Circle Green Community Legal

29 November 2024

Department of Employment and Workplace Relations
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By email only: SJBPReview@dewr.gov.au

Dear Review Panel

Submission to the Secure Jobs, Better Pay Review

Thank you for the opportunity to contribute to the Review Panel's Secure Jobs, Better Pay Review (**SJBP Review**)

About Circle Green

Circle Green Community Legal (**Circle Green**) is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people from marginalised communities and who face disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: https://www.circlegreen.org.au/.

Workplace law services

Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers.

Our workplace law services include legal advice, casework, representation, and education on state and national workplace law, including workplace discrimination and harassment. This means Circle Green has expertise in providing legal assistance to WA workers targeted by sexual harassment and discrimination in connection with their work.

Workplace Respect Project

Circle Green is the lead agency delivering the Workplace Respect Project in Western Australia as part of the Commonwealth Government's response to the Respect@Work Report, which identified the prevention of and response to workplace sexual harassment as an urgent priority due to the widespread and pervasive nature of its occurrence in Australian workplaces.

The Workplace Respect Project seeks to address workplace sexual harassment by working across the spectrum of prevention, as well as providing confidential free legal advice to people who've been targeted by workplace sexual harassment and discrimination

Submission

This submission is based on our experience assisting vulnerable WA workers who have been targeted by workplace sexual harassment. We focus specifically on Part 8 of Schedule 1 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**), which inserted Part

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3-5A – Prohibiting sexual harassment in connection with work, into the *Fair Work Act 2009* (Cth) (**FW Act**).

Since Part 3-5A commenced on 6 March 2023, Circle Green has provided 287 legal assistance services to persons targeted by workplace sexual harassment. Of the 87 clients targeted by workplace sexual harassment that we assisted in the reporting year from 1 July 2023 to 30 June 2024:

(a) 21% were from a culturally and linguistically diverse background;

(b) 12% were younger than 24 years of age;

(c) 12% indicated that they were, or at risk of, homelessness; and

(d) 6% were or had been experiencing family and domestic violence (**FDV**).

Circle Green is pleased to report that the Fair Work Commission's (**FWC**) new workplace sexual harassment jurisdiction confers several advantages including:

(a) the timely processing and allocation of complaints to a FWC member;

(b) the prohibition on sexual harassment being a civil remedy provision; and

(c) the ability to apply for orders to stop workplace sexual harassment as well as to resolve a dispute involving sexual harassment, which is beneficial in circumstances where the person targeted by workplace sexual harassment is still employed.

We commend the FWC's swift work in the implementation and operation of this new jurisdiction. However, we take this opportunity to highlight some issues with the practical operation of Part 3-5A and related matters.

Form F75: Application to resolve a sexual harassment dispute

In this section we explain why Form F75 – Application to resolve a sexual harassment dispute (the **Form**), has been a source of confusion, even for our own legal practitioners and FWC registry staff.

General complexity and confusion

The Form is complex, unnecessarily long and uses terminology that is difficult for some self-represented applicants to understand.

For example, the Form refers to the applicant as the "aggrieved person" throughout. It may be unclear to self-represented applicants that this term refers to them. The word itself is also simply too challenging for some applicants to understand, particularly those from a culturally or linguistically diverse (**CALD**) background. Recently one client submitted a request for assistance to Circle Green in which they described filing a form F75 because they were being sexually harassed at work and told us the FWC sent the form to the aggrieved person and his representative responded. It is clear that this client, from a CALD background, believed that the 'aggrieved person' that the F75 referred to was their harasser rather than themselves.

Its use also stands in contrast to the simple language used in other FWC forms. The Form F2 – Unfair dismissal application, and the Form F8 – General protections application involving dismissal,

for example, use terms like “applicant (you)”,[1] or “the person who has been dismissed”.[2] Complaint forms used by the Australian Human Rights Commission (**AHRC**) and the Equal Opportunity Commission of WA for discrimination and harassment complaints are also simpler and easier to understand, using terms like “about you, the complainant”,[3] and “about you”[4], in the section requiring the applicant / complainant’s personal information.

We recommend that F75 be amended to adopt similar language to ensure it is clear and easy to use for self-represented applicants.

Naming an individual respondent

The Form does not allow an applicant to make a claim without naming the individual perpetrator as a respondent to their matter.

Question 6 refers to the business or undertaking to which the allegations of sexual harassment relate. However, question 7 then asks the applicant to list the respondent/s, but the questions asked about the respondent/s seems to indicate that the respondent/s should be individual persons only, rather than a business or undertaking, such as the employer entity.

