



Sex discrimination

The *Sex Discrimination Act 1984* (SDA) makes it unlawful to discriminate against a person because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status, family responsibilities, because they are pregnant or might become pregnant or because they are breastfeeding. For more information, see the fact sheet *Sexual orientation, gender identity and intersex status discrimination* at www.humanrights.gov.au/employers.

In addition, the SDA makes sexual harassment against the law.

The SDA protects people across Australia from discrimination in a number of areas in public life, including employment, education, getting or using services, or renting or buying a house or unit.

Employees and potential employees

Sex discrimination in employment occurs when someone is treated less favourably than a person of the opposite sex would be treated in the same or similar circumstances. It can occur when employers or managers hold assumptions about what sort of work women are capable – or not capable – of performing.

Examples of sex discrimination could include:

- not hiring a woman because the employer thinks she won't fit into a 'traditionally' male workplace
- not paying a woman the same salary as a man for doing the same work, or not providing the same opportunities for training, mentoring or promotion
- allocating work tasks based on a person's sex.

For example, after working for 11 years with an accounting firm, Erin had been promoted to the role of group auditor. However, when a new manager was appointed, he began treating her differently to the male employees working in similar positions. Erin said she was over-scrutinized, excluded from group events and that her salary package was less than male employees in equivalent positions. When she complained to management about these issues, the treatment became worse.



The SDA makes it unlawful to discriminate when advertising jobs, during recruitment and selection processes, when making decisions about training, transfer and promotion opportunities, and in the terms, conditions and termination of employment.

All types of employers and employment relationships are covered under the SDA, including: Commonwealth Government employees and private sector employees, full-time, part-time and casual employees, contract workers and commission agents, as well as apprentices, trainees and those on probation.

It also covers recruitment processes carried out through recruitment, labour hire and employment agencies. However, the SDA does not cover sexual harassment or sex discrimination in employment by state instrumentalities.





Customers

The SDA makes it unlawful to discriminate in the provision of services, such as banking and insurance services; services provided by government agencies; transport or telecommunication services; professional services, such as those provided by lawyers, doctors or tradespeople; and services provided by restaurants, shops or entertainment venues.

This means that it is against the law for a business to discriminate against a person by:

- refusing to provide a person with goods, services and facilities
- providing them with goods, services and facilities on less favourable terms and conditions, or
- providing goods, services and facilities in an unfair manner

because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status or family responsibilities, because they are pregnant or might become pregnant, or because they are breastfeeding.

Direct and indirect discrimination

Discrimination can be direct or indirect.

Direct discrimination happens when a person is treated less favourably than another person because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.

Indirect discrimination can be less obvious. It can happen when employers or service providers put in place conditions, requirements or practices which appear to treat everyone equally but which actually disadvantage some people because of their sex, marital or relationship status, breastfeeding, pregnancy or potential pregnancy. If the condition or requirement is unreasonable, it could be unlawful discrimination.



Examples

It could be **discrimination** if a bank refused to approve a loan because the applicant was unmarried or was divorced.

It would be **direct** sex discrimination if a company paid men more than women who are doing the same work.

A policy that says only full-time workers will be promoted might disadvantage women who are more likely to work part-time because of family responsibilities. If the requirement to work full-time was not reasonable it would be **indirect** sex discrimination.



Pregnancy discrimination

The SDA makes it unlawful to treat a woman unfairly, or not provide her with the same opportunities, because she is pregnant or might become pregnant.

In general, women who are pregnant should be able to continue to work in the same way and under the same conditions as other employees, unless there are valid medical or safety reasons.

Direct pregnancy discrimination happens when a woman is treated less favourably than another person because she is pregnant or because she may become pregnant.

Indirect pregnancy discrimination occurs when there is a requirement or practice that is the same for everyone but has an unfair effect on pregnant women.

According to case law and industrial law, a woman who returns to work after maternity leave has the right to return to the same job she had before going on leave, or to a comparable position if her original job has ceased to exist.

Breastfeeding discrimination

The SDA makes it unlawful to discriminate against women who are breastfeeding, including those who need to express milk.

Direct breastfeeding discrimination happens when a woman is treated less favourably because she is breastfeeding or needs to breastfeed over a period of time.

Indirect breastfeeding discrimination occurs when there is a policy, requirement or practice that is the same for everyone but disadvantages women who are breastfeeding.

