



Positive Duty: preventing and responding to workplace sexual harassment

Insights from Australian directors

Australian
Institute of
Company
Directors



AHRC Foreword



Dr Anna Cody
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Three years ago, the Australian Human Rights Commission's (AHRC) landmark national inquiry into workplace sexual harassment revealed that it was widespread and pervasive; occurring in every industry, in every location and at every level. We also learnt that some individuals and groups experience sexual harassment at much higher rates. Women from culturally and racially marginalised backgrounds experience higher levels of sexual harassment, along with First Nations women and people from LGBTIQ+ communities.

Our resulting report, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work Report) was a catalyst for change. It prompted a close review of existing legal frameworks and highlighted the need for a more systemic and preventative approach as well as greater coordination between Australia's anti-discrimination, employment and work health and safety laws.

Against that backdrop, the *Anti-Discrimination and Human Rights Legislation (Respect at Work) Act 2022* (Cth) passed Parliament in December 2022, introducing a positive duty on companies to take reasonable and proportionate measures to eliminate sexual harassment, sex-based harassment, sex discrimination, hostile workplace environments and victimisation in connection with work, as far as possible. I welcome the decision to extend the positive duty beyond workplace sexual harassment.

Fulfilling this new obligation requires a shift from a traditionally reactive approach grounded in a complaints-driven model, to a proactive approach that places the responsibility for change in the hands of employers, where it belongs. Simply responding to reports of individual incidents is not enough.

The AHRC has been equipped with regulatory powers to enforce compliance with the positive duty. The AHRC expects

organisations to take action across seven standards, using four guiding principles, detailed in our *Guidelines for Complying with the Positive Duty* – including leadership initiatives, risk management and transparency.

While enforcement activities are important, they will not shift the dial on their own. Instead, a cultural lens should be applied, putting employees and workers at the centre of an organisation's approach by consulting with them across their diversity. The importance of diverse perspectives and experiences to understanding the nature and extent of the issues within an organisation is underlined in this research. Boards and directors will play a crucial role in championing this approach from the top. From a governance perspective, change requires visible prioritisation and ongoing oversight. It also requires investors and other stakeholders to hold organisations accountable for practices and outcomes that fall short of expectations.

I am therefore pleased that the Australian Institute of Company Directors (AICD) and Australian Council of Superannuation Investors (ACSI) have partnered on this initiative and I commend the directors who contributed their time and insights to this valuable research.

It is heartening to see the steps that organisations are taking to foster safer, respectful and more inclusive and diverse workplaces. But there is still a long way to go, and organisations must continue to build on the collective momentum we have seen over recent years.

I commend this Report to organisations of all sizes and sectors. I encourage directors and senior leaders to draw on its insights and recommendations, as Australia enters a new critical phase of our Respect@Work journey.



AICD and ACSI Forewords

In 2020, the AHRC's Respect@Work Report shone a light on the prevalence of sexual harassment in the workplace. Such conduct was alarmingly common, with employers' responses often inadequate. A new approach was needed.

The positive duty presents an opportunity for employers to demonstrate their commitment to stamp out harmful conduct, and to bring about important cultural change. It is without question that the prevention of workplace sexual harassment is relevant to various streams of the board's work including health and safety; oversight of organisational culture; and risk management.

The AICD undertook this research with ACSI to understand how prepared boards are for their obligations, and to support directors in navigating this new landscape. I encourage directors to draw on the insights and recommendations shared in this report and to show leadership in helping to foster safer and more respectful workplaces.



Mark Rigotti
MD & CEO, AICD



Louise Davidson
CEO, ACSI

ACSI advocated for, and welcomed, the introduction of the positive duty because workplace sexual harassment, bullying and hostile work environments not only harm individuals, they can also have serious financial impacts on companies and lead to significant reputational damage. As long-term investors, it is in the interests of ACSI's members that the companies in which they invest are well-run, safe, and have supportive and healthy cultures.

Investors are interested in how companies are addressing the prevention and management of positive duty conduct. This research is important in highlighting where challenges remain for boards and how investors can support and encourage greater engagement in this vital issue.

ACSI will continue to meet with boards to understand how they are building effective cultures that encourage all people to meet their positive duty responsibilities.

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AHRC POSITIVE DUTY GUIDELINES

In 2022, the Australian Parliament responded to the *Respect@Work Report* and reformed federal anti-discrimination law. The Sex Discrimination Act now requires organisations and businesses to take proactive action to eliminate sexual harassment and other positive duty conduct, so far as possible. The intention of this new legal obligation is to create a systemic shift in organisations from responding to harm after it happens to preventing it before it occurs. This is likely to be best achieved through companies taking comprehensive and sustained actions, rather than by a minimal compliance approach.

In August 2023, the AHRC issued the *Positive Duty Guidelines*, which provides comprehensive guidance for employers on how to satisfy the positive duty. These Guidelines set out four Guiding Principles which should inform the implementation of the seven Standards that the AHRC expects organisations and businesses to meet.

The Guiding Principles are:

- Consultation
- Gender equality
- Intersectionality
- Person-centred and trauma-informed

The Standards are:

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

From 12 December 2023, the AHRC will have the power to monitor and enforce compliance with the positive duty. The Positive Duty Guidelines will be used by the AHRC to assess compliance.

In addition to the Positive Duty Guidelines, the AHRC has produced a **suite of guidance material** in relation to the positive duty, to assist organisations and businesses understand their obligations.

Executive Summary

OVERVIEW

Building a gender equal, safe and respectful culture is a growing priority in boardrooms across the world and the role of governance is key. In the past, responses to workplace sexual harassment have often focused on reputation management and compliance. Organisations primarily acted only after an incident occurred.

We are three years on from the release of the AHRC's landmark Respect@Work Report.¹ There has now been a legislative response, which included the introduction of the new positive duty under the *Sex Discrimination Act 1984* (Cth) (*Sex Discrimination Act*).

The positive duty requires all employers to take 'reasonable and proportionate measures' to eliminate, as far as possible, sexual harassment² and an additional set of unlawful conduct, including sex discrimination,³ sex-based harassment,⁴ hostile workplace environments,⁵ and victimisation.⁶ Refer to [Appendix A](#) for key terms. In this report, the unlawful conduct covered by the positive duty is referred to as 'sexual harassment and other positive duty conduct'.

This report provides new insights into how prepared the boards of the ASX 300 are for the new legal landscape based on a survey and interviews with ASX directors and an assessment of a small sample of public reporting.

Overall, board practices to prevent and respond to sexual harassment and other positive duty conduct have improved and there is increased momentum across Australian boardrooms to take action. While this issue is growing in prominence, it is still often driven and prioritised by one or two directors on the board, and they are often women directors. To fulfil the spirit and intention of the new positive duty, collective buy-in and ownership by all directors will be required.

There is an opportunity to build on existing governance practices to prevent and respond to sexual harassment and other positive duty conduct. However, a key challenge is building understanding of the broader range of behaviours that the positive duty covers as well as some of the permissive behaviours that are often drivers of this conduct and which perpetuate gender inequality. Greater awareness is needed among directors to be able

to constructively engage with management on positive duty obligations.

Culture is a fundamental lever to drive the changes required by the positive duty. This includes actions to advance gender equality, diversity, and inclusion in the workforce.

Gaining visibility over culture through a range of approaches and lead and lag indicators remains a key challenge for directors.

There have been promising developments in companies integrating sexual harassment and other positive duty conduct into workplace health and safety (WHS) risk management frameworks. The maturity and level of sophistication of these frameworks presents an opportunity for directors to drive better processes and governance in the prevention and response to sexual harassment. However, there has been slow progress overall in companies treating psychosocial hazards with the same priority as physical safety concerns.

¹ AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020).

² *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2) (b), 47C(4) (a).

³ *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2) (a) (i)-(iv).

⁴ *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2) (b), 47C(4) (a).

⁵ *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2) (c), 47C(4) (b).

⁶ *Sex Discrimination Act 1984* (Cth) ss 47C(1), 47C(2) (d), 47C(4) (c).



The underreporting of sexual harassment and other positive duty conduct remains a significant concern. A key barrier to reporting this conduct is the lack of trust and confidence in systems, processes and outcomes, where workers who have experienced this conduct believe that the costs of reporting or pursuing a resolution outweigh the benefits. Ensuring that response and support systems are trauma-informed and person-centred is a key strategy for lifting trust and confidence in reporting. Internal communication to share de-identified information on incident reports received and actions taken is also key.

Transparency internally offers an opportunity to shift the dial. Organisations that have been transparent around incident reports and the prevalence of sexual harassment and other positive duty conduct have reported a positive impact on culture. Similarly, companies that are transparent externally, engender trust from investors and other key stakeholders. While internal and external disclosure remains nascent, directors have identified the need for a rethink and new approach to demonstrate the commitment to addressing sexual harassment and other positive duty conduct within their organisations.

SURVEY INSIGHTS

- **85 per cent** of directors reported that they strongly or somewhat agreed that the prevention of workplace sexual harassment and other positive duty conduct is a high priority issue for their board.
- **41 per cent** of directors indicated that their board was receiving training on workplace sexual harassment and other positive duty conduct, compared to 78 per cent indicating that employees were receiving such training.
- **Only 20 per cent** of women directors reported that their boards had a very adequate understanding of the nature of other positive duty conduct such as sex discrimination, sex-based harassment, hostile workplace environments on the basis of sex and victimisation. In contrast, 39 per cent of men directors reported the same.
- **32 per cent** of women directors and 45 per cent of men directors strongly agreed with the statement that their organisation is well prepared to meet its positive duty obligations as an employer.
- **70 per cent** of directors indicated that their organisation has set targets to achieve gender balance in management roles via recruitment and promotion strategies.

