

## *Anti-Discrimination and Human Rights Legislation (Respect@Work) Act 2022 - Positive obligations on Growers to prevent workplace sexual harassment*

On 28 November 2022 December 2022, [Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Act 2022](#) (**Respect@Work**) was passed by the Commonwealth Parliament and it commenced on 12 December 2022.

The Respect@Work Amendments will impact how growers prevent and respond to workplace sexual harassment.

Recent changes contained in the [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) (Cth) and work, health and safety laws will also play a part in framing how employers are to prevent unlawful sexual harassment.

### **Background**

[The Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Act 2022](#) (**Respect@Work**) amendments reflect the Federal Government's commitment to implement six outstanding recommendations of the [Respect@Work: Sexual Harassment National Inquiry Report](#) prepared by the Sex Discrimination Commissioner, Kate Jenkins, about sexual harassment in Australian workplaces.

It followed an extensive [National Inquiry into Sexual Harassment in Australian Workplaces](#) conducted by the Australian Human Rights Commission in 2018.

The Respect@Work amendments also follow the previous Government's amendments contained in the [Sex Discrimination and Fair Work \(Respect at Work\) Amendment Act 2021](#) which came into operation on 11 September 2021.

### **Commencement of the Respect@Work Amendments**

The Respect@Work Act commenced on 12 December 2022.

### **Summary of key changes in the Respect@Work Act**

The Respect@Work Act amends the *Sex Discrimination Act 1984* (Cth) (**SD Act**), and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) including by:

- Making it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex (and clarifying what many Court decisions have found to be unlawful sexual harassment).
- Creating a new statutory "positive duty" on employers and persons conducting a business or undertaking (**PCBU**) to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, workplace sexual harassment (incl. hostile working environments and harassment on the grounds of sex) and acts of victimisation.

- Empowering the Australian Human Rights Commission (**AHRC**) with inquiry and compliance functions in relation to a person's compliance with the positive duty.
- Providing the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected unlawful discrimination.
- Enabling representative bodies to make applications on behalf of people who have experienced unlawful discrimination in the federal courts.
- Changing the SD Act's definition of harassment on the grounds of sex to remove the word "seriously" in respect of conduct that is demeaning in nature in relation to the person harassed.
- Changing the objects of the SD Act to replace "equality of opportunity" with "substantive equality" between men and women.
- "Levelling up" other anti-discrimination laws with the Sex Discrimination Act by:
  - Creating similar victimisation offences in the *Age Discrimination Act 2004*; *Disability Discrimination Act 1992*; *Racial Discrimination Act 1975*;
  - Replacing the 6-month limitation period to lodge complaints to the AHRC under other federal anti-discrimination laws, to 24 months. (Note the AHRC may still exercise discretion to allow a complaint beyond the limitation period).
- Expanding the requirement to report to the Workplace Gender Equality Agency (WGEA) to Commonwealth entities with 100 or more employees.

## What is the Positive Duty?

The Respect@Work Act amends the SD Act to require employers and PCBUs to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment (including harassment on the grounds of sex and workplace environments hostile on the grounds of sex) and victimisation (**the positive duty**).

The positive duty relates to identified matters that are unlawful under the SD Act.

Matters to be taken into account in determining whether a duty holder complies with the positive duty are as follows:

- The size, nature and circumstances of the duty holder's business or undertaking;
- The duty holder's resources, whether financial or otherwise
- The practicability and the cost of steps to eliminate conduct covered by duty; and
- Any other relevant matter.

## Who is covered by the Positive Duty?

The positive duty applies to employers and PCBUs (duty-holders) in respect of unlawful conduct engaged in by:

- The duty-holder themselves;
- The duty-holder's employees;
- The duty-holder's workers if the duty holder is a PCBU (as defined in WHS laws); and
- The duty-holder's agents. In addition, the positive duty extends to identified unlawful conduct towards employees and workers by any person, such as customers, clients, or other external parties.