Examples

It would be **direct** pregnancy discrimination if an employer refused to employ a woman because she was pregnant or because she may become pregnant.



It may be **indirect** discrimination if a policy says that all employees must wear a particular uniform if it is difficult for a pregnant employee to wear that uniform.

It would be **direct** discrimination if a cafe refused to serve a woman because she is breastfeeding.

It may be **indirect** discrimination if an employer does not allow staff to take short breaks at particular times during the day. This may disadvantage women who are breastfeeding as they may need to take breaks to express milk.



Pregnancy discrimination complaint resolved by the Commission

A woman found out she was pregnant and informed the recruitment agency and her future employer. She said the company then withdrew their offer of employment and the recruitment agency did not contact her about other employment opportunities. She claimed that she was discriminated against because of her pregnancy.



The company said that it was a small organisation and the decision to withdraw the employment offer was based on business reasons. The complaint was resolved through conciliation, with the company and agency providing financial compensation to the woman. The company also provided a written apology and developed an Equal Employment Opportunity policy for the workplace.



Family responsibilities

It is against the law for employers to directly discriminate against a person because of his or her responsibilities to care for a family member. This includes caring for a spouse or de-facto partner, child, grandchild, brother, sister, parent, or grandparent.

It is good practice to take positive steps to help employees meet their family responsibilities. Workplace practices that don't provide reasonable flexibility around start and finish times and part-time work may also be indirectly discriminatory.

Marital or relationship status

It is against the law to treat a person unfairly or deny a person opportunities because of their marital or relationship status, whether the person is single, married, in a de facto relationship, separated, divorced, widowed or never married. This includes people in same-sex relationships.

Direct marital or relationship status discrimination happens when a person is treated less favourably than a person with a different marital or relationship status would be treated in the same or similar circumstances.

Indirect marital or relationship status discrimination occurs when there is a requirement or practice that is the same for everyone but has an unfair effect on people of a particular marital or relationship status.



Examples

It may be **discrimination** for an employer to refuse to employ a person, demote a person or reduce a person's hours of work because the person needs to care for a family member.

It may be **direct** discrimination for a company not to employ a married woman because it assumes she will want to start a family.

A company that offers only married employees working in remote locations allowances and leave to visit their families may be disadvantaging employees who are single or in de facto relationships (**indirect** discrimination).

Case example

In *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31 the employer unilaterally changed the employee's status from full time to part time after the employee asked for time off to collect her child from a nearby school at 3.00pm and deliver him to an after school care centre. She needed a half hour break and was prepared to take a shorter lunch in order to make up the time.

The Federal Magistrate decided that she was treated less favourably than a person without family responsibilities who would have expected some flexibility in starting and finishing times and in the timing of breaks. It was also found that the unilateral change to part-time employment constituted constructive dismissal, and that one of the grounds for the dismissal was her family responsibilities, in breach of the SDA.



When discrimination is not unlawful

Like other anti-discrimination laws, the SDA says that, in some circumstances, it is not unlawful to discriminate against a person on the basis of their sex in employment or in the delivery of services. This can include excluding people of a particular sex from participating in certain competitive sports, acts done under statutory authority and reasonable differences in the provision of insurance and superannuation. In relation to employment, there are limited exemptions from the SDA for **religious institutions** in relation to employment, and voluntary bodies in relation to membership and services. There may be some circumstances where it is appropriate to hire only a man or a woman for a particular position because the person's sex is a genuine occupational qualification.

For example, providing welfare services to a single-sex client group, or when selecting a person to perform body searches or fit clothing or undertake domestic duties at someone's home. There is also a permanent exemption in relation to superannuation in certain circumstances.

The SDA also permits the Australian Human Rights Commission to grant temporary exemptions from some provisions of the SDA in certain circumstances.

Useful links

Sex discrimination

Supporting working parents:
Pregnancy and return to
work national review
[www.humanrights.gov.au/
pregnancy-discrimination](http://www.humanrights.gov.au/pregnancy-discrimination)

Male Champions of Change

[www.humanrights.gov.au/male-champions-
change](http://www.humanrights.gov.au/male-champions-change)

Women in male-dominated industries: A toolkit of strategies

[www.humanrights.gov.au/publications/
women-male-dominated-industries-toolkit-
strategies-2013](http://www.humanrights.gov.au/publications/women-male-dominated-industries-toolkit-strategies-2013)

Supporting carers in the workplace: A toolkit

[www.humanrights.gov.au/publications/investing-
care-recognising-and-valuing-those-who-care](http://www.humanrights.gov.au/publications/investing-care-recognising-and-valuing-those-who-care)



Special measures

Special measures have the goal of fostering greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.