KEY FINDINGS AND RECOMMENDATIONS

The following table summarises the key findings of the report and recommendations for directors and investors.

In considering compliance with the positive duty under the Sex Discrimination Act, the AHRC will assess companies against its ***Guidelines for Complying with the Positive Duty*** under the Sex Discrimination Act 1984 (Cth) (Positive Duty Guidelines). Where findings and best practices connect to these Guidelines, this has been referenced throughout the report.

This report is not a substitute for the Positive Duty Guidelines. It aims to assist directors and investors in framing and interrogating their company's culture and contains strategies for them to actively oversee their company's prevention and response strategy for the unlawful conduct covered by the positive duty.

Key findings from director interviews	Recommendations for directors
<p>READINESS AND UNDERSTANDING OF THE FULL SCOPE OF THE POSITIVE DUTY</p> <ul style="list-style-type: none"> • There has been a growing focus on sexual harassment among boards, particularly the ASX 100, but sentiment on readiness and understanding of the full scope and obligations of the positive duty is mixed. • Directors emphasised the need for further education to enhance their understanding of the nature and extent of the full scope of the conduct covered by the positive duty, including sex discrimination, sex-based harassment, sexual harassment, hostile workplace environments and victimisation. 	<ul style="list-style-type: none"> • Request a briefing session for the board and senior management, to be delivered by experts, on the positive duty. This should have a focus on the role and responsibilities of senior leaders, scope of the positive duty conduct and include a summary of key drivers and risk factors, with reference to industry-specific data and analysis.
<p>ROLE OF BOARD IN LEADING FROM THE TOP</p> <ul style="list-style-type: none"> • The board plays a critical role in setting the 'tone from the top'. This includes setting the agenda, asking questions and role-modelling expected behavioural standards to ensure a safe and respectful culture. • To shift the dial on sexual harassment and other positive duty conduct within organisations, directors cite the need not to view the positive duty as a compliance exercise but rather an opportunity to drive cultural change. • Selection of the CEO and incentives for leaders to champion a respectful workplace culture are critical. • Directors would like to see management prioritise initiatives to prevent workplace sexual harassment and other positive duty conduct and be proactive, not reactive, in putting these issues on the board's agenda. 	<ul style="list-style-type: none"> • Ensure that sexual harassment and other positive duty conduct is a regular board agenda item and that directors can ask questions about these issues. • Ensure the board is provided with appropriate data to understand the prevalence of positive duty conduct, the drivers and risk factors present in the organisation and the implementation and evaluation of strategies to address these. • For larger entities, use People and Culture, Remuneration, Audit and Risk board committee processes to integrate positive duty obligations into board agendas, and clarify shared responsibilities across committees, where applicable, in committee charters. • Align CEO and senior management appointments, expertise and performance management with positive duty obligations. • Consider embedding safety and culture into short-term and long-term incentives within remuneration frameworks.

Key findings from director interviews

INTEGRATING THE POSITIVE DUTY INTO SAFETY AND RISK MANAGEMENT FRAMEWORKS

- Treating sexual harassment and other positive duty conduct in the same way as physical safety, is an opportunity to accelerate action, particularly in establishing leadership accountability and collective responsibility for identifying and addressing risks.
- Leading organisations are incorporating sexual harassment and other positive duty conduct into WHS and enterprise risk frameworks.
- Overall there is slow progress on treating psychosocial hazards with the same priority as physical safety issues.

VISIBILITY OVER ORGANISATIONAL CULTURE

- Gaining adequate visibility over organisational culture, particularly sub-cultures in pockets of the organisation, is a key priority for directors often requiring the triangulation of different data and information. For example, engagement and pulse surveys, complaints data, whistleblower reports and exit interviews.
- Accelerating progress on gender equality initiatives and diversity and inclusion within the organisation is seen as a key lever for creating a safe and respectful workplace culture.

Recommendations for directors

- Champion a focus on psychosocial hazards, including sexual harassment and other positive duty conduct, in WHS risk frameworks and other risk enterprise processes.
 - Ask management for risk assessments for sexual harassment and other positive duty conduct to be based on national and industry-based prevalence data on sexual harassment, and research on drivers and risk factors.
-
- Prioritise expanding measures of culture to ensure adequate visibility of sexual harassment and other positive duty conduct across the organisation. This could include:
 - Consulting with workers about their experiences of sexual harassment and other positive duty conduct, ensuring the participation of workers more susceptible to sexual harassment;
 - Internal audit functions addressing culture, sexual harassment and other positive duty conduct in their investigations and reports; and
 - Survey-based metrics including anonymous portals to gain insight into prevalence.
 - Using lead indicators, particularly measures of gender inequality, as well as lag indicators, such as poor retention rates for women, to understand culture.

Key findings from director interviews	Recommendations for directors
<p>REPORTING, OUTCOMES AND 'SPEAKING UP'</p> <ul style="list-style-type: none"> • Lifting reporting rates and establishing a 'speak up' culture remains a key challenge for organisations. • Directors suspect fear of victimisation and a 'minimisation' of certain unlawful conduct as likely factors for underreporting. 	<ul style="list-style-type: none"> • Champion actions to strengthen a safe reporting and response culture and increased reporting of sexual harassment and other positive duty conduct, recognising that increased reporting is an indicator of a safer reporting culture. • Seek detailed information on the outcomes of reporting processes, including the ongoing impacts of the process for individuals and teams. • Seek to understand extent and reasons for underreporting by meaningfully engaging with staff. • Regularly compare organisational reporting rates with national and industry-specific prevalence data.
<p>TRANSPARENCY AND ACCOUNTABILITY</p> <ul style="list-style-type: none"> • There is limited but growing internal and external transparency around the prevalence of sexual harassment and other positive duty conduct and the consequences that flow from this conduct. • Organisations that are transparent and share information about sexual harassment and other positive duty conduct with their workforce report a significant positive impact on workplace culture. 	<ul style="list-style-type: none"> • Champion regular internal and public reporting on key metrics related to sexual harassment and other positive conduct, and actions taken. • Set expectations for the sharing of de-identified information on incidents of sexual harassment and other positive duty conduct internally, as well as actions taken. This is to build confidence in systems and demonstrate a culture of accountability.

Recommendations for investors

Seek information on how investee entities are preventing and responding to sexual harassment and other positive duty conduct, including:

- Approaches to measuring the nature and extent of sexual harassment and other positive duty conduct in the organisation;
- De-identified information on the outcomes of reports and actions taken for sexual harassment and other positive duty conduct that occurs within the organisation;
- Risk management approaches, including integration into work health and safety and psychosocial risk assessment processes;
- Approach to the oversight of organisational culture and the data the board gathers to understand it;
- Commitment to, and progress on, gender equality and diversity and inclusion indicators (including through WGEA reporting);
- The provision of training on the positive duty, including its frequency and content for the workforce and the board; and
- Supports available for people who report sexual harassment and other positive duty conduct.

Introduction

WHY THE POSITIVE DUTY MATTERS

Boardrooms across the world are increasingly prioritising building a gender equal, safe and respectful workplace culture and the role of governance is key. Regulators and investors across the globe are increasingly focused on how companies are better leveraging culture to improve business outcomes. At the same time, recent social movements, such as #MeToo, have also stimulated a growing appetite for action and change, with a profound shift in community attitudes towards workplace sexual harassment and discrimination.

In the past, companies' responses to workplace sexual harassment have often focussed on reputation management and minimal compliance efforts such as once-off workforce training. Organisations primarily acted only after an incident was reported.

The new positive duty under the Sex Discrimination Act requires a proactive and comprehensive approach towards elimination, including actions to prevent sexual harassment and other positive duty conduct from occurring in the first place. When or if it does occur, the positive duty also requires organisations to respond effectively.

The positive duty is an opportunity to align the business and regulatory imperatives for lasting cultural change that benefits individuals, organisations and broader society.

The business case for a diverse, safe and respectful culture is clear. Research has consistently demonstrated the benefits that private sector organisations have gained by prioritising gender equality and diversity, particularly through targets that accelerate gender balance and diversity in leadership. The benefits include:

- increased financial performance, productivity, innovation and profitability;
- increased attraction and retention of diverse talent; and
- improved organisational culture.⁷

Investors also have a growing interest in culture, including sexual harassment and other positive duty conduct, as a key environmental, social and governance (ESG) issue. In its **Governance Guidelines**, ACSI identifies that ESG risks and opportunities have a material impact on investment outcomes. Sexual harassment can expose companies to significant reputational risk, both now and in the future.

⁷ Rocío Lorenzo et al, *How diverse leadership teams boost innovation* (Article, January 2018)
Rebecca Cassells and Alan Duncan, *Gender Equity Insights 2021: Making it a Priority: BCEC & WGEA Gender Equity Series* (March 2021)



It can also have financial implications, affect operations and impact a company's social licence to operate. Long-term investors are well aware of these risks and have an interest in supporting the companies in which they invest to be well-run, safe for their people, and have cultures that effectively prevent and address workplace sexual harassment.⁸ Institutional investors, in their capacity as employers, are also subject to the positive duty in respect of their own workforces.

