Part F Submission

National Inquiry into Sexual Harassment in Australian Workplaces

Submission by Harmers Workplace Lawyers

Our submission is ordered in accordance with the terms of reference to which we refer.

1 The use of technology and social media to identify both alleged victims and perpetrators of workplace related sexual harassment

1.1 Applicable legislation has the current potential to prohibit the filming or audio recording of perpetrators of sexual harassment and/or the use of such material as evidence in court.

1.2 Victims of sexual harassment are often not believed by courts and also by their employers, supervisors and human resources managers. In our experience, there is an operative cultural bias towards not believing women, victim blaming and an assumption that complaints of sexual harassment are exaggerated and embellished.

1.3 It is also our experience that where women have filmed, photographed or audio recorded the behaviour of male perpetrators of sexual harassment, this has been useful in overcoming the cultural bias described above when making complaints within the workplace.

1.4 We recommend that the *Sex Discrimination Act 1984* (Cth) and the *Evidence Act 1995* (Cth) be amended to provide for complainants of sexual harassment to make audio or film recordings of the behaviour of perpetrators toward them in the workplace and for such recordings to be admissible as evidence in court in appropriate circumstances.

2 The Current Legal Framework with respect to sexual harassment

Removal of Time Limit

2.1 The *Australian Human Rights Commission Act 1986* (Cth) has recently been amended to impose a time limit such that complaints of sexual harassment must be brought within 6 months after the time when the alleged sexual harassment took place, and further that, when a complaint is terminated because it has not been brought within 6 months, leave of the Court is required before an application can be made to the Federal Court or the Federal Circuit Court.

2.2 This six month limitation period is inappropriately short. It is out of step with the time limitation period applicable to other causes of action. It is particularly inappropriate given the psychological and social factors commonly associated with sexual harassment.

2.3 These factors which militate against victims being in a position to take immediate action include:

- guilt and shame experienced by the victim;
- psychological injury experienced by the victim;
- time needed to process trauma;
- apprehension that the complaint will not be believed;
- fear that the making of the complaint will end, or at least jeopardise, the complainant's career.

2.4 There has been a recent increased awareness of the inappropriateness of behaviour constituting sexual harassment, in part as a result of changing community attitudes in addition to publicity associated with the #Me Too movement. This has emboldened women to come forward in relation to traumatic events about which they have been hitherto afraid to speak.

2.5 This change in societal norms is a positive one and should not be stymied by a regressive approach to the enforcement of women's rights.

2.6 The process of seeking leave for an application to be made to the Federal Court where the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place, requires a separate hearing before the Federal Court on the issue of leave before the substantive merits of the case can be considered. The additional stress and cost burden on the complainant of this process should not be underestimated.

2.7 We recommend that section 46PH(1)(b) section 46PO(3A) of the *Australian Human Rights Commission Act 1986* (Cth) be repealed.

Conciliation process

2.8 It has been our experience that on lodging a complaint, complainants routinely experience two subsequent events:

- complainants receive correspondence from a delegate of the president taking issue with all and every aspect of the complaint which might afford any basis to dismiss the complaint, whether or not there is a firm legislative foundation for doing so – this includes the delegates purporting to be arbiters of factual issues absent of any proper process;
- after dealing with the delegate's objections to the complaint, the complainant must wait for approximately another 6 months before a conciliation takes place.

2.9 In addition we have experienced a trend of conciliation conferences not being convened at all where employer respondents object to them.

2.10 Complainants experience considerable discouragement and distress as a result of this process. This is particularly so where the complainant is required to continue to work with the perpetrator.

2.11 We recommend that delegates of the president refrain from writing to complainants raising objections to complaints unless there is a sound legislative basis for such objections.

2.12 We also recommend that conciliation conferences take place within 4 weeks of the lodging of the complaint, and that delegates of the president make reasonable endeavours to ensure that respondents attend conciliation conferences..

2.13 Legal costs of AHRC and court processes create major barriers to justice for victims of sexual harassment. The cost of progressing a matter through the AHRC has roughly doubled as a result of the approach of the AHRC described above, combined with the six month time limitation issue. The AHRC has in this context become a major barrier to justice and the progression of human rights in Australia,

Victimisation

2.14 It is our view that it is settled law that the Federal Court and the Federal Circuit Court have jurisdiction to hear applications of unlawful discrimination which involve contravention of section 94 of the *Sex Discrimination Act 1984* (Cth): see *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118 at [71].

