RESPECT@WORK

Sexual harassment – new legislative changes and their implications for workplaces

LANDER & ROGERS

Guide

INTRODUCTION

The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 passed both houses of parliament on 28 November 2022.

The new legislation implements a number of the recommendations in the Respect@Work Report released following the National Inquiry into Sexual Harassment in Australian Workplaces in 2018.

Among other things, the new legislation will amend the *Sex Discrimination Act 1984* (Cth) to implement a positive duty on all employers and persons conducting a business or undertaking (PCBUs) to take reasonable and proportionate measures to eliminate, as far as possible, workplace sexual harassment, sex discrimination and victimisation.

Learn more about the new Respect@Work duties and their implications for employers and PCBUs in this guide or visit the Respect@Work information hub at www.landers.com.au/respect-at-work.

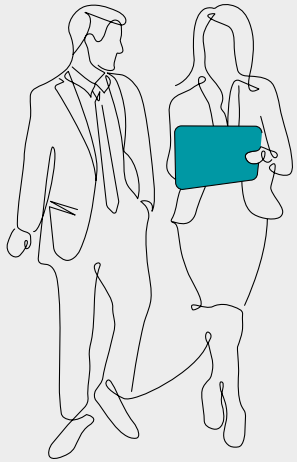
New positive duty

An employer or a person conducting a business or undertaking must take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

Quick links

Click to navigate

- Timeline - Recent legislative changes
- Overview - New Act and next steps for employers
- Access - Respect@Work information hub
- Mitigating risk - Steps to reduce risks
- Mitigating risk - Identifying risk factors
- Mitigating risk - Key controls
- Key contacts



Access the Respect@Work hub

RECENT LEGISLATIVE CHANGES

2018

Government commissions Respect@Work Report

29 Jan 2020

Respect@Work **Report published**

2021

8 April

Roadmap for Success **released**

10 July

Fair Work Regulations **amendment commenced**

11 September

Respect at Work Act **commenced**

16 Sep 2022

NSW Government introduces amendments to the *Work Health & Safety Regulation 2017*

27 Oct 2022

Fair Work ***Secure Jobs, Better Pay Bill 2022*** introduced

28 Nov 2022

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (**Respect at Work Act 2022**) finally passed both houses of parliament

NEW ACT AND NEXT STEPS FOR WORKPLACES

View online

The hotly anticipated Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Respect at Work Act 2022) finally passed both houses of parliament on 28 November 2022.

The Act implements a number of the remaining recommendations in the Respect@Work Report released following the National Inquiry into Sexual Harassment in Australian Workplaces, and has significant implications for all workplaces.

All of the changes will take effect the day after the Respect at Work Act 2022 receives Royal Assent, with the exception of the Australian Human Rights Commission's new enforcement and investigative powers, which will take effect 12 months after Royal Assent.

In this article, learn more about:

- the key changes organisations need to know about;
- the additional obligations employers will now need to comply with in relation to workplace discrimination and harassment; and
- the steps organisations should be taking now to ensure compliance.

Positive duty to eliminate sexual harassment

The *Sex Discrimination Act 1984* (Cth) (**SD Act**) has been amended to include a new Part IIA which introduces a new **positive duty**. The positive duty requires an employer or a person conducting a business or undertaking (**PCBU**) to take **reasonable and proportionate measures** to **eliminate**, as far as possible, conduct that includes:

- sexual harassment (being unwelcome conduct of a sexual nature);
- harassment on the ground of sex (being unwelcome conduct based on the sex of the person, but not necessarily sexual in nature);
- discrimination on the ground of a person's sex (being differential treatment based on the sex of the person);
- conduct that subjects a person to a hostile workplace environment on the ground of sex (being, as set out further below, conduct that results in an offensive, intimidating and humiliating environment for people of one sex, but not necessarily directed at a person);
- acts of victimisation that relate to complaints, proceedings, assertions or allegations in relation to conduct in points 1 to 4 above.

The new positive duty means employers and PCBUs will be required to move from just responding to conduct that has already occurred, to proactively taking steps to prevent that conduct from occurring in the first place.

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

Importantly, the positive duty applies not only to employers in respect of their employees, but to all PCBUs in respect of workers in the relevant business or undertaking. This extends the application of the duty to all organisations that conduct a business or undertaking — including companies, unincorporated bodies or associations, not for profits, sole traders, partnerships and self-employed persons and to a broad category of workers including employees, contractors and subcontractors, labour hire workers, outworkers, apprentices and trainees, volunteers as well as other third parties like clients and suppliers, so far as their behaviour affects workers.

