

## Response ID ANON-DQ2F-3MF9-C

Submitted to Respect@Work – consultation on remaining legislative recommendations  
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### Questions about you

1 What is your name?

Name:  
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2 What is your email address?

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3 Who are you making this submission for?

Organisation (including Commonwealth, state, territory or local government agency)

4 What is your organisation?

Organisation:  
Governance Institute of Australia

5 What sector is your organisation a part of?

Not-for-Profit sector

Other (please specify):

6 What is your position in the organisation?

Position:  
General Manager, Policy and Advocacy

7 Where do you live/where is your organisation based?

NSW

8 What is your gender (if you are submitting on your own, or another person's, behalf)?

Female

9 Making your submission public

I agree to my submission being made public under my/my organisation's name

### Issue 1: Recommendation 16(c) – Hostile work environment

1 What are your views on amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex?

Support amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex

Please expand on your response:

Governance Institute commends the Commonwealth Government and the Australian Human Rights Commission for their efforts to address sexual harassment in workplaces. This is an important opportunity for reform. Governance Institute takes issues of gender equality and the prevention of sexual harassment in workplaces in all sectors very seriously. We regularly engage and advocate on these issues on behalf of our members.

Governance Institute's members in principle support amending the Sex Discrimination Act and strongly support creating work environments which are safe for all, particularly women. Amending the Sex Discrimination Act, to prohibit the creation or facilitation of hostile work environments, would bring the Sex Discrimination Act into line with the existing work, health and safety legislative framework.

2 If you SUPPORT this proposal, what are your key reasons?

Other

Please expand on your response:

The primary reason that Governance Institute's members support this amendment is that amending the Sex Discrimination Act, to prohibit the creation or facilitation of hostile work environments, would bring the Sex Discrimination Act into line with the existing work, health and safety legislative framework.

Governance Institute would like to see harmonisation and greater clarity around sexual harassment laws. The law in this important area should be uniform across all Australian states and territories and be supported by appropriate guidance. This is important for all parties involved. For victims because it enables them to understand clear avenues for pursuing sexual harassment claims. It is important for companies and other organisations because it enables them to understand their obligations and role in preventing sexual harassment and the process if claims are lodged. It also sends a clear message to all those in Australian workplaces about the part they have to play in preventing sexual harassment.

3 If you DO NOT SUPPORT this proposal, what are your key reasons?

Please expand on your response:

N/A

4 Which of the following workplace roles or positions, if any, should a prohibition on creating or facilitating a hostile work environment apply to?

Executive leadership (senior managers, leaders), Middle management (managers, supervisors), Junior staff, All individual/s who contribute towards creating or facilitating an intimidating, offensive, humiliating and hostile work environment

Please expand on your response:

Governance Institute considers culture is the sum of an organisation's shared values, principles and behaviours. The Respect@Work Report refers in various places to factors 'driven by culture', a 'high intensity culture', 'A culture of minimising, normalising and keeping quiet instances of unacceptable behaviour', and 'Cultures which tolerate or minimise the impact of sexual harassment'.

In our members' experience, cultural problems are often the systemic cause of workplace issues. They consider there is a direct relationship between workplace culture and bullying, sexual harassment, and sexual assault. This is supported by recent evidence. Submissions to the Respect@Work Report mention 'the culture or 'climate' of a workplace, including the critical role of leadership in setting workplace culture' and the Commission's recommendations included workplace culture as a key action area, including 'the role of policies and human resources practices in setting organisational culture'. The handbook released by the Champions of Change Coalition notes that 'Workplace cultures that normalise, tolerate and excuse disrespectful behaviour at one end of the continuum may lead to more serious issues at the other'. A joint report by the Australian Council of Superannuation Investors (ACSI) and the Australian Institute of Company Directors (AICD), based on interviews with company directors, also discusses the nexus between workplace culture and harassment and calls for 'a shift from a reactive, complaints-based approach to addressing sexual harassment to one that requires victim-focused action from employers with a focus on prevention and early intervention'.

Cultural change is driven by leaders at the top of an organisation. Governance Institute's 2017 joint guidance on culture makes it clear that boards are responsible for 'setting the tone from the top', including by 'modelling the firm's desired behaviours and values when interacting with management and staff. The guide also notes that, 'Until recently, organisational artefacts – including policies, architecture and processes – have been the predominant mechanism by which an organisation's identity has been defined and its people's behaviour influenced and controlled within an organisation. While these artefacts have a significant influence over decision-making, there is evidence emerging that character and culture have a stronger influence than artefacts in affecting the decisions, behaviours and actions of an organisation's people, and in avoiding ethical failure.' Even with the best policies, procedures and oversight mechanisms in place, workplace issues will persist in the absence of demonstrated, visible leadership. It is crucial for leaders to model the culture they wish to see. Values need to be lived and codes of conduct must be supported by actions. Directors, senior management and other leaders must take ownership of these issues, not only by supporting practical and systemic reforms, but personally as well, by setting the right example for their staff.