Most Australian organisations now recognise that sexual harassment and other forms of sex discrimination are unlawful and create unsafe workplaces. This conduct can pose a significant risk to the physical and psychological health and wellbeing of workers. The extension of the positive duty to the conduct of third parties such as customers and clients recognises the important role that organisations can play in protecting their workers from behaviour such as sexual harassment. Many organisations also understand that if sexual harassment and other positive duty conduct occurs in their workplaces it is a reputational, legal and financial risk to the business and can adversely affect culture, productivity and the ability to attract and retain talent, customers and investors. Deloitte Access Economics has estimated that workplace sexual harassment costs the Australian economy \$3.8 billion in the 2018–2019 financial year.⁹ Despite this, sexual harassment and gender inequality is still prevalent in Australian workplaces.

KEY DATA POINTS FROM *THE FIFTH NATIONAL SURVEY ON SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES*¹⁰

- One in three (33 per cent) workers said that they had experienced workplace sexual harassment in the last five years: 41 per cent of women and 26 per cent of men have been sexually harassed at work.
- Some groups of people reported experiencing workplace sexual harassment at rates disproportionate to the total population: 47 per cent of those aged 15-17 and 46 per cent of those aged 18-29, 46 per cent of workers who identified as gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure or questioning; 56 per cent of Aboriginal and Torres Strait Islander workers, 70 per cent of workers with an intersex variation, and 48 per cent of workers with a disability.
- Fewer than one in five people (18 per cent) who indicated they experienced workplace sexual harassment in the last five years made a formal report or complaint about the harassment.
- Of those who did make a report or complaint, around one quarter (24 per cent) said it resulted in no consequences for the harasser.¹¹

Additionally, recent ANROWS research found that 46 per cent of migrant and refugee women experienced sexual harassment in the workplace in the last five years.¹²

8 ACSI, Governance Guidelines: A guide to investor expectations of listed Australian companies (December 2021) 32.

9 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace: Final Report* (March 2019) 5.

10 AHRC, *Time for Respect: Fifth national survey on sexual harassment in Australian workplaces* (2022) 12.

11 AHRC, *Time for Respect: Fifth national survey on sexual harassment in Australian workplaces* (2022) 14.

12 ANROWS, *Migrant and refugee women in Australia: A study of sexual harassment in the workplace* (August, 2023)



THE ROLE OF DIRECTORS IN DRIVING CHANGE

Directors play a fundamental role in setting the 'tone from the top' by championing best practice in the elimination of unlawful conduct, role-modelling behaviour, and by actively promoting a culture of safety, equality, respect and inclusivity. Directors should take responsibility and accountability for ensuring that their company has in place a robust governance framework for sexual harassment and other positive duty conduct, and for monitoring the effectiveness of this framework across the company. By intentionally prioritising the implementation of the positive duty, directors can help to ensure that their organisations are legally compliant, safe, respectful and empowering workplaces.

The critical role and importance of boards in implementing the positive duty is recognised in the Positive Duty Guidelines. Under the Guidelines, 'senior leaders', which includes board directors, are required to actively oversee the development and implementation of appropriate measures to prevent unlawful conduct. Directors are also expected to understand their new obligations and be visible in their commitment to safe, respectful and inclusive workplaces that value diversity and gender equality.¹³

EARLIER ACSI/AHRC RESEARCH: SEXUAL HARASSMENT IN ASX 200 COMPANIES

In 2021, ACSI and the AHRC conducted a joint research project to assess the state of sexual harassment reporting in Australia's largest companies.¹⁴ This research surveyed and interviewed company secretaries, investor relations leads and executive directors of human resources of ASX 200 companies. The research did not directly assess the views and attitudes of directors, but made a number of recommendations in relation to board responsibility, oversight and accountability for the prevention and response to sexual harassment.

The research found that only 19 per cent of respondents considered that the board had primary responsibility and accountability for the prevention and response to sexual harassment, and only 43 per cent confirmed that sexual harassment was a regular board agenda item. The research also found that external events often served as the prompt for board discussions on these issues, suggesting that boards had been taking a reactive, rather than preventative, approach to addressing sexual harassment in their organisations.

AICD DIRECTOR'S GUIDE TO THE POSITIVE DUTY

The AICD has published a [Director's Guide: Positive duty to prevent workplace sexual harassment](#). It provides practical guidance for Australian directors to assist them in meeting their positive duty obligations to prevent workplace sexual harassment and other positive duty conduct. The guide covers:

- Directors' positive duty obligations and the AHRC's expectations of organisations;
- Practical guidance to equip directors with suggested steps to elevate workplace sexual harassment at the board level; and
- Key questions to be asking management teams.

¹³ AHRC, Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth) (2023) 24, 29–38.

¹⁴ AHRC, [Equality across the board: Investing in workplaces that work for everyone](#) (2021)

METHODOLOGY AND AIMS OF THIS RESEARCH

This research has expanded the insights of the previous research to capture the views, attitudes and perspectives of ASX 300 directors. This initiative has been undertaken at a critical time. Three years on since the release of the Respect@Work Report and following the introduction of the positive duty, this research has been undertaken to gain insight into how prepared the boards of the ASX 300 are for the new legal landscape.

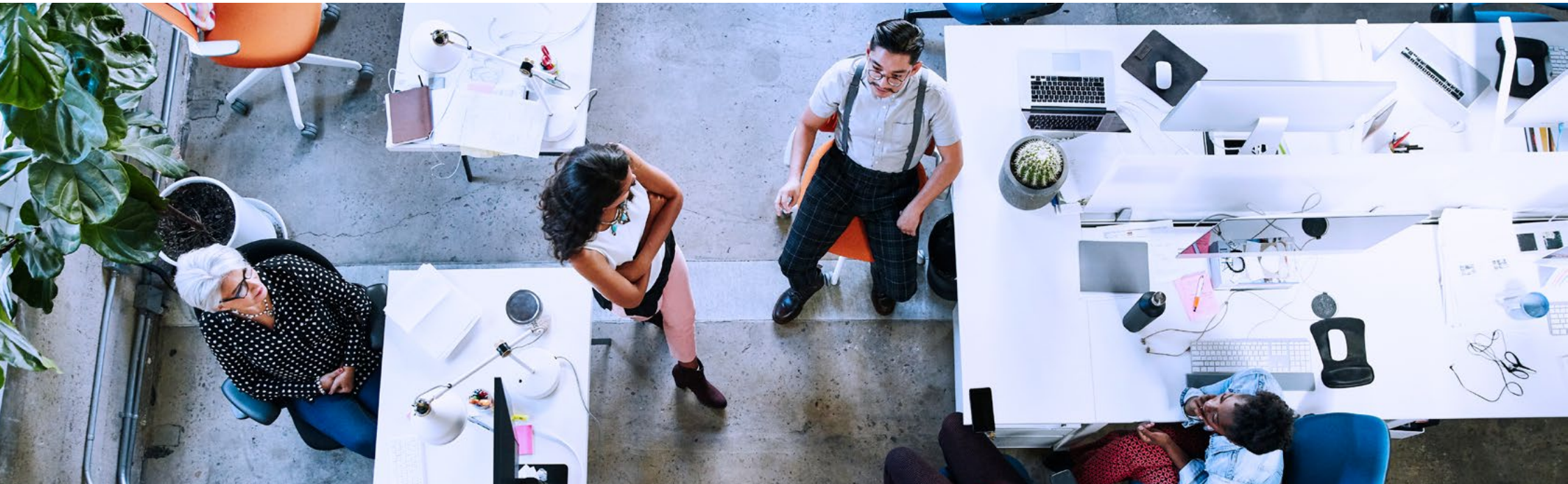
The research has been informed by a survey and interviews with ASX 300 company directors and a desktop review of current ASX 300 company disclosures on sexual harassment prevalence and prevention measures.¹⁵

While the research has assessed the perspectives and practices of ASX 300 company directors, the findings and recommendations in this report are intended to assist directors of organisations of all sizes and sectors in meeting their obligations under the positive duty. The research identifies common challenges that directors face, highlights better governance practices, and sets out key areas that may require further attention.

