

Information Guide on the Positive Duty under the *Sex Discrimination Act 1984 (Cth)*:

.....

Relevant Unlawful Conduct, Drivers,
Risk Factors and Impacts • August 2023



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Information Guide on the Positive Duty under the *Sex Discrimination Act 1984* (Cth):
Relevant Unlawful Conduct, Drivers, Risk Factors and Impacts.

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01

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Introduction

This information guide (**Information Guide**) is a companion to *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (**the Guidelines**) issued by the Australian Human Rights Commission (**the Commission**).

This document provides additional information to help organisations and businesses which must comply with the positive duty in the *Sex Discrimination Act 1984 (Cth)* (**Sex Discrimination Act**) to recognise and understand the unlawful conduct that the positive duty covers.

By introducing a positive duty into the Sex Discrimination Act, the Australian Parliament significantly reformed the way that federal anti-discrimination law protects people at work, or in workplaces, from harmful behaviours and unlawful conduct.¹

The Sex Discrimination Act now requires 'persons conducting a business or undertaking' and 'employers' to take proactive measures to eliminate certain forms of discrimination, harassment and victimisation.² For ease of reference in this document, these duty holders are referred to as '**organisations and businesses**'.

Regardless of their size or resources, all organisations and businesses in Australia that have obligations under the Sex Discrimination Act must satisfy the positive duty. This includes sole traders and the self-employed, as well as small, medium and large businesses, and government.

The Glossary in the Guidelines explains the meaning of key terms such as 'employer', 'person conducting a business or undertaking', 'principal', 'employee', 'worker', 'agent' and 'third party'.

The Guidelines are the Commission's most comprehensive resource on the positive duty. They provide detailed information about the positive duty: what it is, who must meet it, what it means to take 'reasonable and proportionate measures', how it will be enforced, related legal obligations and examples of practical actions that organisations and businesses can take to help them satisfy it. It is expected that organisations and businesses will read these Guidelines, and its disclaimers, before or alongside this Information Guide. The Guidelines also contain links to additional resources and factsheets that will further assist organisations and businesses.

The positive duty

The positive duty in the Sex Discrimination Act requires organisations and businesses to take 'reasonable and proportionate measures' to eliminate, as far as possible:

- discrimination on the ground of sex in a work context³
- sexual harassment in connection with work⁴
- sex-based harassment in connection with work⁵
- conduct creating a workplace environment that is hostile on the ground of sex⁶
- related acts of victimisation.⁷

In this document, the conduct covered by the positive duty is referred to as '**relevant unlawful conduct**'.

To eliminate **relevant unlawful conduct**, it is important to understand what this conduct is. The purpose of this document is to educate organisations and businesses about relevant unlawful conduct: what it is, why it happens, where it happens, when it is unlawful, who it affects and its impacts. It also explains why some people may not report an incident. This information will assist organisations and businesses to take focused, meaningful action to eliminate relevant unlawful conduct and to comply with their positive duty.

To highlight the different ways in which relevant unlawful conduct is experienced across Australian workplaces, this Information Guide features quotes from submissions made to the *National Inquiry into Sexual Harassment in Australian Workplaces* (**Respect@Work National Inquiry**) which produced the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report (**Respect@Work Report**).⁸ It also uses quotes from submissions made to the *Independent Review into Commonwealth Parliamentary Workplaces* (**CPW Review**), which produced *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (**Set the Standard Report**).⁹

Content warning: This document contains high-level references to traumatic experiences in connection with work, including sexual assault. It does not discuss individual experiences in detail.

A note on terminology: This document acknowledges the gendered nature of discrimination, harassment and victimisation. When explaining the law, and the conduct covered by the positive duty, the document uses the term 'sex' and refers to concepts such as sex discrimination and sex-based harassment. This is because it is the language used in the Sex Discrimination Act. In broader policy discussions, the document uses the term 'gender' and refers to concepts such as gender inequality, gender roles and gendered violence. 'Gender' is a more common term than 'sex' and it is more relevant when considering socially constructed roles, behaviours and attributes.

When the terms 'men' and 'women' (or their equivalents) are used in this document, this is intended to be inclusive of all genders, including trans men and trans women (subject to any limitations imposed by the Sex Discrimination Act or relevant case law).¹¹ Where applicable, the document also refers to specific impacts on Lesbian, Gay, Bisexual, Trans and gender diverse, Intersex and Queer ('LGBTIQ+') people.

Summary

- Relevant unlawful conduct includes discrimination on the ground of sex in a work context, sexual harassment and sex-based harassment in connection with work, conduct creating a workplace environment that is hostile on the ground of sex and related acts of victimisation. It covers a wide range of behaviours, including in person, online and over the phone.
- Drivers of relevant unlawful conduct can include power imbalances, gender inequality, intersectional discrimination or disadvantage and a lack of accountability.
- Specific factors, such as features of the work environment, industry characteristics, work culture and work requirements, can also increase the risk of relevant unlawful conduct.
- Relevant unlawful conduct is widespread – it can occur in any workplace and any industry. Some groups, such as women, are targeted more than others and in particular areas, such as in relation to sexual harassment. Data also supports that LGBTIQ+ people, young people, people with disability, Aboriginal and Torres Strait Islander peoples and culturally and racially marginalised people are more likely to be targeted than others.
- Relevant unlawful conduct can have harmful impacts on the person experiencing the conduct, their friends and family, witnesses to the conduct and the broader community.
- Relevant unlawful conduct also has negative consequences for business and the economy. For example, in 2018/2019 Deloitte Access Economics estimated that workplace sexual harassment cost the Australian economy \$3.5 billion in that financial year.¹⁰
- Organisations and businesses have a critical role to play in ensuring that relevant unlawful conduct, and the harm associated with it, is prevented or minimised. Where the conduct does occur, it is important that organisations and businesses respond in a way that minimises harm (in a person-centred and trauma-informed way).
- Very few people report an incident of relevant unlawful conduct. This is often because they fear retaliation, have concerns for their reputation or career, or believe that their employer or workplace will do nothing to address it.



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Understanding relevant unlawful conduct

As noted above, **relevant unlawful conduct** to which the positive duty applies is:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex
- related acts of victimisation.

The Sex Discrimination Act makes it unlawful to discriminate against a person on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities in certain areas of public life. These include work and superannuation, education, the provision of goods, services or facilities, accommodation and housing, buying or selling land, clubs and the administration of Commonwealth laws and programs.

The positive duty does not extend to all the grounds and areas of public life in the Sex Discrimination Act. Broadly speaking, the positive duty is focused on forms of sex discrimination, harassment and victimisation that involve workplaces, workers or working relationships.

Organisations and businesses are obliged to comply with all relevant provisions of the Sex Discrimination Act, including those outside the scope of the positive duty (which is the focus of these informational materials).

Vicarious liability is when employers and principals can be held legally responsible for the actions of their employees or agents in connection with their employment or duties. Across these other grounds and areas, employers and principals may still be vicariously liable for unlawful conduct carried out by their employees or agents unless they can show that they have taken 'all reasonable steps' to prevent the unlawful conduct from happening.¹² Individuals can also still be held accountable for their conduct in those contexts.

See the Guidelines, section 4.6 for a discussion on the positive duty and vicarious liability.



03

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Discrimination on the ground of sex

3.1 Recognising sex discrimination

Sex discrimination is when someone is treated unfairly, or is unreasonably disadvantaged, because of their sex, or a characteristic that is generally associated with people of that sex.

Anyone can experience sex discrimination, regardless of their sex, gender identity, sexual orientation or intersex status. People's experiences of sex discrimination can be affected by these factors as well as by their race, ethnicity, religious belief, disability, age, class, migration status and/or whether they are Indigenous.

The kinds of attitudes that can lead to sex discrimination in a work context include:

- making assumptions about the sort of work that people are capable – or not capable – of performing because of their sex
- thinking that people are suited to different kinds of work because of their sex
- having a personal preference for working with people of a particular sex
- thinking that treating people exactly the same is the best way to ensure fairness between people of different sexes.

Examples of behaviour in a work context that could be sex discrimination include, but are not limited to:

- offering women and men different rates of pay or benefits for doing the same job
- having a policy that only fulltime workers will be promoted, if this is not reasonable in the circumstances
- not providing women and men with the same opportunities for training, mentoring or promotion
- not hiring a woman because it is assumed that she is more likely to complain about sexual harassment or sexual language
- not hiring a man because existing staff do not want to work with a man
- not hiring a woman because it is assumed that the work is 'too physical' or 'too dirty' for women

- not allowing men to wear jewellery to work when women are allowed to wear jewellery
- not promoting a woman to a more senior position because it is assumed that the other staff will not respect her authority
- dividing up work tasks based on sex, including because it has always been done by 'one of the girls'
- insisting that women wear different clothing at work to men, for example, short skirts or sexualised uniforms
- referring to women using sexist, derogatory or demeaning terms.

3.2 What does the law say about sex discrimination in a work context?

The Sex Discrimination Act prohibits sex discrimination in employment and in relation to commission agents, contract workers and partnerships of six or more people.¹³

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Sex discrimination can be either direct or indirect and both forms are unlawful under the Sex Discrimination Act.¹⁴

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Direct sex discrimination occurs when a person is treated less favourably than someone of a different sex would be treated in the same or similar circumstances.¹⁵ Generally speaking, treating someone 'less favourably' means treating them worse or subjecting them to a detriment. To be unlawful, the less favourable treatment needs to be *because of* the sex of the person, or a characteristic generally associated with people of that sex. For example, a decision not to hire a qualified woman as a mechanic because she is a woman and it is assumed that she will not fit into a workplace with lots of men, would be direct sex discrimination.

Indirect sex discrimination may be less obvious. It occurs when an existing or proposed condition, requirement or practice (such as a rule or policy) may appear to treat everyone equally but disadvantages, or is likely to disadvantage, people of a particular sex.¹⁶ It will not be unlawful discrimination, however, if the condition, requirement or practice is reasonable in the circumstances.¹⁷ For example, it may be indirect sex discrimination to require everyone to work from 9am to 5pm if this is not reasonable in the circumstances. This is because the policy may disadvantage women, who are more likely to need to work flexible hours related to the responsibilities of caring for children.¹⁸

The matters a court will consider in determining whether a condition, requirement or practice is reasonable in indirect discrimination matters include:

- a) the nature and extent of the disadvantage resulting from the condition, requirement or practice (or the proposed condition, requirement or practice)
- b) the feasibility of overcoming or mitigating the disadvantage
- c) whether the disadvantage is proportionate to the result sought by the person who imposes (or proposes to impose) the condition, requirement or practice.¹⁹

When working out whether certain conduct is unlawful sex discrimination, there does not need to be an intention or motive to discriminate.