A person targeted by workplace sexual harassment may not want to name the perpetrator as an individual respondent to their application for a variety of reasons, such as not seeking anything from them in terms of a remedy, not wanting to have any further direct or indirect contact with the person, or simply only wanting to pursue a claim against the employer entity for failing to protect them from the perpetrator. There is no legal reason that an applicant cannot make out a valid claim in this way by naming the individual perpetrator in their pleadings and producing evidence to support the necessary elements to demonstrate the employer’s vicarious liability. In fact, this is specifically contemplated by the Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* which specifically refers to that section 527E(1) as being designed to ensure ‘an aggrieved person can obtain a remedy from the principal in addition to, or instead of, the perpetrator’[5] (emphasis added).

Circle Green has assisted a client who wanted to name the employer but not the perpetrator as respondent to her workplace sexual harassment claim. As illustrated in case study 1, below, the client not only received conflicting information from the FWC but was required to attend a mention hearing to decide whether the individual perpetrator had to be named as a party in their application. The FWC member expressed the view that an individual harasser must be named in the application due to the wording of the FW Act. This appears to be contrary to Parliament’s intention for section 527E(1), and is also contrary to the position taken by other jurisdictions where complaints can be made against the employer entity alone under the vicarious liability provisions without naming the individual harasser as a respondent. Further, it creates an additional administrative burden for the FWC to serve and manage a claim against another respondent where the applicant is not seeking a remedy against them.

[1] Fair Work Commission, Form F2 – Unfair dismissal application.
[2] Fair Work Commission, Form F8 – General protections application involving dismissal.
[3] Australian Human Rights Commission – Complaint Form.
[4] Equal Opportunity Commission of WA – Complaint Form.
[5] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* – Revised Explanatory Memorandum, para 545.

We recommend that legislative amendments be made to clarify that a claim under Part 3-5A of the FW Act can be made against an employer entity alone under the vicarious liability provision without necessarily naming the individual perpetrator as a respondent.

Case study 1 - Hazel

*Circle Green assisted Hazel to lodge an application to resolve a sexual harassment dispute (**Form F75**) to the Fair Work Commission.*

Hazel wanted to lodge her Form F75 application against her former employer under the vicarious liability provision. She did not want to name the individual perpetrator of workplace sexual harassment as a respondent in her application because she was not comfortable dealing with them directly, and was not seeking a specific legal remedy from them.

Circle Green called the FWC registry for guidance on how to complete the form without naming the perpetrator. The registry staff member told Circle Green to simply not include the perpetrator's details under Question 7 – "About the Respondent(s)" in the Form F75.

However, once the Form F75 was lodged, the case manager allocated to Hazel's application called Circle Green to confirm that Hazel did not want to name the individual perpetrator as a respondent.

Circle Green confirmed that Hazel did not want to name an individual respondent, and the case manager informed Circle Green that it was outside of the Fair Work Commission's "normal process" to not list an individual respondent.

The case manager informed Circle Green that whilst the application could proceed, the matter would be allocated to a Commissioner for consideration at a mentions hearing instead of proceeding straight to a conciliation conference.

At the mentions hearing, Hazel was ordered to amend her application to include an individual respondent.

Case study 2 - Mira

Circle Green assisted Mira to lodge a Form F75 application against her former employer and the individual perpetrator of workplace sexual harassment.

When the FWC called Circle Green to explain the application process as per its usual process, the FWC informed Circle Green that the individual perpetrator is usually the respondent, not the employing entity.

The conciliation process

We also wish to take this opportunity to emphasise the importance of a trauma-informed, sensitive and predictable conciliation process for all applicants, but particularly those who have been targeted by workplace sexual harassment. As with other forms of sexual violence, sexual harassment often involves an abuse of power, and can be experienced as a traumatic event.[6] We understand that the FWC has an intensive case management model underpinned by the principles of trauma-informed practice,[7] and commend this. However, while our clients have had some positive experiences with FWC conciliators and members, these experiences vary considerably depending on the FWC conciliator or member allocated to the matter.

We recommend that there be some standardised practices for the conciliation of matters involving workplace sexual harassment including:

- acknowledging applicants' trauma at the start of conciliation, which is a practice adopted at the AHRC and can be done in a way that does not compromise conciliators' impartiality or imply liability on the part of an alleged perpetrator;
- minimum notice periods for filing deadlines and conciliation dates;
- processes for applicants who cannot (for legal reasons such as legal orders) or who do not wish to have direct contact with alleged perpetrators;
- the use of non-disclosure agreements and confidentiality obligations; and
- managing workplace sexual harassment applications run concurrently with other claims such as general protections claims. We address this issue separately below.