## What must Growers do to comply with the positive duty?

The Respect@Work Amendments do not identify specific actions to be taken to comply with the positive duty. However, the AHRC will soon prepare and publish guidelines for complying with the positive duty on its website.

The Explanatory Memorandum to the Respect@Work Act provides the following indicative examples of organisations complying with the positive duty:

- A small delivery business with 8 employees:

*“Joe is the owner of a small delivery business. Joe has seven full-time workers, including six male delivery drivers and one female administrative officer. Joe’s business has been operating for two years and makes a modest profit.*

*As Joe is an employer, Joe must take measures to eliminate, as far as possible, himself (as a duty holder) and his employees from engaging in the forms of unlawful discrimination. Joe must also take measures to eliminate, as far as possible, his employees from experiencing the forms of unlawful discrimination covered by subsection*

*Joe is aware of the risk of his employees experiencing discriminatory conduct while at work, including by customers. Given the nature of his business, Joe writes a short policy on harassment and discrimination, including how a complaint would be handled and responding to inappropriate conduct by customers. Joe discusses the policy during a staff meeting and provides a printed copy to all staff. Joe also regularly checks in with his staff to discuss rostering, leave and other matters, including any behavioural issues.*

*As a result of these measures, Joe is likely to be compliant with the positive duty under section 47C in the circumstances.”*

- A hotel business in a ski resort with 60 employees who are largely part-time or casual employees:

*“Aida and Daniel are the co-owners of a large hotel in a ski resort. The hotel employs more than 60 staff in a range of roles, including managers, chefs and cleaners. Due to the seasonal nature of the business, the majority of staff are part-time or casuals, and there is a high staff turnover.*

*Aida and Daniel are employers and must take measures to eliminate, as far as possible, themselves (as duty holders) and their employees from engaging in the forms of unlawful discrimination covered. Aida and Daniel must also take measures to eliminate, as far as possible, their employees from experiencing the forms of unlawful discrimination.*

*Aida and Daniel recognise the risks associated with short-term work and develop an action plan for complying with the positive duty. As part of this plan, Aida and Daniel task their human resources officer with developing a policy on harassment and discrimination and ensuring this is part of the onboarding process for new staff. Aida and Daniel also require managers to complete externally-provided training on harassment and discrimination on an annual basis. The managers are then responsible for ensuring their staff are aware of the policy and reiterating behavioural standards.*

*As a result of these measures, Aida and Daniel are likely to be compliant with the positive duty under section 47C in the circumstances.”*

- A large technology company that employs more than 250 staff who work remotely in small teams:

*“Ben is the human resources manager for ‘Future IT,’ a technology company that employs more than 250 staff. The majority of staff work remotely from across Australia in small teams.*

*To ensure Future IT is meeting its obligations under the positive duty, Ben is responsible for implementing a strategic plan on harassment and discrimination. The plan includes confidential staff surveys, data collection on complaints, regular reviews of existing policies and procedures, and mandatory training for managers and new staff on harassment and discrimination.*

*To mitigate the risks associated with a remote workforce, Ben also develops and circulates specific guidance on harassment and discrimination in a remote context and the supports available to staff.*

*As a result of these measures, Future IT is likely to be compliant with the positive duty in the circumstances.”*

The positive duty is intended to align with section 106 of the SD Act’s vicarious liability defence of taking all reasonable steps to prevent the unlawful conduct, such that the steps taken to satisfy the positive duty should also assist in demonstrating that you took all reasonable steps to prevent the unlawful conduct.

Section 106 of the SD Act provides:

**Vicarious liability etc.**

*(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:*

*(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or*

*(b) an act that is unlawful under Division 3 of Part II;*

*this Act applies in relation to that person as if that person had also done the act.*

*(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.*

While the Respect @ Work Explanatory Memorandum states that the positive duty is “intended to align” with the SD Act’s vicarious liability defence of taking all reasonable steps to prevent the unlawful conduct, growers should not assume that existing preventative measures they have in place will be sufficient to comply with the SD Act’s new positive duty.