Access the Respect@Work hub

Express prohibition on conduct that subjects a person to a hostile workplace environment on the ground of sex

Pursuant to the new section 28M of the SD Act, it is now unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.

In determining whether a person has subjected another person to a hostile workplace environment on the ground of sex, it is necessary to consider the seriousness of the conduct; whether the conduct was continuous or repetitive; and the role, influence or authority of the person engaging in the conduct.

It should be emphasised that for conduct to be prohibited under the new section 28M of the SD Act it needs to result in an offensive, intimidating and humiliating environment for people of one sex, but does not necessarily need to be a directed at a specific person.

Conduct that could result in people of one sex feeling unwelcome or excluded by the general work environment and potentially breach the new prohibition includes displaying obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes.

Expanded investigative and enforcement powers for the Australian Human Rights Commission

The *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) has been amended to expand the investigative and enforcement powers of the Australian Human Rights Commission (**AHRC**) to monitor and address employer compliance with the positive duty.

Under the new powers, the AHRC can:

- conduct inquiries into employer/PCBU compliance with the positive duty if the AHRC reasonably suspects non-compliance;
- provide recommendations to the employer/PCBU to prevent a repetition or continuation of a failure to comply with the positive duty;
- give a compliance notice specifying actions that an employer/PCBU must take, or refrain from taking, to address their non-compliance, including a reasonable period within which specified action must be taken or refrained from being taken;
- apply to the Federal Court or the Federal Circuit and Family Court of Australia for enforcement of a compliance notice;
- enter into enforceable undertakings with employers/PCBUs regarding actions and compliance;
- prepare and publish guidelines for complying with the positive duty, in order to work collaboratively with employers/PCBUs in promoting compliance;
- inquire into any matter that may relate to actual or suspected systemic unlawful discrimination (which is defined to mean unlawful discrimination that affects a class or group of persons and is continuous, repetitive or forms a pattern);
- enable a representative body to progress a complaint on behalf of one or more affected persons from conciliation at the AHRC to application to the court.

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

Lowered threshold for finding of harassment on grounds of sex

The definition of harassment on the ground of sex under section 28AA of the SD Act has been amended so that there is no longer a requirement for the alleged wrongdoer to have engaged in unwelcome conduct of a “seriously demeaning” nature.

All that is required now is that the unwelcome conduct was of a “demeaning” nature. This lowers the threshold requirements for a finding of harassment on the ground of sex.

The prohibition under section 28AA of the SD Act captures harassing conduct that is engaged in by reason of someone’s sex but is not necessarily sexual — for example, a comment that persons of one sex are stronger or weaker than another sex, or have particular strengths or weaknesses.

Clarification that victimising conduct can form the basis of a civil action for unlawful discrimination as well as a criminal complaint

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (**Respect at Work Act 2021**) last year amended the SD Act and the AHRC Act to clarify that victimisation can form the basis of both a civil action for unlawful discrimination as a well as a criminal offence under the SD Act. However, the other Commonwealth anti-discrimination Acts — being the *Age Discrimination Act 2004* (Cth) (**AD Act**), *the Disability Discrimination Act 1992* (Cth) (**DD Act**) and the *Racial Discrimination Act 1975* (Cth) (**RD Act**) — have now been amended to clarify this as well.

These amendments make it clear that the federal courts have jurisdiction to hear an application of unlawful discrimination under the AHRC Act, where the alleged unlawful discrimination is an act of victimisation brought as a civil action.

Amendment to timeframes for making a complaint under anti-discrimination legislation

Complaints made under the AD Act, DD Act and RD Act may now only be terminated by the AHRC if more than 24 months have passed since the alleged unlawful conduct took place. Previously, the AHRC had discretion to terminate complaints made more than six months after the alleged unlawful conduct took place.

These changes are consistent with the amendments already made to the SD Act by the Respect at Work Act 2021.

Commonwealth public sector reporting to the Workplace Gender Equality Agency

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

Additional changes in Secure Jobs Bill

It should be noted that the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Secure Jobs Bill**), which was introduced into parliament on 27 October 2022, proposes, among other things, additional changes relating to sexual harassment and discrimination. These include a new express prohibition on sexual harassment in connection with work.

We will provide further details about the changes in the Secure Jobs Bill separately.

What do these changes mean for your organisation?

While the new AHRC investigative and enforcement powers will not come into effect for 12 months, the positive duty and other rights and duties created by the new legislation will be operative after the Respect at Work Act 2022 receives Royal Assent. This means your organisation must take steps to comply with the positive duty and other obligations now.

