



Respect@Work

Is your business ready to respond?

Helping employers to understand the new 'positive duty' to eliminate discrimination, sexual harassment and victimisation.

New obligations can, and should, provoke innovative responses to systemic harm. Sexual harassment is corrosive and unacceptable. Designing and implementing a response framework can fundamentally change the experience of your people. And now it's the law.

DR MEG BRODIE

Partner in Charge.

KPMG Banarra | Human Rights & Social Impact

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Understanding the 'positive duty' to eliminate sexual harassment

Australian employers have a 'positive duty' to protect their employees from sexual harassment.

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) (Respect@Work Act) requires employers and persons conducting a business or undertaking, to take **proactive, reasonable and proportionate** measures to **eliminate**, as far as possible, sex discrimination, sexual harassment, harassment on the grounds of sex, hostile workplace environments (on the grounds of sex) and victimisation.

The Australian Human Rights Commission (AHRC) is responsible for enforcing obligations under the Respect@Work Act, with new enforcement provisions and powers taking effect in December 2023.

Recent changes to national work health and safety (WHS) regulations also now require employers to eliminate, or minimise, risks of exposure to harassment, including sexual harassment, as part of managing workplace psychosocial risks – a core area of focus for WHS regulators across Australia.¹

Sexual harassment is a pervasive problem that attracts public, investor and regulator attention. Employers must take immediate action to protect their employees and respond to the regulatory requirements.

THESE DUTIES HERALD A SIGNIFICANT SHIFT IN WHAT IS REQUIRED OF EMPLOYERS. IT IS NO LONGER ENOUGH TO ADDRESS SEXUAL HARASSMENT IN THE WORKPLACE AFTER IT HAS OCCURRED. EMPLOYERS MUST PROACTIVELY ELIMINATE ALL FORMS OF SEXUAL HARASSMENT AS FAR AS POSSIBLE. THIS MEANS THAT THE ROOT CAUSES OF SEXUAL HARASSMENT MUST BE ADDRESSED.

This guide provides high-level steps employers in all sectors can take to prevent sexual harassment, by responding to their positive duty obligations under the Respect@Work Act, and related WHS obligations.



¹ Safework Australia, 'Managing Psychosocial Hazards at Work: Model Code of Practice' (July, 2022).

What is sexual harassment?

Workplace sexual harassment, harassment on the grounds of sex, sex discrimination, and victimisation are unlawful under state and Commonwealth anti-discrimination legislation.

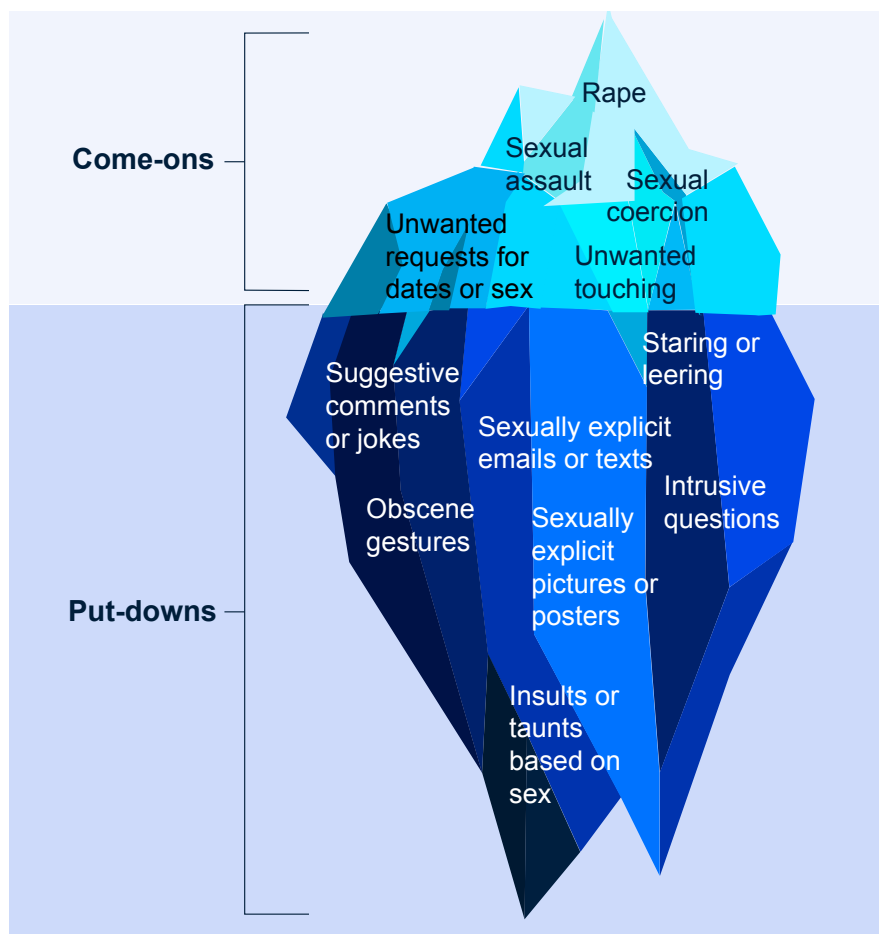
The Sex Discrimination Act describes sexual harassment as any unwelcome and non-consensual advance, conduct of a sexual nature, or request for sexual favours in relation to the person harassed, where a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.²

