

SEXUAL HARASSMENT IN THE WORKPLACE

Report

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1. EXECUTIVE SUMMARY

Sexual harassment has been prohibited in the workplace since the introduction of the *Sex Discrimination Act 1984* (Cth) (**Sex Discrimination Act**), almost 40 years ago, and remains unlawful under anti-discrimination legislation at the federal level and in all Australian State and Territory jurisdictions. Sexual harassment in the workplace can also lead to liability for organisations, as well as directors and other individuals personally, under Australia's model Work Health and Safety (**WHS**) laws, in addition to exposure to workers' compensation claims. Despite the existing legal framework, it is clear that sexual harassment in the workplace remains pervasive. Evidently a new approach is required to prevent and respond to sexual harassment in the workplace.

Sexual harassment is any unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and/or intimidated, where a reasonable person would anticipate that reaction in the circumstances. A working environment or workplace culture that is sexually permeated or hostile will also amount to unlawful sexual harassment. A person who sexually harasses another person will be primarily liable for sexual harassment. However, employers and others can also be held liable for acts of sexual harassment done by their employees or agents, unless they can show that they took all reasonable steps to prevent the harassment occurring. At its most extreme, sexual harassment may constitute a criminal offence.

Sexual harassment causes harm which can be significant, both to those who experience or witness it, as well as to the broader organisation in which it occurs from a culture, governance and safety perspective. Despite this, sexual harassment claims have typically been treated as individual grievances, rather than a potentially systemic organisational issue that reflects the poor workplace culture of an organisation that allows such behaviour to occur and poor leadership of an organisation that allows such a culture to exist.

In order for sexual harassment to be most effectively addressed, it is clear that Boards need to take a leadership position on the issue and drive meaningful change on responding to sexual harassment within their organisations. Current strategies focused on compliance and reactive management of sexual harassment complaints have not shifted the dial on incidents of sexual harassment for organisations and their staff. Tackling this issue *effectively* is essential to support the safety and wellbeing of staff, has the potential to bring broad ranging benefits from a business perspective and is consistent with the current expectations of shareholders, investors, employees, regulators and the community. Meaningfully addressing sexual harassment supports a safe and respectful workplace and demonstrates best practice leadership. Extensive research also shows that workplaces which achieve this will see improvements in staff engagement and corporate culture, which in turn encourage higher productivity and positive stakeholder relations.

'Respect@Work' and 'CoCC' reports

On 29 January 2020, the Australian Human Rights Commission (**Commission**) presented Respect@Work, the report of its 'National Inquiry into Sexual Harassment in Australian Workplaces 2020' (**Respect@Work Report**)¹. The Respect@Work Report examined the nature, prevalence and drivers of sexual harassment in Australian workplaces and proposed a new framework of measures to address and prevent sexual harassment that is "*victim-centred, practical, adaptable for businesses of all sizes and in all industries, and designed to minimise harm to workers*". Momentum stalled following the report's release, as the Federal Government's priorities shifted to responding to COVID-19. The focus however has returned to this important issue. On 8 April 2021, the Federal Government formally responded to the recommendations made in the Respect@Work Report and, on 24 June 2021, the Government introduced the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*, which introduces a vast number of amendments in response to various



recommendations made in the Respect@Work report.

The Federal Government's response to the Respect@Work Report does not propose material substantive changes to employer obligations or responsibilities for workplace sexual harassment. Rather, it primarily seeks to clarify and confirm the operation of laws which currently exist under the Sex Discrimination Act, the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

It is now incumbent on organisations to determine their own initiatives to support real and substantial change in how sexual harassment is addressed, supported by their Boards. There is no 'one size fits all' approach, however guidance can be taken from the Champions of Change Coalition's report 'Disrupting the System – Preventing and responding to sexual harassment in the workplace' (**CoCC Report**)², which proposes a range of practical measures to prevent and respond to sexual harassment in the workplace. In Annexure A, we set out the Board-level measures arising from the CoCC Report, as well as key takeaways from the Respect@Work Report for Boards. We also expand below on the Board's role to drive the prevention of, and adequate response to, sexual harassment in the workplace, and the legal issues that can arise for the organisation in this context.

Shift in focus towards greater transparency

The Respect@Work Report and CoCC Report (together, **Reports**) confirm that there is now a groundswell movement away from a narrow focus on corporate liability and minimising reputational damage, to creating a culture and workplace which is physically and psychologically safe for all. Recent events in corporate Australia have shown that failing to prevent and appropriately respond to sexual harassment in the workplace can create a number of legal and enterprise risks. This includes liability under anti-discrimination and WHS laws, but extends further to impacts on productivity and profitability, corporate reputation, achievement of ESG measures, and loss of shareholder confidence. Organisations need to take action to stamp out sexual harassment because it is

completely unacceptable, presents a risk to the health and safety of staff, and has no place in the workplace at any time. In addition, tackling sexual harassment makes good business sense, in supporting a workplace where both individuals and organisations can reach their full potential.

In this report, we set out the legal considerations relevant to this shift towards creating a safer workplace and culture, and holding alleged perpetrators of sexual harassment to account, including by being more transparent about sexual harassment risks and incidents in the workplace.

In dealing with allegations of sexual harassment, typical practice, to date, has been to keep allegations, investigations and outcomes confidential. For most organisations, as a matter of course all parties (including the complainant and the respondent) are typically directed not to speak about those matters. Complainants are not informed of the outcome of investigations or the action taken against respondents, nor are complainants permitted to discuss their experiences with others, even where their allegations have been substantiated.

Valid reasons have underpinned that approach from the perspective of managing legal and reputational risk. Maintaining confidentiality has historically reduced a host of risks including reputational damage, defamation claims, executive culpability, victimisation and retaliatory conduct, regulator interest and potentially work injury claims.

That risk calculus may not hold much longer, as community expectations of the handling of sexual harassment complaints are rapidly shifting. There is emerging consensus that traditional confidentiality requirements are damaging both to complainants and to organisational culture. From a public policy lens, shutting down sexual harassment complaints and discussion of such issues can appear reactive at best and Machiavellian at worst and often generates more damaging reputational impacts.

It follows that the approach of mitigating legal risk through enforced confidentiality regimes may be short sighted as any immediate benefits are outweighed by long term damage to organisational culture and staff wellbeing.



With the above in mind, we recommend that Boards reconsider their approach to these matters when they become involved (for example, where the matter involves senior personnel or raises significant legal or reputational risk) and support their organisations adopting a more transparent approach going forward. At a minimum, this would involve providing complainants with information about the outcomes of their complaints, including whether the allegations were substantiated and the action taken as a result. In most cases where allegations of sexual harassment are substantiated, further steps that could be taken towards a more transparent approach include:

- ▶ removing the confidentiality requirement in relation to investigation outcomes, and permitting complainants to decide whether allegations, findings and action should be kept confidential or otherwise; and
- ▶ communicating the fact of the findings and the disciplinary action taken within the organisation, either with or without identifying details (depending on the complainant's preference).

Against this backdrop, a particular issue that has received significant attention is the use of 'non-disclosure agreements' by organisations, or NDAs as they are commonly referred to. NDAs are legally enforceable confidentiality agreements (or confidentiality clauses in agreements) between organisations and complainants of sexual harassment. The Reports propose a new approach in relation to the use of NDAs that is 'complainant-centric' and allows complainants to tell their story rather than silencing them for the benefit of their alleged perpetrators. It must be understood that these steps towards openness - and particularly permitting open discussion of outcomes where misconduct is established - may increase legal and reputational risk, at least in the short term. However, this approach would also support transparency of patterns of behaviour, allowing an organisation to tackle systemic sexual harassment issues which can otherwise give rise to significant legal risk where not addressed. It can also assist in limiting reputational damage where sexual harassment in the workplace later is made public. In this report, we outline the legal considerations that apply to shifting towards a

transparent approach, and how these can be navigated, including having regard to defamation laws.

Defamation

Whilst a shift towards transparency connotes an increased risk of a defamation claim against the complainant or their employer organisation (given that information about certain incidents and identification of individual perpetrators may be published), any curtailment of a cultural shift to transparency by reason of that increased risk alone, would permit the "tail to wag the dog". Rather, mindful of that consequence, there are reasonable precautionary steps an organisation (and its Board) may take to manage and minimise the risk of a successful defamation claim arising in the circumstances of disclosure of and remedial action taken in response to, a sexual harassment claim.

These steps focus on the careful management and crafting of communications to be published relating to the incident, and creating circumstances where any such publication may attract the defence of qualified privilege under the National Uniform Law. When implemented, these measures would enable an organisation to remain focused on the prioritisation of a victim-centric approach, whilst reasonably managing any risk of civil exposure to an alleged perpetrator of sexual harassment.

Case studies

Finally, it is story-telling that brings these concepts to life, rather than viewing sexual harassment through the prism of metrics and statistics. To illustrate how sexual harassment matters can play out, including in the media, we have incorporated a series of case studies throughout our report which explore how sexual harassment allegations can arise and the resulting implications that can flow from how they are handled.



2.A PRACTICAL ROADMAP

Managing legal rights and obligations while ensuring accountability and improvements in corporate culture is a delicate balancing act. Traditionally, sexual harassment has been addressed through the implementation of a sexual harassment policy and associated training, with sexual harassment incidents typically dealt with confidentially and 'behind closed doors', including through the use of NDAs. However, it is clear that these measures have failed to adequately address sexual harassment in the workplace. This should be cause for concern for directors, as the presence of sexual harassment in the workplace can result in significant legal liability for organisations as well as broader damage to organisational culture, performance and reputation.

Employers can be held vicariously liable for sexual harassment where a complainant brings a claim under discrimination laws, with exposure to significant awards for damages and compensation. Further, failing to prevent sexual harassment can give rise to a breach of WHS obligations, and lead to intervention by safety regulators with the power to prosecute businesses and their directors (with both criminal and civil penalties at stake). Businesses can also find themselves defending costly civil litigation, in the form of Fair Work 'general protections' claims and breach of contract / torts claims, whilst insurance premiums can be driven up by workers' compensation or other employee claims.

On balance, the short term risk management that is required when a business takes decisive and transparent action in response to sexual harassment pales in comparison to the significant legal risks that flow from failing to prevent sexual harassment in the workplace, as well as the longer term damage to organisational culture and staff wellbeing where sexual harassment is tolerated. Organisations may be impacted not only by the legal consequences of breaches of WHS and anti-harassment obligations, but also by reputational damage, significant distress experienced by those affected by sexual harassment, regulator attention, lost productivity, and reduced profitability, all of which may lead to decreased shareholder confidence. As a result, organisations should use

the learnings outlined in the Reports, and potential legislative reform, to motivate action in this space.

We set out below the key legal risks that can arise in this context in more detail:

- ▶ **Vicarious liability claim for sexual harassment** - Victims of sexual harassment can bring a claim under discrimination laws at either the Federal or State / Territory level (noting individuals must choose one forum, as claims cannot be run concurrently in two jurisdictions). At the Federal level, the Sex Discrimination Act provides that an employer can be held vicariously liable for sexual harassment that is perpetrated by an employee or agent, where that sexual harassment is found to have occurred in connection with an employee or agent's duties.
- ▶ This is a broad liability – it is not necessary for an employer to be aware of an incident of harassment for vicarious liability to be established. Crucially, to avoid vicarious liability, an employer must prove that they took 'all reasonable steps' to prevent the alleged sexual harassment from taking place.
- ▶ 'All reasonable steps' is not a defined term under the legislation, however, it has been considered extensively in case law. What steps are reasonable will depend on all the circumstances, including the size of the organisation, the nature of its workforce, the conditions under which work is carried out, and any history of unlawful discrimination or sexual harassment. The focus is on prevention, but in some circumstances, the way a complaint is dealt with after the act may have relevance to whether all reasonable preventative steps were taken (for example, a failure to comply with policies for investigating and dealing with reported sexual harassment may be reflective of a hostile workplace culture).
- ▶ Traditionally, many businesses have relied exclusively on implementing a sexual harassment policy and conducting periodic 'check-box' sexual harassment training for employees, often in the form of an online module. The Respect@Work Report suggests that a more expansive range of preventative steps ought to be taken. We explore below what 'all reasonable steps' might look like for employers in the future from a best practice perspective, having regard to the Reports.



