

Introduction

Section 47C of the Sex Discrimination Act 1984 (Cth) imposes a positive duty on an employer or a person conducting a business or undertaking (collectively, organisations) to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual/sex-based harassment, conduct conducive to a hostile workplace environment and acts of victimisation against complainants and whistleblowers (collectively, relevant unlawful conduct).

From December 2023, the Australian Human Rights Commission will be legislatively empowered to inquire into an organisation's compliance with this positive duty. The commission has recently released its [guidelines](#), which include the guiding principles and standards it expects organisations to consider and apply when designing and implementing compliance measures.

Whether these measures are "reasonable and proportionate" will, in turn, depend on several factors, including (i) the organisation's size, nature and circumstances; (ii) its financial and human capital resources (e.g. allocated budget and availability of human resources personnel); (iii) the practicability and the cost of measures; and (iv) any other matter the commission deems relevant.

The Standards

The standards provide a framework for organisations to determine feasible measures to satisfy their positive duty:

- (i) **Leadership** – Senior leaders must have up-to-date knowledge of their legislative obligations and what constitutes relevant unlawful conduct, as they are ultimately responsible and accountable for the organisation's governance and legal compliance.
- (ii) **Culture** – Organisations must foster a safe, respectful and inclusive culture that values diversity and gender equality to empower workers to report relevant unlawful conduct, minimise harm and hold people accountable for their actions.
- (iii) **Knowledge** – Organisations must develop, communicate and implement a policy regarding relevant unlawful conduct and one that supports workers to engage in safe, respectful behaviour.
- (iv) **Risk management** – Organisations must take a "risk-based approach" to prevent and respond to relevant unlawful conduct, recognising that such conduct threatens psychological and physical health and safety of workers and their right to equality, non-discrimination and human dignity.

- (v) **Support** – Organisations must ensure that appropriate support is available to workers before, during and after an incident of relevant unlawful conduct.
- (vi) **Reporting and response** – Organisations must ensure that workers have access to, and are aware of, formal and informal options to report and respond to relevant unlawful conduct.
- (vii) **Monitoring, evaluation and transparency** – Organisations must collect appropriate data to regularly assess and improve work culture by understanding, and being transparent about, the nature and extent of relevant unlawful conduct in their workplace.

The commission's [guidelines](#) also provide examples of how organisations may meet each standard.

The Guiding Principles

Organisations must consider the following guiding principles when designing and implementing measures to address the seven standards above:

- (i) **Consultation** – Organisations should consult workers about their needs to create a safe and respectful workplace and their perspectives on risk and mitigation options to eliminate relevant unlawful conduct.
- (ii) **Gender equality** – Actions taken to implement the positive duty should contribute towards substantive gender equality, that is, equal outcomes such as rights, rewards, opportunities and resources.
- (iii) **Intersectionality** – An "intersectional approach" to meet the positive duty involves understanding how different facets of a person's identity intersect and affect how discrimination, harassment and victimisation is experienced differently. Intersectionality involves consideration of race/ethnicity, sex/gender, sexual orientation, First Nations identities, disability, class and/or migration status.
- (iv) **Person-centred and trauma-informed** – A "person-centred and trauma-informed" approach to meet the positive duty involves making systems and processes that, in preventing further harm and promoting repair and recovery:
 - a. Understand individual needs and the impacts of trauma, including on people's ability to recall information
 - b. Respect individual agency, values and preferences and prioritise safety, choice and empowerment

What Does This Mean for Employers?

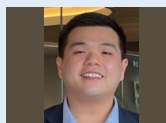
The Australian Human Rights Commission expects employers to have “reasonable and proportionate” measures in line with the guiding principles and standards. Given that Parliament has introduced a 12-month transitional period before the commencement of the commission’s investigative powers, employers should not expect any leniency when suspected and inquired by the commission. Therefore, employers should, as soon as possible, revisit their current measures to ensure that they will meet their legal obligations under the positive duty.

Authors



Nicola Martin

Partner, Sydney
T +61 2 8248 7836
E nicola.martin@squirepb.com



Marcus Lee

Law Graduate, Sydney
T +61 2 8248 7857
E marcus.lee@squirepb.com