3.3 Who has relevant duties under the Sex Discrimination Act?

The Sex Discrimination Act prohibits sex discrimination in a work context by:

- an employer in relation to their employees or prospective employees²³
- a principal in relation to their commission agents or prospective commission agents, and contract workers²⁴
- a partnership or prospective partnership of six or more people in relation to their partners or prospective partners.²⁵

3.4 When do sex discrimination protections in a work context apply?

Sex discrimination is unlawful in advertising jobs, during recruitment and selection processes, as well as when making decisions about terms and conditions, benefits, training, transfer and promotion opportunities.

It is also unlawful to discriminate against a person on the ground of sex by dismissing them as an employee, ending their engagement as a commission agent or contract worker, or expelling them from a partnership.²⁶

Note: A number of permanent exemptions are present in the Sex Discrimination Act that apply to discrimination on the ground of sex,²⁰ as well as temporary exemptions that can be granted by the Commission.²¹ Conduct that might otherwise be unlawful discrimination is not unlawful if it is covered by an exemption. The law also allows for special measures to be taken to help achieve substantive equality for people with attributes covered by the Sex Discrimination Act.²² This is sometimes called 'affirmative action' or 'positive discrimination' and, if done in accordance with the law, it is not unlawful, even if it means that people are treated differently because of their sex.



3.5 Sex discrimination and the positive duty

The positive duty requires relevant organisations and businesses to take reasonable and proportionate measures to eliminate sex discrimination, as far as possible, in the context of employment and in relation to commission agents, contract workers and partners.²⁷ This includes towards prospective employees, prospective commission agents and prospective partners.

Case study: Divya



After working for 11 years with an accounting firm, Divya was promoted to the role of group auditor. When a new manager was appointed, however, the manager treated her differently to the workers in similar positions who were men.

Divya was subject to extra scrutiny and excluded from group bonding events. She also discovered that her salary package was less than the men in equivalent positions. Divya was told by colleagues that her new manager had been saying he did not trust her and was paying her less and giving her extra supervision because 'women are not good with numbers'.

This could be unlawful sex discrimination because Divya has been treated unfairly by her manager because she is a woman.



04

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Sexual harassment

4.1 Recognising sexual harassment

*'Sexual harassment was the overarching feature of my working experience as a young woman. In all of these workplaces, the managers or owners either perpetrated sexual harassment themselves, or were aware that it was happening and did nothing to prevent or respond to it. Sharing these experiences with female friends, I know that my experience is not singular or extreme – this is, in many ways, an unremarkable story.'*²⁸

Individual, Submission 29 to Respect@Work National Inquiry

Sexual harassment is any unwelcome conduct of a sexual nature that occurs in circumstances in which a reasonable person, aware of those circumstances, would anticipate that the person being harassed might feel offended, humiliated or intimidated.

Sexual harassment can take many forms. It can be overt, covert or subtle. It can be repeated or a one-off incident.

Sexual harassment can happen in person, over the phone or online – including via social media.

Anyone can experience sexual harassment, regardless of their sex, gender identity, sexual orientation or intersex status. People's experiences of sexual harassment can be affected by these factors as well as by their race, ethnicity, religious belief, class, disability, age, migration status and/or whether they are Indigenous.

Examples of behaviours that could be sexual harassment include, but are not limited to:

- unwelcome physical touching, staring or leering
- repeated or inappropriate requests to go on dates
- requests or pressure for sex or sexual acts
- emailing, displaying or texting pornography, suggestive material or sexual jokes
- sexual comments in person, online or in writing, including explicit comments or innuendo
- indecent text or social media messages, phone calls or emails, including the use of images or emojis with sexual connotations
- sharing or threatening to share intimate images or video without consent
- sexualised gifts, images or videos
- intrusive questions about a person's private life or physical appearance
- sexual gestures, indecent exposure or inappropriate display of the body
- actual or attempted sexual assault.

It is important to remember that:

- **A person does not need to intend to engage in sexual harassment for it to be unlawful.** When working out whether certain conduct is sexual harassment, it does not matter if a person did not intend for their behaviour to be sexual harassment.
- **Sexual harassment is not always obvious, repeated or continuous.** It can include one-off incidents, or it can include a pattern of behaviour that makes a working environment uncomfortable or threatening in a sexually hostile way. This can include displaying sexually offensive photos or pictures, figurines, sexually inappropriate gifts, or a culture of suggestive comments or jokes.
- **Conduct may be unwelcome even when a person does not explicitly reject it.** It should not be assumed that behaviour is welcome just because someone has not clearly asked for it to stop or reported it. Complex workplace dynamics, including power imbalances and concerns about victimisation, may prevent a person from expressly objecting to unwelcome conduct.
- **Behaviour can become unwelcome at any time.** Behaviour may have been welcome in the past, but this does not mean that it will always be welcome to the person receiving it.

It is not sexual harassment to engage in sexual interaction, flirtation, attraction or friendship that is invited, mutual, consensual or reciprocated.

4.2 What does the law say about sexual harassment in connection with work?

The Sex Discrimination Act protects employers, employees, prospective employees, 'persons conducting a business or undertaking', workers and prospective workers from sexual harassment when it involves specific work relationships or is otherwise connected to work.²⁹

There are three components to the legal definition of sexual harassment:³⁰

1. Conduct that amounts to a sexual advance, a request for sexual favours, or other conduct of a sexual nature.
2. Conduct that is unwelcome.
3. Conduct where a reasonable person, having considered all the circumstances, would anticipate the possibility that the person being harassed would be offended, humiliated or intimidated by the conduct.

All three of these components must exist for the conduct to be unlawful sexual harassment under the Sex Discrimination Act. They are considered further below.

(a) Conduct that amounts to a sexual advance, a request for sexual favours, or other conduct of a sexual nature

Sexual harassment can take many forms. The courts have interpreted 'conduct of a sexual nature' as including a wide range of behaviours and have emphasised the importance of looking at context when assessing the relevant conduct. Conduct does not need to be sexually explicit to be 'of a sexual nature' and can include innuendo, insinuation, undertone and jokes. For example, flicking elastic bands at a woman's legs was held to be sexual harassment by a court because it formed part of a broader pattern of inappropriate sexual conduct.³¹

In determining whether an advance, request or other conduct is sexual in nature, it is not necessary for the person to have intended it to be so. An advance, request or other conduct may be sexual in nature even if the person engaging in the conduct does not have a sexual interest in the other person (including if they are a different sexual orientation to the person being harassed).

(b) Unwelcome conduct

Unwelcome conduct is behaviour that a person has not invited or solicited and that they regard as undesirable, offensive or disagreeable.

Whether the behaviour is unwelcome is a subjective question from the perspective of the person alleging sexual harassment. The behaviour may still be unwelcome even where it:

- may not have been unwelcome to others
- has been welcomed by a person in the past, or has been accepted workplace behaviour in the past
- was not intended to be sexual or to offend, humiliate or intimidate.

This is important because not everyone in a workplace will have the same views about what is 'acceptable behaviour'. Opinions can also change, and conduct can become unwelcome at any time.

It is also not necessary for the person being harassed to have explicitly addressed the behaviour or told their harasser that the behaviour is unwelcome.

(c) Conduct where a reasonable person, having considered all the circumstances, would anticipate the possibility that the person being harassed would be offended, humiliated or intimidated by the conduct

The final element of the legal definition of sexual harassment is the 'reasonable person test'. This considers whether the behaviour occurred in circumstances in which a reasonable person would anticipate the possibility that such conduct would offend, humiliate or intimidate the person being harassed. In this context, a reasonable person means a neutral and unbiased observer.

While the ways in which people experience certain behaviour may differ, whether such behaviour is unlawful sexual harassment therefore depends on how a reasonable person would interpret the behaviour in that situation. Additionally, it is not an assessment of how *any* person might experience the conduct, but rather the particular person who is subjected

to the behaviour. The reasonable person is assumed to have knowledge of the personal qualities of the person being harassed.

The circumstances that a court will consider when applying the 'reasonable person test' in sexual harassment matters include:

- a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, national or ethnic origin of the person being harassed
- b) the relationship between the parties involved
- c) any disability of the person being harassed
- d) any other relevant circumstance.³²

These circumstances ensure that the intersection between sex and other protected attributes under discrimination law are considered when applying the 'reasonable person test'. For example, a young Indigenous woman may experience sexual harassment differently.

4.3 When and where do sexual harassment protections in connection with work apply?

Sexual harassment involving work is prohibited in different ways in the Sex Discrimination Act. Importantly, it does not need to happen in a workplace or 'at work' for it to be unlawful.

Instead, sexual harassment is unlawful if it occurs:

- between people who have a specific work relationship, regardless of where the conduct occurs,³³ or
- in connection with a person being either an employer, employee, 'person conducting a business or undertaking' or worker (which includes conduct by third parties, such as customers, clients, patients or members of the public, towards these people).³⁴

(a) Work relationship-based prohibitions on sexual harassment

One way that sexual harassment in connection with work is prohibited in the Sex Discrimination Act is within specific work relationships, regardless of where the conduct occurs.

Under the Sex Discrimination Act, it is unlawful:

- for an employer to sexually harass an employee or a prospective employee
- for an employee to sexually harass a fellow employee or a prospective fellow employee
- for a 'person conducting a business or undertaking' to sexually harass a worker, or a prospective worker, in that business or undertaking
- for a worker in a business or undertaking to sexually harass a fellow worker, or a prospective fellow worker, in that business or undertaking.³⁵

For sexual harassment involving these specified types of work relationships, there is no requirement that the conduct occurs at work or 'in connection with' work to be unlawful.

(b) Prohibitions based on 'connection' with work

Another way that sexual harassment is prohibited in the Sex Discrimination Act is when it occurs 'in connection with' a person being either an employer, employee, a 'person conducting a business or undertaking' or a worker.³⁶ This makes sexual harassment unlawful in situations where these people are engaging in sexual harassment themselves *and* where they are experiencing it (including from third parties such as customers, clients, patients and members of the public).

The term 'in connection with' does not mean that an employer, employee, 'person conducting a business or undertaking' or worker must actually be performing their work duties at the time at which the conduct occurs. Unlike the relationship-based protections described above, however, the term 'in connection with' requires that they are engaged in some form of conduct or activity, or are visiting a particular place, as a result of being an employer, employee, 'person conducting a business or undertaking' or worker.³⁷

Case study: Daniel



Joe is an engineer and the owner of a small engineering practice. Daniel is an executive assistant at Joe's practice and an engineering student. Daniel is hoping to obtain work as an engineer in the industry when his studies are complete. Daniel also identifies as a gay man.

Following meetings with clients, Joe regularly makes inappropriate sexual jokes to Daniel about his appearance. Joe and Daniel bump into each other at the beach one weekend. Joe invites Daniel out for a drink and suggestively implies that he would be happy to help him find a job in the industry 'if there was something in it' for him in return.

As Joe is an employer and Daniel is an employee in the same engineering practice, the physical location and the timing of his suggestive comment (at the beach, out of work hours) do not prevent Daniel from claiming that it is sexual harassment involving his employment. This is because the law focuses on whether a specific work relationship exists between Joe and Daniel.

