



Fact sheet

Respect@Work – Changes to the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986*

(December 2022)

Background

On 12 December 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (**the Act**) came into effect. The Act makes important amendments to the *Sex Discrimination Act 1984* (Cth) (**the SDA**) and the *Australian Human Rights Commission Act 1986* (Cth) (**the AHRCA**). These changes were recommended by the Australian Human Rights Commission (**the Commission**) following its inquiry *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. They build on recent amendments to the SDA and the AHRCA made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) in 2021. Both sets of changes have been made to provide better protection for workers from sexual harassment and other forms of sex discrimination, harassment, and unfair treatment in the workplace.

This factsheet summarises the key changes made by the Act. The Commission is currently developing more detailed guidance about the new positive duty in the SDA and how duty-holders can satisfy their obligations under this law.

Key changes

The Act makes eight key changes, these are:

- making clear that it is unlawful to subject another person to a workplace environment that is hostile on the ground of sex.
- introducing a new positive duty into the SDA. This is a duty on employers and persons conducting a business or undertaking (PCBUs) to take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct, including sex discrimination, sexual

harassment, sex-based harassment and certain acts of victimisation in the workplace context.

- conferring new functions and powers on the Commission to monitor and assess compliance with the positive duty in the SDA. These functions will not commence until December 2023.
- conferring a new inquiry power on the Commission to allow it to inquire into, and report on, issues of systemic unlawful discrimination or suspected systemic unlawful discrimination across all four federal discrimination acts.
- permitting a representative body (such as a trade union, advocacy group or human rights organisation) to initiate proceedings in the federal courts if it has lodged a complaint with the Commission on behalf of one or more 'persons aggrieved' and the representative complaint is not able to be conciliated at the Commission and is terminated.
- changing the *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Age Discrimination Act 2004 (Cth)* and the AHRCA to clarify that victimising conduct can form the basis of a civil action for unlawful discrimination. Similar changes to the SDA were made in 2021.
- lowering the test for a finding of sex-based harassment under the SDA.
- standardising the discretionary termination ground in the AHRCA to provide that any complaint of unlawful discrimination may be terminated if lodged more than 24 months after the alleged conduct occurred. This timeframe is now consistent across all four federal discrimination acts. It replaces the previous 6-month timeframe, which was extended to 24 months in 2021 for complaints made under the SDA.

Hostile workplace environment

The Act inserts a new section into the SDA that clarifies that it is unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.

A person (the first person) will subject another person (the second person) to a workplace environment that is hostile on the ground of sex if the first person engages in conduct in a workplace where the first person or the second person (or both) work, the second person is in the workplace at the same time or after the conduct occurs, and the conduct is found to contravene a 'reasonable person' test. This test considers whether, having regard to all the circumstances,

a reasonable person would have anticipated the possibility of the conduct resulting in a workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person, by reason of the sex of the person or a characteristic associated with the sex of the person.

If a person considers that they have been subjected to a hostile workplace environment on the ground of sex, they can lodge a complaint with the Commission. If the matter cannot be successfully conciliated by the Commission, the person may make an application to the federal courts for determination.

New positive duty in the SDA

The Act introduces a new positive duty into the SDA on employers and persons conducting a business or undertaking (PCBUs) to take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct that is already made unlawful under the SDA, including:

- sex discrimination in a workplace context;
- sexual harassment in a workplace context;
- sex-based harassment in a workplace context;
- conduct that amounts to subjecting a person to a hostile work environment on the ground of sex;
- certain acts of victimisation.

The new positive duty attaches to employers and PCBUs (the duty holder) and is a duty to eliminate, as far as possible, unlawful conduct in the workplace context by:

- the duty holder themselves — that is, by the employer or the PCBU;
- if the duty holder is an employer — by the duty holder's employees;
- if the duty holder is a PCBU — by the workers in the business or undertaking;
- by the duty holder's agents.

In some circumstances, the positive duty in the SDA extends to taking reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct by third parties (such as customers, clients, patients, suppliers, students, visitors) *towards* employees and workers. This includes sexual harassment, sex-based harassment, hostile workplace environments on the ground of sex and certain acts of victimisation.

The positive duty will operate concurrently with existing duties in work health and safety (WHS) laws, which require employers and PCBUs to provide a safe working environment.

Disclaimer: The information on this fact sheet is only intended as a guide. It is not a substitute for legal advice.

New compliance functions and powers for the Commission

The Act gives new functions and powers to the Commission to monitor and assess compliance with the positive duty in the SDA, including to:

- conduct inquiries into compliance by an employer or PCBU with the positive duty and provide recommendations to achieve compliance;
- issue a compliance notice specifying the action that an employer or PCBU must take, or refrain from taking, to address any non-compliance;
- apply to the federal courts for an order to direct compliance with the compliance notice; and
- enter into enforceable undertakings with an employer or PCBU.

The Commission may inquire into a person's compliance with the positive duty if it 'reasonably suspects' that a relevant person is not complying.

However, these compliance functions do not commence until **December 2023**. This is to provide the Commission with adequate time to prepare educative materials for the community and to ensure that employers and PCBUs have sufficient time to understand their new obligations and implement processes to comply with the positive duty.

Inquiry into systemic unlawful discrimination

The Act gives the Commission the new function of inquiring into, and reporting on, issues of systemic unlawful discrimination or suspected systemic unlawful discrimination across all four federal discrimination acts.

Systemic unlawful discrimination is defined as unlawful discrimination that affects a class or group of persons and is continuous, repetitive or forms a pattern.

The Commission may inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination when 'it appears to the Commission to be desirable to do so' or when the Commission is requested to do so by the Minister.

Once the Commission has inquired into a matter under this new inquiry power, it may report to the Minister in relation to the inquiry and, if appropriate, make recommendations for addressing the matter. It may also publish a report in relation to the inquiry.

Representative applications to court

The Act amends the AHRCA to allow a representative body (such as a trade union, advocacy group or human rights organisation) to make a representative application in the federal courts if it has lodged a complaint with the Commission on behalf of one or more 'persons aggrieved', the representative complaint is not able to be conciliated at the Commission and is terminated, and certain procedural requirements are satisfied. This includes that each person upon whose behalf a representative application to court is made must consent in writing to their inclusion.

Victimisation as a civil action

Building upon changes made to the SDA in 2021, the Act makes equivalent changes to the *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Age Discrimination Act 2004* (Cth) and the AHRCA to clarify that victimising conduct can form the basis of a civil action for unlawful discrimination.

Lowering the test for a finding of sex-based harassment

The Act lowers the test in the sex-based harassment provision in the SDA by removing the word 'seriously'. Previously, a person needed to engage in 'unwelcome conduct of a *seriously* demeaning nature in relation to the person harassed' for there to be a finding of sex-based harassment. Now it is 'unwelcome conduct of a demeaning nature in relation to the person harassed'.

Standardising time limitations

There is no specific time frame in which a complaint must be lodged with the Commission. The Act amends the AHRCA so that the President can now terminate a complaint alleging unlawful discrimination under the SDA, *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Age Discrimination Act 2004* (Cth) if the complaint was lodged more than 24 months after the alleged acts, omissions or practices took place. This change applies to termination decisions made after 13 December 2022 (the date of the amendment's commencement). Prior to this amendment, the President had the power to terminate a complaint lodged under these laws if it had been more than 6 months after the alleged events — except under the SDA, where the timeframe was changed to 24 months in 2021.