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# Positive Duty Compliance Guidelines

Advice for Australian leaders

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# Getting started

This report provides you with a practical understanding of the Australian Human Rights Commission's (AHRC) Guidelines for fulfilling the positive duty to prevent sexual harassment and sex discrimination at work. To truly grasp the essence of the positive duty, we strongly encourage enrolling in the complimentary course, "Preventing Sexual Harassment in the Workplace for Leaders." This course is specifically tailored to empower senior leaders with the knowledge and strategies needed to enhance compliance with this duty.

## The objective of this report

**This report aims to assist you in:**

- Understanding the 4 Guiding Principles of the positive duty.
- Understanding the 7 Standards of the positive duty.
- Knowing the ways in which the Guiding Principles and Standards can be implemented by an organisation.

# Introduction

Under the Sex Discrimination Act, employers and persons who conduct a business or undertaking (PCBUs) have a positive duty to prevent sexual harassment and other sex-based discriminatory conduct in the workplace.

The positive duty 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 context;
- Sexual harassment in connection with work;
- Sex-based harassment in connection with work;
- Conduct that amounts to subjecting a person to a hostile workplace environment on the ground of sex; and
- Related acts of victimisation.

This means that leaders must understand steps that can be taken to help minimise the risks of these types of conduct occurring, as well as know how to deal with them if they do take place in a workplace. It can be challenging to know where to start – but the Australian Human Rights Commission (AHRC), the regulatory body tasked with investigating complaints of workplace discrimination and harassment, has released a set of guidelines to help employers understand how to tackle the positive duty.

# The Guiding Principles

Every organisation is different – they come in different sizes, do different work, have different employees, and face varied challenges. That's why attempting to apply a "one size fits all approach" to addressing sex discrimination in the workplace isn't practical. The AHRC has outlined 4 guiding principles that employers need to consider when addressing the 7 standards. Lets take a look.

## Principle 1:
## Consultation

Consultation means discussing with workers what they need to feel safe and respected in a workplace. When we, as leaders, engage in consultation, we need to make sure that marginalised or under-represented groups are given a chance to be heard.

## Principle 2:
## Gender equality

Gender equality means people of all genders having equal rights, opportunities, recognition, and resources. However, equality means more than just "equal treatment." Substantive gender equality is focused on achieving equal outcomes for people of all genders.

## Principle 3:
## Intersectionality

Intersectionality is about the ways that different parts of our identity come together to shape our experience of the world. We might have aspects of our identity that increase our risks of discrimination or oppression, whilst simultaneously enjoying privilege due to other characteristics. A person's experience of discrimination may differ based on characteristics such as their sex, ethnicity, whether they have a disability, and their socio-economic status.

# The 7 Standards of Positive Duty

The Australian Human Rights Commission (AHRC) has developed 7 Standards that it expects organisations to comply with to meet their obligations under the Sex Discrimination Act. These standards are based on research about what causes illegal conduct and how it can be prevented.

The Seven Standards of Positive Duty encompass a set of guiding principles intended to foster ethical behaviour and responsibility in various aspects of life, including business, government, and personal conduct.  These standards encompass the obligation to do good, act with integrity, respect the rights and dignity of others, be accountable for one's actions, foster transparency and honesty, exercise fairness and equity, and promote social responsibility. By adhering to these standards, individuals and organisations can contribute to a more just, responsible, and compassionate workplace while upholding moral and ethical values.

It's imperative to recognise that the 7 Standards are pertinent to every member within an organisation. They are not only designed to prevent unlawful behaviour but also to serve as a benchmark by which the Australian Human Rights Commission (AHRC) or a court may assess how an organisation approached and applied these standards when determining potential breaches of duties for employers or senior leaders. Throughout this report, we will meticulously examine each of these 7 Standards in detail.

# Standard 1: Leadership

A senior leader is anyone with responsibility for the management and governance of the organisation or business.  Senior leaders are responsible for how compliant the organisation is with its legal duties – they're not just responsible for their own behaviour, but also for those they lead.  Senior leaders play a vital role in making sure the workplace is safe, respectful, and inclusive. People look to them to set expectations, be role models for respectful behaviour, and set the tone for a healthy workplace culture. So, how can our organisation meet Standard 1: Leadership? Senior leaders must understand their obligations under the Sex Discrimination Act and have up-to-date knowledge about relevant unlawful conduct.

