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# What does eliminating sexual harassment require?

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# Today's presentation

## Agenda

- 01** What is Sexual Harassment
- 02** Recent Legislative Changes
- 03** Minimising Risks: What Employers Should Be Doing
- 04** Questions



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## Part 1

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# What is Sexual Harassment?



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# Sexual Harassment

In accordance with the Sex Discrimination Act 1984 (Cth), a person sexually harasses another person if:



they make an unwelcome sexual advance or request for sexual favours

OR



they engage in any other unwelcome conduct of a sexual nature

...which a reasonable person having regard to all the circumstances, would have anticipated the possibility that the person harassed would be **offended, humiliated or intimidated**

# Sexual Harassment

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Sexual harassment can be a single incident or something that happens more than once



A person can be sexually harassed even if they don't object



A bystander may be offended by conduct even if the participants are not



# Examples

Examples of conduct which may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature include:

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;
- unwanted invitations to go on dates, or requests or pressure for sex;
- displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the work environment;
- inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering or kissing;
- behaviours that may be offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking;
- sexually explicit or suggestive emails or messages (including the use of emojis with sexual connotations), indecent phone calls, unwelcome sexual advances online, or sharing or threatening to share intimate images or film without consent.





## Part 2

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# Recent Legislative Changes

# Recent Legislative Changes

- 2020** ● Respect@Work Report by Kate Jenkins
- 2021** ● Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021
- 2022** ● Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022



# Prohibition of Sexual Harassment

Since 6 March 2023, the *Fair Work Act 2009* (Cth) prohibits sexual harassment in the workplace through s. 527D:

*A person (the **first person**) must not sexually harass another person (the **second person**) who is:*

*(a) a worker in a business or undertaking; or*

*(b) seeking to become a worker in a particular business or undertaking; or*

*(c) a person conducting a business or undertaking;*

*if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c).*

Notably, this is a broad prohibition, covering not only acts done by workers but also third parties such as clients or customers against workers.

# Vicarious Liability of Employers

**Employers will be held vicariously liable for the actions of their employees or agents under section s. 527E of the *Fair Work Act 2009* (Cth)**

- Vicarious liability of employers, unless they can prove **all reasonable steps** were taken to prevent contravention of s. 527D
- What constitutes 'all reasonable steps' will be assessed on a case by case basis, but as a starting point.
- Employers should have a comprehensive harassment policy in place, which details what the law is, what is not permitted, and what the consequences are for breaching the policy.
- Workers and management should receive regular training on sexual harassment and the policies and processes in place.
- When a complaint is made, it should be documented and actioned appropriately.



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# Legal Avenues for Sexual Harassment

- Individuals will get to choose whether to commence an application or bring proceedings under:
  - ◆ the Sex Discrimination Act; or
  - ◆ under the new provisions of the Fair Work Act.
- The Fair Work Commission already had jurisdiction to hear matters that related to sexual harassment through general protections and unfair dismissal claims, and through the 'stop sexual harassment' order jurisdiction introduced in 2021.
- By including a prohibition on sexual harassment in the Fair Work Act, the Fair Work Commission is given a new dispute resolution framework for employees to access, without having to relate the dispute to a dismissal or other adverse action taken against them.

# What is 'harassment on the ground of sex'?

## *s. 28AA Sex Discrimination Act 1984*

A person harasses another person on the ground of sex if by reason of the sex of the person harassed (or a characteristic that appertains generally or is generally imputed to persons of the sex of the person harassed):

a person engages in **unwelcome conduct** of a **demeaning nature\***; AND

\* law no longer requires it to be 'seriously' demeaning

in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated

**Section 28B of the Sex Discrimination Act** has been amended to make it unlawful for a person to sexually harass another person 'on the ground of sex'.

# Examples of Conduct

## Harassment on the ground of sex conduct includes:

- Making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing. The conduct can also be in person and also by electronic means.
- For example, sending (including forwarding and otherwise engaging with) inappropriate emails containing inappropriate content while at work, or using an employer-provided email account.

Unlike sex discrimination, where the test is whether someone has been treated less favourably than a person of the opposite sex, there is no need for a comparator to establish 'harassment on the ground of sex'. Unlike sexual harassment, the conduct doesn't need to be "sexual" in nature.

