Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Submission by Job Watch Inc

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Introduction

1. Job Watch Inc (**JobWatch**) is pleased to make a submission in response to the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* ("**the Amendment Bill**").
2. In this submission, JobWatch will reiterate its position in regard to the Commonwealth government's response to the Respect@Work Inquiry and the recommendations it has subsequently agreed to implement to address sexual harassment in Australian workplaces.
3. Specifically, JobWatch will express its views on the proposed legislative amendments to the *Australian Human Rights Commission Act 1986* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth).

About JobWatch

4. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.
5. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).
6. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

a. Tailored legal information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);

b. 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;

c. Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and

d. Law reform work and advocacy aimed at promoting workplace justice and equity for all workers.

7. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 250,000 caller records, with each record usually canvassing multiple workplace problems, such as contract negotiation, discrimination, bullying and unfair dismissal – and relevant to this submission, sexual harassment and assault in the workplace. 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.

8. JobWatch currently assists approximately 15,000 callers through the TIS per 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, 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 public interest issues).

9. Between 2016 - 2019, JobWatch saw a 75 per cent increase in calls to our TIS from people who have experienced workplace sexual harassment. If current year projections hold out, we are likely to see a further 75 per cent increase in callers to our TIS in 2021 when compared to 2020 figures.

10. As a proportion of total callers to the TIS, it has grown from 1 per cent in 2016 to a projected 1.3 per cent in 2021 – significant given that annual call numbers in the same period has increased by 70 per cent. In real numbers, this means that we expect a 121 per cent increase in actual call numbers relating to workplace sexual harassment when comparing projected 2021 figures to 2016 figures.

Case studies provided in this submission

11. This submission is based on the experiences of callers to the JobWatch TIS and clients of the JobWatch legal practice. The case studies are already de-identified. Please note that the facts described in the case studies are not findings of a court or a tribunal but rather they represent what our callers have told us on the TIS and what clients have instructed the JobWatch lawyers.

Summary of our recommendations

Australian Human Rights Commission Act 1986

i. **Recommendation 1 [see para 18]:** amend the *Australian Human Rights Commission Act 1986* (Cth) either abolishing any time limit to make a claim or, at the very least extending that limitation to no less than 6 years.

Fair Work Act 2009

ii. **Recommendation 2 [see para 25]:** amend s 104 of the *Fair Work Act 2009* to allow for at least 4 weeks' paid compassionate leave.

iii. **Recommendation 3 [see para 28]:** amend relevant social security legislation to allow for subsidies or payments for compassionate leave in conjunction with the suggested amendment above for miscarriage compassionate leave to be provided for by the government akin to a paid parental leave payment.

iv. **Recommendation 4 [see para 37]:** a notation is made under s 387 of *Fair Work Act 2009* providing that in addition to sexual harassment, bullying may also be conduct that may amount to a valid reason for dismissal.

v. **Recommendation 5 [see para 39]:** amend s 387 of the *Fair Work Act 2009* to allow the Fair Work Commission (FWC) to review the steps taken by employers to prevent sexual harassment in assessing whether a dismissal is harsh unjust or unreasonable.

vi. **Recommendation 6 [see para 40]:** amend s 392 of the *Fair Work Act 2009* to allow the FWC to make an order allowing for a portion of the compensation paid to an employee who is found to have been unfairly dismissed but is found to have engaged in sexual harassment to be paid to the victim of that harassment.

vii. **Recommendation 7 [see para 44] 8:** an amendment to s 789FF of the *Fair Work Act 2009* to allow the FWC to make a recommendation to a relevant Work Health and Safety Regulator to investigate an employer's sexual harassment prevention mechanisms when an order to stop sexual harassment is issued.

viii. **Recommendation 8 [see para 44]:** a notation is made under s 789FC of the *Fair Work Act 2009* clearly stating that a victim of sexual harassment may still pursue a sexual harassment claim either under the *Sex Discrimination Act 1984* (Cth) or under a relevant state or territory Act regardless of whether the victim has made an application for or has an order to 'stop sexual harassment' made by the FWC.

ix. **Recommendation 9 [see para 46]:** a dedicated and simplified mechanism for the enforcement of breached orders is provided for through a dedicated sexual harassment jurisdiction in the federal courts that allows for the imposition of pecuniary penalties.

