

2 March 2023

Proper Officer
Fair Work Commission
Email: consultation@fwc.gov.au

Dear Proper Officer,

Submission on the Fair Work Commission's Implementation Report: Sexual Harassment in Connection with Work

We welcome the opportunity to make a submission on the *Implementation Report: Sexual Harassment in Connection with Work* (the **Report**). This report discusses key issues with implementing recent changes from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* to the Fair Work Commission's jurisdiction with respect to sexual harassment. We consent to this submission being published.

About Kingsford Legal Centre

Kingsford Legal Centre (**KLC**) is a community legal centre, providing free legal advice, casework, and community legal education to people in south-east Sydney. We specialise in discrimination law and run a state-wide Discrimination Law Clinic. In 2022, we gave 189 discrimination advices and provided intensive assistance with 60 discrimination matters.

KLC also has a specialist Employment Law Clinic (**ERLS**) and Sexual Harassment Legal Service Clinic (**SHLS**). These clinics provide free legal help and assistance to migrant workers and other vulnerable workers experiencing social and economic disadvantage in NSW. Our ERLS is a collaborative partnership between KLC, Inner City Legal Centre and Redfern Legal Centre.

KLC is part of the UNSW Sydney Faculty of Law & Justice and provides clinical legal education to over 500 of its students each year. We have been part of the south-east Sydney community since July 1981.

Due to time constraints, we have only focused on select key aspects in relation to the Report. We understand that we will be separately invited to comment on the proposed changes to the Fair Work Commission Rules.

Key concerns and recommendations

1. Issues with new forms for sexual harassment matters

The Australian Human Rights Commission's *Respect@Work Report* highlighted that most sexual harassment in the workplace is not formally reported.¹ At the

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 99.

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outset, we submit that any applicant forms in the Commission's sexual harassment jurisdiction must be as easy to navigate for applicants as possible to assist with reporting sexual harassment. This is also a key component of trauma informed practice.

We note that applicants now have a choice of jurisdiction under both employment and discrimination laws. One concern is that an applicant may miss their time limits to lodge a dismissal application and instead lodge a Stop Sexual Harassment application. Noting that the Commission are endeavouring to review and action applications within 14 days, the concern is that the applicant is not aware of their rights on dismissal and other options available until the strict 21 day deadline has passed.

We think it is therefore imperative that the Commission makes applicants aware of the ability to access free legal advice and of time limits in dismissal matters within the form and through bounce back messages when applications are made.

Need for plain English language and accessibility of navigation

In general, we encourage the Commission to ensure that all its new forms are in plain English and easy to navigate for all parties. However, we are particularly concerned that the New Form 75 (Application for the Fair Work Commission to deal with a sexual harassment dispute) will be overly technical and inaccessible for many applicants in sexual harassment matters. Examples of this include:

- **The form is very long.** The form is 17 pages. In contrast, the complaint form for the Australian Human Rights Commission is 9 pages. The Commission's F8 Form (General Protections application involving dismissal) is also 9 pages. The length of the New Form 75 may be a deterrent for applicants to submitting applications. The form should seek to capture enough information for a case manager (paragraph 39 of the Report) to make an initial assessment but not so onerous that it is a deterrent.
- **The form does not provide guidance on what will happen if any details are not completed.** For example, the form could say that if any details are missing, these will be followed up by an officer of the Commission through a case-management process. The form could also say that applicants can clarify any issues with the form at this time. The Commission could take reasonable steps to provide assistance to a person making a claim.
- **The form could benefit from plain English drafting.** On page i the form asks if an applicant is "a *Is the worker still employed, engaged or otherwise connected to the workplace where the alleged sexual harassment occurred?*" This could be put more simply – 'are you still working or seeking to work in the business at question 6.' Terms of 'businesses or 'undertaking' could be defined in footnotes, or these issues could be discussed with applicants during the case management process.
- **The format of the form is not user-friendly.** For example, the table for information about respondents on page 6 does not leave much room for applicants to fill in details about respondents. The form also shifts in layout, with some horizontal pages, some vertical ones (see vertical page 5 and

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horizontal page 6). In contrast, the Australian Human Rights Commission complaint form has a lot of negative space and uses the same format for all boxes to complete. It is predictable and provides plenty of space for the applicant to describe what has happened.

- **The form could be revised to provide greater focus on what has happened and what applicants are seeking.** For example, on page 8 the form could say under the heading 'Tell us what happened' – 'Tell us what happened – What is your complaint about?' Where the form says 'attach extra pages if necessary' the form could include examples of what can be attached – a statement, police report, emails, or letters from employers. The form could also be revised to provide greater clarity on the options applicants are seeking. For example, on page 1 where it says, 'by otherwise dealing with the dispute' brackets could be put after this such as '(e.g. compensation, lost remuneration, make a person perform an action).' It could be made clear on page 11 that stop sexual harassment orders are only available if someone is still working. Part 2 could be revised to say 'Only complete Part 2 if you are seeking a stop sexual harassment order. You must be still working for the employer to do this.'
- **The form should not include questions about employer policies or procedures on sexual harassment.** At page 9, the form asks applicants a series of questions about the policies or procedures of employers on sexual harassment. We are concerned that this will again deter applicants from lodging the form, who may not know the answer to these questions or feel as if they must first go through internal policies or procedures on sexual harassment before lodging a complaint. There may be many circumstances where it is not appropriate or safe to require an applicant to go through internal policies or procedures on sexual harassment before making a complaint. These questions on page 9 may be best left to be discussed with an officer at the Commission through part of the case-management process.
- **The form should include greater clarity on the 'complaints made elsewhere' section.** For example, it is unclear what 'anti-discrimination tribunals' the Commission is talking about – does this include the Australian Human Rights Commission? The form could list examples of these across Australia. Alternatively, the form could simply say, 'have you made a complaint about these behaviours to another agency or organisation?' and provide an opportunity for applicants to discuss this. Case managers can then follow up with applicants about this information after the form is submitted.
- **The form should be more accessible to people from culturally and linguistically diverse backgrounds.** For example, the Commission could commit to enabling persons to complete the form in a language other than English and to translate it. This option is available for the complaint form for Anti-Discrimination NSW.
- **The form should provide information about how it can be lodged online.** For example, the General Protections Form (Dismissal) provides a link for online lodgement – applicants can click on it, and it takes you straight to the lodgement page.

