

6 May 2024

Submission to ASX Corporate Governance Council on the Consultation Draft for the 5th Edition of the Corporate Governance Principles and Recommendations

1. Summary

To meet Recommendation 44 of Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, the ASX Corporate Governance Council should:

1.1 Amend the Consultation Draft Recommendation 3.2 as follows:

A listed entity should instill and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly, including by:

- a) having and disclosing a code of conduct for its directors, senior executives and employees including prohibiting sexual harassment, unlawful discrimination and bullying;
- b) ensuring that the board or a board committee is informed of the entity's action to prevent unlawful conduct and breaches of the code;
- c) disclosing actions taken during the last reporting period to prevent unlawful conduct and breaches of the code;
- d) ensuring that the board or a board committee is informed of any material breaches of the code of conduct; and
- e) disclosing (on a de-identified basis) the outcomes during the last reporting period of actions taken by the entity in response to material breaches of the code.

1.2 Insert additional explanatory commentary into the 5th Edition Principles and Recommendations

Based on the material contained in this submission, the ASX Corporate Governance Council include additional commentary to support the Consultation Draft Principles and Recommendations as set out in section 10.2 below.

1.3 Note the responses to the Consultation questions

As set out in section 10.3 below, I have noted my support or comments of the proposals outlined in Consultation Questions 3, 4, 5, 6, 8, 9, 10, 15 and 19.

I make no comment about Consultation Questions 1, 2, 7, 11, 12, 13, 14, 16, 17, 18.

2. Recommendation 44 of Respect@Work, National Inquiry into Sexual Harassment in Australian Workplaces

Recommendation 44 of the Australian Human Rights Commission's 2020 National Inquiry into Sexual Harassment in Australian Workplaces: Respect@Work Report states:

The ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against, under its Corporate Governance Principles and Recommendations. This could include:

- (a) specific mention of sexual harassment guidance on company codes of conduct (ASX recommendation 3.2)*
- (b) information about measures taken to address sexual harassment, as part of its requirements that listed entities have and disclose a diversity policy and set measurable objectives to achieve gender diversity (ASX recommendation 1.5)*

This submission primarily concerns the ways in which to implement the spirit of Recommendation 44.

3. My professional experience

I practised as an employment lawyer and then partner with Herbert Smith Freehills from 1993 to 2013, regularly providing advice to executives and boards of Australian listed companies. In particular, from 2010 to 2013 I advised on boards seeking to comply with the new ASX Corporate Governance Recommendations on gender diversity. I also authored a paper in 2010/11 on the relevant discrimination laws for the new ASX Diversity Resources webpage.

I have served on the boards of Berry Street Victoria (15 years, Vice President), Heide Museum of Modern Art (5 years), Carlton Football Club (3 years) and Play by the Rules (8 years, Co-Chair). Since August 2022 I have been the Chair of the Creative Workplaces Council (statutory appointment).

I am a Graduate of the Company Directors Course (2013), and a Member of the Australian Institute of Company Directors ("AICD"). Since 2020 I have worked with the AICD on improving directors' governance on sexual harassment, unlawful discrimination and diversity.

From 2013 to 2016 I served as the Victorian Equal Opportunity and Human Rights Commissioner.

From 2016 to 2023 I served as Australia's Sex Discrimination Commissioner and was as a member of the Australian Human Rights Commission ("AHRC"). In this role I led a number of significant projects supporting increased diversity, equality and inclusion, and addressing gender-based violence, including within universities, sport, defence and parliament.

The Reports of primary relevance to this submission, which I authored, are:

- [Everyone's business: Fourth national survey on sexual harassment in Australian workplaces \(2018\) | Australian Human Rights Commission](#) ("2018 Sexual Harassment Survey")
- [Respect@Work: Sexual Harassment National Inquiry Report \(2020\) | Australian Human Rights Commission](#) ("Respect@Work Report");
- [Equality across the board: Investing in workplaces that work for everyone \(2021\) | Australian Human Rights Commission](#) ("Equality Across the Board") with the Australian Council of Superannuation Investors ("ACSI");
- [Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces \(2021\) | Australian Human Rights Commission](#) ("Set the Standard Report")

