Respect@Work: Isolated or Integrated Frameworks Between the Positive Duty and Termination of Employment?

Nicola Street[1]

Abstract

The multi-jurisdictional *Respect@Work* reforms implemented by successive Australian Governments in response to the Sex Discrimination Commissioner's landmark *Respect@Work Report* are significant in scope. In revealing both the high prevalence but low reporting rates of workplace sexual harassment, the *Respect@Work Report* recommended legislative reform to jurisdictions beyond the *Sex Discrimination Act 1984 (Cth)*, that the then Sex Discrimination Commissioner intended to be "*complementary and mutually reinforcing*" across different legal frameworks.[2]

This article will explore the relationship between the new positive duty on employers to eliminate identified unlawful behaviour in the *Sex Discrimination Act 1984 (Cth)* (**SD Act**) as supported by the accompanying *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act* (**Positive Duty Guidelines**) and some recent Fair Work Commission (**FWC**) unfair dismissal decisions addressing dismissal for sexual harassment at work. The continued overlap and potential misalignment between how different jurisdictions approach responses to sexual harassment could have significant impacts on workers and employers both interested in the reduction of sexual harassment through actions

[1] Principal at Nicola Street Workplace Advisory, previously Director – Workplace Relations Policy – Diversity, Equity & Inclusion of the national employer association Australian Industry Group who contributed to the Sex Discrimination Commissioner's Respect@Work Report recommendations, the AHRC's Positive Duty Guidelines, and represented Ai Group on the Respect@Work Council.

[2] Jenkins, K. Sex Discrimination Commissioner, Commissioner's Foreward, *Respect@Work Report*, p 12.

of prevention and accountability. It also highlights that there is no one jurisdiction or nationally consistent legal framework that exhaustively addresses workplace sexual harassment and that employers should not proceed on that basis.

Key words

Positive duty, sexual harassment, workplace culture, *Sex Discrimination Act 1984 (Cth)*, unfair dismissal, serious misconduct, termination of employment, procedural fairness, Fair Work Commission

Introduction

Respect@Work Reforms – beyond the positive duty

The multi-jurisdictional *Respect@Work* reforms implemented by successive Australian Governments are significant in scope and were intended to be "*complementary and mutually reinforcing*" across different legal frameworks.[3]

Employers and persons conducting a business or undertaking (**PCBU**) are presently navigating what is required of them and what steps should be taken to comply with both new and existing statutory obligations and community standards to reduce workplace sexual harassment and engage in more effective, people-centred responses when it occurs.

While it is a frequently raised topic to query the difference between the two different and stand-alone statutory duties on PCBUs in the SD Act and work, health and safety (**WHS**) laws to prevent sexual harassment, this article will focus on the role of response actions by PCBUs recognised by the

[3] Jenkins, K. Sex Discrimination Commissioner, Commissioner's Foreword, *Respect@Work Report*, p 12.

Australian Human Rights Commission's (**AHRC**) positive duty model and the treatment of such responses by the FWC in relevant unfair dismissal applications.

In particular, it will look at the extent to which the *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)* (**Positive Duty Guidelines**) prepared by the AHRC engage with the role and consequences of employer response action to sexual harassment as part of discharging the positive duty and how the consequences of employer response action should be dealt with – including the role of workplace investigations and termination of employment. It will also look at some recent and key FWC unfair dismissal decisions dealing with persons dismissed for sexual harassment following the commencement of the SD Act's positive duty, and specifically examine how matters of procedural fairness are dealt with and the extent to which the SD Act's new positive duty is considered.

The Respect@Work Reforms

Released in 2020, the *Respect@Work Report* followed an extensive *National Inquiry into Sexual Harassment in Australian Workplaces* (**National Inquiry**) conducted by the AHRC and commissioned by then Coalition Minister for Women, Kelly O'Dwyer in 2018 in response to the global #MeToo movement. The *Respect@Work Report* provided no fewer than 55 recommendations for the Australian Government and others to implement to better address and prevent sexual harassment, noting that sexual harassment in Australian workplaces was "*widespread and pervasive"* with one in three people experiencing sexual harassment in the last five years.[4]

The Coalition, who were in Government at the time, implemented many, but not all the Report's recommendations during the time they were in Government. The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act* (**2021 Amendments**) in particular, made various amendments to both the *Fair Work Act 2009 (Cth)* (**FW Act**) and SD Act. These included, amongst other things, the

[4] *Respect@Work Report*, Australian Human Rights Commission, 2023, p.11

expansion of the SD Act's application (including protections and obligations) to different classes of workers and businesses, the introduction of different forms of unlawful conduct relating to sexual harassment eg sex-based harassment, and the expansion of the FW Act's anti-bullying jurisdiction to empower the FWC to make 'stop sexual harassment' orders on application by workers, in certain circumstances.

