

A Resource for Small Business on the Positive Duty under the *Sex Discrimination Act 1984 (Cth)*

August 2023



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Acknowledgements

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The Commission thanks Alexi Boyd for her feedback and input into this Resource.

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Design and Layout: Satsuma Creative

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The positive duty

Under the *Sex Discrimination Act 1984* (Cth), businesses now have a positive duty to eliminate, as far as possible, the following behaviour from occurring in a work context or in connection with work:

- sex discrimination
- sexual harassment
- sex-based harassment
- behaviours that create a hostile workplace environment on the ground of sex
- related acts of victimisation.

We call these 'unlawful behaviours' in this resource.

The law has changed and you are likely to have new obligations. Workplaces have a duty to ensure people feel safe and are treated respectfully and fairly at work.

Workplace sex discrimination, sexual harassment and other unlawful behaviours cause physical and psychological harm. They are also bad for business. They lead to:



Decreased productivity



Increased absenteeism



Increased staff turnover



Risk of reputational damage



Increases to workers' compensation premiums



Significant legal costs

The role of the Commission

From December 2023, the Australian Human Rights Commission will have new powers to investigate and enforce the positive duty.

Businesses must take proactive steps to eliminate unlawful behaviours to meet their obligations under the Sex Discrimination Act. Simply responding to reports of unlawful behaviours is not enough. Taking preventative action will help to create safe, respectful and inclusive workplaces.

The Commission has the power to conduct inquiries into businesses that it reasonably suspects are not complying with the positive duty. If the Commission finds any non-compliance, we may first offer to work with businesses to support them to meet their obligations (where appropriate). The Commission can also enter into agreements with businesses, or issue compliance notices, which can be enforced by a court.

Unlawful behaviours covered by the positive duty

There are a number of unlawful behaviours covered by the positive duty.

We have summarised these below. For the full legal definitions, please see the *Information Guide on the Positive Duty (2023)*.



Sex discrimination

Treating someone less favourably because of their sex,* compared to how a person of a different sex would be treated, in similar circumstances (direct discrimination)

OR

Where an unreasonable condition, requirement or practice appears to treat everyone the same, but in fact disadvantages people of a particular sex (indirect discrimination).

For example:

- offering women and men different pay or benefits for the same job
- dividing up work tasks based on a person's gender or because it is considered 'too physical' for some
- requiring women to wear revealing uniforms at work when men are not expected to do the same
- requiring all employees to work 9am–5pm, which may appear to treat everyone equally, but could disadvantage women, who are more likely to have caring responsibilities. This will only be unlawful if it is not reasonable.



Sexual harassment

Unwelcome behaviour of a sexual nature, in circumstances where a reasonable person would anticipate that the person who is harassed might feel offended, humiliated or intimidated by the behaviour.

For example:

- unwelcome physical touching, staring or leering
- repeated or inappropriate requests to go on dates
- emailing, displaying, or texting pornography, explicit material or sexual jokes
- intrusive questions about a person's private life or body.

* or a characteristic generally associated with people of their sex.



Sex-based harassment

Unwelcome behaviour of a demeaning nature that happens because of a person's sex* in circumstances where a reasonable person would anticipate that the person who is harassed might feel offended, humiliated or intimidated by the behaviour.

'Demeaning' means disrespectful or degrading. For example:

- asking intrusive personal questions based on a person's sex (for example, questions about genitalia, menstruation or menopause)
- making inappropriate comments and jokes based on a person's sex
- displaying images or materials that are sexist
- verbally abusing or insulting someone because of their sex.



Hostile workplace environment on the ground of sex

A workplace environment is hostile if a person behaves in a way that a reasonable person would expect might be offensive, intimidating or humiliating to someone because of their sex.*

Behaviour that can contribute to hostile work environments includes:

- displaying pornographic or sexually explicit posters, photos or images
- sexist, derogatory, suggestive or sexual jokes, banter or nicknames
- sexual gestures, indecent exposure or leering
- sexist, derogatory, suggestive or sexual explicit emails, phone calls or messages.

Behaviours can create a hostile work environment even if they are not directed at any one person.



Victimisation

Treating or threatening to treat someone badly or unfairly because they report unlawful behaviours; assert their rights under the law; or help someone else to do so.

It also includes instances where a person is treated badly because they are intending to assert their rights, or are believed to have asserted their rights, even if they haven't. For example:

- demoting, reducing hours or shifts, excluding or threatening a person because they reported unlawful behaviour
- refusing to purchase from an independent contractor because they reported unlawful behaviour
- intimidating a worker to stop them from reporting unlawful behaviour
- denying someone a promotion because they helped someone else to report unlawful behaviour.