It is:

- conduct that is sexual in nature, a sexual advance or a request for sexual favours;
- unwelcome to the person harassed; and
- conduct that offends, humiliates or intimidates a reasonable person.

Contrary to popular belief, sexual harassment is most often a 'put-down' as opposed to a 'come-on', such as inappropriate physical contact where the point is to make a sexual advance. Its most common variety is **harassment on the grounds of sex** (sex-based harassment) – acts conveying offensive, demeaning or derisive attitudes based on gender or sex.

FIGURE 1: THE SEXUAL HARASSMENT ICEBERG³



'Put-downs' may include comments like, 'women are not cut out for mining'. The point of a comment like this is not to make a sexual advance, it is to put people down, and push them out of the workforce. It is sexual harassment because it is based on sex. Compared to other forms of sexual harassment, these behaviours tend to be less visible (beneath the surface as in Figure 1) and therefore more insidious.

Sex-based harassment often overlaps with **sex discrimination** – when someone is treated less favourably because of their sex, gender identity, intersex status, sexual orientation, marital status, family responsibilities, or pregnancy. Examples include not paying a woman the same salary as a man for the same work.

Victimisation occurs when a person subjects, or threatens to subject, another person to any detriment on the grounds that, for example, they have made a complaint about sexual harassment or sex discrimination.

² Sex Discrimination Act 1984 (Cth) s 28A.

³ 'The Iceberg of Sexual Harassment', National Academies (Web page) <<https://nap.nationalacademies.org/visualizations/sexual-harassment-iceberg/>>.

High-risk workplace settings

Some workplace settings create more permissive environments for sexual harassment.

More than one in three employees in Australia have experienced sexual harassment at work.⁴ Although sexual harassment is pervasive across all industries, there are some workplace settings which increase the risk of sexual harassment.⁵

Examples of high-risk workplaces include:



Male-dominated workplaces

Workplaces that are male-dominated (an under-representation of women in senior leadership roles, or involve work considered 'atypical' for women) are known to have higher rates of sexual harassment. Examples include the mining and construction industries.



High levels of contact with customers, clients or patients

Work involving high levels of contact with customers, clients or patients carries inherent risks. This includes the retail, hospitality, healthcare, and social assistance industries.



Hierarchical workplaces

Hierarchical workplace structures can increase the risk of sexual harassment due to the power differentials between organisational levels. Industries with these structures include police organisations, defence forces, medical and legal professions.



Rural, regional and remote workplaces

Rural, regional and remote workplaces, including businesses operating in small communities with low levels of privacy and anonymity, present an elevated risk due to the increased barriers to reporting and lack of accessibility to support and services.

⁴ Australian Human Rights Commission, *Time For Respect: Fifth national survey on sexual harassment in Australian Workplaces* (November 2022).

⁵ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 218 - 257.

Insights on high-risk sectors from our work

MINING

The WA Parliament tabled the *Enough is Enough: Sexual harassment against women in the FIFO mining industry* report in 2022. This report revealed distressing accounts of sexual harassment and sexual assault on Australian mining sites.⁶ As a result, the mining sector has been in the spotlight as a high-risk setting.

Our work in this sector confirms that male-dominated, hierarchical, and remote workplaces are key risk factors for sexual harassment in Australian mining.

Our experience reinforces the need to take a trauma-informed approach to understanding the prevalence, nature, contributing factors and key drivers of sexual harassment in this context. In particular, engagement with stakeholders must be sensitive, safe and confidential.

