



Consultation Paper: Addressing sexual harassment in Victorian workplaces

Submission by Job Watch Inc

Monday, July 26, 2021

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Introduction

1. Job Watch Inc (**JobWatch**) is pleased to make a submission in response to the Consultation Paper addressing sexual harassment in Victorian workplaces (**Consultation Paper**).
2. In this submission, JobWatch will further contribute to the conversation initiated by Engage Victoria to address sexual harassment in Victorian Workplaces with regard to the Commonwealth government's response to the Respect@Work Inquiry.
3. Specifically, JobWatch will express its views on the current framework in Victoria relating to dealing with sexual harassment including those covered by the *Equal Opportunity Act 2010* (**EO Act**) and the relevant legislative instruments underpinning WorkSafe Victoria (**WorkSafe**).

About JobWatch

4. 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.
5. 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.
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. Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria;
 - c. 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
 - 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 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, 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. (JobWatch recorded 16,726 assistances on the TIS over the 2020/2021 financial 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).
 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 these calls over 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 caller assistance numbers in the same period have 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 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 recommendations

Prevention

12. **Recommendation 1 [see para: 40]** Employers provide mandatory training to employees regarding identifying and reporting sexual harassment either provided or approved by one of WorkSafe or the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**).

13. **Recommendation 2 [see para: 41]:** Funding provided to community legal centres (CLCs) and community organisations to engage in further community legal education on sexual harassment.
14. **Recommendation 3 [see para:42]:** Amend the *Occupational Health and Safety Act 2004 (OHS Act)* to make it mandatory for employers to give employees a “*No Harassment, Bullying or Discrimination Information Statement*” similar to the Fair Work Information Statement that includes a list of where to get help including relevant CLCs such as JobWatch.
15. **Recommendation 4 [see para: 43]:** WorkSafe administer a mandatory quarterly online survey that employers must require employees to complete that assesses whether sexual harassment has, or is occurring in the workplace and whether adequate steps are being taken to prevent it.
16. **Recommendation 5 [see para:44 to 46]:** The survey results are only visible to WorkSafe and the survey allow for employees to request discrete direct contact from WorkSafe.
17. **Recommendation 6 [see para: 47]** Enable WorkSafe to initiate an investigation against an employer following the results from the survey referred to in recommendation 4.

Support

18. **Recommendation 7 [see para: 48]:** Increased funding to WorkSafe and VEOHRC to create resources and meet the anticipated demand for services.
19. **Recommendation 8 [see para: 49]:** Funding provided to CLCs and community organisations to provide training to target cohort employees and small businesses on their rights and obligations.
20. **Recommendation 9 [see para:54a]:** Funding to appropriate specialist employment law CLCs to develop continuing professional development (CPD) modules for other CLCs and community organisations on handling victims of workplace sexual harassment.
21. **Recommendation 10: [see para: 54b]:** Funding to appropriate specialist employment law CLCs to employ social workers and/or counsellors to assist victims of workplace sexual harassment with practical and emotional effects of their circumstances to enable the lawyers to deal with the legal issues.

Enforcement

22. **Recommendation 11 [see para: 57]:** Impose mutually positive duties on employers and employees to report sexual harassment.
23. **Recommendation 12 [see para 58a]:** Impose a requirement for employers to keep a register of complaints of sexual harassment and the steps taken to address it that can be requested by WorkSafe at any time.
24. **Recommendation 13 [see para 58b]:** Impose an obligation on employers to provide employees with written acknowledgement of a complaint of sexual harassment within 5 days of the complaint being made.
25. **Recommendation 14 [see para 58c]:** WorkSafe prepare a template form for complaints and acknowledgements that can be easily accessed by small businesses.
26. **Recommendation 15 [see para 58d]:** Enable an employee to make a complaint to WorkSafe where an employer fails to provide the acknowledgement within the stipulated time.
27. **Recommendation 16 [see para 59]:** That WorkSafe provide a “Dealing with Sexual Harassment Code” similar to the Small Business Dismissal Code provided for under the *Fair Work Act 2009* to assist small businesses to meet their obligations

28. **Recommendation 17 [see para: 60]:** Enable employees who have been terminated following:-
- a. either experiencing sexual harassment;
 - b. witnessing sexual harassment; or
 - c. making a complaint about either,
- to make a complaint to WorkSafe that results in a rebuttable presumption on the employer of wrongdoing which may result in the imposition of civil penalties part of which made be made payable to the complainant.
29. **Recommendation 18 [see para: 61]:** That an employer may file an application to the Victorian Civil and Administrative Tribunal for review of a fine imposed where the regulator and not the victim is the respondent.
30. **Recommendation 19 [see para: 62]:** That the scheme operate separate to and not affect any rights or causes of action available to the complainant under the *Fair Work Act 2009* or any federal, state or territory anti-discrimination legislation.
31. **Recommendation 20 [see para: 66]:** That the *Occupational Health and Safety Act 2004* is amended to provide that non-disclosure agreements do not prevent victims of sexual harassment from making complaints to WorkSafe or another relevant regulator or body.

