

The Guiding Principles: Effective consultation and the positive duty

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New provisions in the *Sex Discrimination Act 1984* (Cth) place a **positive duty** on organisations and businesses to take reasonable steps to eliminate the following behaviour as far as possible:

- discrimination on the ground of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the ground of sex
- related acts of victimisation.

We refer to these behaviours as '**unlawful behaviours**' in this factsheet.

Being **consultative** is one of four **Guiding Principles** the Australian Human Rights Commission (Commission) expects organisations and businesses to consider and apply when addressing unlawful behaviours. Consultation ensures that any actions taken are informed by those affected, or potentially affected, by unlawful behaviours at work.

This factsheet tells you what makes consultation effective and how it can assist organisations and businesses to support safe, equitable and respectful workplaces.

Consultation is important because it can help organisations and businesses to:

- understand the prevalence, nature, risk factors and impacts of unlawful behaviours
- develop effective strategies to prevent and respond to unlawful behaviours
- help workers engage with their workplace and be more likely to contribute to and support cultural change.

What makes consultation effective?

Effective consultation is a two-way process between an organisation or business and its workers where they:

- *talk* about unlawful behaviours
- *listen* to concerns raised
- *seek* and *share* information
- *consider* what workers say before making decisions in response.[1]

In the context of the positive duty, workers should be consulted about:

- what they need for their workplace to be safe and respectful
- their experiences of unlawful behaviours connected to work
- characteristics of their workplace that may increase risks of unlawful behaviours
- suggestions for how to address risks
- whether strategies being used are effective.

Consultation is most effective when it is inclusive, accessible, trauma-informed, transparent and respectful of people's confidentiality.

Inclusive

- Consider how to support the participation of all workers in your consultation process, including young people, older people, people with disabilities, people from culturally and linguistically diverse backgrounds, and First Nations and LGBTIQ+ participants.
- Understand that different cultures have different communication styles. Ensure that consultation facilitators have the skills to encourage all participants to contribute equally.
- Identify the people whose voices are often not heard in your workplace and ensure their participation is supported.

Accessible

- Ensure all workers, including shift workers, contractors, remote workers, part-time workers, interns and volunteers have the opportunity to participate.
- Ensure any language, accessibility needs and reasonable adjustments are considered, and barriers to participation are identified and minimised.
- Offer a range of feedback methods such as anonymous surveys, a feedback box, or online or face-to-face interviews, or group consultations.

Trauma-informed

- Recognise that people may be affected by the subject matter and that participating may bring up issues for them.
- Provide details of independent confidential support services. See [Fact sheet: Seeking Support – Counselling and Support Services](#).

Transparent

- Be clear with participants about the reason for the consultation, how information will be used, the process to be followed and the intended outcomes.
- Tell participants ahead of time so that they can reflect on the topic of the consultation.
- Tell participants of the outcome of the consultation, including how any feedback or findings will be used.

Confidential

- Consider the privacy and confidentiality of all participants.
- Be clear with participants about what information will be asked for, the reason for asking for it, and how it will be recorded and used.
- Keep the information confidential, where possible. Do not share within or outside the organisation unless it is agreed or required by law.
- Collect, use, store and share personal information in accordance with privacy laws.

Designing a consultation strategy

Consultation will look different in different organisations and businesses depending on the makeup, distribution and size of their workforce.

A note for small businesses: Consultation doesn't need to involve a lot of time or expense. In a small business it may simply involve a combination of:

- regular conversations with workers about what they need for their workplace to feel, and be, safe and respectful
- regular conversations with workers about any new risks or emerging issues, and ideas to address them
- providing regular advice to workers about what you are doing to address risks or issues and checking with workers to see if it is working.

Organisations and businesses should consider the following when designing a consultation strategy:

Who to consult?

Consider who may be affected (directly or indirectly) by sex discrimination, sexual harassment and the other unlawful behaviours in the workplace. In a small organisation or business, this is likely to be all managers, supervisors and workers, and may include other key people who come into regular contact with the organisation or business.

In a large organisation or business, it may be appropriate to develop a tiered consultation strategy. While all workers should have the opportunity to provide input, it may be appropriate to conduct in-depth consultation with a representative sample of the workforce.

For topics relating to sexual harassment, sex-based harassment and sex discrimination, if possible, it can be useful to hold some group sessions just with women.

Consider if there is any requirement for a union or association to be involved. Even if not specifically required, it can be useful to liaise with relevant union/s or workers' representatives early in a change process to assist with worker engagement. Likewise, it may be appropriate to consult health and safety representatives.

Consultation may also include key stakeholders of the organisation or business. Relevant examples are people who regularly come into contact with the business - such as suppliers, contractors, customers or other third parties.

When to consult?

Organisations and businesses should consult workers (and possibly other stakeholders) before designing their strategies to satisfy the positive duty. Consultation can also occur at any time during a process of change, including:

- during the development and review of key policies
- when new or changed risks are identified
- following an incident, including to determine how risk could be better managed in the future
- on a regular basis, to review the effectiveness of measures taken.

Who will conduct the consultation?

Aim to ensure that feedback can be freely and safely given by participants. For example, consultation may be conducted by a human resources, diversity and inclusion or union representative (rather than a manager), particularly where power imbalances may impact on workers' willingness to provide feedback.

For topics relating to sexual harassment, sex-based harassment and sex discrimination, there may be an advantage to using a woman facilitator outside of any reporting lines.

There also may be advantages to using independent or expert facilitators to encourage openness.

How will the information be used, and results communicated?

Consultation is only the first step in the process of active participation. A key element is providing participants with the opportunity to be involved in identifying and implementing a plan of action to address issues raised. It should include identifying next steps and providing participants with the opportunity to be involved in an ongoing way.[ii]

Organisations and businesses who take a consultative approach are ultimately responsible for making the final decision on how to implement change. However, it is important to communicate the results of the consultation process to participants and other relevant stakeholders. Include clear information about how feedback was incorporated and how decisions were reached and why. This maintains relationships and trust with workers and will assist in the implementation of change.

[i] Safe Work Australia, *Work health and safety consultation, cooperation and coordination: Code of Practice* (May 2018) 13

<https://www.safeworkaustralia.gov.au/system/files/documents/1901/code_of_practice_-_consultation_cooperation_coordination.pdf>.

[ii] Centre for Refugee Research, UNSW, *Community Consultation Skills: Considerations for the planning of community consultations* (2021) 7 <<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/arts-design-architecture/social-sciences/resources/2021-07-Final-UNHCR-Community-Consultation-Skills.pdf>>.

You can find more information about the positive duty under the Sex Discrimination Act on the Commission's [website](#). Resources include [Guidelines for Complying with the Positive Duty](#), an [Information Guide: Relevant Unlawful Conduct, Drivers, Risk Factors and Impacts](#), a [Quick Guide](#), [Small Business Resource](#), and other [factsheets](#).