- ▶ **Work health and safety claims** - Organisations and directors / officers have obligations under WHS laws to understand and address the hazards and risks associated with their workplace. This includes a legal duty to eliminate (or if not possible, mitigate) risks to health and safety as far as reasonably practicable.
- ▶ Whilst the current model WHS laws do not expressly prohibit sexual harassment, sexual harassment is a clear hazard to workers, and appropriate controls must be put in place to mitigate those hazards. It is important to remember that WHS obligations apply to psychosocial hazards (such as stress and mental health risks) as well as physical hazards (such as violence and assault).
- ▶ Where a request for service is raised by a worker regarding sexual harassment with a safety regulator, or a regulator otherwise becomes aware of a sexual harassment matter via media attention or public scrutiny, there is a real potential for the regulator to investigate, issue notices (for example, as under section 155 of the *Work Health and Safety Act 2001* (Cth) in relation to requests for information or provisional improvement notices) and indeed bring safety prosecution proceedings if there is evidence to suggest that a business is not meeting its obligations to manage risks and provide a safe place of work. The risks are particularly acute if a business cannot demonstrate that it has adequate systems and controls to manage the risks of sexual harassment. It is therefore crucial that businesses treat sexual harassment like any other safety risk. This means taking a structured approach to identify hazards, assess risks, implement controls and review the success of control measures. We explore below some practical recommendations of the Reports for how businesses can best manage their WHS obligations for sexual harassment.
- ▶ **Victimisation claims under anti-discrimination, 'general protections' and whistleblower legislation** - Where allegations of sexual harassment are raised, including through whistleblower channels, it is important for an organisation to have appropriate policies and processes in place to ensure that a complainant, informant or investigation participant is protected from reprisal action or victimisation. Failing to do so can give rise to exposure to a victimisation claim under various legislation with uncapped damages (including

anti-discrimination legislation, the 'general protections' provisions in the FW Act, and whistleblowing provisions under the *Corporations Act 2001* (Cth) (**Corporations Act**) where applicable).

- ▶ **Tort claims** - Employers have a duty under tort law to protect employees from reasonably foreseeable harm arising out of their employment. Failing to take reasonable care for the safety of an employee can constitute a failure to fulfil the duty of care and can amount to negligence on the part of the employer.³

What should a framework to prevent and respond to sexual harassment look like?

- ▶ The Commission acknowledges that improving the **prevention** and **response** to workplace sexual harassment requires a new, more holistic approach that looks beyond policies, training and complaint handling procedures.⁴ As outlined in Annexure A, change heavily relies on a tone from the top and a call for action from the Board.
- ▶ Organisations have had a tendency to focus on the minimum steps they need to take to reduce their risk of legal liability and their reputational damage when sexual harassment arises in the workplace. The Respect@Work Report points out that this historical approach has demonstrably failed to reduce sexual harassment. Organisations should now be looking to how they can refocus and find new, effective methods to eliminate the issue.
- ▶ Instead of simply relying on having a sexual harassment policy and implementing corresponding training, the following section sets out a 'snap shot' of practical measures that organisations should consider implementing as part of a renewed attempt to take 'all reasonable steps' to prevent sexual harassment, drawing on the 'seven domains' as set out in the Respect@Work Report. While current legal jurisprudence does not require all or most of these steps to be undertaken, it is likely that there will be a shift in the future in what will be required in order for organisations to demonstrate they are taking adequate steps to combat sexual harassment, and the practical measures set out below will set organisations in good stead to meet the anticipated higher standard.



Framework for Prevention

Recommendation	Practical Strategies from the Reports
Leadership	<ul style="list-style-type: none"> ▶ Prepare and publish a leadership statement which clearly articulates that eradicating sexual harassment is a priority for the organisation. ▶ Set expectations with the leaders in the organisation - support and celebrate them when they take active steps to address gender inequality, gender-based discrimination, everyday sexism, sexual harassment and violence against women. ▶ Ensure the Board is properly informed on the policies and programs in place within the workplace, any incidents that occur and the actions taken by the organisation in response. ▶ Understand how sexual harassment manifests in the organisation and industry, the risks and its impacts.
Risk assessment and transparency	<ul style="list-style-type: none"> ▶ Adopt a proactive risk management approach (similar to the approach commonly used to address other WHS risks) which identifies key risk indicators for sexual harassment and develops measures to control or eliminate risks of sexual harassment in the organisation. ▶ Clearly communicate the actions taken to address unacceptable behaviours, any mistakes the organisation may have made in the past and how it intends to act in the future (for larger corporations, consider public statements of commitment). ▶ Require regular and transparent reports to be provided by business units to the Board, senior leaders and external stakeholders in relation to sexual harassment complaints or concerns and the actions undertaken by the organisation in response. In this context, it is incumbent on the Board to ask questions of management regarding the nature and prevalence of sexual harassment in the workplace and ensure that workplace sexual harassment reporting features regularly on the Board agenda. ▶ Consider possible public reporting on workplace sexual harassment, for example, to the Workplace Gender Equality Agency (WGEA) and / or to the ASX having regard to the ASX Corporate Governance Council's <i>Corporate Governance Principles and Recommendations</i>.
Culture	<ul style="list-style-type: none"> ▶ Ensure codes of conduct and consequence management frameworks reflect a zero tolerance approach to sexual harassment while ensuring consequences of inappropriate behaviour are proportionate and appropriate. ▶ Assess the existing culture in the workplace - identify positive aspects as well as areas of concern (for example, having regard to workplace complaints, staff surveys, focus group results or workplace observations, to determine whether worker behaviour and operations in the business are aligned with stated business values and promote workplace equality and respect). ▶ Adopt a robust sexual harassment policy (separate to other forms of workplace misconduct) which contains the content necessary to educate workers as well as minimise the risk of the organisation being held vicariously liable for sexual harassment. ▶ Review recruitment and promotion policies to ensure they prioritise gender diversity, reward respectful behaviour and penalise past misconduct. ▶ Develop a financial incentive for workers to engage in respectful behaviour. For example, a 'respect for others' performance indicator could be introduced which would be considered as part of a workers' performance assessment and remuneration review, For leaders in the organisation, their compensation could be tied to decreasing costs associated with the impact of sexual



Recommendation	<i>Practical Strategies from the Reports</i>
	<p>harassment in the workplace assessed on an actuarial basis (such as accumulated absences, lost productivity, compromised hiring and retention, legal costs, and reputational harm).</p> <ul style="list-style-type: none"> ▶ Focus on addressing gender inequality by developing and publicising a gender equality strategy and action plan which strives for gender balance in the workforce and the creation of a workplace culture where sexual harassment is not tolerated.
Knowledge	<ul style="list-style-type: none"> ▶ Ensure sexual harassment education and training is undertaken and that training initiatives are part of a holistic organisational commitment to cultural change, conveyed by leadership and practised by all. Training in relation to sexual harassment should be inclusive (for example, to casual staff, contractors, and labour hire staff), be targeted (for example, by gender, seniority, or certain cohorts within an organisation such as managers or leaders), provide bystander intervention strategies, provide a comprehensive overview of all forms of sexual harassment including casual sexism, and include practical case studies which bring the principles to light. ▶ Ensure creative forms of training and educational initiatives are introduced which are innovative, engaging, interactive and, where possible, industry-based, as opposed to more conventional compliance training. These initiatives should seek to normalise discussions about workplace sexual harassment and emphasise the available support resources to ensure staff feel supported and able to speak up, should an issue arise. Deviating from conventional training could include creating 'safe spaces' for men to have open discussions about their understanding, views and observations of sexual harassment, or facilitating training sessions which include delivering components of the training to men and women separately, and then having the groups combine to reflect on their different insights. Whilst not suitable in all circumstances, this approach can assist in progressing an honest dialogue between colleagues of different genders, who may have different views and life experiences informing their beliefs and awareness of sexual harassment and its impacts. ▶ Ensure all training initiatives inform all workers, especially senior employees, that the organisation will not tolerate sexual harassment, casual sexism and / or unacceptable behaviour and set out likely disciplinary action that will be taken against offenders.



CASE STUDY - RICHARDSON V ORACLE CORPORATION AUSTRALIA PTY LTD⁵

Facts

Ms Richardson alleged that she was subjected to multiple humiliating comments and sexual advances from Mr Tucker during her employment (including comments such as: "*Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life*", "*So, Rebecca, how do you think our marriage was? I bet the sex was hot*", "*I love your legs in that skirt. I'm going to be thinking about them wrapped around me all day long*", and "*We should go away for a dirty weekend sometime*").

Mr Tucker's conduct over a period of months caused Ms Richardson distress and psychological injury, with Ms Richardson suffering a chronic adjustment disorder, anxiety and depression.

Most notably, when Ms Richardson reported Mr Tucker's conduct to Oracle, her employer conducted an investigation and allowed them to continue working alongside one another.

Following the investigation, Ms Richardson was advised of the outcome and Mr Tucker apologised to Ms Richardson (via an email which was forwarded to her by a member of Oracle's HR staff). A warning was issued to Mr Tucker and he was permitted to keep his job. Ms Richardson resigned and subsequently brought a sexual harassment suit against Mr Tucker and Oracle.



OUTCOME

Ms Richardson appealed the trial decision to the Full Court of the Federal Court upholding that, amongst other things, the non-economic damages awarded were manifestly inadequate and that the trial judge was wrong in finding that there was no causal link between her resignation and the sexual harassment.

Whilst the range of general damages arising from claims of sexual harassment had typically been between \$12,000 and \$20,000 at the time, the Full Court on appeal commented that the non-economic damages awarded did not reflect the community expectations in relation to the "*higher value to compensat[e] for pain and suffering and loss of enjoyment of life*".⁶ When compared with other sums of compensation in similar cases, the Court considered the fact that higher compensation had been granted to the victims of workplace harassment in the context of bullying, than the victims of sexual harassment, even where there was comparable damage caused by both forms of harassment.

The successful appeal found that the \$18,000 in general damages awarded by the trial judge was "manifestly inadequate", and a \$100,000 figure was substituted (plus \$30,000 in economic loss).



FLOW ON IMPACTS

Case law demonstrates that the amounts awarded to victims should adequately compensate them in a way that reflects prevailing community standards of behaviour. In recent years, the release and uptake of the recommendations in the Respect@Work Report, and particularly the #MeToo movement, may signal to courts the need for higher compensation for workers subjected to workplace sexual harassment.



Framework for response

The Commission recommends that responses to sexual harassment should be "victim-centred, prioritising the rights, needs and wants of victims, their safety, autonomous decision-making and confidentiality".⁷ As part of this, the Respect@Work Report comments that having a flexible response framework will support a 'victim-centred' approach (which we will refer to in this report as the 'complainant-centred' approach) to responding to sexual harassment, recognising different circumstances call for different treatment. For example, consideration should be given to whether a sexual harassment allegation should be formally investigated, or otherwise resolved in a more informal manner (such as via mediation or a formal discussion). Some allegations may warrant immediate escalation to a formal investigation (even if that is not the preference of the complainant), because of the seriousness of the allegations, the seniority of the person, or any risks to health and safety.

