Circle Green
Community Legal

Sexual harassment dispute applications in the Fair Work Commission for WA workers

A Circle Green Community Legal claim guide

Introduction

This claim guide is for:

- WA workers who wish to apply to the Fair Work Commission to deal with a sexual harassment dispute/ stop sexual harassment order for conduct that started **on or after 6 March 2023**; or
- national system employees who wish to apply to the Fair Work Commission for a stop sexual harassment order for conduct commencing **before 6 March 2023.**

For more information see our publication "Q&A: Sexual harassment against WA workers"..

The information below has been written to assist you with the practical process of making a sexual harassment claim to the Fair Work Commission. If you are not yet ready to make a claim and you are seeking more general information, you may wish to view our Q&A resources first. If you need legal advice before making a claim, you can submit an application for advice to us here or see our private solicitors list here.

This claim guide is provided as general information only and is not intended to be a substitute for legal advice. By using the information on this page, you agree to our full disclaimer.

Key terms used

This information resource uses a number of key terms. You can click on our glossary in a new window and read what the key term means. See our glossary here: https://circlegreen.org.au/resource/glossary-workplace-law/

We encourage you to read this claim guide from start to finish. If you are looking for a specific piece of information, you can click on any heading below to skip to that section.

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Overview

On 6 March 2023 there were significant changes to the way the Fair Work Commission (**FWC**) handles workplace sexual harassment.

1. for sexual harassment that occurred **before 6 March 2023,** eligible national system workers could make a stop sexual harassment application to the FWC. This could be a standalone application or as part of a stop bullying application. For sexual harassment that occurred before 6 March 2023 an eligible national system worker is still able to make a stop sexual harassment application to the FWC. That process is outlined below and more information about that process can be found on the FWC website.
2. for sexual harassment that occurs **after 6 March 2023,** eligible WA workers are able to make an application for the FWC to deal with a sexual harassment dispute. Part of this application can include a stop sexual harassment order but is not limited to this.

   This application can be made by state system and national system employees.

An application to stop sexual harassment and/or to resolve a sexual harassment dispute can be made to the FWC if, while you are at work, someone:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature.

This behaviour must be in circumstances where a reasonable person would have expected that you would be offended, humiliated or intimidated. It does not matter whether the perpetrator meant for their actions to offend, humiliate or intimidate you.

For more information about workplace sexual harassment, please see Circle Green's "Q&A: Sexual harassment against WA workers".

If there is a risk of violence or physical assault, you should call the police. These are criminal matters.

Sexual harassment that occurred before 6 March 2023

Where sexual harassment occurs before 6 March 2023 an eligible national system worker can make an application for a stop sexual harassment order to the FWC if while you are at work someone:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature.

This behaviour must be in circumstances where a reasonable person would have expected that you would be offended, humiliated or intimidated. It does not matter whether the perpetrator meant for their actions to offend, humiliate or intimidate you.

The FWC can only make an order if there is a risk that you will continue to be sexually harassed at work. So, if you are no longer employed at the workplace where the sexual harassment took

place, or if there is no risk that the sexual harassment will continue, the FWC cannot make anti-sexual harassment orders. The FWC does not have the power to award compensation (i.e. money) or reinstatement (i.e. getting your job back) for sexual harassment claims.

For more information about workplace sexual harassment, please see Circle Green's "Q&A: Sexual harassment against WA workers".

If there is a risk of violence or physical assault, you should call the police. These are criminal matters.

Who is eligible?

You can make this application to the FWC if:

- you are a national system "worker";
- working in a constitutionally covered business; and
- still connected to the workplace where the conduct occurred.

A "worker" is a broad term, and includes:

- an employee;
- a contractor or subcontractor;
- an employee of a contractor or subcontractor;
- an employee of a labour hire company;
- an outworker;
- an apprentice or trainee;
- a work experience student; and
- a volunteer, except for volunteers at a volunteer association which has no employees.

