

## ORGANISATION

# A director's guide to preventing and responding to sexual harassment at work

Boards are being called on to take a more activist governance approach to preventing and addressing workplace sexual harassment in Australia. This resource provides context, practical insights and questions for boards and directors on this systemic and serious issue.

After four decades of attention to gender equality, Australian workplaces remain far from equal. Sexual harassment has been unlawful in Australia at a Federal level since 1984, yet is largely misunderstood, woefully under-reported and badly handled.

At a minimum, sexual harassment is 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.<sup>1</sup>

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

In January 2020, the Australian Human Rights Commission (AHRC) issued its *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report.<sup>2</sup> The inquiry looked into the nature, prevalence and drivers of Australian workplace sexual harassment, as well as measures for addressing and preventing it. It confirmed that sexual harassment occurs "...in every industry, in every location and at every level, in Australian workplaces".<sup>3</sup> The report noted that:

Australians, across the country, are suffering the financial, social, emotional, physical and psychological harm associated with sexual harassment. This is particularly so for women.

This behaviour also represents a very real financial impost to the economy through lost productivity, staff turnover and other associated impacts.<sup>4</sup>

1. L Bacon, "Preventing workplace sexual harassment - obligations for directors", Membership Update, AICD, 23 February 2021, <https://aicd.companydirectors.com.au/membership/membership-update/preventing-workplace-sexual-harassment-obligations-for-directors>.

2. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, AHRC, 2020, file:///C:/Users/JDopico/Downloads/ahrc\_wsh\_report\_2020%20(1).pdf.

3. Ibid, Executive Summary, p 13.

4. Ibid, Executive Summary, p 13.

The report proposes a new framework for organisations to better prevent and respond to sexual harassment at work. This framework is “...victim-centred, practical, adaptable for businesses of all sizes and in all industries, and designed to minimise harm to workers”.<sup>5</sup> The AHRC recognises that improving workplace prevention and response requires an approach that looks beyond just policies, training and complaint handling procedures.

The AHRC framework recommends action in the following areas in order to **prevent** sexual harassment:<sup>6</sup>

- **Leadership** — the development and display of strong leadership, that contributes to cultures that prevent workplace sexual harassment.
- **Risk assessment and transparency** — greater focus on identifying and assessing risk, learning from past experience and transparency, both within and outside of workplaces about sexual harassment, to mitigate the risk it can pose to businesses. This can help improve understanding of these issues and encourage continuous improvement in workplaces.
- **Culture** — the building of cultures of trust and respect, that minimise the risk of sexual harassment occurring and, if it does occur, ensure it is dealt with in a way that minimises harm to workers. This includes the role of policies and human resources practices in setting organisational culture.
- **Knowledge** — new and better approaches to workplace education and training, to demonstrate an employer’s commitment to addressing harassment and initiate change by developing a collective understanding of expected workplace behaviours and processes.

It goes on to recommend action in the following areas in order to better **respond** to sexual harassment:<sup>7</sup>

- **Support** — prioritising worker wellbeing and provision of support to workers, including before they make a report, as well as after they report and during any formal processes.
- **Reporting** — increasing the options available to workers to make a report of workplace sexual harassment and address barriers to reporting, and creating new ways for business owners and employers to intervene to address sexual harassment, other than launching a formal investigation. Adopting a victim-centred approach to the way investigations are conducted when a report is made can minimise unnecessary harm to workers.
- **Measuring** — the collection of data at a workplace-level and industry-level, to help improve understanding of the scope and nature of the problem posed by sexual harassment. This includes understanding the prevalence, nature and impacts of workplace sexual harassment as well as the effectiveness of workplace initiatives designed to address it.

To support this framework, the AHRC recommends the Australian Institute of Company Directors (and the Governance Institute of Australia) develop education for boards and directors. This director tool is the first component of the AICD’s program in response to this recommendation.<sup>8</sup>

5. Ibid, p 34.

6. Ibid, p 34.

7. Ibid, p 35.

8. The AHRC also recommends: the Workplace Gender Equality Agency work with the Workplace Sexual Harassment Council to consider how good practice indicators for measuring sexual harassment might apply under the Workplace Gender Equality Act 2012 (Cth); the Australian Government amend the Workplace Gender Equality Act 2012 (Cth) to require public sector organisations to report on their gender equality indicators; the ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against; industry educational bodies, in consultation with the Workplace Sexual Harassment Council, develop accredited education and training for individuals who are responsible for advising employers on addressing workplace sexual harassment; and the AHRC, in consultation with the Workplace Sexual Harassment Council, develop a set of good practice indicators for measuring and monitoring sexual harassment.

## 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, to cause offence, humiliation or intimidation.

Whether conduct is unwelcome is subjective. It does not matter if the other person was aware it was unwelcome, although there is also a 'reasonableness' test in the *Sex Discrimination Act 1984* (Cth).

