

What is the Positive Duty?

The **positive duty** is a legal obligation introduced into the *Sex Discrimination Act 1984* (Cth) in December 2022. It applies to ‘persons conducting a business or undertaking’ and ‘employers’ (as defined in the *Sex Discrimination Act*). These duty holders are referred to as ‘organisations and businesses’ in this factsheet.

The positive duty requires organisations and businesses to take ‘reasonable and proportionate measures’ to eliminate the following behaviour 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 creating a workplace environment that is hostile on the ground of sex
- related acts of victimisation.

We refer to these behaviours as ‘**relevant unlawful conduct**’ or ‘**unlawful behaviours**’ in our publications about the positive duty.

The positive duty aims to create change by preventing workplace sex discrimination, sexual harassment and other unlawful behaviour from happening, rather than reacting to it after it has occurred.

Previously, it was left to workers to report unlawful behaviours. The positive duty removes this burden from workers by requiring organisations and businesses to take preventative action, regardless of whether a report is made.

The positive duty was introduced following a recommendation by the Australian Human Rights Commission in the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report*. This preventative approach to unlawful behaviours aligns with other workplace protections, including work health and safety laws.

Who must satisfy the positive duty?

Regardless of their size or resources, all organisations and businesses in Australia that have obligations under the *Sex Discrimination Act* must satisfy the positive duty. This includes sole traders and the self-employed, as well as small, medium and large businesses, and government.

Whose behaviour does the positive duty cover?

The behaviour captured by the positive duty includes behaviour engaged in by:

- employers or people running an organisation or business
- employees, workers and agents
- third parties (in some cases) such as customers, clients, patients, students, members of the public and others towards employees and workers in connection with their work.

Third parties can pose significant risks to workers. The extension of the positive duty to the behaviour of third parties recognises the important role that organisations and businesses can play in protecting their workers from these risks.

When and where could unlawful behaviours occur?

Sexual harassment and other unlawful behaviours can occur in a wide range of contexts that are not necessarily limited to the workplace, or the working hours, of the people involved.

Unlawful behaviours captured by the positive duty may occur:

- in the workplace during work hours or after hours
- during a lunch break
- when working remotely (from home or offsite)
- at staff drinks or staff functions (at work or somewhere else)
- between colleagues outside the workplace and outside work hours
- during work-related travel.

People do not necessarily need to be colleagues or to work together for behaviour to be covered by the positive duty. For example, it is unlawful for third parties such as clients, customers or patients to sexually harass someone while they are at work. It is also unlawful for a worker to sexually harass a client, customer or patient in connection with their work.

Who can experience unlawful behaviours?

Anyone can experience unlawful behaviours, in any workplace, across all industries. Some workers, however, are more likely to be targets for certain types of unlawful behaviour than others. For example, people who are most at risk of workplace sexual harassment include women, people who identify as LGBTIQ+, young people, people with disability, Aboriginal and Torres Strait Islander peoples and culturally and racially marginalised people. Workers who are on temporary work visas or employed under casual or insecure arrangements are especially vulnerable.

How to comply with the positive duty

The Commission has published a range of resources, including **Guidelines for Complying with the Positive Duty**, to assist organisations and businesses to understand their obligations and what steps to take to satisfy the positive duty. The Guidelines also provide examples of practical actions that organisations and businesses can take.

While the Sex Discrimination Act requires organisations and businesses to take proactive steps to eliminate, as far as possible, unlawful behaviours, it recognises that these actions will look different for different organisations and businesses. This is because what is reasonable for one organisation or business may not be reasonable for another.

The Guidelines set out four Guiding Principles and seven Standards that the Commission expects organisations and businesses to meet to satisfy the positive duty. The Guiding Principles and Standards are based on research about what works. They provide an end-to-end framework for prevention and response which organisations and businesses may tailor to their workforce. Organisations and businesses should consider the Guiding Principles and take action against each of the Standards when implementing the positive duty.

The role of the Commission

From December 2023, the Commission will have new powers to investigate and enforce the positive duty.

Under these powers the Commission may conduct inquiries into organisations and businesses that it reasonably suspects are not complying with the positive duty. If the Commission finds non-compliance, it may first offer to work with organisations and businesses to support them to meet their obligations (where appropriate). The Commission may also enter into agreements with organisations and businesses, or issue compliance notices, which can be enforced by a court.

You can find more information about the positive duty under the Sex Discrimination Act on the Commission's [website](#). Resources include [Guidelines for Complying with the Positive Duty](#), an [Information Guide: Relevant Unlawful Conduct, Drivers, Risk Factors and Impacts](#), a [Quick Guide](#), [Small Business Resource](#), and other [factsheets](#).