PROPERTY AND CONSTRUCTION

A report on the construction industry found that a culture of disrespect and sexual harassment towards women was commonplace.⁷ The following features of the male-dominated industry impacted women workers:

- masculine norms and practices
- tolerance for sexism
- exclusion of women in the industry
- women routinely having to prove their capability.

During a recent audit of a commercial property management company, we received sexual harassment disclosures from cleaning staff which had previously gone unreported. Our work confirms that under-reporting is a prominent issue across organisations. Victims are often deterred from reporting because of fear that the grievance will not be taken seriously or escalation of the complaint may result in retaliation or job loss.

RETAIL

Retail trade is a high-risk industry for sexual harassment due to its customer-facing nature. Research indicates that customer-perpetrated sexual harassment occurs almost invisibly as an embedded part of retail culture.⁸

In 2021, the Victorian Equal Opportunity and Human Rights Commission published a report on the efforts of a franchise retailer to prevent workplace sexual harassment. The investigation found gaps in its approach to prevention, which exposed employees to harm, including lack of an overall sexual harassment prevention plan and lack of training for employees.⁹

These gaps are common across organisations in the retail sector. Given the increased risk of sexual harassment in the retail industry, we found this was a salient human rights risk for the national retailer and centred gender-based violence as a core pillar of the organisation's human rights strategy.

⁶ Community Development and Justice Standing Committee, Parliament of Western Australia, *Enough is Enough: Sexual harassment against women in FIFO mining industry* (Report no 2, 23 June 2022).

⁷ Natalie Galea et al, *Demolishing Gender Structures* (Built Environment, Australian Human Rights Institute and Centre for Social Impact, UNSW, 2018).

⁸ Hannah Walker et al, 'Lost in Translation: Gaps Between Law and Practice in Customer-Perpetrated Sexual Harassment' (2019) 44(2) *Alternative Law Journal* 143, 144.

⁹ Victorian Equal Opportunity and Human Rights Commission, *Preventing sexual harassment in retail franchises* (Report, August 2022).

The drivers of sexual harassment

Sexual harassment emerges from four cultural and systemic drivers.¹⁰

Gender inequality

Societal norms, practices and structures that shape (and are shaped by) gender inequality, are key drivers of sexual harassment.

An example is the outdated perception that women are not capable of performing certain tasks, or are not suitable for particular roles within an organisation. These are harmful stereotypes reinforcing the patterns and systems that lead to gender inequality.



Power imbalances

In many instances of sexual harassment, the perpetrator holds power, authority or influence over the victim.

In these cases, the victim is often faced with barriers to reporting the conduct as they fear it will harm their career prospects, or that they will not be believed.



Workplace culture

A culture where respect, inclusion and safety are deprioritised or absent contributes to increased risk of workplace sexual harassment. Where inappropriate conduct is not adequately addressed, employees may feel impunity to act without consequences.

Poor workplace culture fosters an environment where disrespectful behaviours are tolerated without accountability.



Intersecting forms of discrimination and harassment

Intersecting forms of discrimination and harassment on the basis of gender identity, race, disability or sexuality enables sexual harassment, sex-based discrimination, and victimisation.

Sexual harassment, sex-based discrimination, and victimisation rarely occur in isolation and are often experienced concurrently with other exclusionary behaviours like racism or homophobia.



¹⁰ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 138-161

Linking workplace sexual harassment with intersectionality

Some groups of people experience workplace sexual harassment at higher rates. This makes an intersectional approach essential to eliminating workplace sexual harassment.

Who experiences sexual harassment

People who experience sexism, sexual harassment and discrimination are not a homogenous group, and they may be more or less at risk of experiencing these behaviours based on their intersecting identities.

Our work confirms that certain individuals and groups experience sexual harassment at higher rates. This includes: women, young/new workers, First Nations Peoples, people living with disabilities, LGBTQIA+ people, culturally and linguistically diverse people, as well as contract, casual,

third-party labour hires and remote access workforces such as those that are 'fly in fly out'.¹¹

Applying an intersectional lens to workplace sexual harassment prevention

To effectively address sexual harassment, it is essential to focus on the way things work in your organisation, rather than on the intersecting identities themselves – as it is not the intersecting identities that are problematic. The organisational structures that reproduce oppression – such as sexism, racism, and homophobia – are the areas that must be addressed.

What is intersectionality?