In some circumstances, a working environment that is sexually permeated or hostile will amount to sexual harassment.

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.

Particularly where there is a power imbalance, through seniority levels, age, or where a person is in a minority group within the workplace, they may not feel able to make it clear that certain sexual conduct is unwelcome.

### Who experiences sexual harassment; who perpetrates it?

Eighty-five per cent of Australian women and over half of Australian men have been sexually harassed in their workplaces at some point in their lives. Almost two in five women and just over one in four men have experienced sexual harassment in the workplace in the last five years.<sup>9</sup>

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.<sup>10</sup> It is clear that this behaviour is ubiquitous and systematic.

In 79 per cent of cases, one or more of the perpetrators were male.<sup>11</sup>

Women also report experiencing higher levels of offence or intimidation from the conduct.<sup>12</sup>

9. Australian Human Rights Commission *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* AHRC 2018. The Australian Bureau of Statistics also estimates that 53 per cent of women (five million) and 25 per cent of men (2.2 million) over the age of 18 experienced sexual harassment in the 12 months prior to the survey: Australian Bureau of Statistics *Personal Safety Survey 2016* Cat No. 4906.0 ABS 2017.

10. Ibid.

11. Ibid.

12. Ibid.

### What does the law say?

Sexual harassment 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.

Sex discrimination laws make it an offence to victimise a person who makes an allegation or a complaint of unlawful sexual harassment.<sup>13</sup>

Importantly, employers can also be vicariously liable – that is, legally responsible for the actions of their employees or agents – if they fail to take all reasonable steps to prevent the sexual harassment from happening.<sup>14</sup>

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.

#### Safe Work Australia

In January 2021, Safe Work Australia released new 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**<sup>15</sup>

### Drivers of sexual harassment

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

Few workplaces would be willing to tolerate sexual violence, but many workplaces still seem to accept low level sexual harassment such as sexist language or jokes, and a sexually hostile environment. It is part of the same 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, 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 staff feel confident that a report would be dealt with effectively.

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

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

15. L Bacon, 2021, *op. cit.*

## From WHS and risk management to culture and strategy: The role of the board

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.

One of the risk factors for sexual harassment in an organisation is that leaders, including particularly senior leaders and directors, have a poor understanding of sexual harassment. If you are not fully cognisant of the law and the risk of sexual harassment in your organisation, you are in fact increasing the risk of sexual harassment.

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 it is clear this approach has been singularly unsuccessful in eliminating sexual harassment. A new approach is required.

It is important that leaders of organisations recognise that addressing and preventing sexual harassment works on a spectrum from legal compliance through risk management to recognising it is a leadership and safety issue. 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.

However, all organisations benefit when the board plays a strong role in establishing a culture that promotes equality and treats employees fairly.

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## Directors' responsibility for addressing and preventing sexual harassment

### Set minimum expectations

Make sure the organisation has an adequate policy in place and that all staff are aware of it. Human resources and management should review and update it regularly. It should recognise the drivers of sexual harassment, the responsibility of all workplace participants to address it and the importance of culture and leadership. It should establish responsibilities for preventing sexual harassment and clear processes for managing reports.

This policy should form part of a suite of policies including a gender equality policy, code of conduct, values statement and whistleblowing policy that are all consistent in relation to sexual harassment.

#### Questions:

Do you have an adequate policy on preventing and addressing workplace sexual harassment?

Is the policy approved by the board and regularly reviewed as part of the governance calendar?

### Talk about sexual harassment often

The board should include sexual harassment on relevant committee and board meeting agendas regularly. This should provide an opportunity to deepen directors' understanding, assess the organisation's progress, identify any risks or concerns, assess how the organisational culture responds to the issue, and emphasise the ongoing and personal commitment of all directors and management to preventing and addressing sexual harassment. Key messages from the discussions should be circulated to staff. Directors should take opportunities to emphasise to staff the commitment to preventing and addressing sexual harassment and building a respectful, just and safe culture.

All staff should be aware of the commitment of the board to eliminating and addressing sexual harassment and of the consequences for harassment. Evidence shows that the certainty of consequences is more important than their severity, so the board must ensure it is communicating a zero-tolerance position and follows through.<sup>16</sup> Active leadership is important.

#### 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 staff?

How long has it been since the board communicated these expectations to staff?

16. Paula McDonald, Sara Charlesworth & Tina Graham "Developing a framework of effective prevention and response strategies in workplace sexual harassment" Asia Pacific Journal of Human Resources (2014) Vol 53 (1).

**Scrupulously model appropriate behaviour**

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 staff 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:**

Are you confident directors' personal communication styles and behaviour model the desired culture?

Do you discuss this at board level?

**Recruit the right leaders 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. Many organisations still tolerate poor or unlawful behaviour on the part of their leaders because of an assumption that they are valuable. Boards should be particularly mindful of the risk that bad behaviour by high performers will be overlooked.