2.15 Respondents to complaints which involve allegations of victimisation routinely seek to rely on obiter remarks made in cases such as *Walker v State of Victoria* [2013] 297 ALR 284 at [97] to [99]; *Chen v Monash University* [2016] 244 FCR 424 at [121] and *Chen v Birbilis* [2016] FCA 661 at [11] to argue that determining whether or not

section 94 has been contravened would require the Federal Court to decide whether an offence has occurred, which the Federal Court does not have jurisdiction to do.

2.16 This above described argument is regularly run by respondents as part of a strike out application against complainants who allege victimisation. Having to respond to this strike out argument results in an additional burden of delay and cost being placed on complainants.

2.17 The victimisation provisions in section 94 of the *Sex Discrimination Act* are of particular importance in the area of sexual harassment in employment. Historically, sexual harassment has been allowed to flourish in workplaces because women are aware that if they assert their right to an environment free of such behaviour, retaliatory action will be taken against them.

2.18 We recommend that section 46PO of the *Australian Human Rights Commission Act* be amended to further clarify that the Federal Court and Federal Circuit Court have jurisdiction to hear applications which involve allegations of contravention of section 94 of the *Sex Discrimination Act*.

The need for a deterrent

2.19 Judicial opinion on the availability of punitive damages under section 46PO(4) of the *Australian Human Rights Commission Act* has been mixed.

2.20 Most recently in *Wotton v Queensland (No 5)* [2016] FCA 1457 at [1753]-[1788], Mortimer J concluded that there was no power to award punitive damages under section 46PO(4) of the *Australian Human Rights Commission Act*.

2.21 Mortimer J appears to have based this conclusion on what she perceived to be the "*compensatory and remedial regime*" established by the *Australian Human Rights Commission Act* which necessarily excluded deterrent or punitive functions. In Mortimer J's opinion, Parliament did not intend to confer on the Federal Court the ability to make punitive orders as part of resolving a dispute between parties concerning unlawful discrimination.

2.22 Judges in other cases have taken a more positive view of the potential availability of punitive damages under section 46PO(4). See for example: Stone and Bennett JJ in *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 at [133]; Barker J in *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 at [340];

Bromberg J in *Ewin v Vergara (No 3)* (2013) 307 ALR 576 at [681]-[684]; White J in *Vergara v Ewin* [2014] FCAFC 100 at [106]-[112] and Flick, Reeves and Griffiths J in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130 at [166].

2.23 It is our view that, in the area of sexual harassment in particular, the function of the legislative scheme should not be confined to resolving isolated disputes between individual parties. Sexual harassment should not be viewed solely as the subject of private interpersonal disputes, but rather as a public problem which harms society at large.

2.24 The objects of the *Sex Discrimination Act* set out in section 3 include giving effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* and eliminating as far as possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity. We would argue that these objects would be more effectively achieved if the Court, as well as the Commission, were cognisant of sexual harassment in the workplace as not only an unlawful act causing damage to a particular woman on an individuated basis, but as part of a pattern of behaviour which has detrimental effects on the social status, mental health and working conditions of women workers collectively. Appropriate redress, in view of the objects of the *Sex Discrimination Act*, should therefore aim to address the impact of patterns of discriminatory conduct on protected groups as a whole, rather than focusing only on the measurable loss to particular individuals.

2.25 The objective of eliminating sexual harassment from the workplace is difficult to achieve if remedies for contraventions of the Act are restricted to the quantifiable losses of particular complainants viewed in isolation. The remedial nature of the legislation is not inconsistent with a deterrent function where appropriate.

2.26 The need for a deterrent or punitive function is particularly apparent where sexual harassment is endemic in an employer's business, where senior members of staff are found to be serial offenders and where the employer condones the behaviour.

2.27 We recommend that section 46PO(4) of the *Australian Human Rights Commission Act* be amended to expressly provide for the court to make an order requiring reckless, blatant and repeat respondents to pay exemplary damages. Lest it be feared that this will instigate a plethora of avaricious litigation, it could be expressly stated that

positive misconduct of a particularly egregious character contravening section 28A of the *Sex Discrimination Act* would be required before such damages could be awarded.

2.28 We further recommend that the Commission retain a record of the Deeds of Release or other Settlement Agreements reached following conciliation conferences concerning complaints of sexual harassment in order to be in a position to identify repeat offenders.