* or a characteristic generally associated with people of their sex.

Who is responsible and who does it cover?

Employers and people running a business now have a legal responsibility under the positive duty to take steps to prevent unlawful behaviours by:

- themselves
- their employees, workers and agents
- third parties, in some cases.

Unlawful behaviours may come from anywhere – from owners, managers, employees and other workers (such as contractors). They may also come from customers, clients, students, patients and other people who come into contact with the workplace or workers.

Regardless of size or resources, all businesses that have obligations under the Sex Discrimination Act must take steps to meet the positive duty.

When and where can unlawful behaviours happen?

The positive duty applies to sex discrimination, sexual harassment, and other unlawful behaviours that involve workplaces, workers or working relationships. This may include behaviour that is connected to work.

For example:

- when working remotely (such as offsite or from home)
- at staff drinks (whether in the workplace or elsewhere)
- in the workplace after hours or during a lunch break
- between colleagues outside the workplace and outside of work hours
- in a hotel room during work-related travel (e.g., for a conference).

What are the risk factors and underlying causes?

There is a risk of sex discrimination, sexual harassment and other unlawful behaviours happening in **every workplace**. Your business might have a **higher risk**, however, if:

- most of your workers are men
- most of the supervisors or managers in your workplace are men
- your business involves **interacting with third parties** (such as clients, customers and/or others)
- you employ **casual staff** and/or **workers on short-term contracts**
- your workplace is very **hierarchical**
- your workplace **lacks diversity**
- your workplace is **isolated** or **remote**
- your workplace is **divided by gender** (for example, women in the office, men 'on the tools')
- **alcohol** is consumed, especially at work social events
- you and/or your staff **do not understand** sex discrimination, sexual harassment, and other unlawful behaviours
- **disrespectful behaviour** is generally accepted or common in your workplace
- you don't have a **policy** or **code of conduct** which sets expected standards of behaviour
- you have not responded appropriately or **held people accountable** for unlawful behaviours in the past (or have not applied a policy or code of conduct consistently).

In addition, everyone has multiple parts of their identity that intersect and affect the advantage or disadvantage they experience in society. Factors influencing a person's experience of discrimination may include their sex or gender identity, their sexual orientation, whether they have a disability, whether they are from culturally and linguistically diverse communities, whether they identify as Aboriginal and Torres Strait Islander, and their class.



REMEMBER: Apply the Guiding Principles when implementing the 7 Standards.

When people experience multiple and overlapping forms of discrimination and harassment because of who they are this is called **intersectional discrimination**. Multiple forms of discrimination can combine to have a serious impact.

Gender inequality and **power imbalances between workers** can be underlying causes of workplace sex discrimination, sexual harassment and other unlawful behaviours.

Steps to meet the Positive Duty

The Sex Discrimination Act requires all relevant businesses to take **reasonable** steps to eliminate unlawful behaviours as far as possible. This means that while all businesses must act, the steps expected of each business will depend on things like:

- the size and nature of the business
- the resources available.

The Commission has developed **Guiding Principles** and **Standards** to help businesses work out what steps to take so that they can meet their obligations and create safe and respectful workplaces. Businesses should consider the Guiding Principles and every Standard and take action.

Guiding Principles

- be **consultative** – talk to your workers about what they need for a safe and respectful workplace
- aim to achieve **gender equality** – where people of all genders have equal rights, rewards, opportunities and resources
- **think about your people** – do your workers have different **intersecting identities** that may affect their experience of discrimination and harassment? For example, is a particular individual a woman and/or gender diverse, young, from a racial minority, or do they have a disability?
- be **person-centred** and **trauma informed** – support individual choice, safety and dignity and avoid causing harm.

Standards

The Standards are a framework to help you determine the practical actions to take to eliminate sex discrimination, sexual harassment and other unlawful behaviours and to satisfy the positive duty.

Below are some questions to help you consider how to apply the Standards. The full Standards and examples are set out in the *Guidelines for Complying with the Positive Duty (2023)* and *A Quick Guide for Complying with the Positive Duty (2023)*.

Standard 1: Leadership



- Do you understand your obligations under the Sex Discrimination Act?
- Do you have up-to-date knowledge about workplace sexual harassment, sex discrimination and other unlawful behaviours?
- Do you know about the causes and impacts of unlawful behaviour; how to identify and respond to it; and where to go for advice, information and support?
- Have you put in place measures to prevent and respond to these unlawful behaviours and put them in a plan?
- Do you check whether these measures are working and update them?
- Are you a role model for respectful behaviour in your business?
- Have you made it clear that you are committed to creating a safe, respectful, diverse and inclusive workplace?
- Have you set clear expectations about what behaviour is acceptable in your business?