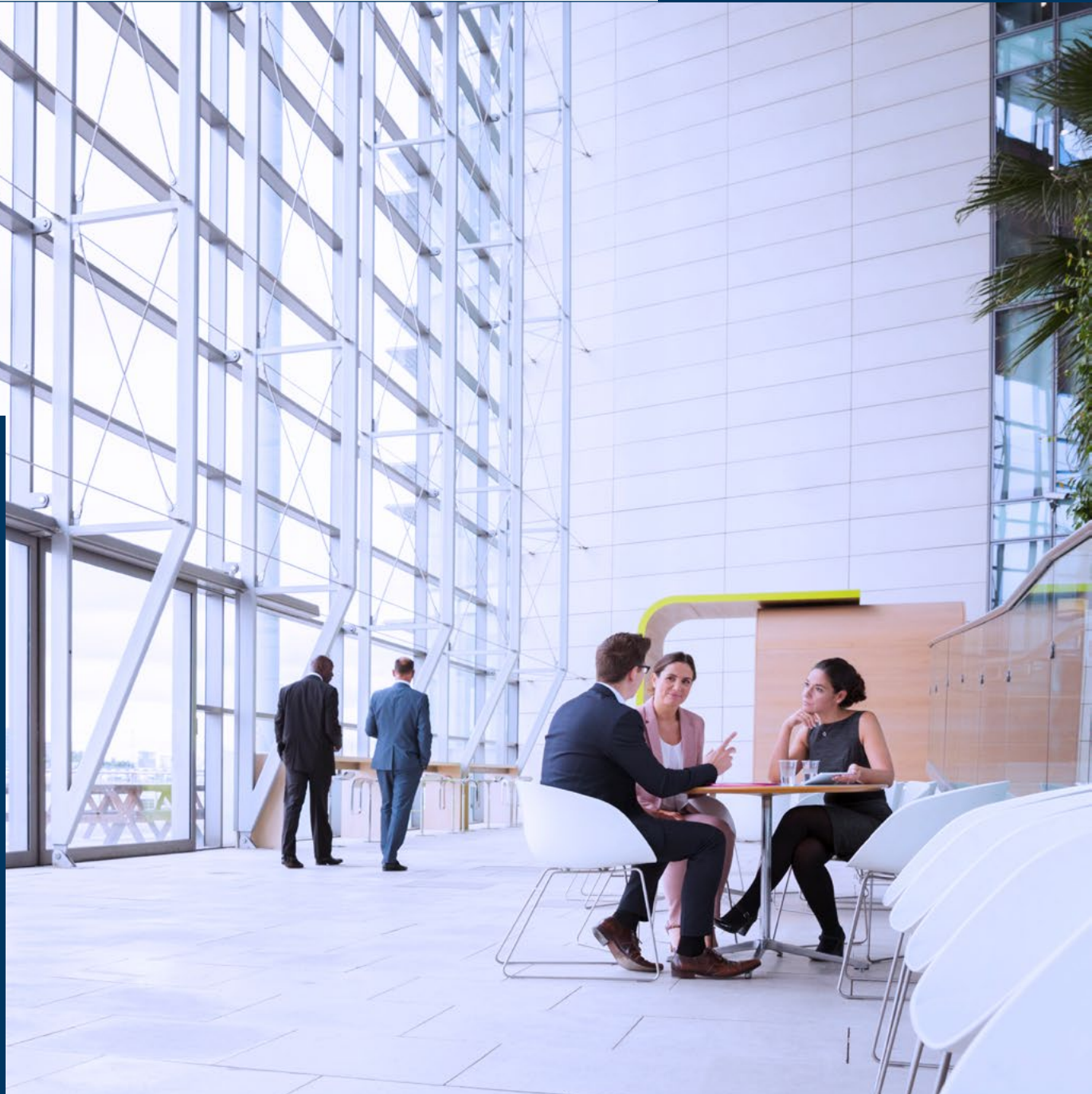
It also provides clear, targeted questions that directors may ask their CEO and management team to ensure they have active oversight of the implementation of the measures designed to satisfy the positive duty.

This report also intends to assist investors by providing them with key questions that they can ask of their investee entities to satisfy themselves that there is not an unacceptable risk of sexual harassment and other positive duty conduct occurring at the investee entity. This will ultimately assist investors in their assessment of whether investee entities have identified and managed this financially material ESG risk.

¹⁵ There were 142 respondents to the survey from ASX listed Board Directors. 39% of survey respondents were women, 36% men and 26% preferred not to say. 27% respondents described their primary organisation as being in the mining sector, while 13% were financial and insurance services and 11% in manufacturing. 19 practising ASX listed Board Directors were interviewed for this research from across a range of sectors.



Research Insights



1. Board readiness and understanding of the full scope of the positive duty

FINDINGS

- There has been a growing focus on sexual harassment among boards, particularly the ASX 100, but sentiment on readiness and understanding of the full scope and obligations of the positive duty is mixed.
- Directors emphasised that further education to enhance their understanding of the nature and extent of the full scope of the conduct covered by the positive duty is necessary, including sex discrimination, sex-based harassment, sexual harassment, hostile workplace environments and victimisation.

KEY ISSUES

Following the publication of the Respect@Work Report in 2020 and the increased focus on sexual misconduct following the global #MeToo movement, boards have increasingly focused on workplace sexual harassment and their role in preventing and responding to it.

I think the biggest shift I have seen in the boardroom is that there is an acceptance that these behaviours are an issue, and we need to do something about it.

— ASX Board Director

The survey data echoes this view, with 85 per cent of directors reporting that they strongly or somewhat agreed that the prevention of workplace sexual harassment and other positive duty conduct is a high priority issue for their board.

Directors shared that the increased priority given to workplace sexual harassment was not always consistent across organisations, with ASX 100 boards more likely to have an intentional focus, largely driven by greater internal resources.

Women directors shared that boards were more likely to focus on workplace sexual harassment when the issue was championed by women on boards and by the men who were visible gender equality champions – including men who are directors, CEOs and other senior leaders.

It has taken many attempts and specific questioning from me for this issue to reach the boards I'm involved with in a meaningful way. It has taken the women on the boards to raise it. It has taken time to move from mere questions and inquiry to having actual visibility on reporting. Our response to this is very much still in its infancy and is immature.

— ASX Board Director

Directors also reflected that an increased focus on sexual harassment often resulted from an incident or complaint that came to the board's attention, particularly if it involved a senior leader in the organisation. The discussion of reported incidents was often a catalyst for boards understanding workplace sexual harassment and other positive duty conduct as a systemic issue and the limitations of current processes and strategies in place to address it.

One of the organisations I have been involved in has had a couple of major shocks on this issue. As a result, the board has taken time to understand whether it was handled correctly and what broader implications it might have. Sexual harassment is definitely something that has grown in focus since then.

— ASX Board Director

Directors shared that the level of understanding of the full spectrum of unlawful behaviour covered under the new positive duty is mixed.

Boards that have a more nuanced understanding of the range of unlawful conduct covered by the positive duty had been briefed by legal teams and had specifically discussed the new positive duty obligations as an agenda item.

However, directors largely agreed that the new obligations were narrowly understood and that greater education on the full spectrum of unlawful conduct was required. The survey found that 41 per cent of directors indicated that their board was receiving training on workplace sexual harassment and other positive duty conduct, compared to 78 per cent indicating that only employees were receiving such training.

The need for a more comprehensive understanding of the nature of unlawful conduct covered by the positive duty was reflected in the survey data which found that only 20 per cent of women directors and 39 per cent of men directors reported that their boards had a 'very adequate' understanding of the nature of conduct such as sex discrimination, sex-based harassment, hostile workplace environments on the basis of sex and victimisation.

I think that broadly, the issues arising under the Respect@Work Report are understood very narrowly. These behaviours are not approached as cultural issues. If there are crimes occurring, the more serious conduct, we often see that recognised by the board as wrong and outrageous and that something needs to be done. But then, there is no cultural response or recognition that the lower-

level forms of these behaviours lead to the more serious conduct.

— ASX Board Director

Directors also highlighted that for multinational companies, behavioural norms and workplace culture was often varied across jurisdictions and what is considered 'acceptable' in one context is not always the same in another. Some directors emphasised that Australia's positive duty obligations set a high standard and presented the opportunity for organisations to adopt the approach as a minimum standard across all jurisdictions in which they operate.

In response to readiness for the positive duty, directors shared mixed responses, again highlighting that ASX 100 companies were more likely to be prepared for the new obligations, compared to ASX 300 companies. The survey data highlighted differences in perception based on gender; 32 per cent of women and 45 per cent of men strongly agreed with the statement that their organisation is well prepared to meet its positive duty obligations as an employer.

Some directors reflected that there was a strong commitment to the issue but that the change would take time, drawing the analogy with governance practices in relation to WHS risks. These have matured over time as a result of increased awareness and understanding of the key duties and responsibilities of boards. Others shared that the shift in mindset from a reactive to proactive approach was still required.



Boards are not ready for the positive duty. It's about a 4/10. The compliance sections, general counsel and human resources are more ready and they will drag the boards with them. But it's not the other way around. On safety, boards will do the dragging because it's so ingrained, but at this stage they aren't calibrated to include the positive duty issues. There needs to be a rising tide for all the boats, driven by board members.

— ASX Board Director

There was a view that a real opportunity presented by the positive duty is to create a shift from a 'should do' to

'can do' mind-set. This would harness the new positive duty obligations to drive broader positive cultural change in organisations with ripple effects across the wider community.

I would say that there is still some work to do to prepare ourselves and ensure we are consistent with our values to not only legally comply with the positive duty but to give effect to the spirit behind the legislation.

— ASX Board Director

BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

Directors identified the following better practices for preparing for the new positive duty obligations and to increase understanding of the conduct covered:

- Briefings by legal teams or external firms on the new obligations and areas of unlawful conduct that are covered by the positive duty.
- High-level assessment by the People and Culture Committee to examine the new obligations, implications and priority areas of action for the organisation.
- Regular briefings from management to the board on actions taken to satisfy the new positive duty.
- Engaging experts to provide an 'outside' view on how the organisation is progressing in preventing and responding to sexual harassment and other positive duty conduct, including against peers or market leaders.

For further insights on how to address board readiness and understanding, see the AHRC Positive Duty Guidelines Standard 3: Knowledge.

The knowledge standard relates to the organisational development, communication and implementation of policies regarding respectful behaviour and unlawful conduct. It states that organisations should support and educate workers, including leaders and managers, to engage in safe, respectful and inclusive behaviour.

