

# Amendments to Sex Discrimination Act 1984: New Positive Duty

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On 29 November 2022, the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 passed Parliament, introducing a positive duty on employers to prevent workplace harassment.

The new legislation, in placing a positive duty on employers, shifts the burden from individuals making complaints to employers taking proactive steps to prevent the behaviour before it occurs.

Employers are now on notice to assess and evaluate their compliance on an ongoing basis.

## The new positive duty

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The positive duty will place an onus on employers to take 'reasonable and proportionate' measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. The duty will extend to conduct by third parties such as customers or clients.

The determination of 'reasonable and proportionate' measures will depend on a range of factors, including:

- the size, nature and circumstances of the employer's business;
- the employer's resources, whether financial or otherwise; and the practicability and costs associated with the relevant measures.

## New enforcement powers for AHRC

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The proposed amendments also introduce new powers for the Australian Human Rights Commission to assess and enforce compliance. Powers of the AHRC will include:

- preparing guidelines regarding how businesses can comply with their positive duty to prevent sexual misconduct;
- inquiring into whether an employer is complying with this positive duty if it reasonably suspects that they are not;
- giving compliance notices specifying the action that an employer must take, or refrain from taking, to address their non-compliance with this positive duty;
- applying to the federal courts for orders enforcing a compliance notice; and
- inquiring into any matter that may relate to actual or suspected systematic unlawful discrimination.

## Next steps for employers

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A 12 month transitional period applies from November 28 2022 before the AHRC's new powers to monitor and assess compliance with the positive duty come into force, ensuring employers have time to prepare.

Employers should begin this process by implementing robust measures to prevent and respond to sexual harassment in the workplace. These measures must go beyond box-ticking exercises and online compliance training. Measures employers should consider include:

- undertaking a risk assessment of sexual misconduct in their workplace, including 'reasonable and appropriate' measures available to mitigate against these risks;
- providing up-to-date and regular education and training to employees on the topic of sexual misconduct;
- implementing and/or revising their workplace harassment, discrimination and bullying policies; and
- implementing and/or revising reporting and support avenues available to employees.

## Amendments to Fair Work Legislation



In addition to the introduction of the Positive Duty, amendments to the Fair Work Act 2009 commenced on 6 March 2023, expressly prohibiting sexual harassment in connection with work.

The new provisions will enable harassed workers, unions and the Fair Work Ombudsman to obtain compensation, financial penalties and other orders against perpetrators of sexual harassment and businesses who do not take reasonable steps to guard against the risk of sexual harassment.

The new provisions in the FW Act will apply to sexual harassment that occurs on or after the commencement of the new provisions (6 March 2023).

The new provisions are intended to complement the existing prohibition on sexual harassment in the Sex Discrimination Act 1984 or similar state or territory legislation.

They do this by providing another option for persons who allege that they have been sexually harassed in connection with work to take action to address that harassment. Workers will have the choice to take action under the new provisions in the FW Act, or under existing provisions in the SD Act or state and territory legislation. It also gives unions the right to pursue such a claim on behalf of this person or the FWO to take action if there has been a breach.

Many individuals who have been sexually harassed are often discouraged from taking action to address the conduct because of this burden. These provisions are designed to alleviate the burden on individuals having to address sexual harassment in the workplace by enabling other parties to represent the person making the allegations or to otherwise take action.

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For further assistance, please do not hesitate to contact Elephant Ed's Workplace team at [info@elephanted.com.au](mailto:info@elephanted.com.au) or on [1300 006 440](tel:1300006440). For more information regarding our workshops, please visit [www.elephant.com.au/workplace](http://www.elephant.com.au/workplace).