

Summary Guidelines for Complying with the Positive Duty

Overview

Eight months after the AHRC enacted the *Respect at Work Act 2022* (Cth) and created a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment, sex based harassment, gender discrimination, hostile workplace environment and victimisation (collectively called 'unlawful conduct') they have released guidelines on what this looks like!

View the guidelines [here](#).

It is a reasonably lengthy document (112 pages) so I have summarised it into what I think are the key concepts that arise out of it.

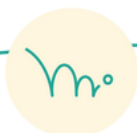
While the Guidelines are not legally binding, they are authoritative and set out the steps that the Commission expects organisations and businesses to take to comply with the positive duty. Compliance with the positive duty may also be achieved by other methods if those methods provide an equivalent or higher level of protection against relevant unlawful conduct. What is necessary is that an organisation or business can demonstrate that they have taken reasonable and proportionate measures to eliminate the relevant unlawful conduct, as far as possible. The Commission expects organisations and businesses to take a holistic approach to creating safe and respectful workplaces. These Guidelines will be used by the Commission in assessing compliance with the positive duty when its enforcement functions commence on 12 December 2023.



Be Brave.



Be Curious.



Be Playful.



We Care.



We Make it Happen.

AIM OF POSITIVE DUTY

The positive duty aims to create systemic change by preventing unlawful conduct from happening in the first place, rather than reacting to conduct after it has occurred and already caused harm. The positive duty requires organisations and businesses to be proactive and take appropriate measures to eliminate relevant unlawful conduct, as far as possible. Simply responding to individual reports as they arise is not enough. Organisations and businesses can also now be held accountable even if no one makes an individual complaint under the *Sex Discrimination Act 1984* (Cth).

While the positive duty is mostly thought about in relation to employee to employee it also provides protection to an employee from external parties (such as clients, customers, suppliers, members of the public). The positive duty requires organisations and businesses to take reasonable and proportionate measures to eliminate, as far as possible, the following types of discriminatory conduct being engaged in by third parties towards employees and workers in connection with work: sexual harassment, sex-based harassment, hostile workplace environment and victimisation. This aspect of the positive duty does not apply to discrimination on the ground of sex.

In deciding whether an organisation has met their positive duty the AHRC will take into consideration the following factors:

- 1 The size, nature and circumstances of the business or undertaking.
- 2 The resources of the organisation or business, whether financial or otherwise (such as access to HR).
- 3 The practicability and the cost of measures to eliminate the relevant unlawful conduct.
- 4 Any other relevant matter: These may include the culture of a workplace, levels of worker supervision, working hours, work design and systems of work (such as rostering arrangements) and geographic location.

The guidelines reference vicarious liability as outlined in the *Sex Discrimination Act 1984* (Cth) (this is not new and now co-exists with the new positive duty). It requires that an employer take all reasonable steps to prevent an employee from acting unlawfully and if they haven't then they are liable for that employee's actions). It is encouraging for an employer that the Guidelines state at CI 4.6 "The Standards and examples outlined in these Guidelines are consistent with, and in some respects go further than, the actions that courts have traditionally expected from employers when considering vicarious liability claims under the *Sex Discrimination Act 1984* (Cth)." What this means is that if an employer follows these guidelines then the standard they are operating at is higher than the previous/current standard of vicarious liability under s 106 of the Act.

AUSTRALIAN HUMAN RIGHTS COMMISSION POWERS

From 12 December 2023, the Commission will have the power to enforce compliance with the positive duty.

The Commission can commence an inquiry when it 'reasonably suspects' that an organisation or business is not complying with the positive duty. This suspicion might come from information or advice provided by other government agencies or regulators, impacted individuals, unions or worker representatives or from reports in the media. The Commission will have the power to:

- Conduct **inquiries** into compliance with the positive duty by an organisation or business and provide recommendations to achieve compliance
- Issue a **compliance notice** specifying action that an organisation or business must take, or refrain from taking, to address any non-compliance
- Apply for an **order** to the federal court to direct compliance with a compliance notice.
- Enter into **enforceable undertakings** with an organisation or business under which the organisation or business agrees to do, or refrain from doing, certain things.

The Commission can commence an inquiry without the consent of an organisation or business. The Commission also has investigative powers to compel the production of information and documents, as well as to examine witnesses.

THE FOUR GUIDING PRINCIPLES

The guidelines set out four Guiding Principles and seven Standards that the Commission expects all relevant organisations and businesses to meet to satisfy the positive duty. The Commission expects organisations and businesses to consider and apply the four Guiding Principles when implementing the seven Standards.

The four guiding principles are

Involve **employee consultation**, so that any actions taken are informed by those affected or potentially affected by relevant unlawful conduct at work

1

Advance **gender equality**, where people of all genders have equal rights, rewards, opportunities and resources

2

Acknowledge **intersectionality**, recognising that the risks and impacts of relevant unlawful conduct are shaped and compounded by systemic issues and factors that include race, religion, gender, sexual orientation and disability

3

Be **person-centred** and **trauma informed**, ensuring that workplace systems, policies and practices support people's safety and dignity.