Examples:

- requiring women to get coffee for a meeting; or
- refusing to permit a woman to do something because "it's a man's job"

# Prohibition of “hostile workplace environments”

## **s. 28M Sex Discrimination Act 1984**

It is unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex. This occurs if:

- a first person engages in conduct in a workplace where the first person or the second person, or both, work; and

- the second person is in the workplace at the same time as or after the conduct occurs; and

- a reasonable person, having regard to all the circumstances, would have anticipated the **possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person** by reason of sex, or characteristics appertaining generally, or imputed to, persons of that sex



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# “Offensive, Intimidating or Humiliating” Workplace Environment

**Section 28M of the *Sex Discrimination Act 1984 (Cth)*** places an obligation on employers to prevent conduct that would create or result in an “offensive, intimidating or humiliating” workplace environment.

This new section captures conduct even if it is not directed at a specified person and has been introduced in an effort to tackle the hostile work environments, and the risks created by those work environments.

The exact application of section 28M is still untested but it could potentially prohibit people from:

- displaying pornographic or obscene materials;
- from making sexual or offensive jokes in the workplace; or
- partaking in conversations that might be considered offensive, intimidating or humiliating by reason of sex, such as ranking the attractiveness of female candidates for a role.

# The Definition of “Workplace”

- The definition of ‘workplace’ has the same meaning as in the *Work Health and Safety Act 2011*:  
    **“workplace”** is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.”
- A workplace can include a vehicle, vessel, aircraft or other mobile structure.
- Similarly to ‘harassment on the ground of sex’, there is no requirement to prove that the conduct is sexual or that a woman is treated less favourably than a male comparator.
- The Australian Human Rights Commission has also been given broader investigative powers, including the power to inquire into any matter that may relate to systemic unlawful discrimination, being unlawful discrimination that affects a class or group of people or that is continuous, repetitive or forms a pattern.



# The new “Positive Duty”

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## **s. 47C Sex Discrimination Act 1984**

- The positive duty requires employers to take **reasonable and proportionate measures** to eliminate, as far as possible: sex discrimination, sexual harassment, harassment on the ground of sex, hostile workplaces environments, and associated victimisation
- This duty shifts the emphasis from a complaints based model to one where employers must take action and continuously assess and evaluate whether they are meeting the requirements of the duty
- Employers are expected to be proactive and not reactive. Examples of proactive measures include:

Implementing  
policies and  
procedures

Collecting and  
monitoring data

Providing  
appropriate  
support to  
workers and  
employees

Delivering training  
and education on  
a regular basis



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# Application of sections 47C and 527E

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The standard is higher under **s. 527E**, which requires that **'all reasonable steps'** have been taken, while **section 47C** of the Sex Discrimination Act only requires employers to take **reasonable and proportionate measures 'as far as possible'**.

In determining whether employers have taken 'reasonable and proportionate' measures, the following factors will be considered.

The size of  
the business

The nature of  
the business

The business  
owner's  
resources

The practicality and  
costs involved to  
eliminate the  
conduct.

Any other  
relevant  
circumstances.



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# Victimisation under the Sex Discrimination Act

Victimisation occurs when a person subjects or threatens to subject another person to detriment on the basis that that person:

has made a complaint or proposes to make a complaint about discrimination or any workplace matter

has provided or proposes to provide information or documents in relation to a complaint

has appeared or proposes to appear as a witness in a hearing

has made an allegation that a person has done an act that is unlawful under legislation

A person can be found to have unlawfully victimised another even where a primary complaint isn't made out. This can result in a criminal offence *and* civil action.

In 2021, the Sex Discrimination Act was amended to clarify that the **victimisation of a complainant or witness can form the basis of a civil action for unlawful discrimination, in addition to criminal proceedings.**



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# Australian Human Rights Commission – Positive Duty

The new broader powers of the AHRC will include being able to:

- **Conduct inquiries** if they 'reasonably suspect' a business or employer is not complying with the positive duty;
- **Provide recommendations** to employers to prevent a continued failure to comply with the positive duty; and/or
- **Give a compliance notice** which specifies the actions that the employer must take to address their non-compliance with the positive duty.

If the compliance notice is not complied with, the Commission can make an application to the Federal Circuit and Family Court of Australia (or the Federal Court) for an order directing compliance with the notice.

These powers will not come into effect until later this year on **12 December 2023**.

As such, employers have about 9 months to implement new processes, review policies, and collect data to assess their compliance against the new positive duty.

# New avenues in the FWC... (since 6 March 2023)

In addition to the Australian Human Rights Commission, complainants will be able to seek some remedies from the Fair Work Commission (and if that is unsuccessful, from the Federal Circuit and Family Court of Australia).