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2. **Importance of trauma informed approach to new forms and case management process** We welcome the Commission's commitment to a case-management process that is underpinned by the principles of trauma-informed practice.² We have written extensively on this issue, including in our Report *'Having My Voice Heard, Fair Practices in Discrimination Conciliation.'* This can be found via our website here: <https://www.klc.unsw.edu.au/publications/reports-guides>.

However, as above, we are concerned that the length, complexity, and inaccessibility of the forms in the new sexual harassment jurisdiction may undermine this goal. In addition to the above, we make the following recommendations to strengthen the trauma-informed approach to the new sexual harassment jurisdiction:

- **The new forms should include details for non-legal supports and legal supports.** For example, the form could list non-legal supports such as Full Stop Australia, Lifeline, and Police, as well as legal-supports, such as Community Legal Centres Australia and Legal Aid. This information should also be included in any bounce-back emails to the commission.
- **The new forms should include a section on safety.** For example, in Form 75 there could be a section that explains that the safety of parties is a priority for the Commission and asks applicants whether anything can be done to ensure this. For example, some applicants may wish to know when respondents will be given their complaint so that they can take steps to best ensure their safety.
- **The new forms should include information about safety options during the case management process.** For example, the form can either set out or provide links to information about options for improving safety during conciliation processes, such as shuttle mediation, telephone conferences, and having support persons present.
- **The new forms should state that applicants can discuss with the case manager any pressing issues for resolution that concern safety.** For example, applicants may wish to start immediate discussions with employers about taking leave while matters are being conciliated, or other measures to increase their safety at work during this time.

We are also concerned that the Case Management Process outlined at paragraphs 39- 45 of the Report does not include a trauma informed process. For example:

- At paragraph 39 of the Report, **we recommend that the case manager's review also includes trauma informed practices.** These could include liaising with the applicant in relation to any safety concerns or measures to be considered (see bullet point on safety options above), reiterating the availability of non-legal and legal supports and referrals, an explanation of the process to the applicant including who will receive a copy of the

² Fair Work Commission, *Implementation Report: Sexual Harassment in Connection with Work* (2023) 9.

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application and when it is being sent (and listening to any concerns about this), as well as who will be involved in the process moving forward and how, in a trauma informed way and listening to the concerns of the applicant.

- At paragraph 40 of the Report, **we recommend that when speaking to the Respondents, the case manager should also discuss any temporary safety measures (having discussed this with the applicant) with the Respondent.**

At paragraph 43 of the Report, it is noted that Members will have broad discretion in who to deal with the matter. **We recommend that, similarly to what occurs at the Australian Human Rights Commission, the Member dealing with the matter contacts the Applicant and Respondent directly,** so that there is contact between the Member and the parties prior to any conciliation or other action or process (excluding hearing), for the purpose of introducing themselves, explaining the process and reasoning in a trauma informed way and so that the Applicant is not speaking to the Member for the first time in, for example, a short, confined conciliation which can be a confronting and traumatic experience for Applicants.

3. Confidentiality issues

We welcome the Report's exploration of the issue of confidentiality in sexual harassment settlement agreements. We support the Commission making it clear to parties that 'non-disclosure' or 'confidentiality' clauses should not be assumed as a matter of course in settlement agreements, but that the issue should be considered on a case-by-case basis and limited in scope and duration.³ We also support the Commission taking the approach of not making confidentiality clauses a standard term in draft settlements provided by the Commission.⁴

However, we recommend the Commission taking an even stronger stance in relation to this matter, clearly stating that confidentiality clauses should not be seen as standard terms and will (instead of may) no longer be a standard term of draft settlement terms. **We recommend that the Commission makes it clear that confidentiality must only be at the express preference of the person who has made a complaint.** Further, we recommend the Commission making it clear that another key issue with confidentiality in settlement agreements is the need for employers and persons conducting businesses or undertakings (PCBU) to comply with their positive duty.

The *Sex Discrimination Act 1984* (Cth) now places an obligation on employers and PCBU to take reasonable and proportionate measures to eliminate sexual harassment, as far as possible.⁵ This must be understood to extend to their policies and practices with respect to confidentiality in sexual harassment settlement agreements. **We recommend that the Commission reminds employers and persons conducting businesses or undertaking of their positive duty in conciliations and particularly in discussions about settlement terms as confidentiality is likely to be in conflict with the positive duty obligations.**

³ Ibid 11.

⁴ Ibid.

⁵ Sex Discrimination Act 1984 (Cth) s47C.

**KLC Submission on the Fair Work Commission's Implementation Report:
Sexual Harassment in Connection with Work**

If you have any questions about this submission, please contact Emma Golledge at legal@unsw.edu.au.

Yours faithfully
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