Sex Discrimination Act 1984

x. **Recommendation 10 [see para 51]:** amend the *Sex Discrimination Act 1984* (Cth) to introduce a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment.

xi. **Recommendation 11 [see para 60**]: amend the *Sex Discrimination Act 1984* to introduce a reverse burden of proof in civil sexual harassment matters that is akin to s 361 of the *Fair Work Act 2009*.

xii. **Recommendation 12 {see para 61]:** amend the *Sex Discrimination Act 1984* to introduce a rebuttable presumption of vicarious liability for employers under the *Sex Discrimination Act 1984* in circumstances where an applicant employee or former employee makes a sexual harassment claim.

Proposed amendments to the *Australian Human Rights Commission Act 1986* (Cth)

12. JobWatch welcomes the amendments to the *Australian Human Rights Commission Act 1986* (Cth) ("AHRC Act") which seek to extend the time period before which the President of the Commission can terminate a complaint of sexual harassment under the *Sex Discrimination Act 1984*.

13. In the past, there has been no specific timeframe in which a complaint of sexual harassment must be lodged with the Australian Human Rights Commission. Nevertheless, many victims of sexual harassment have been unfairly deprived of an opportunity to pursue a formal complaint on the basis that the President of the Commission could, at their discretion, terminate a complaint if it was lodged more than six months after the alleged incident/s. This time frame was introduced in 2017 by the Turnbull Government in an attempt to create a more efficient complaints process.

14. Once a matter has been terminated under section 46PH(1)(b) of the AHRC Act, the complainant must seek leave of the Federal Court of Australia or the Federal Circuit Court of Australia to proceed with their complaint. The relevant application must be filed within 60 days of the date of issue of the termination notice. This short and unrealistic time frame places an additional burden upon complainants who are already experiencing stress, trauma or anxiety.

Case Study – Ellen's Story

Ellen* was drugged and sexually assaulted by a group of uninvited male work colleagues at a private function. Finding it difficult to cope after this trauma, Ellen didn't report the incident and was subjected to regular derogatory remarks at work from the male colleagues that were involved. After she resigned, Ellen found it difficult to work in other roles in the following years and had to undergo counselling. A few years later, Ellen reported the incident to police and contacted JobWatch. Due to the effect this experience had on her, it was two years before Ellen could speak up about her experience.

15. As illustrated in the case study above, one of many actual but de-identified callers to JobWatch's TIS, there may be a range of complex and legitimate reasons for an applicant's delay in making a complaint immediately after an alleged incident of sexual harassment. Apart from those already identified, other common reasons for not immediately proceeding with a claim include feelings of debilitating shame or humiliation, denial or self-doubt, fear of repercussions or retaliation and a reluctance to publicly identify oneself as a victim.

16. JobWatch generally supports the amendment to paragraph 46PH(1)(b) of the SDA extending the timeframe provided for the President of the AHRC to exercise their discretion to terminate complaints involving sexual harassment.

17. JobWatch notes that while the 24-month timeframe is certainly a step in the right direction, it remains problematic for "historical" cases of sexual harassment. As highlighted by the #MeToo movement, it may take many years to report sexual harassment.

18. JobWatch therefore recommends that a more appropriate and reasonable course of action is to abolish time limits as a ground for termination altogether. Should a time limit be necessary, JobWatch recommends that the time limit be not be less than 6 years. The 6-year timeframe is consistent with the time limit to pursue claims involving contraventions of civil remedy provisions under section 544 of the *Fair Work Act 2009* (Cth).

19. In practice, the presence of the presidential discretion for sexual harassment claims within the statutory scheme makes the unfair assumption that complaints lodged a significant time after the alleged conduct took place are vexatious or improper. As JobWatch has outlined in the above case study, this is simply not the case.

20. It should be noted that in the process of removing the time limit as a grounds for termination, the President of the Commission will retain a broad discretion to terminate unmeritorious or improper complaints through alternative grounds such as s46PH(1B)(a). The suggested amendments will therefore maintain the overall efficiency of the complaints system.

Proposed amendments to the *Fair Work Act 2009* (Cth)

21. The *Fair Work Act 2009* (Cth) ("FWA") is the primary piece of legislation which governs the employment relationship in most Australian workplaces.

