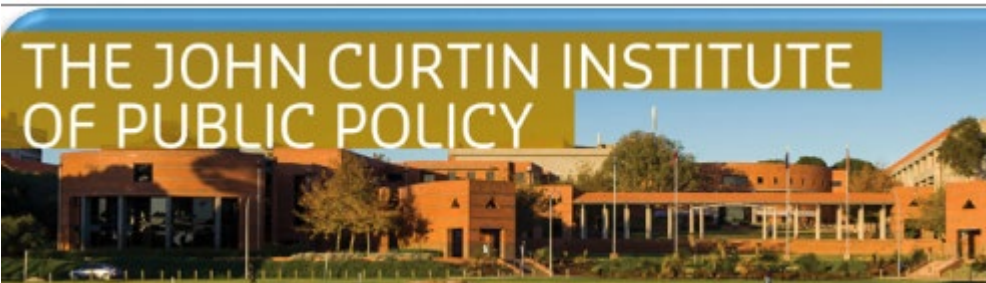


Stopping Workplace Sexual Harassment

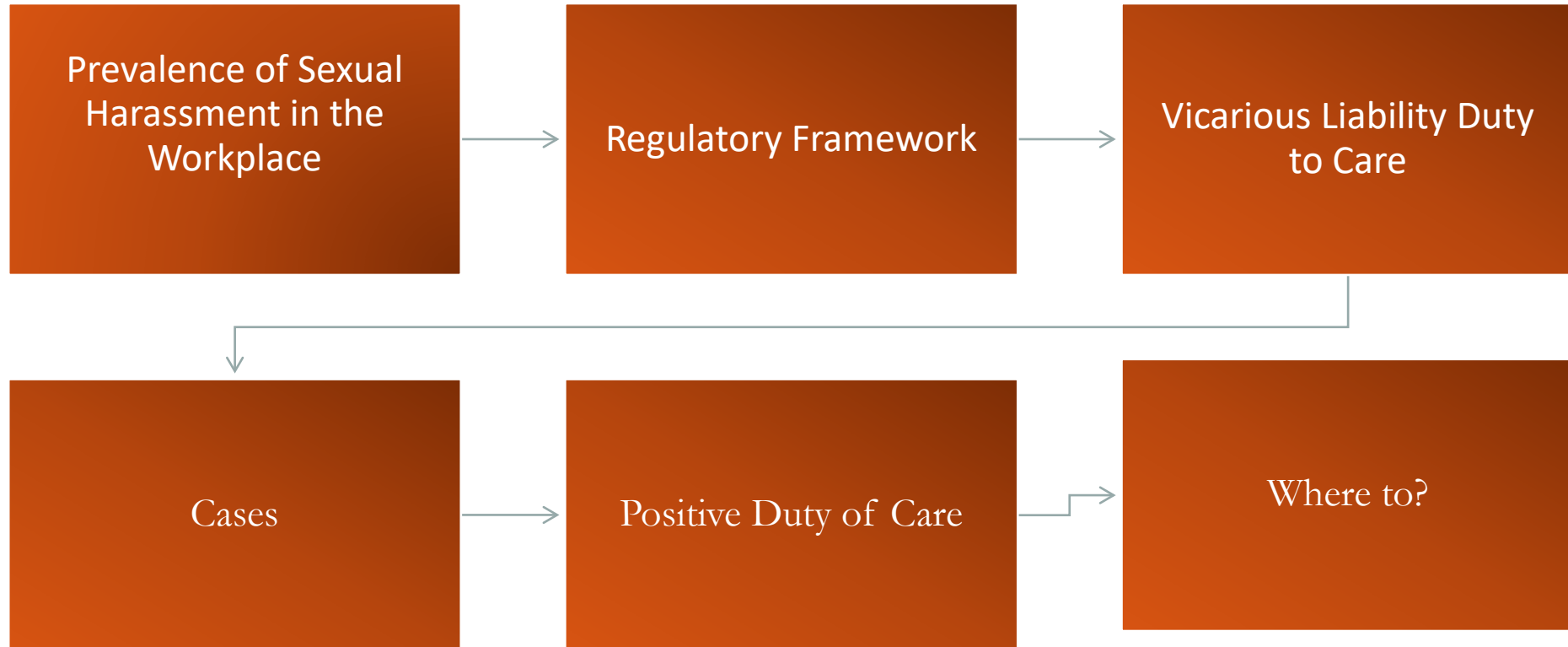
Does the new Positive Duty of Care go far enough?