In particular, to ensure compliance with the positive duty to eliminate sexual harassment your organisation should, if it has not already done so:

- undertake a formal audit or risk assessment to understand the factors and exposure points in your organisation that increase the risk of sexual harassment in the workplace. This could be done on a similar basis to work health and safety risk assessments. To assist you with this task, Lander & Rogers has developed a dedicated diagnostic risk application tool. Please contact a member of our team for more information;
- if any risks are identified, assess what "reasonable and proportionate" steps can be taken within the context of your organisation to address those risks, and perform these steps as soon as possible. Remember that different divisions in your organisation may require different approaches, depending on the risk factors present within each;
- review and update policies dealing with sexual harassment to ensure they clearly set out expected standards of behaviour, including in relation to out-of-hours conduct that may be sufficiently connected to work. This may include the development of a stand-alone sexual harassment policy;
- provide training, preferably face to face, about sexual harassment and the positive duty. Training should be conducted for all staff but tailored to different groups, e.g. executives, people leaders, human resources, managers and supervisors, and frontline employees. Specific training is also recommended for those who are likely to have complaints of harassment reported to them;
- ensure there is a robust complaints/grievance handling framework in place to deal with and manage reports of sexual harassment. This process should be clearly explained to all staff to ensure they know how to make reports;
- encourage or require employees to make reports if they experience, witness or hear about sexual misconduct, and to speak up about key risk areas in the business. Make it clear that they will be protected from victimisation for doing so.

Extra precautions for the festive season

With the 2022 festive season upon us, workplaces need to be particularly mindful to take steps to prevent incidents of sexual harassment occurring at functions.

Promoting a positive workplace culture

The new legislative changes are also a timely reminder of the importance of a strong workplace culture generally. Now is the time to review your organisation's values, think about the type of workplace culture your organisation strives to achieve, and take steps to communicate and action these values and organisational goals to your people.

Creating an inclusive culture that is free from discrimination and harassment, and where staff feel safe and respected, will assist your organisation to meet its legal obligations as well as significantly contribute to employee satisfaction and productivity. It will also be important to both prevent and respond to the likely increase in discrimination and harassment cases we anticipate seeing in the federal courts given the lowered threshold for findings of sex discrimination and increased timeframes for making discrimination complaints.

RESPECT @WORK

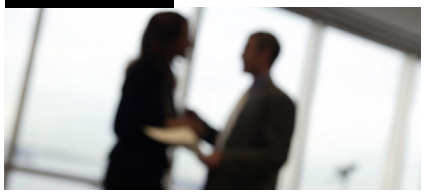
Access your Respect@Work hub for the latest news, information and resources.

Key resources

- Latest news and information
- Research insights
- Diagnostic tool
- Workplace training

Visit: landers.com.au/respect-at-work

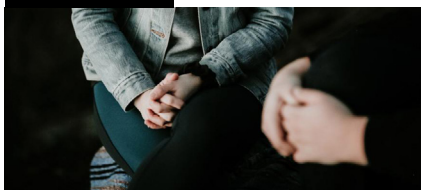
Insight



First look: the new positive duty to eliminate sexual harassment

In September, the Australian Labor Government tabled its proposed bill to address sexual harassment at work, including the positive duty on employers and persons conducting a business or undertaking (PCBU) to eliminate sexual harassment at work.

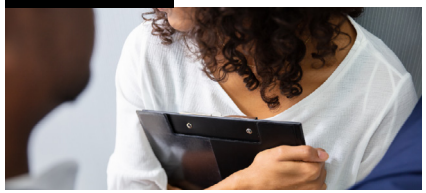
Insight



NSW Work Health and Safety Regulation amended to require management of psychosocial risks

Businesses in NSW are now explicitly required to manage psychosocial risks to worker health and safety, as part of the increasing push to address mental health in the workplace.

Insight



Sexual harassment: Is your workplace prepared?

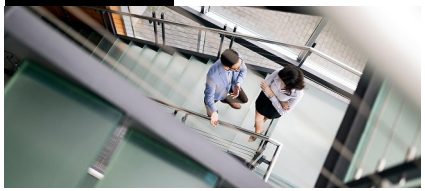
There has been a multitude of litigated disputes involving sexual harassment claims in recent years, with consequent significant awards of damages in favour of successful claimants. Learn more about five key cases here.

Insight

Preventing sexual misconduct in the workplace

This article explores practical and effective recommendations for employers to improve workplace safety and ensure they are free from sexual misconduct.

