

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence Personnel

Defence Act 1903

Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023

Legislative Authority

The *Defence Act 1903* (the Act) prescribes the control, administration, constitution and service of the Australian Defence Force.

Subsection 124(1) of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the Defence Force, or for carrying out or giving effect to the Act.

The *Defence Regulation 2016* (the Defence Regulation) is made under the Act.

The *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023* (the Amending Regulations) amend the Defence Regulation.

Purpose

The purpose of the Amending Regulations is to amend the Defence Regulation to provide for a process for directions to stop anticipated sexual harassment against certain defence members and other people. The process is intended to ensure that certain defence members and other people who are affected by sexual harassment have an avenue to prevent a repeat of that harassment.

Background

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Fair Work Amendment Act) amends the *Fair Work Act 2009* (Fair Work Act) by inserting a regime to address sexual harassment in Australian workplaces. The Fair Work Amendment Act allows ‘aggrieved persons’ to apply to the Fair Work Commission to deal with a dispute about an alleged contravention, and also to make a ‘stop sexual harassment order’ (see subsection 527F(1)). Relevantly, under subsection 527F(3), a ‘defence member’ (as defined in section 3 of the *Defence Force Discipline Act 1982*) claiming sexual harassment cannot access the ‘stop sexual harassment order’ element of the measures, unless the *Fair Work Regulations 2009* allow for this. The provisions within the Fair Work Amendment Act relating to the regime commenced on 6 March 2023.

The *Fair Work and Other Legislation Amendment Regulations 2023* (Fair Work Regulations) amends the *Fair Work Regulations 2009* to permit defence members to apply to the Fair Work Commission to make a stop sexual harassment order where certain circumstances exist.

These circumstances include where one of the respondents was not a defence member at the time the contravention allegedly occurred or is not a defence member at the time the

application is made. These circumstances also include where the respondent was a defence member at the time the contravention allegedly occurred and a stop sexual harassment direction is not issued; a stop sexual harassment direction is issued and the person is dissatisfied; the person is unable to use the process under Part 6A of the Amending Regulations; or the process under Part 6A of the Amending Regulations is available but not suitable.

To cover situations not covered by the Fair Work Regulations, the Amending Regulations amend the Defence Regulation by inserting a new Part 6A, that provides for a process for directions to stop sexual harassment against certain defence members and other persons, which may be enforced under internal Defence and Australian Public Service (APS) processes.

Impact and Effect

The Amending Regulations provide for specified persons to apply to an authorised application officer for a stop sexual harassment direction, where:

- a defence member alleges sexual harassment by another defence member;
- a defence member alleges sexual harassment in a Defence workplace;
- a person alleges sexual harassment and is excluded from applying to the Fair Work Commission by virtue of a Chief of the Defence Force declaration in relation to their participation in a specified activity.

The Amending Regulations will enable a person's commander or manager to receive and manage a sexual harassment complaint in accordance with Defence processes. This will also provide the aggrieved person with an avenue independent of their chain of command if they are concerned that the action being taken in response to their complaint has not adequately managed the risk that they may continue to be subject to sexual harassment.

It is the intention that the Amending Regulations will complement the Fair Work Regulations.

Commencement

The Amending Regulations commence the day after this instrument is registered on the Federal Register of Legislation.

Consultation

During the development of the Amending Regulations, Defence consulted the Department of Employment and Workplace Relations, the Attorney-General's Department, the Australian Public Service Commission and the Australian Government Solicitor. All agencies were supportive of the process and were consulted on a draft of the Amending Regulations. The Amending Regulations were drafted by the Office of Parliamentary Counsel.

Impact Analysis

The Office of Impact Analysis advised that the proposal is unlikely to have a more than minor regulatory impact, as this proposal affects only Defence force personnel and Defence employees (OBPR23-04373).

Details / Operation

Details of the Amending Regulations are set out in Attachment A.

The Amending Regulations are a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

Human Rights Statement

The Amending Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is at Attachment B.

Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023

Section 1 – Name of Regulations

This section provides that the title of the Amending Regulations is the *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023*.

Section 2 – Commencement

This section provides that the Amending Regulations commences on the day after this instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023* are made under the *Defence Act 1903*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in this Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

This Schedule provides for amendments to the *Defence Regulation 2016*.