Kantha Dayaram
Curtin University

13 October 2023



Structure





Range

Range of behaviours from text messages, jokes, and innuendoes..... to serious assault

Prevalence

33% Australian workers indicated that they experienced sexual harassment in the workplace

50% of workers have been exposed to sexual harassment or are bystanders

Reporting is below 5%

(AHRC Respect @Work, 2020)

- The Independent Review into Commonwealth Parliamentary Workplaces
- (77%) experienced, heard of, or witnessed bullying, sexual harassment, including attempted sexual assault at work (2021)
- Rio Tinto report (2021)
- reports of harassments in Australian research bases in Antarctica (Goodyear, 2022; Nash, 2022).

October 2023

Education minister flags possible overhaul of tertiary education regulator amid sexual assault mishandling



The federal education minister is flagging a possible overhaul of the tertiary education regulator amid fears the threshold for triggering investigations into the mishandling of sexual violence matters is too high.

NEW SURVEY REVEALS SHOCKING RISE IN SEXUAL HARASSMENT AT UNIVERSITIES

[LEARN MORE](#)

The NTEU has released the shocking results of our survey on sexual harassment in universities.

Alarming, almost one in three (29%) respondents reported personal experiences of sexual harassment, up from 19% in 2018 - a rise of almost 53%.

The cultural and systemic problems that fuel sexual harassment need the urgent action we are calling for in our Universities Accord petition.

Prevalence rate:

Workplace sexual harassment was notably higher than the national prevalence rate (33%) in the following industries:



81%

Information,
media and tele-
communications



49%

Arts and
recreation services



47%

Electricity,
gas, water and
waste services



42%

Retail trade



40%

Mining

At Greater Risk of Exposure

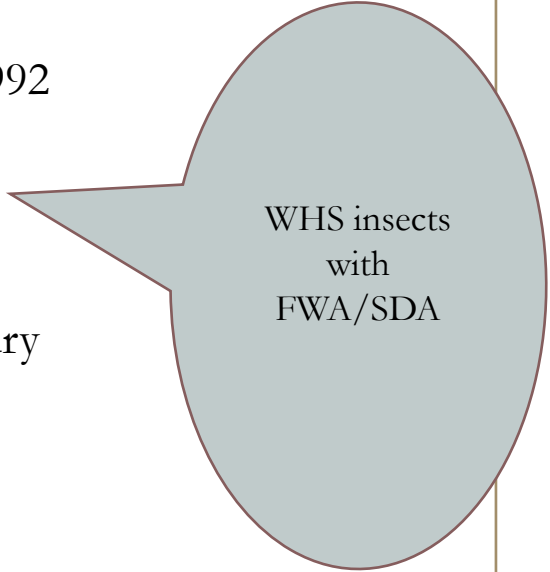
- Women than men - 39% and 26% respectively
- Aboriginal and Torres Strait Islander peoples than non-Indigenous workers - 53% and 32% respectively
- Workers under the age of 30;
- Lesbian, gay, bisexual, transgender, queer, intersex, asexual (LGBTQIA+);
- Culturally and linguistically diverse workers
- Workers with a disability
- Linking sexual harassment with discrimination

(AHRC, 2018)

Overlapping Regulatory Framework

- WHS Act is explicit that health includes mental health In 2022, the Work Health and Safety Act 2020 (WA) is explicit
- It set out extended enforcement powers for psychosocial hazards which covers sexual harassment, consultation, mandatory reporting.