Relevant to employer responses to sexual harassment and the FWC's unfair dismissal jurisdiction was the amendment to the existing statutory note to the FW Act's unfair dismissal provisions in section 387 to explicitly state that sexual harassment can amount to a valid reason for dismissal.

Following a change in Federal Government, the current Albanese Labor Government introduced the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (**2022 Amendments)** in response to its election commitment to implement the outstanding recommendations of the *Respect@Work Report.* Notably, the 2022 Amendments created a new section 47C in the SD Act requiring employers and PCBUs to take reasonable and proportionate measures to eliminate, as far as possible, identified forms of unlawful conduct – including sexual harassment, sex-based harassment, a work environment hostile on the grounds of sex, sex discrimination and victimisation. Also known as "the positive duty" section 47C was similar to the Victorian model in section 15 of the *Equal Opportunity Act 2010* (Vic) and designed to shift the previous reactive complaints-based model of addressing sexual harassment to a model of pro-active prevention.

Across the two stages of specific *Respect@Work* legislative reform[5] were new provisions that increased obligations on employers to eliminate sexual harassment (and other related unlawful conduct) and clarified accountability measures for employees who engaged in such conduct. In doing so, these reforms traversed both the SD Act and the FW Act and impacted the jurisdictions of the AHRC and the

[5] See further: Respect@Work reform in the *Fair Work (Secure Jobs, Better Pay) Amendment Act 2022* (Cth) re the introduction of the sexual harassment prohibition in the FW Act and expanded sexual harassment dispute FWC jurisdiction.

FWC respectively. But are these two distinct legal frameworks aligned and how do they both address matters of employer responses as part of the new positive duty to eliminate sexual harassment?

Reporting and Response and the Positive Duty

The role of reporting and responses to workplace sexual harassment was a strong focus of the AHRC's Respect@Work Report[6] and featured in the Report's recommended framework for the effective prevention and addressing of sexual harassment that should be adopted by organisations[7] The inclusion of responses to sexual harassment in the recommended framework is premised on the idea that *how* an employer responds to a concern of sexual harassment and what actions are taken, is a necessary part of an effective prevention model. That is, visible accountability and consequences for persons found to have engaged in sexual harassment creates confidence that a person may a raise concern for the employer to address and prevent.

In introducing the 2022 Amendments and the new positive duty in particular, this point was reflected in the Government's reasons:

> "The *Respect@Work Report* found that the current complaints-based framework provided by the SD Act is not effectively preventing sexual harassment from occurring. It was noted that rates of sexual harassment are increasing under the current framework, while rates of reporting have decreased. This suggests that many individuals do not have confidence in the existing systems and complaint-handling functions to effectively respond to an incident or complaint."[8]

The importance of response actions to the overall positive duty is also recognised in the Positive Duty Guidelines that state:

[6] *Respect@Work Report*, Australian Human Rights Commission, p 598.
[7] Ibid.
[8] Explanatory Memorandum, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022,* para [52].

"*Wider evidence shows that very few workers feel confident to report relevant unlawful conduct…A belief that certain workers can 'get away' with bad behaviour, or are too valued in an organisation or business to be disciplined, keeps many workers from reporting*."[9]

To this end, employer responses to sexual harassment and its recognition by the Positive Duty Guidelines as one of the seven standards to achieving compliance with the SD Act's positive duty is a relevant factor in how employer responses should be evaluated, including by other jurisdictions who are afforded statutory discretion to consider such matters. It also is relevant however to look at the status and content of the Positive Duty Guidelines.

