

Respect at Work – How to be a good human!



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Acknowledgement of Country

- *We acknowledge the Gadigal and Bidjigal Clans, the traditional custodians of the Sydney Coast.*
- *We pay respect to those Elders, past and present, and thank them for allowing us to work and study on their lands.*





- Recent changes to the law
- The positive duty and your workplace
- How to support people, including bystanders
- Quiz!

We provide generalist legal advice to people who work, live or study in our local area.

We have NSW statewide services:
- Sexual Harassment and Discrimination Legal Service;
- Employment Rights Legal Service

We also run UNSW Law & Justice clinical programs.



WORKING WOMEN'S LEGAL SERVICE

at Women's Legal Service NSW



A specialist legal service for working women



Working Women's Legal Service
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Respect@Work
National Inquiry into
Sexual Harassment in
Australian Workplaces

AUSTRALIAN HUMAN RIGHTS COMMISSION • 2021



Summary of some recent changes to the law

2021

Parliament of the
Commonwealth of Australia

LEGISLATION

passed by
both Houses

**Discrimination and Fair Work
(Amendment) Bill**

2021

**An Act to amend the *Fair Work Act 2009* and the
Discrimination Act 1984, and for**

The law before

Some of the key changes to Commonwealth Discrimination Laws

(Sex Discrimination Act 1984 and Australian Human Rights Commission Act 1986)

- Sex discrimination prohibited
- Sexual harassment prohibited
- Public officials were exempt
- 6 months to lodge complaint
- SDA protections only covered limited types of workers



The law now

- Sex discrimination and sexual harassment prohibited
- Sex-based harassment is expressly prohibited *
- Unlawful to subject another person to a workplace environment that is hostile on the ground of sex *
- New positive duty on employers to take reasonable and proportionate measures to eliminate the above
- Public officials exemption removed
- 24 months to lodge a complaint in SDA, DDA, RDA and Age DA
- SDA protections extended to cover interns, volunteers and apprentices.
- Protections extended to all workplaces, including the home
- New compliance and monitoring functions for the AHRC, including looking into systemic discrimination (beginning Dec 2023)



Sex-based harassment (harassment on the grounds of sex) and hostile workplace



Harassment on the grounds of Sex

S28AA Sex Discrimination Act

“a person harasses another person on the ground of sex if the person engages in **unwelcome** conduct of a demeaning nature in relation to the person harassed”

- Subjective component – conduct must be unwelcome
- Objective component – reasonable person test:

“a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated



Hostile Work Environment



S28M Sex Discrimination Act

A person [the first person] subjects another person [the second person] to a workplace environment that is hostile on the ground of sex if:

- a. the first person engages in conduct in a workplace where either or both of them work, and
- b. the second person is in the workplace at the same time or after the conduct occurs
- c. Objective component - reasonable person test:
“a reasonable person would have anticipated the possibility of the conduct making the workplace environment offensive, intimidating or humiliating”



Hostile Work Environment

Hostile conduct – rude or offensive language, sexual innuendo, displaying pornographic materials

Example:

Kate and Mia work as office staff in a car dealership where all the sales staff are male. The sales staff often make comments to each other about the appearance of female customers. Kate and Mia can see and hear this behaviour from their desks. The dealership has a staff room where everyone eats and usually the men tell each other crude jokes and share pornographic images on their phones over lunch. Kate and Mia try to sit away from the others and the men usually ignore them.



The Fair Work Act and the Fair Work Commission – sexual harassment


The law before

- Stop Bullying Orders
- No Stop Sexual Harassment Orders
- No positive duty

The law now

- New dispute avenues:
 - Stop Sexual Harassment Orders
 - Deal with a sexual harassment dispute
- Sexually harassing someone is a valid reason for dismissal

NSW State Discrimination and Employment Laws remain unchanged



FWC sexual harassment jurisdiction

- If conduct happened or started **before 6 March 2023** –
can apply for Stop Sexual Harassment orders (unlike bullying orders, doesn't need to be repeated incidents)
- If conduct occurred **on or after 6 March 2023** –
can apply for:
 - Stop Sexual Harassment Orders only (fee required)
 - Stop Sexual Harassment Orders plus sexual harassment dispute (free)
 - Sexual harassment dispute only (free)
 - <https://www.fwc.gov.au/issues-we-help/sexual-harassment/sexual-harassment-commencing-or-after-6-march-2023>
 - <https://www.fwc.gov.au/apply-resolve-sexual-harassment-dispute-form-f75>



Deal with sexual harassment dispute – FWA – Form F75

FWC can now directly deal with a dispute about sexual harassment in addition to, or as an alternative to, making an application for a “stop sexual harassment order” via:

- mediation;
- conciliation,
- making a recommendation; or
- expressing an opinion.