The approach taken should be informed by the complainant's wishes and proportionate to the issues raised in order to adequately resolve those issues. It should also provide the respondent the opportunity to respond to the concerns raised, respect and support the individuals involved, facilitate a timely and objective process, and ensure outcomes are fair and proportionate. Where the respondent is a senior leader in the business, it may be appropriate to hold them to a higher standard of accountability and graver consequences, noting the important cultural signals this can send throughout the rest of the organisation. Throughout the process, and pending any resolution or outcome, confidentiality should be maintained and the manner of resolution should be clearly documented, should the organisation need to rely on this at a later date.

Where allegations of sexual harassment are not appropriately handled, a range of legal risks can manifest. Mismanagement of sexual harassment claims may expose organisations to workers' compensation claims by parties involved (both from the complainant and alleged perpetrator), or stress leave claims from parties to the investigation or other individuals involved. Allegations may be made that the organisation has supported a hostile workplace or has otherwise responded to the matter in a way


which is discriminatory, is in breach of its WHS obligations, or lacks procedural fairness. In this context, any response framework and investigation processes must provide adequate flexibility - there is no 'one size fits all' approach.

Organisations with a unionised workforce should also consider the risk of industrial disputes and agitation by unions when complaints are mismanaged. Disputes may arise in respect of individuals directly involved in a complaint (including a complainant or respondent), or in respect of the organisation's wider grievance handling framework. Some Enterprise Agreements include specific terms in relation to how the employer must handle sexual harassment complaints, which must be strictly observed to avoid breaching the relevant agreement. Indeed, the Respect@Work Report notes that there is a growing push from union groups to include policies and procedures for managing sexual harassment in Enterprise Agreements and Modern Awards, including mandatory terms similar to those dealing with dispute resolution procedures and consultation obligations.

Practical roadblocks that can arise when allegations are raised

In our experience, there are common 'roadblocks' that arise at the stage when an organisation considers its response to sexual harassment allegations. These include situations where:

- ▶ the complainant or informant wishes to raise an incidence of sexual harassment but does not wish the matter to go any further, including to be investigated (for example, due to fear of retaliation);
- ▶ sexual harassment allegations are raised anonymously;
- ▶ sexual harassment allegations are raised through whistleblowing channels, which impose stricter confidentiality and consent requirements;
- ▶ allegations of sexual harassment are contested by the alleged perpetrator and there is no objective evidence (such as CCTV footage) that would resolve the matter; and/or
- ▶ decisive action is required and it is not feasible to observe procedural fairness principles in resolving the matter.



We set out below some of the legal considerations that apply in this context, and a suggested path forward.

The complainant/informant does not wish for the matter to go further

In responding to a complaint of sexual harassment, organisations should balance the needs of a complainant or informant, against an employer's duty of care, which may in some cases necessitate action without the consent of a complainant or informant.⁸

From the time that allegations of sexual harassment are raised, an organisation is effectively 'on notice' of a potential risk to the health and safety of its workers. Where allegations are serious, reveal a pattern of conduct, or highlight systemic problems within an organisation, the work health and safety risks are particularly acute.

Once on notice, the organisation has a positive duty to assess the magnitude of the potential risks, understand whether the risks are ongoing, and identify what action can reasonably be taken to mitigate or eliminate the risks as far as possible. In some cases, this means carrying out an investigation is essential. Where a complainant is not willing to take part, this can present challenges, but consideration should be given to whether an investigation can proceed on the basis of other available objective evidence or through the testimony of other witnesses. This can be a complex scenario to navigate, and whether it is appropriate to take action despite a complainant's wishes otherwise will ultimately depend on the facts of the matter. Specific advice should be obtained where there is uncertainty as to the appropriate way to proceed.

The organisation also has a duty to implement any *immediate* controls necessary to mitigate risks to both the complainant and other workers. Whilst this must be assessed on a case-by-case basis, immediate controls can include temporarily preventing the respondent from working with certain individuals, or suspending the respondent from their duties, whilst the allegations are being investigated, ordinarily on full pay.

Anonymous reports

Anonymous reports can raise complexities in terms of whether there is sufficient information to act on sexual harassment allegations and/or whether it is possible to properly particularise allegations to put to any respondents. The complainant's preferences should be taken into account, but should not be determinative of the organisation's chosen process to respond to the complaint.

While the Commission acknowledges that the extent to which disciplinary action can be taken against an alleged perpetrator in an anonymous complaint may be limited due to procedural fairness considerations, employers can still respond or intervene in some way. Any response will need to balance the organisations legal obligations on the one hand (as the reported conduct may raise a workplace safety issue that is required to be acted upon), against infringing upon a respondent's right to a procedurally fair investigation. Failing to act where it is appropriate to do so can give rise to a range of legal risks where any sexual harassment occurring in the organisation is not addressed.

Notwithstanding some of the complexities associated with anonymous reporting, there are a range of options that can be taken to seek to address issues raised anonymously, including:

- ▶ where there is a line of communication with the anonymous reporter, encouraging the **provision of further information** so that allegations can be better particularised (including by articulating the support and anti-victimisation frameworks in place);
- ▶ considering if there are **other sources of information** that can buttress allegations made anonymously;
- ▶ **monitoring or surveying** the alleged perpetrator, or **conducting discussions** with the relevant individuals identified to obtain further information to supplement the anonymous report⁹;
- ▶ **changing workplace protocols or procedures** (to control or eliminate any risk factors identified in the anonymous report and reduce the risk of sexual harassment occurring or continuing); and
- ▶ reminding and **educating workers** about their right to report sexual harassment and their obligation not to engage in it (including through training and education).



KEY TAKEAWAYS

Harnessing technology in anonymous reporting

Organisations should consider implementing various channels for anonymous reporting which prompt the reporter to provide as much detail as possible (i.e. a populated online form requesting specific details to be provided). Including a statement reflecting the organisation's values regarding 'zero tolerance' to sexual harassment, that the report will be taken seriously, that there are confidentiality and victimisation protections in place, and that, by not providing sufficient detail, there may be unintended limits on what the organisation can do with such information, may also encourage complainants or informants to provide sufficient detail.

Anonymous and other informal reporting channels (for example, adopting an open-door policy and inviting workers to discuss any incidents with their manager or supervisors) should be encouraged to instil a 'speak-up' culture and create an opportunity to liaise with a complainant in relation to the next steps in the matter (which may or may not involve an investigation).

Links to the organisation's Employee Assistance Program (**EAP**) and any other employee support mechanisms should be clearly referenced in any online complaints portal as reporting or documenting sexual harassment can be a triggering event.

Whistleblower allegations

Where sexual harassment allegations are raised through whistleblower reporting channels, additional requirements may need to be observed. A person may be protected under the whistleblowing provisions in the Corporations Act where they are an 'eligible whistleblower' (which includes a current or former officer, employee, supplier, employee of a supplier, associate, or a relative or dependant of one of the foregoing) who makes a report about 'misconduct or an improper state of affairs or circumstances' to an 'eligible recipient' of a company or related body corporate (which includes an officer, 'senior manager' (as defined under the Corporations Act), auditor, actuary or another person authorised to receive a whistleblowing report).

'Misconduct', as defined under the Corporations Act, does not encompass sexual harassment. However, an 'improper state of affairs or circumstances' is not defined and ASIC has said in regulatory guidance¹⁰ that the term is intentionally broad. ASIC has also conveyed in this guidance that harassment may indicate a larger or systemic issue that may amount to a whistleblowing matter - for example, it may be representative of a more general culture of

harassment in an organisation or indicate an environment where other misconduct is occurring.

Accordingly, caution ought to be taken when sexual harassment allegations are raised through whistleblowing channels which may indicate broader cultural issues, as opposed to a personal work-related grievance between two people. In this circumstance, the confidentiality and victimisation requirements under the legislation may need to be observed and, as part of this, consent should be obtained from the whistleblower where required to further disclose any identifying information which may be revealed by their disclosure. Where consent is not obtained, there may still be the ability to conduct an investigation, provided the whistleblower's actual identity is not revealed and 'all reasonable steps' are taken to reduce the risk they are identified (noting there is not fulsome guidance on what will amount to 'all reasonable steps' in this context and, accordingly, obtaining consent is the preferred option). It may not be possible to investigate in these circumstances, where the nature of the allegations would necessarily expose the identity of the whistleblower.



Contested verbal evidence

In the sexual harassment context, there will often be scenarios where the reported conduct was not witnessed by anyone other than the complainant and respondent in an investigation, and the verbal evidence of these parties is contested. However, this does not mean that substantiated findings, even on anonymous allegations, cannot be made.

In these circumstances, there are steps organisations can consider taking to support a sound investigation into the matter in order for findings of fact to be made. These include:

- ▶ **gathering detailed evidence** from the complainant and respondent about the allegations, or making further enquiries where an anonymous report is received;
- ▶ using **indirect evidence** to corroborate a version of events (such as eye witness accounts);
- ▶ considering **similar fact evidence** such as whether the respondent has displayed similar behaviours in the past or towards other people. This can be prejudicial to an investigation but if considered carefully, similar fact evidence may be probative and make a determination of fact where there are competing versions of events; and
- ▶ assessing the **credibility** of investigation participants. Amongst other things, consideration can be given to **motive** (i.e. whether the complainant or respondent has a motive to fabricate or deny allegations), **inconsistencies** of evidence (to determine whether they affect credibility), **plausibility** of the events and which scenario makes the most sense, and the **detail** of the statement provided.

To mitigate risk, organisations should ensure that the investigator is properly informed and conducts the investigation in a manner that gives the respondent an opportunity to be heard, remains objective and has a considered foundation forming the basis of any substantiated findings. Depending on the nature of the allegations, it may be appropriate for an organisation to engage a third party such as a law firm or investigation firm to undertake an independent investigation (for example, where

the matter implicates senior personnel or Human Resources, or raises significant reputational risks). In other instances there may be benefits to the organisation undertaking its own internal investigation (for example, where the matter is not overly complex and may be readily resolved by an investigation into the matter by a function such as Human Resources or Legal, in light of applicable company policies). This will place an organisation in a better position to defend any decision it ultimately makes.

Decisive action is required and procedural fairness cannot be observed

Procedural fairness broadly involves conducting a fair investigation into the circumstances of the matter, giving the respondent an opportunity to respond to the allegations against them, and giving proper consideration to their response before making a decision to take any disciplinary action.

Additional procedural fairness principles will apply where a respondent has access to the 'unfair dismissal' jurisdiction. In this instance, in order for an organisation to defend such a claim, it will need to demonstrate that it has afforded adequate procedural fairness to the respondent.

Putting aside any legal obligations, it is otherwise best practice to observe procedural fairness when investigating and taking action in relation to sexual harassment complaints.

In some cases however, the organisation may need to balance workplace culture and the safety of other employees, over being able to conduct a procedurally fair investigation. In this context, there is case law that suggests that in clear cases of serious misconduct it will be rare that procedural faults in the employer's decision to dismiss the employee will outweigh the seriousness of the employee's misconduct (where the outcome of the disciplinary process would have been the same even if there had been no such defect in the process followed).¹¹

Where alleged perpetrators have access to the 'unfair dismissal' jurisdiction (being where they

earn less than the 'high income threshold' (which is \$158,500 for the financial year ending 30 June 2022) or are otherwise covered by an applicable industrial instrument such as a modern award and meet certain other eligibility requirements), the risk of procedural fairness deficiencies contributing to a successful legal claim are heightened. Therefore, an organisation should do what it can to ensure there is a sound and defensible reason for any dismissal and that procedural fairness is observed so far as possible, to reduce the risk that an employee is reinstated or otherwise awarded (capped) compensation.