Questions that directors can ask

- How can we lift our understanding of the positive duty obligations?
- What is our level of readiness to satisfy the positive duty?
- Has there been a review of current systems and processes to align them with the positive duty obligations?

Questions that investors can ask

- What proactive actions is the organisation taking to address workplace sexual harassment and other positive duty conduct?

Governance red flags

- A view that "we are ok, it's not us", based on the view that sexual harassment and other positive duty conduct does not occur in the organisation or only happens in certain sectors, or that zero to few complaints means that there is no issue.
- The absence of board discussions on sexual harassment and other positive duty conduct and workplace culture more broadly.
- Lack of comprehensive training and education programs for people at all levels of the organisation – from the boardroom down.

2. Role of boards in leading from the top

FINDINGS

- The board plays a critical role in setting the ‘tone from the top’. This includes setting the board’s agenda, asking questions and role-modelling expected behavioural standards to ensure a safe and respectful culture.
- To shift the dial on sexual harassment and other positive duty conduct within organisations, directors cite the need to view the positive duty as an opportunity to drive cultural change rather than a compliance exercise.
- Selection of the CEO and incentives for leaders to champion a respectful workplace culture are critical.
- Directors would like to see management prioritise initiatives to prevent workplace sexual harassment and other positive duty conduct and be proactive, not reactive, in putting these issues on the board’s agenda.

KEY ISSUES

Directors overwhelmingly agreed that boards set the ultimate ‘tone from the top’ on culture, respect and safety, in the way that the board prioritises and oversees organisational culture, but also in the composition, dynamics and the behaviour of the board itself.

The culture is set by the top and if the board doesn’t believe in the positive duty, then neither will the CEO and that attitude will flow all the way down.

— ASX Board Director

Several directors commented on the distinction between the role of the board and the role of management in relation to the positive duty obligations, drawing attention to the specific ways in which the board can influence and guide management. This includes putting the issue on the agenda, asking questions, asking for specific reporting and areas of investigation, the process of selecting the CEO and actions around remuneration.

There is still a poor understanding of what boards actually do and what governance is. Boards understand their legal responsibility, but we don’t manage day-to-day. The best the board can do to set the tone is to show that they are interested in, and taking seriously, a particular topic and engaging management on that topic to understand what is going on. If you don’t engage or ask questions, then you don’t set the right tone.

— ASX Board Director

Directors also commented on the role that committees, such as People and Culture committees or Audit and Risk committees, can play in putting sexual harassment and other positive duty conduct on the agenda, including through setting short-term and long-term incentives linked to respectful workplace strategies or outcomes as part of remuneration frameworks. Others also highlighted the opportunity for the board to set the ‘tone from the top’ through informal interactions with management.

Directors emphasised that the most important role that boards have is in the recruitment of the CEO and that this was an important aspect of setting expectations around behaviour and culture. The selection of the CEO was highlighted as a key lever the board could use to ensure that clear expectations and positive cultural attitudes flowed from senior management through to the rest of the organisation.

Boards set the tone with their selection of a CEO who understands the importance of the issues and who has the right attributes to lead a culture that will not tolerate sexual harassment in any form. Boards play a very important role in ensuring the right person leads the company.

— ASX Board Director

As the board, we can hire and fire the CEO. Beyond seeking reports and investigations, that’s one of our most powerful tools to reset culture.

— ASX Board Director

Acting as a cohesive team on culture and behavioural expectations was also raised as important for boards to effectively set the 'tone from the top'. Some directors shared that this often requires boards to collectively reflect on their commitment to the positive duty and how this is demonstrated.

We need to do more than take a minimalist compliance view. We need a true commitment to people and to creating an environment where they can flourish, and I take that personally. In the end, that's what the positive duty embodies and what we need to embody as the board.

— ASX Board Director

Progress on gender equality, diversity and inclusion, including within the board itself, was seen as a key lever to drive progress on the positive duty. This includes the board learning to prioritise action on women in leadership roles and the gender pay gap. In this respect, the survey found that 70 per cent of directors indicated that their organisation has set targets to achieve gender balance in management roles via recruitment and promotion strategies.

45 percent of my board are women, 40-50 percent of the leadership are women. We have a woman Chief Executive. It's not the panacea, but it goes a long way to getting the right focus on these issues and getting the right behaviour within the organisation.

— ASX Board Director

If you have a blokey culture around the board, you pick that up very quickly. If the men and women

come from the same background then there is no robust debate and you actually want to see discussion and debate. You need true diversity.

— ASX Board Director

BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

- Using People and Culture, Remuneration, Audit and Risk committee processes to integrate positive duty obligations into board agendas.
- Embedding safe and respectful workplace culture in short-term and long-term incentives within remuneration frameworks.
- Ensuring culture and safety, including positive duty obligations, are considered as part of CEO recruitment and performance processes.
- Asking management for more detailed reports or investigations.

For further insights on leading from the top, see the AHRC Positive Duty Guidelines Standard 1: Leadership.

The leadership standard relates to the role of senior leaders. This Standard, in its entirety, is relevant to directors. It states that senior leaders should understand their obligations under the Sex Discrimination Act and that they are responsible for ensuring that appropriate measures for preventing and responding to sexual harassment and other positive duty conduct are developed and implemented. They must also be visible in their commitment to safe, respectful and inclusive workplaces.

Questions that directors can ask

- What are we doing to proactively address sexual harassment and other positive duty conduct rather than being reactive?
- How are we embodying the spirit of the positive duty rather than taking a minimal compliance mindset?
- How is management and the board setting expectations of behaviours aligned to the positive duty obligations?
- What character verification checks have been undertaken before appointing or promoting senior leaders into roles within the organisation?

Questions that investors can ask

- How has the board integrated positive duty obligations into its governance structures?
- To what extent are short-term and long-term remuneration incentives aligned to safe and respectful workplace outcomes?

Governance red flags

- A focus on responding to sexual harassment and other positive duty conduct once it has occurred rather than being proactive and seeking to prevent it.
- Poor diversity on the board and in the senior leadership of the organisation.

3. Integrating the positive duty into safety and risk management frameworks

FINDINGS

- Treating sexual harassment and other positive duty conduct in the same way as physical safety is an opportunity to accelerate action, particularly in establishing leadership accountability and collective responsibility for identifying and addressing risks.
- Leading organisations are incorporating sexual harassment and other positive duty conduct into WHS and enterprise risk frameworks.
- Overall there is slow progress on treating psychosocial hazards with the same priority as physical safety issues.

KEY ISSUES

Sexual harassment and other positive duty conduct can pose significant risks to the psychological and physical health and safety of people in workplaces. Oversight of risk is a key governance responsibility for directors. It is a requirement under WHS laws and is also a key aspect of satisfying the new positive duty.

Aligned with the new positive duty obligations, directors spoke to the importance of integrating sexual harassment and other positive duty conduct into WHS and enterprise risk frameworks, pointing to the way in which these frameworks are well established within organisations with strong governance processes. The survey found that 71 per cent of directors indicated their organisation is assessing sexual harassment and other positive duty conduct within their WHS risk management frameworks.

Workplace safety is at the top of the list and workplaces are becoming increasingly sophisticated in how they measure workplace safety. It will be interesting to see how those processes can be adapted for this area.

— ASX Board Director

The whole issue of risk has been a bit of a revolution for NEDs. I chair a Risk Committee and I continue to be amazed by the depth of focus on risk. I can see that all sectors are not equal in how they approach risk. An organisation that has a

mature approach to risk has plainly got all the tools in the kit to handle this well.

—ASX Board Director

Several directors emphasised the potential opportunity created by treating sexual harassment and other positive duty conduct in the same way as physical safety, particularly in establishing leadership accountability and collective responsibility for identifying and addressing risks.

We need to integrate the notion that ‘workplace wellbeing and health and safety is everyone’s business’, into the sexual harassment space. There is accountability for everyone in the workplace in respect of safety. I hope that it will be the exact same with this issue. If there is a trip hazard in a hallway, I would be responsible for moving it, everyone would be. But similarly, if I saw sexism in the hallway I should also be accountable for speaking up. And that is the culture we need to create. It’s expected and it’s your job. And that will be how we create change over time.

— ASX Board Director

The WHS journey we’ve all been on is similar. It is now acceptable and permissible for a junior staff member to tell a senior leader to put a seatbelt on. We need to be in the same place with the positive duty, and I think we will be.

— ASX Board Director

Directors also identified the ways in which a safety lens can offer a focus on drivers, risk factors and early warning signs. Several directors pointed to the analogy of focussing on physical safety ‘near misses’ and the opportunity to apply this analysis to sexual harassment and other positive duty conduct. For example, by encouraging reporting and action on circumstances, behaviours or working conditions which may make people feel uncomfortable, even if unlawful conduct has not yet occurred. This may also assist in identifying lower-level forms of sex discrimination, such as everyday sexism, as early warning signs of sexual harassment and other positive duty conduct.

There is a huge amount of focus on ‘near-misses’ which are incidents that have occurred but not lead to an injury. We treat them as learning experiences. Workforces have these approaches and systems in place for physical safety issues which they can seek to adapt for positive duty issues. We will get better over time and improve our systems to incorporate this behaviour.

— ASX Board Director

Some directors identified that the lag on integrating sexual harassment into safety and risk frameworks has been due to a lack of ownership of the issues. Sexual harassment and other positive duty conduct sits across multiple business functions including People and Culture, Safety and Audit and Risk which can result in a lack of clarity around accountability. Directors also suggested

that a growing number of ESG risk issues for boards to understand, has contributed to a lack of prioritisation in some cases.