## Understanding obligations

Senior leaders must fully understand their responsibilities under sex discrimination laws to foster an inclusive workplace environment. As part of the new law, leaders now have a positive duty to prevent sexual harassment in the workplace and will need to showcase the initiatives they've implemented to do exactly this. The following are the steps a senior leader needs to take to understand their obligation of sex discrimination laws:

- Regularly undertake training on their obligations under the Sex Discrimination Act and their positive duty to prevent sexual harassment in the workplace.
- Read guidance materials published by the AHRC and on the Respect@Work website.
- Ensure the organisation is subscribed to updates from regulators and peak bodies on legal developments related to discrimination and harassment.
- Review industry-specific research about trends relating to unlawful conduct in specific industry.
- Ensure the organisation has systems in place to monitor current best practice approaches to eliminating unlawful conduct, examples include online training that can measure progress and knowledge gaps, survey results, reporting on training rollouts, and more.

Understanding and complying with sex discrimination laws is paramount for organisations and their leaders. These imperative underscores the importance of a proactive approach to compliance. In this regard, the following three steps can help organisations and their leaders effectively fulfill their obligations under these laws.

## Comprehensive understanding of legal obligations

To ensure that all leaders have a comprehensive understanding of their obligations under sex discrimination laws, organisations must consider implementing additional steps. These measures aim to further enhance awareness and compliance.

## Leadership responsibility

Senior leaders must take ownership of measures aimed at responding to unlawful conduct. These measures should be developed, documented, communicated to the workforce, consistently implemented, and subject to regular review.

## Prevention and response plan

One essential aspect of this responsibility is the creation of a Prevention and Response Plan. This plan, developed by designated leaders, outlines the specific measures the organisation will undertake to eliminate sex discrimination and sexual harassment. It is crucial that this plan comprehensively addresses each of the seven Standards set forth in sex discrimination laws.

The holistic approach outlined serves as a blueprint for organisations to strengthen their compliance with sex discrimination laws and foster a workplace culture that champions equality and inclusion. By ensuring that all leaders are well-informed and proactive in their efforts, organisations can effectively mitigate risks and uphold legal and ethical standards.

## Developing, implementing, and reviewing measures

Senior leaders play a pivotal role in establishing a comprehensive document known as a Prevention and Response Plan, outlining the measures their company will implement to eradicate sex discrimination and sexual harassment within the workplace. To effectively create and execute such a plan, senior leaders must undertake several essential steps:

- Ensure that the plan is communicated to all staff within the organisation.
- Frequently engage with employees from all departments within the company to gather their feedback on the effectiveness of these measures and to identify any recommended changes, such as training, surveying and more. Review data to ensure the measures are working.
- Update the plan to ensure ongoing effectiveness.

## A visible commitment

Senior leaders can demonstrate a visible commitment to a safe, inclusive, and diverse workplace by leading by example. This involves actively promoting a culture of respect and equality, not only through words but also through their actions:

- Making statements expressing a commitment to eliminating unlawful conduct and promoting gender equality and inclusion.
- Apologising to people affected by past conduct and committing to improvement.
- Acknowledging positive behaviour through staff awards and performance review and promotion processes.
- Providing time during work hours for leaders and workers to undertake relevant training.

# 🌐 Standard 2: Culture

Workplace culture is one of the most important factors affecting an organisation's risk of unlawful conduct happening, as well as its response if it does occur. Leaders need to make sure that their organisation's has a culture that values gender equality and diversity, and that everyone feels safe to speak up if an incident occurs.

Culture is shaped by leaders and managers at all levels – from senior leaders like CEOs, to any person with responsibilities for managing other workers, including team leaders, supervisors, executives, line managers, people managers and other managers.  Organisations and businesses must foster a culture that is safe, respectful, inclusive, and values diversity and gender equality.

## Fostering a safe, respectful, and inclusive culture

This report underscores the importance of prioritising gender balance and diversity in the hiring process to create a more inclusive and equitable workplace. The male-dominated nature of the workforce can present challenges for certain groups, such as women, in expressing concerns and can increase the risk of sexual harassment. To address these issues and attain gender equality, consider implementing the following strategies.

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## Gender equality targets

A crucial step in fostering a more balanced workforce is the establishment of gender equality targets. These targets serve as benchmarks to measure progress and demonstrate a commitment to achieving a more diverse and inclusive organisation.

## Special measures for diversity

To address the existing gender imbalance, organisations may consider implementing special measures. These measures, including initiatives like female-only networking events for recruitment, are designed to provide additional opportunities for underrepresented groups. Special measures, when done correctly, do not constitute discrimination; rather, they aim to rectify existing disadvantages and promote substantive equality.

