



# HR After the Noughties

## Sexual harassment and bullying - The 'Fraser-Kirk' Factor

Jane Seymour  
Gadens Lawyers, Sydney

7658823

sydney

melbourne

brisbane

perth

adelaide

port moresby



# Overview

- Legal framework
- Effects of sexual harassment/bullying
- Sexual harassment
  - Liability for out of work conduct
  - The ‘Fraser-Kirk’ Factor
- Bullying
  - What it is – and isn’t
- Managing risk

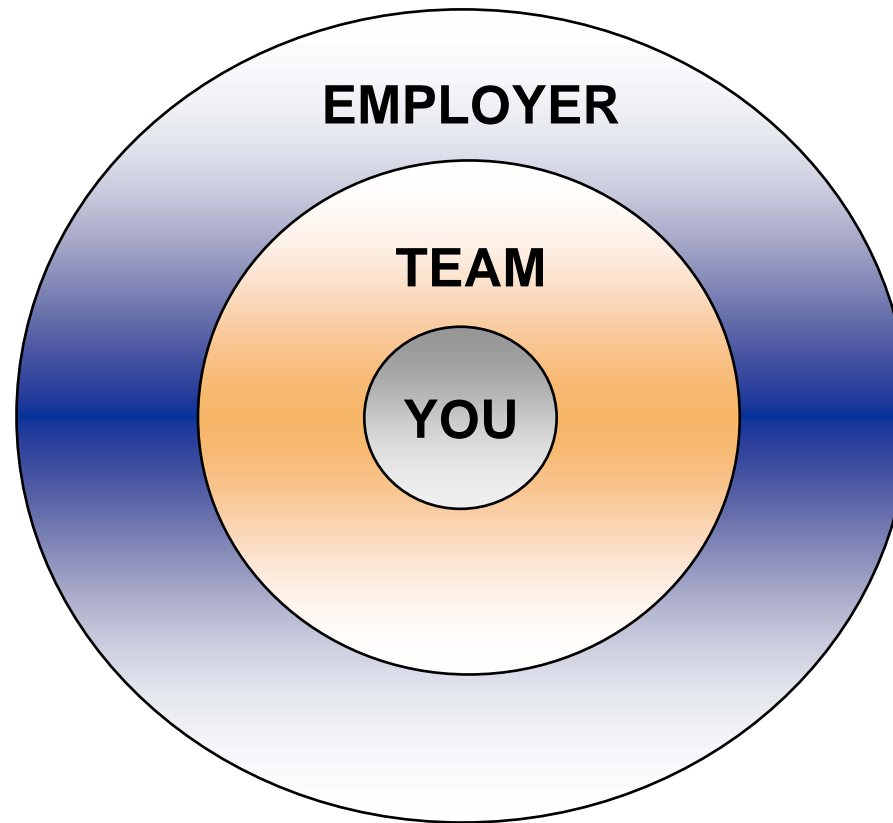
# Legal framework

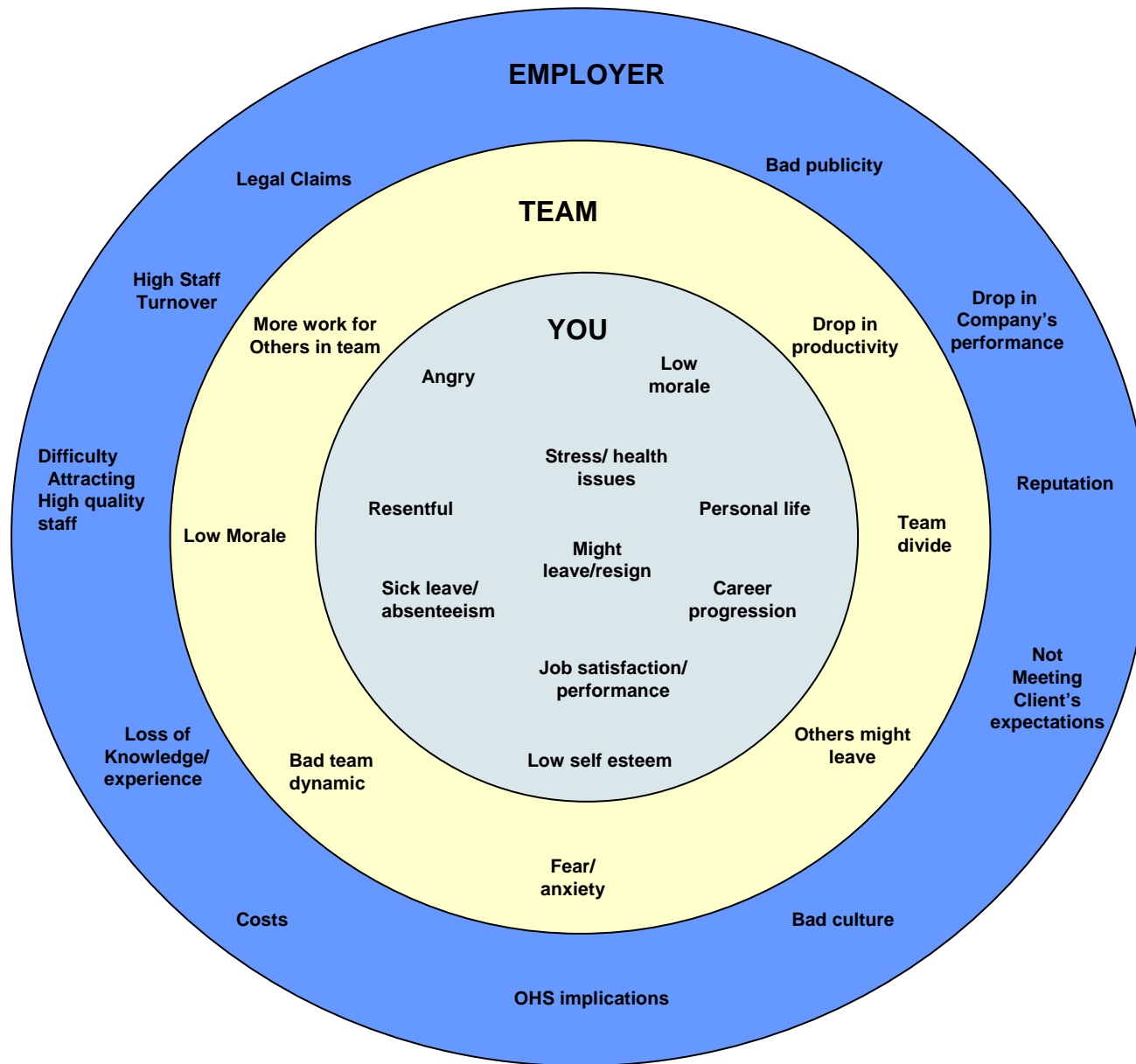
- Laws
  - Federal and State discrimination laws
  - Federal *Fair Work Act 2009* – adverse action, unfair dismissal
  - OHS laws
- Organisational values
  - Standards of behaviour
  - Breach of policy – disciplinary action, including dismissal



# Activity – effects

- If you were being sexually harassed or bullied, how would this affect...?





# What is sexual harassment?

- Sexual conduct
  - Sexual advance
  - Request for sexual favours
  - Other unwelcome conduct of a sexual nature
- ‘Reasonable person’
  - Would have anticipated the possibility the conduct would offend, humiliate or intimidate the person harassed

