

9 August 2024

The Hon Justice Mordecai Bromberg
President
Australian Law Reform Commission
PO Box 209, Flinders Lane
MELBOURNE VIC 8009

Via email: jrsv@alrc.gov.au

Subject: ALRC Inquiry into Justice Responses to Sexual Violence

Dear the Hon Justice Mordecai Bromberg,

Following our meetings on 17 June and 30 July 2024, I am pleased to provide further information on behalf of the Office of the Fair Work Ombudsman (OFWO) to the Australian Law Reform Commission Inquiry on Justice Responses to Sexual Violence (the Inquiry).

Based on our discussions, this submission provides information about the OFWO's remit and our current education and compliance role in relation to the new workplace sexual harassment jurisdiction. Since this new jurisdiction commenced, our message has been very clear to the workplace community: Everyone has the right to a workplace that is safe and free from sexual harassment. Workplace sexual harassment is prohibited under the *Fair Work Act 2009* (Cth) (Fair Work Act).

I recommend that the Inquiry also consult with our portfolio agency, the Department of Employment and Workplace Relations, on any particular proposals being considered.

Our remit

At the outset, I would acknowledge that the OFWO, working with other regulators, has a complementary role to play in minimising and eliminating all forms of sexual violence. Within our current remit, we work closely with the Fair Work Commission (FWC), the Australian Human Rights Commission (AHRC), Safe Work Australia, Australian Border Force, and alongside state and territory human rights and work health and safety agencies.

We have also been very actively involved in the Respect@Work reforms, including during the inquiry process led by Kate Jenkins, implementing the Final Report's recommendations, and as an ongoing member of the Respect@Work Council. My office is committed to continuing to work constructively with other regulators and agencies through existing forums and mechanisms, and as part of any frameworks agreed to by government in the future.

The OFWO is an independent statutory agency created by the Fair Work Act and led by the Fair Work Ombudsman (FWO). Since our inception, the OFWO's purpose as the national workplace relations

regulator has been to promote harmonious, productive, cooperative and compliant workplace relations in Australia. We have approximately 900 staff, including around 220 Fair Work Inspectors, currently regulating approximately one million employing businesses and around 14 million workers.

Under the Fair Work Act, our functions include to:

- promote harmonious, productive and cooperative workplace relations,
- promote and monitor compliance with Australian workplace laws,
- provide education, assistance and advice to employers, employees, outworkers, outworker entities and organisations,
- inquire into and investigate breaches of the Fair Work Act or a fair work instrument, and
- take appropriate enforcement action, including by commencing court proceedings.

Our remit has recently expanded following several tranches of amendments made to the Fair Work Act over the last 18 months. Relevant to this Inquiry, this includes regulating the new workplace sexual harassment prohibition from 6 March 2023, and the new paid family and domestic violence leave entitlement which, from 1 August 2023, applies to all national system employees. These key changes to the FWO's remit are each discussed in further detail below.

From 1 January 2025,¹ the OFWO will also become a dual civil and criminal regulator with the commencement of the new criminal underpayment offence. In addition, our current regulated community will expand when new provisions commence in August this year that enable the Fair Work Commission to set minimum standards for gig platform workers and road transport workers.

Workplace sexual harassment

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) introduced a new civil remedy provision at s527D(1) of the Fair Work Act which prohibits sexual harassment in connection with work, including in the workplace,² adopting the definition of sexual harassment from section 28A of the *Sex Discrimination Act 1984* (Cth). The OFWO has standing to bring proceedings for an alleged contravention of the s527D workplace sexual harassment prohibition, with no requirement to first apply to the FWC (ss539(2), 682(1)(d)). Instead, the usual 6 year time limit for commencing proceedings applies³ (see [Fair Work Ombudsman v Wongtas Pty Ltd \[2011\] FCA 633](#) at [39]-[49] and [Vanden Driesen v Edith Cowan University \[2012\] FMCA 735](#) at [46]).

¹ Subject to a Voluntary Small Business Wage Compliance Code being declared under subsection 327B(1) of the Fair Work Act.

² These changes implement recommendation 28 of the *Respect@Work: Sexual Harassment National Inquiry Report*, to ensure and clarify a total prohibition against sexual harassment within the Fair Work system.

³ Section 544 of the Fair Work Act.

The Fair Work Act amendments complement a corresponding positive duty on employers to eliminate sexual harassment in the workplace, as regulated by the Australian Human Rights Commission (AHRC).

The FWC can deal with disputes about sexual harassment at work, including by issuing a 'stop sexual harassment' order. The OFWO has standing to bring proceedings alleging non-compliance with a term of a 'stop sexual harassment order' issued by the FWC. The OFWO's role investigating complaints regarding the express prohibition in s527D(1) and FWC stop orders complements our broader work dealing with treatment of persons within the workplace. As part of the 2022-23 Federal Budget, the Government provided the OFWO with \$3.1 million over 4 years from 2022-23 to support the introduction and implementation of the express prohibition on sexual harassment.