Item [1] – Subsection 6(1)

This item inserts four definitions in subsection 6(1):

- ***Authorised application officer*** is signposted to draw the reader’s attention to subsection 37B(2) of the Amending Regulations for the meaning.
- ***Respondent*** is, in relation to an alleged contravention of Division 2 of Part 3-5A of the *Fair Work Act 2009*, signposted to draw the reader’s attention to section 37C of this instrument
- ***Sexually harass*** has the meaning given by section 28A of the *Sex Discrimination Act 1984*. A note following this definition provides that other parts of speech and grammatical forms of “sexually harass” have a corresponding meaning.
- ***Stop sexual harassment direction*** means a direction under section 37F of the Amending Regulations.

Item [2] – After Part 6A

This item inserts a new Part 6A—Stop sexual harassment directions, after Part 6 – Defence honours and awards, detailing the process for directions to stop sexual harassment.

New Part 6A includes sections relating to the object, authorised application officers, dealing with an application, interim directions, stop sexual harassment directions, review and withdrawing an application or request.

Section 37A Object of this Part

Section 37A provides for the object of Part 6A, that is to provide a process for directions to stop sexual harassment against certain defence members and other people.

Section 37B Authorised application officer

Section 37B permits the Chief of the Defence Force (CDF) or the Secretary of the Department of Defence to authorise certain persons to receive and deal with applications made under section 37C in Part 6A.

The CDF or the Secretary would be permitted to authorise an officer not below the rank of Commander (Navy), Lieutenant-Colonel (Army), Wing Commander (Air Force) or an APS employee in the Department who is classified as Executive Level 1 or higher, or who is acting in a position usually occupied by an APS employee who is so classified.

The person authorised by the CDF or the Secretary would be an ***authorised application officer***.

It is intended that APS employees who are authorised under this section would be persons in a 'Job Family' which is a career path for those with specialised human resource and workplace relations administration skills and duties.

Those authorised will be an officer above specific ranks and APS levels and will be experienced managers of people. It is intended that those authorised will receive specialised training to assist them in dispute resolution and trauma-informed approaches to personnel issues. Further information about the relevant skills, experience, qualifications and training an authorised application officer will have will be detailed in policy.

It is expected that authorised application officers dealing and managing applications under section 37C would have similar skills, experience, qualifications and training as those responsible for issuing stop sexual harassment directions under the fair work legislative framework.

Any information collected through these processes is handled in accordance with the Defence's privacy obligations under legislation such as the *Privacy Act 1988*.

Section 37C Application for authorised application officer to deal with a sexual harassment dispute

Section 37C provides the situations by which an eligible defence member or other person can make an application for an authorised application officer to deal with a sexual harassment dispute.

Subsection 37C(1) provides for a definition of ***eligible defence member*** that means a defence member within the meaning of the *Defence Force Discipline Act 1982*.

This section also enables an eligible defence member or other person to apply to an authorised application officer for a stop sexual harassment direction to be made where:

- an eligible defence member (the ***aggrieved person***) alleges sexual harassment in contravention of Division 2 of Part 3-5A of the *Fair Work Act 2009* (the Fair Work Act) by one or more other persons (a ***respondent***), the aggrieved person was an eligible defence member at the time the sexual harassment allegedly occurred and each of the respondents is an eligible defence member and was an eligible defence member at the time the sexual harassment allegedly occurred (subsection 37C(2));
- an eligible defence member (the ***aggrieved person***) alleges sexual harassment in contravention of Division 2 of Part 3-5A of the Fair Work Act by one or more other persons (a ***respondent***), the aggrieved person was an eligible defence member at the time the sexual harassment allegedly occurred and the sexual harassment is alleged to have occurred at a Defence workplace (subsection 37C(3)); and
- a person (the ***aggrieved person***) alleges sexual harassment in contravention of Division 2 of Part 3-5A of the Fair Work Act by one or more other persons (a ***respondent***), and the Fair Work Commission would be prevented, by a declaration under section 527N of the Fair Work Act, from making an order under section 527J of that Act in relation to the alleged harassment, and the activity to which the declaration applies is a naval, military or air force operation or practice (whether warlike or non-warlike) (subsection 37C(4)).

Section 37D Dealing with an application

Section 37D sets out the process that an authorised application officer must take when dealing with an application (the ***applicant***) made by a person under section 37C.

Subsection 37D(1) provides that this section applies if a person makes an application under section 37C to an authorised application officer.