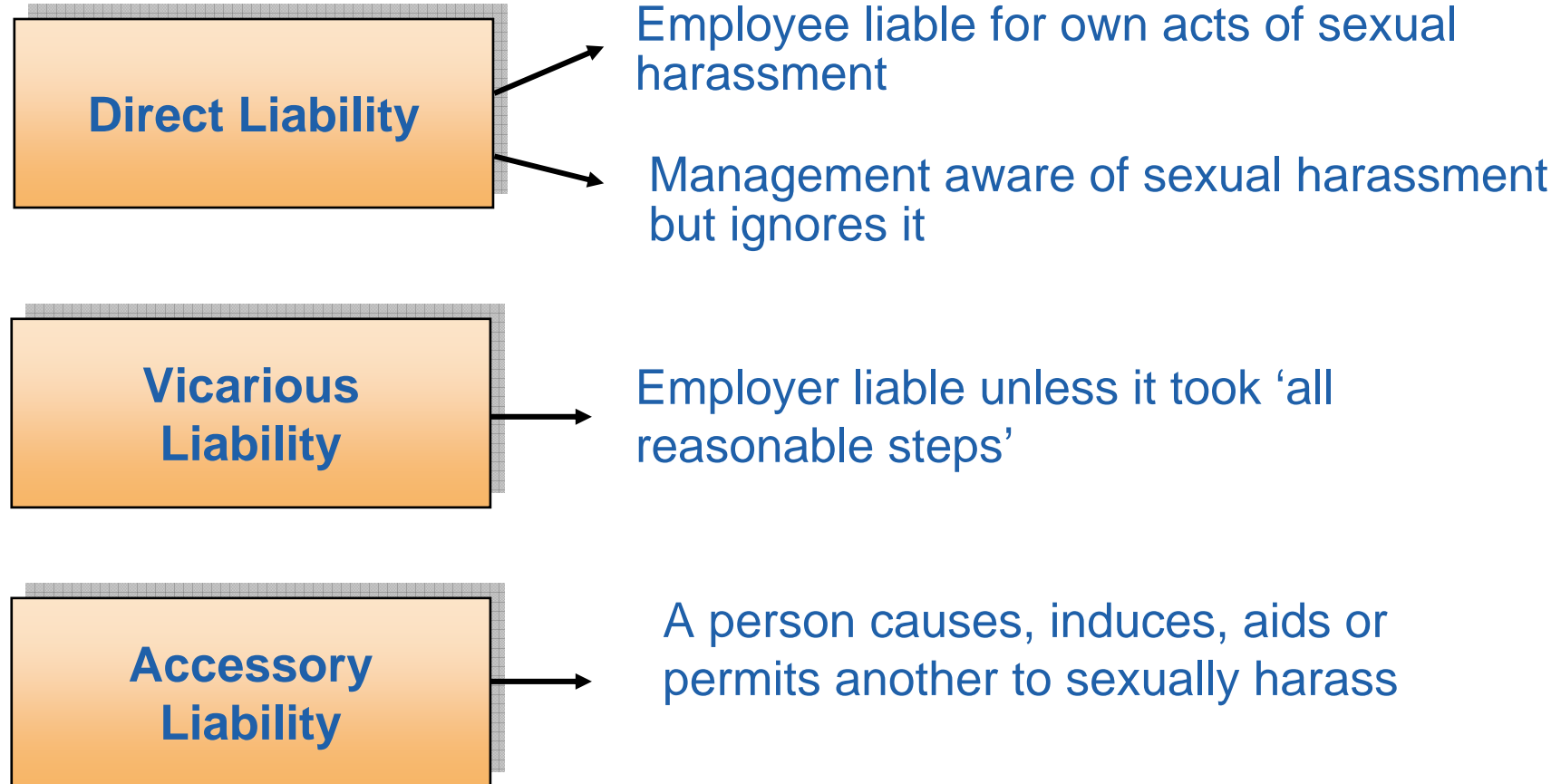


# When can sexual harassment occur?

- Employment/workplace
  - Recruitment
  - During employment
  - Termination of employment
- Work functions
  - Christmas parties
  - Work lunches/conferences
  - Regular drinks



# Who can be liable?



Both employers and employees can be liable!