- Disability Discrimination Act 1992
- Equal Opportunity Act 1894
- Age Discrimination 2004
- Racial Discrimination Act 1975
- Sex Discrimination Act 1984
- Workers Compensation and injury Management Act 1981 (WA)
- Fair Work Act 2009
- WHS Act, 2011



WHS intersects with FWA/SDA

In response to the increasing prevalence of workplace sexual harassment, in 2021 the Fair Work Act 2009 (Cth) was amended to include the provisioning of 'Stop Sexual Harassment Orders' (Recommendation 29)

Duty of Care vs Duty to Care

Duty of care includes

- clear communication of safety,
- providing training to workers,
- establishing codes of conduct,
- eliminating and preventing workplace hazards

Psychosocial hazards include

- working unreasonable long hours,
- bullying and harassment, traumatic events, and exposure to stress

Safe Work Australia, 2022

- Section 106(1)(b) of the SDA states that employers are 'vicariously liable' for any incidents of sexual harassment by their workers or agents in the course of their employment.
- Employers are responsible for both discouraging workplace sexual harassment and facilitating just resolutions

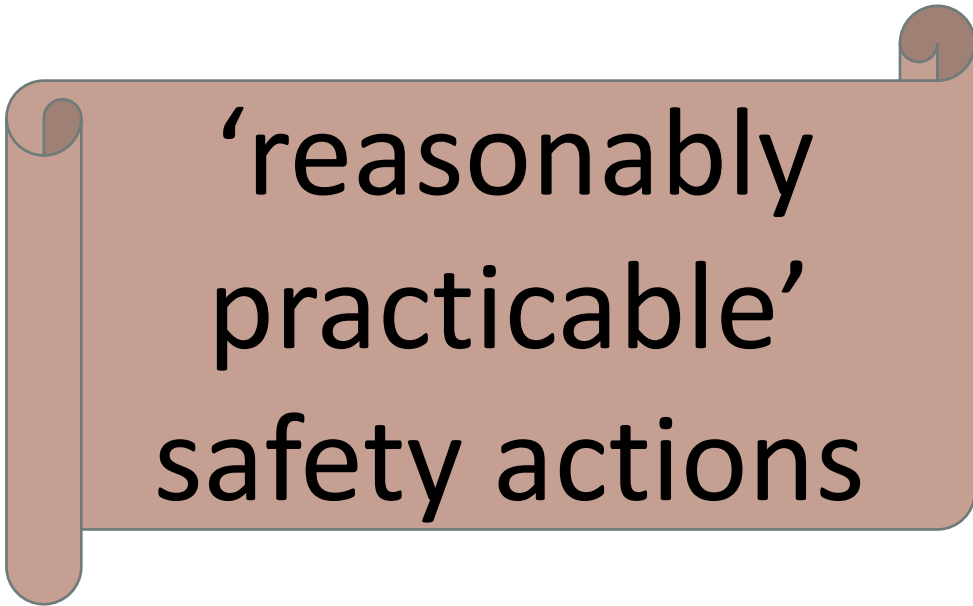
(AHRC, 1984; Eastreal and Saunders, 2020)

SH - Vicarious Liability

Federal and State jurisdictions and takes its definition from the Sex Discrimination Act 1984 (Cth) Section 28A (SDA).

SDA places vicarious liability onto the employer for failure to act and confers powers to the Australian Human Rights Commission to refer matters to the Federal Court

Section 106(2) of the SDA also makes clear that the employer is *not* vicariously liable if they 'took all reasonable steps to prevent the employee or agent from doing acts of the [prohibited] kind' (AHRC, 1984).



**'reasonably
practicable'
safety actions**

FC defined sexual requests, advances or conduct as unwelcome if it was 'not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive', *Aldridge v Booth (1988)*

Since 1988 - 44 cases

- 4 claims against vicarious liability supported;
- 8 were dismissed

- Not provided with training or made aware of what constituted harmful conduct/misconduct

