



Positive duty to prevent workplace sexual harassment

A director's guide

Employers have a positive duty to prevent and respond to workplace sexual harassment and similar harmful conduct. This resource provides context, practical steps and questions to help boards and directors implement the Australian Human Rights Commission's (AHRC) Positive Duty Guidelines and meet related legal obligations.

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KEY TERMS

- **Sexual harassment** - an unwelcome sexual advance or unwelcome conduct of a sexual nature in relation to another person.
- **Sex discrimination** - discrimination of a person on the basis of their sex.
- **Hostile work environments on the grounds of sex** - a workplace environment being offensive, intimidating or humiliating to a person by reason of their sex or a characteristic associated with their sex, even if conduct is not directed towards a particular person.
- **Victimisation** - retaliatory action, or the threat of action, against a person because they made a complaint of sexual harassment or because they took action in support of a complaint.



Snapshot for directors

Sexual harassment should not be seen as an individual problem. It can also have causes and consequences at an organisational level. It is the board's responsibility to prevent and address sexual harassment.

The AICD's Director's Guide outlines key governance steps and questions to ask in the boardroom to assist directors meet their obligations, consistent with the **AHRC's Positive Duty Guidelines**.

Key governance steps for directors	Questions for directors
<p>LEADERSHIP</p> <ul style="list-style-type: none"> • Develop and display strong board leadership that actively guides a positive culture in preventing workplace sexual harassment and sex discrimination. • Recruit the right leadership team and hold them to account. 	<ul style="list-style-type: none"> • As a director, do you understand your role in actively preventing and addressing workplace sexual harassment? • Is there an ethical and respectful management style and commitment to eliminating sexual harassment? Is this integrated into performance indicators and remuneration settings for senior management?
<p>CULTURE</p> <ul style="list-style-type: none"> • Set the "tone from the top" for a culture of trust, safety and respect that minimises the risk of sexual harassment and sex discrimination occurring. • Foster a culture that empowers all employees to report harmful conduct and holds people to account. • Consider what broader structural barriers, such as power imbalances or gender inequality risks, need addressing in the workplace. 	<ul style="list-style-type: none"> • Do directors' and senior leaders' personal communication styles and behaviour model the desired culture? • What tools does the board have to assess organisational culture and employee morale? • Is the board confident that the culture is one of respect and safety? • Are there initiatives in place to promote gender equality in the organisation, including in leadership roles?
<p>KNOWLEDGE</p> <ul style="list-style-type: none"> • Develop, communicate and implement a meaningful policy to address sexual harassment, based on a shared understanding of expected workplace behaviours and processes. • Allocate adequate resources and equip employees at all levels, including directors, with education and training. • Deepen your understanding of the positive duty and what steps your organisation is taking to meet its obligations. 	<ul style="list-style-type: none"> • Do all directors have an adequate understanding of workplace sexual harassment and its drivers? • Are the board's expectations on prevention of sexual harassment clearly communicated to employees? • Is the board committed to adequately resourcing the necessary organisational changes to comply with the positive duty? • Does our organisation's training include education on bystander responsibilities?
<p>RISK MANAGEMENT</p> <ul style="list-style-type: none"> • Set expectations for the management of sexual harassment and sex discrimination as part of workplace health and safety risk assessment. • Consider ways to involve employees in developing controls to minimise the risks of sexual harassment and sex discrimination. 	<ul style="list-style-type: none"> • Does the board consider workplace sexual harassment risks as part of work health and safety risk management and governance? • Has the organisation undertaken a risk assessment specifically for workplace sexual harassment and sex discrimination?

Key governance steps for directors	Questions for directors
<p>SUPPORT</p> <ul style="list-style-type: none"> • Prioritise support for employees who experience or witness sexual harassment or sex discrimination. • Understand how often support mechanisms are used by employees and regularly review their effectiveness. 	<ul style="list-style-type: none"> • Is the board aware of formal and informal mechanisms available to support employees in the organisation? • Is the board kept informed about use of these mechanisms and are they periodically reviewed for improvements?
<p>REPORTING AND RESPONSE</p> <ul style="list-style-type: none"> • Set expectations for management to report regularly to the board on sexual harassment and sex discrimination. • Understand what grievance pathways are used by employees, including bystanders, to report sexual harassment and sex discrimination, and whether there are barriers preventing reporting. • Adopt a person-centred approach to the way investigations are conducted when a report is made to minimise unnecessary harm to employees. 	<ul style="list-style-type: none"> • Does the board receive periodic reporting from management on sexual harassment? • Is reporting able to identify trends in behaviour over time? • Is there evidence through surveys and other consultations of a positive "speak up culture" where employees, including bystanders, feel safe to report sexual harassment without fear of retribution?
<p>MONITORING, EVALUATION AND TRANSPARENCY</p> <ul style="list-style-type: none"> • Ask management to develop metrics and collect data to regularly assess the extent and nature of sexual harassment and sex discrimination concerning the workforce. • Consider whether the organisation's policies and processes protect employee confidentiality when misconduct is reported and investigated. • Be transparent internally with employees about the extent of reported sexual harassment and sex discrimination, and actions taken to address these behaviours. 	<ul style="list-style-type: none"> • Has the board requested a report on the steps the organisation is taking to meet its positive duty? • Are you confident that internal communications on the prevalence of sexual harassment and associated consequences balances confidentiality with transparency and leadership? • Does the board understand the use (if any) of non-disclosure agreements within the organisation and alternative options that may be available?