Subsection 37D(2) provides that the authorised application officer must either deal with the application, by considering the application and deciding whether to issue a stop sexual harassment direction, or refer the application to another application recipient to deal with under paragraph 37D(2)(a). A note follows this subsection to indicate that the authorised application officer may make an interim direction while the application is being considered, in accordance with section 37E.

Subsection 37D(3) further provides that an authorised application officer may decide not to deal with or refer the application under subsection 37D(2), if the authorised application officer considers that:

- dealing with the application would be, or could be, prejudicial to Australia's defence, Australia's national security; or
- a declaration under section 527P (declarations by the Director-General of Security) or 527Q (declarations by the Director-General of ASIS) of the Fair Work Act would prevent the Fair Work Commission making an order under section 527J of that Act in respect of the allegation of sexual harassment made in the application.

Time limits for dealing with and making a decision on an application

Subsection 37D(4) provides that, subject to subsection 37D(3), the authorised application officer to whom an application is made or to whom an application is referred must start dealing with this application within 14 days of when the application was made.

Subsection 37D(5) provides that the authorised application officer who deals with the application must make a decision under subparagraph 37D(2)(a)(ii) within 60 days of when the application was made.

Subsection 37D(6) provides that, if the authorised application officer does not make the decision within 60 days, the authorised application officer is taken to have made the decision not to issue a stop sexual harassment direction in relation to the application, at the end of that 60 day period.

Notice of decision not to issue a stop sexual harassment direction

Subsection 37D(7) provides that if an authorised application officer decides under subparagraph 37D(2)(a)(ii) not to issue a stop sexual harassment direction, or decides under subsection 37D(3) not to deal with or refer the application, the authorised application officer must give written notice of the decision to the applicant and may give written notice of the decision to any other person who is responsible for dealing with the sexual harassment made in the application.

Section 37E Interim directions

Section 37E sets out the process that an authorised application officer must take when issuing an interim direction in relation to the authorised application officer considering an application made by a person under section 37C.

Subsection 37E(1) provides that this section applies if a person (the **applicant**) makes an application under section 37C and an authorised application officer is considering the application.

Subsection 37E(2) provides that an authorised application officer may issue one or more interim directions if the authorised application officer is satisfied that there is a plausible allegation that the applicant has been sexually harassed in contravention of Division 2 of Part 3-5A of the Fair Work Act and the applicant has a reasonable apprehension that they will continue to be sexually harassed in contravention of that Division.

Subsection 37E(3) provides that an interim direction must be in writing, it may apply to one or more people (who may be respondents, or other people) and it must set out the actions that the person, or each of the people, to whom it applies is required to do, or not to do, in order to comply with the interim direction.

Subsection 37E(4) provides that a copy of an interim direction:

- must be given to the applicant, the person, or each person, to whom it applies; and
- may be given to the commanding officer or supervisor of the person, or each person, to whom it applies, and any other person who is responsible for dealing with the allegation of sexual harassment in the application.

Subsection 37E(5) provides the requirements set out in an interim direction under paragraph 37E(3)(c) must be reasonable, and necessary or desirable for the purpose of protecting the applicant from the risk of sexual harassment while the application is being considered.

Subsection 37E(6) provides that an interim direction continues in force until:

- an authorised application officer issues a stop sexual harassment direction in response to the application; or
- an authorised application officer decides not to issue a stop sexual harassment direction in response to the application; or
- the applicant withdraws the application; or
- the interim direction is revoked.

A note following this subsection refers the reader to subsection 33(3) of the *Acts Interpretation Act* (Acts Interpretation Act) for provisions relating to variation and revocation.

It is the intention that where an APS employee is issued an interim direction, that the scheme does not prejudice any investigations under the *APS Code of Conduct*.

As interim directions are issued on the basis that an applicant has a reasonable apprehension of being subject to sexual harassment, although an interim decision would not proceed without the benefit of an appropriate procedural fairness process, this is justified in the circumstances to allow for a quick interim direction to be made. An interim direction does not involve a conclusion or adverse finding that a respondent has sexually harassed an applicant in contravention of Division 2 of Part 3-5A of the Fair Work Act. Subsection 37E(5) provides that an interim direction will only be issued where this is reasonable and necessary or desirable for protecting the applicant from the risk of sexual harassment.

37F Stop sexual harassment directions

Section 37F sets out the process that an authorised application officer follows for issuing a stop sexual harassment direction.