This means that sexual harassment can be unlawful even if it occurs outside a physical workplace, or outside of normal working hours. It can also be unlawful if it occurs while a worker is not 'at work' or actually performing their duties at the time at which the conduct occurs (for example, on a meal break or on a coffee break).

Examples of sexual harassment occurring in connection with work may include, but are not limited to:

- where a worker is working remotely, including if the person's workplace is their home
- in a vehicle used to travel to work, a conference or meeting, or to meet clients
- in a place where a worker is undertaking work at a different location (such as a client's home or a client's workplace)
- at social functions in connection with a team/workplace
- at after-parties to such events (regardless of their location)
- in accommodation (including hotel rooms) associated with, or provided by, an employer or 'person conducting a business or undertaking'
- where a worker visits the workplace out-of-hours because of a connection with work (for example, to check the roster or collect payslips or belongings)
- where a worker remains in a workplace on a lunch break or after a shift has finished
- online via the use of technology and social media (see below)
- at any other location, in situations where the conduct commenced in the workplace and continued outside the workplace and vice-versa (for example, attending a pub to continue a discussion that began in a workplace).

(c) Technology-facilitated sexual harassment

Laws that prohibit sexual harassment in connection with work also apply to conduct that occurs in a virtual workplace, for example, during remote working. This includes sexual harassment using devices such as phones, computers, tablets and through social media, email, chat and virtual meets.

Even if people are using private equipment during non-work hours, if the sexual harassment involves specific work relationships, or occurs in connection with work, it may still be unlawful.

Where there is a connection with work (including by way of a specific work relationship) people are subject to the same rules about sexual harassment in the virtual world as they are in the physical world.

Other forms of relevant unlawful conduct, such as 'sex-based' harassment, can also occur using technology. See section 5 below for more information on sex-based harassment.

4.4 Who has relevant duties under the Sex Discrimination Act?

As discussed above, the Sex Discrimination Act makes it unlawful for:

- an employer or a 'person conducting a business or undertaking', or
- an employee or a worker

to sexually harass:

- their employees or workers
- their prospective employees or prospective workers
- fellow employees or fellow workers
- prospective fellow employees or prospective fellow workers
- their employers or 'persons conducting the business or undertaking', or
- third parties with whom they come into contact in connection with their work (for example, customers, clients and patients).³⁸

The Sex Discrimination Act also makes it unlawful for a third party (such as a customer, client or patient) to sexually harass:

- an employer or a 'person conducting a business or undertaking', or
- an employee or a worker

if it occurs in connection with that person being an employer, a 'person conducting a business or undertaking', an employee or a worker.³⁹

These protections are intended to ensure that people are not exposed to sexual harassment while they are engaging in activities connected to their work (regardless of who the harasser is) and that people do not use their work, its context or activities, to engage in sexual harassment.

4.5 Sexual harassment and the positive duty

The positive duty requires employers and 'persons conducting a business or undertaking' to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment being engaged in:

by themselves, their employees, workers and agents, including –

- by the employer or 'person conducting a business or undertaking' *towards* employees, prospective employees, workers and prospective workers
- *between* fellow employees and workers
- by employees and workers *towards* prospective employees and prospective workers
- by employees and workers *towards* the employer or 'person conducting a business or undertaking'
- by the employer, 'person conducting a business or undertaking', employee or worker *towards* third parties, when the harassment occurs in connection with them being an employer, 'person conducting a business or undertaking', employee or worker.

by third parties – *towards* their employees and workers, when the harassment occurs in connection with them being an employee or worker.

Case study: Keira



Keira is an Indigenous woman who works for a law firm. One evening, Alan, who also works at the firm, sends Keira a direct message through her social media account. He asks her out to dinner on the weekend. Keira responds saying that she would like to keep their relationship professional. Alan continues to send Keira messages on social media late at night, commenting on what she wore to work that day and sending her sexually suggestive photos and emojis. Alan also sends Keira memes, which often have a sexual element and sometimes refer to Indigenous people in offensive ways. Keira feels uncomfortable at work with Alan.

Alan's behaviour is likely to be considered unlawful sexual harassment. The racial element of his conduct, and the fact that Keira is an Indigenous woman, will also be relevant to assessing his conduct under the 'reasonable person test' in the Sex Discrimination Act.

Further, as an Indigenous woman, Keira's experience of sexual harassment may be different from that of a non-Indigenous woman.



05

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Sex-based harasssment/ harassment on the ground of sex

5.1 Recognising sex-based harassment

*'The misogynist, sexist and sexual harassment, bullying and discrimination that I and my female colleagues had suffered throughout our careers had chipped away at me until I broke.'*⁴⁰

Individual, Submission 40 to Respect@Work National Inquiry

Although they sound similar, and often occur in combination, sexual harassment and sex-based harassment are different.

Harassment on the ground of sex (**'sex-based harassment'**) involves unwelcome behaviour that is sexist and demeaning in nature, but that is not necessarily sexual. As with sexual harassment, sex-based harassment is unlawful when it occurs in circumstances in which a reasonable person, aware of those circumstances, would anticipate that the person being harassed might feel offended, humiliated or intimidated. It can happen when a person is degraded, put down or disrespected because of their sex, or a characteristic generally associated with people of that sex. Workplace cultures that foster sex-based harassment and everyday sexism also provide environments where sexual harassment can thrive.

Anyone can experience sex-based harassment, regardless of their sex, gender identity, sexual orientation or intersex status. People's experiences of sex-based harassment can be affected by these factors as well as by their race, ethnicity, religious belief, disability, age, class, migration status and/or whether they are Indigenous.

Examples of behaviours that could be sex-based harassment include, but are not limited to:

- asking intrusive personal questions based on a person's sex (for example, inappropriate questions about menopause, menstruation or genitalia)
- making inappropriate comments and jokes to a person based on their sex

- displaying images or materials that are sexist (showing prejudice or discrimination on the basis of sex), misogynistic (strongly prejudiced against women) or misandrist (strongly prejudiced against men)
- making sexist, misogynistic or misandrist remarks about a specific person
- verbally abusing or insulting someone on the basis of their sex
- requesting that a person engage in degrading conduct based on their sex
- bullying, physical threats, attacks or other hateful conduct motivated by a person's sex.

5.2 What does the law say about sex-based harassment in connection with work?

The Sex Discrimination Act protects employers, 'persons conducting a business or undertaking', employees, prospective employees, workers and prospective workers from sex-based harassment when it involves specific work relationships or is otherwise connected to work.⁴¹

Sex-based harassment is any unwelcome conduct of a demeaning nature, in relation to a person being harassed, that happens because of a person's sex or a characteristic that is generally associated with people of that sex.⁴²

To 'demean' is to debase or degrade another person.

As with sexual harassment, determining whether specific conduct is unlawful sex-based harassment involves a 'reasonable person test'. This considers whether the behaviour occurred

in circumstances in which a reasonable person, aware of those circumstances, would anticipate the possibility that such conduct would offend, humiliate, or intimidate the person being harassed.⁴³ As discussed above, in this context, a reasonable person means a neutral and unbiased observer.

While the ways in which people experience certain behaviour may differ, whether such behaviour is unlawful sex-based harassment therefore depends on how a reasonable person would interpret the behaviour in that situation. Additionally, it is not an assessment of how *any* person might experience the conduct but, rather, the particular person who is subjected to the behaviour. The reasonable person is assumed to have knowledge of the personal qualities of the person being harassed.

The circumstances that a court will consider when applying the 'reasonable person test' in sex-based harassment matters include:

- a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person being harassed
- b) the relationship between the person being harassed and the person who engaged in the conduct
- c) any disability of the person being harassed
- d) any power imbalance in the relationship between the person being harassed and the person who engaged in the conduct
- e) the seriousness of the conduct
- f) whether the conduct has been repeated
- g) any other relevant circumstance.⁴⁴

Case study: Jennifer



Jennifer is a new truck driver at a mining site and is one of two women in an eight-person crew. Jennifer has walked with a pronounced limp since birth. When her team leader introduced her to the crew in her first week, she overheard someone say 'urgh, not another chick ...'.

Jennifer was 'buddied up' with Leon, a senior operator, who was tasked with training her. During her first few training sessions with Leon, he would frequently make comments such as 'I can see that you are one of those affirmative action hires', 'hope you don't drive like a girl', and 'don't think I will take it easy on you because you are a woman'. Leon would often get frustrated with her and shout at her when Jennifer was trying to learn new skills. On one occasion when Jennifer expressed her concern at Leon's treatment of her, he said 'I told you not to expect any special treatment – I am not going to baby you because you are a disabled woman, you need to harden the f\$%# up'.

Leon and some of the other truck drivers who are men would make fun of Jennifer on the two-way radio, telling each other to 'watch out boys ... Jen is coming through', and making sexist jokes about women not knowing how to drive.

During their breaks, while the crew were in the tearoom, Leon would refer to Jennifer as his 'peg-leg slave-girl' and ask her to fetch him cans of soft drink from the vending machine.

Jennifer is experiencing sex-based harassment at work. This intersects with the discrimination she is experiencing because of her disability. Leon and the other men are suggesting that she only got the job to meet affirmative action targets and not because she was competent for the role. They are also suggesting that women are less capable than men, that women cannot drive and that the function of women in a workplace is to serve men. Jennifer's disability is a relevant circumstance to be considered under the 'reasonable person test' when assessing whether she has experienced sex-based harassment at work.

As with sexual harassment discussed in section 4, these circumstances ensure that the intersection between sex and other protected attributes under discrimination law are considered when applying the 'reasonable person test'. For example, a woman with a disability may experience sex-based harassment differently.

5.3 When and where do sex-based harassment protections in connection with work apply?

Under the Sex Discrimination Act, the sex-based harassment protections relating to work apply in the same way as the sexual harassment protections relating to work (discussed above). This means that sex-based harassment does not need to happen in a workplace or 'at work' for it to be unlawful.

Sex-based harassment will be unlawful if it occurs:

- between people who have a specific work relationship, regardless of where the conduct occurs,⁴⁵ or
- in connection with a person being either an employer, a 'person conducting a business or undertaking', an employee, or a worker (which includes conduct by third parties, such as customers, clients or patients, towards these people).⁴⁶

Laws that prohibit sex-based harassment in connection with work also apply to conduct that occurs in a virtual workplace, for example, during remote working. This includes, but is not limited to, sex-based harassment using devices such as phones, computers, tablets and through social media, email, chat and virtual meets. See section 4.3(c) for further detail.

