



Consultation - Draft Fair Work Commission Benchbook

Submission by Job Watch Inc

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Introduction

1. Job Watch Inc (**JobWatch**) welcomes the changes to the *Fair Work Act 2009 (Cth)* that have been made as a result of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*. The modification of section 789FC to include sexual harassment as a behaviour that the Commission can make an order to prevent is an encouraging step in working to prevent such behaviour in Australian workplaces.
2. The draft Benchbook is a well written and accessible document. We anticipate that the case examples given will be very useful to lay users trying to navigate the stop bullying/sexual harassment jurisdiction, particularly those case examples used to illustrate what can constitute sexual harassment in the workplace and its legal elements.
3. JobWatch, nevertheless, would like to take this opportunity to make some suggestions for the final version of the Benchbook, as detailed in the three recommendations below.

Recommendation 1: That more consideration be given to the preliminary steps of case management when a stop sexual harassment application is made.

4. Page 17 of the draft Benchbook details a flow chart of the process involved when an application is lodged for an order to stop bullying and/or a stop sexual harassment. Currently, when an application is lodged, the application is referred to the Commission's Case Management Team to review. This is a necessary part of the application process as it allows the Commission to determine whether the application is complete and/or fits within the Commission's jurisdiction.
5. We note that Page 1 of the draft modification of the Form 72 makes a point of stating the following:

If you are worried about particular information being passed on, don't include it yet. Lodge your completed form and then contact us to talk about whether you should provide the information.

6. We welcome the inclusion of this in the finalised version of the Form 72 as it acknowledges the fact that, for many applicants, filing an application seeking an order to stop sexual harassment may represent challenges not present when applying for an order to stop bullying.
7. It has been JobWatch's experience that there is often a degree of shame attached to sexual harassment. It is damaging and demoralising in a way that is unique and more often than not gendered. Bullying behaviour can be equally damaging and demoralising – but when the bullying behaviours have a sexual angle, there is a fundamental difference that it is important to acknowledge.
8. There is often a degree of hesitancy on the part of a person speaking out about sexual harassment in the workplace. For many applicants this hesitancy and trepidation is magnified knowing that this information will be provided to their employer and/or the harasser in their workplace. While we acknowledge that this is an unavoidable step in the process of an application, we would suggest an additional step in the case management process when an application is lodged for an order where sexual harassment is involved.
9. For example, upon receipt of Form F72 that involves sexual harassment, a next step in the process could involve a mandatory meeting between the applicant and a case manager where the process of the application could be explained in detail. The purpose of this step would not be merely to ascertain the completeness or validity of the claim, but also to take an applicant

through what they can expect from the process itself. Such a step would serve to acknowledge the inherent sensitivity of the issue.

Recommendation 2: That the question of whether a party can be represented be decided at an early stage of the application process.

10. Another suggestion would be to have the question of whether or not an applicant can be represented before a Commissioner or Deputy President decided prior to a hearing (or conciliation conducted by a Commissioner or Deputy President) and at a preliminary stage of the application process.
11. The reason for this would be that some applicants may be reluctant to proceed with an order to stop sexual harassment if they are unsure whether or not they can be represented. Again, this would be owing to the sensitive nature of the issues being discussed.
12. We are conscious that this may not be possible considering that the Commission must exercise its functions in a manner that is fair and just.
13. In the event that this question cannot be decided without allowing the respondent to raise any objections – we would suggest that the issue be decided ‘on the papers’, as it were, prior to the hearing (or conciliation) taking place.

Recommendation 3: That alternate avenues of redress for people who have experienced sexual harassment in the workplace be made clearer.

14. The draft Benchbook makes it clear that the Commission must be satisfied that there is a risk of sexual harassment reoccurring in order to validly make an order. Similarly, the Benchbook makes clear that in the stop bullying/stop sexual harassment jurisdiction, the Commission cannot order reinstatement or the payment of money.
15. We would suggest that the Benchbook provide clearer avenues of referral to the Australian Human Rights Commission (AHRC) or the relevant state body for applicants seeking orders beyond what the Commission is empowered to do; perhaps by way of a hyper-link to the relevant Commission or Tribunal website.
16. While the reach of the Commission’s jurisdiction with regards to orders made under 789FF is made clear, we would argue that it also needs to be made very clear that while the Commission is subject to limitations, these limitations do not apply in other jurisdictions such as Victorian Civil and Administrative Tribunal or the AHRC.

Conclusion

17. Many thanks for considering our submission and recommendations. We welcome the opportunity to answer any questions to highlight the issues we have raised.

For further enquiries or comments, please contact:

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Appendix: About JobWatch

JobWatch is Victoria's only specialist employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

JobWatch is funded by Victoria Legal Aid, the Victorian Government and the Office of the Fair Work Ombudsman. We are a member of the Federation of Community Legal Centres (Victoria) and Community Legal Centres Australia.

JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Tailored legal information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria;
- Community legal education, through a variety of publications, public awareness campaigns, and interactive seminars aimed at workers, students, lawyers, community groups and other relevant stakeholders; and
- Law reform work and advocacy aimed at promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 300,000 caller records, with each record usually canvassing multiple workplace problems, such as contract negotiation, discrimination, bullying and unfair dismissal – and relevant to this submission, workplace sexual harassment. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across state and federal laws.

JobWatch currently assists over 16,000 callers through the TIS every year. The vast majority of our callers are not union members and cannot afford to get legal assistance from a private lawyer. In order to become clients of the legal practice, Victorian workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and the public interest).