- The Fair Work Commission will continue to have the power to issue a “stop sexual harassment order”, being any order that the Commission sees fit to **stop or prevent a worker from being harassed at work**. A stop sexual harassment order is intended to resolve disputes to allow workers to return to work and to protect other workers from future harm. It is not intended to punish poor behaviour or compensate victims. This is only available for current employees and will not be available once employment terminated.
- The Fair Work Commission can also try to resolve a complaint by conciliation, but if that is unsuccessful, the parties to the dispute can proceed by consent arbitration at the Commission, or an application can be made to Court.
- If it does proceed to arbitration by the Commission, the Fair Work Commission will have the power to make orders for:
  - A payment of compensation;
  - A payment for lost remuneration; and/or
  - An order requiring a person to perform any reasonable act to redress loss or damage suffered by an aggrieved person.

# No Cost Jurisdiction

- The prohibition on sexual harassment under the Fair Work Act will be under a 'no-cost jurisdiction' which means that all parties bear their own legal costs and the Commission or Court will not have the power to order one party to pay the legal costs of the other, with limited exceptions (such as bringing vexatious proceedings, unreasonably refusing to participate in the matter before the Fair Work Commission, or if one party has acted unreasonably which has caused the other to incur costs).
- This can create barriers to aggrieved persons pursuing their claims in court as the process can be lengthy and expensive.
- By contrast, the existing sexual harassment prohibitions under the Sex Discrimination Act (which the new laws are modelled on) are not restricted by a no-cost jurisdiction. As such, if a complainant is successful in their claim, the Court may order the other party to pay the legal costs of the complainant, which can be significant.
- It is likely that a number of claims will continue to be brought under the Sex Discrimination Act and via the Australian Human Rights Commission for this reason.





## Part 3

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What should employers  
be doing?

# What should employers be doing?

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## 1. Implement Workplace Policies

Employers will need to:

- have workplace policies in place, including policies on discrimination and harassment, which clearly set out what is not lawful behaviour, what the internal processes are for lodging and responding to a complaint, and what the consequences may be for breaching the policy;
- ensure the policies are followed and complied with – there will be little value in having a complaints process if it is not followed, and this will be a consideration when assessing whether an employer has followed their positive duty and whether all reasonable steps have been taken to prevent sexual harassment.



# What should employers be doing?

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## 2. Conduct Training and Sending Reminders

Employers will need to:

- deliver appropriate workplace training to managers and workers. This should not only cover what not to do, but also how to recognise sexual harassment, discrimination, or signs of a hostile workplace environment.
- Training should be conducted regularly to ensure that workers are aware of the expectations and processes in place.
- Another good practice would be to send timely reminders to employees of policies in place, e.g. you might send an email prior to a work event with reference to the applicable policies and appropriate conduct.

# What should employers be doing?

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## 3. Collect and Monitor Data

- Employers will need to collect and monitor data in relation to complaints and employee experiences (e.g. frequency of complaints, workplace demographic statistics, and employee surveys).

## 4. Provide Support to Workers

- Employers will need to provide support to employees who come forward with concerns or complaints, giving particular attention to the aggrieved persons health and wellbeing and taking any reasonable steps in that regard (e.g. providing time off if needed and checking in after complaint or report has been made).

# Take aways:



Have your policies been updated?



How will you train employees *and specifically managers* to update them of their revised obligations?



Has the company's complaint management process been reviewed and assessed for adequacy?



What positive steps are you taking – including conducting risk assessments?



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# Risks of Non-Compliance

- A contravention of the new prohibition on sexual harassment under the Fair Work Act
  - ◆ will attract a civil penalty of up to \$16,500 for an individual and \$82,500 for a body corporate.
- Irrespective of this, there have been a number of cases in the last decade where employers have been ordered to pay compensation amounts in the hundreds of thousands.
- In practical terms the obligations of employers have not changed, the expectations are largely still the same as before these new laws were introduced, but the **risk of liability** is arguably higher now, as the environment in which employers must operate is more sensitive:
  - Employees are more aware of their rights in the workplace, and with this we often see a rise in claims and proceedings;
  - The Australian Human Rights Commission has received greater funding to assist with their new duties and processes are expected to be made quicker (currently the waiting times are between 6 and 9 months); and
  - From December this year, the AHRC may conduct their own investigations if they have suspicions about an employer's compliance with their new positive duties to eliminate sexual harassment and discrimination in the workplace.



# Questions

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