

Respect@Work: A positive duty to prevent sexual harassment

OCT22

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At a glance

- In early 2022, the Albanese government committed to implementing and legislating all 55 of the recommendations of the Australian Human Rights Commission's Respect@Work Report.
- On 27 September 2022, the government introduced the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, which seeks to implement seven of the 55 recommendations to strengthen laws that prevent sexual harassment.
- Once implemented, the changes will involve a positive duty on employers to take reasonable and proportionate measures to eliminate workplace harassment, victimisation and sex discrimination.
- The Bill also proposes giving the AHRC the powers to enforce these changes.
- These proposed changes create a range of issues insurers should consider.

Background

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*, once implemented, will have significant implications for employers and their insurers. Among other things, it will introduce a positive duty on employers to take reasonable and proportionate measures to eliminate workplace harassment, victimisation and sex discrimination. It also gives the AHRC the powers to enforce these changes.

Employers already have obligations to adhere to work health and safety legislation to ensure employees are not exposed to risk. However, the compliance burden on employers will soon be significantly higher.

The issues for employers

Employers should begin taking action to comply with the new positive duty obligations by rolling out updated harassment and discrimination policies, training all workers in their rights and obligations, and repeating that training on a regular basis.

They should also ensure they have a complaints mechanism in place, which is accessible to all workers, and act promptly and responsibly in the face of all complaints.

Whether an employer is complying with the new positive duty will depend on the size, nature and circumstances of the business or undertaking, the duty holder's resources (financial or otherwise), and the practicability and costs associated with the compliance steps.



The issues for insurers

Insurers should review their employment liability and management policies to adopt the language of the new legislation, particularly considering the positive duty that imposes the duty to take reasonable and proportionate measures to eliminate workplace sexual harassment.

Insurers should also revisit policies to reflect the expanded powers of the AHRC to issue compliance notices and to enter into enforceable undertakings, which would not have been contemplated in previous policies.

It is well known that the risk of an adverse costs order is a disincentive to applicants considering pursuing their claims in the federal courts. The Bill proposes a 'cost neutral' regime, which means the default position will be that each party bears their own costs in any unlawful discrimination proceeding. Insurers should be aware this means it is highly likely there will be an increase in the number of claims brought in the AHRC and the federal courts.

The new duty and expanded powers of the AHRC also gives rise to the possibility of new exclusions in recently issued policies. Insurers have the ability to hold their insureds to a relatively high standard by excluding cover under a policy if the insured fails to demonstrate they took all reasonable and proportionate measures. What is considered reasonable and proportionate will turn on the facts of any case, however insurers will need to become familiar with this space over the next 12 months.

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Need to know more?

For more information, contact our authors, **Workplace Health + Safety** specialists.



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