Where findings are not able to be made, recommendations following any investigation may relate to company culture or suggest a holistic workplace culture review so that sexual harassment concerns can be addressed, albeit not on an individual basis.



KEY TAKEAWAYS

The risk of an 'unfair dismissal' claim being successful because of procedural deficiencies, where it is apparent the alleged conduct occurred, should not be seen as a roadblock to the organisation taking action. Adopting a 'complainant-centred' and more transparent approach to sexual harassment is the priority. There are ways to navigate an investigation to afford procedural fairness and in our view, organisations should not be reluctant to dismiss workers who have engaged in sexual harassment, based on any minor procedural deficiency. In our experience, employees who have been dismissed due to improper conduct are unlikely to want to bring the matter to light via a legal claim (if the conduct did in fact occur).

There does however need to be a sufficient basis to assert that sexual harassment did occur, otherwise employers may run the risk of the harasser succeeding in a breach of contract or 'unfair dismissal' claim and either being reinstated to their role in the workplace, or being awarded compensation. These risks can be mitigated by following a procedurally sound investigation.

Leaders within organisations must recognise that, by not taking action in relation to reports of sexual harassment (including those based on verbal evidence or raised anonymously), they may inadvertently be perceived as condoning the behaviour and indicate that an organisation is attempting to 'protect' the respondent, as opposed to taking a 'complainant-centred' approach.



What should occur when findings of sexual harassment are substantiated?

Organisations can consider a range of outcomes when responding to substantiated instances of sexual harassment in the workplace. The Reports have shown that the proportionate consequence must hold the respondent to account for their behaviour, whilst also effectively protecting the interests of the complainant when considering the 'complainant-centred' approach. Employers have a duty of care to consider the risk to the health and safety of workers when assessing conduct and deciding on the appropriate course of action regarding disciplinary action.

When allegations regarding sexual harassment have been substantiated and organisations must decide on the appropriate disciplinary action to be taken, regard must be had to:

- ▶ applicable legislative and regulatory frameworks;
- ▶ the respondent's employment contract, including whether the conduct amounts to 'serious misconduct' as defined under the contract;
- ▶ any applicable workplace policies;
- ▶ professional conduct standards / any professional certifications or accreditations; and
- ▶ the interests of the complainant, the respondent, the organisation, its staff and the public at large.

The remedial action taken against a respondent may include the following, depending on the seriousness of the misconduct:

- ▶ a requirement to make an apology to the complainant;
- ▶ ongoing supervision;
- ▶ counselling;
- ▶ participation in mandatory training;
- ▶ a change of working hours and / or location;
- ▶ verbal or written formal warnings;
- ▶ demotion or a requirement to forego specific incentives (e.g. withdrawal of bonus payments, removal of leadership responsibilities or removal from leadership programs); or
- ▶ termination of employment.

Promotions - holistic approach to addressing sexual harassment



CASE STUDY

A sexual harassment complaint is made against a male executive of an ASX listed company, by a female subordinate employee. The complaint alleges that, at a work rugby event she attended, the executive remarked "*This game would be a lot more interesting if there were cheerleaders to perform for us. What do you say boys?*" The complaint also alleged that, following the rugby event, the team moved to a nearby bar for some drinks, where the executive made sexually suggestive jokes with female bar staff and, at one stage, put his hand on the complainant's shoulder and said "*you should wear dresses like this more often around the office, you'd get far more attention!*".

The company commissions an external investigation into the complaint. The executive admits to making the comments about cheerleaders and the complainant's attire, but denies they were sexual in nature. In relation to the alleged comments to bar staff, the executive states he was merely engaging in flirtation with women outside the workplace, which is his right to do outside of work hours. Ultimately, the allegations are substantiated and the investigator finds that they constitute sexual harassment under the company's Code of Conduct.

Given the seniority of the executive, the Board is made aware of the findings of the investigation. A decision is made that the executive will undergo coaching on appropriate workplace behaviour and he is issued a verbal warning. In the weeks following the investigation, there are rumours in the company that the executive has "gotten away" with sexual harassment.

Two years later, the promotion of the executive to the senior leadership team is announced publicly by the company. Following the announcement, one of the company's clients raises concerns with a Board member, detailing their belief that the senior executive is widely known in the industry as someone who is sexually inappropriate. In addition to this, a number of other senior executives threaten to resign, on the basis they perceive a cultural misalignment with the company.

The executive, who is known for being litigious, becomes aware there is "noise" regarding the promotion. He threatens to bring an adverse action claim if his promotion is not maintained, claiming he is being subjected to adverse treatment as a result of his participation in the initial investigation. The Board is concerned about the adverse sentiment demonstrated by internal and external stakeholders but worries that demoting the senior executive will expose the company to legal and reputational damage.



PRACTICAL GUIDANCE FOR BOARDS

Board members have a responsibility to take action against sexual harassment, including not to tacitly condone misconduct due to an individual's seniority or their importance to the financial stability of the organisation. Promotion following incidents of sexual harassment can send the message to staff that misconduct is tolerated which can do little in deterring harassers and much more to limit the confidence that staff have in the systems in place. However, promotion in this context may be reasonable where there has been intervening action in the interim to remediate misconduct and to support a shift to alternative and appropriate behaviour. Leaders should be visible and proactive in their efforts to address sexual harassment, challenge inappropriate conduct and celebrate positive behaviour in the workplace (including considerations of remuneration and incentives being tied to cultural improvement).



Legal risks in taking action

There are legal risks that must be managed when businesses take a more decisive and transparent approach to preventing sexual harassment. Where perpetrators of sexual harassment are dismissed from their employment, businesses may be forced to defend 'unfair dismissal' claims which interrogate the procedural fairness of the disciplinary process. Where sexual harassment matters involve high profile individuals and unfold in the public eye, there is also a heightened risk that an alleged harasser may bring a claim of defamation against their employer. In particular:

- ▶ **Unfair dismissal claims** - Certain employees can bring a claim of 'unfair dismissal' (as set out above at pages 14-15) where they have access to the jurisdiction. In addition to the procedural fairness considerations outlined above, the presence of other mitigating circumstances in an unfair dismissal claim may tip the balance in favour of a finding that the dismissal was harsh, unjust or unreasonable and therefore 'unfair' (for example, the respondent's age, personal or economic situation, length of service, work record, and differential treatment in similar cases or other extenuating circumstances to the misconduct).
- ▶ **Defamation claims** - As canvassed below in part 4, there is a risk that a claim of defamation may be brought against a business by a respondent in a sexual harassment claim, if the matter becomes publicly known. Whilst defamation claims are expensive to run, they are not uncommon and the risk cannot be discounted, particularly where misconduct concerns senior employees. As with any litigation, defamation claims can require employers to outlay significant time and costs to defend those claims, which are run in the courts system as opposed to a tribunal.
- ▶ **Other claims by the respondent** - There is the potential for a respondent who experiences significant stress as the result of a sexual harassment investigation and misconduct process to make a claim of their own against their employer – for example, a workers' compensation claim for psychological injury, or a claim of constructive dismissal. They may also claim that action taken against them purportedly for sexual harassment is, in fact,

'adverse action' taken because of the exercise of a workplace right.

Criminal reports and police investigations

Where a report regarding sexual harassment includes serious allegations, such as sexual assault or rape, the matter may be required to be reported to the police. From an organisational perspective, the period of time during which the police investigate the matter, brief the prosecution, and make decisions about whether to charge, can be lengthy. The involvement of police and pending criminal charges does not prevent an employer taking action in relation to the reported conduct.

If an organisation has investigated an employee's sexual harassment or assault allegations and is satisfied they are substantiated on the balance of probabilities, even if there may be limitations regarding whether the allegations can be definitively proved, the organisation is entitled to take appropriate disciplinary action. Where there are criminal proceedings on foot, a conviction in those proceedings will require proof beyond a reasonable doubt that the offender is guilty, which means the criminal proceedings may not result in a conviction. This does not, however, prevent disciplinary consequences from being enforced by an employer where it substantiates allegations on the balance of probabilities following an investigation process.

The primary consideration from a legal perspective in these scenarios will be to ensure the safety and wellbeing of the victim. Organisations must consider appropriate additional supports for all involved in these circumstances to mitigate the other legal risks (such as stress-related psychiatric injury). Additional supports could include (but are not limited to) additional time off work (including to attend to the court proceedings or to make statements), connecting the victim with external supports and contacts, or appointing a sexual harassment support officer. Organisations will also need to be cognisant to collect and preserve evidence. From a practical perspective this could include suspending the respondent's access to emails or IT systems, taking custody and preserving devices (such as computer/laptop, phone, GPS) and maintaining records of witness evidence. Depending on the industry and the nature of the incident, an organisation may also have reporting obligations to certain regulators.



3. TRANSPARENCY

Balancing confidentiality and transparency in the workplace when considering an organisation's response to sexual harassment is fundamental in promoting safer and more productive workplaces. As a result of recent media attention, shareholders, investors, employees, regulators and the community at large are now expecting change. An organisation's priority must expand from minimising reputational damage and legal liability to creating a culture and systems which ensure a physically and psychologically safe workplace for all.

In the past, many public and private sector organisations have adopted rigorous confidentiality regimes when dealing with sexual harassment. It is not unusual for complainants to simply be informed that the matter is being 'handled' by the organisation, or that appropriate action has been taken. The rationale for this approach has been mixed, but has predominately centred on mitigating legal and reputational risks for the organisation and, to some extent, to the persons involved. These risks are not inconsiderable. They include, for example:

- ▶ reputational damage for the organisation, including media scrutiny, executive culpability and loss of trust and confidence by employees and stakeholders;
- ▶ reputational damage for respondents;
- ▶ risks of defamation actions against complainants and/or organisations;
- ▶ victimisation and retaliatory conduct against complainants;
- ▶ increased attention from regulators including safety and industrial regulators; and
- ▶ workers' compensation claims by complainants and/or respondents.

There is now, however, a push by leading advocates in equal opportunity (including the Commission and the Champions of Change Coalition) to move Australian organisations towards greater transparency in their handling of misconduct matters, particularly in cases of sexual harassment. The case for change is, in

broad summary, that a lack of transparency is in the medium to long term damaging to complainants, organisational culture and to the broader welfare of staff. On this view of things, the mitigation of legal risk through enforced confidentiality regimes may be short sighted, with short term benefits outweighed by longer term damage to organisational culture and staff wellbeing.

A key area for transparency is in outcomes, particularly where disciplinary action has been taken. The Respect@Work Report identified the benefits of openness about disciplinary outcomes as follows:

The delivery of commensurate sanctions for harassers, and transparency within the workforce about these sanctions, can lead to shifts in perception across a workplace.

Subject to considerations of privacy and confidentiality, where employers impose such sanctions and inform their workforce of these actions, it can help reinforce behavioural standards and also give workers confidence that their leaders take complaints seriously. Over time, this can positively influence the culture of a workplace.¹²

Recent changes in community expectations may also mean that increased transparency may actually avoid reputational damage. The CoCC Report suggested that the rise of social media and intense public scrutiny of sexual harassment matters means reputational harm to an organisation can be more significant if an organisation is not seen to be proactive and transparent in its handling of misconduct. Whether that is correct will vary from case to case, but it is broadly correct that allegations which are eventually made public after initial suppressions can be particularly damaging.



What information should be provided to complainants?