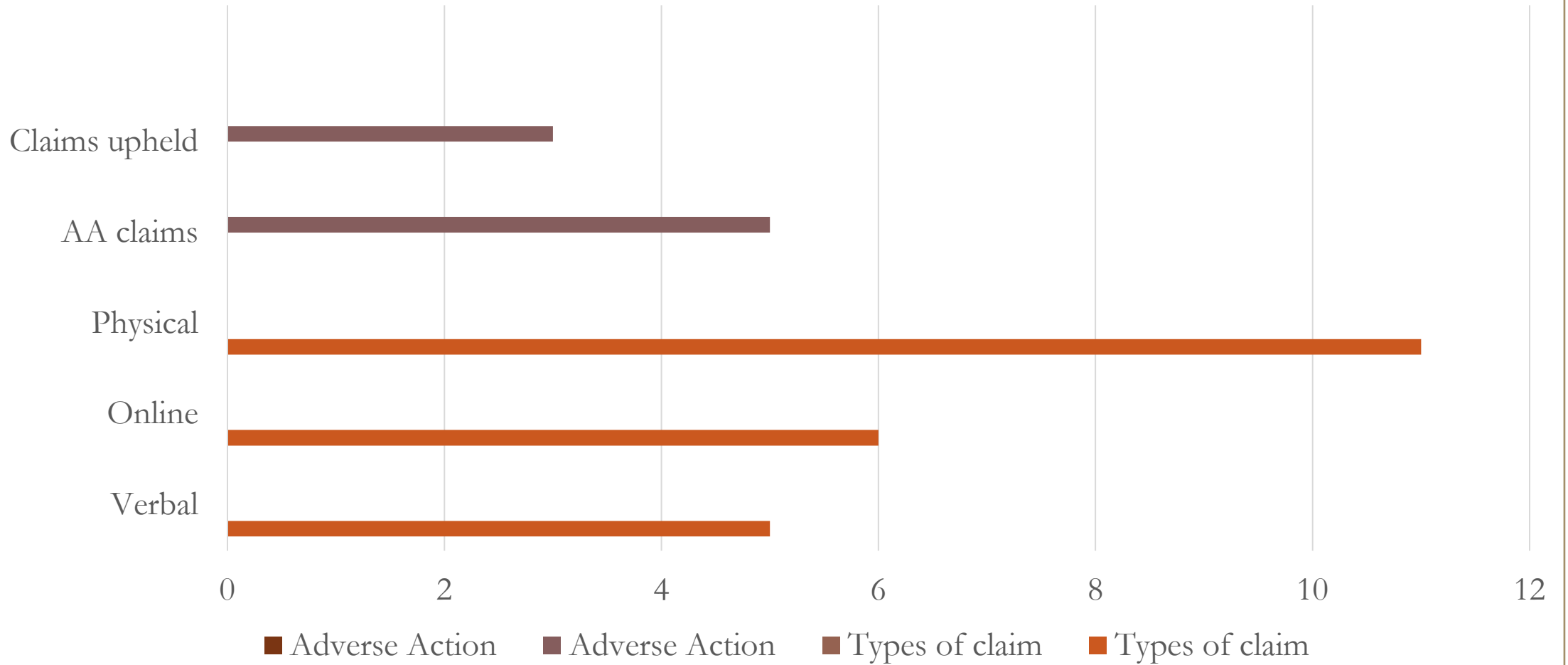
- Occurred between 2000 and 2009 and post the implementation of the SDA and WHS Act (State)

(Dayaram & Burgess, 2023)



(Dayaram & Burgess, 2023)

Adverse Action Claims



5 claims

FCA upheld 3

- *Leslie v Graham [2002] FCA 32*
- initially victimised through a reduction of work roles subsequently dismissed for poor work performance
- co-worker also the employer's family member
- *Poniatowska v Hickenbotham [2009] FCA 680, p282,*
- FCA “put bluntly, I find that none of those warning letters, or the suspension or termination of her employment, were for her poor work performance”.
- *Lynette Jane Aldridge v Grant Rodney Booth [1988] FCA 170*
- delay in reporting SH despite repeated exposure – feared losing her job

<https://www.austlii.edu.au/>

Adverse Action and Fear of Job Loss

2 cases dismissed

Tracey Lee Thompson v Nissan Motor Co (Australia) Ltd [1998] FCA 359

- numerous stressful events
- Cannot separated the mental health impacts that resulted directly from sexual harassment exposure at work
- Sexual harassment was found to have occurred, however the claim was reported after the mandated 12-month period.