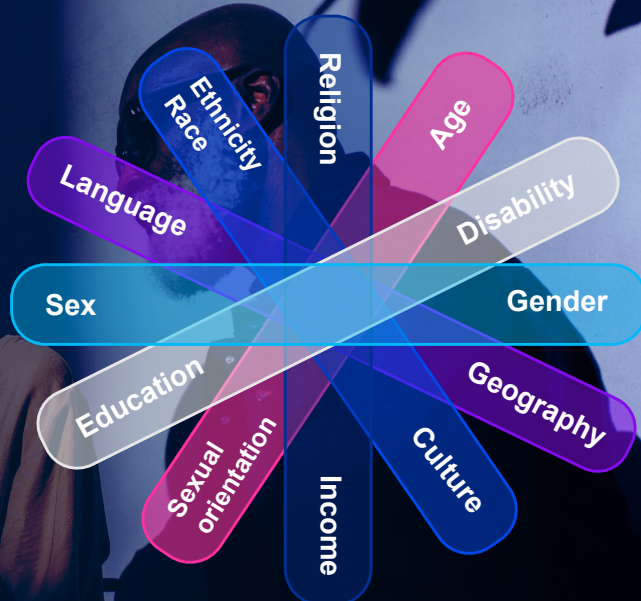
Intersectionality is a tool you can use to see your workforce in a more nuanced way.

Intersectionality refers to how an employee's experience of the world is shaped by the intersection of various features of social identity like gender, race/ethnicity, sexuality, social class, age, ability, etc.

Figure 2 shows that social identity is not multiple categories operating in isolation. Each person has a unique combination of factors that makes their experience of the workplace unique.

If you apply an intersectional lens, you cannot untangle the experience of being First Nations and being a woman, for example.

FIGURE 2: INTERSECTIONALITY FACTORS¹²



¹¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 161.

¹² Crenshaw, Kimberlé Williams, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' in *The Public Nature of Private Violence: Women and the Discovery of Abuse* (2013) 93.

The impacts of sexual harassment on your business

Sexual harassment is a human rights violation. It poses significant health and safety risks and harms to employees, as well as financial, regulatory, and reputational risks for employers.

Harm to employees

Sex-based discrimination, sexual harassment and sexual assault are against the law.

Sexual harassment is a significant risk to psychological safety. Some forms of sexual harassment, particularly when repeated, can impact a person's psychological and physical health and wellbeing including long-term trauma, depression, self-harm, insomnia, anxiety, and other wide-ranging harms.

Discrimination and WHS Regulations

Providing a safe and healthy workplace free from discrimination and sexual harassment for all employees, constitutes minimum compliance under Australian anti-discrimination and WHS legislation.

Australian WHS regulators are currently strengthening their capacity to regulate for the risk of sexual assault and sexual harassment.

Substantial fines and penalties will result for employers that do not take steps to manage the risk of sexual harassment (in line with penalties for breaching other physical work health and safety requirements).

Reputational damage

There is a compelling case for businesses to take action given the increasing awareness of the harm of sexual harassment and evolving community expectations for employers to protect their employees. This emerged from:

- a broader gender equality movement in Australia, including new gender pay gap and ASX corporate governance reporting requirements¹³
- heightened stakeholder and investor expectations on ethical, social and governance (ESG) issues for energy and resources companies
- public examples of transparency igniting debate.

Employee productivity and retention

Sexual harassment costs the Australian economy approximately \$3.8 billion per year.¹⁴ The bulk of lost productivity is borne by employers, with the largest share of lost productivity experienced by females aged 25-34. In addition, there is a highly competitive labour market with employees increasingly demanding employers address workplace sexual harassment.

The benefits of addressing sexual harassment

Providing a safe and healthy workplace, free from discrimination and sexual harassment, will allow you to:

- increase organisational performance by maintaining employee productivity
- foster a safe work environment
- attract and retain the best talent in a highly competitive market
- enhance your organisation's reputation, creating a positive public perception
- promote diversity and inclusion within the workforce which can enhance innovation and lead to improved performance outcomes.

¹³ KPMG, *ASX Corporate Governance Council: Diversity* (Report, 2022).

¹⁴ This is the estimated annual cost to the Australian economy in 2018: Australian Human Rights Commission, *National Inquiry Into Sexual Harassment in Australian Workplaces* (Report, 2020) 295.

How should you respond to the new positive duty?

There are immediate steps employers can take to start eliminating sexual harassment across the organisation.

1.

Understand your current state

To target the root causes, develop an understanding of the nature and prevalence of sexual harassment across your organisation.

2.

Develop a prevention and response framework

To embed effective measures to eliminate sexual harassment, design an overarching prevention and response framework.

3.