5.4 Who has relevant duties under the Sex Discrimination Act?

The Sex Discrimination Act makes it unlawful for:

- an employer or a 'person conducting a business or undertaking', or
- an employee or a worker

to engage in sex-based harassment *towards*:

- their employees or workers
- their prospective employees or prospective workers
- fellow employees or fellow workers
- prospective fellow employees or prospective fellow workers
- their employers or 'persons conducting the business or undertaking', or
- third parties with whom they come into contact in connection with their work (for example, customers, clients and patients).⁴⁷

The Sex Discrimination Act also makes it unlawful for a third party (such as a customer, client or patient) to engage in sex-based harassment *towards*:

- an employer or a 'person conducting a business or undertaking', or
- an employee or a worker

if it occurs in connection with that person being an employer, a 'person conducting a business or undertaking', an employee or a worker.⁴⁸



5.5 Sex-based harassment and the positive duty

The positive duty requires employers and 'persons conducting a business or undertaking' to take reasonable and proportionate measures to eliminate, as far as possible, sex-based harassment being engaged in:

by themselves, their employees, workers and agents, including –

- by the employer or 'person conducting a business or undertaking' *towards* employees, prospective employees, workers and prospective workers
- *between* fellow employees and workers
- by employees and workers *towards* prospective employees and prospective workers
- by employees and workers *towards* the employer or 'person conducting a business or undertaking'
- by the employer, 'person conducting a business or undertaking', employee or worker *towards* third parties, when the harassment occurs in connection with them being an employer, 'person conducting a business or undertaking', employee or worker.

by third parties – *towards* their employees and workers, when the harassment occurs in connection with them being an employee or worker.



06

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Hostile workplace environments on the ground of sex

6.1 Recognising workplace environments that are hostile on the ground of sex

Workplace environments may be hostile and intimidating to people of a particular sex, even if behaviour is not specifically directed at them or any person. This is because general actions can contribute to a workplace culture that makes people feel degraded, humiliated or offended in ways that are associated with their sex. Hostile workplace cultures foster everyday sexism and make it more difficult for workers to speak up and report relevant unlawful conduct when it occurs. In turn, hostile workplace environments are also settings in which sexual harassment and sex-based harassment can thrive.

Anyone can be subjected to a hostile workplace environment on the ground of sex, regardless of their sex, gender identity, sexual orientation, or intersex status. People's experiences of hostile workplace environments can be affected by these factors as well as by their race, religious belief, class, ethnicity, disability, age, migration status and/or whether they are Indigenous.

Examples of behaviours that could create a hostile workplace environment on the ground of sex include, but are not limited to:

- conduct involving gendered stereotypes, such as making women workers responsible for cleaning the office
- making demeaning comments about anatomical attributes or topics such as pregnancy, menstruation or menopause
- the display or circulation of obscene, sexist, pornographic or sexual photos, materials, posters or gifts
- making sexist, derogatory, suggestive or sexual comments, jokes or banter
- using sexist, derogatory, suggestive or sexual nicknames for others in the workplace
- sexual gestures or indecent exposure
- sexist, derogatory, suggestive or sexual emails, phone calls, text messages or online interactions – including the use of emojis with sexual connotations.

Depending on the circumstances, these behaviours might also amount to other relevant unlawful conduct, such as sexual or sex-based harassment.

6.2 What does the law say about hostile workplace environments?

The Sex Discrimination Act makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.⁴⁹ The prohibition is intended to apply broadly in the workplace context and ensure that workplaces are safe, respectful and inclusive for people who come into contact with them. It is not limited to physical workplaces, but may also apply in the context of online workplaces.

As with sexual and sex-based harassment, whether conduct creates a workplace environment that is hostile on the ground of sex is determined using an objective test, based on how a reasonable person would interpret the behaviour in that situation.⁵⁰ To be unlawful, a reasonable person, having considered all the circumstances, must anticipate the possibility of the relevant conduct being offensive, intimidating or humiliating to a person of a particular sex, because of their sex or a characteristic that is generally associated with people of that sex.⁵¹ For example, the conduct could include displaying obscene or pornographic materials of women in a workplace dominated by men. This could be offensive to women on the basis that the images perpetuate a degrading view of women. It could also include comments about men not requiring parental leave because 'children only need their mothers', which may be offensive to men.

Conduct does not need to be directed at a particular person for it to create a hostile workplace environment. Rather, the conduct will be unlawful if it is *reasonably anticipated* that the conduct *might* result in a workplace environment being offensive, intimidating or humiliating to a person of a particular sex.

A person can engage in conduct that creates a hostile workplace environment for someone else, even if they did not intend to do so.

The circumstances that a court will consider when applying the 'reasonable person test' in hostile workplace environment matters include:⁵²

- a) The seriousness of the conduct:** The more serious the conduct, the more likely it is to be unlawful. This will be particularly relevant when a person complains about a single action.
- b) Whether the conduct was continuous or repetitive:** Repetition is not required for conduct to result in a hostile workplace environment, as a single action can still be unlawful. Repetition may be relevant, however, where one instance of the conduct may be perceived as less serious in nature but, when repeated or continuous, has significant impacts. It may also be relevant if the effect of the conduct is ongoing, such as displaying obscene or pornographic images.
- c) The role, influence or authority of the person engaging in the conduct:** If senior staff engage in inappropriate behaviour themselves, it is likely to be viewed more seriously, particularly because of power

imbalances, and because it may be seen as condoning and encouraging such behaviour in the workplace environment. This factor also recognises that people in positions of authority have greater control or influence over a workplace environment than others. As a result, there are often more actions that they can take to prevent, or stop, behaviour that contributes to a hostile work environment. Senior staff may also be found to have subjected others to a hostile workplace environment by inaction if they see junior workers engaging in inappropriate conduct and do not intervene.⁵³

- d) Any other relevant circumstance:** This could include relevant aspects of the workplace environment or culture in which the conduct took place. Examples include the type of work undertaken in the workplace; whether the workplace is dominated by people of one sex; or whether there have been previous incidents of harassment and discrimination in the workplace.⁵⁴

Case study: Sanjiv and Josh

Sanjiv and Josh are the only dance instructors who are men at their ballet academy.

Sanjiv and Josh's manager, Megan, excludes them from team discussions and social activities because they are men and she 'has no interest in their views.' Megan and the other instructors regularly hide women's underwear or pornography in Sanjiv and Josh's bags 'as a joke.' Megan also refuses to provide Sanjiv and Josh with changing facilities for men (although there are changing facilities for women).

Megan's conduct could be unlawful conduct that creates a hostile workplace environment for Sanjiv and Josh. Megan is engaging in conduct in a workplace where Sanjiv and Josh work and they are in the workplace at the same time as the conduct occurs. A reasonable person may anticipate the possibility that Megan's conduct would result in a workplace that is offensive, intimidating or humiliating for men, because of their sex. Megan's seniority and the seriousness of the conduct are likely to be relevant considerations.



6.3 Who has relevant duties under the Sex Discrimination Act?

Under the Sex Discrimination Act, it is unlawful for ‘a person’ to subject another person to a workplace environment that is hostile on the ground of sex, if they engage in relevant conduct in a workplace where *one or both of them work*.⁵⁵

This means that a broad category of people must not engage in this behaviour, including employers, ‘persons conducting a business or undertaking’, employees, agents and workers, as well as third parties such as customers, clients or patients.

A person who engages in conduct that creates a hostile workplace environment could be a worker who engages in relevant conduct in their *own* workplace, or they may be a third party who engages in relevant conduct in *someone else’s* workplace. For example, a woman could be subjected to a hostile workplace environment by the behaviour of a male client who attends her workplace and refuses to engage with her, or the other women who work

there, on the basis that ‘women are airheads’ and who makes derogatory remarks about their physical appearance. It is not relevant that the person engaging in the conduct is a client and is not working at the time, because he is engaging in the conduct in the woman’s workplace.

Depending on their level of seniority and authority, senior staff may also be liable for contributing to a hostile workplace environment – such as if they fail to intervene or act when they observe a client engaging in relevant unlawful conduct as above – or if they fail to intervene when they see junior workers engaging in hostile behaviour.⁵⁶

6.4 Where does conduct that creates a hostile workplace environment need to occur to be covered by the law?

To be unlawful under the Sex Discrimination Act, conduct that subjects another person to a hostile workplace environment on the basis of sex must occur ‘in a workplace’. A workplace is any place where work is carried out and includes any place where a worker goes, or

Case study: Ruby

Ruby is a salesperson in a car dealership, selling tint and paint protection. She is the only young woman employed by the business.

Her manager, Tom, frequently shows the salespeople sexualised images and memes on his phone and loudly discusses intimate details of his personal life when at work.

One day, Ruby and Tom drive to visit a potential customer at their home, to try to sell a vehicle and tint to them. As they are walking up to the customer’s front door, Tom encourages Ruby to ‘use her assets’ to help to ‘make a sale’.

Tom’s conduct could be unlawful conduct that creates a hostile workplace environment for Ruby. Tom is engaging in conduct in a workplace where Ruby works, and Ruby is in the workplace at the same time as the conduct occurs. This includes the conduct that occurs when Tom and Ruby are at the potential customer’s home, which is also Ruby’s ‘workplace’. A reasonable person could anticipate the possibility that Tom’s conduct would result in a workplace that is offensive, intimidating or humiliating for women by reason of their sex. Tom’s seniority and the repetitive nature of his conduct are likely to be relevant considerations.



is likely to be, while at work.⁵⁷ It includes a physical workplace (such as an office) and online workplace environments (such as conduct occurring over work emails or during online meetings). It also covers a worker's usual place of work (such as a school), as well as a place where a worker is undertaking work at another location (such as a campsite when supervising a school camp or when providing a service at a client's home or office).

6.5 When does conduct that creates a hostile workplace environment need to occur to be covered by the law?

A person may experience a hostile workplace environment from conduct they encounter, hear or witness while in their workplace. A person who experiences a hostile workplace does not always need to be in the workplace *at the same time as* the person who engages in the relevant conduct, however, for the conduct to be unlawful.

The conduct may still be unlawful if a person enters the workplace *after* the relevant conduct has occurred.⁵⁸

6.6 Hostile workplace environments and the positive duty

The positive duty requires employers and 'persons conducting a business or undertaking' to take reasonable and proportionate measures to eliminate, as far as possible, workplace environments that are hostile on the ground of sex.⁵⁹

This includes preventing relevant conduct from being engaged in by themselves, their employees, their workers and their agents: both *towards* each other and *towards* third parties who might be in the workplace at the same time or after the conduct occurs.⁶⁰

Organisations and businesses must also take reasonable and proportionate measures to prevent, as far as possible, their employees and workers from *experiencing* conduct that results in a hostile workplace environment on the ground of sex from third parties in the workplace, such as customers, clients and patients.⁶¹

Case study: Amira

Several professional football players choose to display pornographic images, some of which include violent slurs about women, in the men's locker room of their club. The players believe that the locker room is private and do not expect other people to see the images.

The owners of the football club organise a deep clean of the facilities ahead of the new season and several cleaners, who are all women, are required to clean the locker room, including Amira.