# Types of sexual harassment

- Direct harassment
  - Comments/physical contact
  - Directed towards individual(s)
- Hostile work environment
  - Overhearing/viewing comments/conduct
  - General discussion about sexual matters

# Examples of sexual harassment

- Unwanted physical contact
- Sexual propositions
- Remarks or questions about a person's sex or private life
- Persistent requests to go out where they are refused
- Suggestive comments
- Sexually explicit conversations



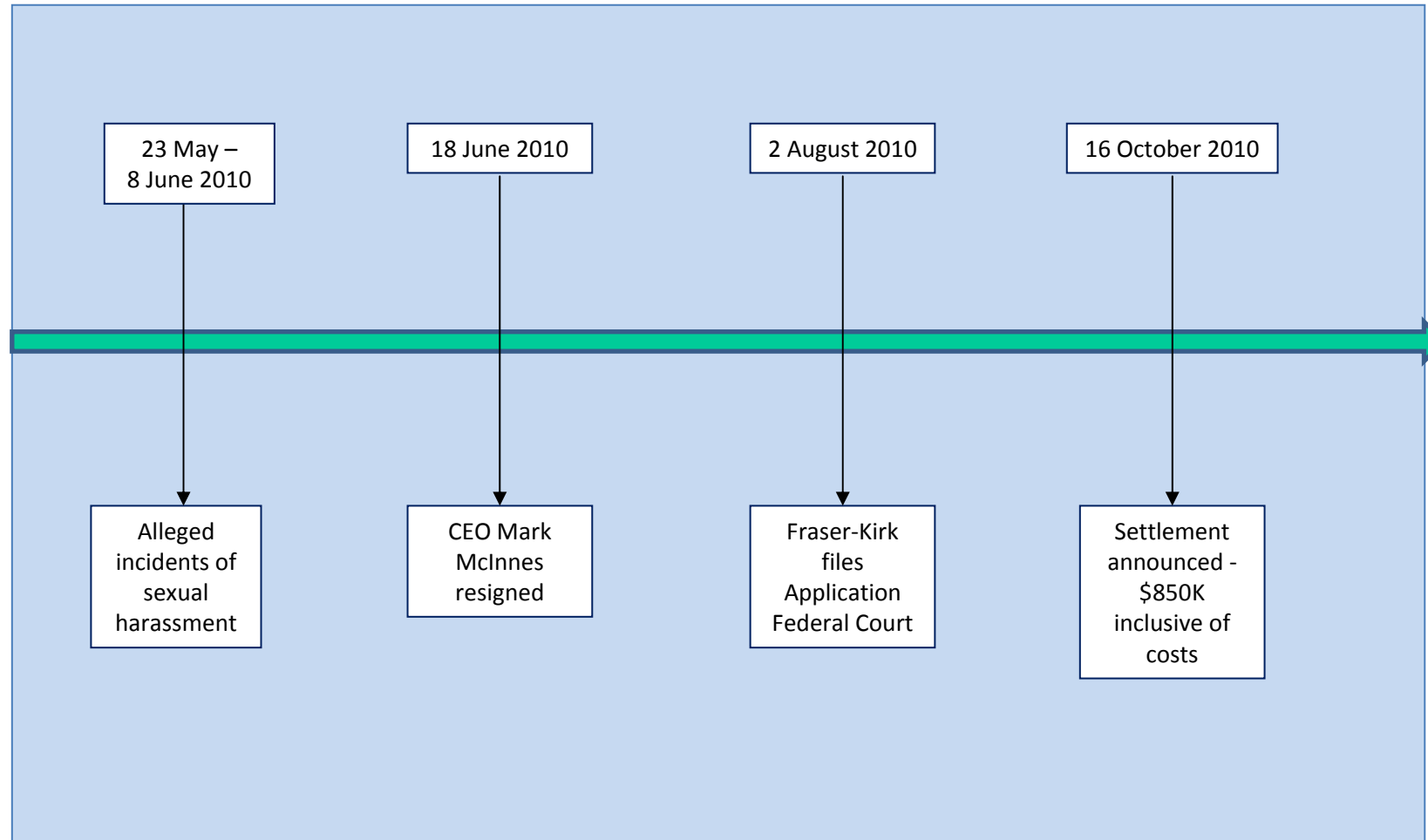
# Key points - sexual harassment

- Applies to both men and women
  - Can be a 'one off' - or ongoing
  - Impact of power relationships
  - No requirement to intend to harass
  - Complainant need not confront harasser
  - 'Crossing the line'