- [Time for respect: Fifth national survey on sexual harassment in Australian workplaces | Australian Human Rights Commission](#) (“2022 Sexual Harassment Survey”)

4. Respect@Work Sexual Harassment National Inquiry 2020 – Australian Human Rights Commission

Sexual harassment laws were first introduced in Australia under the *Sex Discrimination Act 1984* (Cth.) on 1 August 1984. Reporting of sexual misconduct by movie producer Harvey Weinstein in 2017 started a global conversation about the unacceptable prevalence of workplace sexual harassment, including in Australia. Prompted by that report and with the support of Government, from June 2018 to December 2019 I led the world-first, National Inquiry into Sexual Harassment in Australian Workplaces. The resulting Respect@Work Report was tabled in the Commonwealth Parliament on 5 March 2020.

Respect@Work investigated the nature, prevalence, reporting, drivers and impacts of sexual harassment in Australian workplaces and assessed the effectiveness of current practices and the legal framework.

We found that workplace sexual harassment is prevalent and pervasive: it occurs in every industry, in every location and at every level in Australian workplaces. In 2018 and 2022 the National Survey on Sexual Harassment found that on average 33% of workers had experienced sexual harassment in the previous 5 years. We found that this conduct had real financial impact on individuals, businesses and the economy. Deloitte Access Economics estimated that sexual harassment cost the Australian economy at least \$3.8 Billion dollars in 2018.

We found that the laws relevant to sexual harassment were complex, confusing and sometimes inconsistent. We also found that the system was a reactive one which relied on victims of sexual harassment coming forward to enforce the law, yet only 17% of workers who had experienced sexual harassment reported the conduct.

We made 55 recommendations to improve how Australian workplaces prevent and respond to sexual harassment across the following five areas:

1. Data and research;
2. Primary prevention;
3. The legal and regulatory framework;
4. Workplace prevention and response;
5. Support, advice and advocacy.

We recommended law reform to ensure consistency across the workplace, safety and discrimination regimes; the creation of the Respect@Work Council for the relevant agencies to collaborate more effectively; and that the *Sex Discrimination Act* be amended to introduce a new positive duty requiring persons conducting a business or undertaking to take reasonable and proportionate measures to address unlawful conduct, independent of complaints (“Positive Duty”).

We concluded that the secrecy of the systemic experience of sexual harassment was contributing to its prevalence. Chapter 6 of the Respect@Work Report on “workplace prevention and response” set out the seven areas of action required by employers to more effectively prevent and better respond to sexual harassment. These areas became the seven standards under the Positive Duty (see Section 9 below and Attachment 1).

We identified that there were two agencies that should require public reporting to drive thoughtful, planned action to be measured, reported to show progress:

- Workplace Gender Equality Agency (Respect@Work Recommendation 42, 43); and
- ASX Corporate Governance Council (Respect@Work Recommendation 44).

As noted above, Recommendation 44 of the Respect@Work Report states:

The ASX Corporate Governance Council introduce sexual harassment indicators for ASX-listed entities to report against, under its Corporate Governance Principles and Recommendations. This could include:

- (a) specific mention of sexual harassment guidance on company codes of conduct (ASX recommendation 3.2)*
- (b) information about measures taken to address sexual harassment, as part of its requirements that listed entities have and disclose a diversity policy and set measurable objectives to achieve gender diversity (ASX recommendation 1.5)*

As you are aware the previous revision of the ASX Corporate Governance Principles and Recommendations was completed before our Respect@Work Report was finalised. At the time of drafting the Respect@Work Report, the ASX Corporate Governance Council office indicated the recommendation could be considered at the next revision.

5. Progress from ASX Corporate Governance on Gender Diversity; 2010 to today

Recommendation 44 of the Respect@Work Report recommended explicit reporting on sexual harassment in the ASX Corporate Governance Principles and Recommendations. This Recommendation was informed in particular by the success of the ASX gender diversity reporting requirements introduced in 2010, and contemporary behavioural insights expertise.