Compassionate leave

22. Part 2-2 of the FWA sets out the National Employment Standards (NES) which broadly apply to all Australian employees and set a minimum set of protections covering core aspects of the relationship between employees and employers.

23. Division 7 sets out a set of standards that are meant to protect employees from suffering a detriment in their employment in circumstances where the vicissitudes of life occur.

24. JobWatch generally supports and applauds the government's inclusion of miscarriage as grounds for compassionate leave and that the inclusion accommodates both an employee who has experienced a miscarriage and one whose partner has experienced a miscarriage.

25. JobWatch however recommends that s 104 of the FWA is amended to allow for an employee affected by a miscarriage to access up to 4 weeks of compassionate leave.

26. The following case study shows the need for a more generous compassionate leave scheme where employees have experienced a miscarriage.

Case Study - Cindy's Story

Cindy suffered a miscarriage and made an application for compassionate leave. Her employer denied this and told her that she could either take unpaid special leave or use her personal leave of which she did not have much left . Cindy took two days off and went into a negative leave balance and then returned to work as she needed the money. On her return she suffered a severe medical event that required her to be taken to the ER and have surgery. Her doctor stated that the medical emergency was due to her returning to work too soon.

27. As can be seen from Cindy's story above, and those of countless others who have experienced similar circumstances and contacted the JobWatch TIS, allowing for only two days of compassionate leave is insufficient to accommodate the physical, emotional and psychiatric toll of such an event.

28. JobWatch notes that some employers, particularly small businesses, may be reluctant to support such a scheme given the potential outlays which may result in further marginalisation of affected people. As such, JobWatch recommends that the federal government allow for a subsidy or payment for compassionate leave where there has been a miscarriage, similar to the paid parental leave scheme that presently exists.

The unfair dismissal regime and sexual harassment

29. JobWatch acknowledges that the FWA in its current form makes no explicit reference to sexual harassment though it may be raised indirectly through a number of specific provisions.

30. The unfair dismissal regime under Part 3-2 of the FWA may arise in relation to the dismissal of an alleged harasser or victim. Section s 385 provides that a person is unfairly dismissed if the FWC is satisfied that the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not a case of genuine redundancy, and if the person was employed by a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.

31. Section 387 of the FWA requires the FWC to consider a number of criteria when determining whether a dismissal was 'harsh, unjust or unreasonable'. Such criteria includes (but is not limited to) whether there was a valid reason for the dismissal relating to the person's capacity or conduct.

32. JobWatch broadly supports the Government's decision to amend s 387 of the FWA to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal when determining whether a dismissal was harsh, unjust or unreasonable.

33. As outlined in the Respect@Work Report, uncertainty surrounding exactly what conduct the unfair dismissal provisions encompasses has led to employers taking an overly legalistic approach to workplace investigations of sexual harassment complaints. Explicitly recognising sexual harassment as a 'valid reason' for dismissal will better support consistent decision-making and encourage employer accountability.

34. It should be noted however, that Australian courts and tribunals have generally accepted that engaging in sexual harassment will constitute a valid reason for workplace dismissal.

35. Evidence of the prevalence of sexual harassment in workplace settings is alarming. A 2018 survey by the AHRC found that 39% of women had been sexually harassed at work in the last five years.

36. Additionally, complaints lodged with state and federal human rights and equal opportunity commissions have increased in every jurisdiction except New South Wales since 2017-18.

37. While JobWatch generally supports the inclusion of a note to s 387 of the FWA providing that sexual harassment can form a valid reason for dismissal, JobWatch recommends that the note also includes bullying as relevant conduct.

38. As will be demonstrated by the case study below, while terminating or taking disciplinary action against employees who have allegedly engaged in sexual harassment acts as a deterrent, it does not necessarily encourage employers to take active steps to educate its staff and prevent sexual harassment from happening.

Case Study – Janelle's Story

Janelle was an employee in a large company. During a work function, she had a lot to drink. Her colleague noticed this and proceeded to take advantage of her and raped her. Janelle was traumatised by the event and only managed to report it to the police and to work after a month. While her employer investigated and found that on balance, sexual harassment had occurred, they found that it had occurred outside of work and as such could not be addressed at work. While her employer directed the alleged perpetrator to attend sexual harassment training, the employer allowed the alleged perpetrator to work in close proximity with Janelle and took no further steps to address the conduct.