Time limits

You don't need to make a bullying and/or sexual harassment claim within any specific period of time. However, you should keep in mind the following information if you are thinking of making a claim.

The FWC can only handle a sexual harassment claim if there is still a risk that you will continue to be sexually harassed by the same person or group. This means you can only make a claim if you are still working in the workplace where the sexual harassment took place. Unlike a bullying claim, you do not need to have experienced repeated instances of sexual harassment. It is enough if the sexual harassment occurred once.

Outcome

The FWC can make any order it considers appropriate to prevent you from being sexually harassed at work. However, it cannot make an order that you be paid money. It also cannot order reinstatement (ie getting your job back). The FWC's focus is on sorting out the issues and allowing you to return to work as normal.

Some possible orders include:

- requiring the person or group to stop bullying and/or sexually harassing you;
- the employer having to regularly monitor the person or group;
- preventing unsupervised contact between you and the person or group at work;
- making sure people are following the employer's anti-bullying and/or sexual harassment policy;
- requiring information and additional support and training to be given to workers; and
- a review of the employer's workplace bullying and/or sexual harassment policy.

Costs

You cannot usually ask for another party (i.e., someone you have named in your claim) to pay your costs. In other words, if you lose, generally you will not have to pay the employer's legal costs.

However, you can apply to the FWC for orders that another party pay some or all of your costs if:

- the other party responded to your claim vexatiously (i.e. to annoy, embarrass, harass you); or
- it should have been reasonably obvious to the other party that their response to your claim was not likely to succeed.

Claim process

To make a claim you must complete a Form F72A – Application for an order to stop sexual harassment that occurred before 6 March 2023.

You will need to lodge the Form F72A with the FWC and pay a filing fee.

You can lodge your form by email, fax, express post, or in person at one of the FWC's offices. See the end of this Claim Guide for the FWC's details.

You can apply to the FWC for the filing fee to be waived by lodging a Form F80 – Waiver of application fee if paying the filing fee will cause you serious financial hardship. Your application to have the filing fee waived must be lodged at the same time you lodge your Form F72A claim.

For information on fees see here: https://www.fwc.gov.au/apply-or-lodge/fees-and-costs

For access to the forms see here: https://www.fwc.gov.au/apply-or-lodge/forms

Once the application is lodged the FWC has 14 days to start dealing with the application. The FWC may do this by asking the parties questions or asking parties for further information. The FWC does not conduct investigations into allegations of workplace bullying and/or sexual harassment.

The FWC can decide to deal with your claim by mediation, conference, or hearing. If this happens, the FWC will send you a written notice telling you the date and time of the meeting – this is called a Notice of Listing.

If you can't be there on the date or at the time stated in the Notice of Listing, you can ask for your matter to be adjourned (postponed). As soon as you know that you won't be able to be there, you should ask the FWC to adjourn the meeting and explain the reason why you can't be there. The FWC will only adjourn the meeting if you have a good reason.

For more information on the process for making a stop bullying application for sexual harassment that occurred before 6 March 2023 see here: https://www.fwc.gov.au/issues-we-help/sexual-harassment/sexual-harassment-before-6-march-2023

Sexual harassment that occurred on or after 6 March 2023

For sexual harassment that occurs **after 6 March 2023,** eligible workers are able to make an application for the FWC to deal with a sexual harassment dispute. Part of this application can include a stop sexual harassment order but is not limited to this. Significantly, the FWC's new broader power to deal with the matter in a different way allows for past sexual harassment to be addressed and rectified. This may include compensation.

An application to stop sexual harassment and/or to resolve a sexual harassment dispute can be made to the FWC, if while you are at work, someone:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature.

This behaviour must be in circumstances where a reasonable person would have expected that you would be offended, humiliated or intimidated. It does not matter whether the perpetrator meant for their actions to offend, humiliate or intimidate you.

For more information about workplace sexual harassment, please see Circle Green's "Q&A: Sexual harassment against WA workers".