Insight



Preventing sexual harassment in the workplace: Updates and developments for 2022

Explore the rights and obligations of employers in preventing sexual harassment in the workplace along with steps employers should be taking now.

Insight

Victoria to limit non-disclosure agreements in workplace sexual harassment cases

Victoria the first Australian jurisdiction to prohibit non-disclosure agreements (NDAs), sometimes described as “gag orders”, in relation to workplace sexual harassment.

Access the Respect@Work hub

STEPS TO REDUCE RISK

STARTING POINT:
Under cover of legal privilege, conduct an audit or organisational review to understand your organisation's exposure points and key risk areas

Create a **register of key risks** that could contribute to the occurrence of sexual harassment

Implement controls to address identified risks

Implement a formal risk management framework which addresses sexual harassment in the workplace as part of your proactive preventative action plan to address sexual harassment at a systemic level.

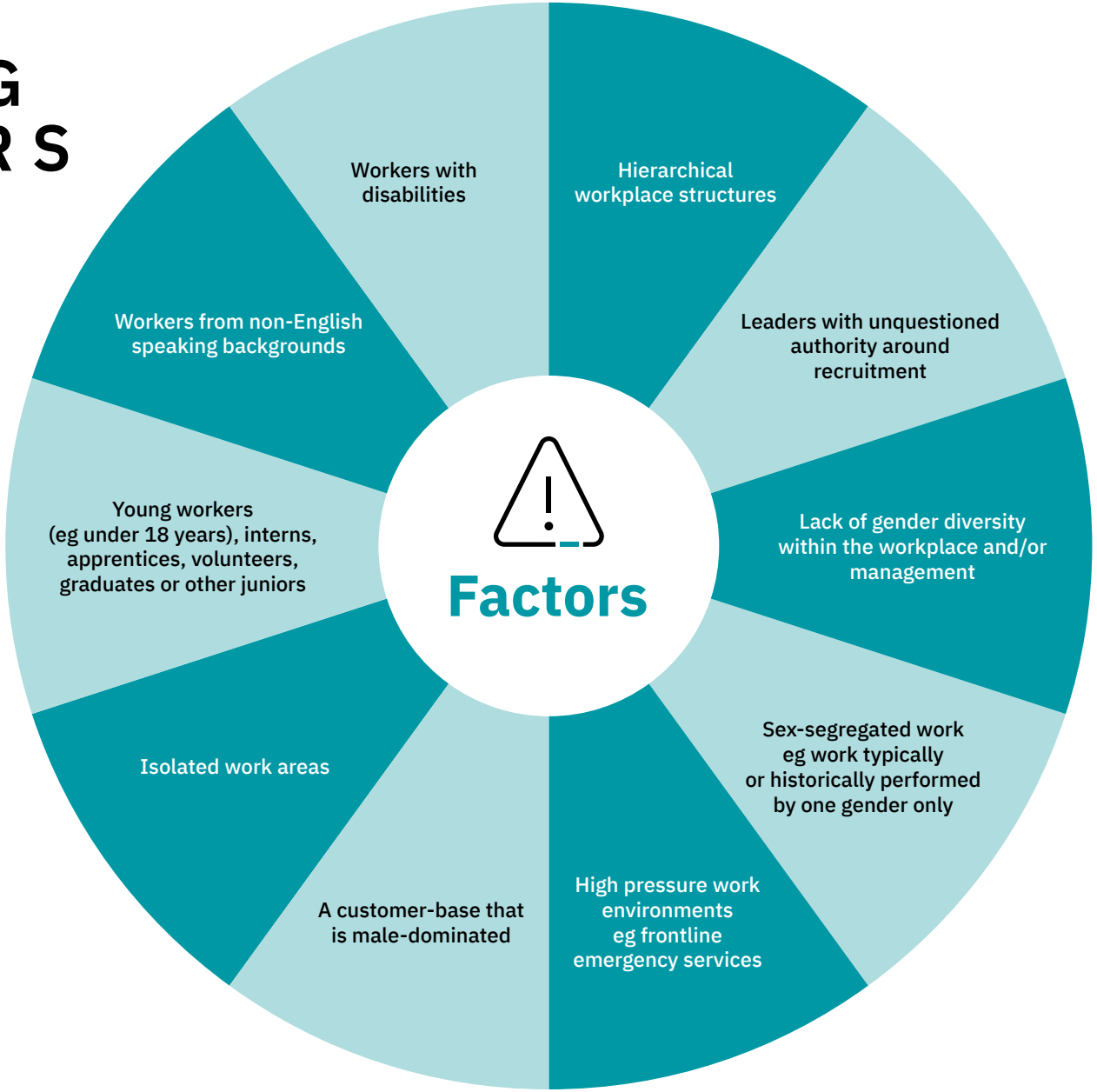
A risk management framework will help:

- identify sexual harassment risks;
- assist in enacting a prevention plan;
- ensure systems are in place which enable employees to report their complaints and subsequently ensure such complaints are clearly communicated and accessible to all workers; and
- establish a confidential and secure system for tracking and monitoring complaints data to ensure matters are adequately dealt with and continuous improvement in the organisation.