Guiding these actions should be four key principles, recommended by the AHRC, for implementation to be successful:

- 1. Consultation:** Recognising that policies, processes and strategies to address sexual harassment and sex discrimination will be most impactful where informed by consultation with employees.
- 2. Intersectionality:** Recognising that some groups may be affected differently by sexual harassment and sex discrimination due to aspects of a person's identity intersecting with other factors (e.g. gender identity, sexual orientation, culture and race).
- 3. Gender equality:** Recognising that sexual harassment and sex discrimination can often be perpetuated by gender inequality within the organisation.
- 4. Person-centred and trauma-informed:** Recognising that an impacted person's experience, needs and preferences should be genuinely considered in any organisational response to sexual harassment and sex discrimination, and further harm to the individual through the process be avoided.



Why is it important for organisations to take sexual harassment seriously?

Sexual harassment has been unlawful in Australia at a federal level since 1984, yet is largely misunderstood, woefully under-reported and badly handled. Prevalence levels remain worryingly high, and we know more than ever about the serious impact of sexual harassment on individuals, workplaces and society. Along with a growing recognition of its harms, it is clear the “old” approach to sexual harassment — have a generic policy, train on the policy and have a complaints procedure to deal with harms that have already occurred — is not working.

In 2022, sweeping changes were made to sexual harassment laws to put in place a new approach

aimed at preventing sexual harassment and sex discrimination before it occurs. These changes were recommended in the AHRC’s *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*.¹ The report proposes a framework that is “...victim-centred, practical, adaptable for businesses of all sizes and in all industries, and designed to minimise harm to workers”.² Improving workplace prevention and response requires an approach that looks beyond just policies, training and complaint handling procedures.

Most importantly, it is everyone’s human right to work free from the harm of sexual harassment.

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, AHRC, 2020

² *Ibid*, p 34.

A new approach to sexual harassment

The new approach to sexual harassment is a paradigm shift from the former individual and reactive model that proved ineffective, to one that is preventative and proactive. It is centred around a **positive duty** on employers and ‘persons conducting a business or undertaking’ (PCBUs) to prevent sex discrimination and sexual harassment. It responds to the high prevalence and seriousness of sexual harassment³ and to the need to renew and reinforce current practices to prevent it.

The reforms grounded in the *Respect@work* national inquiry created an expanded view of sexual harassment that is embedded in a broader regulatory system. In the past, sexual harassment was mostly confined to anti-discrimination laws with limited scope. Now, other workplace equality regulators, the labour law jurisdiction and the workplace health and safety system will all work together to address sexual harassment and sex discrimination more broadly.

Senior leaders, including directors, have a crucial role and responsibility in implementing these changes.

In the anti-discrimination system, sexual harassment provisions now sit alongside new offences of **sex-based harassment** and creating a **hostile environment**.⁴ These recognise that not all harassment has a sexual element – for example, it may be derogatory treatment based on gender – and that some workplaces may be so permeated with negative behaviours that the environment is toxic.

The positive duty requires employers and PCBUs to take “reasonable and proportionate” measures to prevent sex discrimination, sexual harassment, hostile environments and victimisation occurring in their workplaces. What is considered reasonable will vary according to the size and resources of the business. Compliance with the new duty will be monitored by AHRC and, where needed, the Federal Court.

Other *Respect@work* changes have reinforced areas of

regulation that support the human rights jurisdiction. Sexual harassment is now clearly covered by **work health and safety laws** and organisations have a legal responsibility to identify and manage this risk, through implementing control measures and regularly reviewing their risk and mitigation measures.⁵ Sexual harassment is also explicitly included in **Fair Work laws** and there are “Stop Sexual Harassment Orders” that offer immediate protection against harassment that is underway.⁶ There are also new reporting obligations for sexual harassment within the **Workplace Gender Equality Agency (WGEA)** reporting scheme.⁷

Together these changes create a more cohesive and systemic set of protections against sex discrimination and harassment. It means that in preventing and responding to sexual harassment through the positive duty, employers should also take care to meet WHS, labour and WGEA obligations, and create workplace cultures that are safer and more equal on every measure.

³ Sex Discrimination Act 1984 (Cth) s47C

⁴ Sex Discrimination Act 1984 (Cth) ss28AA and 28M

⁵ **L Bacon**, “Preventing workplace sexual harassment - obligations for directors”, *Membership Update, AICD*, 23 February 2021

⁶ Fair Work Act 2009 (Cth).

⁷ **Workplace Gender Equality Agency**, *Reporting Guide*

WGEA REPORTING

From 2024, WGEA will collect data from organisations with 100 or more employees on workplace sexual harassment prevention initiatives.

This is in addition to the current reporting of gender pay gap information to WGEA.

Sexual harassment reporting will cover policies or strategies, risk management practices, measurement of sexual harassment prevalence and reporting, and support available for employees who have or are experiencing sexual harassment.

This means that employers will be reporting to WGEA each year on many of the measures that go to meeting their positive duty obligations. This is an opportunity for boards to assess the effectiveness of these measures, challenge management and set expectations for improvement if required.

For more details of the 2022-2023 Reporting Change see the [WGEA Reporting Guide](#).