## Legal compliance

It's essential to note that these special measures are legally permissible under the Sex Discrimination Act when undertaken with the goal of achieving substantive equality. By recognising and addressing historical disadvantages faced by specific groups, organisations can create a workplace environment that is not only compliant with the law but also fosters fairness and inclusivity

Prioritising gender balance and diversity in hiring practices is a move towards creating a more equitable and harmonious workplace. By setting targets and implementing special measures, organisations can address imbalances, mitigate risks, and promote a culture of equality and respect for all employees. Embark on a journey to discover additional initiatives that can empower your organisation to foster a culture marked by safety, respect, inclusivity, and a wholehearted embrace of diversity.

**Steps an organisation can take:**

- Consult workers about gender equality, diversity, and inclusion.
- Participate in gender equality and diversity initiatives specific to your industry.
- Ensure that leaders undertake self-reflection and seek feedback.
- Regularly communicate expectations about respectful behaviour to workers.
- Value workers' contributions to a positive and inclusive workplace culture when considering promotions.

## Empowering Culture

The organisation's culture fosters empowerment among all employees, including leaders and managers, encouraging them to report any instances of unlawful conduct. Furthermore, this culture aims to minimise harm and ensure accountability for individuals' actions.

It is essential for all employees, including leaders and managers, to recognise their authority to refuse clients who engage in sexually harassing behaviours and other forms of unlawful conduct.  To bolster these principles, employees can put the following measures into practice:

- Ensuring that their company has adequate disciplinary procedures in place for any workers engaging in inappropriate behaviour.
- Ensuring that people engaging in unlawful conduct are not protected (including leaders, managers, and "high value" customers).
- Training all staff to call out disrespectful comments – such as "everyday sexism".
- Ensuring that the management team and workers are aware that they can refuse service or entry to customers engaging in sexually harassing behaviours.

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These actions collectively contribute to creating a safer and more inclusive organisational culture, where employees are encouraged to report misconduct, and swift actions are taken to address it while holding all individuals accountable, regardless of their status within the organisation.

To uphold a strong organisational culture, companies are required to provide concrete evidence of their adherence to Standard 2: Culture. The following elements serve as relevant evidence, demonstrating their commitment to nurturing a robust corporate culture:

- Correspondence with workers and meeting notes.
- Written materials such as posters, notices, and brochures.
- Data on gender equality and workplace diversity.
- Gender equality, diversity, and inclusion targets.
- Consultations with diversity groups.
- Evidence of the taking of special measures to further substantive equality,
- Job descriptions.
- Induction manuals and codes of conduct.

# Standard 3: Knowledge

Education plays a critical role in eliminating unlawful conduct at work. Training must be ongoing, and address what constitutes unlawful conduct, what causes it, and the harm that it creates. Education is also vital in teaching all workers at an organisation how to respond to unlawful and inappropriate behaviours.

Training for leaders and managers may need to be more comprehensive – addressing ways to identify risk factors for unlawful conduct, and skills for responding appropriately to reports.

## Does your organisation implement regular training?

The Australian Human Rights Commission (AHRC) recognises the significance of records related to training modules or sessions as valuable evidence in showcasing the proactive steps taken to align with Standard 3: Knowledge. Implementing regular training not only reinforces employee competence but also reinforces your organisation's dedication to staying informed and compliant with evolving standards and regulations. Many organisations are turning to online training to quickly and easily rollout training across their organisation, as well as easily track progress and report on knowledge gaps and outcomes.

# Standard 4: Risk Management

Sexual harassment, sex discrimination and other unlawful conduct can pose a risk to workers' physical and psychological safety. However, the risk goes beyond this. Even if there isn't an identifiable risk to health and safety rights, this conduct can pose a risk to equality rights. It can violate a person's right to equality, non-discrimination, and human dignity. This is why risk management is key – to identify risks, implement control measures and regularly review their effectiveness.

## Understanding Work Health and Safety (WHS) regulations and sexual harassment: A dual risk approach

In the realm of risk management, it is imperative for organisations and businesses to acknowledge that misconduct falling under the category of relevant unlawful conduct poses a dual risk: an equality risk and a health and safety risk. Specifically, it is essential for all employees, including leaders and managers to understand the significance of addressing sexual harassment within the framework of WHS regulations.

This is not only a distinct legal requirement but also a fundamental aspect of managing health and safety hazards effectively. In alignment with this perspective, the Australian Human Rights Commission (AHRC) underscores the necessity for leaders to possess a comprehensive understanding of sexual harassment within the context of WHS laws. Furthermore, staying on top of Occupational Health and Safety (OHS)/WHS legislation, particularly pertaining to the management of sexual harassment risks, is crucial for all organisational leaders to fulfill their responsibilities effectively.

