviews
 - Support persons at interviews
 - Offering flexibility in interviewing

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Advice to Client

8. Instructing Investigator

- Make initial contact with persons involved then pass contact details to Investigator
- Be clear about work product sought
 - Findings of fact + any control issues
 - Standard to apply (balance of probabilities)
 - Contemporaneous notes/taping interviews
 - Expectation re report
- Discuss evidence gathering with Investigator - order of interviews, secured evidence, any issues that might present

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Advice to Client

9. Anticipating Outcomes

- Anticipate what information/action might be needed in the event that;
 - allegations are substantiated
 - allegations are not substantiated
- Ascertain whether **Casey** would like a record to be made of accepted evidence to avoid re-traumatisation in future
- Organise (any) internal/external statements. What? Who by?
- Seek feedback about how those involved experienced investigation for future learning/feedback to Investigator

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Choosing an Investigator

- Goal: thorough, impartial and fair investigation that presents the Decision-maker with reliable Findings and (if required) a coherent, complete, and sensitively written Report
- Capable & Professional
- An appropriate Attitude & Style

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Choosing an Investigator

Traits of a Capable and Professional Investigator

- Neutral
- Experienced
- Organised
- Analytical
- Thorough
- Efficient
- Persuasive

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Choosing an Investigator

Investigator's Attitude

- Role = impartial fact gatherer and interpreter of evidence:
 - proving an allegation is not a victory
 - no cause is being furthered
 - there are no points to be scored

- Responsibility = identify and collect all relevant information, assess it and make sound findings of fact

- All persons to be treated with respect, fairness & even handedness

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Choosing an Investigator

- Not there to make friends, nor to make it a distressing experience for interviewees

- Conduct of investigation should cause as little damage to ongoing working relationships as possible

- Investigation should not traumatise people involved, cause them to leave, or make them reluctant to speak up

- Reputations and dignity are important; promoting confidentiality is a duty

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Choosing an Investigator

Investigator's Style

- Projects integrity, competence, diligence and open-mindedness in demeanour
- Capable of relating to people at all levels of organisation
- Avoids perceived/actual conflicts of interest; no opinions, no judgemental questions
- Deals sensitively, no cross-examination
- Shows empathy and is comfortable with emotion and silence
- Is persistent; seeks proper answers and relevant details
- Calmly manages expectations of those involved in process
- Applies trauma-informed techniques

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Choosing an Investigator

Trauma-informed techniques:

- Build rapport
- Show genuine empathy
- Recognise that traumatic memories are often fragmented and wrapped up in feelings
- Treat emotion as part of the impact of the experience
- Show neutrality
- Make no assumptions
- Choose questions/language carefully
- Don't be afraid of pauses
- Be sensitive to difference
- Give the interviewee a sense of control over the interview

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Advice to Client

10. Acting on Findings

The organisation will need to act promptly on the findings of the investigation, particularly if they are **substantiated**.

- Any action re **Rebb**
- Victimisation reminders
- Any internal/external statements
- Control changes
- Learnings

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Questions?



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