**INFORMATION SHEET**

[**Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022**](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6916_first-reps/toc_pdf/22093b01.pdf)

The Australian Parliament has passed the [Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6916_first-reps/toc_pdf/22093b01.pdf) (**the Bill**) which seeks to implement seven of the 55 recommendations from the Australian Human Rights Commission’s (**AHRC**) Respect@Work Report. (Report)

**1. Prohibiting a hostile work environment**

Recommendation 16c in the Report was that the Sex Discrimination Act 1984 (**SDA**) should be amended to make it clear that any conduct or behaviour that created a hostile work environment for someone else based on their sex was prohibited under law.

The Bill inserts a new section 28M into the SDA, and it is now unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex. A person (**First Person**) will be found to have subjected another person (**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 Second Person, or both, work; and
* The Second Person is in the workplace at the same time as or after the conduct occurs; and
* a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the Second Person by reason of that person's sex, a characteristic that appertains generally to persons of that sex or a characteristic that is generally imputed to persons of that sex.

In determining whether a person has subjected another person to a hostile workplace environment on the ground of sex, it is necessary to consider the seriousness of the conduct; whether the conduct was continuous or repetitive; and the role, influence or authority of the person engaging in the conduct. It should be emphasised that for conduct to be prohibited under the new section 28M of the SDA it needs to result in an offensive, intimidating and humiliating environment for people of one sex, but does not necessarily need to be a directed at a specific individual. Conduct that could result in people of one sex feeling unwelcome or excluded by the general work environment and potentially breach the new prohibition includes displaying obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes.

The provision is intended to align with other provisions in the SDA by using existing terms and concepts, such as ‘offensive, intimidating or humiliating’ and the reasonable person test. This would enable existing case law to be considered when interpreting and applying the new provision.

## 2. Positive duty on employers

Recommendation 17 was a key recommendation of the Report, and called for another change to the SDA, introducing a "positive duty". The SDA has been amended to include a new Part IIA which introduces a new positive duty that requires an employer or a person conducting a business or undertaking (**PCBU**) to take reasonable and proportionate measures to eliminate, as far as possible, conduct that includes:

* discrimination on the ground of a person's sex;
* sexual harassment or harassment on the ground of sex;
* conduct that subjects a person to a hostile workplace environment on the ground of sex; and
* acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to conduct in the previous points.

The new positive duty means employers and PCBUs will be required to move from simply responding to conduct that has already occurred, to proactively preventing that conduct from occurring in the first place. This would require measures be taken to prevent this conduct being engaged in by duty holders themselves, as well as their employees, workers and agents, and third parties, where applicable. This may involve implementing policies and procedures, collecting and monitoring data, providing appropriate support to workers and employees, and delivering training and education on a regular basis.

In determining whether an employer or PCBU has taken *"reasonable and proportionate measures”* to eliminate sexual harassment, factors for consideration include the size, nature and circumstances of the organisation; its resources (whether financial or otherwise); and the practicability and cost of steps to eliminate such conduct.

The positive duty is intended to align with section 106 of the SDA, which relates to the vicarious liability of employers for unlawful acts done by their employees or agents. Under section 106 of the SDA, an employer is not liable for the unlawful conduct of their employees or agents if they have taken ‘all reasonable steps’ to prevent their employees from engaging in the conduct. This means that employers should already be preventing discrimination and harassment by their employees or agents in order to manage their potential liability under the SDA.

## 3. Enforcing the positive duty

The Parliament has also, in line with recommendation 18 of the Report, given the AHRC the ability to oversee whether people are complying with the positive duty obligations and, if they're not, enforce some of the measures.

The Bill confers a number of functions on the AHRC to ensure that employers and PCBUs are supported to meet their obligations and achieve compliance. This includes functions to prepare and publish guidelines for complying with the positive duty and promote understanding, and public discussion, of the positive duty. As noted in the Report, these functions would enable the Commission to work collaboratively with employers to assist them in complying with the positive duty.

The Bill would also confer functions on the AHRC to monitor and assess compliance with the positive duty when necessary, including the options 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.

The AHRC is able to initiate an inquiry into a person’s compliance with the positive duty if it ‘reasonably suspects’ that a person is not complying. The AHRC may form this view based on information or advice provided by other agencies or regulators, information disclosed by impacted individuals, information or advice provided by unions or worker representatives, or media reporting, for example.

The compliance functions conferred on the AHRC include appropriate procedural fairness mechanisms for employers and PCBUs. This includes provisions to ensure employers and PCBUs can seek reconsideration of a compliance notice or apply to the Federal Courts for review of a compliance notice.

The new AHRC powers will come into effect 12 months after the Respect at Work Act 2022 receives Royal Assent, giving employers and PCBUs 12 months to understand and begin to comply with the positive duty.

## 4. Systemic inquiries into discrimination

The main point of implementing recommendation 19 is to enable the AHRC to conduct broad inquiries into systemic unlawful discrimination and try to expose exactly what factors drive it.