The traditional approach of withholding information about outcomes from complainants should be abandoned. That practice can no longer be justified. In our view, organisations should provide complainants with the following information:

- ▶ the allegations that were put to the respondent, or a summary of those allegations if it is not appropriate to provide all particulars (for example, if other issues are involved that do not affect the complainant);
- ▶ which allegations were substantiated;
- ▶ if an investigation into the matter was not undertaken, what action was taken;
- ▶ what disciplinary action was taken against the respondent as a result of the misconduct (if any); and
- ▶ details of support services such as EAP or any other targeted services to assist the complainant with the impact of the decision, and any support measures that will be provided to the complainant by their employer to assist them going forward.

To be clear, this information should be provided only after any investigation is concluded and outcomes settled upon. There are good reasons to maintain confidentiality during an investigation, not least of which is the need to avoid publishing misconduct allegations against a respondent unless and until they are established by investigation. This is consistent with the recommendations and observations made by the Reports.

In the usual case, we would not recommend providing:

- ▶ the reasons for the decision-maker's final decision, or the recommendations put to the decision-maker; or
- ▶ the investigation report, or any witness statements or supporting materials in the investigation.

It is likely that complainants who are unsatisfied with an outcome will press for further reasons for the decision, and may request the material

above. Whilst each case must be considered on its specific facts, we think the default stance should be to decline those requests because:

- ▶ a proper investigation of allegations requires frank disclosure from participants. That is only likely to be forthcoming if participants are confident that their evidence will, as far as possible, be kept confidential. This is particularly the case for witnesses who may be colleagues of both the respondent and the complainant;
- ▶ keeping those materials confidential will provide a measure of protection for witnesses against retaliation and/or legal action; and
- ▶ it would be preferable to avoid exposing the decision-maker's reasons to scrutiny unless that is truly necessary.

Should complainants be permitted to speak about their experiences?

A change urged by the Reports is that organisations avoid 'silencing' complainants who are victims of sexual harassment. This is said to have the adverse effect of protecting perpetrators and limiting opportunities for cultural change within an organisation. Conversely, allowing victims of proven misconduct to speak openly increases accountability and demonstrates organisational commitment to combating misconduct.

Some of the commentary on this issue includes:

- ▶ the Respect@Work Report suggests confidentiality obligations / NDAs can create a culture of silence which disempowers victims, covers up unlawful conduct and facilitates repeat offending. Particularly for sexual harassment, confidentiality obligations can have the effect of making victims feel that they have no voice, no ability to speak to friends and family and no ability to tell their story to assist their healing, or help other survivors. Strict confidentiality obligations also serve to conceal the behaviour of harassers who are able to move between companies and industries and continue to engage in conduct without adverse consequences; and

- ▶ the CoCC Report which argued that prioritising legal responses and 'shutting down the issue' can have the perverse outcome of protecting and emboldening higher status employees at the expense of complainants, their co-workers and the broader interest of the organisation and community. It is common for victims to never speak up to their organisation because they see that the system deters it at every stage. For some complainants, raising the possibility of public disclosure of the misconduct is the only option available to compel action or redress.


There is, in our view, force in these observations. We would add, as practical matters:

- ▶ the increasing ease by which allegations can be publicised through social media and other channels means that suppressing discussion is increasingly difficult; and
- ▶ any attempt to discipline an employee for speaking out about sexual harassment is likely to give rise to further reputational and legal risk.

It is of course critical to appreciate that some complainants may prefer confidentiality and that those preferences should be respected. For some individuals who experience sexual harassment, confidentiality is extremely important for protecting privacy, avoiding further trauma from the matter being aired in the public eye and gaining closure. Confidentiality also allows parties to maintain professional standing and workplace wellbeing. Further, some complainants may only come forward on the basis that the matter will be handled confidentially. We do not therefore suggest that confidentiality should never be maintained. Rather, we consider that the issue should be considered on a case-by-case basis, with the complainant's preferences being the predominant factor considered.

Further, and as mentioned, there are risks associated with openness about sexual harassment. They include:

- (a) **Reputational risk** - There will of course be reputational risks to the organisation in allowing employees to speak out, particularly where 'speaking out' involves public comment and/or social media use. Sexual harassment matters have the potential to garner media attention;
- (b) **Defamation risk** - There is a risk that the respondent may choose to bring a claim of defamation if the complainant speaks out publicly about their experience. A defamation claim could be brought against the complainant or the organisation depending on the nature of the statements made. As noted above, given the prohibitive cost of running defamation proceedings, this risk may not eventuate often, however it cannot be discounted, particularly if the alleged perpetrator is a senior member of the organisation and there is likely to be media scrutiny;
- (c) **Victimisation and bullying** - There is also a risk that allowing complainants to speak out may provoke retaliatory action, victimisation or bullying from the respondent, or other colleagues or peers of the complainant. The organisation will need to actively manage those risks as far as possible to avoid vicarious liability under discrimination laws and ensure that the organisation is meeting its WHS obligations in respect of psychosocial risks; and
- (d) **Claims by the respondent** - It is important that the organisation maintains fairness to all individuals involved in misconduct matters. In some cases, allowing a respondent's personal and professional reputation to be irreparably damaged by public disclosure of the sexual harassment might be unwarranted by the behaviour in question - for example, a one-off incident occurred of relatively low misconduct. This is particularly important if the respondent remains an employee of the organisation, as there is the potential for a respondent who experiences significant stress as the result of a misconduct process to make a claim of their own - for example, a workers' compensation claim for psychological injury or a claim of constructive dismissal.



These risks illustrate why transparency is not currently the norm. A critical factor relevant to the seriousness of these risks is of course the quality of the investigation and the reliability of findings. Where findings are robust and capable of being vindicated in later proceedings, the risks associated with open discussion are reduced. Conversely, where findings are unreliable or processes are questionable, the risks of transparency are increased.

Ultimately, in our view, it is preferable that Boards take a leadership position on these issues and support management in allowing complainants to speak out in cases where serious sexual harassment has been established following a full investigation. There is, however, no single correct answer to these difficult questions. It is ultimately a matter for the Board, where it becomes involved, to determine the approach having regard to the many competing considerations.

Recommendations

Our recommendations in this context are that:

- ▶ Once a misconduct matter has been finalised and allegations have been substantiated, the organisation meet with complainants to:
 - discuss the outcome, and provide the information outlined above at page 20;
 - discuss the pros and cons of confidentiality and transparency from the complainant's perspective; and
 - seek the complainant's views on confidentiality.
- ▶ It will of course be necessary to take a case by case approach, and where appropriate, for the Board to exercise its judgment when it becomes involved in sexual harassment matters (for example, those concerning executives and senior leaders in the organisation), having regard to the seriousness of the misconduct and the benefits to all parties and the wider organisation in permitting the misconduct to be publicly discussed.
- ▶ The conversation should include a discussion with the complainant about the risks that might arise from speaking out publicly about their experiences. It should be emphasised

that the organisation will respect the complainant's decision in either case but that speaking out creates some risk for the complainant including potential defamation actions. It should also be emphasised that complainants must be mindful that speaking out about their experiences does not progress into unfairly victimising or bullying any person.

- ▶ It may also be appropriate to negotiate a specific confidentiality regime with the complainant. For example, in some cases the matter could be discussed openly but without identifying the persons involved. The organisation should take a flexible approach to this issue, prioritising the complainant's preferences.
- ▶ Whatever position is reached on confidentiality should be recorded. It is not necessary that deeds be executed but some record of the position of the organisation and its expectations should be made and shared with the complainant.
- ▶ We agree with the CoCC Report that, where there is a legitimate public or stakeholder interest, the organisation may wish to consider taking proactive steps to identify the perpetrator and be transparent about the disciplinary action taken. A public interest will not exist in respect of every case (or individual) and this would generally be limited to conduct of the utmost seriousness involving senior ranking members of the organisation. Each situation should be judged in its own context.

Transparency



CASE STUDY

Several female employees raise similar sexual harassment complaints against a senior executive of a listed commercial real estate and development company. The allegations included that the senior executive routinely had inappropriate conversations with members of his predominately young female workforce. For example, it is alleged that the senior executive stated in a meeting that, when he was younger, he used to "shag" his sister's friends if there was no one else around. It was also alleged that he questioned a number of his female employees about their sex life and sexual exploits.

After receiving the complaints, the company commissions an independent and confidential investigation which finds the majority of the allegations are substantiated and that the executive has breached the company's Code of Ethics.

The Board is cognisant of the "blokey" reputation of its industry and wants to make it clear to the public that this behaviour is not tolerated. On this basis, the findings of the investigation trigger the executive's sudden departure from the company.

When the news breaks, the company's share price falls significantly and shareholders raise issues of poor corporate transparency in relation to the reasons for the departure. Shareholders request further information from the company in order to assess whether the Board's decision was appropriate and fair in the circumstances.

Following the executive's departure, the Board swiftly speaks to a number of stakeholders and later issues a public statement which provides: "*we maintain a respectful workplace and our priority is to ensure that all employees are held to the same standards in our organisation*".



PRACTICAL GUIDANCE FOR BOARDS

In this example, the Board's decisive action highlights the company's commitment to having a respectful and inclusive environment, and demonstrates both internally and externally that the company has a zero tolerance for actions that breach its culture and values. It also demonstrates the importance of the Board holding its senior leaders to account. In this regard, the executive's conduct may have been judged more harshly by the Board in light of him being a key leader within the organisation. However, it is likely that in similar instances, shareholders are likely to demand further information of incidents to ensure that an organisation's response is justified. We envisage that the risk of this result will be higher in the short to medium term until the current corporate climate shifts and non-action is not an option for organisations who value proactive response and longer term prevention of sexual harassment.

Confidentiality and Non-Disclosure Agreements

- ▶ NDAs are legally enforceable confidentiality agreements (or confidentiality clauses in agreements) between organisations and complainants. In the context of sexual harassment matters, NDAs are most often used to secure a complainant's agreement not to discuss the matter publicly, or share any information about the matter with others. NDAs are a common feature of settlement agreements that prevent a complainant from taking legal action against the organisation, often in exchange for monetary compensation.
- ▶ In the past, NDAs have been used by many organisations as a matter of course when managing sexual harassment matters. NDAs have undeniable benefits for reducing both legal and reputational risks for organisations, particularly where matters involve high profile or senior employees and are likely to attract widespread attention both in the workplace and the media. Additionally, NDAs have conventionally

contained non-disparagement clauses in favour of the employer, which restricts a complainant from saying anything about their employer that would damage the employer's reputation. The practical upshot is that the use of NDAs has silenced complainants from speaking about their experiences and prioritised immediate risk management for organisations.

- ▶ Having regard to each of the Reports advocacy for a complainant-centred and trauma informed approach to dealing with sexual harassment, it is recommended that complainants of sexual harassment are given a choice as to whether they would like to use a NDA. This should be considered on a case by case basis, and will involve a delicate balancing exercise. On the one hand, a NDA can afford all parties privacy, prevent re-traumatisation and victimisation of the complainant, and may provide closure. Indeed, many complainants will want a NDA to protect their professional reputation. On the other hand, use of NDAs can protect offenders, create a culture of silence and fear, and prevent organisations from making critical changes to ensure the safety of their workplace. Given the current social climate, and the prolific rise of social media, it is also increasingly difficult for organisations to actually enforce or rely on NDAs – as information can 'leak' anonymously through any number of media platforms. With that in mind, best practice organisations are beginning to shift away from using NDAs as a default 'one stop shop' solution in responding to sexual harassment, and are rather considering alternative approaches that facilitate greater transparency and drive cultural change.
- ▶ Before resorting to a NDA, the organisation should critically consider the utility of the NDA and whether it is appropriate to fully restrain a complainant from speaking out about their experience in that particular matter. To the extent that using a NDA is suitable, an organisation ought to consider whether tailored confidentiality requirements in the NDA should be used – for example, including a carve-out clause that enables a complainant to speak to their wider support network, or discuss the matter publicly on a de-identified basis. It should also be made clear to the employee that there are also carve outs for bringing the matter to the attention of appropriate law enforcement agencies. Furthermore, a NDA may give the company the right to reveal the outcome of any investigation that has taken place, including potentially revealing the harasser's identity to company stakeholders.
- ▶ We set out below a cost/benefit analysis for consideration in relation to the use and non-use of NDAs.