**Important factors for organisation leaders:**

- Recognise unlawful conduct as both an equality and health and safety risk.
- Understand sexual harassment within WHS as a distinct legal requirement.
- Properly manage sexual harassment as a health and safety hazard.
- Leaders need a comprehensive understanding of sexual harassment in WHS.
- Stay informed about OHS/WHS legislation.
- AHRC emphasises sexual harassment risk management under OHS/WHS laws.

## Enhancing organisational compliance through inclusive risk management and culture

Organisations must adopt a comprehensive approach to risk management, particularly when it pertains to preventing and responding to unlawful conduct within the workplace. The effectiveness of risk management systems hinges on several factors, including the size of the business, the industry in which the business operates, and the specific risk factors associated with the workforce.

One critical aspect of our risk management strategy is the assignment of dedicated senior leaders responsible for managing and reviewing the risk management processes. While this approach may seem sufficient, it is essential to recognise that a more inclusive approach is needed. To ensure a well-informed and proactive response to unlawful conduct, it is imperative that all leaders are actively involved in this process. All organisational leaders should have access to ongoing data on unlawful conduct, which includes trends, patterns, and lessons learned. Additionally, embedding a commitment to gender equality, diversity, and inclusion in job descriptions, contracts, and promotional materials reaffirms the organisation's dedication to a healthy workplace culture and holds leaders responsible for upholding these values. A risk-based prevention and response approach is essential for compliance and ensuring a safe, inclusive organisational environment.

# Standard 5: Support

Organisations and businesses play a crucial role in fostering a safe and inclusive work environment by ensuring that appropriate support is readily accessible to all workers, including leaders and managers, who may experience or witness unlawful conduct. It is imperative that workers are not only informed about the existence of such support but can also access it, irrespective of whether they choose to formally report the misconduct. This report emphasises the significance of recognising and addressing inappropriate behaviour within the workplace, thereby underlining the shared responsibility of leaders and organisations in promoting a respectful and secure work atmosphere.

To address incidents of inappropriate behaviour, it is crucial to establish an accessible framework for workplace support. This support should be available to all employees who experience or witness harassment, discrimination, or any form of unlawful conduct, irrespective of their decision to initiate formal proceedings.

Research has shown that many individuals who face such situations in the workplace choose not to file formal reports due to concerns about potential consequences, workplace dynamics, or personal reasons. Therefore, organisations must prioritise communicating information about the various support options available to employees.

This approach ensures that affected individuals are informed about available resources and assistance, even if they choose not to initiate formal reporting procedures. This proactive approach is essential for creating a workplace environment that prioritises employee well-being and fosters a culture of safety, inclusivity, and respect. It aligns with ethical and legal obligations while promoting a harmonious and equitable work environment for all.

## Internal and external support options

Organisations should offer both internal and external support. People responsible for internal support may include HR, managers, and workers specifically trained in handling complaints of unlawful conduct.

Internal support could involve the HR representative proactively interacting with the employee to understand their requirements, resolve workplace concerns, and provide necessary advice and resources. The primary goal of this assistance is to safeguard the employee's welfare and cultivate a workplace environment characterised by positivity. Through extending this internal support, the HR representative showcases the organisation's dedication to strengthening its staff members and cultivating a conducive work culture.

**External support might include:**

- Counsellors.
- General Practitioners (GPs).
- Helplines like 1800 RESPECT.
- Union representatives.
- Employee Assistance Program (EAP) funded by the organisation.
- Independent, confidential professional counseling support (can be used with or without referral.

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# Standard 6: Reporting and response

Very few personnel will feel comfortable reporting unlawful conduct. In fact, the National Survey 2022 found that that fewer than 1 in 5 Australian workers formally reported sexual harassment when they experienced it.

Further, 22% of those who did report sexual harassment felt 'not at all satisfied' with the process that occurred once their report was made.

**As senior leaders, it is up to you to turn these statistics around.**
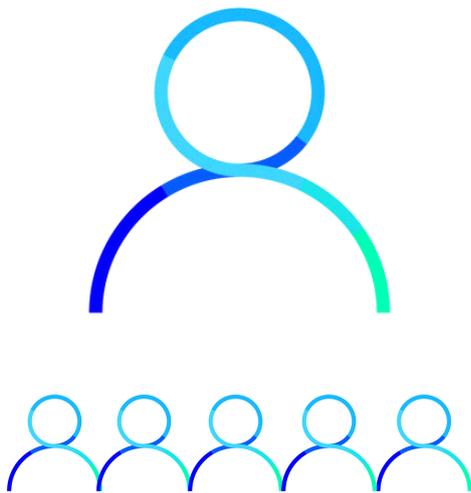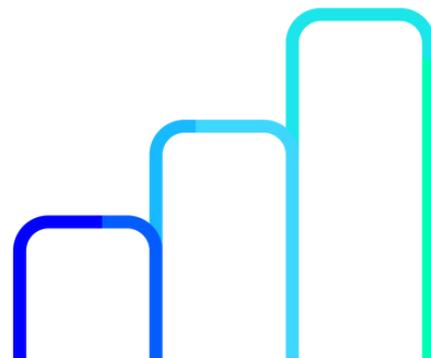
## 1 in 5

Australian workers formally reported sexual harassment when they experienced it.