The Seven Standards: A framework for action

A framework for action to help employers meet the new duty is provided by the AHRC in positive duty Guidelines. The Guidelines are suggestions only, and directors need to consider the best way for their organisation to build a non-discriminatory, safe and respectful culture.

The AHRC Positive Duty Guidelines provide seven “standards” to prevent and respond to sexual harassment and sex discrimination.⁸ These can be organising principles for a cohesive Prevention and Response Plan or a measure against which current organisational policies and practices can be tested, improved and built upon.

1. Leadership
2. Culture
3. Knowledge
4. Risk management
5. Support
6. Reporting and response
7. Monitoring, evaluation and transparency

⁸ Australian Human Rights Commission, Positive Duty Guidelines, p 34.

Making the framework work

For many organisations, sexual harassment policies and practices have not led to significant improvements in incidence rates and culture, even when intentions are good and resources are allocated. The sexual harassment ‘generic policy, compulsory training, standard grievance procedure’ approach has sometimes led to a tick-a-box approach, delegated to a human resources unit.

So, how can a new framework for action be more effective?

The AHRC Positive Duty Guidelines set out four principles that should underpin all board actions on sexual harassment and sex discrimination. These are key to successful implementation.

1. Consultation

It is the organisation’s own strengths and challenges that should direct action and benchmark change, through consultation with employees. Policies and practice will be most impactful where informed by knowledge about the organisation’s culture, strengths and challenges. A top-down, compliance approach imposed without consultation can lead to disengagement, non-compliance and even backlash.

2. Gender equality

Sexual and sex-based harassment and sex discrimination are perpetuated by gender inequality. Where an organisation is committed to preventing and responding to sexual harassment, gender equality is the best measure of success. Equality in sex discrimination laws means substantive equality: whether, for example, women are measurably equal to men in pay, conditions and promotions, including through policies and programs (such as flexible work or mentoring) designed to achieve this equality.

3. Intersectionality

Sexual harassment impacts certain groups differently, and often with a heightened impact. The evidence is clear on this point, and the statistics are sobering.⁹ LGBTQ+ women may experience more sexualised and hostile treatment from co-workers. Women with disability may be targeted more, and disbelieved more when they report unwanted behaviours. Comments made to Aboriginal and Torres Strait Islander people may perpetuate both racist and sexist stereotyping. These exacerbating factors are relevant to any legal claim brought against an individual or organisation, and should be central in any action to prevent or respond to harassment.

4. Person-centred and trauma-informed

Person-centred approaches emphasise the impact of sexual harassment and discrimination on individuals and keeps them at the heart of any process. It does not mean automatically following that preference – organisations are still responsible for responding to and preventing future harassment – but it means listening to an impacted person’s experience and considering their preferences in any action taken. Processes should also acknowledge the impact of trauma on the person and promote repair and recovery to the greatest degree possible.

⁹ Australian Human Rights Commission, 2022, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces*

Background and legal landscape

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is any unwelcome conduct of a sexual nature, that a reasonable person would anticipate, in all the circumstances, would cause offence, humiliation or intimidation. It is a form of sex discrimination and recognised as both gender inequality and a type of gendered violence.

Conduct can be unlawful whether or not the other person was aware it was unwelcome, although there is also a 'reasonableness' test in the Sex Discrimination Act 1984 (Cth).

This does not make consensual sexual relations, flirtation, attraction or friendship in the workplace unlawful or a form of sexual harassment, because it is not unwelcome. However, these can be difficult to manage if a relationship breaks down, if sexuality is overt in the workplace or if there is a power imbalance. Joking can often escalate into harassment.

Where there is a power imbalance, through seniority levels, age, precarity or where a person is in a marginalised group within the workplace, individuals may find it difficult to report the behaviour. These factors, and other circumstances, such as race, disability and the relationship between the parties can all be relevant to a legal claim of sexual harassment.¹⁰

WHAT IS SEX-BASED HARASSMENT, A HOSTILE WORKING ENVIRONMENT AND VICTIMISATION?

Sex-based harassment, also known as harassment on the grounds of sex, occurs when a person is harassed because of their sex – being a woman or a man.¹¹ The law was changed to acknowledge that there need not be any sexual element to certain unwanted behaviour for it to be harmful. It covers situations where, for example, a woman is undermined at work, treated as less authoritative or targeted with other negative behaviour because of her gender.

In some circumstances, **hostile working environments on the grounds of sex** will amount to sexual harassment.¹² This acknowledges the impact an individual or group of individuals may have in creating a generally toxic environment for other workers by reason of their sex or a characteristic associated with their sex.

Victimisation is the very common experience of an individual being targeted, or 'punished', by others in a workplace for making a report or otherwise disclosing sexual harassment.

Under the positive duty, directors and senior leaders have a responsibility for addressing and preventing all of these behaviours from occurring in the workplace.

WHO EXPERIENCES SEXUAL HARASSMENT; WHO PERPETRATES IT?

Sexual harassment in the workplace was experienced by 41 per cent of Australian women and 26 per cent of men within the last five years¹³ Overall, 89 per cent of women and 64 per cent of men aged 15 or older have been sexually harassed at some point in their lifetime.¹⁴

Sexual harassment is much more pervasive for people with disability, for people who identify as non-binary or trans, and for gay, lesbian, Aboriginal or Torres Strait Islander people. Young people are particularly likely to be the subject of sexual harassment.¹⁵ It is clear that this behaviour is ubiquitous and systematic.