If the dispute is not settled in the FWC:

- with the consent of both parties, the FWC can arbitrate the dispute; or
- If no consent is given to arbitrate, an applicant can make an application to the Federal Courts

Positive Duty to Eliminate Sexual Harassment or Sex-Based Harassment

Background to the Positive Duty

- S106 SDA – vicarious liability in the employer for the unlawful act unless the employer took ‘all reasonable steps’ to prevent the employee from doing the unlawful act
 - duty seen as reactive
 - places burden on individual to report
- calls for change to a positive approach focusing on prevention

The Respect@Work Positive Duty Recommendations

- Rec 17: Amend the *Sex Discrimination Act* to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.
- Rec 18: The Commission be given the function of assessing compliance with the positive duty, and for enforcement.

Sex Discrimination Act 1984 Part IIA – Duty to Eliminate Unlawful Sex Discrimination Etc

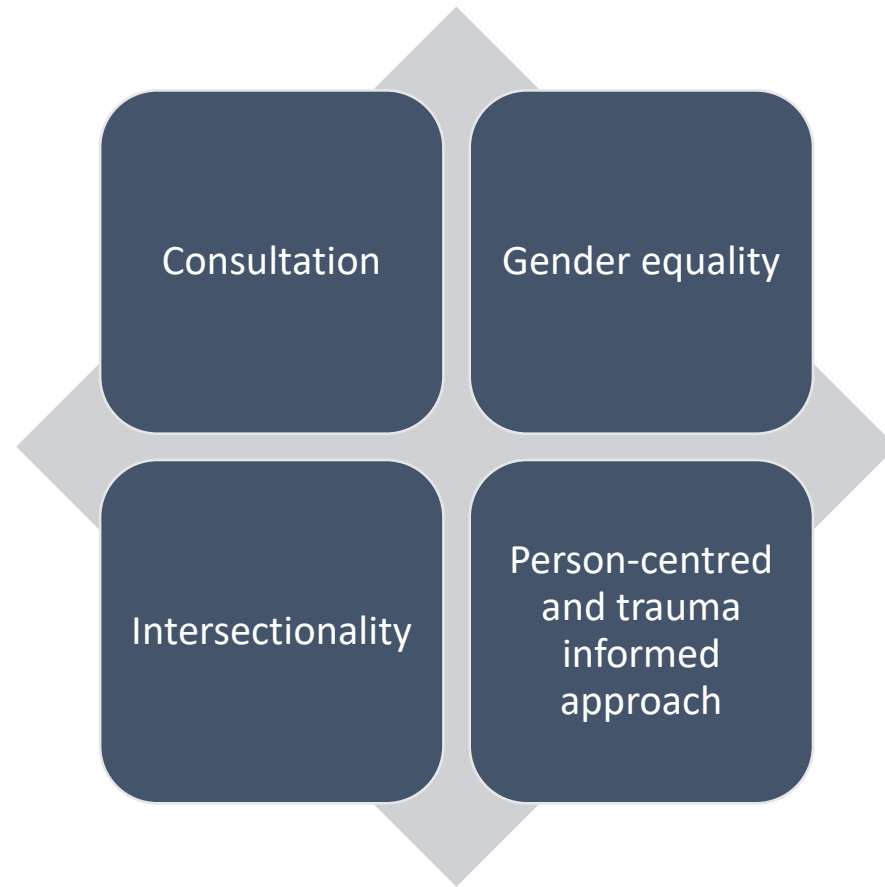
- **Positive duty:** An employer or a person conducting a business or undertaking must take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct.
- **Discriminatory conduct:**
 - Discrimination on the ground of a person's sex
 - Sexual harassment
 - Harassment on the grounds of sex
 - Hostile workplace environments
 - Victimisation

Drivers of Unlawful Conduct

The AHRC has identified 5 main drivers of unlawful conduct:

- Power imbalances
- Gender inequality
- Intersecting forms of discrimination and exclusion
- Lack of accountability
- Specific workplace and industry factors

The Guiding Principles



The Seven Standards

Leadership

Culture

Knowledge

Risk Management

Support

Reporting and response

Monitoring, evaluation and transparency

Reasonable and Proportionate Measures

The size, nature and circumstances of the organisation or business

The resources of the organisation or business

The practicability and cost of measures

Any other relevant matter

The AHRC resources for employers to assist them in complying with their obligations that can be accessed [here](#).



