

1 November 2021

The Honourable Justice Ross AO
President
Fair Work Commission

By email: consultation@fwc.gov.au

Consultation on implementation of orders to stop sexual harassment at work

WEstjustice welcomes the opportunity to make a submission regarding the Fair Work Commission's proposed implementation measures regarding its expanded jurisdiction on orders to stop sexual harassment (**Stop Orders**).

1. ABOUT WESTJUSTICE AND OUR EMPLOYMENT AND EQUALITY LAW WORK

WEstjustice is a community legal centre that provides free legal help and financial counselling support to people living in the western suburbs of Melbourne. We service the legal needs in the West in a way that addresses the systemic nature of disadvantage. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services.

WEstjustice's Employment and Equality Law Program (**EELP**) seeks to improve employment outcomes for vulnerable workers including migrants, refugees, temporary visa holders, young people and people who have experienced gender-based violence. We do this by empowering communities to understand and enforce their workplace rights through the provision of tailored legal services, education, sector capacity building and advocacy for systemic reform.

Our EELP Program has in-depth experience working with victims of sexual harassment. While sexual harassment is not the most common issue for our clients (sexual harassment claims account for less than 10% of our casework files), our view is these matters are likely to be underreported. Even when we identify clients with potential sexual harassment claims, they can be unwilling to pursue these claims. Where our clients do seek legal help for sexual harassment, the conduct is often very serious and has had a significant impact on our clients. In most cases we have supported these clients through to the completion of their legal claims.

Our experience echoes the findings of the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report* (2020) (**Respect@Work Report**) - that culturally and linguistically diverse (**CALD**) communities, women and LGBTIQ+ communities are significantly overrepresented in sexual harassment claims, and intersectional disadvantage is also present.

2. SUMMARY OF RECOMMENDATIONS

<p>Amendments to the orders to stop sexual harassment bench book</p>	<p>1. Legal options other than Stop Orders: <i>The Benchbook should include a list of all legal options a complainant who has experienced sexual harassment in the workplace could have, including under the Equal Opportunity Act 2010 (Vic), and Sex Discrimination Act 1984 (Cth). This list should include up-to-date links to relevant websites for all complaint bodies.</i></p>
	<p>2. Referrals to free legal services <i>The Benchbook should contain a discrete section on ‘where to get free legal help’ with links to the websites of relevant organisations.</i></p>
	<p>3. Jurisdictional issues: <i>The Benchbook must set out any possible jurisdictional issues and/or risks which may preclude a complainant from making a complaint of sexual harassment in another jurisdiction if a Stop Order is made.</i></p>
	<p>4. Volunteers <i>The Benchbook should include clear information about the eligibility of volunteers for Stop Orders, as well as other relevant protections for volunteers under state/territory sexual harassment laws.</i></p>
	<p>5. Further guidance and resources on preventing sexual harassment in the workplace <i>The Benchbook should include guidance on preventing sexual harassment in the workplace by addressing the drivers of sexual harassment</i></p>
<p>Training of Commission Staff</p>	<p>6. Training on jurisdictional issues and referrals for free legal advice <i>Ensure Commission staff are appropriately trained to provide:</i> a) <i>information about other options for making a complaints in respect of sexual harassment;</i> b) <i>information about any jurisdictional issues and/or risks associated with applying for a Stop Order;</i> c) <i>appropriate referrals, including to state and territory complaint bodies; and</i> d) <i>appropriate referrals to legal practitioners (including community legal centres).</i></p>
	<p>7. Trauma-informed responses to sexual harassment <i>Ensure all Commission Members and all Commission staff receive training on sensitive responses to sexual harassment, including trauma informed practice</i></p>

3. OUR SUBMISSION

On the ground, we see the difficulties faced by the most vulnerable workers when they are victims of sexual harassment. This includes low-income earners, young people, people from culturally and linguistically diverse (**CALD**) backgrounds, temporary visa holders, and people living with a disability. The experience of navigating the legal system for these cohorts is already especially cumbersome, but this is often exacerbated when making a claim in relation to sensitive issues such as sexual harassment.

Our submission will focus on the following:

- 1) The draft ‘Benchbook: orders to stop sexual harassment’ (**Benchbook**) and how it can be further improved to support the most vulnerable workers.
- 2) Training of Fair Work Commission (**Commission**) Members and staff to ensure that the process of applying for a Stop Order is safe, accessible and appropriate for complainants.