In 77 per cent of cases, one or more of the perpetrators was a man.¹⁶

Women also report experiencing higher levels of offence or intimidation from this harmful conduct.¹⁷ The AHRC points out that sexual harassment can more negatively impact women because it is compounded by sex-based harassment and gender inequality.¹⁸

¹⁰ Sex Discrimination Act 1984 (Cth) s28(1A)

¹¹ Sex Discrimination Act 1984 (Cth), s28AA

¹² Sex Discrimination Act 1984 (Cth), s28M.

¹³ Australian Human Rights Commission, 2022, *Time for respect: Fifth national survey on sexual harassment in Australian workplaces*

^{14, 15, 16, 17} Ibid.

¹⁸ Ibid, 101.

WHAT DOES THE LAW SAY?

Sexual harassment against an individual is unlawful under the federal Sex Discrimination Act 1984 (Cth) and in all Australian State and Territory jurisdictions. Each jurisdiction establishes procedures for dealing with allegations of sexual harassment. In all jurisdictions, sex discrimination provisions will make harassment on the grounds of sex and, in some situations, hostile workplace environments, unlawful. These are explicitly made unlawful under the federal Sex Discrimination Act.

At its more extreme, sexual harassment may constitute a criminal offence and should be handled as such. Even where a matter is investigated by the police, the complainant may continue with a complaint under anti-discrimination law.

Sex discrimination laws make it an offence to victimise a person who makes an allegation or a complaint of unlawful sexual harassment.¹⁹

Under the new approach to regulating sexual harassment and sex discrimination, sexual harassment provisions have been added to federal workplace laws, expanding their protections, and guidelines have been issued to make it clear that preventing sexual harassment is also a workplace health and safety issue.

RESPONSIBILITIES OF EMPLOYERS AND PERSONS CONDUCTING A BUSINESS OR UNDERTAKING (PCBUS)

While the positive duty sets up broad responsibilities for prevention of and response to sexual harassment, employers will still be vicariously liable – that is, legally responsible – for the individual actions of their employees or agents if they fail to take all reasonable steps to prevent the sexual harassment from happening.²⁰

At its more extreme, sexual harassment may constitute a criminal offence and should be handled as such. Even where a matter is investigated by the police, the complainant may continue with a complaint under anti-discrimination law, and the organisation may still have an obligation to address workplace practices and cultures as part of its positive duty for eliminating sexual harassment.

Australia's model Workplace Health and Safety laws require employers to manage risks to psychological and physical health so far as reasonably practicable. Sexual harassment is recognised as a major risk to safe work. Directors and officers are responsible for taking reasonable steps to ensure the organisation has devoted appropriate resources and has proper processes in place to eliminate or mitigate the risk of sexual harassment.

FAIR WORK LAWS

The Fair Work Act 2009 (Cth) now includes provisions making sexual harassment unlawful, and allowing workers to request the **Fair Work Commission** to make an order to stop sexual harassment or otherwise deal with the dispute through conciliation, mediation, making a recommendation or expressing an opinion before, if these are unsuccessful, proceeding to arbitration or court.

For more information see the Fair Work Commission's **Sexual Harassment Disputes Benchbook**.

WORK HEALTH AND SAFETY LAWS

Safe Work Australia has guidance aimed at assisting directors and officers discharge their duties under WHS laws to address the risk of sexual harassment occurring in the workplace. See **Preventing workplace sexual harassment – obligations for directors**.²¹

There is also a **Model Code of Practice: Managing psychosocial hazards at work**, including sexual harassment as a psychosocial hazard.

¹⁹ See, for example, s94 Sex Discrimination Act 1984 (Cth).

²⁰ See, for example, s106 Sex Discrimination Act 1984 (Cth).

²¹ L Bacon, 2021, op. cit.

DRIVERS OF SEXUAL HARASSMENT

On an individual level, sexual harassment tends to be about power.

While serious cases of sexual violence may be readily identifiable, more subtle acts such as sexist language or jokes can still cause harm. They contribute to a sexually hostile environment and are part of the spectrum of harassment.

At an organisational level, sexual harassment can betray bad management and an unhealthy culture that may be sexually hostile, unequal, uncivil or unjust. It is also correlated with a gender unbalanced workforce, where women and men are segmented within the workforce, where one sex is highly outnumbered, and where leadership is highly male dominated.

Organisations are also at greater risk of sexual harassment where gender inequality is ignored or overlooked.

Opportunities for sexual harassment also arise more commonly where the workforce is young, the workplace is hierarchical or where the workplace is decentralised or dispersed.

All organisations should aim to create a workplace culture where employees feel confident that a report would be dealt with effectively.

FROM WHS AND RISK MANAGEMENT TO CULTURE AND STRATEGY: THE ROLE OF THE BOARD

One of the risk factors for sexual harassment in an organisation is leaders, including directors, having a poor understanding of sexual harassment. It is important that directors are fully cognisant of the law and risk of sexual harassment in their organisations.

Australian organisations generally respect and comply with legal obligations, and this legal compliance approach has generally driven responses to sexual harassment. Compliance is obviously important, but a compliance-focused approach has proven to be unsuccessful in eliminating sexual harassment. A new approach is required.

Addressing and preventing sexual harassment requires actions across legal compliance, proactive risk management, and in leadership and safety strategies. Ultimately, addressing and preventing sexual harassment needs to be seen as important because it is the right thing to do.