# Kristy Fraser-Kirk

- ***Kristy Fraser-Kirk v David Jones Limited & Ors***
- *Allegations (disputed by the defendants):*
  - 23 May 2010 – Gai Waterhouse lunch - comments by McInnes about dessert, invitation to Bondi, touching bra strap under clothes, hug – raised with her manager
  - 24 May 2010 – emails repeating invitation to Bondi
  - 7 June 2010 – La Prairie dinner – further invitation to Bondi, touching bra, attempted kiss, Fraser Kirk uses taxi door as physical barrier
  - 8 June 2010 – phone invitation to dinner/drink – ‘could have had guaranteed sex with brunette’; text message ‘change your mind’
- *Defence:*
  - Gai Waterhouse lunch: Fraser-Kirk engaged with McInnes in a ‘flirtatious manner’, she smiled during hug, McInnes hugged others, conduct not an unwelcome sexual advance
  - When she spoke to her manager she was not upset
  - La Prairie dinner: invited her for a drink at North Bondi Italian; Fraser-Kirk made comments of a sexual nature to him in response to which he attempted to kiss her
  - Denies ‘full terms’ of conversation on 8 June; admits text message but says not a sexual advance
- *Settlement - \$850K including legal costs*

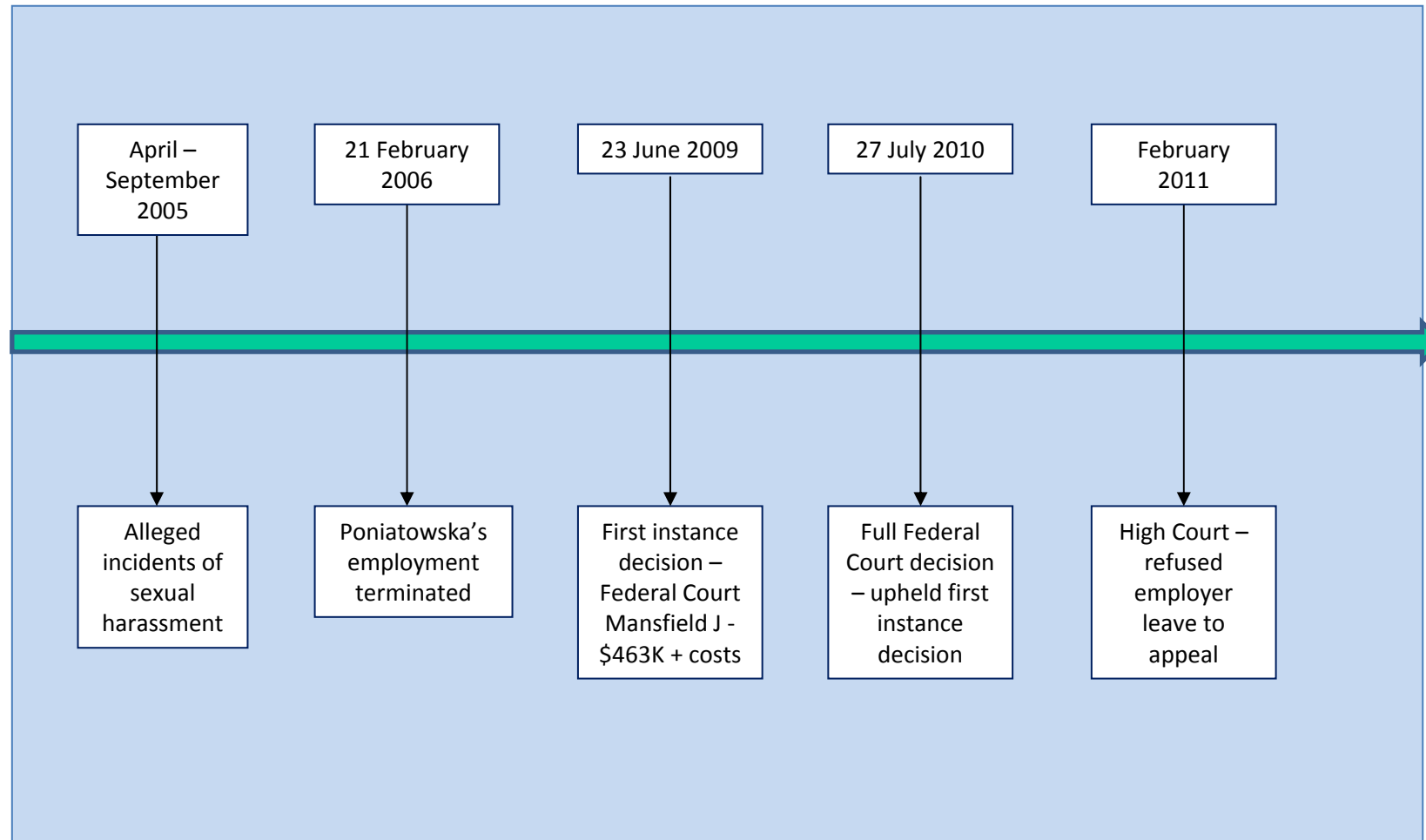
# Fraser-Kirk



# Malgorzata Poniatowska

- ***Poniatowska v Hickinbotham Homes & Ors [2009] FCA 680***
- *Facts:*
  - May 2005 – emails from colleague Flynn
  - June 2005 – lewd MMS and phone calls - invitations for sex
  - Poniatowska complained – no action taken
  - No policies or procedures in place
  - Poniatowska given performance warnings and terminated
- *Decision:*
