

Preventing and investigating sexual harassment in the workplace: the good, the bad and the ugly

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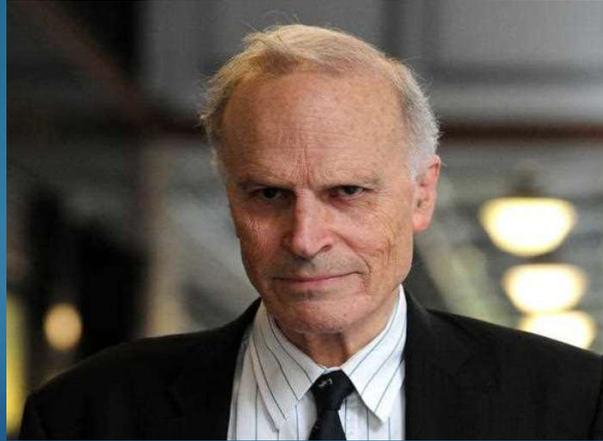
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Allegations in Commonwealth Parliament



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► High Court 'ashamed' of Heydon sexual harassment



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S 106 of the Sex Discrimination Act 1984 (Cth)

Vicarious liability etc.

(1) Subject to subsection 2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

(a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or

(b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that **the person took all reasonable steps** to prevent the employee or agent from doing acts of the kind referred to in that paragraph. (my emphasis)

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Von Schoeler v
Allen Taylor and
Company Ltd
Trading as Boral
Timber (No 2)
[2020] FCAFC 13

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A sexual harassment policy and any training package will need to state that sexual harassment is against the law, cite the source of the law and state that the employer is vicariously liable for the acts of its employees.

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‘Preventing Workplace Sexual Harassment’, Safe Work Australia National Guidance, January 2021.

‘Identifying hazards’ which requires a number of different proactive actions rather than just waiting for a formal complaint. For example, assessing the physical and on-line working environment; considering work systems and practices; observing the culture of the workplace; carrying out confidential anonymous worker surveys; reviewing industry data and identifying the worker demographics.

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*Richardson v
Oracle
Corporation
Australia Pty
Limited [2013]
FCA 102*

- ▶ 'pressured' to make a formal complaint rather than have the complaint dealt with informally.
- ▶ not interested in any form of negotiation and wanted the matter to be dealt with more discreetly.
- ▶ told she should not discuss her complaints against Mr Tucker with other people, including those whom she had identified as witnesses.
- ▶ Ms Richardson was upset by being offered conflict resolution training.

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*Richardson
v Oracle
(contd)*

- ▶ Ms Richardson was required to continue to work with the accused perpetrator while the investigation was being conducted.
- ▶ Ms Richardson complained she was demoted as a result of the decisions taken after the findings of the investigation were made available.
- ▶ Ms Richardson ultimately resigned from her employment as a result.
- ▶ Persons she had reported the sexual harassment to had done nothing about it.

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Some criticisms levelled against Commonwealth Parliament

- ▶ Pushed to choose between reporting the alleged rape to police and keeping her job,
- ▶ Senator Reynolds summoned her to a formal employment meeting about the incident in the same room that the alleged rape occurred.
- ▶ No one who knew about it reported it to the police.
- ▶ No one who knew about it supported Higgins to make a complaint.
- ▶ It was not reported to the Prime Minister.
- ▶ Senator Linda Reynolds called her a “lying cow”.
- ▶ Confusing, murky, little understood complaint processes that staffers did not know how to access and were not sufficiently independent.

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High Court process

No complaint process but Independent investigator appointed – report provided to the complainants.

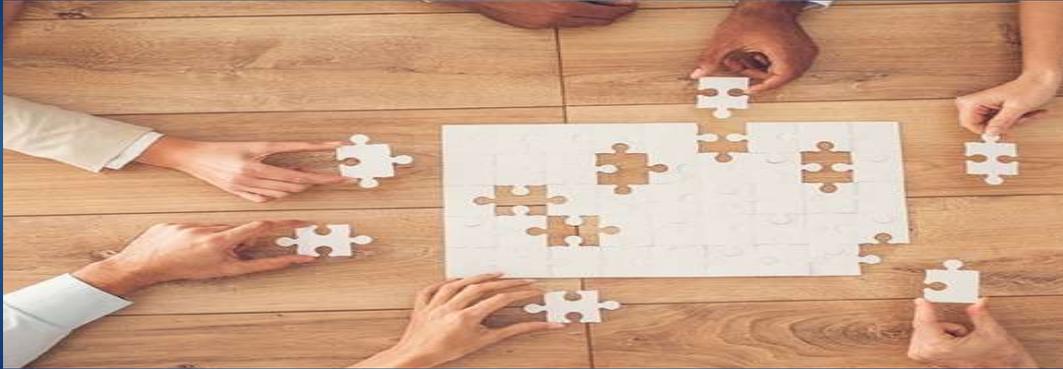
No news leaks – perhaps lucky/nature of the beast but reported that this was because the women requested confidentiality.

Statement from Chief Justice that girls have been believed.

Australian Human Rights Commission process continuing.

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The Australian Human Rights Commission's 'Respect@Work: Sexual Harassment National Inquiry Report (2020)



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- (a) reporting processes that are delayed;
- (b) requiring victims to make multiple complaints before action is taken;
- (c) requiring victims to 'explain their story' multiple times;
- (d) victims being victimised as a result of making their complaint (even where the allegations are substantiated) such as lower performance ratings and promotion rates;

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(e) lack of confidentiality in the process which sometimes resulted in victimisation by co-workers;

(f) Not knowing who to complain to or knowing options for external reporting, particularly where the alleged perpetrator is the owner of the business;

(g) No action taken against the perpetrator and in particular, no action to attempt to alter their behaviour.

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A choice of supported options made available to employees:

1. support to take direct action;
2. informal dispute resolution team;
3. bystander reports;
4. anonymous reporting;
5. referral to an independent workplace investigator.

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Future trends

- Greater focus on preventative steps other than just training and policies – looking at ‘culture’ in the workplace.
- Greater focus on independent processes to respond to allegations of sexual harassment
- Greater focus on bystanders’ responsibilities.

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