Clearly, the size, sector and operations of organisations will dictate different approaches to addressing sexual harassment, and this is acknowledged in the positive duty provisions and AHRC Guidelines. All organisations benefit when the board plays a strong role in establishing a culture that promotes equality and treats employees fairly.



Directors' responsibility for preventing and responding to sexual harassment

1. LEADERSHIP

Active leadership on sexual harassment measures

The positive duty requires leaders to be actively engaged in developing sexual harassment and gender equality measures, and ensuring that they are implemented. All directors should be involved in developing sexual harassment measures that address the specific challenges of the organisation.

Recruit the right leadership team and hold them to account

Building the right leadership team is crucial for any organisation aiming to eliminate sexual harassment. Using recruitment and promotion strategies that create a diverse workforce should start from the top, including ensuring diversity on the board. Boards should be particularly mindful of the risk that bad behaviour by high performers will be overlooked.

Focusing on gender balance, with a strong focus at leadership level, will generally support efforts to address and prevent sexual harassment.

Employment contracts and codes of conduct should be explicit about expectations.

A culture of safety and respect: setting the "tone from the top"

Directors should actively demonstrate their personal commitment to eliminating sexual harassment by behaving respectfully, fairly and ethically at all times.

While robust and difficult conversations are always important, a bullying or aggressive communication style will undermine stated commitments and erode employee trust. The board culture sends important cultural signals within the organisation.

Communication styles and behaviour of directors and senior management should be raised in performance discussions.

QUESTIONS

- Do you understand your role in actively preventing and addressing workplace sexual harassment?
- Is there a process for board members to actively shape and assess sexual harassment measures as part of the governance calendar?

QUESTIONS

- Is an ethical and respectful management style and commitment to eliminating sexual harassment part of the performance indicators for senior management?
- Are these indicators considered in senior management performance reviews and remuneration settings?

QUESTIONS

- Are you confident that the personal communication styles and behaviour of directors and senior management model the desired culture?
- Do you discuss this at board level?



2. CULTURE

Lead change with a positive culture of safety and respect, based on consultation

A culture of respect, natural justice and safety is a pre-condition for preventing sexual harassment. Employees can recognise where statements about sexual harassment are merely lip service and where that is so, it may foster a culture of tolerance for sexual harassment. Addressing hostile environments, preventing victimisation, maximising compliance and reaping the benefits of workplace change will all depend on establishing and maintaining a positive culture of safety and respect.

Building psychological safety and trust are also critical to ensure there is a "speak up culture" where employees, including bystanders, feel they can report sexual harassment and sex discrimination without fear of retribution.

To lead positive change, directors should set expectations for consultation and engagement with employees (including other leaders). There will need to be processes, adapted to the size and nature of the organisation, for asking about and assessing the organisational culture. This could include employee surveys,

focus discussions, site walk-throughs, and should always include informal assessments of the climate and culture.

Compliance from employees (including other senior leaders) will be most effective where positive changes have been put in place through consultation and engagement.

Leaders can often be surprised when allegations of sexual harassment emerge against their senior employees. But for many employees, there is no surprise at all. It is important that directors' oversight of organisational culture involves regularly assessing any trends or patterns in employee engagement, attrition rates (particularly where it is higher in parts of the organisation) and exit interview feedback.

QUESTIONS

- What tools does the board have to consult on and assess organisational culture and employee morale?
- Is the board confident that the culture is one of respect and safety to speak up?

Promote a positive culture through intersectional gender equality

Power imbalances and inequality are risk factors for sexual harassment, so it is important that organisations that are serious about eliminating sexual harassment promote gender equality, including in leadership roles.

Given the evidence that factors such as race, disability or sexual orientation heighten the impact of sexual harassment, this means understanding how certain groups within the organisation may experience compounded inequality. Consultations with employees, and measures to promote a positive culture, must include intersectional factors.

In practice, achieving intersectional gender equality is about addressing broader structural barriers so that women and men can equally work in all business areas and at all levels of the organisation. For example, improving pay equity and ensuring that women and men are equally empowered to work flexibly to manage their family responsibilities will help build a culture of respect, justice and safety.

Directors of organisations with over 100 employees should pay close attention to the reports made to WGEA on their organisation's gender pay gap information and workplace sexual harassment prevention initiatives, recognising that poor performance in one or more areas of these reports could well be a warning sign for sexual harassment or similar harmful conduct, as well as a problem in its own right.

QUESTIONS

- Are there adequate initiatives in place to promote gender equality in the organisation, including in leadership roles?
- Is the board confident that the culture is positive for employees of all genders, abilities, sexual orientation and cultural and racial backgrounds?

For more information on intersectional measures to address gender and race inequality, see the Chief Executive Women's 2023 report, [Unlocking Leadership: Conversations on Gender and Race in Corporate Australia](#).



3. KNOWLEDGE

Create and build knowledge through meaningful policies and effective communication

Generic policies on sexual harassment and discrimination have limited impact with employees. To be effective, a policy or strategy for preventing sexual harassment should reflect the organisation's values and speak to the specific challenges and strengths of the organisation and industry.

Policies should recognise:

- the drivers of workplace sexual harassment;
- the responsibility of all workplace participants to address and prevent workplace sexual harassment;
- the importance of culture and leadership; and
- the importance of clear processes for managing complaints.