## **How will the positive duty be enforced?**

The Respect@Work Act gives the AHRC an inquiry function in relation to a duty holder's compliance with the positive duty if the AHRC reasonably suspects that the duty-holder is not complying. The inquiry function will allow the AHRC to obtain information and documents and to examine witnesses.

If the AHRC finds that a duty-holder is not complying with the positive duty, the AHRC is empowered to enter enforceable undertakings and issue compliance notices to duty-holders to achieve compliance. The AHRC may apply to the federal courts for orders directing compliance when compliance notices or enforceable undertakings have not been satisfied by duty-holders.

There is no civil penalty for a failure to comply with the positive duty, however the AHRC may publish undertakings provided to non-compliant duty-holders on its website, adding the incentive of public scrutiny for duty-holders to comply.

Importantly, the AHRC's compliance powers relating to the new positive duty will commence 13 December 2023.

## **AHRC's new inquiry functions into systemic unlawful discrimination**

In addition to the AHRC's positive duty inquiry functions, the AHRC may also inquire into matters relating to actual or suspected, systemic unlawful discrimination.

Like the inquiry functions relating to the positive duty, these inquiry powers will also enable the AHRC to obtain information and documents and power to examine witnesses. The AHRC may inquire into individual businesses, multiple businesses or across industries.

Systemic unlawful discrimination is defined as unlawful discrimination that affects a class or group of persons; and is continuous, repetitive or forms a pattern.

The AHRC may publish a report in relation to its inquiry.

## **Clarifying what is prohibited as sexual harassment**

The Respect@Work Act amends the SD Act to make it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.

This has a broad meaning addressing where:

- the conduct occurring in a workplace where either the victim or perpetrator works;
- the victim is in the workplace at the time the conduct occurs or afterwards, and
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct being offensive, intimidating or humiliating to a person of the sex of the person impacted by the conduct.

The SD Act sets out that in determining whether a person has subjected another person to a hostile workplace environment on the ground of sex, it is necessary to consider:

- (a) the seriousness of the conduct;
- (b) whether the conduct was continuous or repetitive; and
- (c) the role, influence or authority of the person engaging in the conduct.

This amendment clarifies what many Court decisions have already found to be unlawful sexual harassment.

In addition, the definition of harassment on the grounds of sex that was inserted into the SD Act on 11 September 2021 will change. The change will remove the word “seriously” such that conduct that is demeaning in nature in relation to the person harassed need no longer be “seriously demeaning” but simply “demeaning.”

Growers should be aware that these changes to what is prohibited by the SD Act as sexual harassment should be reflected in organisational policies and approaches to prevent and address sexual harassment.

### **Interaction with Work Health and Safety laws and the *Fair Work Act 2009* (Cth)**

It is vital that growers understand that the Respect@Work Amendments are not the only source of regulatory change impacting employer obligations to prevent and address workplace sexual harassment.

Work, health and safety (**WHS**) laws create an obligation on an employer to eliminate or minimise work related risks to health and safety, so far as is reasonably practicable (the general WHS duty). This obligation relates to both physical and psychological risks and extends to sexual harassment.

The Respect@Work Amendments make it clear that duties under WHS laws operate independently the SD Act’s positive duty. This means that complying with the SD Act’s positive duty does not automatically result in complying with duties and obligations under WHS laws.

Please refer to the Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022 – Sexual Harassment Summary sheet, for recent changes to sexual harassment introduced into the *Fair Work Act 2009* (Cth) by the [\*Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022\*](#).

## Work Health and Safety (WHS) Laws related to Psychological Health and Safety

All Australian health and safety laws create an obligation on an employer to eliminate or minimise work related risks to health and safety, so far as is reasonably practicable (**the general duty**).

This obligation relates to both physical and psychological risks. Health and safety regulations prescribe specific things that a duty holder must do to comply with this general duty. Codes of Practice provide additional information about how an employer can comply with the general duty or the requirements of the regulations, and have a particular legal status specified by each jurisdiction.

### The Model WHS Laws

The majority of states/territories (jurisdictions) adopted the original version of the Model WHS Laws commencing in January 2012. Western Australia adopted their version of the laws from 31 March 2022. These jurisdictions are generally referred to as harmonised jurisdictions.