Directors pointed to the new standards for psychosocial risk management¹⁶ and the opportunity to drive the implementation of the positive duty by elevating psychosocial safety to the same level of importance as physical safety. However, most also reflected that there has been slow progress, and even reluctance, in organisations prioritising psychosocial hazards to the same extent as physical safety in terms of harm and cost to the organisation.

Some organisations are starting to address psychosocial risks, but overall it has been slow to see that shift across organisations. I don’t think that the behavioural element of sexual harassment is generally safe to talk about yet, compared to physical safety risks.

— ASX Board Director

The consequences of reporting are really high, but they’re not if you report a physical safety issue. In physical safety if something is reported, it’s celebrated. But the problem with sexual harassment and assault is that there are pejorative issues around both parties. The responses are mixed and sometimes the person accused gets fired and then the person who made the report gets blamed for ruining someone’s life and career.

— ASX Board Director

WORK HEALTH AND SAFETY LAWS

Safe Work Australia has guidance that may assist directors in understanding and discharging their duties under WHS laws, as they relate to sexual harassment. See [Preventing workplace sexual harassment: National guidance material](#).

Safe Work Australia has also published a [Model Code of Practice](#) for managing psychosocial hazards at work, which may assist directors in their understanding of sexual harassment as a psychosocial hazard.

¹⁶ Safe Work Australia, *Managing psychosocial hazards at work: Code of Practice* (2022)

BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

- Inclusion of sexual harassment and other positive duty conduct in the safety infrastructure and processes that include the board. For example, using organisational 'safety moments', 'tools down safety talks' and safety banners to embed messages about sexual harassment and other positive duty conduct.
- Root cause and system analysis of incidents of sexual harassment and other positive duty conduct.
- Risk assessment for sexual harassment and other positive duty conduct based on national and industry-based prevalence data on sexual harassment, and research on drivers and risk factors. For example, male dominated areas of the organisation, sexualised racism and excessive alcohol consumption in the context of work.
- Board/board committee consideration of a sample of de-identified complaints from lodgement through to resolution, to assess application of policies, procedures and management judgement.

For further insights on integration into risk and safety framework, see the [AHRC Positive Duty Guidelines Standard 4: Risk management](#).

The risk management standard states that organisations and businesses should recognise that sexual harassment and other positive duty conduct is an equality risk and a health and safety risk. They should take a risk-based approach to prevention and response. must also be visible in their commitment to safe, respectful and inclusive workplaces.

Questions that directors can ask

- Have sexual harassment and other positive duty conduct and psychosocial risks been integrated into our safety and risk frameworks?
- Have we assessed our organisation against national and industry-specific prevalence data to understand the extent of the problem and our areas of risk?
- How are we recording and treating 'near misses' for sexual harassment and other positive duty conduct?
- How are we ensuring that our prevention and response strategies do not just target very serious forms of unlawful conduct, but also address other forms of unlawful conduct (e.g. misogynistic jokes)?

Questions that investors can ask

- How is sexual harassment and other positive duty conduct integrated within the organisation's risk management framework?

Governance red flags

- Lack of focus on sexual harassment and other positive duty conduct, and psychosocial hazards in WHS risk frameworks and governance processes.
- Not acknowledging sexual harassment and other positive duty conduct as a key enterprise risk.
- Lack of incidents being reported – may speak to the absence of a "speak up" or "listen up" culture.

4. Visibility over organisational culture

FINDINGS

- Gaining adequate visibility over organisational culture, particularly sub-cultures in pockets of the organisation, is a key priority for directors, often requiring the triangulation of different data and information. For example, engagement and pulse surveys, complaints data, whistleblower reports and exit interviews.
- Accelerating progress on gender equality initiatives and diversity within the organisation is seen as a key lever for creating a respectful and safe workplace culture.

KEY ISSUES

There was strong agreement among directors that sexual harassment and other positive duty conduct was an issue of culture, and that cultures where everyday sexism and other forms of gender inequality were normalised needed to shift to create change. The need to understand the culture that enables more serious misconduct to flourish was also highlighted as a concern.

People don't feel comfortable talking about the continuum. This is how I start my thinking. We need to think about and recognise the links between demeaning women and disregarding their views and the more serious forms of harassment. These things are so deeply linked.

— ASX Board Director

Despite this recognition, directors also noted that at times, sexual harassment was still understood as an issue of unrelated incidents rather than as a broader cultural issue. The survey data revealed differences by gender in the extent to which board members acknowledged the prevalence of sexual harassment in the organisation. 50 per cent of women, compared to 33 per cent of men, strongly agreed or agreed that sexual harassment and similar conduct occurs within their organisation.

There's not an understanding of the breadth of this issue. It's not seen as a diversity issue and a cultural issue. And the consequence of this is that boards don't understand there

is a significant cultural challenge here that they will need to take on and take seriously. This is something boards have to understand more.

— ASX Board Director

A key challenge identified by directors was in gaining visibility over the culture and understanding the nature and extent of sexual harassment and other positive duty conduct in the organisation, particularly within sub-cultures and pockets of the organisation.

The measurement of culture in organisations has evolved significantly over time. Boards have grappled with this and feel accountable for culture but also struggle with how to measure it. There has been an effort to identify metrics which provide companies with qualitative results with respect to culture, but there's no silver bullet yet.

— ASX Board Director

While directors drew attention to the value of data from engagement and pulse surveys, incident reports data and whistleblower reports, they noted that understanding the culture of the organisation often required them to triangulate different sources of data and information. Several directors commented that the experience of women in the organisation was a strong indicator of the culture around sexual harassment and other positive duty conduct. Others also pointed to the value of customer or client feedback as a useful data point on culture.

I think you're just constantly looking for data points. A very reliable data point is your female executives and female employees across all levels of the organisations. Ask simple questions like "how do you find working around here?" I really think the experience of women in the workplace is one of the best indicators of the health of the organisation.

— ASX Board Director

The lead indicators for this issue are how people feel as part of a team. It's not just the engagement survey but we have diversity, equality and inclusivity indicators and look for evidence on where that is at, because it is crucial. We also look for it on other risk measures and through other behaviours.

— ASX Board Director

Several directors reflected that their understanding of the culture was often strengthened by walking the floor of organisations, or through more informal interactions with management and staff. Directors also shared

examples of listening sessions or focus groups that were held by boards to gain a deeper understanding of the organisation's culture. Others shared examples of external reviews that had deepened the board's understanding of the culture around sexual harassment and other positive duty conduct.

As a board director you need to get out and speak to people. Depending on the business, you can walk into a store front, trying to get multiple experiences. Trying to connect with people from as many different levels as you can give you an impression of culture. Whether the CEO provides the board with easy and transparent access to employees is also very telling.

— ASX Board Director

You know good culture when you see it and bad culture when you see it. You get the tone around the board table very quickly about what is accepted or tolerated.

— ASX Board Director

Walking the floors is very important but it can be hard. Board tours can be like a royal visit. There's less visibility. I try to hang back and talk to the person in the corner or go to the bathroom and break away. Being a woman in a male dominated area you need to find ways to make inroads.

— ASX Board Director

Directors also shared their reflections on identifying early warning signs of a culture problem around sexual harassment including, for example, how complaints are handled, the willingness of management to own and address internal audit findings, the circumstances under which key personnel are leaving and the language and behaviour of senior leaders, particularly around transparency and access to information.

While culture is increasingly being addressed by internal audit functions in organisations, some directors noted that building capability for internal audit to address issues of culture, sexual harassment and other positive duty conduct is necessary.

AICD-ACSI RESEARCH: GOVERNING COMPANY CULTURE

Earlier research by the AICD and ACSI in 2020 examined the board's role in overseeing, assessing and influencing corporate culture.

The [Governing Company Culture: Insights from Australian Directors](#) report provides real-world insights from the boardrooms of Australia's largest companies, examined relevant changes and provided directors with practical guidance on some of the key issues and questions boards should seek to explore.



BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

- Internal audit functions addressing culture and sexual harassment and other positive duty conduct in their investigations and reports.
- Using lead indicators, particularly measures of gender inequality, inclusion and diversity, as well as lag indicators to understand culture.
- Using customer and external feedback to understand culture.
- Integrating performance on culture into annual appraisals.
- Small group listening sessions with the board, including with people 3-4 levels down from the executive leadership team (without senior leaders or managers present).
- Identifying opportunities for discussions with the workforce that are not curated or chaperoned.

For further insight on organisational culture, see the [AHRC Positive Duty Guidelines Standard 2: Culture](#).

The culture standard states that organisations and businesses should foster a culture that is safe, respectful and inclusive and values diversity and gender equality.

Questions that directors can ask

- What data points do we need to understand culture in relation to sexual harassment and other positive duty conduct?
- What are our lead and lag indicators to understand culture in relation to sexual harassment and other positive duty conduct?
- Is our internal audit function equipped to examine issues of culture?
- How might we, as a board, be able to engage across the organisation to gain better visibility over culture?
- What is the experience of women and gender diverse employees, particularly employees who may be at an increased risk of experiencing unlawful conduct (e.g. women from culturally and racially marginalised backgrounds, First Nations women)

Questions that investors can ask

- How does the board get an understanding of the organisation's culture? What governance approaches assist the board to oversee organisational culture?
- How is the organisation addressing gender equality and diversity and inclusion, and is progress being made?