ASX Corporate Governance Council introduced reforms on 30 June 2010 requiring listed boards to establish measurable objectives and to report on gender diversity, which applied to the listed entities for financial year commencing on or after 1 January 2011. I know this new requirement drove immediate action from my firm's clients, and the evidence suggests this reform caused widespread change. In 2009, only 5% of board appointments to the ASX300 were women compared to 46% of appointments reported at 8 March 2024, with women now comprising 36.9% of all ASX300 board directors.

Chapter 13 of Harvard Professor Iris Bohnet's 2016 book *What Works: Gender Equality by Design* recognised the ASX reporting requirements as an example of the global trend of achieving improved gender equality through increased transparency.

While multiple initiatives supported the increasing number of women on boards, in my experience it was the ASX reporting requirements, which evolved over time, that drove the significant consistent change by motivating boards to act on this recommendation. Given the high rates of sexual harassment, we believed that sexual harassment should be explicitly mentioned in the Principles and recommendations to create a similar momentum.

6. Government response to Respect@Work recommendations

The previous Morrison Government published their response to the 55 recommendations in Respect@Work in April 2021 in [A Roadmap for Respect – The Commonwealth Government's response to the Respect@Work Report \(aph.gov.au\)](#) in which they accepted in full, in part, in principle or noted all recommendations.

The Government noted Recommendation 44, stating "The Government welcomes any initiatives to support the prevention of sexual harassment across the private sector and strongly encourages the sector to engage with the Council." The progress update on 22 February 2022 stated:

For the private sector to implement. The Government understands there has been progress on implementing this recommendation. The Attorney-General wrote to the ASX Corporate Governance Council on 25 June 2021 to request information on their implementation of Recommendation 44. On 13 January 2021 [sic 2022], the Chair of the Respect@Work Council (Sex Discrimination Commissioner Kate Jenkins) wrote to the Chair of the ASX Corporate Governance Council seeking an update on actions to implement Recommendation 44 of the Respect@Work Report. The Treasury has advised that the ASX Corporate Governance Council's updated Corporate Governance Principles commenced on 1 January 2020. The ASX Corporate Governance Council generally updates the Corporate Governance Principles every three to four years.

While the Albanese Government accepted all 55 recommendations of the Respect@Work Report in full upon their election on 21 May 2022, Recommendation 44 requires action by the ASX Corporate Governance Council.

7. Equality Across the Board Report 2021

In late 2020, following investor concerns about the handling of sexual harassment claims at a listed company, ACSI commissioned my office at the AHRC to undertake research to better understand how ASX200 companies were addressing sexual harassment, including how information about sexual harassment is reported, managed and shared. The data indicated that the majority of boards were addressing sexual harassment on a reactive basis rather than proactively seeking assurance on prevention. We recommended that boards should focus on oversight of prevention as well as response.

The Equality Across the Board Report made the following 8 recommendations, all of which are relevant to the Principles and Recommendations:

Recommendation 1: Leadership

Demonstrate visible leadership and appropriate oversight and governance over culture, sexual harassment and gender equality. The board has primary responsibility and accountability for ensuring that the entity has in place a governance framework for the prevention of and response to sexual harassment, and for monitoring performance across the entity.

Recommendation 2: Skills and experience

Ensure the entity has the skills and experience to effectively prevent and respond to workplace sexual harassment.

Recommendation 3: Culture

Make gender equality a priority and set gender diversity targets.

Recommendation 4: Systems and frameworks

Ensure systems and frameworks are in place to collect, analyse and use data to effectively manage the risks related to sexual harassment.

Recommendation 5: Executive alignment

Align appointment, expertise and performance management of the CEO and EMT with the entity's values to ensure that EMT demonstrates and displays visible leadership on culture, sexual harassment and gender equality.

Recommendation 6: Use transparency to drive outcomes

Report internally and externally to measure and track the effectiveness of systems and frameworks to prevent and manage sexual harassment.

Investors

It is important to acknowledge that institutional investors are also a workplace and the recommendations set out above will equally apply to their entities. In addition, investors have an ongoing responsibility to protect and enhance investment value. To that end, the Commission makes the following further recommendations for investors:

Recommendation 7: Seek information on investee entities’ systems and processes to prevent and address sexual harassment

Recommendation 8: Advocate for improved transparency and public disclosure on sexual harassment

Investors should encourage their investee entities to disclose their approach to prevent and respond to sexual harassment.

