

THE EQUALITY INSTITUTE  
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*RESPECT@WORK* REFORMS

# What you need to know



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In March 2020, the Australian Human Rights Commission released the *Respect@Work: Sexual Harassment National Inquiry Report*.

The Inquiry found that sexual harassment remains pervasive in Australian workplaces. Indeed, the Australian Human Rights Commission's fifth national survey on workplace sexual harassment found that in the last five years, 41% of women and 26% of men have been sexually harassed at work. Yet, reporting of incidents remains unacceptably low. Fewer than one in five people (18%) who experienced workplace sexual harassment in the last five years made a formal report or complaint about the harassment. Of those who did make a report or complaint, one quarter said it resulted in no consequences for the harasser.<sup>1</sup>

The Respect@Work report concluded that the legal and regulatory system was simply no longer fit for purpose and recommended a new model that improves the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes. It also proposed a shift from the current reactive model, that requires complaints from individuals, to a proactive model, which will require positive actions from employers.

The report made 55 recommendations directed to all levels of government and the private sector for policy and legislative reforms to prevent and address workplace sexual harassment.

There are five key areas of focus which underpin the recommendations:

- Data and research
- Primary prevention
- The legal and regulatory framework
- Workplace prevention and response
- Support, advice and advocacy

Over the last two years there have been two key rafts of legal reforms to implement the recommendations of the Respect@Work report.

This overview provides a short summary of the changes and what they mean.

## 2021 CHANGES

# Sex Discrimination and Fair Work (*Respect at Work*) Amendment Act 2021 (Respect@Work Act)

In September 2021, the Sex Discrimination and Fair Work (*Respect at Work*) Amendment Act 2021 (Cth) (Respect@Work Act) was passed with the aim of strengthening and streamlining existing legislative frameworks to protect workers from sexual harassment and other forms of sex discrimination.

The Respect@Work Act expanded and extended the scope of the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act) to include, among other things:

- **sex-based harassment** as an explicit form of unlawful conduct, expanding to include harassment that is based on an individual's sex, but is not necessarily sexual in nature;
- **all members of State and Federal Parliament, State and Territory public servants, and judges** along with their staff and consultants.
- the terms **"worker"** and **"person conducting a business or undertaking"** used in model Work Health and Safety law, effectively covering interns, apprentices, volunteers and self-employed persons; and

### What is sex-based harassment?

Sex-based harassment is any unwelcome conduct of a seriously demeaning nature that involves the sex of the person or characteristics associated with the sex of that person, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Unlike sexual harassment, the behaviour does not need to be sexual in nature, though manifestations of sex-based harassment can overlap with sexual harassment.

Examples of sex-based harassment can include commenting about or verbally abusing a person or group because of their gender, referring to a transgender person by their previous name or gender, or displaying or circulating images or material that are sexist, misogynistic or misandrist.

Under the *Fair Work Act 2009* (Cth) (FWA) employees are protected against unlawful discrimination, including sexual harassment.

Under the *Respect@Work Act*, key changes to the FWA which may impact employees and employers included:

- a new mechanism for the Fair Work Commission (FWC) to deal with sexual harassment complaints within the existing anti-bullying jurisdiction, including by issuing '**Stop Orders**', to prevent further sexual harassment where there is an ongoing risk of sexual harassment. This may directly affect workplace operations and require enforcement by the employer; and
- sexual harassment can be a **valid reason for dismissal** when determining whether a dismissal was harsh, unjust or unreasonable, making it clear that employers can take disciplinary action in response to workplace sexual harassment.

## 2022 CHANGES

# *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)*

On 28 November 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) to give effect to the remaining legal recommendations of the *Respect@Work* report was passed.

The key reform introduced by the Act is the highly anticipated positive duty for employers to eliminate discriminatory conduct under the Sex Discrimination Act. The positive duty was the cornerstone recommendation in the *Respect@Work* Report and will shift the burden away from individuals taking remedial action, to an approach putting the onus on employers to prioritise early intervention and prevention. Sex Discrimination Commissioner, Kate Jenkins considers that 'the positive duty and the employers being focused on this will be the single most revolutionary change that will impact sexual harassment'.<sup>2</sup>

The Commission has also been provided with a broad function to inquire into systemic unlawful discrimination. Such inquiries may initially focus on organisations, industries or sectors of concern.

The Act also introduces a mechanism to enable class actions to be brought in the federal courts on behalf of a group of people who have experienced unlawful discrimination. This would allow representative groups such as unions to commence proceedings on behalf of one or more impacted people in the AHRC and continue to lead the proceedings from the AHRC to the federal courts. This reform aims to address the barriers that may prevent individual claimants from taking legal action.

## The new positive duty

The new positive duty provides that an employer or person conducting a business or undertaking (PCBU) (the duty holder) must take **reasonable and proportionate measures** to eliminate as far as possible sex discrimination, sexual harassment, sex-based harassment, hostile workplace environments and victimisation. The language of this positive duty is based on the positive duty in the Victorian *Equal Opportunity Act 2010* (subsection 15(2)).

It is important to note that the positive duty extends to protecting employees and workers from unlawful discrimination under the Sex Discrimination Act perpetrated by third parties, such as the public and clients.