Eligibility

You can make a claim to the FWC if:

- you are a "worker", and you work for a business or undertaking; or
- you are seeking to become a worker in a business or undertaking; or
- you are a person conducting a business or undertaking.

Importantly, both state and national system employees are able to make a claim.

What is a worker?

A "worker" is a broad term, and includes:

- an employee;
- a contractor or subcontractor;

- an employee of a contractor or subcontractor;
- an employee of a labour hire company;
- an outworker;
- an apprentice or trainee;
- a work experience student; and
- a volunteer, except for volunteers at a volunteer association which has no employees.

Note that some remedies are limited for employees of the Defence Force, Australia's security agencies and the Australian Federal Police:

- stop sexual harassment orders are not available to certain members of the Defence Force;
- the Commission may dismiss stop sexual harassment order applications if it considers the application might involve matters relating to Australia's defence, national security, or existing or future covert or international operations of the AFP;
- the Commonwealth Minister may approve declarations made by the Chief of the Defence Force, Director General of Security and the Director-General of the Australian Secret Intelligence Service to alter the application of the stop sexual harassment order provisions.

Sexual harassment and connection to the workplace

If you only want to apply to the Fair Work Commission for them to deal with the dispute other than by arbitration and you are not applying for a stop sexual harassment order, then you do not need to still be connected to your workplace to make an application.

However, you must still have a connection to the workplace if:

- you are applying for an order to stop sexual harassment; or
- you are applying for both an order to stop sexual harassment and you want to apply to the Fair Work Commission for them to deal with the dispute other than by arbitration.

What counts as being connected to work is not settled but based on how similar provisions in the *Sex Discrimination Act 1984* (Cth) have been interpreted by the Federal Court, it is likely that:

- 'In connection with' is a phrase of wide import;
- A mere relation between one thing and another is required, and this does not necessarily require a causal relationship; and
- The relationship does not need to be express or direct.

Time limits

Applications must usually be made within 24 months after the alleged sexual harassment, if more time than this has passed then the Commission may decide not to deal with the sexual harassment dispute and may dismiss the application.

What may be sexual harassment?

Sexual harassment at work is where someone:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature.

This behaviour must be in circumstances where a reasonable person would have expected that you would be offended, humiliated or intimidated. These circumstances may include:

- the relationship between the individuals;
- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed; and
- other relevant circumstances.

It does not matter whether the perpetrator meant for their actions to offend, humiliate or intimidate you.

Examples of conduct that may be sexual harassment include:

- unwelcome touching, staring or gestures that have a sexual nature;
- sexually suggestive comments, jokes, or images;
- sharing sexually explicit content, such as photographs, emails or text messages;
- unwanted requests for dates or sex; and
- intrusive questions about a person's private life, sex life, or body.

A single incident can be sexual harassment.

Who can I bring the application against?

An eligible worker can bring an application against:

- the person or persons engaging in the sexual harassment; and
- the employer.

You may look to include the employer where they have been vicariously liable. They do not need to have been the person who perpetrated the sexual harassment. In order for the employer to be vicariously liable the worker will need to show a connection with work.

Whether the necessary connection is present depends on the particular facts and circumstances of the case.

However, the employer will not be vicariously liable if they prove that they took all reasonable steps to prevent the employee or agent from doing acts that contravene the prohibition on sexual harassment in connection with work.

The onus will be on the employer to show that they took all reasonable steps to prevent the sexual harassment.

What outcomes can the FWC order?

Each person's situation will be different. You should think about your specific circumstances and your workplace when asking for orders. The FWC is not limited to making the orders you ask for, but it will likely consider them.

Stop sexual harassment orders

If you have made an application for a stop sexual harassment order the FWC can make any order it considers appropriate to prevent you from being sexually harassed at work (other than the payment of money). The FWC's focus is on sorting out the issues and allowing you to return to work as normal.

Keep in mind that the FWC can only make an order if its finds there is a risk of continued sexual harassment.