The first of our 8 recommendations in the Equality Across the Board Report recommended that boards should take primary responsibility and accountability for ensuring the company has in place a governance framework for sexual harassment and monitors performance against that framework.

The survey conducted for the Equality Across the Board Report found that in 2021 only 19% of ASX200 boards recognised that boards had this primary responsibility. Pleasingly AHRC, AICD and ACSI repeated this survey in 2023 after the Positive Duty had been legislated, and found that 85% 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 the board. (See [Positive duty: preventing and responding to workplace sexual harassment - Insights from Australian directors \(aicd.com.au\)](#) (2023)).

8. Set the Standard Report 2021

For the Independent Review of Commonwealth Parliamentary Workplaces in 2021, AHRC was asked to examine the prevalence, nature, reporting and impacts of bullying, sexual harassment and actual and attempted sexual assault, and to make recommendations for the Parliament to be a best practice workplace. The Parliament is obviously not a listed entity, however the findings of the review are instructive on what makes a best practice workplace in light of identified risks of bullying, sexual harassment and other forms of discrimination.

Set the Standard Report outlines that one out of every two workers had experienced one or more instance of bullying, sexual harassment and actual and attempted sexual assault in their time working in the Commonwealth Parliament. We confirmed that the key, society-wide drivers of this conduct were: power imbalances, lack of accountability, gender inequality, and entitlement and exclusions. We also identified numerous risk factors that were specific to the Commonwealth parliamentary workplace. We made recommendations about:

- leadership;
- diversity equality and inclusion;
- systems to support performance;
- standards, reporting and accountability; and
- safety and wellbeing.

The Parliament accepted all recommendations, including for the first time introducing codes of conduct for all parliamentarians, staffers and people working parliamentary workplaces. Parliament has introduced reporting on diversity metrics, leadership education and a focus on prevention, consistent with our recommendations in Respect@Work Report. (See Set the Standard (Code of Conduct- [Appendix 1 – Parliament of Australia \(aph.gov.au\)](#)).

9. The Positive Duty to prevent unlawful conduct under the Sex Discrimination Act

The Positive Duty laws were passed in December 2022, and the AHRC has now published resources which specific the Seven Standards that all workplaces must meet. The Seven Standards are set out and explained in [A Quick Guide for Complying with the Positive Duty under the Sex Discrimination Act 1984 \(Cth\)](https://www.humanrights.gov.au/positive-duty) ([humanrights.gov.au](https://www.humanrights.gov.au)), which are also extracted in Attachment 1 to this submission.

As you will see from Attachment 1, the Standards (with the aspects relevant to ASX listed boards noted in brackets) relate to:

1. Leadership (*education; governance; role modelling*)
2. Culture (*diversity, equality and inclusion; a "safe to speak" culture*)
3. Knowledge (*policies; education*)
4. Risk Assessment (*including mitigations*)
5. Support (*trauma informed approach which ensures no further harm*)
6. Response and reporting (*multiple options for reporting; protections from victimisation*)
7. Measurement, evaluation and transparency (*includes reporting to the board and externally*)

I encourage you to use these Standards to supplement the commentary for the new Principles and Recommendations.

10. Feedback on the Consultation Draft for the 5th Edition of the ASX Corporate Governance Principles and Recommendations

Australia is at a turning point on workplace sexual harassment. The ASX Corporate Governance Principles and Recommendations are an important piece of the puzzle to significantly reduce the prevalence and harms of sexual harassment, and thereby improving productivity of Australian workplaces.

The following three amendments to the Principles and Recommendations will reinforce and align with the now consistent, co-ordinated and clear obligations on organisations to prevent sexual harassment and other unlawful conduct. These three amendments are consistent with the purpose of achieving good governance outcomes and meeting the reasonable expectations of most investors.