Implement the prevention and response framework

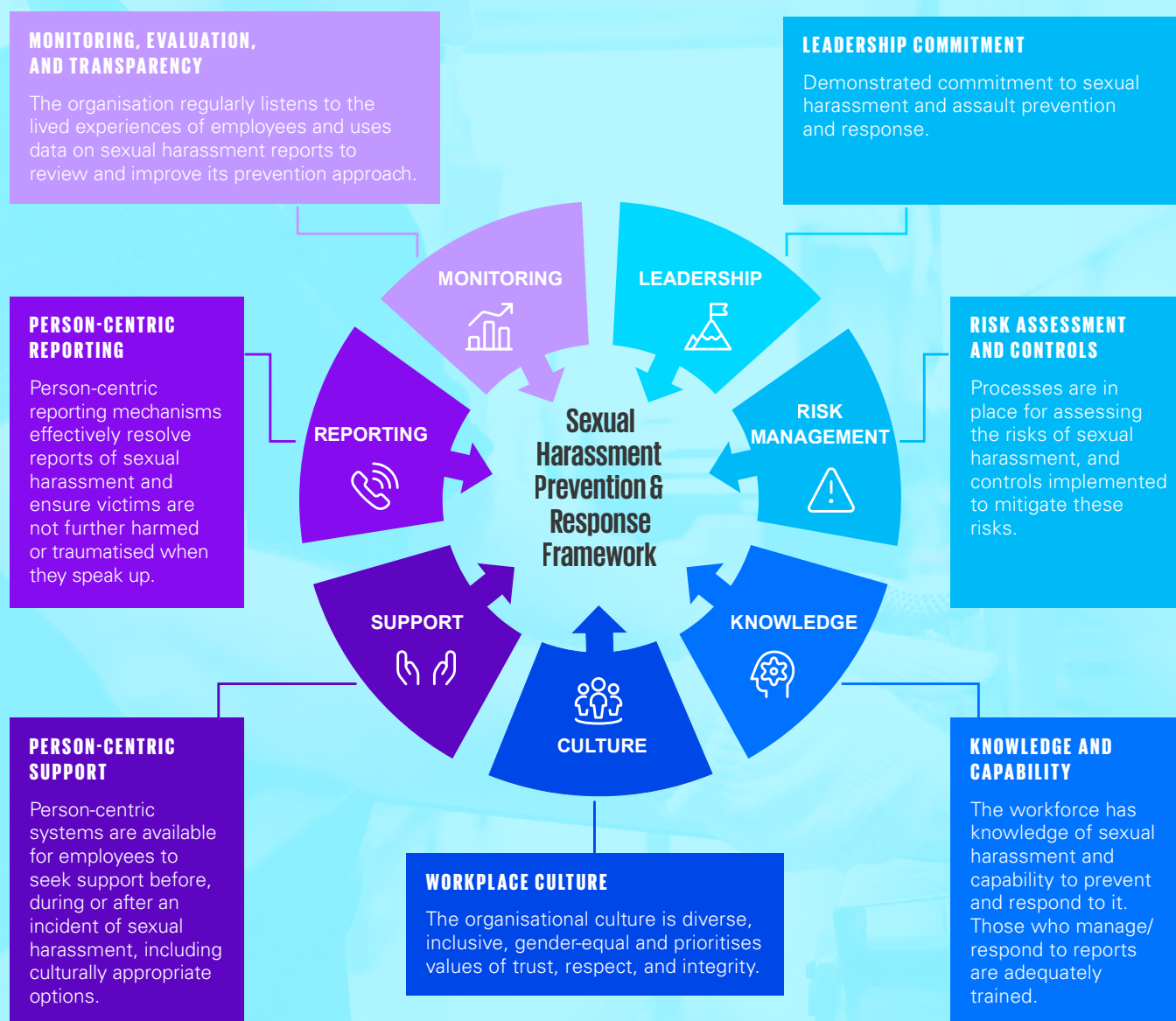
This framework should be implemented across business operations.

Preventing and responding to sexual harassment

To eliminate sexual harassment in your business, consider implementing measures across seven domains.

The drivers of sexual harassment are complex, multifaceted and require an organisational framework which tackles the root causes of sexual harassment. The Australian Human Rights Commission has developed a framework of good practice indicators across seven domains to help employers understand their obligations (Figure 3).

FIGURE 3: LEADING PRACTICE SEXUAL HARASSMENT PREVENTION AND RESPONSE FRAMEWORK¹⁵



¹⁵ Adapted from Australian Human Rights Commission, 'Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment' (2022).