3.1 Amendments to the Benchbook

3.1.1 Legal options other than orders to stop sexual harassment

Recommendation 1: *The Benchbook should include a list of all legal options for making a complaint about workplace sexual harassment, including under the Sex Discrimination Act 1984 (Cth), state and territory equal opportunity and anti-discrimination legislation and WHS legislation. This list should include links to relevant websites for all complaint bodies.*

A person who has experienced sexual harassment in the workplace often has numerous options for legal recourse. In our experience, clients who are vulnerable to workplace sexual harassment, in particular young workers and workers from CALD backgrounds, have a limited understanding of their different rights and options to make complaints.

The Benchbook contains reference to some other options for making complaints about sexual harassment, but only in cases where a Stop Order is not appropriate (i.e. where a complainant has been dismissed or resigned).¹ In our view, the current information in the Benchbook is insufficient to help complainants identify whether or not they may have other claims available to them, or how to make such a claim.

In particular, a key difference of the Stop Order regime, as compared to other jurisdictions, is that successful applicants cannot obtain orders for compensation. This may have a significant bearing on a complainant's decision on which avenue to choose. It is important that this information is made clear in the context of all other legal options available to victim-survivors of sexual harassment.

We therefore recommend the Benchbook include further information and guidance about all potential legal avenues for making a complaint about sexual harassment in the workplace, and the associated remedies available, similar to the content provided in Part 7 of the General Protections Benchbook.

In our view, such guidance should include a list of legal options available to *any* worker who has experienced sexual harassment in the workplace (not just workers who resigned or have been dismissed), including under relevant WHS legislation and anti-discrimination legislation, and their associated remedies. It is important that complainants understand that a Stop Order is not to only option available to them.

3.1.2 Referrals to free legal services

Recommendation 2: *The Benchbook should contain a discrete section on 'where to get free legal help' with links to the websites of relevant organisations.*

The broad range of legal options available to a person to deal with complaints of sexual harassment is complex. This has now increased with the introduction of new Stop Order applications.

Many of our clients do not have the means or confidence to self-advocate in relation to complaints of sexual harassment and certainly are not in a position to engage a private solicitor. In addition, many opt not to join a union as the cost of the fees is prohibitive.

The Benchbook contains some limited information on options to receive legal help and/or make complaints to relevant regulators.² However, this information is not easily identifiable, and based on our experience working with vulnerable cohorts, especially those from CALD backgrounds, references

¹ See Benchbook, p 78-79.

² Benchbook, p 79, 124-125.

to 'WHS regulators' and 'anti-discrimination bodies in the states and territories' will be insufficient to effectively direct a complainant to the appropriate body. Anecdotally, most of the clients we see through our service do not know Work Health and Safety (**WHS**) or anti-discrimination complaint bodies exist, never mind how to find their websites.

In order to ensure that the Stop Order jurisdiction is accessible to complainants, it is important that the Benchbook introduce a new section entitled 'Where to get free legal help' which includes the names and website links for organisations who can provide free legal assistance or respond to complaints. In addition to the current links community legal centres, this should include links to:

- Victoria Legal Aid, and other state legal Commissions;
- The Australian Human Rights Commission;
- Each state and territory anti-discrimination commission (by name); and
- Each state WHS regulator (by name).

Information on free legal assistance should also be included on the Fair Work Commission website along with referral links (as referred to in para 63 of the Implementation Report).

3.1.3 Jurisdictional issues

Recommendation 3: *The Benchbook must set out any possible jurisdictional issues and/or risks which may preclude a complainant from making a complaint of sexual harassment in another jurisdiction if a Stop Order is made.*

The Benchbook, makes it clear that a worker who has made an application to the Commission for an order to stop bullying or sexual harassment (or both) can also seek intervention by a WHS regulator under WHS laws, and where the conduct involves criminal behavior, may also be the subject of investigation by the police.³

However the Benchbook does not specify whether a Stop Order would bar a worker from seeking further redress regarding the conduct in an anti-discrimination jurisdiction because proceedings have been initiated in another forum and/or the matter has been adequately dealt with.⁴

The Benchbook must make any possible jurisdictional issues clear and flag any potential risks that a complainant may have if they later lodge an application in relation to the same conduct.

3.1.4 Information regarding volunteers

Recommendation 4: *The Benchbook should include clear information about the eligibility of volunteers for Stop Orders, as well as other relevant protections for volunteers under state/territory sexual harassment laws.*

The Benchbook requires further information to clarify that volunteers (except for those working for volunteer associations that do not employ anyone) are eligible to apply for a Stop Order.

While volunteers in most states and territories are protected from sexual harassment under equal opportunity or anti-discrimination legislation, those in the Northern Territory and Western Australia do not have any clear avenue for such complaints.⁵ It is therefore especially important to make sure that volunteers in those states or territories understand they can make an application for a Stop Order.

³ Benchbook, p 126.