Our clients, almost without exception, experience significant stress in the lead up to conciliation or indeed any legal process. Those who have been targeted by workplace sexual harassment are often particularly impacted due to the nature of their trauma. We understand that one of the benefits of conciliation is its informality and ability to be adapted to the particular complaint and parties. However, having a clear idea of exactly what to expect from their upcoming conciliation and being reassured that they and their matter will be treated sensitively is critical to managing and mitigating further trauma and harm for applicants.

Workplace sexual harassment before 6 March 2023

Part 3-5A of the FW Act does not apply to workplace sexual harassment that occurred before 6 March 2023. If workplace sexual harassment occurred before 6 March 2023, even if it continued after that date, a person targeted by the behaviour must limit their claim to that portion of the conduct that occurred after Part 3-5A commenced.

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[6] Australian Institute of Health and Welfare, 'Sexual Violence', Family, domestic and sexual violence, https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/sexual-violence; Respect@Work, 'What causes workplace sexual harassment?', https://www.respectatwork.gov.au/individual/understanding-workplace-sexual-harassment/what-causesworkplace-sexual-harassment; Fred Lunenburg, 'Sexual harassment: An abuse of power' (2010) 13(1) International Journal of Management, Business, and Administration 1, 1.

[7] Fair Work Commission, 'Bench Book: Sexual Harassment Disputes', 1 October 2024, https://www.fwc.gov.au/documents/benchbooks/sexual-harassment-disputes-benchbook.pdf.

This is confusing and complex for self-represented applicants seeking both a stop order and other remedies for workplace sexual harassment. It prevents them from making a single FWC claim based on the full set of relevant circumstances.

For these reasons, we consider the legislation should have been drafted to expressly allow the FWC to consider an entire pattern of conduct that started before and continued after 6 March 2023 in an application made under s 527F of the FW Act. However, we also recognise this is likely to be a transitional issue and legislative amendments to address it at this later stage may be of limited impact.

Limitation period

24 months to make a workplace sexual harassment complaint is not long enough.

In our experience, it often takes people targeted by sexual harassment much longer than 24 months to deal with the practical and psychological impacts of workplace sexual harassment, particularly if they come from a vulnerable or disadvantaged background. We have repeatedly observed that a person targeted by sexual harassment is primarily concerned about their physical, mental, and economic safety and security after experiencing sexual harassment, rather than pursuing a legal claim. The psychological impacts of sexual harassment can also vary significantly between individuals, and those impacts can continue for extended periods of time. It is not reasonable to expect a person targeted by sexual harassment to prioritise their legal claim before they have addressed these fundamental issues.

The following quote was provided by a member of the Workplace Respect Project's Lived Experience Advisory Panel:

> *To grow yourself back post-trauma can take more than 12 months… then to be in a position to even speak about it? Even when I left that company, the VP of HR said to me "if this had happened more recently, he would have been fired". But he wasn't, and he still worked there. This 12 or 24-month period is not enough. You need longer, particularly for those whose experiences were prior to this cultural (#MeToo) movement, because only then do workers have the empowerment of feeling like maybe they deserved better.*

We recommend that the FWC's discretion to dismiss a workplace sexual harassment application not arise until 6 years after the contravention. This is consistent with the general limitation period that applies to many other civil law actions, including a general protections claim not involving dismissal, and is a more appropriate timeframe considering the nature of the impact of sexual violence.

Concurrent general protections and WSH applications

Where a worker is targeted by workplace sexual harassment and then victimised or subjected to adverse action because they make an informal or formal complaint about that conduct, a contravention of the general protections provisions occurs.

Even where the adverse action occurs as a result of the workplace sexual harassment conduct in this way, the potential applicant must consider making a separate general protections claim to address it. If the adverse action involves a dismissal, the potential applicant must make the claim within 21 days from the date of their dismissal. Then, they must make a separate Form 75A application for the workplace sexual harassment.

Even after an applicant has made both applications to the FWC it can be difficult to keep them separate when dealing with both processes concurrently. For example, if the general protections

claim does not settle at the conciliation conference, the applicant faces a deadline to apply to the Federal Court of Australia or Federal Circuit and Family Court of Australia if they wish to pursue it further, whilst also dealing with their workplace sexual harassment dispute in the FWC. Distinct legal arguments would presumably also have to be made about different facts within the same sequence of events. This will inevitably be difficult for a self-represented applicant to navigate.