Subsection 37F(1) provides that an authorised application officer may issue one or more stop sexual harassment directions if a person (an **applicant**) makes an application under section 37C and the authorised application officer is satisfied that the applicant has been sexually harassed in contravention of Division 2 of Part 3-5A of the Fair Work Act by one or more people and there is a risk that the applicant will continue to be sexually harassed in contravention of that Division by the person or people.

Subsection 37F(2) provides that a stop sexual harassment direction must be in writing, may apply to one or more people (who may be respondents, or other people) and must set out the actions that the person, or each of the people, to whom it applies is required to do, or not to do, in order to comply with the direction. The stop sexual harassment direction may also include recommendations to one or more people and may specify a day on which the direction ceases to have effect, unless earlier revoked.

A note following this subsection refers the reader to subsection 33(3) of the Acts Interpretation Act for provisions relating to variation and renovation.

Subsection 37F(3) provides that a copy of stop sexual harassment direction must be given to the applicant and to the person, or each person, to whom the direction applies. This subsection also permits a copy of a direction to be given to the commanding officer or supervisor of the person, or each person, to whom it applies and to any person who is responsible for dealing with the allegation of sexual harassment made in the application.

Finally, a copy of a direction must be given to the person, or to each such person, to whom recommendations made under paragraph 37F(2)(d) apply.

Subsection 37F(4) provides that, without limiting the requirements that may be set out in a stop sexual harassment direction under paragraph 37F(2)(c), a stop sexual harassment direction may require any of the following:

- a respondent to cease engaging in specified behaviour;
- regular monitoring of behaviour;
- the provision of information, support and training to workers;
- a safety risk assessment of a workplace;
- a review of workplace policies or culture.

Subsection 37F(5) provides that, without limiting the requirements set out in a stop sexual harassment direction under paragraph 37F(2)(d), a stop sexual harassment direction may recommend management, administrative or disciplinary action.

Subsection 37F(6) provides that if a stop sexual harassment direction specifies a day on which the direction ceases to have effect, the direction ceases to have effect on that day.

It is the intention that where an APS employee is issued a stop sexual harassment direction, that the scheme does not prejudice any investigations under the *APS Code of Conduct*.

In regards to a respondent of a stop sexual harassment direction, the rules of procedural fairness apply. An authorised application officer issuing a direction will be impartial, following a process of fact finding and analysis that meets the regular standards of natural justice. This ensures that the direction is based on accurate and reliable information.

Section 37G Review by Chief of the Defence Force or Secretary

Section 37G sets out the process by which a person who makes an application under section 37C may ask either the CDF or the Secretary to review a decision made by an authorised application officer in relation to a stop sexual harassment direction.

Subsection 37G(1) provides that this section applies if a person (the **applicant**) makes an application under section 37C and an authorised application officer makes any of the following decisions (a **reviewable decision**):

- a decision to not issue a stop sexual harassment direction in relation to the application;
- a decision to issue a stop sexual harassment direction in relation to the application, if the applicant is dissatisfied with the direction;
- a decision not to deal with the application, or to refer the application to another authorised application officer, under subsection 37D(3).

Subsection 37G(2) provides that an applicant may, within 14 days after the reviewable decision was made, may ask either CDF or the Secretary (the **reviewer**) to review the reviewable decision.

Subsection 37G(3) provides that a request made under 37G(2) must be in writing.

Subsection 37G(4) provides the process that a reviewer must undertake if an applicant makes a request under section 37G(2).

The reviewer must:

- start dealing with the request within 14 days of the applicant making the request;
- reconsider the reviewable decision;
- make a decision on the review within 60 days of the applicant making the request; and.
- affirm, vary or set aside the reviewable decision.

The reviewer may also:

- exercise any powers of an authorised application officer under section 37E (interim directions), while reconsidering the reviewable decision;
- make such other decisions as the reviewer thinks appropriate, if the reviewable decision is set aside;
- exercise any of the powers of an authorised application officer under Part 6A for the purposes of giving effect to the reviewer's decision on the review.

Subsection 37G(5) provides that if the reviewer does not make a decision on the review within 60 days of the applicant making the request, the reviewer is taken to have made a decision to affirm the reviewable decision at the end of that 60 day period.