10.1 Amend the proposed draft of Recommendation 3.2 as follows:

A listed entity should instill and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly, including by:

- a) having and disclosing a code of conduct for its directors, senior executives and employees including prohibiting sexual harassment, unlawful discrimination and bullying;
- b) ensuring that the board or a board committee is informed of the entity's action to prevent unlawful conduct and breaches of the code;
- c) disclosing actions taken during the last reporting period to prevent unlawful conduct and breaches of the code;
- d) ensuring that the board or a board committee is informed of any material breaches of the code of conduct; and
- e) disclosing (on a de-identified basis) the outcomes during the last reporting period of actions taken by the entity in response to material breaches of the code.

These small amendments to Recommendation 3.2 will:

- Ensure there is specific reference to sexual harassment in the recommendation. We have also included bullying and unlawful discrimination given the increasing evidence of the prevalence of

these physical and psycho-social risks and the similarity of drivers and risk factors causing this conduct.

- Direct boards towards their responsibilities for oversight and prevention. The current draft only requires reactive reporting which the Respect@Work Report identified has led to inadequate action and is also not sufficient to meet the Positive Duty.
- Encourage transparency on prevention actions in paragraph (c), not simply reporting on material breaches (e). This is consistent with the findings of the Respect@Work Report that organisations needed to direct their primary attention to prevention, as well as to improve their responses.

10.2 Add further explanatory information in the commentary of the ASX Corporate Governance Principles and Recommendations as follows:

I welcome the many aspects of the Principles and Recommendations that align with findings in the Respect@Work Report, Equality Across the Board Report, Set the Standard Report and the Positive Duty Standards. This creates the opportunity to include some additional commentary in the Principles and Recommendations document to reflect this alignment under the following recommendations:

Recommendation	Suggested commentary
2.2	Board skills matrix. Positive Duty Standard 1: Leadership (education of senior leaders) and Equality Across the Board Report Recommendation 2 both noted the need for board members to have sufficient skills and experience to provide appropriate governance on sexual harassment.
2.3	Board Diversity. Respect@Work and Set the Standard found that drivers of sexual harassment and bullying include gender inequality and lack of diversity. See Positive Duty Standard 2 on Culture and Set the Standard Report recommendations on diversity, equality and inclusion.
2.7	Induction of board director. As for Recommendation 2.2, See Positive Duty Standard 1 on Leadership education and Equality Across the Board Recommendation 2 on board skills and expertise.
3.2	Culture of acting lawfully, ethically and responsibly. Sexual harassment, bullying and unlawful discrimination are significant risks to physical and psycho-social health. See comments in section 10.1 above.
3.3	Engagement with key stakeholders Noting you have removed reference to the Whistleblower policy. Workers who experience sexual harassment or disclose sexual harassment hold real fears of victimisation. Under this recommendation you may wish to include a specific note that directors must be confident that: <ul style="list-style-type: none"> • there are safe mechanisms for people to raise concerns about senior executives, board members and other high value workers in particular; and • there are protections against victimisation in place for people who raise complaints of sexual harassment, unlawful discrimination and bullying.
3.4	Diversity and Inclusion Policy

	<p>Respect@Work and Set the Standard found that drivers of sexual harassment and bullying include gender inequality and lack of diversity. See Positive Duty Standard 2 on Culture and Set the Standard Report recommendations on diversity, equality and inclusion.</p> <p>WGEA Gender Equality Indicator 6 is “sexual harassment, harassment on the grounds of sex or discrimination”. In theory this requirement for reporting entities will cover reporting on indicators relating to sexual harassment. I recommend the commentary ensures sexual harassment is expressly noted. Also noting that non-reporting entities (ie those note required to report to WGEA) are also covered by the Positive Duty.</p>
7.4	<p>Disclosure of material risk</p> <p>Positive Duty Standard 4 Risk Management specifically requires organisations to undertake a risk assessment. Sexual Harassment would now be included for most listed organisations as a material risk. I suggest you include sexual harassment and managing psycho-social risks as an example of managing risk under some risk examples (with current proposed examples covering cyber risk and climate change-related risk).</p>