2.29 By way of legislative reform, it is recommended that there be a requirement for any settlement of an issue involving sexual harassment in Australia, whether that settlement be by way of deed, private agreement, or otherwise, be required to be submitted on a strictly confidential basis, to form part of a private computer register of the parties to such settlements to be maintained by the AHRC. The aim is that repeat offenders participating in 'Harvey Weinstein' type activity, whereby a serial sexual predatorial activity is facilitated by non-disclosure clauses in settlements, allowing the repeat offender to 'pay for the pleasure' and 'pave their way via deeds' can be detected and thereafter referred for further attention by way of AHRC investigation or by reference to an alternative authority such as ASIC, the FWO, or the DPP in appropriate cases.

Access to Commonwealth Legislation by employees of States and State Instrumentalities

2.30 Section 12 of the *Sex Discrimination Act 1984* (Cth) currently provides that the Act does not bind the Crown in right of a State.

2.31 Section 13(2) provides that the prohibition on sexual harassment contained in section 28B does not apply in relation to an act done by an employee of a State or an instrumentality of a State.

2.32 The exclusion of these employees from the protection of section 28B of the *Sex Discrimination Act* is a significant reduction in the legal avenues of redress available to them.

2.33 We recommend the removal of the exclusion of employees of States and State Instrumentalities from the application of section 28B of the *Sex Discrimination Act*.

Workplace Participants

2.34 Section 28B of the *Sex Discrimination Act 1984* (Cth) extends the prohibition on sexual harassment in employment such that the prohibition covers employees,

prospective employees, commission agents, contract workers and partners and prospective partners in a partnership.

2.35 In our experience, members of the board of directors and other officers of employer corporations and related corporations can and do exploit their positions of power in relation to employees of the corporation of which they are directors and in relation to employees of related corporations in a manner which falls within the definition of sexual harassment in section 28A.

2.36 It is the circumstance of the workplace that gives rise to the opportunity for this behaviour.

2.37 We recommend that the definition of workplace participant in section 28B be extended to include members of the board of directors and other officers of the employer corporation and related bodies corporate.

Complaints on behalf of deceased persons

2.38 There is presently conflicting authority about whether the estate of a deceased person has standing to bring a complaint on behalf of the deceased. The AHRC, in correspondence with our firm, has expressed the view that the estate of a deceased person does not have standing to make a complaint of this nature.

2.39 This would appear to be a harsh result, particularly where the behaviour which constitutes sexual harassment has led to the death of the person harassed, either through murder or suicide.

2.40 We recommend that section 46P of the *Australian Human Rights Commission Act 1986* (Cth) be amended to clarify that the estate of a deceased person has standing to bring a complaint on behalf of the deceased.

3 Recommendations to address sexual harassment in Australian workplaces by way of reform within the current system

3.1 We recommend that the *Sex Discrimination Act 1984* (Cth) and the *Evidence Act 1995* (Cth) to be amended to provide for complainants of sexual harassment to make audio or film recordings of the behaviour of perpetrators toward them in the workplace and for such recordings to be admissible as evidence in court in appropriate circumstances.

3.2 We recommend that section 46PH(1)(b) section 46PO(3A) of the *Australian Human Rights Commission Act 1986* (Cth) be repealed.

3.3 We recommend that delegates of the president refrain from writing to complainants raising objections to complaints unless there is a sound legislative and/or factual basis for such objections.

3.4 We also recommend that conciliation conferences take place within 4 weeks of the lodging of the complaint, and that delegates of the president make reasonable endeavours to ensure that respondents attend conciliation conferences

3.5 We recommend that section 46PO(4) of the *Australian Human Rights Commission Act* be amended to expressly provide for the court to make an order requiring reckless, blatant and repeat respondents to pay exemplary damages. Lest it be feared that this will instigate a plethora of avaricious litigation, it could be expressly stated that positive misconduct of a particularly egregious character contravening section 28A of the *Sex Discrimination Act* would be required before such damages could be awarded.

3.6 We further recommend that the Commission retain a record of the Deeds of Release or other Settlement Agreements reached following conciliation conferences concerning complaints of sexual harassment in order to be in a position to identify repeat offenders.

3.7 We recommend the removal of the exclusion of employees of States and State Instrumentalities from the application of section 28B of the *Sex Discrimination Act*.

3.8 We recommend that the definition of workplace participant in section 28B be extended to include members of the board of directors and other officers of the employer corporation and related bodies corporate.