There is no process for external merits review provided for in the Amending Regulations. Exclusion of merits review was considered with reference to the principles developed by the Administrative Review Council (ARC) as outlined in its publication, *What decisions should be subject to merits review?*

The Amending Regulations are designed to work in conjunction with the scheme for persons who are subject to sexual harassment to seek a sexual harassment stop order from the Fair Work Commission under the Fair Work Act and the *Fair Work and Other Legislation Amendment Regulations 2023* (the Fair Work Amendment Regulations) The operation of the Amending Regulations with the Fair Work Act and the Fair Work Amendment Regulations means that, in effect, an applicant who is dissatisfied with the outcome under the Amending Regulations is able to seek a stop sexual harassment order from the Fair Work Commission.

A merits review system for the stop sexual harassment direction regime under the Amending Regulations would be redundant, time-consuming, costly to repeat on review and would only operate to delay an aggrieved person from seek a sexual harassment stop order from the Fair Work Commission.

Section 37H Withdrawing application or request

Section 37H sets out the process for withdrawing an application under section 37C or withdrawing a request under subsection 37G(2).

Subsection 37H(1) provides that a person who has made an application under section 37C may withdraw the application at any time by giving written notice to the authorised application officer.

Subsection 37H(2) provides that a person who has made a request under subsection 37G(2) may withdraw the request at any time by giving written notice to the person to whom the request was made.

Item [3] – Before subsection 83(1)

This item inserts new subsection 83(1A) before subsection 83(1), with the effect that it enables the Secretary, by instrument in writing, to delegate the powers of the Secretary under section 37G to officers who hold a rank not below the rank of Rear Admiral (Navy), Major General (Army), Air Vice-Marshal (Air Force), or an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department.

Delegates would be limited to senior ADF officers and APS employees who possess the necessary authority, expertise and resources to make decisions effectively. This will enable the Secretary to more effectively manage their responsibilities and ensure that reviewable decisions are dealt with efficiently and effectively. Additionally, delegations made under this subsection are limited to reviewable decisions under section 37G of the Amending Regulations.

Item [4] – After subsection 84(1B)

This item inserts new subsection 84(1B) after subsection 84(1A), with the effect that it enables CDF, by instrument in writing, to delegate the powers of the CDF under section 37G to officers not below the ranks of Rear Admiral (Navy), Major General (Army), Air Vice-Marshal (Air Force), or an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department.

Delegates would be limited to senior ADF officers and APS employees who possess the necessary authority, expertise and resources to make decisions effectively. This will enable CDF to more effectively manage their responsibilities and ensure that reviewable decisions are dealt with efficiently and effectively. Additionally, delegations made under this subsection are limited to reviewable decisions under section 37G of the Amending Regulations.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023

The *Defence Amendment (Stop Sexual Harassment Directions) Regulations 2023* (the Amending Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Amending Regulations is to amend the *Defence Regulations 2016* to provide for a process for directions to stop sexual harassment against certain defence members and other people. The process ensures that certain defence members and other people that are affected by sexual harassment have an avenue for resolution.

Human rights implications

The Amending Regulations engage the following rights:

- the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR);
- the right to physical and mental health under article 12 of the ICESCR;
- the right to an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and right to a fair hearing under Article 14(1) of the ICCPR;
- Right to privacy and reputation under Article 17 of the ICCPR;
- the right to freedom of expression under Article 19 of the ICCPR; and
- the right of women not to be discriminated against based on gender under Articles 2, 3 and 11 of the CEDAW and Article 26 of the ICCPR.

Rights to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Statement of Compatibility with Human Rights Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work. Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

The Amending Regulations positively engage the right to work and rights in work by extending access to stop sexual harassment directions to defence members and other people that are affected by sexual harassment, so that they have an avenue to seek assistance that will prevent future harassment. By providing an avenue to a broader range of workers, this

gives more people access to a quick remedy to stop sexual harassment connected with work, preventing further harm. This also promotes safer and healthier workplaces and discourages behaviours that can cause both physical and psychological harm.

Right to physical and mental health

Article 12 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extending to underlying determinants of health such as safe and healthy working conditions.

As noted in the Respect@Work Report, sexual harassment in the workplace can have significant negative effects on an individual's health and wellbeing. The Amending Regulations promote the right to the enjoyment of the highest attainable standard of physical and mental health by enabling authorised application officers to make directions to stop sexual harassment in relation to defence members and other people. This provides a means of early intervention to stop and prevent sexual harassment for more Australians, therefore promoting a higher standard of physical and mental health.