The Bill inserts a new provision in the AHRC Act to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination. The Bill defines ‘systemic unlawful discrimination’ to mean unlawful discrimination that ‘affects a class or group of persons’ and ‘is continuous, repetitive or forms a pattern.’ Although the AHRC presently has existing powers to inquire into systemic human rights and unlawful discrimination issues, this amendment would provide the AHRC with an enhanced inquiry function on its own motion.

The AHRC will be permitted to inquire into instances (or suspected instances) of unlawful discrimination within individual businesses, as well as instances (or suspected instances) of unlawful discrimination across multiple businesses within a broader industry or sector.

Once the AHRC has inquired into a matter, the AHRC may report to the Minister in relation to the inquiry or publish a report in relation to the inquiry, or both, and, if appropriate, make recommendations to address the issues identified.

## 5. Representative claims

Currently, representative bodies are permitted to initiate complaints in the AHRC on behalf of one or more persons, but they are not permitted to initiate unlawful discrimination matters in the Federal Courts should a complaint be unresolved and terminated by the AHRC.

The Act amends the AHRC Act to enable representative bodies (such as a union representing one or more workers) to make representative applications to the Federal Courts on behalf of people who have experienced unlawful discrimination. This change fulfils recommendation 23 of the Report.

## 6. Costs protections

According to recommendation 25 of the Report, the risk of ending up with a huge legal bill can act as a disincentive to people who may have considered taking their sexual harassment case to court.

The Government, on the advice of the AHRC, had suggested a "cost-neutrality" approach where each side paid for their fees unless the court decided to impose costs, which it would be allowed to do in certain circumstances.

But late last week the Government removed the cost provision part of the bill after listening and consulting with stakeholders who raised concerns about the cost-neutral approach.

Instead, it's referred the issue to the Attorney-General's department to be reviewed. The Government says it'll seek to legislate whatever cost model the department recommends at the end of its review.

## 7. Public sector gender reporting

The *Workplace General Equality Act 2012* (Cth) has been amended to bring the Commonwealth public sector into line with the private sector in relation to its reporting requirements. Commonwealth public sector organisations must now report annually to the Workplace Gender Equality Agency on six gender equality indicators. This change fulfils recommendation 43a.

**Other changes**

Victimisation

The Bill clarifies that victimising conduct can form the basis of both a civil action for unlawful discrimination in addition to a criminal complaint under the Anti-Discrimination Act 1991(Cth) (**AD Act**), Disability Discrimination Act 1992 (Cth) (**DD Act**) and the Racial Discrimination Act 1975 (Cth) (**RD Act**).

This amendment seeks to address judicial uncertainty as to whether the Federal Courts had jurisdiction to hear an application of unlawful discrimination under the AHRC Act, where the alleged unlawful discrimination is an act of victimisation brought as a civil action.

Timeframes for making a complaint

The Bill amends the discretionary grounds on which a complaint made under the AD Act, DD Act and RD Act may be terminated by the President of the AHRC and, in practical terms, extends the timeframe for making complaints under any of the Acts mentioned from six months to 24 months after the alleged unlawful conduct took place.

This amendment complements a corresponding change already made to the SD Act in 2021.

Amending the objects of the SDA

The Bill amends the existing object clause of the SDA to state that an object of the SDA is to “achieve substantive equality between men and women”.

*Sex-based harassment*

The Bill amends section 28AA of the SDA, which prohibits harassment on the ground of sex, to remove the reference to conduct of a ‘seriously’ demeaning nature. This would ensure that the provision does not impose an unnecessarily high threshold on applicants and implement the intent of recommendation 16(b) of the Report.

**Key takeaways**

The shift in the existing legislative framework from reactive measures to preventative measures to eliminate, as far as possible, unlawful discriminatory conduct will require employers to do more than just implement another standard workplace policy.

Employers must be across the legislative changes, and will need to closely examine the risk factors pertaining to their workplace environments and establish appropriate controls and performance standards to manage those risks under anti-discrimination and safety laws.

In particular, employers can, undertake a formal audit/risk assessment to understand the factors that increase the risk of sexual harassment in the workplace; to the extent any risks are identified, assess what "reasonable and proportionate" steps can be taken within the context of the organisation to address those risks, and take these steps as soon as possible; provide/organise training for staff regarding the legislative changes; ensure there is a complaints/grievance handling framework in place to deal with and manage reports of sexual harassment; encourage or require employees to make reports if they experience, witness or hear about sexual misconduct. Make it clear that they will be protected from victimisation for doing so.

**Promoting a positive workplace culture**
Creating an inclusive culture that is free from discrimination and harassment, and where staff feel safe and respected, will assist your organisation to meet its legal obligations as well as significantly contribute to employee satisfaction and productivity. For more information see the following website: <https://www.respectatwork.gov.au/>