Standard 2: Culture



- Is the culture at your business safe and respectful?
- Is your workforce diverse and inclusive?
- Are you paying attention to gender balance when recruiting or promoting people?
- Are all workers supported to report unlawful behaviours when they occur?
- Are reports of unlawful behaviours handled in a way that minimises harm?
- Are people who engage in unlawful behaviour held accountable for their actions?

Standard 3: Knowledge



- What do your staff know about unlawful behaviour?
- Do they know about their rights and responsibilities in relation to creating a safe, respectful and inclusive workplace and working relationships?
- Are you including this information in staff inductions and training?
- Does your training and education include focus on the kind of respectful workplace you want to create?
- Do you have a policy about unlawful behaviours and is it consistently enforced?

REMEMBER: Use the Seven Standards as a framework for your 'prevention and response' plan.

Standard 4: Risk management



- Do you understand that unlawful behaviour is both an equality risk and a health and safety risk?
- Are you taking a risk-based approach to preventing unlawful behaviour?
- Have you identified the risks in your business and taken steps to manage these risks?
- Are you checking to see if your approach is working?

Standard 6: Reporting and response



- If your workers experience or witness unlawful behaviour, how can they report it?
- Have you told your workers how they can report unlawful behaviour?
- How will you respond to a report from your workers?
- Will your response be consistent, timely and prioritise workers' safety and wellbeing?
- Will the consequences for people who engage in unlawful behaviour be consistent and appropriate in the circumstances?

Standard 5: Support



- What supports do you have for workers who have experienced or witnessed unlawful behaviour?
- Who can your workers speak to inside your business about these experiences?
- What support services outside your business can your workers access?
- Do your managers and workers know about these supports?
- Can your workers access support without talking to you?

Standard 7: Monitoring, evaluation and transparency



- Do you know what unlawful behaviours your workers experience or are at risk of experiencing?
- What are you doing to prevent and respond to these risks and incidents of unlawful behaviour if/when they occur?
- Are you up-front with your workers about the presence or risk of unlawful behaviour?
- Have you told your workers about what steps you have taken to address incidents and risks of unlawful behaviours?
- Are you checking to see that what you are doing is working and updating/changing your approach if necessary?

Case Studies

The Standards are a framework to help businesses decide what practical actions to take to eliminate unlawful behaviours in their workplace. Each business will have a different way of applying the Standards, depending on their risks and circumstances. Below are some examples of how some Standards may be applied in different businesses. Please note that these case studies do not address all parts of all Standards. For further information see the ***Guidelines for Complying with the Positive Duty (2023)***.



Paula is the owner of a real estate agency with 15 employees

She receives an email from her business association advising that there have been updates to the Sex Discrimination Act, and that she now has a positive duty to eliminate sex discrimination, sexual harassment, and other unlawful behaviours at work.

Paula shares the email with her employees and asks them to speak with her if they have any questions. Following this, Aisha, a young agent and the only woman of colour at the agency, speaks privately with Paula. Aisha shares that she feels uncomfortable with some things that her direct supervisor, Luke, has done. She says that Luke doesn't let the women in his team run high-profile sales because he thinks 'they can't handle the pressure'.

Aisha tells Paula that Luke also suggests that women wear high heels and short skirts to property inspections 'to make a good impression' on their clients. Luke suggests to her that she straighten her hair to look more 'professional' and that he likes the way bright colours look against her skin tone. Paula asks Aisha if she would like assistance to access support. Aisha declines, saying she just wants to be able to do her job.

Paula organises training for all staff about understanding and addressing sex discrimination, sexual harassment and other unlawful behaviours. She reiterates the company dress code, which is 'smart business attire' and stresses that the dress code expectations are the same for everyone, regardless of gender. Paula reviews the portfolios of all senior staff and directs Luke to allocate certain high-profile sales to senior women staff.

Paula creates a new policy. The policy sets out the definitions of unlawful behaviour, the options for reporting it and the consequences for engaging in it. Paula prints out the policy and displays it in the office and tells her employees about the policy during a team meeting. Paula includes conversations about it at quarterly team meetings. She regularly checks in with her workers to see if they feel they are treated fairly at work.

Paula is aware that women of colour like Aisha are more likely to experience victimisation than others. She keeps an eye on Aisha's career progress, to make sure that she is being treated fairly.