The creation of workplaces that are not hostile is the responsibility of all, but must be led from the top of the organisation.

## Issue 2: Recommendation 17 – Positive duty

1 What are your views on introducing a positive duty into the Sex Discrimination Act to prevent sexual harassment from occurring in Australian workplaces?

Support introducing a positive duty into the Sex Discrimination Act

Please expand on your response:

Governance Institute's members in principle support introducing a positive duty into the Sex Discrimination Act but consider there needs to be more detail about what this duty involves to enable them to consider some of the practical implications for companies and other organisations.

Governance Institute recognises that a positive duty currently exists in the existing work, health and safety legislative framework. Our members in principle support changes that bring the Sex Discrimination Act into line with the existing work, health and safety legislative framework. Their preference is for measures focusing on prevention and early intervention, rather than reactive/remedial measures.

2 If you DO support the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

Promote a culture of prevention in workplaces – the proposal would contribute to cultural change around addressing sexual harassment, promoting a preventative approach rather than a reactive, remedial one, Alignment with the existing Work Health and Safety framework's focus on prevention – the proposal would align employers' obligations under the Sex Discrimination Act with their obligations under the Work Health and Safety framework, by focusing on preventative efforts

Please expand on your response:

Governance Institute's members in principle support introducing a positive duty through the Sex Discrimination Act. Governance Institute agrees that sexual harassment in the workplace is an important issue and that organisations which have systemic problems with sexual harassment should be addressed. The members would like greater clarity regarding the positive duty and its practical implications for companies and organisations. It is important that any positive duty is carefully framed and does not create unintended consequences or increased regulatory burden, particularly for smaller organisations.

The key reason that Governance Institute would support the positive duty, in principle, is that it would align with the existing work, health and safety legislative framework's focus on prevention. This would align employers' obligations under the Sex Discrimination Act with obligations already existing through the work, health and safety legislative framework. Our members consider a preventative approach to sexual harassment would achieve better outcomes than a reactive/remedial approach and assist in promoting a culture of prevention in workplaces and contribute to cultural change around addressing sexual harassment.

3 If you DO NOT support the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

Please expand on your response:

N/A

4 What, if any, complexities would introducing a positive duty into the Sex Discrimination Act create for employers and/or people who experience sexual harassment?

Enter your response here:

Applicants/victims

- Individuals should still be able to make complaints under any new proposed model.
- There needs to be clarity over which body to approach to report sexual harassment complaints. There should be one specialist body or regulator that applicants can approach.
- There needs to be clarity over what the process involves and costs for individuals.
- The current approach to sexual harassment involves alternative dispute resolution ('ADR') mechanisms such as mediation and conciliation as a preliminary step before matters proceed to court. It is important that the ADR mechanisms continue to be used despite the introduction of a positive duty. ADR reduces the number of matters which proceed to litigation. Litigation often takes a financial and psychological toll on all parties involved including victims and businesses/organisations.

Employers

- It is important that there is clarity over what the positive duty involves and which body is responsible for enforcement of the duty.
- Whichever regulator is responsible for the positive duty must be appropriately funded and resourced with suitably qualified and trained staff.
- The content of any regulations needs to be appropriate and not create unnecessary regulatory burden particularly for community groups and volunteers.

5 What are your views on the interaction between a new positive duty in the Sex Discrimination Act and the existing work health and safety duty? Can you identify any particular areas of interaction or concern that would require further thought or consideration, such as between different regulators when investigating issues of sexual harassment?

Enter your response here:

Governance Institute's members consider the key areas of concern are the drafting of the legislation and the identification of the appropriate regulator.

It is important that the legislation makes it clear whether sexual harassment matters fall under the Sexual Discrimination Act or the work, health and safety legislative framework.

If it is decided that there is a need for a new regulator to oversee sexual harassment, it needs to be made clear that there is one regulator with oversight over sexual harassment issues. It is also important that this regulator is appropriately funded and resourced with qualified and trained staff.

6 What other options to prevent sexual harassment in the workplace could the Government consider, alongside or instead of, introducing a positive duty into the Sex Discrimination Act?