The AHRC Positive Duty Guidelines

(a) Status of the Guidelines

The Positive Duty Guidelines were released on 10 August 2023, 10 months after the commencement of the SD Act's new positive duty and five months before the duty became enforceable by the AHRC. The status of the Guidelines is important. While they are not legally binding, the ARHC regards them as authoritative and sets out the steps that the AHRC expects organisations and businesses to take to comply with the positive duty.[10]

This is highly relevant to the AHRC's new investigative and compliance powers under section 35B of the AHRC Act. These powers commenced on 12 December 2023 in relation to the AHRC enforcing the SD Act's positive duty. Under this new provision, the AHRC may utilise its existing powers to seek written information, interview witnesses, access documents amongst other things where the AHRC reasonably suspects the duty is not being complied with. In determining whether and how to exercise

[9] Ibid, p.68 and 69.
[10] Ibid, p.12. Note the Guidelines are issued in accordance with section 35A of the *Australian Human Rights Commission Act. 1986 (Cth).*

those powers, it can be reasonably expected that the AHRC will refer to its own Positive Duty Guidelines and any preliminary assessment of how, if at all, they have been followed by PCBUs and employers.

In addition to framing the AHRC's focus as a newly established regulator of the SD Act's positive duty, a court may also consider whether the Positive Duty Guidelines have been followed when assessing compliance with the positive duty. It would therefore be prudent for employers and PCBUs to be familiar with, and demonstrate compliance with, the Positive Duty Guidelines to ensure that the AHRC can be satisfied that the PCBU is in fact complying with the SD Act's positive duty. In light of the AHRC's new inquiry powers, it is reasonable to expect that the Positive Duty Guidelines will, and should be, an influential document to frame and benchmark prevention and response efforts by PCBUs to satisfy the positive duty and as part of addressing sexual harassment.

(b) What do the Guidelines say?

The Positive Duty Guidelines adopt a model of seven standards similar to those contained in the *Respect@Work Report*. These standards are:

- Leadership;
- Knowledge;
- Culture;
- Support;
- Reporting and response; and
- Monitoring, evaluating and transparency.

As the Guidelines say,

> ...the standards are based on research about the causes of relevant unlawful conduct and what is required to prevent it from happening. They provide an 'end-to-end' framework for prevention and response, which organisations and business can then tailor to their workforce in order to satisfy the positive duty.[11]

Specifically, standard six sets out the AHRC's expected outcomes for Reporting and Response, where PCBUs are to demonstrate that:

- Responses to reports of relevant unlawful conduct are consistent, timely and minimise harm to people involved. Examples of practical ways to achieve this outcome include:
    - Pathways for resolving reports include early intervention and both formal and informal resolution options;
    - External referral options for the investigation and management reports;
    - Safety and wellbeing is prioritised, rather than the reputation of the organisation/business or a focus on immediately starting a formal disciplinary process;
    - Processes recognise the trauma and support the affected person's choice and control over the process, as far as possible;
    - Processes allow the person to tell their experiences in their own words and minimise the need to tell it multiple times and to multiple people;
    - The affected person can stop or withdraw from the process at any time; and
    - The affected person has a clear understanding of the timeframes and decisions and they receive regular updates.
- Consequences are consistent and proportionate. Examples of practical ways to achieve this outcome include:
    - Consequences are applied consistently regardless of the alleged perpetrator's role in an organisation;

[11] AHRC, *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984* (Cth), August 2023, p.26.

- Sanctions or disciplinary outcomes exist along a scale of seriousness and might include an apology, ongoing monitoring, verbal/written warnings, suspension, barriers to pay increases, impact on bonus, barriers to promotion, demotion or dismissal; and
- Corrective actions targeted at behavioural and systemic change may include coaching training, addressing culture, the consequences for work opportunities and promotions, or addressing power imbalances.

The Positive Duty Guidelines, while not seeking to limit the type of consequences that may be taken by PCBUs, place greater emphasis on the standard of consequences as they relate to consistency and proportionality rather than whether such consequences are lawful, procedurally (un)fair or require some level of factual substantiation (such as through a workplace investigation), where facts may be disputed, or where an employer may have specific obligations relating to those consequences under a workplace law, industrial instrument of contract of employment or policy.[12] It seems likely that the Positive Duty Guidelines are intended to address a concern about potential bias in PCBU decisions when considering the position of persons involved in a sexual harassment report, rather than adopting a broader framework underpinned by provisions set out in other workplace laws.

Matters of how other workplace laws impact responses to sexual harassment are significant and no decision made by a PCBU should be made without consideration of them. This is particularly so in cases involving decisions to terminate an employee's employment – particularly where the dismissed employee is eligible to file an unfair dismissal application under the FW Act's provision providing statutory criteria that go well beyond principles of consistency and proportionality.

[12] Some acknowledgement is made on p.72 of the Guidelines for businesses/organisations to consider any relevant legal obligations in relation to the conduct of investigations and disciplinary procedures, eg under an enterprise agreement.