Andy is the owner of a bar

He employs 12 people – four managers who are men and eight bar staff of different genders. Andy knows that there have been changes to the Sex Discrimination Act, including that he now has a positive duty to eliminate sexual harassment in his workplace.

Andy considers the risk factors for his bar. These include that all managers are men, and that his workplace involves intoxicated customers, late night shifts and after-work staff drinks. Andy knows these factors increase the chances of his staff being sexually harassed by customers and by each other. He considers what steps he needs to take to prevent sexual harassment in his business.

Andy arranges sexual harassment training for himself and all staff. Following this he asks staff to share experiences and ideas about how to make their workplace safer. He was told that one group of customers frequently make sexual comments, especially to the women and gender diverse staff members. The next time they enter the bar, Andy tells them that sexual harassment is not on, saying 'if it happens again, you will be asked to leave'.

Andy puts up a poster about sexual harassment so that it is in clear view for customers and staff. Andy develops a simple Respectful Behaviour Policy outlining behaviour that is unlawful under the Sex Discrimination Act; how people can report; and actions that will be taken. All staff sign the policy. Andy follows up every three months at staff meetings and commits to refresher sexual harassment training and a team review of actions every year.

Andy decides that a more diverse management team might reduce risks into the future. He considers management roles for experienced women and gender diverse bar staff, including offering training and providing opportunities for them to fill in as managers when there is an absence. Andy checks in with his staff regularly to see if what he is doing is working and whether he needs to do more.



Ann and Tim are married and own a corner store

They employ their two teenage daughters and their nephew to help in the store. They know most of their customers and they have respectful relationships with them.

Ann and Tim have heard from their accountant that they have a positive duty to prevent their employees from experiencing unlawful behaviours in connection with their work. They sit down one night and look at the resources on the Commission and **Respect@Work** websites. They think about some of the risks for their business. They realise that their young employees, especially their daughters, are at greater risk of sexual harassment. They identify their customers, suppliers, and contractors as potential sources of risk to their employees.

They decide to put up a poster about respectful workplaces behind the counter, to remind their customers, suppliers and contractors to behave respectfully towards their staff. They ask their daughters and nephew to let them know if they experience any unwanted behaviour from anyone who enters the shop. They make a note to review the Commission and **Respect@Work** materials and to talk about it as a group at different times throughout the year.



Samar owns a small construction company

He employs eight men. The team moves to a new worksite every few months. They often work alongside tradespeople from other companies, including women. The men often make loud sexual jokes about the women on site, whistle at them, and try to show them pornographic videos. They joke to each other about the women painters they work with, laughing about their 'handling of their tools'. They find out that one of the women is married to another woman and they target her daily with jokes about her sex life.

Samar suspects that the behaviour of his employees is creating a hostile work environment under the Sex Discrimination Act and is also sexual harassment. He knows that he has a positive duty to remove it from his workplace. He also sees this as a risk to his workers and his business.

Samar realises his workplace culture needs to change. He has a talk with his team on-site and makes it clear that their behaviour is against the law and that it will not be tolerated. He states that he has a duty to create a safe and respectful work environment for everyone on the worksite.

Samar creates a simple Positive Duty policy and asks his employees to read and sign copies. He approaches the women on-site and says that he runs a respectful worksite and asks them to report any inappropriate comments or banter to him, if they feel comfortable. He tells them he will keep any reports confidential if they wish. Samar puts up a **Respect@Work** poster at each new worksite and adds a discussion about unlawful behaviours to future team meetings.

For further information

- *Guidelines for Complying with the Positive Duty (2023), Information Guide on the Positive Duty (2023) and A Quick Guide for Complying with the Positive Duty (2023)*. Available on the Commission's website.
- Respect@Work Information Service on 1300 656 419 (Option 1), TTY: 1800 620 241 (toll free), Email: respect@humanrights.gov.au
- Respect@Work website, <https://www.respectatwork.gov.au/>
- The Commission's National Information Service, 1300 656 419 (Option 2), 02 9284 9888, or Email: infoservice@humanrights.gov.au.
- Your professional or industry association for more information and tools to help you create a prevention and response plan.

The **purpose** of this resource is to promote understanding in the small business community about the new positive duty. For a detailed explanation about the law, compliance, enforcement and examples of actions that businesses can take to satisfy the positive duty, please see the *Guidelines for Complying with the Positive Duty (2023), Information Guide on the Positive Duty (2023) and A Quick Guide for Complying with the Positive Duty (2023)*. Available on the Commission's website.