4

It is however also important to note that the Guidelines state, "Being person-centred and trauma-informed does not always mean doing what a person requests, but it does mean genuinely considering their wishes and the impact that decisions may have on them." (p22)



THE SEVEN STANDARDS

The seven standards are

1 Leadership

Senior leaders understand their responsibilities and ensure appropriate measures to prevent and respond to unlawful behaviours are developed, recorded in writing, communicated to workers and implemented. Senior leaders regularly review the effectiveness of these measures and update workers. Senior leaders are visible in their commitment to safe, respectful and inclusive workplaces that value diversity and gender equality. They set clear expectations and role model respectful behaviour. P31-38 outlines very detailed (possible) examples.



2 Culture

Organisations and businesses foster a culture that is safe, respectful and inclusive and values diversity and gender equality. This culture empowers workers (including leaders and managers) to report relevant unlawful conduct, minimises harm and holds people accountable for their actions. P 41-45 outlines very detailed (possible) examples.



THE SEVEN STANDARDS

3 Knowledge

Organisations and businesses develop, communicate and implement a policy regarding respectful behaviour and unlawful conduct. Organisations and businesses support workers (including leaders and managers) to engage in safe, respectful and inclusive behaviour through education. The most effective education programs involve key concepts being revisited or presented repeatedly over time, to build knowledge and familiarity, including through formal training, team meetings, leader messaging and regular staff engagement. Each time that a topic is revisited, it might involve deepening layers of complexity or different applications, depending on the audience.

To be effective, formal training or learning should:

- Be compulsory for all new and existing workers
- Be part of a broader workplace commitment to cultural change, gender equality, diversity and inclusion
- Be shown as important by leaders, through what they say and how they act
- Be led by instructors with expertise in discrimination and harassment, as well as with skills to engage with people from culturally and linguistically diverse backgrounds and other marginalised backgrounds
- Focus on developing behavioural skills and new ways of thinking and acting and on providing knowledge to support those skills
- Involve immersive and active participation, with space for debate and discussion and opportunities to ask questions, or express doubt and concerns
- Provide a safe environment for all participants, which may require that certain modules be gender-specific
- Reflect the cultural diversity of the organisation or business.



The Guidelines also state and p 47, “Education and training should also be designed to meet the needs of its targeted audience. For example, training or formal learning for leaders and managers may need to be more comprehensive. This may include incorporation of skills development in relation to identifying risks of relevant unlawful conduct as well as skills in relation to responding to reports of such conduct appropriately.” P 48-50 outlines very detailed (possible) examples. P 51 outlines what should be in a Workplace Behaviour Policy and Procedure template. EEO Specialists have created a [Workplace Behaviour Policy and Procedure template](#) that follows these recommendations.

THE SEVEN STANDARDS

The seven standards are

4 Risk Management

Organisations and businesses recognise that relevant unlawful conduct is an equality risk and a health and safety risk. They take a risk-based approach to prevention and response. The guidelines quote, at p52, “Risk management is a standard part of running any organisation or business. It is a requirement under WHS laws and should form part of the ‘prevention and response plan’ that an organisation or business develops for satisfying the positive duty in the *Sex Discrimination Act 1984* (Cth).” The risk-based approach is the same as the risk based approach in safety which is identify, assess, eliminate or minimise and regular checks/audits. In undertaking risk assessment processes and determining appropriate control measures, consideration should be given to the duration (how long a person is exposed to the risk), frequency (how often a person is exposed to the risk) and severity (level of seriousness) of the risks identified. P 54-59 outlines very detailed (possible) examples.



5 Support

Organisations and businesses ensure that appropriate support is available to workers (including leaders and managers) who experience or witness relevant unlawful conduct such as contact officers, peer support, well-being officers, safety reps and EAP. Workers are informed about the available support, and can access the support, regardless of whether they report the conduct. P 63-67 outlines very detailed (possible) examples.



THE SEVEN STANDARDS

The seven standards are

6 Reporting and Response

Organisations and businesses ensure that appropriate options for reporting and responding to relevant unlawful conduct are provided and regularly communicated to workers and other impacted people. Responses to reports of relevant unlawful conduct are consistent and timely. They minimise harm to, and victimisation of, people involved. Consequences are consistent and proportionate. Reporting and response processes should have the following features: Accessible, clear, simple, timely, transparent, fair, confidential, multiple reporting avenues and resolution options, consistent and appropriate outcomes and consequences, person centred and trauma informed approach, prohibition on victimisation. P 70-74 outlines very detailed (possible) examples.



7 Monitoring, Evaluation and Transparency

Organisations and businesses collect appropriate data to understand the nature and extent of relevant unlawful conduct concerning their workforce. 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. Organisations and businesses are transparent about the nature and extent of reported behaviours that could constitute relevant unlawful conduct concerning their workers and actions taken to address it. P 79-86 outlines very detailed (possible) examples.



About us

EEO Specialists has operated for the last 14 years and continues to operate in the space of standard 3 as outlined above. Franca Sala Tenna is legally qualified and has a team of highly skilled facilitators who deliver legally sound, understandable, interactive training. EEO Specialists have conducted training for more than 30,840 people over this time. In addition to the training, EEO Specialists provides a range of complimentary content such as posters, email scripts and toolbox talks to continue the learning.

Franca has now created and sold more than 55,360 emodules in relation to sexual harassment, discrimination, and bullying, using the 14 years of in-person training, coupled with workplace investigations and coaching experiences to create engaging, meaningful content.

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