Reporting SH and responses to SH claims

- Common pattern of claimants' delayed reporting due to fear of reprisals and/or job loss.
- *Ingram-Nader v Brinks Australia Pty Ltd [2006] FCA 624*, the case was dismissed because it was reported after the 12-month mandated period for lodging sexual harassment claims.
- *Gilroy v Angelov [2000] FCA 1775*, a small business operation, the perpetrator relocated overseas and was not able to provide evidence despite reporting whilst being employed
- Reported to the AHRC after the claimant was diagnosed with severe trauma and was unable to afford the personal medical costs
- <https://www.austlii.edu.au/>

cases accentuate

1) reporting is dependent on knowing where and how to report;

2) trusting the reporting system will not have negative consequences/led to reprisals;

3) shifting reactionary consequences of reporting to preventative measures

Definition of workplace

Worsley-Pine v Kathleen Lumley College [2001] FCA 818, the

- Sexual harassment might have occurred,
- Could not attribute liability as no direct employer could be identified.
- Student in residence and did not have an employment contract with the university.

<https://www.austlii.edu.au/>

“The definition of ‘worker’ provided in section 7 of the WHS Act, includes ‘a volunteer’ at (h).

The term ‘volunteer’ is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a ‘volunteer’ for the purposes of the WHS Act is a question of fact that will depend on the circumstances of each case.

<https://www.commerce.wa.gov.au/worksafe/modernisation-work-health-and-safety-laws-frequently-asked-questions-faq>

Organisational culture and right to safe work

- Gendered organisational cultures perpetuates discriminatory behaviours and increases psychosocial risks.
- *Ford v Inghams Enterprises Pty Ltd (No 3) [2020]*
- FCA argued the claimant initially participated in sexual harassment related jokes and could not hold the employer vicariously liable, despite being repeatedly sexually harassed and reporting it to the organisation.
- Workers bear the consequences of toxic workplace cultures



Multiple burdens Trauma, Evidence, Cost Protection

- Stress, depression, anxiety and post-traumatic stress disorder
- Stress related illness –cardiovascular disease, musculoskeletal disorders, immune deficiency and gastrointestinal disorders (Pega et al, 2019)
- Suicide
- Provide evidence whilst traumatised – lack of trauma informed approach (Dayaram & Burgess, 2023)
- Cost burden (K. Pender, 2022) – cost protection
- Six year average from claim to final outcome (Dayaram & Burgess, 2023)

**Sexual harassment
11% of
workplace
stress claims**

**Duration of
such claims
(and absence
from work) is
twice that of
other stress
claims
(Guthrie, Taplin and
Oliver, 2009).**

Respect@work Recommendations

5 key areas underpinning the recommendations:

1. Data and research
2. Primary prevention
3. The legal and regulatory framework
4. Workplace prevention and response
5. Support, advice and advocacy

- **Recommendation 9:** Educational resources for young people of working age on workplace rights
- **Recommendation 12:** support HE providers through the Tertiary Education Quality Standards Authority and the Australian Skills Quality Authority – Ombudsman
- **Recommendation 15:** ratify ILO Convention 190.
- **Recommendation 16:** ‘workplace participant’ and ‘workplace’ covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed
- **Recommendation 25:** insert a cost protection provision
- **Recommendation 35:** amend the model WHS Regulation to deal with psychological health, recommended by the Boland Review, and develop guidelines on sexual harassment and a Code of Practice

Recommendations 17 & 18 – Positive duty

November 2022, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 passed a positive duty of care

Shifts the responsibility of prevention of harm from workers who experience it, to PCBUs who have the power to prevent such conduct

The Parliament of the Commonwealth of Australia. Anti-Discrimination and Human Rights Legislation Amendment Bill (Respect at Work) 2022).

Recommendations 17 & 18 – Positive duty

- Amend SDA introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation
 - Reasonable and proportionate:
 - a. the nature and circumstances of the person's business or operations*
 - b. the person's resources*
 - c. the person's business and operational priorities*
 - d. the practicability and the cost of the measures*
 - e. all other relevant facts and circumstances*
1. Enter into agreements/enforceable undertakings with the organisation
 2. Apply to the Court for an order requiring compliance with the duty

Enforcing the positive duty

- AHRC has the ability to oversee compliance with the positive duty obligations and, if they're not, enforce some of the measures.
- Employers will have 12 months before the AHRC's new powers (Nov 2022) to "monitor and assess compliance"
- Recommendation 23

"The bill removes existing procedural barriers by ensuring that a representative body (union) that has lodged a complaint on behalf of one or more affected persons in the commission (a representative complaint) is able to make an application to the federal courts,"

- [Laws to implement Respect@Work recommendations have passed parliament. What are they? - ABC News](#)

Two Positive Duties of Care

◦ SDA was amended in 2022 to include a positive duty of care.