Access the Respect@Work hub

IDENTIFYING RISK FACTORS

If some of the following factors are present in your workplace, the risk of sexual harassment occurring may be increased.



Access the Respect@Work hub

KEY CONTROLS

There are several controls that may aid your organisation in addressing identified risks of sexual harassment.

- Conduct an organisation-wide audit to identify key risks
- Introduce a stand alone sexual harassment policy
- Due diligence training for executive team and board
- Organisation wide comms campaign from the CEO down
- Anonymous reporting hotline
- Training for line managers to help them identify problematic behaviours
- Regular training for employees on acceptable workplace behaviour
- Ensure existence of robust complaints framework
- Investigate complaints

KEY CONTACTS

Access the Respect@Work hub

For more information and guidance about the impacts of Respect@Work on your organisation, contact Lander & Rogers' workplace relations and safety experts.

Sally Moten
Partner & Practice Group Leader
Workplace Relations & Safety

D +61 2 8020 7801
M +61 414 333 424
E smoten@landers.com.au

Will Spargo
Partner & Practice Group Leader
Workplace Relations & Safety

D +61 3 9269 9639
M +61 421 988 475
E wspargo@landers.com.au

Shannon Chapman
Partner
Workplace Relations & Safety

D +61 7 3456 5199
M +61 407 694 927
E schapman@landers.com.au

Emma Purdue
Partner
Workplace Relations & Safety

D +61 3 9269 9471
M +61 438 830 929
E epurdue@landers.com.au

Amie Frydenberg
Partner
Workplace Relations & Safety

D +61 3 9269 9359
M +61 412 997 932
E afrydenberg@landers.com.au

Christian Mooney
Partner
Workplace Relations & Safety

D +61 3 9269 9605
M +61 439 600 088
E cmooney@landers.com.au

Derek Humphery-Smith
Partner
Workplace Relations & Safety

D +61 3 9269 9116
M +61 413 202 222
E dhumpherysmith@landers.com.au

Jeremy Hanrahan
Partner
Workplace Relations & Safety

D +61 2 8020 7681
E jhanrahan@landers.com.au

Julian Riekert
Partner
Workplace Relations & Safety

D +61 3 9269 9363
M +61 411 221 872
E jriekert@landers.com.au

Kaitlyn Gulle
Partner
Workplace Relations & Safety

D +61 3 9269 9532
M +61 401 615 339
E kgulle@landers.com.au

KEY CONTACTS

Access the Respect@Work hub

Mark Sullivan
Partner
Workplace Relations & Safety

D +61 2 8020 7643
M +61 411 756 515
E msullivan@landers.com.au

Vince Rogers
Partner
Workplace Relations & Safety

D +61 7 3456 5156
M +61 408 184 466
E vrogers@landers.com.au

ABOUT US

Founded in 1946, Lander & Rogers is one of the few remaining truly independent Australian law firms and a leader in legal tech innovation.

With offices across the eastern seaboard of Australia, Lander & Rogers has grown organically resulting in a unified firm with a strong focus on client and staff care.

We believe legal services involve more than just the law – practical, commercial advice and exceptional client experience are equally important to our clients and to us.

Lander & Rogers advises corporate, government, not-for-profit and private clients in insurance law and litigation, family law, workplace relations & safety, real estate, corporate transactions, digital & technology and commercial disputes.

The firm is global in approach, working closely with a network of leading firms to provide advice to clients, both domestically and abroad. Lander & Rogers is also the exclusive Australian member of the largest worldwide network of independent law firms, TerraLex.

Brisbane
Level 11 Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3456 5000
F +61 7 3456 5001

Canberra
Level 11
15 London Circuit
Canberra ACT 2601
T +61 2 5138 8000
F +61 2 5138 8001

Melbourne
Level 15 Olderfleet
477 Collins Street
Melbourne VIC 3000
T +61 3 9269 9000
F +61 3 9269 9001

Sydney
Level 5
33 Alfred Street
Sydney NSW 2000
T +61 3 9269 9000
F +61 3 9269 9001

landers.com.au