Raise awareness

32. **Recommendation 21 [see para: 68]:** A targeted public awareness campaign setting out the changes and avenues that are available.

Prevention

Question: How can we help employers identify and prevent sexual harassment in workplaces? Do we need a different approach for smaller employers?

33. The current framework enabled by the state and federal equal opportunity and occupational health and safety legislative instruments relies on victims of, or witnesses to sexual harassment coming forward and making complaints.
34. As has been identified in the consultation paper, despite the positive obligations placed on employers to eliminate sexual harassment, discrimination and victimisation in Victorian workplaces under the EO Act, the assessment of whether an employer has in fact complied with that duty happens as a consequence of a claim rather than as a preventative measure.
35. As the case studies below will demonstrate, it is generally not difficult for employers to identify sexual harassment but rather, because sexual harassment is generally perpetrated by people in authority, in the case of small businesses, the owner or in many businesses, a person whose financial value to the organisation outweighs any “bad behavior”, victims or witnesses of sexual harassment, are left with few options to report the conduct as they often fear retribution for doing so.

Case Study – Josie and Dani’s Stories

Josie* worked as a regular casual employee in a warehouse for a small business and made a complaint to the owner that she was sexually harassed by one of the supervisors. Despite this, her boss continued to place her on shifts with this supervisor. After Josie took time off on stress leave due to the conduct, rather than addressing the issue, her boss deleted her timesheets so that

there was no evidence that they had continued to place her on shifts with that supervisor and then stopped offering her any further shifts with the company.

Dani worked in a larger company and made a complaint about her manager sexually harassing her by calling her late at night and making inappropriate comments about her body. Dani told her manager's superior that she does not feel safe to attend work and explained the conduct and while it was acknowledged, nothing was done. Dani ultimately resigned as she felt that she had no choice but do so in order to stop the sexual harassment from occurring.

36. These case studies also demonstrate the experience of many callers to the TIS who have made complaints, but their employers have treated the complaint as being “too hard” to deal with. It also demonstrates the very real fear and difficulties faced by victims to address their concerns as it often results in a loss of meaningful employment and difficulties in proving their claim as evidence can be tampered with to avoid a risk of liability.
37. This tampering can also involve witnesses who are still employed by the employer being directed to provide false statements under a threat that giving an unfavorable statement against the employer would result in termination of their employment. For most workers, the risk of immediately losing income acts as a disincentive from coming forward or taking any steps to prevent or stop the conduct.
38. As demonstrated by the case studies above and through countless accounts from victims of sexual harassment who have contacted the JobWatch TIS, there often is an acute awareness of the existence of sexual harassment in the workplace among staff members. Despite this, there often is either a lack of confidence about relevant protections or a lack of concern to report the conduct.
39. The lack of confidence appears to stem from a perceived lack of protection for individuals who are not directly victims but observe the relevant conduct and fear reporting it for fear of retribution.
40. JobWatch recommends that mandatory education on identifying and reporting sexual harassment should be conducted in a joint initiative between VEOHRC and WorkSafe Victoria:
 - a. The training should be made available free of charge on individualised online portals to be accessed by employees and completed bi-annually; and
 - b. Businesses can alternatively create their own training curriculum or materials either directly or through third party providers and this material should be approved by either VEOHRC or WorkSafe.
41. JobWatch recommends that increased funding is provided to community legal centres (CLCs) and organisations that regularly interact with workers experiencing or witnessing sexual harassment, such as JobWatch, to enable them to deliver community legal education activities in order to empower and educate workers on their rights and the avenues available to them to seek redress.
42. JobWatch recommends that either the EO Act or the **OHS Act** is amended to provide that all employees are given a “*No Harassment, Discrimination or Bullying at Work Statement*” similar to the Fair Work Information Statement at the start of their employment or, if they're already employed, within 30 days of the proclamation of the amendment that sets out:
 - a. What is meant sexual harassment, bullying and discrimination;
 - b. That it is prohibited;