The positive duty applies to all duty holders regardless of size or resources. There are no exemptions from the duty.

When assessing compliance with the positive duty, the matters to be taken in account by a decision-maker are:

- a) the size, nature and circumstances of the duty holder's business or undertaking;
- b) the duty holder's resources, whether financial or otherwise;
- c) the practicability and the cost of steps to eliminate conduct covered by subsection (2) or (4); and
- d) any other relevant matter.

This framework allows micro or smaller businesses, volunteer organisations, for example, to be held to a standard proportionate to their means.

This positive duty is intended to enhance the vicarious liability provision in the Sex Discrimination Act. Under vicarious liability, an employer is liable for the unlawful conduct of their employees or agents unless they have taken 'all reasonable steps' to prevent their employees from engaging in the conduct. The key difference is that the vicarious liability provisions only kick in once a complaint has been lodged. The positive duty applies regardless of whether there is a complaint or report.

## Enforcement of the positive duty

Consistent with the recommendations of the Respect@Work Report, the *Australian Human Rights Commission Act 1986* (Cth) has been amended to enable the Australian Human Rights Commission to monitor and assess compliance with the positive duty. These functions will only commence 12 months from the date of Royal Assent (12 December 2022) in order to provide organisations sufficient time to implement measures to comply with the positive duty.

The suite of enforcement mechanisms conferred to the Australian Human Rights Commission include the power to:

- conduct inquiries into a person's compliance with the positive duty and provide recommendations to achieve compliance;
- give a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance;
- apply to the federal courts for an order to direct compliance with the compliance notice; and
- enter into enforceable undertakings in accordance with the *Regulatory Powers Act 2014* (Cth).

# Meeting positive duty obligations

The positive duty requires a significant shift in mindset and approach. A policy and once-off training will not be sufficient to prevent sexual harassment and advance gender equality.

A more comprehensive and pro-active approach to creating a safe, equal and respectful culture includes actions to:

- establish sexual harassment as a core leadership issue, with leaders clearly setting expectations and modelling safe and respectful behaviour;
- proactively understand the nature and extent of sexual harassment in the workplace beyond complaints through employee surveys and data gathering that can identify hot spots and high-risk areas or activities of the business;
- build skills and knowledge through evidence-based programs to increase understanding of sexual harassment and its impacts, and empower individuals to intervene early;
- establish trauma-informed and people-centred reporting and response processes that create a safe reporting environment to create better outcomes for individuals and organisations;
- build manager and organisational capability to receive disclosures using a trauma informed approach and support people through resolution and restoration;
- focus on transparency around outcomes and actions taken to help the organisation learn and build confidence in reporting and systems; and
- advance gender equality, diversity and inclusion including achieve diverse representation in leadership, close pay gaps and address everyday sexism.

The Australian Human Rights Commission has a statutory function of preparing and publishing guidelines for complying with the positive duty and it is expected this material will be produced shortly. There is, however, nothing stopping employers from getting ahead of the curve now with the actions articulated above.

## About The Equality Institute (EQI)

The Equality Institute (EQI) is a global feminist agency working to advance gender equality and end violence against women and girls. It was founded in 2015 by Dr. Emma Fulu – born from the belief that violence prevention would benefit from more organisations and programmes working with an evidence-based and intersectional feminist approach. Since inception, EQI has conducted over 50 studies around the world and supported dozens of organisations in advancing equality and addressing gendered violence.

## How we can help

We acknowledge there are multiple ways organisations will take **reasonable and proportionate measures** to eliminate as far as possible sex discrimination, sexual harassment, sex-based harassment, hostile workplace environments and victimisation.

One such way is through holistic, evidence-based and engaging, education and training that specifically tackles the drivers of sexual harassment – namely gender inequality and other forms of discrimination. That's why we've produced a suite of e-learning courses, designed to support organisations to train their employees, at speed and scale.

## Our courses

### Gender Equality Foundations

An evidence-based and transformative experience that meets learners where they're at, and helps them reflect and think critically about how gender issues affect them, their relationships, family, workplace and the world around us. Learners reflect on how gender inequality underpins sexual harassment and other forms of violence against women. Featuring insights and teachings from global and local authorities, like Rosie Batty AO, Carly Findlay OAM and Tasneem Chopra OAM, among many more, Gender Equality Foundations shows us that gender equality benefits everyone and we all have a role to play in advancing it.

→ Watch the official trailer

### Diversity, Equity and Inclusion Foundations

This course helps learners understand the difference between diversity, inclusion, equity, equality and intersectionality. It builds an understanding of how these shape individuals and workplace cultures and practices, and what the learner can do to create an inclusive and diverse workplace. Featuring insights and teachings from global and local authorities, like Lisa Annese, Div Pillay and Carly Findlay OAM, among others, this course builds empathy, asks learners to reflect on their own power and privilege, and take action where they can.

### Inclusive language

A fun and engaging foundational course that helps learners understand the impact of language, adopt a growth mindset, and build confidence in using inclusive language every day. Featuring animations, gamification, scenario-based learning, downloadable tools and more, learners will foster courage to have difficult conversations and ask the right questions when they're faced with new situations.

FOR MORE INFORMATION, PLEASE VISIT

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