Governance red flags

- A focus on sexual harassment and other positive duty conduct as a series of unrelated individual incidents, rather than as a culture issue.
- The absence of data on gender inequality, sexual harassment and other positive duty conduct in culture metrics that are reported to the board.
- Over-reliance on either quantitative or qualitative metrics.

Metrics to gain visibility over culture identified in the interviews

Directors referred to a number of metrics they used to gain visibility over workplace culture. Most directors emphasised that it was critical they use multiple data points from different sources to triangulate information on culture.

Examples of internal metrics or sources of information

- Survey-based metrics
 - Employee engagement surveys
 - Pulse surveys
 - 360-degree feedback on management team and those in leadership positions
- Internal audit reports that address culture
- Reporting rates of sexual harassment and other positive duty conduct
- Medium and longer-term outcomes for workers who make reports about sexual harassment and other positive duty conduct and/or poor workplace culture, for example retention and promotion outcomes
- Workforce statistics including worker retention rates (particularly of women), rates of absenteeism and use of sick leave, exit data, rates of access to flexible working arrangements and parental leave across all genders
- Diversity profile of the workforce across all levels

Examples of external metrics

- Investor or stakeholder surveys
- Transparency of external reporting on sexual harassment, other positive duty conduct and workplace culture
- Customer complaints and reviews
- Supplier feedback



5. Reporting rates, support, outcomes and 'speaking up'

FINDINGS

- Lifting incident reporting rates and establishing a 'speak up' culture remain a key challenge for organisations, as is embedding a 'listen up' response.
- Directors suspect fear of victimisation and a 'minimisation' of certain unlawful conduct as likely factors for underreporting.

KEY ISSUES

Directors agreed that they play a critical role in setting the tone and expectations around speaking up and reporting sexual harassment and other positive duty conduct. As directors, they can send important cultural signals to management by demonstrating a clear and consistent interest in lifting reporting rates and reviewing outcomes relating to reports that are shared with the board.

The boards' role in driving up reporting rates is based on having interest in the report and receiving them and really looking at them.

— ASX Board Director

Many directors shared that they received regular updates on incident reporting and data, including briefings from management, the People and Culture Committee and/or the Audit and Risk Committee. However, this tended to occur more in organisations where there were directors, most often women, championing regular and detailed incident reporting to the board. It was also more common in organisations where there had been a significant incident of sexual harassment that required oversight and consideration by the board. Directors also shared that more detailed information about incidents, within the limits of privacy and confidentiality, enabled richer boardroom discussions and longer-term improvements to workplace settings and processes.

The need for greater understanding around underreporting was emphasised as a concern for many directors. Supporting the education and empowerment of the workforce was highlighted as a key action for the board to assist in raising reporting rates to reflect the genuine experience of workers. There was a view that, despite the change in societal expectations around sexual harassment and other positive duty conduct, there was still a general tendency by people to minimise their experience of this conduct, because of a lack of understanding or because they fear that they may experience retaliatory action for making a report.

What I've seen in reporting is that people who report are saying it's bullying and harassment and not saying 'sexual harassment'. They're more likely to say this person is bullying me and is displaying bad behaviour but it's not, 'this is sex-based discrimination and sexual harassment.' There's not the level of understanding of these behaviours and there's a tendency to minimise experience.

— ASX Board Director

Directors also shared that they suspect an overall lack of trust and confidence in the reporting and response processes, and potential for re-traumatisation, were likely factors contributing to underreporting. Directors highlighted the opportunity to empower and engage bystanders to report incidents through training and awareness of responsibilities. This would assist in alleviating some issues of underreporting, particularly where individuals directly affected may fear retaliatory action for making a report.

Directors also noted that actions to build psychological safety and provide person-centred and trauma-informed support, reporting and response processes play a key role in lifting reporting rates. A key element to establishing a 'speak up' culture is the creation of a 'listen up' culture, where leaders demonstrate that they listen to people's concerns and reports through visible action.

Some directors identified that to have sufficient oversight of the reporting and response process, the board also needs to consider the short and long-term outcomes for people who make reports. Directors shared that data on short-term and long-term outcomes for individuals who make reports of sexual harassment and other positive duty conduct, could be explicitly requested by the board to assist in its assessment of workplace culture and understanding of trust and confidence in reporting processes. Such data can also provide evidence on whether an organisation has a safe reporting environment and whether the process is person-centred and trauma-informed.

Tracking the outcomes of the process including retention after making a complaint is so important. The manager must know whether the outcome for the person who reported is a good one. They must be able to track the people who reported for whether they're retained. I see this data only because I demand it. These are the questions that need to be asked.

— ASX Board Director

I said, "that's great we get this report about sexual harassment" but then I ask, "where are they today? What percentage of these women have left the company? A significant amount had left the company. It's not good enough that we get reports and take corrective action. We need to make it safe to report. Because something has gone wrong when we realise huge numbers of people who have raised concerns have then left the company.

— ASX Board Director

There was a common view that incident reporting and complaints mechanisms lacked the maturity to capture the types of conduct covered by the positive duty which are typically more prevalent, but do not amount to serious incidents of sexual harassment. Directors raised concerns that without more sophisticated reporting and support systems, the board and management struggled to have effective visibility over the reporting process. Some directors raised questions around the suitability of whistleblower lines or existing human resources processes for responding to sexual harassment and other positive duty conduct, particularly in providing trauma-informed support.

We need the reporting infrastructure set up. There is a bit of an affront by the board. A feeling of "we don't have any incidents so why would we need to change our reporting models." But they're really only talking about sexual assault and harassment, so we really need to get to the next level of maturity in our processes and reporting for these lower-level behaviours.

— ASX Board Director



With respect to prevalence data on sexual harassment, directors highlighted the importance of reviewing national and industry data from the [AHRC's regular national survey on the prevalence of workplace sexual harassment](#).¹⁷ This assists directors and organisations in understanding the extent of underreporting in their organisation.

We need to be able to demonstrate underreporting based on industry comparison. There needs to be a comparator. If you're comparing your reports to your own experience then it's not helpful, but if there is an external comparison then you can see the underreporting.

— ASX Board Director

We need to keep a metric front of mind about how many people nationwide were harassed that year. We need a population figure on an annual basis and that population figure needs to be a comparison point for companies. If we're so much better than the population then there is a massive problem. We need to get the conversation happening that starts with "what am I missing?" Every year we need to highlight the broader population rate and ask boards "do you really think you're that much better than the rest of the population?"

— ASX Board Director

BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

- Directors requesting more frequent and more detailed information on incident reports, including detail about the circumstances, the conduct, roles of those involved, outcomes and actions taken by the organisation.
- Directors requesting information on the short-term and longer-term outcomes for people who make reports of sexual harassment or other positive duty conduct. For example retention, career progression and remuneration.
- Directors advocating to include more detailed and specific metrics on sexual harassment and other positive duty conduct in external reporting, such as annual reporting and WGEA reporting.
- Board oversight of underreporting issues and indicators of 'speak up' culture through meaningful engagement with staff, including focused consultation processes.
- Board interest in, and oversight of, actions designed to build a 'speak up' culture and raise reporting rates.

For further insights on reporting rates, support, outcomes and 'speaking up', see the [AHRC Positive Duty Guidelines Standard 5: Support and Standard 6: Reporting and responses](#).

The support standard states that organisations and businesses should ensure appropriate support is available to workers who experience or witness sexual harassment and other positive duty conduct, and that workers are aware of the availability of that support.

The reporting and response standard states that organisations and businesses should ensure that appropriate options for reporting and responding to sexual harassment and other positive duty conduct are provided to workers and other impacted people (third parties). Responses to reports should be consistent, timely and minimise any harm to, or victimisation of, the people involved. Any consequences should be consistent and proportionate.

17 AHRC, Time for Respect: Fifth national survey on sexual harassment in Australian workplaces (2022) 109-127.

Questions that directors can ask

- How 'fit for purpose' are our systems and processes for people to report sexual harassment and other positive duty conduct (e.g. in providing trauma-informed support and responses)?
- What is our reporting rate compared to the national average and to an industry-specific average?
- Do we understand the extent and reasons for underreporting in our organisation?
- What can we do to support a 'speak up' culture, raise reporting rates and confidence in reporting?
- What are we doing to ensure that the reporting process is safe for people?
- What are the long-term outcomes for people who make reports?
- Do we regularly review detailed reporting data and resolution outcomes to ensure our responses are fair and timely?
- Are the consequences of unlawful conduct consistent and proportionate?

Questions that investors can ask

- What data is available on the prevalence of sexual harassment and other positive duty conduct within the organisation?
- What information is available on the organisation's reporting and response processes and support options available to staff?
- Does the organisation have mechanisms in place to monitor trends in sexual harassment and other positive duty conduct over time and are they developing targeted measures to address trends and issues?

Governance red flags

- Very low number of reports of sexual harassment and other positive duty conduct.
- Lack of information on the details of how reports are handled or the outcomes for the person who reported experiencing sexual harassment and other positive duty conduct and for those that were alleged to engage in that conduct. For example, lack of de-identified information on the nature of incidents, roles, outcomes, time taken to resolve, career progression and retention.