Benefit/risk analysis of varying NDA forms

	<i>Common features</i>	<i>Benefits</i>	<i>Risks</i>
Traditional NDA	<ul style="list-style-type: none"> ▶ Strict confidentiality clause ▶ Non-disparagement clause in favour of the organisation ▶ Claw-back clause allowing organisation to recover settlement sum and instigate proceedings against complainant if NDA is not complied with 	<ul style="list-style-type: none"> ▶ Preserves complainant's identity (should they require anonymity) ▶ Bars the complainant from making disparaging remarks ▶ Prevents reputational risks of media attention and public scrutiny of the matter ▶ Avoids risk of claims by the respondent (such as defamation claims) 	<ul style="list-style-type: none"> ▶ Reputational risk if the NDA is breached and the conduct is made publicly known, as the organisation may be seen to have 'silenced' the complainant ▶ Limits potential structural and cultural change within an organisation if the complaint is not dealt with transparently ▶ Alleged perpetrator's identity kept confidential, which may allow them to reoffend or commit the same behaviour
New form NDA or release agreement	<ul style="list-style-type: none"> ▶ Tailored non-disparagement and confidentiality clauses, providing avenues for a 	<ul style="list-style-type: none"> ▶ Can protect complainants whilst allowing them to speaking out about their 	<ul style="list-style-type: none"> ▶ Defamation risk from an alleged perpetrator is higher, where they are identified in the complainant's



	<i>Common features</i>	<i>Benefits</i>	<i>Risks</i>
A 'new' form NDA can take a range of forms	<ul style="list-style-type: none"> complainant to speak about their experience ▶ Clause allowing an organisation to disclose an alleged perpetrator's identity where there is a legitimate public or stakeholder interest ▶ Carve-out clauses included where appropriate, allowing a victim to speak to law enforcement agencies ▶ Avenue for organisation to make statement about investigation(s) and any outcome(s) ▶ A communication to the workplace that is contractually agreed to by the parties 	<ul style="list-style-type: none"> experience in particular contexts ▶ May aid in a complainant's healing and recovery ▶ May drive cultural change within an organisation ▶ Can hold alleged perpetrator to account ▶ Agreed statements may allow for greater transparency with respect to the misconduct that occurred 	<ul style="list-style-type: none"> statements and those are publically known ▶ Workers' compensation claim for psychological injury by complainants / respondents ▶ Other claims from respondents including constructive dismissal
No NDA	<ul style="list-style-type: none"> ▶ No confidentiality agreement or release of any kind 	<ul style="list-style-type: none"> ▶ Allows a complainant to speak out about their experience ▶ May drive cultural change within an organisation ▶ Can hold alleged perpetrators to account ▶ Transparency allows boards and stakeholders a clearer picture for addressing sexual harassment and remedial action required 	<ul style="list-style-type: none"> ▶ Reputational risk if sexual misconduct perpetrated gains media attention ▶ Defamation risk from the alleged perpetrator ▶ Retaliatory conduct against complainants ▶ Workers' compensation claim for psychological injury by complainants / respondents ▶ Other claims from respondents including constructive dismissal

Whistleblowing

Separate legal considerations applicable to transparency can arise in the context of the allegations being raised in a whistleblowing context, including having regard to the confidentiality and victimisation protections that apply under whistleblowing provisions in the Corporations Act. As set out at page 13 above, these protections apply to 'eligible whistleblowers' who make a report regarding 'misconduct or an improper state of affairs or circumstances' to 'eligible recipients' of a company or related body corporate.

The confidentiality protections impose a strict personal obligation on each person who has received information that discloses the identity of the whistleblower, or information that could be likely to lead to a whistleblower's identification, to keep this information strictly confidential and not to further disclose such information without the whistleblower's consent unless a limited confidentiality exception applies. Significant civil and criminal penalties can arise from a failure to comply with these provisions. These confidentiality protections can pose practical difficulties in supporting a shift towards greater transparency, where a



whistleblower has not provided their consent for identifying information to be more broadly disseminated, including for the purposes of an investigation or reporting on the matter. However, if handled well, an organisation can bring a whistleblower on the journey towards greater transparency by addressing any particular concerns raised by them and emphasising the protections that will be applied to them in this context, including under an applicable whistleblowing policy.

Whistleblowers in a sexual harassment context can also be particularly vulnerable to victimisation by both the alleged perpetrator and their peers or colleagues, especially where the harassment occurs in the context of a power imbalance in the workplace or a close-knit team. In light of the victimisation protections that apply under whistleblowing laws, Boards will need to ensure that the organisation has appropriate frameworks in place to protect a whistleblower from any victimisation.

Utility of NDAs



CASE STUDY

The Board of publically listed company receives a complaint from a male employee against a manager. The complaint alleged that the manager repeatedly touched his leg during meetings and would often show him pornographic material on their phone. The company commissions an external investigation into the complaint which finds that the manager has engaged in sexual harassment in breach of the company Code of Conduct.

Ultimately, the company decides to offer a settlement agreement to the complainant, under which they are required to keep the matter confidential in exchange for a one-off payment and a commitment from the company to run refresher workplace behaviour training across the organisation. The company imposes a financial penalty and a formal written warning on the manager, who is allowed to remain in their position. The company considers that the matter has been put to bed.

A year later, the company receives a complaint through its whistleblowing hotline concerning the same manager. The whistleblower report claims that the company has failed in its duty of care to prevent the manager sexually harassing staff and, in doing so, has supported the creation of a toxic workplace. Subsequently, the Board becomes aware of an Instagram account that is posting information about the original complaint made by the male employee a year ago. These posts are being picked up by media outlets across Australia and is becoming widely known. The company has no proof that this information is being released by the male employee, however all signs point to him as there were no other investigation participants outside of the complaint and his manager.

Shortly after the Instagram account goes live, a post is uploaded which reads: "*Notwithstanding [company] has forced complainants of sexual harassment to sign confidentiality agreements, it is important their stories are told in the hope they will help others in similar situations*". The post goes on to detail the sexual harassment suffered by the complainant and garners significant media attention.



PRACTICAL GUIDANCE FOR BOARDS

As we can see from this case study, bad press and reputational harm to an organisation can result even in circumstances where NDAs are offered or entered into, giving rise to questions about their effectiveness in the first place. NDAs are not always strictly followed and, while there is recourse for organisations to take where there is a breach of a NDA (which can be costly), there is always a risk that information subject to any confidentiality agreement may come to light in the future.

As set out in the Reports, workplaces should be encouraged to embrace and speak openly about past transgressions, and foster a culture that supports the complainant rather than silencing them. This includes considering the utility of NDAs and possible alternatives

4. DEFAMATION

A key risk from a legal perspective when contemplating a shift towards greater transparency is exposure to a defamation claim.

In essence, defamation is the publication to a third party of material that is defamatory (in the sense that it causes an ordinary reasonable listener or reader to think lesser of the person the subject of the material) and which causes damage to the reputation of that person. Whilst there are certain defences available under the National Uniform Law on Defamation¹³ (**National Uniform Law**), such as truth, fair comment or honest opinion, nevertheless once a defamatory publication is made, the onus shifts to the defendant (i.e. the complainant or employer organisation) to justify the availability of that defence on the balance of probabilities.

It can be immediately seen that aside from any other intended purpose of a NDA, it has the effect of limiting the exposure of the parties to the NDA (usually the complainant and the complainant's employer) from exposure to a defamation claim from the alleged perpetrator, because it has the effect of requiring the parties to not disclose the facts or circumstances of the alleged event of harassment.

Anecdotally, from our experience, part of the reason for an organisation insisting upon a NDA with a complainant, is the dual objective of protecting the reputation of the organisation, but also importantly, limiting the exposure of the organisation to potential civil liability for defamation.

We note the observations made in the Reports in connection with the historical effect of NDA's, of essentially 'covering up' the circumstance of sexual harassment within the workplace. The criticism of NDA's in this regard in other contexts (including in connection with historical child sexual abuse claims) are to the same effect.¹⁴ We also agree with the recommendation set out in the Reports to the effect that if there is to be a shift towards a 'complainant centric' and transparent response to sexual harassment in the workplace, any future use or entry of NDA's, in connection with such matters, should be primarily at the election or choice of the complainant.¹⁵

Accordingly, it follows that any shift towards transparency in managing sexual harassment claims within the workplace, where a NDA is not 'required', will necessarily increase the risk of a defamation claim against either the complainant or the employer organisation.

This risk can be observed and considered in regard to the section of the CoCC Report which sets out its recommended new principles on confidentiality and transparency for high-profile sexual harassment cases,¹⁶ which embodies or seeks to effect a change to a more transparent regime for the handling of sexual harassment matters within an organisation. These new principles are set out in the Report as follows:

PRINCIPLE 01	Our organisations will be transparent with internal and external stakeholders about the fact that sexual harassment claims exist.
PRINCIPLE 02	The identity of those involved will be protected by our organisations at all times during the investigation process.



PRINCIPLE 03	We will ask everyone involved to keep any workplace investigation process confidential while that process is underway with an exception for receiving expert counselling or support.
PRINCIPLE 04	Once any investigation is complete, our organisations will not restrict the complainant's right to speak.
PRINCIPLE 05	Where there is a legitimate public or stakeholder interest and an investigation has found that allegations are substantiated, our organisations may identify the offender.
PRINCIPLE 06	Where an investigation has substantiated the allegations, we will be transparent about the outcomes and where an alleged offender leaves our organisation, we will be transparent about the fact of any financial settlement as part of that departure.
PRINCIPLE 07	If a financial settlement is reached with the complainant, the fact of the settlement will be disclosed by our organisations to relevant stakeholders, together with the restrictions it imposes but not the amount.

It can be seen from principle 5 and principle 6, that a more transparent approach contemplates the potential identification of the offender, the circumstances of the incident, and the outcome involved (including any financial settlement and consequences for the offender).

The release of the identification and publication of that matter gives rise to a risk of a defamation claim being brought by the individual offender against either the complainant or the organisation (either for vicarious liability for statements made by the complainant,¹⁷ or for its own published statements about the matter).

Notwithstanding this, we consider there are reasonable measures that can be taken by an organisation, to minimise the risk of a potential defamation action being taken, or if taken, being successful.

An important preliminary observation from our experience is that the incidence of defamation claims being pursued by individual employees against either other employees or against the organisation are relatively few. The majority of cases that do lead to claims in defamation are those commenced by senior executives which tend to have 'higher profile'. So an important starting point for a consideration of the legal issues set out next, is that the incidence of such claims starts off from a relatively 'low base'.