- c. That employees and employers have a duty to report sexual harassment either to the employer or to WorkSafe if they observe or experience it; and
 - d. A list of government and community organisations including community legal centres where employees can seek assistance or information if they think they either experienced or observed the relevant conduct in the workplace.
43. JobWatch recommends that it be made mandatory for all employers in Victoria, to provide their employees with a deidentified online survey, prepared and administered by WorkSafe and conducted on a quarterly basis. The survey would not identify any employees but would identify the relevant employer who is the subject of the survey.
44. JobWatch recommends that the results of the survey cannot be accessed by the employer and are only visible to WorkSafe.
45. JobWatch recommends that the survey asks employees the following, and any other potential questions that are simply answered through a yes/no multiple-choice format with an optional additional free text box:
- a. Have you either observed or experienced sexual harassment in your current workplace?
 - b. Would you like WorkSafe to discretely investigate the conduct?
 - c. Have you complained to your employer or WorkSafe about the conduct?
 - d. Have steps been taken to address this conduct?
 - e. Are those steps working?
 - f. Would you like WorkSafe to contact you outside work hours to discuss your matter further?
46. JobWatch recommends that the final question lead to a link wherein the employee can provide their details and a preferred contact time to initiate discrete contact with WorkSafe.
47. JobWatch recommends that WorkSafe is provided with explicit powers that allow them to investigate employers whose employees have indicated that sexual harassment has occurred at the workplace.

Question: What can we do to make sure prevention activities target high risk industries and at-risk groups?

48. In order for the recommendations made above to have the necessary effect, increased funding would be required to be provided to WorkSafe and VEHOHC in order to develop the necessary resources, review the surveys and respond to the demand.
49. JobWatch recommends that increased funding is provided to appropriate community legal centres and community organisations to develop and deliver community legal education sessions on the proposed amendments and to conduct training for employees of small businesses.

Support

How can we make it easier for people to report sexual harassment in the workplace?

50. JobWatch refers to its recommendations in paragraph [43 – 46].

What can we do to make people who experience workplace sexual harassment feel supported and make it easier for them to access support?

51. As will be demonstrated in the case study below, many callers to the JobWatch TIS who have summed up the courage to report sexual harassment feel unsupported in the workplace and feel as though there is a lack of understanding of their circumstances, particularly in situations where victims have past sexual trauma.

Case Study – Anna’s Story

Anna had a history of sexual abuse in her family. She was then sexually harassed at work which triggered her PTSD. She reported the sexual harassment to HR but asked that it be kept confidential. HR told Anna that they would not investigate the complaint unless she made it an official one. Anna told HR that she could not engage in the investigation at that time because it triggered her PTSD. HR told Anna that they would not take any measures to prevent the conduct without her going through official channels.

Anna sought assistance from a private lawyer who advised Anna that she was being difficult and unreasonable. Anna then approached JobWatch who made representations on her behalf regarding the effect of the alleged harassment in the context of her history which resulted in HR taking a less intrusive and caring approach to managing her complaints and addressing the alleged conduct.

52. As demonstrated in the case study above, while HR was willing to address the complaint, there was an unnecessary level of procedural rigour and a lack of emotional and psychological support to enable the victim to complain and engage in the process with confidence that she would be cared for.
53. JobWatch recommends that in addition to the training recommended in paragraph [40], further mandatory training is provided to all Victorian businesses on dealing with complaints of sexual harassment.
54. JobWatch recommends further that specialist employment law community legal centres, such as JobWatch, that regularly supports victims of workplace sexual harassment, is provided with additional funding to:
 - a. Develop and provide continuing professional development training to other CLCs and the legal profession in general on dealing with victims of workplace sexual harassment;
 - b. Have a social worker or a counsellor employed to provide emotional and practical support to the victim so as to enable the lawyers to deal with the legal issues.

Enforcement

Question: What are the problems with how workplace sexual harassment is responded to now by WorkSafe or employers? How else could it be dealt with?

55. As discussed in paragraph [35] and further demonstrated in the case study below, employers are often able to identify sexual harassment particularly when reported, but often lack the gumption to take active steps to prevent it beyond giving the offender a “talking to”.

Case Study – Jim’s Story

Jim, a call centre worker, was sexually harassed by a co-worker and reported it to his supervisor. His supervisor spoke to the offender but no further action was taken. A few weeks later, Jim again experienced sexual harassment from the same co-worker who kept trying touch him despite his objections. In order to prevent further sexual harassment by this co-worker, Jim responded to their next attempt to touch them inappropriately by pulling the offender down by their collar. Jim then reported the incident to his manager who did not take the complaint seriously, even laughing at the situation.

Eventually, the manager was informed that an incident had occurred and decided to investigate. This resulted in his employer acknowledging that the sexual harassment had occurred. However, the employer also began an investigation into Jim’s conduct, alleging that he had committed misconduct in physically assaulting the offender. Jim was terminated as an outcome of this investigation. To Jim’s knowledge, the offender remained employed.