  - Sexual harassment, sex discrimination in termination of employment which was due to her complaints, not poor performance
  - Poniatowska suffered PTSD
  - \$463K compensation + legal costs

# Poniatowska



# Fraser-Kirk v Poniatowska

Comparison of claims	Fraser-Kirk	Poniatowska
Time to resolve – from time of alleged incidents	5 months	6 years
Compensation	\$850,000 including costs	\$463,000 plus costs
Press coverage	August - October 2010 340 articles	From 2008 70 articles



# Legal bases for claims

## Kristy Fraser-Kirk

*Trade Practices Act 1974 (Cth)/  
Fair Trading Act 1987 (NSW)* –  
Employment conditions representations;  
Public portrayal of Fraser-Kirk (Isolated  
Event Representations)

Breach of contract – Code of Conduct;  
Trust and Confidence Term, Good Faith  
Term, Cooperation Term, Safe Work Term

Breach in tort – duty of care to provide  
safe system of work

Breach in tort – trespass

*Sex Discrimination Act 1984 (Cth)*

Adverse action – s 351 *Fair Work Act*

## Malgorzata Poniatowska

*Sex Discrimination Act 1984 (Cth)* –  
Sex discrimination (s. 5)  
Sexual harassment (s. 28A)

Breach of contract – implied term – employer  
not to conduct itself in a manner calculated  
or likely to destroy relationship of confidence  
and trust

# Compensation

## Kristy Fraser-Kirk sought damages for:

### Loss and damage

- offence, humiliation, distress and anxiety
- loss of opportunity for promotion and advancement
- damage to personal and professional reputation
- medical, legal and public relations expenses

### Punitive damages

- 5% of David Jones' profit from 2003-2010
- 5% of Mark McInnes' remuneration and benefits