⁴ See e.g. *Equal Opportunity Act 2010 (Vic)* s116(b) and (d); and *Australian Human Rights Commission Act 1986 (Cth)* s46PH(1)(d) and (f).

⁵ *National Volunteer Guide (Part 4)* Part 4 provides guidance on volunteers and unlawful workplace behaviour (Sept 2021) <https://nfplaw.org.au/sites/default/files/media/Part_4_Workplace_behaviours_0.pdf>

Accordingly, we recommend that a section on volunteers is included in the Benchbook, to confirm the eligibility of volunteers working for non-volunteer associated organisations and clarify the other protections from sexual harassment for volunteers who are not eligible to make orders to stop sexual harassment.

3.1.5 Further guidance and resources on preventing sexual harassment in the workplace

Recommendation 5: *The Benchbook should include guidance on preventing sexual harassment in the workplace by addressing the drivers of sexual harassment.*

Stop Orders will provide a valuable opportunity to prevent sexual harassment from occurring in workplaces the future. The Commission must therefore take this opportunity to equip workplaces to effectively prevent and respond to sexual harassment by addressing the underlying drivers of sexual harassment.

In our experience, many employers do not fully understand their obligations to proactively address and/or respond to sexual harassment in the workplace. Our clients' employers commonly lack policies or procedures relating to sexual harassment. Moreover, even those employers who do have relevant policies often fail to effectively prevent or address sexual harassment in the workplace, often because they do not understand of the drivers of sexual harassment in the workplace; and/or fail to take appropriate measures to implement relevant sexual harassment policies. This results in incredibly damaging outcomes for our clients, as demonstrated in the case study below.

CASE STUDY – AUGUSTINA⁶

Augustina was one of only two female employees at her workplace. When she started, she was given an induction pack from her office manager which included a number of different policies, including a sexual harassment policy – however none of these were explained to her. She was also given basic safety training, but this only extended to physical safety risks in the workplace. During her induction, her office manager, who was also a woman, told Augustina to watch out for a few male colleagues who were known for using sexist and offensive language.

Throughout her employment, Augustina was subjected to repeated sexual harassment. This included unwelcome comments about her looks and unwelcome sexual advances from multiple different male colleagues, as well as being shown photos of a sub-contractor's genitals. Augustina was also sexually harassed by the office manager at a work function, who became intoxicated and asked Augustina invasive questions about her sex life and pushed Augustina to admit she was attracted to one of her colleagues. As a result of these experiences, Augustina developed a severe anxiety disorder.

WEstjustice assisted Augustina to make a discrimination and sexual harassment complaint. At mediation, Augustina received an apology, and her employer agreed to pay her a significant amount of compensation and undergo sexual harassment training for all employees in the workplace. However, Augustina continues to be fearful of working in male-dominated workplaces, which has affected her career progression in the construction industry.

The Respect@Work report highlighted that sexual harassment, is fundamentally a societal rather than an individual problem.⁷ In order for workplaces to appropriately understand, prevent and respond to sexual harassment, they must address the drivers of gendered violence, which include:

⁶ Names of clients in our case studies have been changed to protect their privacy.

⁷ Australian Human Rights Commission, Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (Report, 29 January 2020) p 138
<https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf> ('Respect@Work Report').

- intersecting forms of disadvantage, including gender inequality, and discrimination on the basis of race, sexuality and disability;⁸
- a lack of awareness across the workforce and the broader community of conduct that constitutes sexual harassment, the harm caused by sexual harassment, as well as complaint processes and options for support;⁹ and
- workplace cultures which tolerate sexual harassment.¹⁰

To assist workplaces to effectively prevent sexual harassment, we consider the Benchbook should include information and resources on the drivers of gendered violence and sexual harassment, similar to the information contained in the NSW ‘Equality before the Law Benchbook’.

In our view, the Benchbook should include links to the following important resources:

- The VEOHRC’s comprehensive guideline for preventing and responding to workplace sexual harassment.¹¹
- The AHRC’s Respect@Work Report.¹²
- The ‘Prevention of Sexual harassment in the Workplace’ resources created by the Victorian Public Sector Commission, which includes a guide and model policy for preventing sexual harassment in the workplace.¹³

3.2 Training of Commission Staff

We welcome the Commission’s commitment to provide training to Commission Members and staff regarding the nature, drivers and impacts of sexual harassment. However, in our view, more needs to be done to ensure that the orders to stop sexual harassment regime is both accessible and safe for complainants.