The Model WHS Laws were amended in 2022 to include a division addressing psychosocial hazards and risks.

Victoria continues to operate outside the Model WHS laws, maintaining their own Occupational Health and Safety Act, Regulations and Codes.

The laws implemented in the harmonised jurisdictions are mostly consistent with the Model, but there are some variations to address local needs and/or maintain historical decisions of importance to that jurisdiction.

The process of amending the Model WHS Laws involves Members of Safe Work Australia making recommendations to the combined Commonwealth/State/Territory WHS Ministers. A change to the Model WHS Laws will occur if two thirds of these Ministers accept the recommendations.

The amendments are inserted into the Model WHS laws, but only come into effect in an individual jurisdiction, if the Act or Regulations in that jurisdiction are amended to incorporate the change. Model WHS Codes of Practice come into effect if a jurisdiction formally adopts the Code.

Due to the nature of the Safe Work Australia process and the need to obtain majority agreement of WHS Ministers, the process of finalising changes to the Model WHS Laws can be slower than some jurisdictions would like. Accordingly, in the area of psychological health and safety, some jurisdictions implemented their own response to addressing this issue, or were well-progressed in doing so, prior to final decisions being made at Safe Work Australia.

There is nothing that compels jurisdictions to adopt the Model WHS Regulations or Code of Practice that relate to psychological health and safety. A Model WHS Code may be relevant to assist employers to consider how they manage psychosocial hazards and risks. However, where an alternative Code exists in an individual jurisdiction it will be the local Code that is used by the regulator to assess compliance and may be used in court as evidence during a prosecution.

## Addressing psychological health and safety in the Model WHS Laws

### Regulations for managing hazards and risks

As above, The Model WHS Regulations were amended in 2022 to include a division addressing psychosocial hazards and risks. These are gradually being adopted by harmonised jurisdictions.

Most harmonised jurisdictions have either adopted or intend to adopt these regulations. However, some jurisdictions will make some amendments to the detail.

Victoria, as the only non-harmonised jurisdiction, will not be adopting these regulations. They are currently developing their own regulations and Code.

The amendments have inserted a new Division into Part 3.2 of the Model WHS Regulations as follows:

#### **55A Meaning of psychosocial hazard**

*A psychosocial hazard is a hazard that:*

*(a) arises from, or relates to:*

- I. the design or management of work; or*
- II. a work environment; or*
- III. plant at a workplace; or*
- IV. workplace interactions or behaviours; and*

*(b) may cause psychological harm (whether or not it may also cause physical harm).*

#### **55B Meaning of psychosocial risk**

*A psychosocial risk is a risk to the health or safety of a worker or other person arising from a psychosocial hazard.*

#### **55C Managing psychosocial risks**

*A person conducting a business or undertaking must manage psychosocial risks in accordance with Part 3.1 other than regulation 36 (emphasis added, see further information later in this Advice).*

#### **55D Control measures**

*(1) A person conducting a business or undertaking must implement control measures:*

*(a) to eliminate psychosocial risks so far as is reasonably practicable; and*

*(b) if it is not reasonably practicable to eliminate psychosocial risks—to minimise the risks so far as is reasonably practicable.*

*(2) In determining the control measures to implement, the person must have regard to all relevant matters, including:*

*(a) the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards; and*

*(b) how the psychosocial hazards may interact or combine; and*

*(c) the design of work, including job demands and tasks; and*

*(d) the systems of work, including how work is managed, organised and supported; and*



*(e) the design and layout, and environmental conditions, of the workplace, including the provision of:*

*(i) safe means of entering and exiting the workplace; and*

*(ii) facilities for the welfare of workers; and*

*(f) the design and layout, and environmental conditions, of workers' accommodation; and*

*(g) the plant, substances and structures at the workplace; and*

*(h) workplace interactions or behaviours; and*

*(i) the information, training, instruction and supervision provided to workers.*

## **Code of Practice for managing hazards and risk**

The Model Code of Practice for Managing psychosocial hazards at work was published on 1 August 2022. It is designed to provide guidance on how to comply with the Model WHS Laws, including the new regulations related to psychosocial hazards and risks. In jurisdictions that have not yet published their own Codes, growers may find useful information in the Model WHS Code to assist them to address psychosocial risk in their workplace.