Recent FWC unfair dismissal decisions dealing with sexual harassment

Recent FWC unfair dismissal decisions made after the 2022 Amendments, reflect a legitimate focus by the FWC on employer processes that relate to the termination of employment, including the role of workplace investigations in determining the basis for an employer's decision to terminate an employee's employment. Given the specific statutory considerations in the FW Act's unfair dismissal provisions that include matters of valid reason, procedural fairness and a range of other matters for the FWC to consider, scrutinising the employer's process is entirely appropriate and indeed required at least to some degree (subject to certain statutory exemptions in the FW Act).

What can be ascertained from some key FWC's decisions post the creation of the positive duty, is a continuation of a close scrutiny on an employer's investigative findings relevant to the stated reason for the dismissal and whether the FW Act's provisions were complied with in relation to the process afforded to the employee prior to the decision to dismiss. However, how these decisions have considered the SD Act's positive duty (if it all) and the extent to which decisions to terminate employment may be viewed in that context, also remain widely variable.

The decision of *Crook v CITIC Pacific Mining Management Pty Ltd* [2023] FWC 2446 (**Crook**) resulted in an order that the employer both reinstate and restore lost pay to an employee dismissed for serious misconduct of a sexual nature. The alleged behaviour was that the dismissed employee:

- Instigated sexually explicit and disparaging conversations with several other employees in ear shot of female trainees that concerned inserting objects into women's vaginas and transgender people whose sex reassignment surgery had suffered complications;

- Procuring and sharing images of the above on a mobile phone to co-workers and did so in a manner that resulted in the complainant seeing the images; and
- Lewdly staring at the complainant and making sexualised remarks about her.

As evident in the decision, the employer had received a complaint from one of the female trainees and acted. The employee accused was stood down pending the outcome of an investigation. The employee was asked to respond to the allegations and was represented by his union. The employee and his co-workers who were present disputed the events put forward by the complainant and the employer.

The decision identified a number of procedural flaws used by the employer in its investigation and further sought to establish whether or not the alleged serious misconduct engaged in by Crook had occurred on the balance of probabilities. The ability for the FWC to determine for itself whether the employee misconduct occurred as alleged, is an established approach based on past authorities[13] and enabled by the FW Act's unfair dismissal provisions in requiring the FWC to *be satisfied* that the dismissal was unfair in accordance with section 386 of the FW Act.

The FWC found that the employer's process in relation to its investigation was deficient. Particular deficiencies included:

- Interviewing the complainant in the presence of another witness she had identified, meaning that the second witness evidence relied on by the employer could be tainted by what she heard from the complainant;
- Imprecise allegations put to the dismissed employee;
- Failing to interview the witnesses nominated by the dismissed employee;

[13] For example, see *Robert Crook v CITIC Pacific Mining Management Pty Ltd* [2023] FWC 2446 at [28]; *Edwards v Justice Giudice* [1999] FCA 1836; *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB Ross VP, Williams SDP, Hingley C, 17 March 2000.

- The failure to review and consider other available and relevant data, such as swipe card records;
- The failure to consider additional information that corroborated with the dismissed employee's version of events;
- The employer's head office assuming that a complete and proper investigation had taken place prior to accepting a recommendation that the employee be dismissed;
- The failure to provide an opportunity for the employee to respond to why he should not be dismissed, beyond the initial response sought from him in relation to the complainant's allegations; and
- The failure to interview nearby-witnesses in relation to one of the incidents.

These factors led the Deputy President to find that the "lack of adequate rigour in the process followed by the respondent employer contributes to the unjustness of the termination." [123]

Ultimately, the Deputy President found that he was not satisfied with the findings of the employer as constituting a valid reason for his dismissal. The Deputy President went on to consider the evidence before him as to whether or not the dismissed employee did engage in the misconduct as alleged, and found that he could not be satisfied on the balance of probabilities that behaviour occurred, finding that the dismissed employee's "denial has been consistently resolute and is supported by [his co-worker] Mr Flowers."[14] The FWC went on to find that he "could not be satisfied on the balance of probabilities that the particular allegations against the dismissed employee had been made out."[15] In doing so, the FWC's assessment of the evidence was framed only against the specific allegations of the respondent, with no order made that reflected additional findings such as, "I do not think that Ms Kimber (the complainant) is being untruthful, and I suspect that she was exposed to some forms of inappropriate behaviour…"[16]

[14] [2023] FWC 2446 at [96].
[15] Ibid [96].
[16] Ibid [96].