Providing further education on employer obligations and building capacity across all industries on creating safe workplace cultures, Encouraging increased compliance with the existing Work Health and Safety framework, for example through training or production of further guidance materials, Establishing a specific accreditation framework targeted at sexual harassment, under which businesses could seek accreditation for facilitating workplace environments that are free from intimidating, hostile, humiliating or offensive behaviour and have that accreditation removed, Establishing industry codes of conduct/practice, which would set out specific standards for sexual harassment prevention and could be mandatory or voluntary to adopt (building on efforts already underway by some industries to respond to the findings of the Respect@Work Report and under recommendation 47

Please expand on your response:

Education, building capacity across industries and establishment of accreditation frameworks should be additional steps taken to address this issue.

There currently are educational resources available to employers regarding sexual harassment. However, it is important that these resources are regularly updated, clarified and shared between agencies. The resources should be trauma informed, focused on both physical and psychological health and practical to industry. It would also be useful to consider material developed by the work, health and safety authorities in Western Australia and New South Wales on management of psychosocial hazards in workplaces as well as industry codes of practice currently in development.

Our members consider that preventative measures are preferable to the need for enforcement after the event. Where possible, it would be useful to form cross agency and sectoral working groups and centres of knowledge and expertise on the prevention of sexual harassment in Australian workplaces. This would assist in knowledge sharing and improving the availability of resources available to employers and managers. It would also provide support for organisations about the actions needed when they receive complaints.

Accreditation programs targeted at sexual harassment may also provide further practical knowledge and assistance in reducing sexual harassment.

7 What are your views on how broadly or narrowly a positive duty should apply in terms of who it covers?

Apply to all employers as broadly as possible within the working world, regardless of size, structure and revenue, with no exclusions

Please expand on your response:

The positive duty should extend to all companies and other organisations, however the level of the duty imposed should vary according to factors such as:

- The nature and size of the business or operations
- Business resources
- The business operational priorities
- The practicality and costs of the measure and any other relevant facts or circumstances.

The safety of all staff is paramount. So there must be minimum and clear standards that ensure staff safety in all companies and other organisations. These standards should go beyond merely ticking boxes and should require consideration of the specific workplace and staff safety needs. However, it is also important the regulations are not overly burdensome and do not create an impediment to the formation and work of community organisations. The approach needs to be balanced.

8 What considerations should be relevant when determining whether a duty holder has adequately discharged a positive duty?

The nature and size of the business or operations, Business resources, Business operational priorities, The practicability and costs of the measure, Any systemic issues within that industry or workplace, Any other relevant facts or circumstances

Please expand on your response:

All of the above.

9 What assistance or guidance would help support employers to meet any new positive duty obligations?

Enter your response here:

The measures mentioned above would help support employers to meet any new positive duty obligations. These include:

- Harmonisation of sexual harassment laws across all jurisdictions.
- Having a single point of regulatory responsibility regarding sexual harassment.
- High level educational resources which include:
  - Explaining sexual harassment laws.
  - What the positive duty means for companies and organisations.
  - Which body oversees sexual harassment laws.
  - What effects sexual harassment has on physical and psychological health.
  - What factors create a high-risk workplace. Practical steps that employers can take to reduce sexual harassment risks.
  - Minimum standards, which smaller organisations should consider in improving safety in their specific workplace or organisation.
  - How to make a complaint.

### Issue 3: Recommendation 18 – Enforcement powers for the Australian Human Rights Commission

1 If you SUPPORT the introduction of a positive duty, how should it be enforced?

Other

Please expand on your response:

Governance Institute recommends a hybrid model.

Individual Complaints

Individuals should still be able to make complaints about their specific workplace to the responsible regulator. The current ADR mechanisms (eg conciliation and mediation) should continue to be used to reduce matters escalating to the courts. Individuals should still be able to access the courts if ADR is unsuccessful.

#### Systemic Complaints

The specialist regulator should have powers modelled on the Victorian Equal and Human Rights Commission to address systemic problems. This allows the regulator to investigate a suspected contravention of the positive duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by ADR. The regulator should have the following powers:

- Compliance and co-regulatory powers would enable the regulator to work with an employer to facilitate compliance with the positive duty. It could include powers to request that employers develop an action plan for complying with the positive duty and register it with the regulator, and monitor and conduct assessments of the steps taken by employers to comply with the positive duty. The Australian Charities and Not-for-profits Commission carries out this type of process effectively.

- Investigation powers would enable the responsible regulator to request and then compel the production of information and documents, the ability to hold a hearing, examine witnesses and compel them to appear/give evidence. Penalties could also be available for non-compliance with these inquiry powers.

- Enforcement powers would enable the responsible regulator to issue compliance notices when required, accept enforceable undertakings from an employer and/or initiate proceedings to enforce enforceable undertakings or enforce non-compliance with a compliance notice in the court.