The SDA provides for special measures that improve equality of opportunity for people based on their sex, sexual orientation, gender identity, intersex status, relationship status, pregnancy or potential pregnancy status or family responsibilities.

What is sexual harassment?

Sexual harassment is unwelcome sexual behaviour which a reasonable person would anticipate would make someone feel offended, humiliated or intimidated. It has nothing to do with mutual attraction or consensual behaviour.

Both men and women can experience sexual harassment, however it is most commonly experienced by women.

Sexual harassment can happen at work, at school or university and in the provision of goods and services.

Examples

- staring, leering or unwelcome touching
- suggestive comments or jokes
- sexually explicit pictures or posters
- unwanted invitations to go out on dates or requests for sex
- intrusive questions about a person's private life or body
- unnecessary familiarity, such as deliberately brushing up against a person
- emailing pornography or rude jokes
- displaying posters, magazines or computer screen savers of a sexual nature
- communicating content of a sexual nature via social media, such as sending sexually explicit text messages.





Complaint of sexual harassment in employment via social media resolved by the Commission



The complainant worked in a sales role with a car dealership. The complainant posted a photo of herself wearing a bikini and displaying tattoos on a social networking site. The complainant alleged the owner of the dealership sexually harassed her by posting comments of a sexual nature on the site in relation to the photograph. The complainant said she resigned because of the comments.

The dealership owner confirmed that he made the alleged comments but said he did not anticipate the complainant would feel offended or intimidated by the comments. He said he did not believe the complainant resigned because of the comments.

The complaint was resolved with an agreement that the owner of the dealership pay financial compensation to the woman and provide her with a written apology. The parties agreed to have no further contact with each other, including through social media.

Sexual harassment is prohibited in all work-related activity, including at the workplace and at work-related activities such as training courses, conferences, field trips, work functions and office Christmas parties. It is also prohibited between employees and customers.

A person who sexually harasses someone else is primarily responsible for their behaviour. However, in many cases, employers can also be held responsible – or vicariously liable – for acts of sexual harassment by their employees or agents.

Some types of sexual harassment may also be offences under criminal law. These include:

- physical molestation or assault
- indecent exposure
- sexual assault
- stalking
- obscene communications (telephone calls, letters, etc)
- sexually explicit physical contact, and
- sexually explicit emails or SMS text messages.

If an employer suspects that a criminal incident has occurred, the individual should be advised to report the matter to the police. There should be a person nominated in the organisation's harassment policy and procedures to whom the incident can be reported. This person should provide any necessary support and assistance to the individual who is the subject of the alleged criminal incident.

For more information, see *Good practice guidelines for internal complaints processes* at www.humanrights.gov.au/employers.



Useful links

Sexual harassment

Know the Line

www.knowtheline.com.au

Ending workplace sexual harassment: A resource for small, medium and large employers

www.humanrights.gov.au/publications/ending-workplace-sexual-harassment-resource-small-medium-and-large-employers

Effectively preventing and responding to sexual harassment: A code of practice for employers

www.humanrights.gov.au/publications/effectively-preventing-and-responding-sexual-harassment-code-practice-employers-2008



Employers' obligations

Employers have a legal responsibility not to discriminate against employees and to take all reasonable steps to prevent sex discrimination and sexual harassment.

'Reasonable steps' will vary based on the size of the organisation. It may include putting in place policies and procedures to create a discrimination-free environment. It could also include procedures to deal with allegations of discrimination and harassment made by employees or customers.

It is against the law to victimise a person for making, or proposing to make a complaint to the Australian Human Rights Commission alleging discrimination or harassment under the SDA.

Employers can also be held legally responsible for sex discrimination or sexual harassment by their employees.

For more information, see *Vicarious liability* at www.humanrights.gov.au/employers. An employer can also be responsible as an accessory to the discrimination.

Further information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001

Telephone: (02) 9284 9600
National Information Service: 1300 656 419
TTY: 1800 620 241

Email: infoservice@humanrights.gov.au
Website: www.humanrights.gov.au/employers



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