However, it is important to recognise that the Code does not have any legal status in a jurisdiction unless it has been adopted as a Code by that jurisdiction. Growers must ensure they refer to relevant Regulations, Codes and guidance material for the jurisdictions in which they operate. A Code adopted in an individual jurisdiction will have a specific legal status which means that compliance with the law in that jurisdiction will be assessed against that Code.

## **Jurisdictional approaches to managing psychological health and safety**

Further information on the applicable legislation, Regulations and Codes relevant to psychological health and safety in each Australian jurisdiction, and the status of each can be found below.

Growers are encouraged to check these resources frequently as they may be subject to regular change.

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| <b>New South Wales</b>   | The <a href="#">WHS Regulations for psychosocial hazards</a> commenced on 1 October 2022. They adopt the Model WHS Regulations without amendments. <a href="#">The Code of Practice Managing psychosocial hazards at work</a> , which was published by SafeWork NSW in May 2021, will continue to apply.<br>Additional resources can be accessed <a href="#">here</a> .   |
| <b>Western Australia</b> | Western Australia has introduced the psychosocial risk regulations into the <a href="#">general WHS Regulations</a> and the WHS Mines regulations. The regulations adopt the Model WHS Regulations without amendment.<br>Western Australia has published a suite of Codes of Practice related to psychological hazards, including: <ul style="list-style-type: none"><li>- Psychosocial hazards in the workplace</li><li>- Workplaces behaviour</li><li>- Violence and aggression at work</li></ul> Additional resources can be accessed <a href="#">here</a> . |
| <b>Tasmania</b>          | Tasmania adopted the <a href="#">WHS (psychosocial risk) regulations</a> with effect from 12 December 2022 as a direct adoption of the Model WHS regulations. The <a href="#">Code of Practice</a> was published in January 2023.   |

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|                                     | Additional resources can be accessed <a href="#">here</a> .   |
| <b>Queensland</b>                   | <p>Queensland has published the <a href="#">Work Health and Safety (Psychosocial Risks) Amendment Regulations 2022</a> which will commence on 1 April 2023.</p> <p>Queensland has published their <a href="#">Code of Practice for managing the risk of psychosocial hazards at work</a>. The information in the Code is very similar to the Model WHS Code. The major variation is that the risk controls are categorised in line with the hierarchy of controls.</p> <p>Additional resources can be accessed <a href="#">here</a>.</p>  |
| <b>Australian Capital Territory</b> | <p>The ACT has not yet made regulations for psychosocial risks.</p> <p>Current guidance from WorkSafe ACT can be accessed <a href="#">here</a>.</p>   |
| <b>Victoria</b>                     | <p>Victoria released draft Regulations for consultation in February 2022. It was intended that the Regulations would be in place by 1 July 2022.</p> <p>However, the most recent advice from WorkSafe Victoria is that the public comment is still being considered by the government with work continuing to finalise the regulations with a view to commencement in early 2023. The draft Regulations include a requirement to develop Prevention Plans for some psychosocial hazards and to provide periodical reports to WorkSafe Victoria in relation to specified complaints (bullying, sexual harassment and violence and aggression).</p> <p>Additional resources can be accessed <a href="#">here</a>.</p> |
| <b>Northern Territory</b>           | <p>The Northern Territory has not yet made regulations for psychosocial risks.</p> <p>Whilst the Model WHS Code has not been adopted in NT, it has been referenced in the Resources from WorkSafe NT that can be accessed <a href="#">here</a>.</p>   |
| <b>South Australia</b>              | <p>South Australia has not yet made regulations for psychosocial risks.</p> <p>Resources from SafeWork SA can be accessed <a href="#">here</a>.</p>   |