We have also seen a respondent use this situation as an opportunity to argue that by making two claims the applicant is "opportunistic", "strategic" and an engaging in "abuse of the process". Our client had made both a general protections claim for victimisation, and a workplace sexual harassment claim. For a self-represented applicant, it would be a daunting and complex exercise to have to explain for themselves why they *can* make two claims.

In contrast, under the SD Act and the *Equal Opportunity Act 1984* (WA), both victimisation and sexual harassment complaints can be made in the same application and dealt with together.

We make the following recommendations to address the complexity of making two concurrent FWC claims under the current regime. Firstt, potential applicants must have easy access to resources that explain the need to potentially make two claims, one of which may be subject to a 21-day limitation period. Second, we request FWC consider whether a standardised procedure or case management guidelines can be introduced to deal with such matters. In our view, any guidelines should address issues such as:

- when and how a general protections and sexual harassment application may be joined; and
- providing applicants with information about global settlements.

Case study 3 - Elena

Elena was targeted by workplace sexual harassment. The perpetrator, Tom, owned and directed the company that employed Elena. Elena was wary of antagonising Tom because the company was Elena's work visa sponsor and her ability to remain in Australia depended on this job. However, Elena gathered the courage to stand up to Tom as she could not endure the sexual harassment any longer. Elena was dismissed a few days later.

Circle Green assisted Elena to lodge a general protections claim involving dismissal and an application to resolve a sexual harassment dispute. During the conciliation conference for the general protections claim, the FWC member told Elena that although the general protections claim was evidently lodged quickly due to timeframes, their view was that the workplace sexual harassment came first in the dispute. The FWC member encouraged Elena to consider a global settlement figure.

The matter did not settle at this conference, and Circle Green assisted Elena to lodge a general protections application in the Federal Circuit and Family Court of Australia. Circle Green also assisted Elena with a workplace sexual harassment application in the FWC, and the parties eventually agreed to a global settlement of both matters at the conciliation conference for her workplace sexual harassment application.

Circle Green Community Legal

Elena's story is an illustration of how having to navigate two concurrent claims related to the same conduct can create unnecessary complexity and require additional time, advice and resources to resolve. In Elena's situation, despite the matter ultimately reaching a global settlement in the FWC, Circle Green still had to advise, draft, and lodge a general protections application in the Federal Circuit and Family Court of Australia whilst the workplace sexual harassment application was made and proceeding in the FWC. This is a strain on the limited resources of the FWC, the Court, legal assistance service providers such as Circle Green, and applicants themselves.

At a legislative level, we also recommend that the limitation period for dismissal related general protections claims be extended, at a minimum to 24 months and preferably to 6 years. This would benefit applicants, respondents, legal assistance service providers and the FWC by:

- reducing complexities and the resultant strain on resources for concurrent applications made to the FWC, such as a workplace sexual harassment application and a general protections claim involving dismissal; and

- reducing the number of unmeritorious general protections (dismissal) claims made to preserve an applicant's rights in the context of the extremely short limitation period. Often, individuals seek assistance from Circle Green after they have lodged a general protections claim? involving dismissal and sometimes they have lodged the claim after being informed of the minimum employment period for an unfair dismissal claim by the FWC Registry. Applicants simply do not have enough time to, first, deal with the mental and financial impacts of losing a job, and then seek legal advice on the strength of any potential claim and make a considered decision before lodging. Extending the limitation period to 6 years will allow applicants to seek adequate and appropriate legal advice that would ultimately alleviate the burden on the FWC and respondents with the reduction of any unmeritorious claims where applicants have not been able to seek legal advice prior to lodgement.

We do not consider that extending the limitation period for general protections (dismissal) claims will create a landslide of unmeritorious applications for the reasons we outline above – specifically that applicants will have time to seek advice on and consider their options before lodgement. We also wish to highlight the protection of employee rights (PERS) claim available under the *Industrial Relations Act 1979 (WA)* (**IR Act**), which is similar in nature to the general protections claim.[8] The time limit to make a damaging action claim to the Industrial Magistrates Court of WA is 6 years, even where the damaging action is a dismissal. The PERS claim was introduced into the IR Act in 2021 and did not cause an influx of damaging action claims, dismissal or otherwise. The first decision was only delivered this month.

Thank you for considering our submission. We would be pleased to discuss any of its contents further. Please contact Imogen Tatam, Senior Lawyer (Law Reform) – Workplace, at imogen.tatam@circlegreen.org.au if you wish to do so.

Yours faithfully

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[8] *Industrial Relations Act 1979* (WA), s 97A: Damaging action because of inquiry or complaint.