Some possible orders include:

- requiring the person or group to stop bullying and/or sexually harassing you;
- the employer having to regularly monitor the person or group;
- preventing unsupervised contact between you and the person or group at work;
- making sure people are following the employer's anti-bullying and/or sexual harassment policy;
- requiring information and additional support and training to be given to workers; and
- a review of the employer's workplace bullying and/or sexual harassment policy.

Application for the FWC to deal with a sexual harassment dispute

Compensation can also be awarded and there is no cap on compensation.

Compensation can be sought for lost wages, as well as for non-financial losses such as hurt, stress and humiliation. If you are claiming for mental distress, you should be prepared to show losses flowing from that – for example the medical bills you incurred seeing a medical professional, or other losses you can identify.

A breach of this section of the Fair Work Act is a breach of a civil penalty provision. You can seek that your employer (and any individuals involved in the breach) be penalized for the breach. You can ask for penalties to be paid to you, however penalties are discretionary (i.e. up to the Court).

In conciliation, you are free to negotiate for any outcome you want. Conciliation is discussed further below.

Costs

There is no lodgment fee for this claim.

For information on fees see here: https://www.fwc.gov.au/apply-or-lodge/fees-and-costs

Generally, each party will bear their own legal costs, meaning they will pay their own legal fees. However, there is a limited range of circumstances in which one party can be made to pay some or all of the legal costs of the other party.

Costs can be awarded where a claim has been made or defended “frivolously or vexatiously”. For example, if you made a claim even though you knew it had no chance of succeeding, this might be considered frivolous or vexatious. This is a fairly high bar to clear and only occurs in rare circumstances. However, if you are unsure as to whether or not your claim might be frivolous or vexatious, you may wish to seek legal advice, as legal costs can be a significant amount of money.

Representation

Conciliations and hearings at the FWC are designed to be navigated by an ordinary person without a lawyer or other representation. However, a person can be represented by a lawyer or an agent if a member of the FWC grants permission. This is different from having a support person attend a conference or hearing to provide emotional support. You do not need permission to have a support person.

Being represented by a lawyer or agents means that they speak and act on your behalf at the proceedings. An employee must notify and seek permission from the FWC before they can be represented at conciliations or hearings. Permission is only granted if:

1. the complexity of the matter means that a representative would help it to be dealt with more efficiently;

2. the party is unable to represent themselves so it would be unfair to refuse permission for them to be represented by someone else; or

3. it would be unfair not to allow the person to be represented, considering fairness between the party and other parties in the same matter.

You can indicate on your Form F75 that you are being represented by a lawyer or other representation.

Further information about representation can be found in the FWC Sexual harassment benchbook here: https://www.fwc.gov.au/benchbook/sexual-harassment-benchbook

Claim process

The flow chart at the end of this section shows the FWC process for dealing with your claim.

The length of this process will depend on how busy the FWC is, and how urgently your matter needs to be dealt with.

Starting a claim

You start a claim by filing a Form F75 – Application to deal with a sexual harassment dispute with the FWC.

There is no filing fee for making this application.

You will need to lodge the Form F75 to the FWC registry either:

- in-person at Floor 16, 111 St Georges Terrace Perth, WA, 6000 (9:00AM to 5:00PM Monday to Friday);
- by pre-paid post to GPO Box X2206, Perth, WA, 6001. Note that if lodging by post, you will need to pay the filing fee by credit card or cheque; or
- by email to ABSH@fwc.gov.au or
- by using the online portal system.

Application details and rules can change over time. If you are having trouble making your application, you can call the Perth registry on 1300 799 675.

If you are very close to the limitation period, you can ask the registry if you can commence a claim over the phone.

Completing the form

You will need to fill in your details and the details of your employer who is the “Respondent”. You should make sure you are using your employer’s legal name and not their trading name.

You can find your employer’s legal name on the Australian federal government’s business register.

Go to https://abr.business.gov.au/ and enter your employer’s ABN. You can find the ABN on a pay slip or group certificate.