The display of images could be conduct that creates an unlawful hostile workplace environment for Amira. The players engaged in the conduct in her workplace and she was in the workplace after the conduct occurred. A reasonable person could anticipate the possibility that the players' conduct in putting up the images would result in a workplace that is offensive, intimidating or humiliating for women by reason of their sex. It does not matter that the players did not anticipate that any women, including Amira, would be affected by their conduct, or that any women would even see the images.





07

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Victimisation

7.1 Recognising victimisation

*'In retail and fast food, our members are often victimised as a result of making a complaint. They're the ones who are demoted or transferred or made to work on the other side of the city they live in just to get away from the perpetrator who is still employed.'*¹⁶²

Consultation, Melbourne, Respect@Work National Inquiry

People should be able to stand up for their legal rights, or help others do so, without being threatened or treated badly in return.

Victimisation involves retaliatory action, or the threat of such action, against a person because they have asserted, or intend to assert, their rights under the law, or because another person thinks that they have. A person can also be victimised if they help someone else to assert their rights (for example, by being a witness). Victimisation happens when a person is treated badly or subjected to a detriment. People are often victimised after they call out or make a report about experiencing or witnessing unlawful conduct.

Anyone can experience victimisation, regardless of their sex, gender identity, sexual orientation or intersex status. People's experiences of victimisation can be affected by these factors as well as by their race, religious belief, class, ethnicity, disability, age, migration status and/or whether they are Indigenous.

Examples of behaviour that could amount to victimisation in a work context include, but are not limited to:

- demoting or threatening to demote someone because they have made a complaint, or intend to make a complaint, of sex discrimination (for example, by asking for information about how to make a complaint)
- ostracising or excluding a worker in the workplace, or refusing them overtime shifts, because they appeared as a witness in support of a colleague who made a complaint of sex-based harassment

- denying a promotion to a person because they reported that someone in the workplace sexually harassed them
- moving a worker who has made a complaint to another worksite, or a non-client-facing role (without first checking if they would like to move)
- reducing or threatening to reduce someone's shifts or salary because they made a complaint (for example, offering fewer shifts to a casual worker because they are seen as a 'troublemaker')
- dismissing, or threatening to dismiss, someone who has made a complaint
- intimidating or threatening a worker to prevent them from making a complaint
- refusing to purchase from, or supply goods to, an independent contractor, because they made a complaint.

Unfortunately, it is common for people to be treated unfairly because they have reported relevant unlawful conduct. The Respect@Work National Inquiry heard from many people that, after they made a report about being sexually harassed, they were subjected to increased scrutiny or micromanagement. Others were ignored by management, moved or taken off projects, denied development or promotion opportunities, dismissed for vague reasons, or not given any more shifts.

7.2 What does the law say about victimisation?

Under the Sex Discrimination Act, it is unlawful to commit an act of victimisation against another person.⁶³ Victimisation is both a civil and a criminal offence, punishable by up to three months' imprisonment.⁶⁴ Victimisation gives rise to a separate additional complaint under discrimination law, which can be made to the Commission under the civil prohibition on victimisation.⁶⁵ Related acts of victimisation are also covered by the positive duty (discussed in section 7.4 below) and organisations and businesses must take reasonable and proportionate measures to eliminate them, as far as possible.⁶⁶

Under the Sex Discrimination Act, victimisation occurs when a person subjects, or threatens to subject, another person to any detriment because they have done, or intend to do, any of the following:

- a) made a complaint under the Sex Discrimination Act or the *Australian Human Rights Commission Act 1986* (Cth) (**Australian Human Rights Commission Act**)
- b) commenced legal proceedings under the Sex Discrimination Act or the Australian Human Rights Commission Act against any person
- c) provided any information or documents to someone exercising or performing any power or function under the Sex Discrimination Act or the Australian Human Rights Commission Act
- d) attended a conciliation conference in relation to a complaint under the Sex Discrimination Act or the Australian Human Rights Commission Act
- e) appeared as a witness in a legal proceeding relating to a complaint under the Sex Discrimination Act or the Australian Human Rights Commission Act
- f) reasonably asserted their rights, or someone else's rights, under the Sex Discrimination Act or the Australian Human Rights Commission Act
- g) made an allegation that someone has breached Part II of the Sex Discrimination Act, or
- h) made an allegation that someone has breached the positive duty in the Sex Discrimination Act.⁶⁷

The victimisation provisions also apply if a person believes that the other person has done, or intends to do, any of the acts referred to above and subjects them to a detriment on that basis.⁶⁸

7.3 Who has relevant duties under the Sex Discrimination Act and when and where do victimisation protections apply?

Under the Sex Discrimination Act, it is unlawful for 'a person' to commit an act of victimisation against another person.⁶⁹ This is a broad provision. In a work context, it means that an employer, a 'person conducting a business or undertaking', as well as their agents, employees and workers, are prohibited from victimising one another or any third party. It also prohibits any third party from victimising an employer, a 'person conducting a business or undertaking', an employee or a worker.

As the focus of victimisation is whether a person has been subjected to any detriment, and the reason for any retaliatory action, it is not limited to acts committed in a workplace or while 'at work'.

7.4 Victimisation and the positive duty

The positive duty requires employers and 'persons conducting a business or undertaking' to take reasonable and proportionate measures to eliminate, as far as possible, acts of victimisation that relate to complaints, proceedings, assertions or allegations about:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex.⁷⁰

This is the other conduct covered by the positive duty. This means that organisations and businesses must take reasonable and proportionate measures to prevent, as far as possible, themselves, their employees, their workers and their agents from engaging in these particular acts of victimisation, including towards each other.⁷¹

Organisations and businesses must also take reasonable and proportionate measures to prevent, as far as possible, their employees and workers from experiencing these particular acts of victimisation from third parties.⁷²

For example, organisations and businesses must take measures to prevent their employees or workers from being subjected to a detriment, or threatened with detriment, by third parties, such as friends or associates of a worker who may be facing allegations of engaging in sexual harassment in relation to a fellow worker.⁷³



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What are the drivers
and risk factors for
relevant unlawful
conduct at work?

08 What are the drivers and risk factors for relevant unlawful conduct at work?

Organisations and businesses should understand the drivers (or underlying causes) and risk factors that lead to relevant unlawful conduct within their workplace and involving their workers.

Drivers and risk factors within any organisation or business:

- enable relevant unlawful conduct to occur
- enable people to target some groups over others
- influence the nature, frequency and severity of relevant unlawful conduct
- influence whether people report an incident and access support
- influence how people respond to relevant unlawful conduct.

Research into workplace sexual harassment and sex discrimination has grown over the past 30 years.⁷⁴ Significant reviews of Australian workplaces, including the Respect@Work National Inquiry,⁷⁵ national surveys⁷⁶ and other Australia-wide research,⁷⁷ have found clear evidence that certain societal factors play a key role in driving sexual harassment and sex discrimination. These key drivers are:

- power imbalances
- gender inequality
- intersecting forms of discrimination and exclusion
- lack of accountability.

In addition, specific workplace and industry factors can increase the risk of some forms of relevant unlawful conduct occurring.

These drivers and risk factors are set out below.

The Guidelines provide useful information on how to prevent, counteract and address the impacts of these drivers and risk factors in practice through its four Guiding Principles, seven Standards and example actions.

8.1 Power imbalances

Power – including power imbalances and the misuse of power – is one of the primary drivers of relevant unlawful conduct. Power imbalances exist within workplaces (evident in hierarchies and workplace structures) and within broader society, resulting in gender inequality and intersectional discrimination.

Power imbalances are a driver of relevant unlawful conduct because they create a context where someone who holds power gains a sense of entitlement, while others may hold a fear of challenging or speaking out against that power.

Research included in the Respect@Work Report indicates that a rigidly hierarchical workplace structure can increase the risk of sexual harassment.⁷⁸ Hierarchical structures can lead to power imbalances which make junior staff more vulnerable to harassment and less likely to report it.⁷⁹ This can be particularly prominent in hierarchical organisations such as the police and the Australian Defence Force and in professions such as the medical and legal professions.⁸⁰

Power is also complex and runs in multiple ways, with the misuse of power not always limited to those who are in more senior positions.

While the removal of power imbalances may not be possible because of the structure of an organisation, consideration must be given to reducing the effects of power imbalances to create a safe, respectful and inclusive workplace environment. In such an environment, workers can feel confident to raise issues when they do occur, regardless of the level of seniority of the person engaging in the unlawful conduct. This includes ensuring that there are safe avenues for reporting the conduct of leaders and managers, and demonstrating that leaders and managers will be held accountable for their actions.

*'[T]here's still this mindset within the older cohort of our executive within the [Parliamentary department] that we are meant to be providing a service at any cost. So irrespective of how the Members [of Parliament] behave, irrespective of what they do, you still need to be professional and provide that service to them.'*⁸¹

Interview 88, Set the Standard Report

8.2 Gender inequality

*'As a woman [working in the mining industry], I have, and my female colleagues have, been exposed to pornography ... exclusionary language constantly being used, no [maternity] leave policy ... I worked so hard to get this job and now I hate it and just feel like I'll never fit in.'*⁸²

Individual, Submission 167 to Respect@Work National Inquiry

Gender inequality is a term used to describe the unequal distribution of resources, opportunity and value afforded to people in society because of their gender.⁸³ Gender inequality is evident when men are valued more than women and gender-diverse people in social, economic and public life.

For example, harmful and traditional attitudes towards gender in a workplace and in society may contribute to the targeting of women by colleagues in industries that are considered 'men's work'; the penalisation of people who take parental leave; and the 'gender policing' of workers who are seen to deviate from traditional gender norms.⁸⁴

Gender inequality is a key driver of sex discrimination, sexual harassment, sex-based harassment, and hostile workplace environments on the basis of sex.⁸⁵

Gender inequality is reflected in men's dominance in leadership and decision-making in almost all industries, as well as in key economic and social indicators such as the gender pay gap, the unequal sharing of unpaid caring responsibilities and high rates of gender-based violence. For example, women:

- experience a gender pay gap of 22.8% compared to men⁸⁶, and
- are under-represented in senior leadership positions compared to men (representing just 19.4% of CEOs and 32.5% of key management personnel).⁸⁷

Caring for children is the most common reason that women in Australia are unavailable to work or work more hours.⁸⁸

Women's unequal status reinforces the message that women are less valuable or worthy of respect in the workplace and creates an environment where disrespect and discrimination are accepted, trivialised or ignored.

In the 2021–2022 financial year, the Commission received 597 complaints relating to the Sex Discrimination Act. The majority (72%) of these complaints were made by women.⁸⁹ These complaints include discrimination related to sex, gender identity, marital or relationship status, pregnancy, breastfeeding and family responsibilities.⁹⁰

Gender inequality can also influence the culture and characteristics of a workplace or industry, which can in turn increase the risk of relevant unlawful conduct. Examples of these characteristics and cultural factors include: workplaces or leadership positions that are dominated by men; gender-segregated workplaces; a lack of access to appropriate facilities for women and gender-diverse workers; expectations that workers will perform certain jobs because of their gender; or a culture of sexist, misogynist, misandrist and/or transphobic jokes.