The board may want to develop a comprehensive prevention and response policy or strategy to give effect to the positive duty, or it may want to assess and renew its existing sexual harassment policy within its organisational context. Any policy or strategy should form part of a suite of policies including a gender equality policy, workplace health and safety strategy, code of conduct, values statement, reporting and whistleblowing policy that are all meaningful and consistent in relation to sexual harassment.

QUESTIONS

- Do you have a meaningful policy or strategy on preventing and responding to workplace sexual harassment?
- Is the policy approved by the board and regularly reviewed for relevance as part of the governance calendar?

The board should include sexual harassment on meeting agendas regularly (for certain board committees, it should be a standing item - e.g. People & Culture and/or Risk Committee). Board review provides an opportunity to deepen directors' understanding of organisational progress and risks, challenge management and demonstrate prioritisation by the board.

The Board's commitment to preventing and addressing workplace sexual harassment, and promoting a respectful, just and safe workplace culture, should be clearly communicated to the organisation.

The certainty of consequences for harassment is often more important than their severity, so the Board should consider how its zero-tolerance position is given effect and communicated internally.

QUESTIONS

- Do all directors have an adequate understanding of workplace sexual harassment and its drivers?
- Are the board's expectations on prevention of sexual harassment clearly communicated to employees?
- How long has it been since the board communicated these expectations to employees?

For more information on the drivers of sexual harassment, see Australian Human Rights Commission, 2023, Fact Sheet Series, [Causes and Risk Factors of Sex Discrimination, Sexual Harassment and Other Unlawful Behaviours](#).

Ensure the organisation develops and adequately resources meaningful training to prevent and address sexual harassment

Many organisations understand the importance of training as a tool for preventing sexual harassment. Fewer understand that it can fail to work or create backlash and worsen inequality if it is imposed on employees without building support and connecting training to a positive culture of safety and respect.

All too often in the past, "training" has meant a tick-a-box exercise where new employees are provided with relevant policies at induction, and then periodic updates through compulsory, often online training exercises. There is no evidence that such an approach, termed "symbolic compliance"²² prevents harassment or improves equality.

Effective training is authentic, aligned to organisational values, grounded in consultation, regularly repeated, and reviewed for continued relevance. It should be championed by senior leaders and its importance clearly communicated. Best practice delivery is in-person training that focuses on skill-building (such as practice

in responding to a report), and is relevant to the everyday working roles of people within the organisation. For that reason, it is important that employees at all levels, including directors, are given training. This should include training on early intervention techniques to support bystanders when they witness or are told about harmful behaviour.

Effective training requires a commitment to adequate resourcing but should represent better value for money and lead to organisational benefits, as well as meeting the positive duty.

QUESTIONS

- Is the board committed to adequately resourcing the necessary organisational changes to comply with the positive duty?
- What, if any, uplift will be required?
- Does our organisation's training include education on bystander responsibilities and safe intervention techniques?

22 See Lauren B. Edelman and Jessica Cabrera, "Sex-Based Harassment and Symbolic Compliance" (2020) 16(1) Annual Review of Law and Social Science 361-383.





4. RISK MANAGEMENT

Manage sexual harassment risks as part of workplace health and safety

It is clear that sexual harassment impacts physical and psychological health. Safe Work Australia points to the importance of managing sexual harassment as a work health and safety risk for organisations. It is directors' and officers' duty to eliminate the risk as far as practicable. The experience of sexual harassment can also lead to particular groups of workers, including leaders, being marginalised, losing authority and their capacity to participate in work on the same basis as others, causing further financial and career harm.

Managing equality risks alongside health and safety risks means effectively identifying organisational risk factors for sexual harassment and sex discrimination, taking steps to control the risk so as to prevent any harmful conduct, and regularly reviewing progress.

Directors should ask management whether employees are being involved in developing controls and how employee buy-in on a strong risk management approach is being fostered?

QUESTIONS

- Does the board, or relevant board committee, consider workplace sexual harassment risks as part of work health and safety risk management and governance?
- Has the organisation undertaken a risk assessment specifically for workplace sexual harassment and sex discrimination?
- Does this assessment, and any measures to address it, consider the heightened risk for employees who are younger, culturally and linguistically diverse, disabled or similar?



5. SUPPORT

Ensure appropriate support is available to all employees, including leaders and managers

Appropriate support for all employees who may experience or witness sexual harassment and discrimination is crucial to a person-centred, trauma-informed response to sexual harassment. Support may be informal or formal, and should be monitored to assess whether it is being used and remains effective.

This will mitigate harm, encourage reporting and contribute to a positive culture. There is a strong connection between support and workplace health and safety systems.

Directors should be confident that there are adequate supports in place for people who experience sexual harassment. This could include counselling services.

QUESTIONS

- Is the board aware of the available formal and informal mechanisms for support in the organisation?
- Are they kept informed about use of these mechanisms and do they periodically review and consider improvements?

For more information on support see Australian Human Rights Commission, 2023, Fact Sheet Series, [Person-centred and Trauma-informed Approaches to Safe and Respectful Workplaces and Seeking Support - Counselling and Support Services](#).

6. REPORTING AND RESPONSE

Encourage reporting and ensure there is no backlash for doing so

Sexual harassment is notorious for under-reporting. People who experience harassment may not report it for a number of reasons: because they feel the behaviour was not serious enough or it was 'just part of the job'; because they are unclear about their rights and the processes in their workplace; because they are frightened of their harasser; or, crucially, because they feel their organisation will not take the complaint seriously or deal with it confidentially, respectfully and completely.