You will also need to include the outcome you are seeking by making the claim – this can be compensation, penalties or other outcomes that are available.

At this stage, you don’t need to set out the amount you are seeking, you can simply write what you are seeking, for example compensation for losses and penalties to be applied against the employer.

Response

The FWC will then send a copy of your application to the respondents you have named; this may include the employer and any person who has engaged in the sexual harassment. They will be given 7 days to respond.

A response giving the individual respondent’s side of the case (including any objections to the application) must be made by using a Form F76.

An employer or prospective employer that is required to respond to a Form F75 application must do so within 7 calendar days using the Form F77.

Service

The FWC will serve an application for the FWC to deal with a sexual harassment dispute on each person named as having engaged in the sexual harassment (individual respondent) and each employer.

Conciliation or FWC Member conference

Generally, the next step the FWC will take once the employer has sent a response is to schedule a conciliation conference. A conciliation conference is private and confidential, and will usually include you, your employer, and a FWC Member.

The FWC Member is a neutral party and is there to assist you and your employer to come to an agreement and avoid the more formal process of a hearing. They are not there to advocate for one side, but to assist with the process.

At certain points the Member may speak to each party alone to assist with the negotiation process.

Conciliation can be a good opportunity to try and resolve the matter outside of the more stressful and formal process of a hearing. It is a good idea to approach the conciliation with an open mind and be prepared to negotiate.

Resolution at conciliation

It may be that you are able to come to an agreement in conciliation. It is standard for this type of an agreement to be put in writing. Sometimes a settlement agreement is drawn up on the spot and becomes binding when accepted and signed by the parties.

It may be that your employer wants a lawyer to draw up a settlement agreement which will be sent to you after the conciliation, so even though an agreement has been reached there is not an opportunity to close the matter on the spot.

If you are making an agreement to settle, it's important to be clear as to whether the agreement is settling just your sexual harassment claim, or all possible claims. It is quite common for employers to want to settle all claims.

Employers may also want non-disparagement and confidentiality clauses in the agreement. This means that you can't speak badly about them, or even discuss the claim or the sexual harassment (there are some limited exceptions, for example seeking legal advice).

If it's important to you that you be able to talk about your experiences, then it's a good idea to raise this issue in the conciliation. Otherwise, the other party may incorrectly assume that they are able to include these types of clauses in a written agreement.

A written agreement is normally in the form of a deed. It's important that you read and understand all the clauses of the deed because you are agreeing to them if you sign it. You may wish to seek legal advice if you don't understand all the clauses.

No resolution at conciliation

If you are seeking an order to stop sexual harassment:

- if you do not reach an agreement, the claim will go to a conference or hearing.

If you are seeking an order to stop sexual harassment and an application for the FWC to deal with a sexual harassment dispute OR an application for the FWC to deal with a sexual harassment dispute:

- if conciliation fails and you and your employer are unable to come to resolution, you can seek a consent arbitration, proceed to court, or discontinue your claim.
- to proceed to consent arbitration at least one respondent party must consent to the arbitration. Any parties who do not consent to the arbitration will be removed from the dispute.

The notifying parties must notify the Commission of their consent to arbitration by lodging a Form F78 within 60 days of the certificate being issued.

Arbitration

If all reasonable efforts to settle the matter were made at conciliation and this was not successful, the FWC will issue a certificate outlining this. The certificate will be dated, and you have 60 days from that date to progress your claim to the next steps. The certificate will also state if the FWC member who issued it does not believe you have a reasonable prospect of success.

You can make an application to have your claim arbitrated by the FWC. Engaging in arbitration requires the consent of both parties, so you cannot proceed with arbitration if your employer or the individual respondent does not agree to do so.

Arbitration allows for a final and binding decision on the matter. A Member of the FWC makes a final decision, though either side may appeal the decision. An arbitration can be cheaper and quicker and is less formal than a court hearing, so your employer may agree to undergo this process for efficiency.

This may take the form of a:

- determinative conference with a FWC Member; or
- hearing.