08 What are the drivers and risk factors for relevant unlawful conduct at work?

The *Time for respect: Fifth national survey on sexual harassment in Australian workplaces (National Survey 2022)* demonstrated that women (41%) and non-binary workers (67%) are more likely than men (26%) to record that they have been sexually harassed at work. According to the survey data, most harassers are men. 77% of people who recorded being sexually harassed at work were harassed by a man. 91% of women and 55% of men were harassed by men.⁹¹

(a) Rigid gender roles

Gender roles are beliefs and expectations about what is ‘normal’ in relation to gender. Rigid gender roles dictate that people should behave in certain ways according to their gender. Examples include that men should dress, think, speak or act in a certain way and women in a different way. They also include assumptions about the type of industry in which a person should work or the skills or job that they should have, based on their gender. Rigid gender roles are often the reason why some workplaces or industries are either dominated by men (like transport and construction)⁹² or women (like education and health care).⁹³ Rigid gender roles particularly disadvantage women. For example, men hold most senior management and leadership roles, even in women-dominated industries.

Rigid ideas about gender roles also explain why some people experience relevant unlawful conduct at higher rates than others. For instance, when people do not conform to expected gender roles, they are more likely to be marginalised or discriminated against. LGBTIQ+ people experience workplace sexual harassment and discrimination at higher rates, particularly those who are perceived to transgress traditional gender norms.⁹⁴

The review *Proud, Visible, Safe: Responding to Workplace Harm Experienced by LGBTI Employees in Victoria* Police conducted by the Victorian Equal Opportunity and Human Rights Commission found that homophobia, transphobia, and hypermasculine and heteronormative cultural expectations are key drivers of discrimination and harassment towards LGBTIQ+ workers.⁹⁵

(b) Discriminatory community attitudes and norms

Gender inequality is reflected in community attitudes and norms. For example, 2021 data from the *National Community Attitudes towards Violence against Women Survey* found that, of those surveyed:⁹⁶

- 9% agreed that men make better political leaders than women
- 10% agreed that men make more capable bosses
- 15% saw no harm in telling sexist jokes about women when they are among men
- some agreed that receiving catcalls (13%) or being persistently pursued without consent (14%) is flattering to women
- 10% agreed that, if a woman is sexually assaulted while she is drunk or affected by drugs, she is at least partly responsible.

Organisations and businesses are not required to change an individual’s set of attitudes and beliefs. They do have a responsibility, however, to set expectations about appropriate workplace behaviour and create a positive workplace culture which is safe, respectful, inclusive and diverse.

Remember: Addressing harmful attitudes and advancing gender equality in the workplace is central to eliminating relevant unlawful conduct.

8.3 Intersecting forms of discrimination and exclusion

Some forms of relevant unlawful conduct, such as sexual harassment, disproportionately affect some groups of workers. For example, women, LGBTIQ+ people, Aboriginal and Torres Strait Islander peoples, young people, people with disability, and culturally and racially marginalised people experience workplace sexual harassment at significantly higher rates than other groups of people (see section 9, 'Who is most at risk?').

An intersectional approach helps us to understand why this happens.

People can be discriminated against because of different attributes. When people experience multiple and intersecting forms of discrimination and harassment because of who they are (for example, because of their race, gender, disability, gender identity and/or sexual orientation), this is called **intersectional discrimination**.

Intersectionality is a framework for identifying and analysing the dynamics of power and inequality.⁹⁷ An intersectional approach acknowledges that workplace inequality and resulting harms are never the result of a single factor. Rather, these harms arise as the result

of intersecting power relations, experiences and discrimination that, combined, operate across multiple layers of a person's identity. These layers may include their sex, race, ethnicity, disability, LGBTIQ+ status, gender, age, migration status, or whether they are Indigenous – that may put them at a higher risk of experiencing discrimination.⁹⁸

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In 2017, Diversity Council Australia released the Capitalising on Culture and Gender in ASX Leadership report, which analysed the likely cultural origins of all ASX leaders. The report revealed that 2.5% of all ASX directors were culturally diverse women (defined as women without Anglo Celtic origins), compared to 5.7% of women with Anglo Celtic origins.⁹⁹

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Intersectional factors can exacerbate a person's experience of relevant unlawful conduct, as they may be forced to endure behaviour such as sex discrimination and sexual harassment in combination with other discriminatory behaviours, such as race, age or disability discrimination.¹⁰⁰

Intersectional discrimination can also influence how individuals and organisations respond to reports (such as whether someone is believed or victimised) and increase barriers to reporting and seeking support.

*'... as women with disabilities, we know that our experiences of sexual harassment overlap with our experiences of harassment, abuse, discrimination and workplace bullying on the basis of our disabilities.'*¹⁰¹

Women with Disabilities Victoria, Submission 312 to Respect@Work National Inquiry

08 What are the drivers and risk factors for relevant unlawful conduct at work?

Consider – do the workers in a particular organisation or business have multiple intersecting identities that may exacerbate their experiences of discrimination and harassment? For example, are they a woman or gender diverse, young, from a racial minority, and/or do they have a disability?

Diversity and inclusion in workplaces means ensuring that **all** workers (regardless of their ethnicity, cultural background, disability, gender identity, sexual orientation, age, intersex status) feel and are valued and respected in the workplace.

Diversity refers to the mix of people in an organisation - meaning all the differences between people in how they identify professionally and personally.

Inclusion is about creating a workplace environment that enables the mix of people to work together effectively to improve performance and wellbeing.

Diversity and inclusion require organisations and businesses to address the power imbalances that may prevent marginalised workers from accessing the same opportunities and resources as other workers. They also require organisations and businesses to ensure that marginalised workers can meaningfully contribute and add value to the organisation. They require the creation of a safe and respectful workplace culture.

8.4 Lack of accountability

Relevant unlawful conduct thrives in environments where there is a lack of accountability for disrespectful and discriminatory behaviour. A lack of accountability sets the tone within a workplace, creating a culture in which relevant unlawful conduct is accepted and unchallenged.

Lack of accountability is often found in workplaces where there is:

- a workplace culture that accepts or tolerates disrespectful behaviour
- a workplace in which authority figures perpetrate or tolerate relevant unlawful conduct
- a lack of management and worker awareness of relevant unlawful conduct
- a poor or non-existent reporting process
- worker fear around reporting, and/or a lack of trust in the reporting process
- a failure to take appropriate and proportionate prevention and disciplinary measures, and to provide appropriate support
- a lack of transparency regarding the consequences for relevant unlawful conduct
- overlapping or unclear responsibilities and lines of reporting, which decrease and dilute accountability
- protection of 'high value' workers and/or perceived rewards (for example, a promotion) for people who engage in relevant unlawful conduct
- organisational reputation being prioritised over worker safety.

For example, in the Respect@Work National Inquiry, the Commission noted 'examples of workplace sexual harassment being justified or excused on the basis that it was acceptable for men to behave in this way, or that the harassers were "from a different generation" and so "don't know any better"'.¹⁰²

Our Watch identify that excusing or minimising violence against women and sexual harassment, or trying to justify this behaviour, is a key driver of gender-based violence and sexual harassment.¹⁰³

A lack of transparency, the absence of values of openness and accountability, and negative perceptions of ‘whistleblowers’ and people who raise concerns can also contribute to victimisation. The Respect@Work National Inquiry heard that it ‘was common for blame to be shifted to the victim of the workplace sexual harassment, which sent a clear message that the workplace condoned the behaviour’.¹⁰⁴

Sexually harassing behaviour is also less likely to occur when it is not accepted by authority figures.¹⁰⁵

8.5 Workplace and industry factors that increase risk

Specific workplace factors, including the nature of the work and workplace, can increase the risk of some forms of relevant unlawful conduct occurring.

An organisation or business will be better placed to eliminate relevant unlawful conduct from their workplace if they are able to identify and address these workplace factors and their potential to increase the risk of relevant unlawful conduct occurring.

These workplace factors include:

- **A lack of diversity** – For example: the workforce and/or the leadership of the workforce being dominated by one gender, age group, race or ethnicity; roles within the workplace being segregated according to gender; workplace culture imposing traditional gender roles and expectations; networking events being held that exclude some groups (for example, work lunches at men’s clubs); structural barriers functioning to prevent access to roles or opportunities for some people more than others.
- **Unclear and inconsistent standards of behaviour** – For example: a lack of workplace policies or codes of conduct that specify expected standards of behaviour; if relevant workplace policies exist, a lack of enforcement when a worker breaches them; policies regarding relevant unlawful conduct not being enforced consistently for

leadership or workers perceived to be of higher value; workplace policies and codes of conduct not being easily accessible by, or regularly communicated to, all workers; an absence of adequate processes to report relevant unlawful conduct, or workers not being aware of these processes; a lack of education and understanding about relevant unlawful conduct; or a failure to collect or report on data in relation to relevant unlawful conduct.

- **Poor workplace culture** – For example: general impoliteness, disrespect or discourteous behaviour being normalised in a workplace culture; lower level (but still harmful) behaviours being accepted in a workplace culture (for example, small acts of disrespect and instances of inequality are ignored) and reports of inappropriate behaviours not taken seriously. This conduct can escalate to other forms of harassment, discrimination and violence.
- **Workplace dynamics** – For example: prioritising optics or organisational reputation over worker safety and wellbeing; high pressure, competitive and high stakes environments; high staff turnover; a ‘customer is always right’ mentality; protecting workers considered to be ‘high value’ (those who make a lot of money, hold relationships with valuable clients, or are in senior positions); a workplace culture of fear of losing one’s job or experiencing consequences for making a report. This could also include hierarchical structures and leaders with unquestioned authority.
- **Social conditions of work** – For example: the blurring of work and personal lives, which could be the result of long irregular work hours; travel and overnight stays; fly-in-fly-out commitments. This could also include where there is an expectation to attend conferences, social events, or other events where alcohol is served, as part of work duties.

08 What are the drivers and risk factors for relevant unlawful conduct at work?

- **Employment structures, conditions and systems** – For example: large numbers of the workforce on temporary or short-term contracts, freelance or other insecure arrangements; worker requirements to engage with third parties such as customers, clients or patients; regular off-site working. This could also include workplaces that are inherently sexualised or where the business model is centred around ‘sex appeal’ (such as some nightclubs and bars).
- **Physical workplace environment** – For example: workplaces being isolated and remote; a lack of appropriate facilities; poorly lit areas; confined spaces where workers cannot maintain personal space; areas with limited natural surveillance; areas where sexualised, sexist or heterosexist materials¹⁰⁶ are on display (for example, posters, screensavers, calendars).

Each of these factors can increase the likelihood, frequency or severity of one or more forms of relevant unlawful conduct. They can also amplify the harmful impacts on the person experiencing the unlawful conduct and prevent people from reporting incidents.