## 22%

of people who reported sexual harassment were dissatisfied with the reporting process.

## Appropriate options for reporting and response

Organisations and businesses must maintain a commitment to providing clear reporting and response options for addressing relevant unlawful conduct. Organisations need to ensure these options are consistently communicated to personnel and others affected by such conduct. Responses to reports of relevant unlawful conduct need to be executed in a timely and consistent manner, with a primary focus on minimising harm to all parties involved.

## Establishing reporting and response mechanisms for unlawful conduct involves:

### Communication

Organisations and businesses must maintain a commitment to providing clear reporting and response options for addressing relevant unlawful conduct. Organisations need to ensure these options are consistently communicated to personnel and others affected by such conduct. Responses to reports of relevant unlawful conduct need to be executed in a timely and consistent manner, with a primary focus on minimising harm to all parties involved.

### Third-party reporting

To enhance transparency and accountability, it's important to offer reporting options to third parties, which includes clients and customers. It's crucial to recognise and respect their right to report any cases of unlawful conduct while actively encouraging and supporting them throughout the reporting process.

## Support and anonymity

Ensure a variety of support options, both internal and external, are available to those who choose to report. Establish diverse communication channels to facilitate the reporting of misconduct, including anonymous feedback mechanisms that allow individuals to report concerns without revealing their identity. This anonymity is essential to ensure that everyone feels comfortable coming forward with information.

## Trauma-informed handling of reports

Guarantee that individuals tasked with managing reports receive comprehensive training in a person-cantered, trauma-informed approach. They should possess a strong understanding of their responsibilities in maintaining privacy and confidentiality, as this is essential for establishing a secure and supportive environment for those choosing to report.

## Promoting equitable work environments through consistent consequences

Maintaining consistency in addressing inappropriate behaviour is not just a fundamental organisational principle; it's a cornerstone of fostering workplace equity, independent of an individual's position within the hierarchy. When individuals deviate from this principle, whether influenced by seniority or the importance of ongoing projects, we undermine the very foundations of workplace fairness.

To genuinely uphold equity, it is imperative that consequences for inappropriate behaviour are applied impartially. An employee's position should have no bearing on the determination of their accountability. This unwavering commitment to equitable practices plays a pivotal role in creating and nurturing a harmonious and respectful work environment.

Within the spectrum of disciplinary measures available, the seriousness of the conduct should guide the appropriate response. These measures can also be employed in combination, as needed:

- Apology.
- Ongoing monitoring.
- Verbal/written warnings.
- Suspension.
- Barriers to pay increases.
- Impact on bonuses.
- Barriers to promotion.
- Demotion or dismissal.

By aligning the consequences with the nature of the behaviour, organisations can further strengthen their commitment to maintaining fairness and equity in the workplace.

Compliance with Positive Duty Guidelines

# Standard 7: Monitoring, evaluation, and transparency

## Understanding workplace misconduct through data analysis

Organisations and businesses collect appropriate data to understand the nature and extent of relevant unlawful conduct concerning their workforce. The focus on analysing workplace misconduct data is to gain a comprehensive understanding of its nature and extent. The examination involves a thorough review of any complaints related to staff behaviour.

Additionally, the monitoring investigates the percentage of employees who leave a company and who are replaced by new personnel within a specific period to assess whether there is any noticeable connection with workplace misconduct. Moreover, the frequency of employee absenteeism and sick leave usage is carefully evaluated, along with an assessment of access to parental leave and flexible work arrangements. The significance of interviews and consultations with workers provide valuable insights into how poor conduct may be affecting employee satisfaction and their decisions to remain with the company.

## Understanding workplace misconduct through data analysis

Organisations and businesses use the data they collect to regularly assess and improve the work culture, as well as to develop measures for preventing and responding to relevant unlawful conduct.  It is not enough to simply collect data about unlawful or inappropriate conduct in the workplace. That data needs to be analysed so that we can implement effective measures in response to it.

Evaluation should be data-driven, incorporating input from workers and stakeholders. Following evaluation, the organisation should update its prevention and response plan for ongoing improvement.

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