How we can help

KPMG are specialists in helping organisations confidently respond to workplace sexual harassment.

We support organisations to drive lasting cultural change by implementing controls and prevention measures that address the root causes of sexual harassment. We will work closely with you to understand why, how and where sexual harassment exists in your organisation. We are experts in stakeholder engagement and we use trauma-informed and culturally sensitive approaches to engage meaningfully with your workforce to assess your current state.

We understand that sexual harassment is enabled by workplace cultures, where other forms of structural inequality and discrimination occur. Our holistic, intersectional approach places leadership, culture and trust at the centre of organisational change.

1.

CURRENT STATE ANALYSIS

In a context where under-reporting of sexual harassment is common, we help you understand what is happening within your organisation.

- Diagnostic assessment of prevalence and nature of sexual harassment through culturally competent and trauma-informed engagement with employees.
- Gap analysis of current policies, systems and controls against leading practice.

2.

FRAMEWORK DEVELOPMENT

We provide you with tailored recommendations and an action plan to prevent and respond to workplace sexual harassment.

- Bespoke organisational prevention and response framework with recommendations and roadmap.
- Identification of key high-risk areas where your organisation can make meaningful change.
- Executive capability building workshops including support in setting executive accountabilities and reporting through to the Board.

3.

FRAMEWORK IMPLEMENTATION

We offer a range of services to support you to implement your action plan.

- Assessments of physical and psychosocial risks.
- Design of leading practice reporting and resolution processes.
- Development of monitoring and evaluation frameworks.
- Tailored policies, strategies and processes.
- Capability building to enhance identification, management, and prevention of risks.
- Design of long-term organisational cultural change programs.

Our specialists

KPMG brings deep understanding and experience working with Australian and global companies to prevent and respond to workplace sexual harassment.

Our multidisciplinary team brings together thought leaders and industry specialists in gendered violence, sexual harassment, risk management, workplace law, occupational health and safety, forensics, human rights, organisational culture, psychosocial risk, and trauma-informed engagement with vulnerable stakeholders. In leveraging this breadth and depth of skills and experience, we take a robust approach to supporting organisations to proactively prevent workplace sexual harassment.

DR MEG BRODIE

**Partner in Charge,
Human Rights & Social Impact
KPMG Banarra**



Meg is a human rights specialist with deep experience across the corporate, government and community sectors. Meg has particular expertise in gender equality and gendered violence. She also leads our Global Business and Human Rights Network.

ADRIAN WONG

**Partner and Head of Workplace
& Employment Law
KPMG Law**



Adrian leads KPMG Law's Workplace & Employment Law practice. Adrian's practice involves acting for employers in all areas of workplace relations, with a particular focus on workplace misconduct, sexual harassment, enterprise bargaining and award/agreement compliance issues.

MARIA BASIL

**Partner
Behavioural Risk**



Maria leads KPMG's national Behavioural Risk Advisory practice which is focused on assisting clients address organisational cultural issues by understanding how staff behaviours influence performance and execution of key processes, and embedding the desired behavioural factors which influence effective process operationalisation.

TRAVIS MERLO

**Director
Forensics**



Travis has over 25 years experience in managing and conducting high-profile, complex and sensitive investigations across government, law enforcement, corporate and professional services environments. Travis has managed and conducted hundreds of investigations managing high-performing teams of investigators, forensic analysts and data analytics professionals.

Paul Rubotham

**Director
Health and Safety**



Paul has led multiple Health, Safety & Wellbeing engagements covering WHS audits, WHS & Wellbeing frameworks, regulatory compliance, risk management (physical and psychosocial), emergency planning, safety leadership and culture, strategy, benchmarking, board reporting, governance, assurance, training and operational support.

Steve Clark

**Partner
Management
Consulting**



Steve works with clients to develop scalable workforce solutions addressing culture talent and wellbeing. His work focusses on applying organisational psychology and data to surface root causes and develop systematic responses that do more than ameliorate symptoms.

Contact us

Meg Brodie

**Partner-in-Charge, ESG Social,
Head of the KPMG Global Business
and Human Rights Network**

E: megbrodie@kpmg.com.au

T: +61 3 8626 0929

Paul Rubotham

Health and Safety Director

E: prubotham@kpmg.com.au

T: +61 8 9263 4840

Maria Basil

Partner, Behavioural Risk Advisory

E: mbasil@kpmg.com.au

T: +61 2 9455 9809

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