### Interest

### Costs

## Malgorzata Poniatowska received damages for:

Past and future pain and suffering - \$90,000

Past loss of earning capacity - \$200,000

Future loss of earning capacity - \$140,000

Future medical expenses - \$3,000

Interest - \$30,000

Costs – 90%

# The 'Fraser-Kirk' Factor

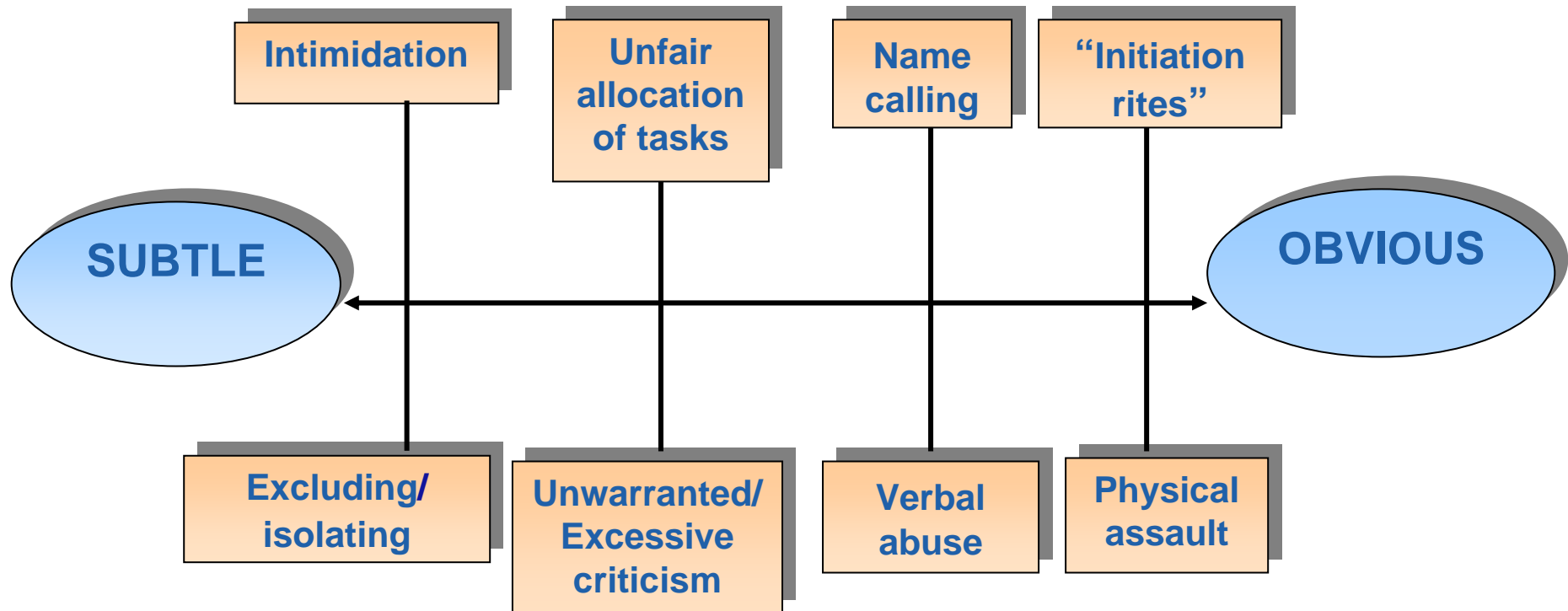
- **Employees**
  - Increased awareness of sexual harassment
  - Novel claims by applicants
- **Employers**
  - Implement systems to proactively identify risks
  - Workplace behaviour training - senior management
  - Investigation of complaints
- **Everyone**
  - Consider use of PR/media in litigation
  - Take care with technology – email, txts, MMS

# What is bullying?

- Repeated behaviour
- 'Reasonable person' would expect to victimise, humiliate, undermine or threaten
- Creates a risk to health and safety
- Often combined with sexual harassment/discrimination claims