39. In order to better address this through the unfair dismissal regime JobWatch recommends the inclusion of a sub-section to s 387 that allows the FWC to review the steps taken by employers to prevent sexual harassment in assessing whether a dismissal is harsh, unjust or unreasonable.

40. JobWatch recommends further, an amendment to s 392 of the FWA to allow the FWC to make an order allowing for a portion of the compensation paid to an employee who is found to have been unfairly dismissed but may have engaged in sexual harassment to be paid to the victim of that harassment.

Stop sexual harassment order

41. JobWatch supports the introduction of 'stop sexual harassment orders', similar to a 'stop bullying order' in the FWA. JobWatch however continues to urge the government to take further steps to facilitate prevention.

42. In view of this, JobWatch recommends an amendment to s 789FF of the FWA allowing the FWC to make a recommendation to the relevant Workplace Health and Safety regulator to investigate an employer's sexual harassment prevention mechanisms in circumstances where an order to "Stop Sexual Harassment" is made.

43. While JobWatch notes that the "Stop Bullying/ Stop Sexual Harassment" jurisdiction does not necessarily prevent a victim from pursuing other claims, JobWatch recommends this amendment to avoid any doubt or any intended consequences where an applicant may be dissuaded from pursuing a compensatory claim on the assumption that issue estoppel applies in these circumstances.

44. In view of this, JobWatch recommends that a notation is made under s 789FC of the FWA that clearly states that a victim of sexual harassment may pursue a sexual harassment claim either under the *Sex Discrimination Act 1984* (Cth) or under a relevant state or territory Act

regardless of whether the victim has made an application for or has an order to 'stop sexual harassment' made by the FWC.

45. Under s 789FG of the FWA, breaching an order to stop bullying or, in this case, stop sexual harassment, would be a breach of civil remedy provisions. In practice, this means that a victim of sexual harassment will have to make an application to either of the federal courts or a relevant state court to either enforce the order or seek the imposition of the penalty.

46. JobWatch is concerned that such a process may be too onerous on victims of sexual harassment and as such recommends that a simplified mechanism for the enforcement of breached orders is provided for through a dedicated sexual harassment jurisdiction in the federal courts that allows for the imposition of pecuniary penalties.

Proposed changes to the *Sex Discrimination Act 1984*

47. The *Sex Discrimination Act 1984* (Cth) ("SDA") prohibits sexual harassment in the workplace. Section 28A of the SDA provides that a person sexually harasses another person if that person makes unwelcome sexual advances, or unwelcome requests for sexual favours, or engages in any other unwelcome conduct of a sexual nature in relation to the person harassed, 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.

48. As per s 28B of the SDA, sexual harassment by an employer of an employee, or a person seeking to become an employee, is prohibited. Likewise, it is unlawful for an employee to sexually harass a fellow employee (or person seeking employment) with the same employer. The prohibition against sexual harassment in s 28B also extends to protect commission agents, contract workers, a partner in a partnership and any other 'workplace participant'.

49. As Sex Discrimination Commissioner Kate Jenkins has rightly emphasised, "workplace sexual harassment is not inevitable… it is preventable". JobWatch endorses the Commissioner's views that the SDA's 'reactive framework' is no longer suitable to respond to the increasing prevalence of sexual harassment in Australian workplaces.

50. JobWatch is concerned that the amendments as they currently stand, fall short of the Respect@Work recommendation seeking to amend the SDA to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sexual harassment, as far as possible.

51. Whilst JobWatch broadly supports the proposed amendments and regards them as a positive step, JobWatch recommends that the SDA is amended to introduce a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment.

52. This would facilitate the objective of achieving substantial equality and the prohibition of sex-based harassment. This would ensure a consistent and robust framework at both the federal, state and territory levels, as Victoria is currently the only jurisdiction in Australia to provide a positive preventative duty in equal opportunity legislation.