Back to the legal questions. The legal measures that may be taken to minimise a risk of defamation include:

- ▶ managing and carefully crafting any communications to be published about the incident; and
- ▶ potentially creating the circumstance where any such publication (particularly to other employees of the organisation) is done in a manner which attracts the defence of qualified privilege under the National Uniform Law.¹⁸



Management of communications

The first element of a defamation claim, is to determine what defamatory imputations are reasonably conveyed by the published statement. For example, when there is a publication dealing with conduct which is potentially criminal or unlawful, the Courts have found that those sorts of assertions may convey "at least 3 potential levels of meaning" namely:

- ▶ that a person is guilty of criminal or unlawful conduct;
- ▶ that there are reasonable grounds to suspect that a person is guilty of criminal or unlawful conduct; or
- ▶ that there are grounds to investigate whether a person is guilty of criminal or unlawful conduct.¹⁹

Of these three meanings it can be seen that the first limb above would clearly carry a defamatory imputation against the character of the person whereas meanings at the second and third limb above may be defended on the basis that they do not carry a defamatory imputation against the character of the individual, but rather raise allegations or a reasonable basis for the investigation of a particular matter.²⁰ Relatedly, it is likely that even if meanings at the second and third limb above are defamatory of the individual, there may be available defences to a defamation claim based in truth or contextual truth of those imputations.

The purpose for giving this example, is to indicate that the language used in any published statement, in particular whether there is an imputation of guilt of a criminal offence prior to any investigation or outcome, is critically important in managing the defamation risk associated with such publication. With careful crafting and management of the communication, the risk of exposure to a defamation claim can be minimised (if not entirely removed).

Qualified privilege

The National Uniform Law, also provides a defence to a publisher, in the event that the publication is made in the circumstances of qualified privilege. This defence is routinely relied upon where, for example an allegation or reporting

of an incident is made to a regulator, the police, or (within an organisation) HR management or the senior leadership team. Principally (as explained further below), this is based on the rationale that the person disclosing has a reasonable basis to disclose certain information and the recipient has an interest in receiving that information.

More specifically, the National Uniform Law provides that in order to establish the defence of qualified privilege, it must first be found on the balance of probabilities that the recipient has an interest or apparent interest in having information on some subject, that the matter is published to the recipient in the course of giving to the recipient information on that subject, and that the publisher's conduct in doing so was reasonable in the circumstances.²¹

In respect of the term 'apparent interest', section 30(2) of the *Defamation Act 2005* (NSW) states that "*a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest*".

Case law interpretation of the statutory provisions have found that the terms 'interest' or 'apparent interest' are to be interpreted widely and need not be a proprietary or even a pecuniary interest.²² The courts have placed a broad construction upon the words 'an interest' to include any matter of genuine interest to the general public (for example, the readership of a newspaper).²³

In determining whether the publisher's conduct was 'reasonable in the circumstances', the National Uniform Law provides a non-exhaustive list of factors that a Court may take into account,²⁴ which invariably involves a consideration of all the circumstances leading up to and surrounding the publication.²⁵ In any event, it is incumbent upon the person making the publication to establish that:²⁶

- ▶ they exercised reasonable care in making proper inquiries in relation to the accuracy of their sources;
- ▶ their conclusions, whether statements of fact or opinion, followed logically, fairly and reasonably from the information obtained;

- ▶ the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
- ▶ each imputation intended to be conveyed was relevant to the subject matter which they were presenting to the recipient.

Further, the publisher will generally fail to establish reasonableness unless it is evident that they believed in the truth of the publication.²⁷ Generally, the Courts have found that it will not be reasonable to publish:

- ▶ rumours that a person has been guilty of discreditable conduct;
- ▶ material known to be false, without an express disclaimer;
- ▶ an irrelevant defamatory statement in the course of giving information to those with the relevant interest; or
- ▶ unfair and inaccurate material.²⁸

In pursuit of a more transparent handling of sexual harassment claims in an organisation, thought could be given to consider expanding internal policies, practices and procedure, to effectively broaden the scope of persons within the organisation who might have an 'apparent interest' to receive information about the incidences of sexual harassment in the workplace, which goes to effectively providing a safe and healthy working environment for those workers.

In the event that the policy framework may create that expectation and information flow, we consider there is a reasonable basis to contend that the circumstances (and intricacies) of the qualified privilege described above could apply to a publication of incidences to a broader audience within the organisation. Again, to further minimise the risk of exposure to a successful defamation claim, any communications within this framework should be carefully prepared to reduce the risk of the conveyance of any defamatory imputation against the offender²⁹ and to ensure that the statutory indicia set out at page 29 is met.

Amendments to the National Uniform Law

We note that the National Uniform Law has been under review since 2019, following the review by the Council of Attorney's-General defamation working party, and that a model Defamation Amendment Bill has been circulated for further consultation.³⁰

We refer to the extract in the Respect@Work Report page 568, which summarises some of the proposed changes to the National Uniform Law that are currently under consideration. We consider that, in addition to the matters set out above, amendments which:

- ▶ introduce a serious harm threshold which must be established by a plaintiff before a cause of action is established;
- ▶ introduce a 'single publication rule' which imposes a one-year limitation period from the date the material is uploaded to the internet;
- ▶ make it mandatory to issue a concerns notice and clarifying when a 'reasonable offer to make amends' will be operated as a defence; and
- ▶ clarify that the cap on damages for non-economic loss operates as a scale and aggregated damages are awarded separately,

will also likely assist an organisation in its potential management of and defence to any defamation claim that is brought in the circumstances of publication in the future.³¹

As a final observation, we note commentary in the Respect@Work Report about the potential amendments to the qualified privileged defence being considered by the Council of Attorney's-General,³² however, the amendments under consideration there are really intended to broaden the scope of defence for media organisations who potentially seek to publish information and allegations, including in relation to sexual harassment or assault. Therefore whilst this is an interesting issue to follow, it is unlikely to have any immediate application to an organisation, which is contemplating a shift to transparency, whilst minimising its own exposure to a defamation risk.



SUMMARY

It is clear that Boards will necessarily have to consider the risk and risk management processes of defamation as part of their consideration of an overarching approach to sexual harassment within the organisation.

What we have intended to convey above is that for the reasons given, the risk of defamation arising from implementing or prioritising a 'complainant-centric' and more transparent approach, should not be seen as a roadblock to or handbrake on that shift.

It should be noted that the views expressed in this report reflect best practice and, whilst genuinely held by the authors, may not be representative of the Clayton Utz partnership as a whole.

Yours sincerely



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Annexure A - Board level issues

Respect@Work: Workplace prevention and response framework to address sexual harassment

The Respect@Work Report made 55 recommendations which are primarily directed at driving legislative and regulatory reform by the Commonwealth, state and territory governments and government entities, as well as the development and delivery of prevention and response resources by industry and professional groups. However, the Commission does put forward a workplace sexual harassment prevention and response framework that is relevant to how organisations can address sexual harassment in the workplace, with suggested areas of action for response or prevention activities across seven domains. We set out the Board-level considerations with respect to each of these domains in Annexure B.

Champions of Change Coalition: Leading from the top - 10 principles for Executive Teams and Boards

In the CoCC Report, the Champions of Change Coalition has put forward 10 principles for executive teams and Boards with respect to 'leading from the top'.³³ The CoCC Report does not differentiate between Board-level considerations and management-level considerations in relation to implementing each principle, however we have set out below what we see as a sensible delineation of the two, drawing insights from both Reports.

Principle	Description	Board role	Management role
1.	<i>"Lead through your own behaviour and hold others accountable for creating safe, respectful and inclusive environments and preventing sexual harassment."</i>	<p>Given the ultimate responsibility rests with the Board, directors should set the 'tone from the top' by modelling appropriate and respectful behaviours, and ensuring management do the same. Directors should be held accountable for their own behaviour and ensure they also hold management to account.</p> <p>The Board should seek to understand the consequence management frameworks in place and whether they include appropriate and proportionate responses to sexual harassment, from a leadership, governance and safety perspective.</p>	<p>Management should lead by example in ensuring their behaviours are appropriate and respectful. Any unacceptable behaviour by management or staff should result in proportionate and appropriate consequences.</p> <p>Management should set and implement consequence management frameworks to apply within the organisation and ensure there is a zero tolerance approach to sexual harassment. This means that there will be consequences for sexual harassment, but such consequences will be appropriate, proportionate and formulated with regard to the complainant's preferences.</p>
2.	<i>"Ensure your organisation has a gender equality strategy that includes a sexual harassment prevention strategy aligned to existing workplace health and safety systems."</i>	<p>The Board should ensure the organisation has a clear and effective gender equality and sexual harassment prevention strategy that accords with existing workplace policies, procedures and health and safety systems.</p>	<p>Management's role involves setting and implementing the company's gender equality and sexual harassment prevention strategy. In doing so, management should ensure the strategy accords with existing workplace policies, procedures and health and safety systems.</p>

<i>Principle</i>	<i>Description</i>	<i>Board role</i>	<i>Management role</i>
3.	<i>"Include sexual harassment on risk registers and do scenario planning on potential risks and responses."</i>	<p>Boards should, with the benefit of recommendations of management and having had the opportunity to ask questions of management, review risk management tools to ensure that the risks of sexual harassment are adequately accounted for in the company's risk register. This is particularly important given potential reputation issues for a company and its directors in relation to these types of issues.</p> <p>Depending on the size and nature of the company, this identification of risks might be undertaken directly by the Board or, alternatively, by a committee of the Board (such as a risk committee) that then reports back to the Board.</p>	<p>Management is responsible for creating, revisiting and maintaining risk registers to ensure that sexual harassment remains on the register and then report to the Board (and/or relevant committee of the Board) on the risk register from time to time as appropriate.</p> <p>In creating and maintaining risk registers and undertaking scenario planning activities, management should ensure that sexual harassment is prioritised.</p>
4.	<i>"Require regular reporting of complaints data (e.g. incidents, themes, resolution time frames, and outcomes including settlements), as well as cultural indicators (e.g. culture surveys) and other prevalence data (e.g. industry surveys)."</i>	Boards should ensure that they receive complaints data on a regular basis from management, as well as cultural indicators and other prevalence data as and where appropriate, and are given the opportunity to ask questions of management in the forum of a board meeting, Board committee meeting or otherwise (as appropriate).	Management should collect or obtain complaints data, cultural indicators and other prevalence data and regularly report it up to the Board.
5.	<i>"Interrogate the numbers to account for under-reporting: low or no reporting does not mean there are no incidents."</i>	Directors should maintain a healthy level of scepticism in relation to the accuracy of the data they receive from management about the incidence of sexual harassment. Low reporting may be indicative of a lack of a 'speak up culture' or a challenging reporting process, rather than an actual lack of incidents.	In collating and acting upon data regarding sexual harassment, managers should note that numbers may not reflect the actual level of sexual harassment occurring in the workplace. Managers should also consider monitoring other metrics to identify unhappy staff, such as attrition rates and absenteeism, and report these metrics to the Board.

Principle	Description	Board role	Management role
6.	<i>"Insist on external transparency regarding incidents involving senior leaders and where there is legitimate public or stakeholder interest."</i>	<p>The Board should form a view on the appropriate level of external transparency regarding incidents of sexual harassment, and will support and encourage external transparency.</p> <p>In addition, Boards of ASX listed companies will remain particularly mindful of their continuous disclosure obligations and financial reporting obligations.</p>	Management should treat incidents of sexual harassment with the agreed level of external transparency, having regard to the privacy and confidentiality of the parties involved.
7.	<i>"Ensure proportionate and appropriate consequences for offenders."</i>	The Board should seek to understand from management how offenders are dealt with by the company, and should ensure that the consequence management frameworks in place provide for proportionate and appropriate consequences for offenders.	<p>Management's role is likely to include setting and implementing consequences for individual offenders, having regard to the offender's behaviour, the impact of their actions, the wishes of the person subjected to harassment, and any consequence management frameworks in place.</p> <p>Management's role will also be to keep the Board informed of these frameworks and how offenders have been, or are being, dealt with in the event the Board needs to respond to any media or other enquiries should these matters become leaked to the public.</p>
8.	<i>"Recognise that respect and support for people who experience sexual harassment is now essential to effective and responsible approaches. Do not restrict victims' ability to manage their own circumstances and tell their own story."</i>	Boards should have regard to the complainant-centred approach when forming a view of how sexual harassment should be approached and addressed by the company (including in the context of use of NDAs), and should seek to understand the level and kinds of support provided to complainants.	Management's role is likely to include setting sexual harassment policies and investigation protocols and determining the level and kinds of support to be provided to complainants (for example, Employee Assistance Programs). Management should undertake these activities with reference to a complainant-centred approach.