People who have experienced harassment often perceive the processes as adversarial

or hostile and they fear reprisal from their harasser or colleagues.

Interpreting trends in reports or complaints of sexual harassment is a complex and nuanced task. Increasing reports of sexual harassment can be an indicator of increased disruption, poor morale and an inadequate culture of safety and respect. It may also reflect an increasing focus on sexual harassment so that employees feel safer to report. The absence of any reports in a reasonable sized organisation should be interrogated further by management and directors as it may suggest the absence of a speak-up culture.

QUESTIONS

- Does the board receive periodic reporting from management on sexual harassment?
- Is reporting able to identify trends in behaviour over time?
- Does the board consider possible systemic issues when reviewing periodic reporting?
- Are you comfortable that management understands the dynamics and prevalence of sexual harassment in the organisation and how it relates to the organisational culture?
- Does the organisation conduct employee surveys that ask about perceptions of the culture and sexual harassment?
- Is there evidence through surveys and other consultations of a positive "speak up culture" where employees, including bystanders, feel safe to report sexual harassment without fear of retribution?

Ensure the organisation deals constructively with reports of sexual harassment

The board needs to be confident that internal processes encourage reporting and deal effectively with reports. Confidentiality, reporting and referrals to external organisations need to be clear and well understood. The board should be confident that processes reflect a commitment to respect and safety, rather than a high focus on reputation management and legalistic responses.

Directors should require that the organisation engages in any legal processes fairly and be constructively, mindful of the cultural signal that it can send.

Processes should provide clear and appropriately strong consequences for sexual harassment, ensuring there is appropriate communication of outcomes to employees, and taking into account the need to balance confidentiality and natural justice. What is an appropriate communication to employees will depend on the organisational context. Larger businesses may want to circulate aggregate data showing number of incidents and organisational responses, while smaller businesses with confidential reports may need to give more limited or generic information. Where there is a legitimate public or stakeholder interest and allegations are substantiated, both the offender and outcomes may be identified.²³

QUESTIONS

- Are you confident your organisation's handling of reports, whether formal or informal, and investigations are based on due process and natural justice?
- Does management communicate to employees the consequences and organisational responses to sexual harassment?

²³ More detail and suggested wording is provided in Champions of Change Coalition, 2020, *Disrupting the System: Preventing and responding to sexual harassment in the workplace*, pp 44-48.



7. MONITORING, EVALUATION AND TRANSPARENCY

Monitor regularly

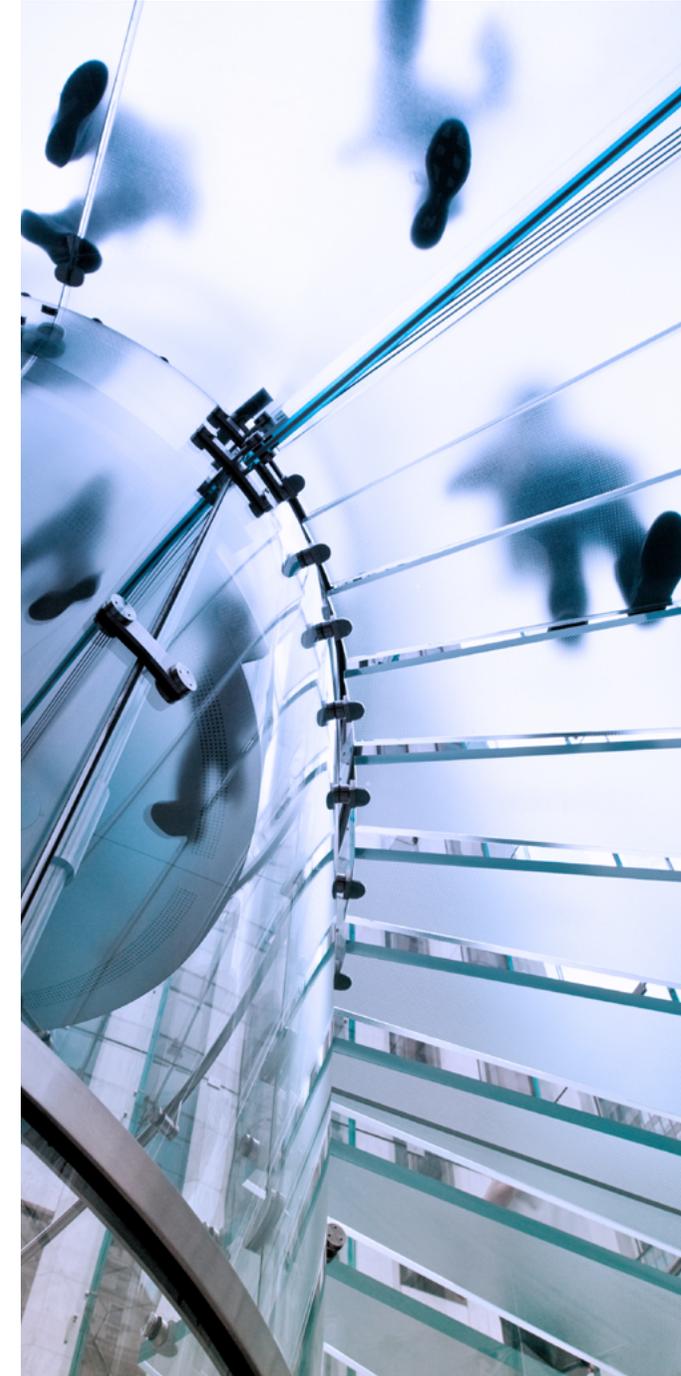
Directors should develop, with management, a set of metrics that will be regularly monitored by the board. This will include metrics about informal and formal reports of sexual harassment, and any litigation risks. Boards of larger organisations might request management to report their actions and initiatives against the AHRC's Seven Standards for complying with the positive duty.