6. Transparency and accountability

FINDINGS

- There is limited but growing internal and external transparency around the prevalence of sexual harassment and other positive duty conduct and the consequences that flow from this conduct.
- Organisations that are transparent and share information about sexual harassment and other positive duty conduct with their workforce note significant positive impact on workplace culture. It also engenders trust with investors and other external stakeholders.

KEY ISSUES

Directors stated that transparency from the CEO and management is critical for the board. They identified that without transparent practices around reports and access to information, the board is not able to properly satisfy itself about what is happening within the workplace.

You need management to be transparent around culture and Respect@Work issues. If everything has to go through the CEO and there is no trust or transparency then you will never know whether Respect@Work is happening. There will be no finger on the pulse for the board.

— ASX Board Director

There was a strong view that being transparent internally and externally relating to the prevalence of sexual harassment and other positive duty conduct in the workplace remains important but limited. Directors suggested that part of the reason for this is a view that a more transparent approach to reporting posed a risk to their privacy and confidentiality obligations to workers who made reports. Directors also suggested there is a common concern that reporting on unlawful conduct occurring within the workplace would damage the company's reputation.

I think the main issue that many companies see with respect to transparency around bad behaviour is that they are scared of reputational risk and the idea that the public will see them as a terrible company. I actually think the opposite is true. If you

do publish this data people know you care. It shows that you prioritise it, you address it, investigate it, and report back. If it is swept under the carpet and everything is kept confidential it creates a culture of mistrust.

— ASX Board Director

There were a number of directors who actively advocated for comprehensive internal and external reporting by their company. Internal transparency around actions taken to respond to sexual harassment and other positive duty conduct can send a strong cultural signal around expected behaviours. Directors also shared that a more transparent approach to reporting would give companies the opportunity to demonstrate accountability and their commitment to best practice and create a culture of trust within the organisation and with investors.

If we need to put a report out about anything that's bad, I'm always the one asking, "what's the argument for containment? For not letting all the raw truth out there?" My own experience is that typically only good things happen when you're honest about what has occurred and you have the courage to share that publicly. The default position should be get it out there and move on with the remediation.

— ASX Board Director

I feel the best approach will be shining the light on examples of organisations being courageous enough to release the reports and the data, and this will lead the way.

— ASX Board Director

A MOVE AWAY FROM NDAS

A barrier to transparency and accountability on sexual harassment and other positive duty conduct has been the blanket use of confidentiality clauses and non-disclosure agreements (NDAs) in workplace sexual harassment settlement agreements. In the past, these have been used to intimidate and silence victims, conceal the behaviour of alleged harassers, and inhibit oversight by leaders and boards who, in some cases, may not have been aware that complaints have been raised if they were settled confidentially. A key change coming out of Respect@Work Report has been the issuance of guidelines which recommend moving away from confidentiality as the starting point for every case, to a more individualised case-by-case approach.¹⁸

WGEA REPORTING

Organisations will also be required to consider their approach to transparency on these issues as a result of reforms to the *Workplace Gender Equality Act 2012*¹⁹ (Cth) (WGEA Act). From 2024, these reforms mandate that organisations with 100 employees or more report to the Workplace Gender Equality Agency (WGEA) on 'sexual harassment, harassment on the ground of sex, or discrimination'.

The reporting obligation will include the following information:

- the provisions set out in any policy/strategy, including accountabilities for:
 - preventing and responding;
 - the provision of training, its frequency, and content ;
 - the disclosure processes and management of disclosures; and
 - leadership statements or communication to demonstrate commitment to prevention and response.
- information about sexual harassment risk management;
- information about the prevalence data organisations currently collect; and
- supports available for staff.

This information will be included in a company's public report to WGEA, which must be shared with its employees and shareholders.²⁰ A WGEA generated Executive Summary and Industry Benchmark Report must also be shared with the board.²¹ These changes will require a shift in the way that boards view public reporting and transparency around sexual harassment and other positive duty conduct.

¹⁸ AHRC, *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (2022) 11

¹⁹ Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023 (Cth).

²⁰ Workplace Gender Equality Act 2012 (Cth) s 16.

²¹ Workplace Gender Equality Act 2012 (Cth) s 16C (1)–(2).

REVIEW OF PUBLIC DISCLOSURES ON SEXUAL HARASSMENT AND OTHER POSITIVE DUTY CONDUCT

To understand the current approach to external reporting on the board's role in overseeing the prevention of sexual harassment and other positive duty conduct, we undertook a desktop review of a small sample of a companies' most recent Annual Reports.

These 20 companies were chosen for their size, industry, a history of relevant issues or their workforce risk profile. Given the timing of this review, some Annual Reports assessed were published in late 2022, and, as expected, less reporting was provided in these reports in general. Given the board's central role in ensuring the company has in place a governance framework for sexual harassment, investors expect to see reporting in the Annual Report detailing the Board's activities.

Observations from the desktop review of market disclosures include:

- Minimal reporting is being provided, despite the sampled companies being chosen for a potentially stronger risk profile, or larger size that may encourage more specialised reporting.
- The reporting that exists is strongly focused on sexual harassment, and is often provided in the context of a Code of Conduct, as opposed to WHS frameworks.
- Some references to 'cultural change' are included within short term and long term incentive remuneration structures, but they are non-specific. Only two companies refer to indicators more connected to the Positive Duty and other similar conduct, mentioning the implementation of sexual harassment-related reports and strategies.
- Better reporting includes deidentified information on instances and allegations. This includes information on terminations where relevant, other consequences (for example remedial actions and remuneration forfeiture) and insights into the types of Code of Conduct breaches (if reported in this context).
- Where there was more developed reporting, it tended to be provided by companies in the mining and resources sector.

BETTER PRACTICES IDENTIFIED FROM THE INTERVIEWS

- Directors setting expectations for the CEO and senior management to engage in an honest and transparent way with the board about sexual harassment and other positive duty conduct reports and workplace culture.
- Directors receiving regular and detailed reports on sexual harassment and other positive duty conduct. This includes detailed de-identified information on the report, rather than mere statistics.
- Board setting expectations for the sharing of de-identified information on incidents of sexual harassment and other positive duty conduct internally, as well as actions taken. This is to build confidence in systems and demonstrate a culture of accountability.
- Board advocating for public reporting and disclosures, including an assessment of the effectiveness of the systems and frameworks in the company for addressing sexual harassment and other positive duty conduct. This is to build trust among investors and the community.
- Robust discussions and assessments happening at the committee level before reaching the board.

For further insights on transparency and accountability, see the [AHRC Positive Duty Guidelines Standard 7: Monitoring, evaluation and transparency](#).

The monitoring, evaluation and transparency standard states that organisations and businesses should collect appropriate data to understand the nature and extent of sexual harassment and other positive duty conduct concerning their workforce. They should regularly use the data they collect to improve culture and prevention and response strategies. They should also be transparent about the nature and extent of this conduct and the actions they take to address it.

Questions that directors can ask

- Are we receiving regular reports about sexual harassment and other positive duty conduct and how is data being monitored and evaluated?
- How have we assessed whether or not to include information about sexual harassment and other positive duty conduct in public reports and to the workforce?
- Are we using NDAs or confidentiality clauses in any settlements of complaints?
- Are alternative options being offered or considered?

Questions that investors can ask

- How does the board keep investors and other stakeholders updated as to the approach to sexual harassment and other positive duty conduct?
- Can prevalence data, and prevention and response measures be shared?

Governance red flags

- A lack of discussion amongst board or board committee members on whether and how to share de-identified information that demonstrates that sexual harassment and other positive duty conduct exists in the organisation.
- The continued blanket use of NDAs rather than a case-by-case approach.



Appendix A: Key terms

Note: Most of these terms appear in the Sex Discrimination Act. These summaries have been taken from the Glossary of the *Positive Duty Guidelines*.²²

Hostile workplace environment on the ground of sex

It is unlawful under the Sex Discrimination Act to subject another person to a workplace environment that is hostile on the ground of sex. Workplace environments may be hostile and intimidating to people of a particular sex, even if behaviour is not specifically directed at them or any person. This is because general actions can contribute to a workplace culture that makes people feel degraded, humiliated or offended in ways that are associated with their sex.

Sex discrimination

Direct sex discrimination

Treating someone less favourably because of their sex, or a characteristic generally associated with people of that sex, compared to how a person of a different sex would be treated, in similar circumstances.

Indirect sex discrimination

Where an existing or proposed condition, requirement or practice (that is not reasonable) appears to treat everyone the same, but disadvantages, or is likely to disadvantage, people of a particular sex.

Sex-based harassment

Sex-based harassment involves behaviour that is sexist and demeaning in nature, but that is not necessarily sexual. Sex-based harassment is unlawful when it occurs in circumstances in which a reasonable person, aware of those circumstances, would anticipate that the person being harassed might feel offended, humiliated or intimidated. It can happen when a person is degraded, put down or disrespected because of their sex, or a characteristic generally associated with people of that sex.

Sexual harassment

Sexual harassment is any unwelcome conduct of a sexual nature that occurs in circumstances in which a reasonable person, aware of those circumstances, would

anticipate that the person being harassed might feel offended, humiliated or intimidated.

Report (of sexual harassment and other positive duty conduct)

Report refers to a complaint or disclosure. 'Complaint' and 'complainant' have intentionally not been used widely in this report due to negative associations with the term 'complain'.

Victimisation

Treating or threatening to treat someone badly or unfairly because they report unlawful behaviours, assert their rights under the law or help someone else to do so.

²² AHRC, Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth) (2023) 88–94.



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