3.9 We recommend that section 46P of the *Australian Human Rights Commission Act 1986* (Cth) be amended to clarify that the estate of a deceased person has standing to bring a complaint on behalf of the deceased.

3.10 We suggest the legislative reform should extend to require the registration of all settlements of sexual harassment across the country with a private computer register maintained by the AHRC and designed to detect repeat offenders.

4 The necessity for the creation of a new system for dealing with sexual harassment

4.1 The current legal avenues for dealing with sexual harassment in Australia involve a ‘patchwork quilt’ of Federal and State legislation dealing with workplace relations, human rights, safety, workers compensation, corporate regulation, and common law

claims in areas such as contract and tort, impeded by civil liability legislation restrictions.

4.2 We consider that there is a need to integrate all of these myriad avenues into a single co-ordinated system. To this end, we commend to the AHRC the reform model embodied in the Australian Institute of Employment Rights (AIER) "New Architecture Project". Details of the project can be found on the AIER website: www.aierights.com.au.

4.3 Features of that reform approach by way of brief summary would involve, to our understanding:

1) A single unitary system addressing workplace relations, safety and human rights issues across all Australian jurisdictions.

2) The system would be modelled upon the 'Robens' style legislation currently providing the framework for the national model work health and safety legislation.

3) The system, in adopting the 'Robens' model, would move beyond the changing future of work, and oblige all persons, including persons undertaking a business or undertaking (PCBU's), to take all reasonably practicable steps to ensure 'fairness' of treatment. This would involve the application of the "fair go all round" notion to workplace relations, safety and human rights streams within the unitary system

4) Transition to the system would potentially involve the current legislative scheme forming prima facie indicia of fairness or unfairness in each of the streams, under the over-arching fairness obligation.

5) The unitary system would carry a high preventive emphasis built upon sound notions of business governance, with the formation of Codes of Practice to provide educative, prima facie indicia of fairness or unfairness in specific aspects of workplace relations, safety and human rights.

6) Businesses would be required to achieve accreditation to standards built from those Codes of Practice, the AIER Charter of Employment Rights and the Standard of Employment Rights. Those standards would extend to high quality investigation and dispute resolution in relation to issues such as workplace bullying and sexual harassment.

7) The aim would be to ensure the Robens devolution of responsibility for each business to adapt the standards so as to take all reasonably practicable steps to ensure fairness based upon management's intricate understanding of their own business. The notion of reasonable progress to reasonable proximity would be utilised to accommodate businesses of different sizes and resources.

8) It is suggested that the current safety legislation model of director due diligence would reinforce the preventive approach.

9) Workplace democracy would play an important role with the existing safety committee model being extended to all workplace issues – including specifically consultation on optimal governance, prevention and reaction in relation to sex discrimination and sexual harassment. Such committees may provide a vehicle to breathe life back into the ailing Australian union movement, and hence reverse the strong trend to self-representation before a currently complex and expensive legal system.

10) Accreditation commitments would extend to agreement to arbitration as a means to facilitating a strong central tribunal focus. The aim would be for a strong single tribunal to exercise conciliation and arbitration powers to the maximum extent possible under the Federal Constitution.

11) Supervision and enforcement of the system would rest with the Courts, with penalties across all streams at the level of current national safety penalties. It is suggested that all penalties would be civil in nature, other than for extreme cases of activity (such as manslaughter or sexual assault).

12) All three streams would be supported by a Single Inspectorate, with educative, audit, and enforcement functions across all areas – including sexual harassment – so as to reduce the complaint driven focus of the current human rights system.

13) It is further suggested that the tribunal be supported by "Counsel Assisting" roles to play the part of advocates for both Applicants and Respondents, and as a means of improving access to justice on a more equal footing (as opposed to depending upon the legal team a litigant can afford).

14) It is suggested that the operation of procedural and substantive fairness in the system would be reinforced by requirements for business, as part of their

accreditation to the system, to expose their management to high quality training in business governance, good faith, respect and ‘mindfulness’.

4.4 The “New Architecture” project has been developed to date through consultation with a variety of participants in the Australian economy, including Professor Ron McCallum and Professor Joellen Reilly. It is to be further developed by the AIER through ongoing tripartite consultation as per the Project Plan available on the AIER website. It is hoped that this preliminary outline of no more than some current thinking is of assistance to the AHRC in its national workplace sexual harassment inquiry.

Harmers Workplace Lawyers

28 February 2019