A determinative conference is less formal than a hearing but will still involve a FWC Member considering evidence submitted by each of the parties and making a decision. This process can involve the Member taking a more active role in seeking information or evidence.

A hearing is a more formal process than a determinative conference. It involves a FWC Member hearing evidence from the people involved in the case, including witnesses, and making a decision. This may feel like more of a traditional court process where both parties argue their case.

You need to file a Form F78 signed by both you and your employer to proceed to arbitration. This needs to be within 60 days of the receipt of the certificate that conciliation was unsuccessful. If the employer does not agree to arbitrate, you will have to make a court application to continue the matter. This also needs to be done within 60 days of the date listed on your certificate.

If it is nearing the 60 day deadline and your employer has not signed the Form F78 or given an indication that they will agree or not, you may want to lodge a court application, or you risk not having an option to proceed at all.

Confidential information

While Member conferences and determinative conferences are almost always held in private, hearings are usually public.

Where a matter involves sensitive confidential information, including medical information, the FWC has the power to make an order that certain information is kept confidential.

To make this order the FWC needs to be satisfied that it is desirable to do so, taking into account the confidential nature of the information or for any other reason the FWC choses to consider.

Making an application to Court

If your employer does not agree to arbitrate, or you wish to proceed to court without seeking arbitration, you can make an application to either the Federal Court of Australia (**FCA**) or the Federal Circuit and Family Court of Australia (**FCFCOA**). If you make an application to the Court, your employer does not have a choice and must participate in the hearing.

You must make the application within 60 days of the date listed on your certificate.

A court application can be quite time-consuming, stressful, and sometimes more expensive as it may be difficult to navigate without legal representation.

Interpreters and other requirements

The FWC can arrange for an interpreter to assist you at your mediation, conference, or hearing. You do not have to pay for the interpreter. However, you must tell the FWC as soon as possible that you will need an interpreter, and the language you require.

You can also request other things from the FWC if you require something to be able to participate (eg a hearing loop). The FWC will try to make arrangements for you.

If you need an interpreter, or have other requirements, then you can include these things in your Form F75. You can also contact the FWC Registry after you lodge your claim. The details of the FWC Registry are at the end of this Claim Guide.

Related resources

- Q&A: State or National system for WA employees
- Q&A: Bullying against WA workers
- Q&A: Sexual harassment against WA employees
- Q&A: Contractor or employee for WA workers
- Q&A: Dismissal for WA employees

For more information on each process see the Fair Work Commission website:

- conduct before 6 March 2023: https://www.fwc.gov.au/issues-we-help/sexual-harassment/sexual-harassment-before-6-march-2023
- conduct after 6 March 2023: https://www.fwc.gov.au/issues-we-help/sexual-harassment/sexual-harassment-commencing-or-after-6-march-2023
- sexual harassment benchbook: https://www.fwc.gov.au/benchbook/sexual-harassment-benchbook

Further information and assistance

Circle Green Community Legal

WA employees can request free and confidential legal assistance with employment and workplace discrimination issues from Circle Green Community Legal.

Complete an online request: circlegreen.org.au/get-help

Telephone enquiries: 08 6148 3636 (Please note that we do not provide on demand legal advice)

For further information on our Workplace law services, please visit: circlegreen.org.au/workplace

Commissions	Government departments & other supports
Fair Work Commission Phone: 1300 799 675 Email: perth@fwc.gov.au (enquiries only) Email: ABSH@fwc.gov.au (to lodge a claim form) Web: https://www.fwc.gov.au **Federal Circuit and Family Court of Australia** Phone: (08) 9268 7100 Email: waregistry@fedcourt.gov.au Web: https://www.fcfcoa.gov.au/ **Federal Court of Australia** Phone: 1300 720 980 Email: perth.registry@fedcourt.gov.au Web: https://www.fedcourt.gov.au/	**WorkSafe** Phone: 1300 307 877 Web: http://www.dmirs.wa.gov.au/worksafe

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