

Respect at Work: 'Positive duties' explained

There are **two separate positive duties** that require workplaces to prevent sexual harassment. This document compares the positive duty applied by SafeWork NSW with the positive duty applied by the Australian Human Rights Commission.¹

What is a positive duty to prevent workplace sexual harassment?

It means taking proactive action to prevent the risk of harm to workers from **workplace sexual harassment**, rather than waiting for incidents or reports before taking action.

There are two separate positive duties to prevent sexual harassment that exist under work, health and safety (WHS) and human rights law which **operate at the same time**. The duties support safer and more respectful workplaces.

Who oversees these positive duties?

SafeWork NSW and the Australian Human Rights Commission.

SafeWork NSW is the WHS regulator for NSW organisations and businesses² and regulates the broad positive duty requiring NSW organisations and businesses to eliminate or minimise risks to health and safety, so far as reasonably practicable. Sexual harassment is a WHS hazard, which businesses must proactively manage, just as they do any other WHS hazard, physical or psychological.

The **Australian Human Rights Commission** has the power to ensure organisations and businesses comply with the positive duty in the *Sex Discrimination Act* to eliminate work-related sexual harassment and other relevant unlawful behaviours, as far as possible. This came into effect in December 2023.

See more from SafeWork NSW



[Request a free SafeWork NSW Advisory Visit](#) if you have less than 50 staff or a Safety Workshop if you are part of a business group. These services allow you to get advice and support on how to meet WHS responsibilities, including about preventing sexual harassment.

Visit SafeWork NSW's website for more [resources and tools](#).

- For more information about the different legal obligations in relation to workplace sexual harassment, please see [SafeWork NSW's Regulation Map](#).
- For more information about reporting options see the [SafeWork NSW Guidance: Reporting Options for NSW Workers](#).

¹ Disclaimer:

- This guide provides general information only and is not legal advice.
 - The information contained in this guide is accurate at the time of publication. However, relevant agencies and legislation may change over time and businesses are responsible for making independent enquires on their responsibilities in relation to sexual harassment. Information on the latest laws can be checked by visiting the NSW legislation website www.legislation.nsw.gov.au or the Federal Register of Legislation website <https://www.legislation.gov.au>. You can also contact the relevant agency for up-to-date information.
 - This guide does not provide information on other relevant legal and regulatory frameworks such as workers compensation or industrial relations. Please contact the relevant organisations if you require more information.
- ² Except for NSW mine or petroleum sites, which are regulated by the NSW Resources Regulator. For the purpose of this guidance, 'businesses' and 'organisations' refer to employers and persons conducting a business or undertaking (PCBUs) as defined respectively under WHS law and the Sex Discrimination Act. The term describes all forms of modern working business arrangements and is not limited to commercial or private entities.
- ³ The *Sex Discrimination Act 1984 (Cth)* defines 'sexual harassment' for the purposes of the AHRC positive duty. There is no definition for 'sexual harassment' under the *Work Health and Safety Act 2011 (NSW)*. The Safe Work Australia Code of Practice: Sexual and gender-based harassment describes sexual harassment in similar terms.

Explaining the difference		
Where does the duty apply?	Only in NSW . However, other states and territories may have similar duties	Australia-wide (Commonwealth law)
Which law should I look at?	<i>Work Health and Safety Act 2011 (NSW)</i>	<i>Sex Discrimination Act 1984 (Cth)</i>
What is sexual harassment?	<p>It is very similar!</p> <p>While both positive duties share common ground in how they describe sexual harassment, they differ slightly in wording and are contained in different sources.³ Both definitions include that sexual harassment is:</p> <ul style="list-style-type: none"> • unwelcome sexual advances or request for sexual favours, or • other unwelcome conduct of a sexual nature <p>in circumstances in which a reasonable person would anticipate the possibility that the person harassed would be offended, humiliated or intimidated.</p>	
How is the positive duty fulfilled?	<p>They both require positive action to prevent harm.</p> <p>Organisations and businesses are required to eliminate risks to health and safety and if it is not reasonably practicable to eliminate risks, to minimise those risks so far as is reasonably practicable.</p>	<p>Organisations and businesses must take reasonable and proportionate measures to eliminate specific discriminatory conduct by themselves, their employees, workers, agents or third parties (e.g. clients) as far as possible.</p>
What is the standard for measures to be taken under the proactive duty?	<p>The focus is on degree of risk and potential harm to worker health and safety.</p> <p>“Reasonably practicable” means that which is, or was at the time, reasonably able to be done to ensure health and safety, taking into account and weighing up all relevant matters specified in the WHS Act such as the likelihood of the hazard or risk occurring, and the degree of harm from the hazard or risk.</p> <p>Cost is taken into account only if it is grossly disproportionate to the risk.</p>	<p>The focus of the Sex Discrimination Act is human rights and equality.</p> <p>Whether a measure is “reasonable and proportionate” is assessed by considering numerous factors, including the nature, size and circumstances of the business.</p> <p>The practicability and costs of available measures to eliminate sexual harassment will also be relevant.</p>
How is compliance promoted?	<p>It is very similar!</p> <p>SafeWork NSW and the AHRC each provide education, support, monitoring and enforcement of compliance of organisations and businesses with their positive duties.</p>	
What can happen if there is non-compliance with the positive duty?	<p>SafeWork NSW can:</p> <ul style="list-style-type: none"> • Visit workplaces to enquire about compliance • Compel production of information and documents • Provide advice and education • Issue compliance notices and warnings • Conduct an investigation • Enter into enforceable undertakings • Seek criminal prosecution for a serious breach of WHS laws. 	<p>The AHRC can:</p> <ul style="list-style-type: none"> • Compel production of information and documents • Educate businesses • Inquire into compliance • Issue compliance notices • Apply to the Federal Courts for an order to direct compliance • Enter into enforceable undertakings.