Focussing on gender balance in leadership will generally support efforts to address and prevent sexual harassment since diverse leadership teams bring a variety of perspectives and are more likely to model equality.

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

**Questions:**

Are 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?

### Encourage reporting and ensure there is no backlash for doing so

Sexual harassment is notorious for underreporting. 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 workmates. If your workforce feels like this, directors should treat it as a major red flag about the workplace culture and therefore the real risk of harassment occurring.

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 staff 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 on sexual harassment?

What are the trends in reporting?

Does the board consider potential systemic issues when reviewing periodic reporting?

### 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.

It should 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.

#### Questions:

Are you comfortable that the board understands the dynamics and prevalence of sexual harassment in the organisation and how it relates to the organisational culture?

Does the organisation conduct staff surveys that ask about perceptions of the culture and sexual harassment?

### Manage risks

Safe Work Australia points to the importance of managing sexual harassment as a risk for organisations. It is the directors' and officers' duty to eliminate the risk as far as practicable. This means effectively identifying hazards, assessing risks, taking steps to control the risks so as to prevent the conduct, and regularly reviewing progress.

It is important that this management be undertaken in good faith and authentically.

Involving staff in developing controls will help build staff buy-in and build a stronger risk management approach.

#### Questions:

Has the organisation undertaken a risk assessment specifically for workplace sexual harassment?

Does the board, or relevant board committee, consider workplace sexual harassment risks in overall risk management and governance?

### 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.

Some organisations routinely require non-disclosure agreements in settling sexual harassment reports or complaints. The board should closely consider whether this is the best approach to managing sexual harassment, as it can sometimes be used to silence victims.

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 (NDAs) made each year.

#### Questions:

Are you confident that reporting of sexual harassment balances confidentiality with transparency and leadership?

Does the board understand the use (if any) of NDAs within the organisation?

### 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, providing natural justice to all parties. Confidentiality, reporting and referrals to external organisations need to be clear and well understood. The board may require legal advice to develop and implement these processes but should ensure they reflect the board's commitment to build a culture of respect and safety, rather than taking a purely reputation management and legalistic approach.

Directors should ensure 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 staff, and taking into account the need to balance confidentiality and natural justice.

#### Question:

Are you confident your organisation's management of reports, whether formal or informal, is based on due process and natural justice and reflect your commitments to eliminate sexual harassment?

### **Ensure the organisation adequately resources work to prevent and address sexual harassment**

Many organisations understand the importance of training as a tool for preventing sexual harassment, but fewer understand that it can fail to work or actually be counter-productive if it is imposed on an organisation where sexual harassment is not seen to be taken seriously. Directors should be confident that training is introduced when the board and management are confident that processes are in place and the culture is established. Once training is introduced, it is important that staff at all levels, as well as the directors, are given tailored training. This should include training to support bystanders and witnesses to intervene. Training should be regularly refreshed.

Resources should be devoted to clearly communicate expectations, supports and processes.

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

#### **Question:**

Have directors and staff at all levels received training about sexual harassment?

### **Build a just, respectful and safe culture**

A culture of respect, natural justice and safety is a pre-condition for eliminating sexual harassment. This means staff should commonly perceive internal processes generally as fair, and should feel trust in the organisation, their colleagues and leaders. Staff can recognise where statements about sexual harassment are merely lip service and where that is so, it may foster a culture of impunity and tolerance for sexual harassment.

Directors should consider introducing processes, adapted to the size and nature of the organisation, for assessing the organisational culture. This could include staff surveys, focus discussions, site walk-throughs, and should always include informal assessments of the climate and culture.

Leaders can often be surprised when allegations of sexual harassment emerge against their senior staff. But for many staff, there is no surprise at all. It is important for directors to have their eyes open at all times and look carefully at senior staff and fellow directors' engagement with colleagues, particularly junior colleagues.

#### **Questions:**

What tools does the board have to assess organisational culture and staff morale?

Is the board confident that the culture is one of respect and safety?

### Promote 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.

This means reducing sex segmentation in the workforce, so that women and men can work in all business areas and at all levels of the organisation. 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 larger organisations should pay close attention to reports to the Workplace Gender Equality Agency and recognise that poor performance in one or more areas of these reports could well be a warning sign for sexual harassment, as well as a problem in its own right.

#### Question:

Are there adequate initiatives in place to promote gender equality in the organisation, including in leadership roles?

### Further resources:

- Australian Human Rights Commission, 2020, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplace*
- Male Champions of Change, 2020, *Disrupting the System: Preventing and responding to sexual harassment in the workplace*
- AICD Governance Snapshot, 2021, *The board's role in preventing workplace sexual harassment*
- S Dempsey, 2021, *"The board's role in preventing workplace sexual harassment"*, *Membership Update*, 22 March, Australian Institute of Company Directors
- Australian Council of Superannuation Investors and Australian Institute of Company Directors, 2020, *Governing company culture: Insights from Australian directors*

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