Right to an effective remedy and right to a fair hearing

Article 2(3) of the ICCPR and Article 2 of the CEDAW provide the right to an effective remedy for persons who have suffered human rights violations by Australian authorities, as well as persons who have suffered discrimination perpetrated by Australian authorities. The United Nations Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to the persons who have suffered human rights abuses. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

The Amending Regulations would positively engage the right to a fair and effective remedy by enabling an aggrieved person to seek a stop sexual harassment direction from an authorised application officer in relation to a contravention of Division 2 of Part 3-5A of the *Fair Work Act 2009* (Fair Work Act). The future focus of the direction means that it may be easily satisfied by any potential respondent in any case, as it would usually only be necessary for the respondent to observe reasonable measures aimed at preventing misconduct, for the direction to be fully complied with.

Although interim directions may be issued, the threshold for issuing such direction is proportionate, appropriate and necessary considering that the authorised application officer must be satisfied that there is a plausible allegation that the applicant has been sexually harassed in contravention of Division 2 of Part 3-5A of the Fair Work Act and the applicant has a reasonable apprehension that they will continue to be sexually harassed in contravention of that Division. An interim direction will not involve a conclusion or adverse finding that a respondent has sexually harassed an applicant in contravention of Division 2 of

Part 3-5A of the Fair Work Act. An authorised application officer issuing a direction will be impartial, following a process of fact finding and analysis that meets the regular standards of natural justice. This ensures that the direction is based on accurate and reliable information.

Right to privacy and reputation

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home and correspondence. This includes respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control the dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person's reputation.

The Amending Regulations enable an authorised application officer to deal with a dispute about sexual harassment in connection with work. While the Amending Regulations do not directly engage the right to privacy, authorised application officers are required to receive personal information in relation to sexual harassment complaints. Collecting this information is proportionate, appropriate and necessary to facilitate the effective administration of the stop sexual harassment directions. Given the mental and physical health risks posed by workplace sexual harassment, it is essential that authorised application officers are able to easily and quickly access information that relates to a sexual harassment application. Any information collected through these processes is handled in accordance with the Defence's privacy obligations under legislation such as the *Privacy Act 1988*.

The right to freedom of expression

Article 19(2) of the ICCPR protects individuals' freedom of expression in any medium. It protects both the ability to impart information and ideas and to receive them. Freedom of expression may be limited under Article 19(3) only where provided for by law and when necessary to protect the rights or reputation of others, national security, public order or public health or morals

The Amending Regulations limit a person's right to freely express themselves by prohibiting words or conduct that meet the definition of sexual harassment issued under a stop sexual harassment direction. This is consistent with other anti-discrimination legislation which seeks to achieve the appropriate balance between protecting against discrimination and protecting the right of an individual to express themselves. This does not limit freedom of expression beyond existing limitations on conduct amounting to sexual harassment that already exist under anti-discrimination legislation (and generally provide that conduct which constitutes sexual harassment is a form of unlawful discrimination).

Further, the limitation on the right of expression is necessary to achieve a legitimate objective: protecting eligible defence members and other persons from a form of sex discrimination. The limitation on the right of freedom of expression is reasonable, necessary and proportionate to this objective. The extent to which the right to freedom of expression is limited is the least restrictive way of achieving the objective. The targeted focus of these amendments is meant to ensure that the right to freedom of expression is only limited in instances of conduct that the legislation appropriately aims to address workplace sexual harassment.

The right of women not to be discriminated against based on gender

The CEDAW provides that in relation to discrimination against women, State Parties must:

- ensure the effective protection of women against acts of discrimination (Article 2(c));
- ensure the full development and advancement of women (Article 3); and
- take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the same rights between men and women (Article 11). This includes the right to equal remuneration, treatment in respect of work of equal value, and evaluation of the quality of work (Article 11(1)(c)).

Article 26 of the ICCPR requires State laws to guarantee equal and effective protection against discrimination on a number of grounds, including sex.

While sexual harassment can affect anyone, as noted in the Respect@Work Report, sexual harassment disproportionately affects women. The Amending Regulations positively engage the rights of women in work by expanding access to stop sexual harassment directions to more women and so enabling women seeking work to obtain such orders.

Conclusion

The Amending Regulations are compatible with human rights because they promote human rights, including civil, political, social, economic and labour rights. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.