Directors should set expectations for board reports to include data about early indicators and risk factors, particularly around culture and gender equality. For example: What are sex ratios at various levels? How are women represented in leadership? Is alcohol prevalent in the workplace? Is the workplace dispersed/ decentralised? Are there significant power discrepancies in the workforce?

It is important to consider the trends and overarching issues, rather than treating each report as an isolated event.

Be very aware of confidentiality. While it is important for the board to be aware of key incidents and the nature of reports, it is also vitally important that the confidentiality of all parties be respected. Sensitive information should be restricted to the fewest number of people necessary to manage the issue. Reports to the board should be anonymised. Directors should be very aware of this and hold management to account for any breaches.

The board is responsible for safeguarding the organisation's reputation. The prevalence and response to sexual harassment is a key part of this reputation.



Consider the board's public position and approach to confidentiality

The board and management should be clear about the approach to managing reports confidentially and how and when referrals to external organisations such as the police will be made.

People who experience sexual harassment are entitled to have their report managed confidentially and shared with as few people as necessary for effective management. Reports to the board should generally be anonymised.

Routine use of non-disclosure agreements in settling sexual harassment reports or complaints should be

avoided. The board should have visibility of instances where non-disclosure agreements (NDAs) are used within the organisation. Alternative person-centred and trauma-informed approaches should be considered, taking into account the harassed person's preferences.²⁴

Organisations may consider setting a leadership standard by publicly reporting the number of sexual harassment reports, what steps are being taken to eliminate sexual harassment, and the number of non-disclosure agreements made each year. For larger organisations, the WGEA reporting changes will require this information. See the discussion of WGEA reporting requirements on page 7.

QUESTIONS

- Has the Board requested a report on the steps the organisation is taking to meet its positive duty?
- How well are our organisation's new measures being implemented, monitored and reviewed?
- Does the organisation's policies and processes protect confidentiality?
- Does the board understand the use (if any) of NDAs within the organisation and the alternative options that may be preferable?

THE AHRC RECOMMENDED IN RESPECT@WORK THAT THE AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS DEVELOP EDUCATION FOR BOARDS AND DIRECTORS. THIS DIRECTOR TOOL IS ONE COMPONENT OF THE AICD'S PROGRAM IN RESPONSE TO THIS RECOMMENDATION.

For more information on transparency, see the Respect@work Council's 2022, **Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment.**

²⁴ For more detail and advice on this point, see AICD-Clayton Utz, Sexual Harassment in the Workplace Report, at p23-24.

Further resources

- Australian Council of Superannuation Investors and Australian Institute of Company Directors, 2020, **Governing company culture: Insights from Australian directors.**
- Australian Human Rights Commission, 2023, **Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)**, August 2023.
- Australian Human Rights Commission, 2020, **Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace.**
- L Bacon, **Preventing workplace sexual harassment - obligations for directors**, AICD Membership Update, AICD, 23 February 2021.
- Champions of Change Coalition, 2020, **Disrupting the System: Preventing and responding to sexual harassment in the workplace.**
- Chief Executive Women (CEW), 2023, **Respect is Everyone's Business: Resource Pack.**
- Chief Executive Women (CEW), 2023, **Unlocking Leadership: Conversations on Gender and Race in Corporate Australia**
- Clayton Utz (commissioned by AICD), 2021, **Sexual Harassment in the Workplace.**
- S Dempsey, 2021, **The board's role in preventing workplace sexual harassment**, AICD Membership Update, 22 March 2021.
- Fair Work Commission, 2023, **Benchbook: Sexual Harassment Disputes** (Consultation Draft).
- Respect@work Council, 2022, **Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment.**
- Respect@work Council, 2022, **Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints.**
- Respect@work Council, **Resource Hub.**
- Safe Work Australia, 2021, **Model Code of Practice: Managing psychosocial hazards at work.**
- Safe Work Australia, 2022, **Preventing Workplace Sexual Harassment Guide.**



About the authors

This update to the Directors' Tool was written by Dr Karen O'Connell, an Associate Professor at the University of Technology Sydney. Karen's research interests are in the fields of equality law and sex discrimination, and she has many years of experience in law and policy reform. She advises public and private organisations on evidence-based approaches to addressing sexual harassment and discrimination.

The original version of this tool was written by Sally Moyle, an Honorary Associate Professor at the ANU, associated with the Gender Institute. Sally has had extensive experience in international development policy and practice, and over 25 years experience addressing gender issues both domestically and in international development. She has held senior roles in government, including as Principal Gender Specialist and Assistant Secretary with the Australian Department of Foreign Affairs and Trade. Until August 2019, Sally was Chief Executive Officer at CARE Australia.

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For more information 1300 739 119

E: policy@aicd.com.au



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