10.3 In response to the Consultation questions:

Question	Comment
1	No comment.
2	No comment.
3	Support. See Recommendation 2 of Equality Across the Board Report.
4	Support. Noting the success of the requirement of setting measurable objectives since 2010, this is a positive step towards actually achieving the goal and benefits of gender balanced boards.
5	Support.
6	Support.
7	No comment.
8	Support. See paragraph 10.1 above where I propose amendments to Recommendation 3.2. The current draft focuses only on reporting when material breaches occur. The Respect@Work Report identified the need for reporting on <i>prevention</i> activity, in addition to response.
9	Support. I note that since 2020, customers, workers, media and investors have all objected to handling of sexual harassment issues.
10	This new Recommendation 3.3 may not adequately cover whether there is a process in place for complaints about board or executive? The Respect@Work Report identified power imbalance as a key driver of sexual harassment, and we heard of numerous examples of people being unable to report concerns about the most powerful people, including board directors, executives and high value employees.
11	No comment.
12	No comment.

13	No comment.
14	No comment.
15	Support. Noting there have been examples where historic sexual harassment is proven. In those cases it may be appropriate to take action on senior executive performance-based remuneration.
16	No comment.
17	No comment. Noting the Positive Duty applies to all organisations.
18	No comment.
19	I propose Recommendation 3.2 be amended as set out in section 10.1 above, and additional explanatory commentary may be included as set out in section 10.2 above.

Please contact me if you have any queries on this submission or if I can assist in any other way.

Yours faithfully



Kate Jenkins AO

Attachment 1

**7 Standards for complying with the Positive duty under the Sex Discrimination Act 1984 (Cth):
Australian Human Rights Commission**

[A Quick Guide for Complying with the Positive Duty under the Sex Discrimination Act 1984 \(Cth\)
\(humanrights.gov.au\)](http://humanrights.gov.au)



01: Leadership

Senior leaders understand their obligations under the Sex Discrimination Act and have up-to-date knowledge about relevant unlawful conduct.

Senior leaders are responsible for ensuring that appropriate measures for preventing and responding to relevant unlawful conduct are developed, recorded in writing, communicated to workers and implemented. Senior leaders regularly review the effectiveness of these measures and update workers.

Senior leaders are visible in their commitment to safe, respectful and inclusive workplaces that value diversity and gender equality. They set clear expectations and role model respectful behaviour.

02: Culture

Organisations and businesses foster a culture that is safe, respectful and inclusive and that values diversity and gender equality. This culture empowers workers (including leaders and managers) to report relevant unlawful conduct, minimises harm and holds people accountable for their actions.

03: Knowledge

Organisations and businesses develop, communicate and implement a policy regarding respectful behaviour and unlawful conduct.

Organisations and businesses support workers (including leaders and managers) to engage in safe, respectful and inclusive behaviour through education on:

- expected standards of behaviour, including actions and attitudes that foster equality and respect
- identifying behaviours that constitute relevant unlawful conduct, and the consequences for engaging in such conduct
- their rights and responsibilities in relation to safe, respectful and inclusive workplaces and working relationships. This includes their role in preventing and responding to relevant unlawful conduct.

04: Risk management

Organisations and businesses recognise that relevant unlawful conduct is an equality risk and a health and safety risk. They take a risk-based approach to prevention and response.

05: Support

Organisations and businesses ensure that appropriate support is available to workers (including leaders and managers) who experience or witness relevant unlawful conduct.

Workers are informed about the available support, and can access the support, regardless of whether they report the conduct.

06: Reporting and Response

Organisations and businesses ensure that appropriate options for reporting and responding to relevant unlawful conduct are provided and regularly communicated to workers and other impacted people.

Responses to reports of relevant unlawful conduct are consistent and timely. They minimise harm to, and victimisation of, people involved.

Consequences are consistent and proportionate.

07: Monitoring, evaluation and transparency

Organisations and businesses collect appropriate data to understand the nature and extent of relevant unlawful conduct concerning their workforce.

Organisations and businesses use the data they collect to regularly assess and improve the work culture, as well as to develop measures for preventing and responding to relevant unlawful conduct.

Organisations and businesses are transparent about the nature and extent of reported behaviours that could constitute relevant unlawful conduct concerning their workers and actions taken to address it.