<i>Principle</i>	<i>Description</i>	<i>Board role</i>	<i>Management role</i>
9.	<i>"Ensure thorough due diligence in recruitment of senior leadership roles, including by insisting on disclosure of misconduct and where employment has ceased during a misconduct investigation."</i>	<p>Boards should undertake thorough due diligence in their own recruitment activities (e.g. for candidates as directors and for members of senior management such as CEO, CFO and Company Secretary, as applicable).</p> <p>Boards should also challenge the recruitment procedures in place for senior leadership roles to ensure they are thorough and appropriately directed at uncovering past misconduct, so as not to perpetuate bad behaviour.</p> <p>This process might be undertaken directly by the Board or, alternatively, by a committee of the Board (such as a remuneration or nomination committee) that then reports back to the Board.</p>	Management should ensure there are thorough due diligence procedures in place (which are followed in practice) in the recruitment of senior leadership roles that are appropriately directed at uncovering past misconduct.
10.	<i>"Ensure who you promote and reward reinforces your organisational values and your commitment to gender equality and the prevention of sexual harassment."</i>	<p>The Board should examine the frameworks in place for promotion and reward (including whether these are followed in practice) and consider whether they reinforce the company's commitment to gender equality and the prevention of sexual harassment. Changes in approach should be suggested where required.</p> <p>This process may be undertaken by the Board directly or via (and upon recommendation) of any committees of the Board which may be charged with the Board's responsibilities in relation to the promotion and reward of those in executive and/or senior leadership or other employment roles (such as a remuneration committee or nomination committee).</p>	Management should ensure there are frameworks in place (which are followed in practice) for making promotion and reward decisions based on the company's commitment to gender equality and the prevention of sexual harassment.

As the Reports demonstrate, Boards need to be actively engaged in and informed about the company's sexual harassment response across a number of areas including risk assessment, policies and procedures, consequence management and accountability, recruitment and reward, investigation, support, and external transparency.



KEY TAKEAWAYS

As stated in the CoCC Report, Boards should elevate sexual harassment as a leadership, governance and safety issue. Management will be responsible for the day-to-day setting and implementation of policies and procedures aimed at preventing sexual harassment, and for responding to any reports of sexual harassment. By contrast, the Board will need to hold management to account in ensuring its efforts to prevent and respond to sexual harassment are aligned with legal obligations and evolving best practice, as well as investor and broader societal and community expectations.

Directors should be aware of the potential for a number of legislative reforms in the near future that may increase legal risks associated with sexual harassment and the regulatory burden upon employers. Ultimately, however, it is never too early to put the prevention of sexual harassment on the Board's agenda.

Annexure B - Respect@Work - Seven domains for prevention and response strategies³⁴

Leadership

The Commission's view is that, in order to prevent sexual harassment, Boards should prioritise sexual harassment as a leadership and safety issue, and directors should focus on how sexual harassment is managed in the workplace as part of fulfilling their oversight of governance, compliance, performance and management systems, as well as their management of non-financial risks and legal obligations. We agree that reframing the issue in this way is essential to driving change in this area.

Risk assessment and transparency

The Respect@Work Report suggests that organisations should focus on risk assessment and transparency in seeking to prevent sexual harassment. In this context, the Commission notes that transparency can serve the purpose of risk mitigation and management, by keeping workplace leaders informed and assisting directors to discharge their duties.

As part of this, the Commission believes that Board members should be provided with reporting on the incidence of sexual harassment and how sexual harassment incidents have been handled within the organisation, de-identified for confidentiality and privacy. We agree that this is essential in order to give the Board appropriate insight into any sexual harassment themes and trends and/or any systemic issues or 'hot spots' within the organisation. We also suggest that Boards are privy to some of the specific stories behind incidents reported on, in order to bring to life how sexual harassment is manifesting in the organisation, which could take the form of a more detailed verbal update given to the Board.

The Respect@Work Report makes clear that organisations should not only be concerned with the information reported to the Board about sexual harassment, but also the information they share with their employees and external stakeholders. In this context, it is important to maintain privacy, confidentiality and due process while

investigations are ongoing. However, at the conclusion of an investigation, as acknowledged by Commissioner Kenneth Hayne AC QC during the Banking Royal Commission and reiterated in the Respect@Work Report, being transparent regarding incidences of misconduct identified and the sanctions imposed by Boards can serve as a clear indicator about conduct the Board regards as unacceptable and the accountability measures in place.³⁵


Some organisations may be subject to mandatory or optional external reporting requirements of aggregated information regarding gender diversity matters, including sexual harassment. We note that Boards will need to form a view of the appropriate level of external transparency when complying with reporting requirements.

Culture

The Respect@Work Report highlights the important role of Boards in creating a culture of trust and respect, including by modelling appropriate behaviours (setting the 'tone from the top'). We note that in selecting the CEO and considering the makeup of the Board, diversity and the *prevention* of sexual harassment should be front of mind. Preventing sexual harassment should also be a key consideration for the Board in approving governance policies and frameworks that can drive cultural change, such as policies concerning recruitment and promotion, codes of conduct, consequence management, and sexual harassment.

Knowledge

The Respect@Work Report emphasises the role of education and training in *preventing* sexual harassment by demonstrating an organisation's zero-tolerance stance on the issue and developing shared understanding of expected workplace behaviours. The Commission notes that directors should ensure they have the requisite knowledge and skills required to perform their governance role. Further, the Commission states that Board members should not only



diligently participate in sexual harassment training, but should also ensure adequate resources are allocated to the delivery of best practice training in their organisations.

Support

Support should be a critical area of focus for organisations in *responding* to sexual harassment. The Respect@Work Report alludes to the tendency of employers to focus on the preservation of the company's legal, reputational and financial position in responding to sexual harassment. The Commission recommends that employers instead respond to sexual harassment using a so-called 'victim-centred' approach (which we refer to in this report as the 'complainant-centred' approach) that recognises the significant impact that sexual harassment has on a complainant and, rather than going into 'damage control', with a view to minimising corporate liability, ensures that any investigation process and response is designed to minimise harm to the complainant and respect their wishes whilst being appropriate and proportionate to the situation. When an organisation receives a report of sexual harassment, it should prioritise ensuring the safety and welfare of the complainant and provide them with appropriate support. Boards should have regard to the complainant-centred approach when forming a view of how sexual harassment should be approached and addressed by the organisation.

Reporting

The Respect@Work Report highlights the impact that an organisation's response to a reported incident of sexual harassment can have on the complainant, the alleged perpetrator and the organisation as a whole. The reporting process and any responses to reports of sexual harassment should both be conducted by adopting a complainant-centred approach that is adaptive to the complainant's wishes and the severity of the conduct concerned. In this regard, the Board should ensure it is kept abreast of the process undertaken by management in this area, and should suggest changes in the overall approach as required.

Measuring

According to the Respect@Work Report, in order to better understand and address sexual harassment, workplaces should measure the prevalence, nature and reporting of sexual harassment and the effectiveness of responses to sexual harassment. Boards should ensure they are receiving this data and interrogate the measurements they receive where appropriate. Boards should also form a view on the level, quality and types of information they are receiving, so that they have sufficient insight whilst not being overwhelmed with data.

¹ Australian Human Right Commission, 'Respect@Work: Sexual Harassment National Inquiry Report' (29 January 2020) (**Respect@Work Report**).

² Champions of Change Coalition, 'Disrupting the System - Preventing and Responding to Sexual Harassment' (2020) (**CoCC Report**).

³ Respect@Work Report, page 575.

⁴ Ibid at page 621.

⁵ *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334; (2014) 312 ALR 285; [2014] FCAFC 82.

⁶ Ibid at [96].

⁷ Respect@Work Report, page 705.

⁸ Ibid.

⁹ Ibid at page 700.

¹⁰ ASIC Regulatory Guide 270, 'Whistleblower policies' (RG 270).

¹¹ *Farquharson v Qantas Airways Ltd* (2006) 155 IR 22; [2006] AIRC 488 at [41]; *Suzara v St Vincent's Private Hospitals Ltd T/A St Vincent's Private Hospital Melbourne* [2019] FWC 87; *Dickinson v Calstores Pty Ltd* [2011] FWA 6858; and *Slater v Patrick Port Logistics Pty Ltd* [2012] FWA 7204 at [127].

¹² Respect@Work Report, page 708.

¹³ The common law principles of defamation sit with the National Uniform Law except to the extent the Act provides otherwise - (see section 6 of the *Defamation Act 2005 (NSW)*). However, in this paper we will focus upon the National Uniform Law rather than common law principles.

¹⁴ Refer to the Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, Volume 4 - 'Identifying and disclosing child sexual abuse' (15 December 2017) available at <https://www.childabuseroyalcommission.gov.au/final-report>.

¹⁵ We would also endorse the other recommendations referred to on pages 564 and 573 of the Respect@Work Report, namely that the Commission, in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of regulation on NDAs; and that the Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, with consideration also given to additional witness safeguards and protections.

¹⁶ See CoCC Report, page 44.

¹⁷ Where the workplace provided the opportunity and was the occasion of the defamatory statement - see *Prince Alfred College v ADC*, (2016) 258 CLR 134.

¹⁸ For example, see section 30 of the *Defamation Act 2005 (NSW)*.

¹⁹ See *Bolton v Stoltenberg* [2018] NSW SC 1518 (**Boltions**) at [70].

²⁰ In *Boltions* case, Payne J further noted (with reference to *Nationwide Newspapers Limited v Harrison* (1982) 149 CLR 293) that "an allegation that a person has been charged with an offence or is under investigation does not necessarily impute that the person is guilty of the conduct, only that they are reasonably suspected of it".

²¹ See section 30 of the *Defamation Act 2005 (NSW)*.

²² *Howe & McCollough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ, at 396 per Higgins J.

²³ *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 358 per Lord Griffiths, PC.

²⁴ See for example section 30(3) of the *Defamation Act 2005* (NSW).

²⁵ *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354.

²⁶ *Morgan v John Fairfax & Sons Ltd* (No 2) (1991) 23 NSWLR 374 at 388.

²⁷ *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 44.

²⁸ *Plumb v Australian Consolidated Press Ltd* [1975] 2 NSWLR 414.

²⁹ For example de-identifying the incident or providing a summary of outcomes on a de-identified basis.

³⁰ Which proposed amendments are likely to gain greater attention and scrutiny in light of recent high profile cases of defamation proceedings in connection with sexual harassment claims and allegations.

³¹ In essence, these amendments, are designed to meet the objectives of:

- ensuring that the law of defamation does not place unreasonable limits on freedom of expression and, in particular on the publication and discussion of matters of public interest and importance;
- providing effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter; and
- promoting speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.

(see section 1.2 of the Councils of Attorneys-General, 'Review of Model Defamation Provisions' (Discussion Paper, February 2019).

³² See Councils of Attorneys-General, 'Review of Model Defamation Provisions' (Discussion Paper, February 2019).

³³ CoCC Report, page 30.

³⁴ See Respect@Work Report, section 6.

³⁵ *Ibid* at pages 636 - 637.