56. The case study above also highlights a secondary issue, that being the perception that men can’t be sexually harassed. As demonstrated in the consultation paper, both women and men are being sexually harassed in the workplace, although men are overwhelmingly the perpetrators .
57. JobWatch recommends that a positive duty is placed on not just the employer, but employees to report instances of perceived sexual harassment with failure to do so potentially attracting financial penalties or the potential to be an accessory to contravention proceedings.
58. JobWatch recommends the following reporting and register scheme be implemented to facilitate greater reporting of sexual harassment in the workplace:-
 - a. Employers should be required to keep a register of reports and steps taken to respond to any report that can be requested by WorkSafe at any point.
 - b. Employees who make a report are to be provided with acknowledgement that the report has been made from the employer within 5 days of making the report.
 - c. WorkSafe to provide a template report for employers and an acknowledgment to be provided to employees for small businesses to use,
 - i. Businesses to be permitted to create their own template report which needs approval from WorkSafe or must include a basic set of required fields to be defined by WorkSafe.
 - d. Where an employer does not provide acknowledgement to the employee within the stipulated time, the employee should be able to make a complaint to WorkSafe who can seek compliance from the employer through its compliance powers.
59. JobWatch recommends that WorkSafe prepare a Small Business “Dealing with Sexual Harassment Code” similar to the Small Business Fair Dismissal Code provided for under the *Fair Work Act 2009* to assist small businesses to meet their obligations.
60. JobWatch recommends an amendment to the OHS Act that allows either victims of sexual harassment or witnesses who have made a report and have been terminated from their employment, to be able to file a complaint to WorkSafe
 - a. The complaint should operate with a rebuttable presumption of fault on the employer;

- b. Employers should be provided with notice that a complaint has been made and given an opportunity to show cause;
 - c. Where WorkSafe forms a view that the employer has failed in its obligations, it is recommended that WorkSafe be empowered to issue a fine against the employer, part of which is payable to the victim of sexual harassment.
61. Under the scheme, an employer could make an application to the Victorian Civil and Administrative Review Tribunal (VCAT) for a review of the penalty. Adopting such an approach would make it easier for victims of sexual harassment to make complaints and seek compensation as the onus would be on the alleged perpetrator and/or employer to review a penalty. Furthermore, it would be the regulator and not the victim who would be the subject of any review thereby offering victims a further layer of protection.
 62. This scheme would work separately to and is unaffected by the present mechanism to pursue compensation for unlawful terminations through the Unfair Dismissal and General Protections regimes under the *Fair Work Act 2009*.
 63. The scheme would also work in conjunction with the recommended reporting and register scheme discussed in paragraph [58] above.

Question: What should WorkSafe or employers do to hold perpetrators accountable who sexually harass others? What changes are required to do so?

64. The following case study is the story of thousands of callers to the JobWatch TIS and individuals who have been represented by JobWatch.

Case Study – Jessica’s story

Jessica got her first job as an administrative assistance in a medium sized IT company. From the start of her employment, Jessica’s boss took a liking to her. Jessica’s boss would invite her to “dinner meetings” where he would make sexually suggestive comments and solicit sexual favours from her. As it was her first job, Jessica put up with it as it was her boss and she did not want to lose the job. Jessica eventually could not deal with her boss’s advances which became increasingly explicit and physical, leading her to make a complaint to HR. Soon after, Jessica was stood down and provided with a Deed of Release that provided Jessica with 12 weeks’ worth of wages in exchange for her silence and departure from the company.

65. As has been identified in the Consultation Paper, the effect of non-disclosure agreements (**NDA**s) have allowed perpetrators of sexual harassment to get away with their conduct in exchange for a monetary sum.
66. While JobWatch accepts and agrees that a Deed of Release that acts as a bar to proceedings acts as a useful tool of negotiation to achieve outcomes for affected workers, JobWatch recommends that the OHS Act is amended to provide that NDAs, including confidentiality and/or non-disparagement clauses in Settlement Deeds, Deeds of Release or Settlement Agreements (whatever form they may take), do not prevent a victim of sexual harassment from making a complaint to WorkSafe or another regulator regardless of whether the allegations or controversy that is the subject of the agreement, includes sexual harassment. This recommendation is intended to only cover sexual harassment.
67. JobWatch further recommends that WorkSafe is permitted to investigate and prosecute complaints made by victims who have signed an NDA.

Raise Awareness

Question: What can we do to both promote better understanding of workplace sexual harassment and its impact on the community?

68. JobWatch recommends that a targeted public awareness campaign is funded to support the recommendations made above.
69. JobWatch further reiterates the recommendations made regarding increased funding to relevant community organisations and community legal centres, such as JobWatch, to engage in the development and deliver of community legal education seminars, training and educational material to empower and inform workers of not only their rights, but their obligations.

Conclusion

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

For further enquiries or comments, please contact:

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