

7-Step Framework to Comply With Australia's New Guidelines Requiring "Positive Duty" to Prevent Workplace Sex Discrimination

Insights

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When the Australian parliament passed the Anti-Discrimination and Human Rights Legislation bill late last year, it introduced a new "Positive Duty" on employers to not only respond to but take proactive steps to prevent workplace sexual harassment and discrimination. The Australian Human Rights Commission (AHRC) will soon have the power to assess and monitor compliance with the Positive Duty starting this December 2023. To help businesses and other employer organizations with compliance, the agency recently published Guidelines to provide a set of guiding principles on how employers can meet their positive duty obligations. What do you need to know about these Guidelines and what is the seven-step framework you can use to comply?

What Does the New Law Require?

The new law amends the *Sex Discrimination Act 1984* and requires organizations and businesses to engage in "reasonable and proportionate" steps to prevent and eliminate "relevant unlawful conduct" from occurring in connection with work. In other words, businesses are required under the Positive Duty to not only respond to unlawful workplace conduct after it occurs, but also to actively prevent such conduct from the outset.

What Conduct Does the Positive Duty Cover?

The Positive Duty requires businesses and organizations to take measures to eliminate and prevent the following conduct:

- 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 victimization.

Whose Conduct Does the Positive Duty Cover?

The Positive Duty requires businesses and organizations to take measures to eliminate and prevent the following persons from engaging in the proscribed unlawful conduct:

- the entity itself;
- the entity's employees, workers, and agents; and
- in some cases, third parties (such as the entity's customers, vendors, or clients) towards employees in connection with their work.

Importantly, the definition of "workers" or employees covered under the Positive Duty is broad and includes any person who "carries out work in any capacity for an organization or business," including full-time or part-time employees, contractors or subcontractors, home-based workers, "gig" workers, interns, students gaining work experience, and volunteers.

What Factors are Considered in Determining "Reasonable and Proportionate" Measures?

The AHRC recognizes that "reasonable and proportionate" measures will look different for each business and organization. Therefore, in deciding whether a business or organization has satisfied its duties under the positive duty, the AHRC will consider each of the factors below:

- the size, nature, and circumstances of the business or undertaking;
- the resources of the organization or business, whether financial or otherwise;
- the practicability and the cost of measures to eliminate the relevant unlawful conduct; and
- any other relevant matters, including the culture of the workplace, levels of employee supervision, working hours, work design and systems of work, geographic location, and any known risks, as well as whether the organization or business has acted in accordance with the Guidelines and other relevant laws.

7 Standards of Compliance

The Guidelines provide a seven-step "end-to-end" framework that employers can use to tailor their strategies to eliminate and prevent relevant unlawful conduct:

1. **Leadership:** Members of the company's senior leadership should familiarize themselves with the Positive Duty requirements and understand the scope of unlawful conduct. Senior leadership must ensure that appropriate steps are taken and communicated with employees. Senior leadership should also practice and exemplify respectful and lawful behavior to set the proper standard for equality and inclusion.
2. **Culture:** Employers should create a safe and respectful culture for all employees. Employees should also be encouraged to report any unlawful conduct to their employers.

3. **Knowledge:** Employers should establish policies regarding appropriate workplace behavior. Employers should also educate their employees on behavioral standards, identifying problematic conduct, consequences of unlawful conduct, and employee's workplace rights and responsibilities.
4. **Risk Management:** Employers should take a "risk-based" approach to prevent unlawful conduct by consulting with all shareholders regarding potential risks and hazards. Employers are also required to minimize or eliminate risks associated with psychological safety and health caused by workplace harassment.
5. **Support:** Employers should provide readily available and accessible support to employees who experience or witness relevant unlawful conduct, regardless of whether the conduct has been reported.
6. **Reporting and Response:** Employers should provide employees with appropriate and regularly communicated options for reporting unlawful conduct. Reports should be responded to consistently, promptly, and in a manner that minimizes harm to victims.
7. **Monitoring, Evaluation, and Transparency:** Employers are expected to collect relevant data in relation to unlawful workplace conduct. Employers should use the data to continuously improve their work culture and develop precautions for preventing unlawful behavior. The AHRC also recommends transparency regarding the nature and extent of reported unlawful conduct as well as actions taken to address them.

The Positive Duty rules and, in effect, the Guidelines, apply to businesses and organizations of all sizes that operate or employ workers in Australia. It is therefore crucial for businesses and organizations to understand their responsibilities under the Guidelines and to make timely changes to meet their new obligations before the AHRC's enforcement powers commence in December 2023.

Conclusion

If your organization does business or employs individuals in Australia, please contact your Fisher Phillips attorney, the authors of this insight, or any attorney in our [International Practice Group](#) to learn more about the implications of the new Guidelines and how to stay compliant. We will monitor similar developments and provide updates as warranted, so make sure that you are [subscribed to Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox.

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