53. In its Roadmap to Respect, the Federal Government notes that under existing Workplace Health and Safety (WHS) laws, persons conducting a business or undertaking, such as employers, already have a duty to ensure that all workers are not exposed to health and safety risks, so far as reasonably practicable. The Government additionally notes that this extends to the risk of sexual harassment. In an attempt to avoid creating further complexity, uncertainty or duplication in the overarching legal framework, the Government has

subsequently stated that it will need additional time to assess whether the recommended amendments are practicable.

54. JobWatch submits that sexual harassment in the workplace is not adequately addressed by employers or regulators as a WHS issue. Whilst we acknowledge and accept that the existing WHS regime is broad enough to embrace psychosocial risks such as sexual harassment, this is not made explicit in any relevant guidelines, Codes of Practice or the legislation itself. The few examples of psychological risks which are explicitly listed in the Codes of Practice are limited to 'excessive time pressure, bullying, violence and work-place fatigue.' As a consequence, employers often lack the necessary awareness to effectively identify and manage the risk of sexual harassment in the workplace.

55. Furthermore, given the endemic nature of sexual harassment, JobWatch submits that a multi-jurisdictional and multi-organisational approach is necessary to address the present circumstances. Workplace Health and Safety regulators often have limited resources and as such are unable to adequately deal with the number of sexual harassment complaints that are lodged in addition to a range of other claims. Providing for the suggested amendments allows for a more considered and unified approach in addressing the issues.

56. Through anecdotal evidence, JobWatch is also aware that, at times, victims of sexual harassment are overwhelmed by the number of organisations that they are referred to when seeking to complain about conduct. Including a positive duty on employers under the SDA will work to enhance the effectiveness of the present efforts to combat the issue as it provides for a more accessible forum for complainants to bring grievances individually in circumstances where regulators are overwhelmed.

57. In its present form, the SDA operates as an individual claims-based system which imposes negative duties or prohibitions on employers to refrain from discriminatory behaviour.

58. JobWatch believes that a strong focus on prevention rather than fault is a necessary course of action to ensure that the operation of the SDA more accurately aligns with its stated objectives. As outlined in s 3 of SDA, the Act seeks to "eliminate, so far as possible, discrimination including sexual harassment in the workplace…". Rather than simply setting aside particular incidents of sexual harassment within a system that continues to generate them, it would prove more effective to require positive action and prevent this form of discrimination from occurring in the first place.

59. In addition to addressing the systemic causes of sexual harassment, a shift to a proactive model will also relieve victims of the onus of having to first prove that a harm has occurred. As the law currently stands, the evidentiary burden rests on the individual complainant to satisfy each element of a claim. This is problematic in a number of ways. Firstly, the evidence itself is difficult to obtain, often because the conduct may occur in a private setting where there is a lack of eyewitnesses. More importantly, the process forces victims to relive what is often regarded as a traumatic experience. A system which alternatively imposes a responsibility on employers to prevent sexual harassment from occurring in the workplace is necessary in light of these circumstances.

Case Study – Debbie and Lisa's Stories

Debbie was employed at a hotel where she delivered food and drinks through room service to patrons. One of the guests of the hotel began acting in a sexually explicit manner towards Debbie including exposing his genitals. Debbie reported this to her manager who did not take any action. The patron continued to act in a sexually explicit manner towards Debbie however, she was still expected to serve, deliver meals and drinks to his room. Debbie had to take stress leave due to the trauma from the experience.

Lisa, a 19 year old young woman was told by a male colleague “I want to rape you so hard”. She put in a report to HR and has been psychologically unwell since then as she also experienced sexual assault as a young teenager (PTSD). She was off work and not being paid while they investigated, while the male colleague continued to work and be paid.

60. The examples above demonstrate the deficiencies of the current mechanisms and the often-inadequate manner in which employers deal with these matters. In view of this, JobWatch recommends that a reverse burden of proof in civil sexual harassment matters is introduced into the SDA that is akin to s 361 of the FWA.

61. JobWatch further recommends the imposition of a rebuttable presumption of vicarious liability for employers under the SDA in circumstances where an applicant makes a sexual harassment claim. JobWatch submits that this would further encourage employers to take active steps to prevent sexual harassment from occurring in workplaces.

Conclusion

Many thanks for considering our submissions and recommendations, and welcome the opportunity to answer any questions or provide further case studies to highlight the issues we have raised.

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