#### Limits

However, the powers should be limited to sexual harassment matters. The powers should be exercised with discretion regarding the specific circumstances of the organisation. The powers should not extend to making determinations and bringing proceedings to enforce determinations in court.

2 If you SUPPORT the introduction of enforcement powers (option 3 above) for the Australian Human Rights Commission, what powers should be made available?

Enter your response here:

The regulator should have compliance and co-regulatory powers, investigation powers and enforcement powers. However, the powers should be operated with discretion and have limits (discussed below).

Compliance and co-regulatory powers would enable the regulator to work with an employer to facilitate compliance with the positive duty. It could include powers to request that employers develop an action plan for complying with the positive duty and register it with the regulator, and monitor and conduct assessments of the steps taken by employers to comply with the positive duty. It would be useful to look at the processes other regulators adopt in these situations.

Investigation powers would enable the responsible regulator to request and then compel the production of information and documents, the ability to hold a hearing, examine witnesses and compel them to appear/give evidence. Penalties could also be available for non-compliance with these inquiry powers.

Enforcement powers would enable the responsible regulator to issue compliance notices when required, accept enforceable undertakings from an employer and/or initiate proceedings to enforce enforceable undertakings or enforce non-compliance with a compliance notice in the court.

#### Limits

However, the powers should be limited to sexual harassment matters. The powers should be exercised with discretion regarding the specific circumstances of the organisation. The powers should not extend to making determinations and bringing proceedings to enforce determinations in court.

3 Should the Australian Human Rights Commission be able to exercise enforcement powers in relation to an alleged breach of the positive duty by any employer, regardless of size or number of employees?

Yes

Please expand on your response:

Yes, the responsible regulator should have power to exercise enforcement powers in relation to a breach of the positive duty by any employer regardless of size. However, the regulator must operate with discretion. It should have regard to factors including: the nature and size of the business or operations, business resources, the business operational priorities, the practicality and costs of the measure and any other relevant facts or circumstances. It should investigate contraventions that are serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution. The responsible regulator should be properly resourced and funded with suitably qualified and trained staff.

### Issue 4: Recommendation 19 – Inquiry powers for the Australian Human Rights Commission

1 What are your views on providing the Australian Human Rights Commission with new or additional inquiry powers to inquire into systemic unlawful discrimination, including sexual harassment?

Support providing the Australian Human Rights Commission with new or additional inquiry powers to inquire into systemic unlawful discrimination, including sexual harassment

Please expand on your response:

Yes, the responsible regulator should have inquiry powers to investigate systemic sexual harassment. However, the regulator must operate with discretion. It should investigate contraventions that are serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolutions. The responsible regulator should be properly resourced and funded. It should investigate and resolve matters quickly. The regulator should have regard to factors including: the nature and size of the business or operations, business resources, the business operational priorities, the practicality and costs of the measure and any other relevant facts or circumstances.

2 If you SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

Enter your response here:

Governance Institute supports one regulator having responsibility for sexual harassment laws. This could be the Australian Human Rights Commission. Whichever regulator is responsible it is important that it has sufficient funding and powers to investigate matters quickly and carefully. It should operate with discretion and with regard to the circumstances of the organisation and individuals involved. The primary reason why the Governance Institute's members would support a single regulator with responsibility for sexual harassment is the importance of the issue. It is important that all workers are safe in the workplace.

3 If you DO NOT SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

Enter your response here:

N/A

4 What are your views on limiting the Australian Human Rights Commission's proposed inquiry powers?

Enter your response here:

The responsible regulator's proposed inquiry powers should be limited to discrimination under the Sex Discrimination Act, for example, discrimination on the ground of sex, sex-based harassment and sexual harassment, not discrimination regulated by other legislation.

5 What are your views on accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers (such as the power to require the giving of information, the production of documents and the examination of witnesses)?

Support accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers

Please expand on your response:

Governance Institute supports the responsible regulator having powers to obtain information and documents, examine witnesses and allocate penalties for non-compliance. However, these powers should be limited to discrimination under the Sex Discrimination Act- for example, discrimination on the ground of sex, sex-based harassment and sexual harassment, not discrimination regulated by other legislation. The regulator should operate these powers with discretion and with regard to the circumstances of the organisation and individuals involved.

6 Are any investigatory powers appropriate to accompany a broad inquiry power for the Australian Human Rights Commission?

Require the giving of information, Require the production of documents, Enable the examination of witnesses, Issue penalties for non-compliance

Please expand on your response:

The responsible regulator should have the powers discussed above. However, the power should be limited to discrimination under the Sex Discrimination Act, for example, discrimination on the ground of sex, sex-based harassment and sexual harassment, not discrimination regulated by other legislation.