The OFWO has established a small sexual harassment specialist team within the agency's inspectorate to investigate allegations of sexual harassment that may breach the Fair Work Act or stop order. To date, the OFWO has commenced two formal investigations of allegations of sexual harassment under the new prohibition, which are currently ongoing. One of these commenced as a result of the OFWO receiving an anonymous report about the alleged behaviour. We are also proactively monitoring reports of alleged sexual harassment by employers in the media and through our other intelligence channels. This is a developing area of work for the OFWO.

In accordance with our statutory functions, and with additional funding, the OFWO has also invested heavily in educating the workplace community on the sexual harassment prohibition. The OFWO has updated, and created new, online materials on the sexual harassment prohibition to assist workers and businesses to understand their rights and obligations. These resources were published on commencement of the prohibition. The OFWO communicated the changes through our well-established channels, including website news articles (promoted in My account), employer newsletters, Community Engagement Stakeholder eNewsletters, social media channels, subscriber emails, webinars, stakeholder workshops and community forums.

The OFWO was responsible for Recommendation 33 of the Respect@Work Report, to update employee information and guidance to include sexual harassment (including amending the Fair Work Information Statement (FWIS)). The FWIS was updated in November 2021, with in-language versions amended in February 2022. The OFWO has also actively supported and implemented a number of agreed Respect@Work Report recommendations, including those related to data collection, staff training and referral services.

Other sexual harassment jurisdictions

As noted above, there are a number of regulators that the OFWO works closely with on matters relating to sexual harassment. In addition to the OFWO, complaints about sexual harassment can be made to the AHRC, the FWC, a relevant state or territory workplace health and safety regulator, or a relevant state or territory human rights/anti-discrimination body. A person may seek a remedy in more than one jurisdiction, but generally can't seek multiple remedies in relation to the same conduct.

In September 2023, the OFWO formalised a return referral mechanism with the FWC and AHRC, which provides a pathway for individuals to seek assistance from the OFWO in addition to our usual frontline

channels such as the OFWO's Infoline or via an online enquiry. The referral mechanism ensures that applicants can efficiently and effectively refer certain unresolved matters, including matters relating to the prohibition against sexual harassment in the workplace that raise potentially serious and/or systemic issues, to the OFWO for potential investigation and enforcement action.

No referrals have been made under the formalised return referral arrangements to date. We expect this is because the return referral mechanism is relatively new, having only been established late last year. We note that it is ultimately the complainant's choice as to whether they pursue a complaint through the OFWO when referred by the FWC. The OFWO's referral arrangement with the AHRC was established in the context of the AHRC being conferred with regulatory powers to enforce the new sexual harassment positive duty in the *Sex Discrimination Act 1984*. The OFWO has no direct role or involvement in the enforcement of the new positive duty, which commenced in December 2023.

The overlapping jurisdictions (including both civil and criminal) means that victims of workplace sexual harassment and sexual violence must often elect between what remedy to pursue and in which jurisdiction. An upfront legal advisory service that could comprehensively outline those options to victims with the potential to recommend referral to the most appropriate regulator or other body would assist in simplifying decision-making for victims.

Family and domestic violence leave

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* introduced a ten-day paid family and domestic violence leave entitlement in the National Employment Standards (NES) that is now in effect for all national system employees. The *Fair Work Regulations 2009* were also amended to provide requirements on what can and cannot be shown on pay slips relating to family and domestic violence leave.

In line with our remit, the OFWO is responsible for educating our regulated community on, and the compliance and enforcement of, the workplace entitlement. The OFWO worked with stakeholders to develop information, tools and resources to assist businesses and employees to administer and access family and domestic violence leave in their workplaces. This includes working with the Department of Employment and Workplace Relations, Family and Domestic violence leave community groups, employer groups, and unions.

The OFWO also worked closely with the Department of Social Services and 1800Respect, the National Domestic Family and Sexual Violence Counselling Service, to ensure that we can offer clear and appropriate referral pathways relevant to these employee entitlements, so that the FWO's regulated community can leverage the expertise and support offered by these organisations in relation to family, domestic and sexual violence.

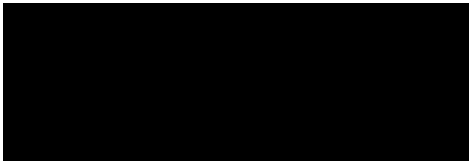
Further information

The OFWO is open to further discussion with your office and DEWR on your Inquiry. As a final observation, I note the immense work across federal, state and territory governments, private and public institutions,

academia and civil society to understand and address the scourge of sexual violence in our communities. It is, and must be, a collective effort with victim-survivors at the centre of any solutions.

I trust that the information in this submission will be of assistance to the Inquiry. We welcome further engagement with the Inquiry if it may be of assistance and, in particular, if there are any deliberations which may have direct implications on the OFWO's role and remit. Please contact Mr Anthony Fogarty, Executive Director of Policy, on (03) 9954 2746 or at [REDACTED]

Yours sincerely,



Anna Booth

Fair Work Ombudsman