In fact, despite this particular observation, the FWC still proceeded to order the employee's reinstatement, the maintenance of continuity of service, and restoration of lost pay. The respondent employer submitted that it did not dispute that reinstatement was appropriate if the FWC found that there was no valid reason for dismissal, nor did it oppose the maintenance of the employee's service on that basis also. The decision does not appear to explicitly consider the impact of these orders on the complainant, notwithstanding the finding above in para [96] in relation to her truthfulness and likely experiences. There is no mention in the FWC's decision of its consideration of other regulatory frameworks regarding workplace sexual harassment or the new positive duty in section 47C of the SD Act that would have likely applied at the time of the employee's dismissal. This is despite the FWC retaining discretion as to whether it orders reinstatement of a dismissed employee[17] and being empowered with discretion to consider other relevant matters in considering whether the dismissal was harsh, unjust or unreasonable.[18]

The impact of a decision like *Crook* can be severe for complainants of sexual harassment, who in this case, not only faced the reinstatement of the employee she complained of, but was required to attend as a publicly identified witness and undergo cross-examination in formal tribunal proceedings that were not of her initiative. Indeed, the Positive Duty Guidelines regularly refer to trauma-informed approaches – both as a key guiding principle to how PCBUs should implement the seven standards and as a specific outcome itself in relation to standards of Reporting and Response. While the Guidelines are not intended to apply to the case procedures of tribunals or Courts (that would be another matter), it seems that this may be an area for further consideration in matters before the FWC that deal with sexual harassment that may sit outside the FWC's specialised sexual harassment dispute jurisdiction recently expanded by the *Fair Work (Secure Jobs Better Pay) Amendment Act 2022* (Cth).

[17] See s390 FW Act.
[18] See s387(h) FW Act.

It should also go without saying that reinstatement can also significantly undermine the measures of accountability and consequences imposed by employers attempting to transform workplace cultures and to build confidence in prevention and complaints systems. In *Crook* however, the Deputy President refers to a submission from the respondent employer of "some gratuitous advice about cultural change" and placed no weight on this.[19]

In the recent decision of *Scott Matthew Ashburner v St Marys Rugby League Club Ltd* [2024] FWC 246, (**Ashburner)** the FWC's Deputy President Grayson found that the dismissal of an employee for breaching the employer's code of conduct and making sexually inappropriate and disrespectful comments to other employees was unfair under section 385 of the FW Act, based on the significant procedural fairness deficiencies.

Specifically, the employer had failed to notify the dismissed employee of the reason for his dismissal and had not provided him with an opportunity to respond. In so failing, the employer had not explicitly forewarned the employee that he was facing dismissal until his dismissal meeting which was found to have occurred after the decision to terminate his employment had already been made. The employee was not provided with any particulars of the allegations against him. The Deputy President found that the procedures the employer adopted "were deficient, ad hoc, lacked transparency and lacking in procedural fairness"[20] and so weighed in favour of finding that the dismissal was harsh, unjust and unreasonable.

Specific to the employer's investigation to the employee's conduct, the FWC found that the employee was not provided with any evidence obtained during the employer's investigation that the employee could consider and respond to prior to his dismissal.

Despite this, the FWC nonetheless found that there was a valid reason for the employee's dismissal on the basis that the FWC found the employee engaged in a pattern of behaviour and that the series of

[19] [2023] FWC 2446 at [125].
[20] [2024] FWC 246 at [221].

incidents constituted a well-founded, sound, defensible reason for his dismissal. While the decision does not appear to explicitly refer to other legal obligations that may have applied to the employer at the time of dismissal, the FWC specifically remarked that "workers are entitled to expect, and are expected to demonstrate, basic levels of appropriate behaviour and conduct in all workplaces"[21] and that the employer's decision to dismiss the employee was a proportionate response to the gravity of the employee's conduct.

The decision of *Ashburner* was accordingly one that appeared to consider the impact of the alleged behaviour and upheld a workplace standard dealt with in multiple areas under the Positive Duty Guidelines.

A further decision of the FWC concerns *Lindsay Swift v Highland Pine Products Pty Ltd* [2023] FWC 1997 **(Swift),** where an employee's dismissal for serious misconduct by the employer was upheld. The serious misconduct in question was sexual harassment in relation to at least three employees over a lengthy period of time and a failure to communicate respectfully and appropriately with work colleagues. Specifically, the conduct concerned a large number of allegations that the employee had engaged in sexual harassment including:

- Comments and questions directed to employees such as "did you do any rooting on the weekend?";
- Describing his sexual activities such as "I f*cked this girl";
- Describing various sexual activities and positions in detail to female employees;
- Sharing sexually explicit images with employees on his phone; and
- Approaching a new employee and asking "do you like to f*ck?".