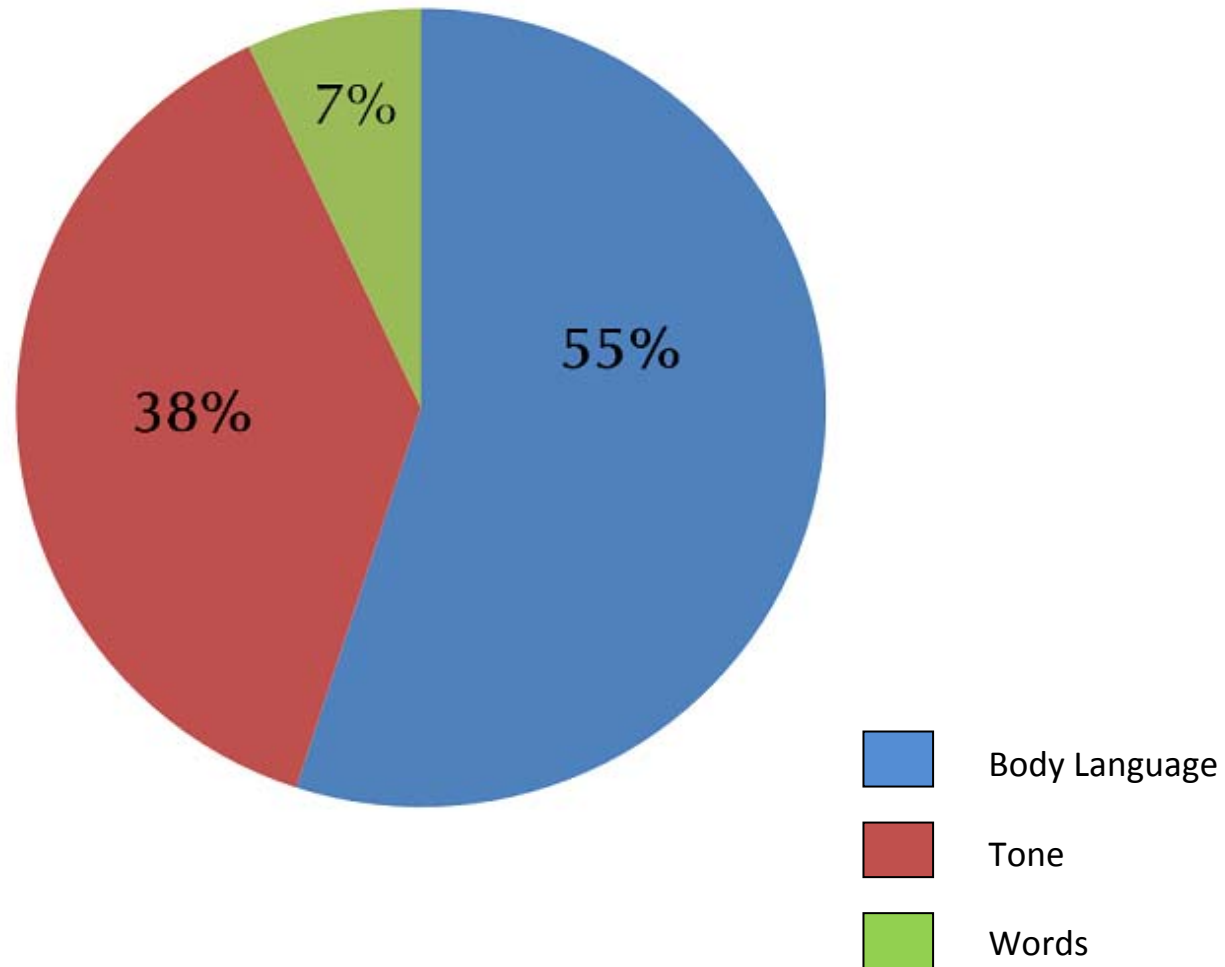
# Spectrum of bullying



# Workplace bullying

- Workplace bullying is not:
  - Reasonable performance management
  - Legitimate managerial actions/decisions
  - Disciplinary action
  - Poor management
  - Single incident or 'one-off'

# Interpersonal communication



# Complaint procedures

## Informal

- Less serious allegations
- Agreed facts
- Employee seeks quick resolution
- On-going relationship

## Formal

- Serious allegations
- Disputed facts
- Informal procedure failed
- Victimisation



# Wrap up

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