Organisations and businesses should also consider the specific industry characteristics that can contribute to relevant unlawful conduct within their workplace.¹⁰⁷ The nature of some industries can create unique risk factors or increase the likelihood that workers will experience relevant unlawful conduct.

Examples of industry-specific risk factors include:

- high interaction with third parties (such as customers) in retail, accommodation and food services
- greater levels of short-term and insecure work in arts and recreation
- a disproportionate number of men in workplaces in mining and electricity, water and waste services
- rigid hierarchies and dependence on professional connections for career progression in law and medicine
- off-site work and home visits in health and social services
- high-pressure work and expectations of long work hours in Australian parliaments.

‘... I have witnessed and experienced ass grabbing, inappropriate touching of the inner thigh and other body parts and attempts to kiss women who are not willing or consenting to do so. It is a disgusting culture that has been created by the male managers within this company ... it’s made it ok for other managers below them to act the same way.’¹⁰⁸

Individual, Submission 11 to Respect@Work National Inquiry



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Who is most at risk?

*'I was sexually assaulted by a senior management colleague at a staff function ... He said he needed to show me what a real man was so he could "unlesbian" me.'*¹⁰⁹

Individual, Submission 7 to Respect@Work National Inquiry

While anyone can experience relevant unlawful conduct in the workplace, we know that some workers are more likely to be targets for certain types of conduct than others. For example, the data in the box below illustrates how some people are more likely to experience sexual harassment than other people. Organisations and businesses should understand who is most at risk in order to eliminate relevant unlawful conduct in their workplace in an effective way.

Research indicates that culturally and racially marginalised workers, including migrant workers, may also experience sex discrimination and sexual harassment in the workplace at a higher rate than others. This is particularly the case for those who are on temporary visas and employed under 'precarious' or 'insecure' arrangements such as cash-in-hand or short-term employment contracts.¹¹¹

A survey conducted by the Migrant Workers Centre on the experiences of migrant workers in the job market highlighted that nearly half of all respondents reported feeling unsafe at work.¹¹²

The National Survey 2022 found that, in the previous five years:¹¹⁰

- women (41%) and non-binary workers (67%) reported experiencing sexual harassment at higher rates than men (26%)
- young people aged between 15–17 (47%) and 18–29 (46%) reported experiencing workplace sexual harassment at higher rates than other age groups (less than 40%)
- people with an intersex variation were more likely to report experiencing workplace sexual harassment (70%, compared to those without such a variation which was 33%)
- people who identified as gay (40%), bisexual (54%), lesbian (60%), or another sexual orientation (50%) reported experiencing sexual harassment at much higher rates (compared to 31% of those who identified as straight or heterosexual)
- people who identified as Aboriginal and Torres Strait Islander were far more likely to report experiencing workplace sexual harassment (56%, compared to 32% of those who did not identify as Aboriginal and Torres Strait Islander)
- people living with disability reported experiencing sexual harassment at higher rates (48%, compared to 32% without a disability).

*'I work with women who have just arrived in Australia ... and they're working in regional Australia ... in meat factories, with 99% males in the workforce, and are going to work with minimal, very basic English skills ... they're wearing head scarves, they're battling the sexism, the sexual harassment, the racism, and every other form of 'ism' that they can encounter in that [environment].'*¹¹³

Consultation, Adelaide Respect@Work National Inquiry

Remember: Relevant unlawful conduct can be closely connected with attitudes of entitlement and other forms of discrimination. To ensure workplaces are safe for at-risk workers, organisations and businesses should address harmful attitudes and beliefs, and advance gender equality, diversity and inclusion. See the Guidelines for further information.



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How common is
relevant unlawful
conduct?

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Relevant unlawful conduct in the workplace, in some form, is common and widespread – it occurs in all workplaces and industries.

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For example, over three quarters of people in Australia aged 15 or older (77%) report that they have been sexually harassed at some point in their lifetime.¹¹⁴ Additionally, 1 in 3 people in Australia report having experienced sexual harassment at work in the previous five years.¹¹⁵

Relevant unlawful conduct is often experienced in combination. In the Respect@Work Report, many people described experiences of being sexually harassed in addition to experiencing sex-based harassment, victimisation and being subjected to hostile workplace environments.¹¹⁶

This trend is also consistent with complaints received by the Commission. It is common for complaints of sex discrimination to include discrimination related to victimisation, sexual harassment, sex-based harassment and other discrimination in combination.

While all forms of relevant unlawful conduct can occur in any workplace, there is more data available in relation to sexual harassment, with this data indicating that this form of relevant unlawful conduct is extremely common.

The National Survey 2022 showed that workplace sexual harassment is more common in certain industries, including:¹¹⁷

- information, media and telecommunications (64% of workers reported experiencing workplace sexual harassment in the previous five years)
- art and recreation services (44% in the previous five years)
- electricity, gas, water and waste services (40% in the previous five years)
- retail trade (40% in the previous five years)
- accommodation and food services (34% in the previous five years).

In most of these industries, rates of sexual harassment appear to be disproportionately high relative to how much of the overall workforce they represent. This demonstrates the importance of considering risk factors that are specific to, or characteristic of, the particular industry or industries in which workplaces operate.

As noted in section 8, power imbalances, and other particular workplace factors can create risks for relevant unlawful conduct to occur in the workplace. These factors can create unsafe work environments and increase the vulnerability of some workers over others.

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The National Survey 2022 indicates that women are more likely to have been sexually harassed in nearly all industries, for example:¹¹⁸

- art and recreation services (72% of women compared to 14% of men)
 - electricity, gas, water and waste services (71% of women compared to 30% of men)
 - mining (62% of women compared to 25% of men)
 - agriculture, forestry and fishing (47% of women compared to 17% of men)
 - administrative and support services (34% of women compared to 12% of men)
 - construction (29% of women compared to 8% of men).
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What are the impacts?

Relevant unlawful conduct can cause physical and psychological harm to the person at whom it is directed, as well as others who witness the conduct. It can also negatively affect an impacted person's family and friends, the organisation or business and the community more broadly. Relevant unlawful conduct can also negatively impact the person engaging in the behaviour.

11.1 Impacts on the person experiencing the conduct

Health and wellbeing impacts	Employment and career development impacts	Financial impacts
• stress, anxiety, depression and post-traumatic stress disorder (PTSD) • loss of self-esteem, self-confidence and ability to trust others • feelings of social isolation • illness as a result of stress, including cardiovascular disease, immune deficiency and some cancers • physical injury as a result of physical violence.	• increased use of sick leave and annual leave to avoid perpetrators • avoiding training opportunities and social events, which may inhibit building social networks and career progression • being overlooked for promotion • losing potential mentors and champions • resigning • leaving their industry altogether.	• lost income as a result of absences and taking leave • periods of unemployment • retraining following a change of sector, position or role • costs associated with accessing health and justice systems.

*'The outcome of all of this for me was catastrophic. My health was destroyed; I lost my job and my income and everything I had ever studied and worked for; my family was greatly affected; and my life has never recovered from the betrayal and injustice.'*¹¹⁹

Individual, Submission 180 to Respect@Work National Inquiry

*'Once, I was a confident, competent, ambitious scientist with a bright career ahead of me. Now I have post-traumatic stress, depression and anxiety. I don't have a shred of confidence or ambition left. I am not in regular work and on many days just leaving the house is beyond me. I avoid public spaces and events in fear of encountering one of my persecutors. I am a limited and diminished version of what I once was.'*¹²⁰

Individual, Submission 40 to Respect@Work National Inquiry

11 What are the impacts?

Every person is different and so are their experiences of relevant unlawful conduct. A range of factors can influence how harmful the conduct will be on a person, including:

- the nature and seriousness of the conduct that they experienced
- the amount of time since the incident/s occurred
- their experiences of intersectional discrimination or disadvantage (see section 8.3 for further information)
- whether the person engaging in the conduct is someone who can influence their job security or career progression
- how their co-workers, employer or organisation respond to their report or complaint
- the availability of appropriate support during and/or after an incident.

The harmful impacts of relevant unlawful conduct are minimised if an organisation or business puts appropriate responses and supports in place. Conversely, organisations and businesses can cause further harm to people who have experienced relevant unlawful conduct if responses and supports are inappropriate.¹²¹

Organisations and businesses should adopt a person-centred and trauma-informed approach to the prevention of, and response to, relevant unlawful conduct. For more information, see the Guidelines.

*'My employers – mostly female – took physical harassment seriously, but laughed off the verbal and low-level physical harassment saying it was 'just men'. It was stressful and made me feel angry, frustrated and occasionally frightened.'*¹²²

Individual, Submission 175 to Respect@Work National Inquiry

The Respect@Work National Inquiry heard that repeated or ongoing 'low level' sexual harassment can still have a serious impact on those targeted.¹²³

11.2 Impacts on others, workplaces and the wider community

Relevant unlawful conduct can also have devastating impacts on other individuals, workplaces, organisations and businesses and the broader community. There are also significant consequences for people who engage in the conduct.

Witnesses, colleagues, friends and family	Workplaces, businesses/ organisations	The community	People who engage in harmful behaviour
- feeling powerless - frustration at inadequate responses from organisation/ business - experiencing victimisation and bullying if they stand up for people who experienced the conduct - vicarious trauma - financial difficulties as a result of supporting the person who experienced the conduct.	- reputational damage - decreased productivity - higher staff turnover and increased absenteeism - negative workplace culture impacting organisational performance - expenses related to compensation claims and legal costs.	- flow-on impacts in tight-knit communities - reinforcement of harmful attitudes and stereotypes - implications for diversity and inclusion - contributions to the gender pay gap.	- reputational and career damage, including difficulty securing future employment - financial impacts, for example, conciliation or court fees - dismissal from job or other disciplinary action.

Economic modelling conducted by Deloitte estimated that the cost of workplace sexual harassment in Australia was approximately \$3.5 billion in 2018. This cost was shared by individuals, organisations, government and the community. Lost productivity made up the greatest part of this total at around \$2.6 billion.¹²⁴



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What prevents
people from
reporting harmful
behaviours?

*'I was sexually harassed multiple times, sexually assaulted, bullied and terrorised. And I was told that if I ever sought help or spoke about what happened to me my professional reputation and personal life would be destroyed.'*¹²⁵

Individual, Submission W257 to CPW Review

While we know that some forms of relevant unlawful conduct are concerningly common in Australian workplaces, the majority of incidents go unreported. For example, the National Survey 2022 found that fewer than 1 in 5 people who were sexually harassed at work in the previous five years made a formal report or complaint.¹²⁶

Some of the reasons individuals do not report include:

- **Fear of victimisation** from leaders of the organisation or business and from co-workers, which can impact their reputation and career aspirations. This may include: being denied promotions or professional development opportunities; having shifts changed; being fired; or being forced to resign.
- **Lack of faith** that a complaint will be managed effectively (for example, workers believe that nothing will be done).
- **Inadequate support** from the business or organisation.
- **Lack of access to information and advice** about the nature of relevant unlawful conduct and a lack of clarity about reporting procedures.
- **Lack of job security**, particularly for workers on casual, temporary or contractual arrangements.
- **Experiences of trauma or shame**, or a fear of re-traumatisation during the complaints process.