[21] Ibid at [173].

The FWC found that a significant number of the allegations were established on the evidence before it.

Commissioner McKinnon determined that

> "the process undertaken by Highland Pines to deal with this conduct in relation to Mr Swift was imperfect, but it was not unfair. Mr Swift had access to support and representation in connection with the dismissal and a meaningful opportunity to respond to the allegations against him."[22]

In relation to the employer's investigation itself, the Commission found that it was not necessary for Highland Pines to disclose the individual names of each of the individuals who made the allegations against him, because the detail of their allegations was provided in a way that allowed Mr Swift to understand what was put against him and so that he could respond.

Notably, in the Commissioner's decision is some detailed analysis of relevant provisions and definitions of the SD Act and duties of employers and employees under work, health and safety legislation. The Commissioner also recognised that "employers have a positive duty to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sexual harassment by their employee. This duty applied to Highland Pines at the time of Mr Swift's dismissal".[23]

The Commissioner further made comments in relation to the employer's workplace environment that had enabled the sexual harassment to continue for a lengthy period of time. The Commissioner found that, despite the employer having in place a Workplace of Respect Policy, the case before the FWC "uncovered a workplace culture that does not encourage reporting…. Highland Pines will need to do more to meet its duty to prevent workplace sexual harassment in the future having regard to its legal obligations"[24] under both the FW Act and the SD Act.

[22] [2023] FWC 1997 at [91].
[23] Ibid at [68].
[24] Ibid at [82].

These recent FWC cases, while not an exhaustive list of every FWC unfair dismissal decision dealing with sexual harassment following the positive duty amendments, demonstrate that unfair dismissal matters before the FWC so far appear to attract varying levels of consideration and recognition of the broader Respect@Work reforms as they may apply to the employer in responding to sexual harassment.

While the FW Act's unfair dismissal provisions do not specifically direct the FWC to consider other workplace law obligations relating to sexual harassment, the effect of the SD Act's positive duty (not to mention workplace, health and safety laws) on employers to eliminate sexual harassment have the potential to play a more prominent role in the FWC's discretionary consideration in determining relevant unfair dismissal matters before it.

Equally, the Positive Duty Guidelines, as comprehensive as they are regarding sexual harassment prevention, do not substantially address the lawfulness of employer decisions around responses and consequences to sexual harassment and, further, do not reference potential orders under other workplace laws that may remedy any deficiency.

This highlights that it is important for employers to look beyond the Positive Duty Guidelines in seeking guidance for appropriate and lawful response actions to workplace sexual harassment. A failure to do so, has the potential for employer response actions to be overturned by orders of tribunals or courts under other workplace laws, potentially undermining both the efficacy of the positive duty and employer intentions to comply with it.

Conclusion

The ongoing overlapping but misaligned nature of Australia's workplace laws relating to sexual harassment have been improved by the *Respect@Work Report*'s recommendations but more needs to be done to achieve greater consistency.

In the meantime, it is important that key decisions and approaches taken within different jurisdictions, be that the FW Act, the SD Act or WHS laws – particularly those absent consideration of other applicable legal frameworks, are publicly scrutinised and evaluated to ensure that gaps and misalignments can be identified and considered for any further workplace reform.

Addendum

The recent FWC decision of *Tamaliunas v Alcoa Australia Limited [2024] FWC 779* handed down on 2 April 2024 upheld the employer's decision to dismiss an employee for inappropriately touching a female employee, finding that the conduct was sexual in nature, in breach of the employer's policies and serious misconduct warranting termination of employment. Deputy President Binet referred to the decision of *Swift* and observed recent amendments to the FW Act as reflecting " a societal recognition that sexual harassment has no place in the workplace in the same way as violence or theft don't."[25] Relevantly, the Deputy President remarked "it is a sad indictment of the positive work that has been undertaken by employers, unions and regulatory bodies in the mining industry that young women like Witness A are still frightened to report incidents of harassment for fear of being ostracized." [26]

[25] [2024] FWC 779 at [147]
[26] Ibid at [149]

Declaration of interests

Nil

Nicola Street

April 2024