- The Model Work Health and Safety Act establishes positive WHS duties
- Not explicit in the Model WHS Act, but imposes a positive duty on employers to prevent SH as a risk to a worker's psychological health
- Covers SH as a general duty under psychological hazards, but no specific definition of SH in Model WHS Act.
- No model WHS Regulations or model Codes focused primarily on how to manage SH
- Recommendation 35 endorses WHS ministers' agreement to amend the model WHS Regulation in accordance with SDA
- May 2021, the Federal, State and Territory WHS Ministers voted to amend the Model WHS

2023 Implementation

- Western Australia's WorkSafe agency - Fortescue Metals Group (FMG), charged with **34 counts of refusing or failing to comply with a requirement** to provide documents to a WorkSafe inspector within a specified period without a reasonable excuse.
- Documents relate to cases of alleged sexual harassment at three mining operations in WA's Pilbara region – Christmas Creek, Solomon and Cloudbreak.
- The Work Health and Safety Act 2022 gives WorkSafe inspectors the right to request that documentation be received within a specified time period unless the person in charge of the business or undertaking has a reasonable excuse for not supplying the documents.

FMG faces maximum fines of \$55,000 for each of the 34 alleged breaches; a potential total of \$1.87 million.

Seven standards expected of organisations in relation to their duty of care to prevent sexual harassment

Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth) p.23

<https://humanrights.gov.au/sites/default/files/2023->



Duty of care and employer's
vicarious liability /Stop SH orders

Two Positive Duties of Care

SDA Act and Model WHS Act

ILO Convention 190
Violence and
Harassment

Explicit – Reasonably
practicable

Moves away from
individual to collective
voice in safety

SYSTEMIC APPROACH

*‘Are we there
yet?’*



Implementation → Safe Work Australia Model Legislation and Code of Practice

- All states and territories have implemented the Model Legislation except Victoria.
- SA comes into effect Dec 2023, and ACT Nov 2023.
- All jurisdictions except Victoria have adopted the Code of Practice.
- States and territories have taken different approaches to the treatment of sexual harassment.
- While Victoria has not implemented the legislation to date, it does already have legislation in place which treats SH as a form of gender-based violence rather than a psychosocial hazard
- Some treat it as a specific risk, others subsume the risk into the basket of psychosocial risks. This has implications for a PCBU wishing to manage SH as a specific risk, and for workers who may be looking for support in relation to SH and not understand it is a psychosocial hazard.

Remediation

Which jurisdiction?

Financial compensation through the WHS

Via the AHRC

- Request for conciliation.
- AHRC has the power to refer the matters to the courts if conciliation cannot be achieved or where they determine there is a case to be answered.
- Relevant issue - whether there has been discrimination arising from sexual harassment, and whether the employer took appropriate steps to mitigate the risk of this occurring.

Via their Employer or State based WHS agency

- Treated as any other compensation claim for workplace injury.
- Relevant issue is whether there was harm to physical or mental health as a result of exposure to sexual harassment, and whether the employer took appropriate steps to mitigate the risk of this occurring.

Broadening violence and harassment
(sexual harassment is a subset)



online harassment and intimidation

Spillover can also go from work to home, when certain workplace environments – such as those that are violent or dangerous, abusive, bullying - condition workers to violence, making it more likely that they will commit violence at home. (Melzer, 2002)

Power relations, gender, cultural and social norms, discrimination and economic inequalities also need to be considered in Australia's management of violence and harassment in the workplace.

C190

‘Changes include a shift away from full-time permanent roles to increasing numbers of contractual and self-employed and those with ambiguous contractual status including gig and platform workers.’ Conversation, Dayaram & Heap, 2023

Approx 2.7 million casual workers and 1.1 million contractual workers

Harder for these workers, who are more vulnerable to the risk of violence and harassment, to report these incidents than it is for permanent workers

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