Supporting staff

Supporting Staff

Positive duty: No one size fits all.



What is sexual harassment?

Sexual harassment

*Any **unwelcome behaviour** of a sexual nature where a reasonable person would have **anticipated the possibility** that the person harassed would feel **offended, humiliated or intimidated**.*

Sex-based harassment: A person harasses another person on the ground of their sex if by reason of their sex they engage in unwelcome conduct of a demeaning nature in circumstance in which a reasonable person would have anticipated that the person would be offended, humiliated or intimidated by the conduct.

Sex-based discrimination: Discriminating against someone by reason of their sex, or a characteristic that appertains generally to persons of that sex; or a characteristic that is generally imputed to that sex, and the person is treated less favourably.

Hostile-workplace environment: Subjecting a person to a workplace environment that is hostile based on sex.

Sexual assault: Having sexual intercourse with another person without their consent and that person knows you do not want to or cannot consent or has no reasonable grounds to believe the other person had consented.

What is sexual harassment?

Sexual harassment is not just physical acts, it can include...

It is a sexual act or comment that makes you feel uncomfortable, ashamed, embarrassed, offended or intimidated

Comments or questions about body, looks or sex life

Sexual or crude jokes

Unwanted touching, grabbing, kissing or fondling

Unwelcome sexual advances or repeated requests for dates

Sexual actions or gestures

Asking you to do sexual acts

Wolf-whistling

Sexual/ indecent texts, emails, notes, letters, online conduct

Being leered at



If a person is harassed

Effect of sexual harassment/bullying

- Impact on health
- Dread about coming to work
- Isolation from colleagues
- Feeling of hopelessness
- Fear about the harasser and about what might happen if a complaint is made
- May leave job / profession for good.

Why take action?

- To make the harassment/ bullying stop
- To prevent it from happening again (to you or others)
- To have action taken against the harasser/ bully

Why would someone decide not to take any action?



Power imbalance

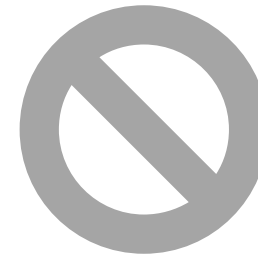
Fear

I won't be believed

Things will get worse, better to put up with it

Effect on career

HR will protect harasser/bully



Effect of harassment/bullying

Lack of confidence

Psychological injury

Lack of support

Onus on person harassed to take action



Promote and create policies



Understand your rights
and obligations



Speak up



Talk to someone
you trust

Practical steps a worker can take to address workplace sexual harassment



Report behaviour



Seek professional help



Be an active bystander



Listen attentively

What are their options if this happens?

Employer

Professional body

Court/Judicial Commission

AHRC

ADNSW

FWC

Workers compensation

Health/counselling

Police

Effect on business

- Poor culture, not an attractive employment option
- Staff productivity
- Staff retention- loss of workforce
- Cost: sick days, workers compensation claims, advertising jobs


Who is a bystander?

- Someone who sees or hears sexual harassment or bullying at the time it is happening.
- Someone who hears about it after it happens.

Who is an **ACTIVE** bystander?

- Someone who takes action about what they saw or heard
- This can be at the time, or after the time that the conduct happened.





Why are
the actions/
inactions of
bystanders
important?

Stop harassment

Change workplace culture

Assists reporting

Supports person harassed


Reinforces behaviour unacceptable

Reduce future harassment

Stops complicity

Stops further harm

Stops isolation of person harassed



Why might you (as a bystander) *not* act?



Fear of retaliation

“What will happen to me if I speak up?”



Bystander effect

“Surely someone else will step in?”



Past experiences

“What’s the point? It won’t change anything.”