*'[My co-workers] had no idea they were routinely sexist ... and if you accused them of it, they would certainly deny it and tell you that you are insane or a feminist bitch.'*¹²⁷

Individual, Submission 166 to Respect@Work National Inquiry

*'[After I reported a harasser] I was told not to make a big deal of it because that's how they are in high finance.'*¹²⁸

Individual, Submission 16 to Respect@Work National Inquiry

12 What prevents people from reporting harmful behaviours?

The National Survey 2022 indicates that a significant proportion of people are treated unfairly or experience other negative outcomes after making a formal report of sexual harassment, for instance:

- they reported being ostracised, victimised or ignored by colleagues (13%); denied workplace opportunities (10%); having their shifts changed (12%); or being dismissed (6%)
- 2 in 5 people (40%) said that no changes occurred at their workplace as a result of them reporting the conduct
- in less than a third of cases (28%), the harassment stopped after a formal report or complaint was made
- almost 1 in 4 (24%) said that there were no consequences for the harasser.

*'I didn't know, I didn't recognise it was sexual harassment ... I didn't know ... my rights. I didn't complain at that time.'*¹²⁹

**Consultation, Canberra,
Respect@Work National Inquiry**

It is important to note that there are unique and overlapping barriers to reporting for different people. Certain groups face additional barriers to reporting some forms of relevant unlawful conduct, accessing their legal rights, or being believed because of intersectional discrimination (see section 8.3). An unsafe and disrespectful workplace may have a different and unfair effect on different people.¹³⁰ This includes women, LGBTIQ+ people, Aboriginal and Torres Strait Islander peoples, young people, people with disability, and people from culturally and linguistically diverse backgrounds.

Further, some workplace factors and contexts create barriers to reporting. This is especially the case for small organisations and businesses and/or rural, regional and remote workplaces, where there is a lack of anonymity of reporting and a lack of reporting options available, and where tight-knit communities and interpersonal relationships are central to job security.

Organisations and businesses can understand the particular barriers to reporting among their workers through the collection, analysis and reporting of workplace information and data. Monitoring data helps organisations and businesses to understand the prevalence of relevant unlawful conduct in their workplaces, the rates of reporting and the reasons why workers may not report relevant unlawful conduct. It is also the best way for organisations and businesses to evaluate the effectiveness of their efforts to eliminate relevant unlawful conduct. For more information, see *Standard 7: Monitoring, evaluation and transparency* in the Guidelines.

Remember: When workers feel unsafe to make a report, or organisations and businesses fail to respond appropriately, relevant unlawful conduct will likely persist.

Communicating with workers about the data collected, and how it is used to inform workplace processes relating to preventing and responding to relevant unlawful conduct, is also crucial. Data can be reported to leaders and managers, to the workforce, to industry peak bodies and associations, to measurement agencies such as the Workplace Gender Equality Agency, or to the broader community through annual reports. Transparency and the communication of data keeps organisations and businesses accountable in relation to their duty to eliminate relevant unlawful conduct.

Remember: An inappropriate business response and lack of support can create further harm to a person experiencing relevant unlawful conduct. An organisation or business should address barriers to reporting and review their processes to ensure that responses to relevant unlawful conduct are supportive and appropriate.

‘The people who are most abused are least likely to say so, they are the least likely to come to people in authority. It’s a challenge that any procedure needs to begin with: to justify the trust of someone who has been (multiply) violated by someone with power over them. It is not the case that survivors don’t want to talk – it’s a question of, under what circumstances, to whom ... It’s our challenge to create these conditions.’¹³¹

Professor Catharine A. MacKinnon

Endnotes

- 1 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
- 2 The positive duty is found in s 47C of the *Sex Discrimination Act 1984* (Cth).
- 3 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(a)(i)–(iv).
- 4 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(b), 47C(4)(a).
- 5 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(b), 47C(4)(a).
- 6 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(c), 47C(4)(b).
- 7 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(d), 47C(4)(c).
- 8 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.
- 9 Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021) <<https://humanrights.gov.au/set-standard-2021>>.
- 10 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, 2019) 5 <<https://www2.deloitte.com/au/en/pages/economics/articles/economic-costs-sexual-harassment-workplace.html>>.
- 11 The *Sex Discrimination Act 1984* (Cth) does not define the terms ‘man’, ‘woman’ or ‘sex’. Following the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), it is likely that ‘sex’ is not limited to sex assigned at birth or to a strictly biological understanding of sex characteristics. This issue has not yet been determined by the federal courts.
- 12 *Sex Discrimination Act 1984* (Cth) s 106.
- 13 *Sex Discrimination Act 1984* (Cth) ss 5, 14(1)–(2), 15, 16, 17. See *Sex Discrimination Act 1984* (Cth) s 4(1) for definitions. A ‘commission agent’ is a person who does work for another person as the agent of that person and who is remunerated, whether in whole or in part, by commission. A ‘contract worker’ is a person who does work for another person pursuant to a contract between the employer of the first-mentioned person and that other person.
- 14 *Sex Discrimination Act 1984* (Cth) s 5.
- 15 *Sex Discrimination Act 1984* (Cth) s 5(1).
- 16 *Sex Discrimination Act 1984* (Cth) s 5(2).
- 17 *Sex Discrimination Act 1984* (Cth) ss 5(2), 5(3), 7B.
- 18 Discrimination in employment on the ground of ‘family responsibilities’ is also separately covered by the *Sex Discrimination Act 1984* (Cth) s 7A, limited to direct discrimination in specified areas of work, but there can be overlap with the ground of ‘sex’ as women are more likely to require flexible work arrangements as a result of family responsibilities.
- 19 *Sex Discrimination Act 1984* (Cth) s 7B(2).
- 20 *Sex Discrimination Act 1984* (Cth) Part II, Division 4.
- 21 *Sex Discrimination Act 1984* (Cth) s 44.
- 22 *Sex Discrimination Act 1984* (Cth) s 7D.
- 23 *Sex Discrimination Act 1984* (Cth) ss 14(1)–(2).
- 24 *Sex Discrimination Act 1984* (Cth) ss 15, 16.
- 25 *Sex Discrimination Act 1984* (Cth) s 17.
- 26 *Sex Discrimination Act 1984* (Cth) ss 14(2)(c), 15(2)(c), 16(b), 17(3)(b).
- 27 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(a)(i)–(iv), 47C(3).
- 28 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 91.
- 29 *Sex Discrimination Act 1984* (Cth) ss 28A, 28B.
- 30 *Sex Discrimination Act 1984* (Cth) s 28A.
- 31 *Shiels v James* [2000] FMCA 2 [72].
- 32 *Sex Discrimination Act 1984* (Cth) s 28A(1A).
- 33 *Sex Discrimination Act 1984* (Cth) ss 28B(1)–28B(4).

- 34 *Sex Discrimination Act 1984* (Cth) ss 28B(5)–28B(8).
- 35 *Sex Discrimination Act 1984* (Cth) ss 28B(1)–28B(4).
- 36 *Sex Discrimination Act 1984* (Cth) ss 28B(5)– 28B(8).
- 37 Revised Explanatory Memorandum, Sex Discrimination and Fair Work (Respect@Work) Amendment Bill 2021 (Cth) [185].
- 38 *Sex Discrimination Act 1984* (Cth) ss 28B(1)–28B(4), 28B(5), 28B(7).
- 39 *Sex Discrimination Act 1984* (Cth) ss 28B(6), 28B(8).
- 40 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 265.
- 41 *Sex Discrimination Act 1984* (Cth) ss 28AA, 28B.
- 42 *Sex Discrimination Act 1984* (Cth) s 28AA.
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- 52 *Sex Discrimination Act 1984* (Cth) s 28M(3).
- 53 See *Sex Discrimination Act 1984* (Cth) s 4(2), which provides that for the purposes of the *Sex Discrimination Act 1984* (Cth), refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to a refusal or failure to do an act. See also the *Australian Human Rights Commission Act 1986* (Cth) s 3(1), which provides that subjecting another person to a hostile workplace environment is ‘unlawful discrimination’ for the purposes of the *Australian Human Rights Commission Act 1986* (Cth). Unlawful discrimination is defined by s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) to mean ‘any acts, **omissions** or practices that are unlawful under...Part II of the SDA’ (emphasis added). As a result, s 28M of the *Sex Discrimination Act 1984* (Cth) extends to conduct by omission, such as a failure to act or intervene. See also Revised Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect At Work) Bill 2022 (Cth) [44].
- 54 Revised Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect At Work) Bill 2022 (Cth) [33].
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- 56 See *Sex Discrimination Act 1984* (Cth) s 4(2), which provides that for the purposes of the *Sex Discrimination Act 1984* (Cth), refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to a refusal or failure to do an act. See also the *Australian Human Rights Commission Act 1986* (Cth) s 3(1), which provides that subjecting another person to a hostile workplace environment is ‘unlawful discrimination’ for the purposes of the *Australian Human Rights Commission Act 1986* (Cth). Unlawful discrimination is defined by s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) to mean ‘any acts, **omissions** or practices that are unlawful under...Part II of the SDA’ (emphasis added). As a result, s 28M of the *Sex Discrimination Act 1984* (Cth) extends to conduct by omission, such as a failure to act or intervene. See also Revised Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect At Work) Bill 2022 (Cth) [44].
- 57 *Sex Discrimination Act 1984* (Cth) s 4(1) definition of ‘workplace’; *Work Health and Safety Act 2011* (Cth) s 8.
- 58 *Sex Discrimination Act 1984* (Cth) s28M(2)(b).
- 59 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(c), 47C(4)(b).
- 60 *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2)(c), 47C(3).
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- 101 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 180.
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- 103 Our Watch, *Change the story: A shared framework for the primary prevention of violence against women in Australia* (2021) 37–39.
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- 105 See Paula Johnson et al (eds), *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (The National Academies Press, 2018) 35, 47–48.
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- 107 See Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) section 3.7. Employers and 'persons conducting a business or undertaking' (particularly small businesses) can benefit from looking into research on their own industries to better understand the drivers and risk factors of relevant unlawful conduct that may be present in their workplaces.

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- 126 Australian Human Rights Commission, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces* (2022) 14.
- 127 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 152.
- 128 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 151.
- 129 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 186.
- 130 See Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 161–198.
- 131 UN Women, *What will it take? Promoting cultural change to end sexual harassment* (2019) 29 <<https://www.unwomen.org/en/digital-library/publications/2019/09/discussion-paper-what-will-it-take-promoting-cultural-change-to-end-sexual-harassment>>, quoting Professor Catharine A MacKinnon, *Feminist Think Space on sexual harassment*, UN Women Address (2018).