3.2.1 Training on jurisdictional issues and referrals for free legal advice

Recommendation 6: *Ensure Commission staff are appropriately trained to provide:*

- information about relevant options for making a complaints in respect of sexual harassment (in addition to Stop Orders);*
- information about any jurisdictional issues and/or risks associated with applying for a Stop Order;*
- appropriate referrals, including to state and territory complaint bodies; and*
- appropriate referrals to legal practitioners (including community legal centres).*

Given the complexity that the new Stop Orders will add in navigating possible causes of action for sexual harassment (as outlined in sections 3.1.1 and 3.1.3 above), it is imperative that Commission staff are trained to provide relevant information to complainants about the options available to them, any risks associated with applying for a Stop Order, as compared to any other available to them.

In addition, it is rare that the vulnerable cohorts that we work are able to self-represent in claims for sexual harassment. The role of Commission staff in helping vulnerable workers (including by providing relevant information and making relevant referrals to trusted sources of free legal assistance (such as community legal centres) will be crucial in making the Commission’s new Stop Order jurisdiction accessible for those most in need.

⁸ Ibid.

⁹ Ibid p 385.

¹⁰ Ibid p 138.

¹¹ Victorian Equal Opportunity and Human Rights Commission, <[Resource-Guidelines-Workplace sexual harassment-Aug20.pdf \(humanrights.vic.gov.au\)](https://www.vic.gov.au/eohrc/resources-guidelines-workplace-sexual-harassment-aug20.pdf)>

¹² Australian Human Rights Commission, above n 7.

¹³ Victorian Public Sector Commission, <<https://vpssc.vic.gov.au/resources/prevention-sexual-harassment-workplace/>>

3.2.2 Trauma-informed responses to sexual harassment

Recommendation 7: *Ensure all Commission Members and all Commission staff receive training on sensitive responses to sexual harassment, including trauma informed practice.*

We are concerned that only some (not all) Commission staff have undertaken training on responding to allegations of sexual assault, including trauma informed practice (run by the Centre Against Sexual Assault in Victoria).

We consider that such training should be mandatory for all Commission Members and staff who may interact with victim-survivors of sexual harassment. Our experience has shown that a lack of sensitivity by Commission conciliators or Members can re-traumatise complainants. Conversely, staff and decision makers who can respond appropriately to complaints of sexual harassment can assist victim-survivors to heal from their experiences.

CASE STUDY: DEV

Dev, a young international student, worked as a casual kitchen hand at a restaurant. One night, he was forced by one of his colleagues to come out as gay in front of the rest of the kitchen staff. His colleague then made a number of sexual gestures towards Dev and throughout the rest of the shift and repeatedly asked Dev invasive questions about his sex life. Dev refused to answer these questions and told his colleague to leave him alone. When Dev finished his shift, he received from a message cancelling his shift for the next day. He then had the rest of his shifts cancelled and was offered no further shifts by his employer. Prior to coming out in the workplace, Dev had been praised for his performance. His employer also failed to pay Dev for the work he had performed for the workplace. This treatment had a serious impact on Dev's mental health.

In the first instance, Dev made a general protections claim to the Fair Work Commission, seeking compensation for his unlawful and discriminatory treatment and the recovery of his outstanding entitlements. At conciliation, Dev explained to the conciliator that he was feeling very emotionally fragile and asked to excuse himself during the joint session while the employer provided a response because he was worried about listening to his experiences being denied or minimised.

However, during private session, the conciliator repeated to Dev the employer's comments to the effect that Dev was lying and that Dev had engaged in inappropriate behaviour in the workplace. The conciliator showed no regard for Dev's feelings and Dev was made to feel that his story was not believed. The conciliation severely exacerbated Dev's pre-existing anxiety and depression and he ended up being hospitalised due to his mental health a few months later.

Dev withdrew his complaint from the Fair Work Commission and, once his mental health recovered, WEstjustice helped him to lodge a sexual harassment and discrimination complaint with VCAT. At the VCAT compulsory conference Dev was given an opportunity to read a victim impact statement highlighting the impact of his experiences. After listening to this statement, his employer and the perpetrator of the sexual harassment provided a verbal apology without being prompted. The VCAT member mediating the dispute was able to provide information on the risks of litigation without discrediting or undermining Dev's experience. This assisted Dev to negotiate a settlement, which included a substantial amount of money to compensate him for the harm he had suffered, and the employer agreeing to run anti-discrimination and sexual harassment training for all staff in the workplace. Dev described the compulsory conference as providing a 'safe place' for him to share his experiences without being accused of lying, and said to us: '[it] was extremely empowering...I finally feel like I am free'.

We would be happy to discuss our submission and recommendations with the Fair Work Commission and can provide further case studies or information.

Please contact me by email on jennifer@westjustice.org.au or (03) 9749 7720.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Jennifer Jones', with a long horizontal flourish extending to the right.

Jennifer Jones

Legal Director, Employment and Equality Law Program