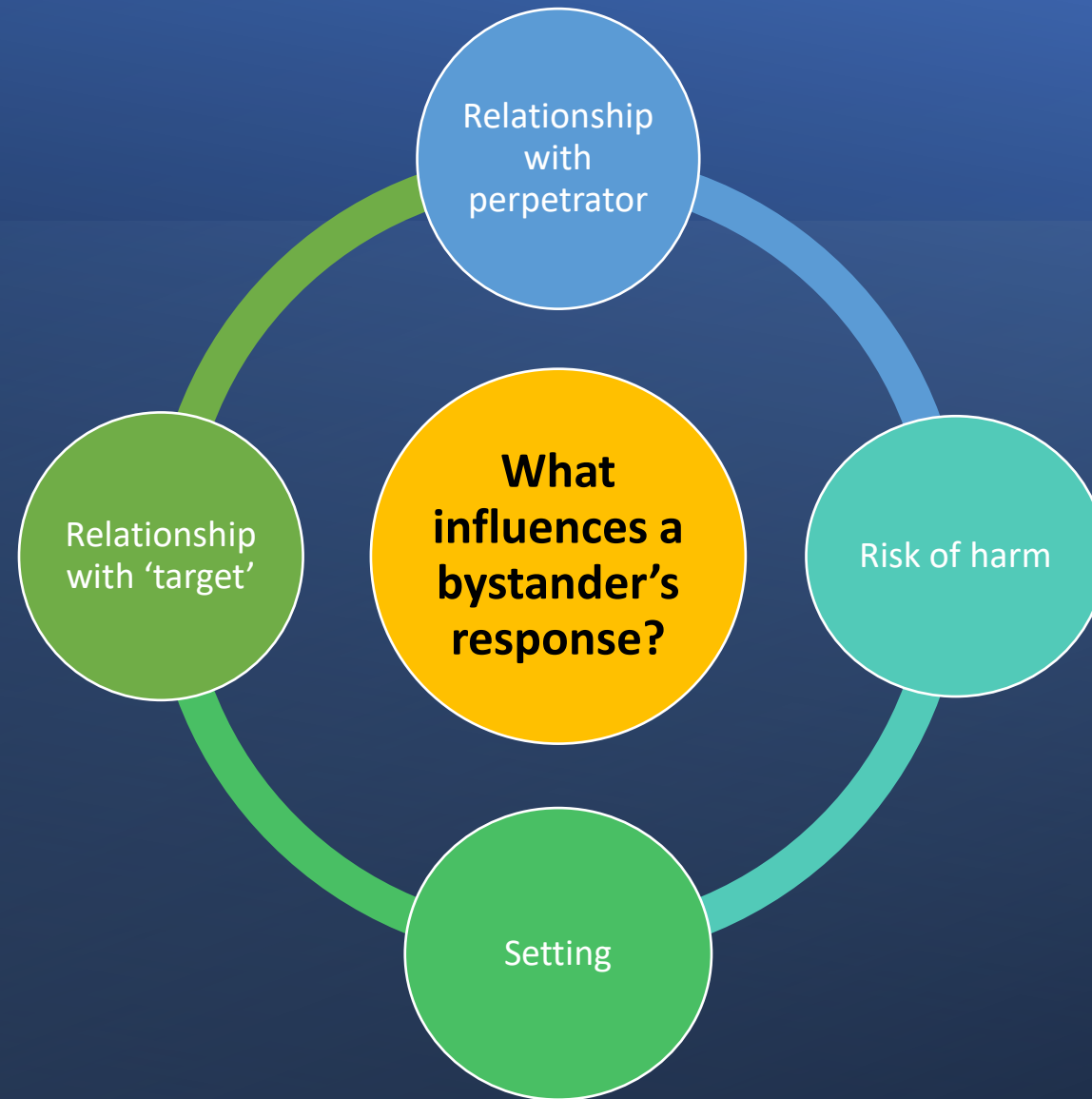
Relationship with perpetrator

“I don’t like what they’re doing, but they’re still my friend.”



Not knowing what to do

“I don’t know how to fix this? What’s the right/safe way to act?”





At the time
Low Involvement

Afterwards
Low Involvement

**At the time
High Involvement**

**Afterwards
High Involvement**



Practical steps

- Do a risk assessment
- Don't just think of staff to staff interactions (volunteers, students, clients, other third parties, events etc)
- Clear policies and complaint pathways known to workers
- Messaging to staff- sexual harassment etc not tolerated
- Assurances/ reassurance that making complaints/ informing of behaviour is okay (for both bystanders and person who is being harassed)
- Making process easy / comfortable- not looking like a discipline process
- Flexibility in approach- ask worker about what they need
- Trauma informed- check in with worker, help them access services
- Ask worker what they want
- Communicate what happens next, communicate outcome as far as possible

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