## Issue 5: Recommendation 23 – Representative actions

1 What are your views on amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters?

Do not support amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters

Please expand on your response:

Governance Institute does not support amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters.

2 If you SUPPORT this proposal, what are your key reasons?

Please expand on your response:

N/A

3 If you DO NOT support this proposal, what are your key reasons?

The amendment is not necessary as representative bodies are already able to provide financial, legal and other support to individuals and groups to pursue litigation. Allowing representative bodies to commence representative proceedings may heighten the existing conflict of interest risks in class actions in circumstances where the interests of the representative plaintiff, lawyers, litigation funders and other members of the class may not align

Please expand on your response:

Governance Institute's members do not support this amendment. They recognise the role of representative bodies in supporting individuals. However, the amendment is not necessary as representative bodies are already able to provide financial, legal and other support to individuals and groups to pursue litigation. Further, the amendment could increase conflict of interest risks in class actions in circumstances where the interests of the representative plaintiff, lawyers, litigation funders and other members of the class do not align.

4 Do you consider representative complaints and representative proceedings (class actions) to be an effective mechanism for people to address anti-discrimination matters, such as sexual harassment?

No

Please expand on your response:

No, for the reasons mentioned above.

5 What are the advantages of allowing representative bodies to commence representative proceedings on behalf of people who have experienced discrimination, including sexual harassment, given they are already able to provide financial, legal and other support to applicants under the existing framework?

Enter your response here:

Governance Institute considers there are not clear advantages to allowing representative bodies to commence representative proceedings on behalf of people who have experienced discrimination including sexual harassment for the reasons given above. Representative bodies currently are able to provide financial, legal and other support to individual applicants. This support is important and should continue.

6 Are there other benefits associated with allowing representative bodies to commence representative proceedings in the federal courts in anti-discrimination complaints? Is there any evidence to support these benefits?

Enter your response here:

No, for the reasons given above.

7 What are your views on placing limits and restrictions on any amendments that would permit representative bodies to bring a representative proceeding on behalf of applicants in anti-discrimination matters to prevent potential misuse of such a mechanism? If you support limitations, what should these limits be?

Enter your response here:

Governance Institute's members do not support the amendments. If the amendments proceed, they consider there should be limitations that safeguard the interests of the representative plaintiff, the applicant, if there is a conflict of interest between the plaintiff and representative bodies/ litigation funders.

## Issue 6: Recommendation 25 – Costs protections

1 What are your views on changing the current costs model?

Support changes to the current costs model

Please expand on your response:

Governance Institute's members support changes to the current costs model. Governance Institute has two recommendations in relation to costs:

- 1) Any changes to sexual harassment legislation must integrate Alternative Dispute Resolution Mechanisms to reduce matters escalating to court, and
- 2) Costs should follow a model whereby each party bears their own costs in the first instance, but the courts have discretion to make exemptions in the interests of justice.

Firstly, Governance Institute recommends that any changes to sexual harassment legislation must integrate ADR mechanisms. The current approach to sexual harassment, at first instance, involves ADR mechanisms, such as mediation and conciliation, as a preliminary step before matters proceed to court. It is important that the ADR mechanisms continue despite the introduction of a positive duty. ADR can reduce the amount of matters which result in court proceedings. The escalation of matters to a court hearing often takes a financial and emotional toll on all parties involved including plaintiffs (applicants) and businesses/organisations.

Secondly, Governance Institute's members support a model in which each party bears their own costs in the first instance, but the courts have discretion to make exemptions in the interest of justice. The court should consider factors including: the financial circumstances of the parties, whether a party is wholly unsuccessful in the proceedings and or/whether a party made an offer in writing earlier to settle the matter. The advantage of this model is that it would provide the plaintiff with certainty and clarity around the amount of costs they would pay, but would also provide a mechanism for the successful party to recover their legal costs. It would also provide an incentive for parties to settle matters through conciliation rather than proceeding to a court hearing.

2 If you SUPPORT a change to the costs model, what are your key reasons?

Other

Please expand on your response:

Governance Institute's members recognise that the current cost model could deter applicants from initiating civil proceedings. We make two key recommendations, which are noted at question 1 above.

3 If you DO NOT support a change to the current costs model, what are your key reasons?

Please expand on your response:

N/A

4 Which of the following options, if any, is the most appropriate costs model to apply in anti discrimination matters?

Not Answered

Please expand on your response:

Governance Institute recommends the cost neutrality model for the reasons discussed above.