

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations

Fair Work Act 2009
Fair Work (Registered Organisations) Act 2009
Federal Circuit and Family Court of Australia Act 2021
Federal Court Act 1976

Fair Work and Other Legislation Amendment Regulations 2023

AUTHORITY

The *Fair Work Act 2009* (Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

Subsection 796(1) of the Fair Work Act provides that the Governor-General may make Regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 527F(3) provides that regulations may be made to prescribe circumstances in which defence members may apply to the Fair Work Commission (FWC) for a Stop Sexual Harassment Order (SSHO).

The *Federal Circuit Court and Family Court of Australia Act 2021* (Federal Circuit Court Act) and the *Federal Court of Australia Act 1976* (Federal Court Act) provide a framework for the operation of those courts and provisions with respect to their jurisdiction.

Paragraph 285(1)(a) of the Federal Circuit Court Act provides that the Governor-General may make Regulations prescribing matters that are required or permitted by the Act to be prescribed. Subsection 164(1) of the Federal Circuit Court Act provides that regulations may be made about dispute resolution processes.

Paragraph 60(1)(a) of the Federal Court Act provides that the Governor-General may make Regulations prescribing matters that are required or permitted by the Act to be prescribed. Section 60 of the Federal Court Act further provides that regulations may be made which prescribe the fees to be paid in respect of proceedings in that Court.

The *Fair Work (Registered Organisations) Act 2009* (Registered Organisations Act) regulates registered employer and employee organisations to ensure they are representative of and accountable to their members and operate effectively.

Section 359 of the Registered Organisations Act provides that the Governor-General may make Regulations prescribing matters that are required or permitted by the Act to be prescribed. Subsection 316A(2) of the Registered Organisations Act provides that

regulations may prescribe a provision of the *Fair Work (Registered Organisations) Regulations 2009* to make the provision subject to an infringement notice.

The *Fair Work Regulations 2009* (Fair Work Regulations), the *Fair Work (Registered Organisations) Regulations 2009* (Registered Organisations Regulations) and the *Federal Court and Federal Circuit Court Regulations 2012* (Federal Court Regulations) each provide for matters of a regulatory nature under their respective Acts.

PURPOSE AND OPERATION

The purpose of the *Fair Work and Other Legislation Amendment Regulations 2023* (Instrument) is to:

- amend the Fair Work Regulations to prescribe circumstances in which defence members may apply to the FWC for a SSHO
- amend the Federal Court Regulations to introduce fee arrangements for applications made in the Federal Courts under the sexual harassment prohibition in the Fair Work Act. Applicants will not be required to pay a fee for applications made to the Fair Work Commission under the same jurisdiction
- amend the Fair Work Regulations to prescribe subsections 536AA(1) and (2) of the Fair Work Act (which prohibit certain non-compliant job advertisements) to make the provisions subject to that Act's infringement notice scheme
- amend the Registered Organisations Regulations to prescribe certain provisions of the regulations to make them subject to the infringement notice scheme under the Registered Organisations Act.

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) inserted a prohibition on sexual harassment into the Fair Work Act to implement recommendation 28 of the *Respect@Work: Sexual Harassment National Inquiry Report 2020*. The prohibition is accompanied by a new dispute resolution function, allowing for applications to be made to the FWC and, in certain circumstances, to a Federal Court. The Regulations prescribe circumstances in which defence members may make applications, and provide fee arrangements for applications to the Federal Courts, under the new Sexual Harassment jurisdiction.

The changes to infringement notice schemes are consequential to amendments made by the Secure Jobs, Better Pay Act that inserted new section 536AA into the Fair Work Act, and established an infringement notice scheme for the Registered Organisations Act.

The Fair Work Act, the Federal Circuit Court Act, Federal Court Act and Fair Work (Registered Organisations) Act specify no conditions that need to be satisfied before the powers to make the Regulations may be exercised.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

REGULATORY IMPACT

The Office of Impact Analysis (formerly the Office of Best Practice Regulation (OBPR)) assessed that a Regulation Impact Statement was not required for this instrument as the reforms are unlikely to have more than a minor regulatory impact (OBPR ref: OBPR22-03691, OBPR23-04318).

COMMENCEMENT

The various Parts and Divisions in the Instrument commence on different days, including upon commencement of relevant parts of the Secure Jobs, Better Pay Act.

CONSULTATION

The Department of Employment and Workplace Relations consulted with referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation.

The department separately consulted staff of the Attorney-General's Department, the Department of Defence, the Fair Work Commission and the Fair Work Ombudsman.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Fair Work and Other Legislation Amendment Regulations 2023

The *Fair Work and Other Legislation Amendment Regulations 2023* (Instrument) is 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 *Fair Work Act 2009* (Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

The Instrument amends the *Fair Work Regulations 2009* (Fair Work Regulations) to:

- prescribe circumstances in which a defence member, as defined in the *Defence Force Discipline Act 1982* may apply to the Fair Work Commission (FWC) for a Stop Sexual Harassment Order (SSHO)
- add a new contravention type (for breach of the job ad prohibition in section 536AA of the Fair Work Act) to the list of contravention types that may be subject to an infringement notice.

The Instrument amends the *Federal Court and Federal Circuit and Family Court Regulations 2012* and the *Federal Court and Federal Circuit and Family Court Regulations 2022* to prescribe a filing fee for applications made to the Federal Courts under the new prohibition on sexual harassment in Part 3-5A of the Fair Work Act.

The Instrument amends the *Fair Work (Registered Organisations) Regulations 2009* (Registered Organisations Regulations) to prescribe certain provisions of the regulations that are subject to the infringement notice scheme under the Registered Organisations Act.

Human rights implications

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties. The Instrument engages 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 the highest attainable standard of 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

- the right to presumption of innocence and other guarantees in relation to criminal charges under Article 14 of the ICCPR
- 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.

When the ILO Convention (No. 190) concerning Violence and Harassment comes into force for Australia, amendments made by the Instrument will engage Australia's commitment under that Convention to adopt a gender-responsive approach for the prevention and elimination of violence and harassment in the world of work.

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 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.

Measures expanding access to the FWC's Stop Sexual Harassment Order jurisdiction

The Instrument engages the right to just and favourable working conditions by extending access to SSHOs for defence members under certain circumstances. The circumstances in which a defence member could apply to the FWC for an SSHO include:

- where at least one of the respondents was not a defence member at the time the contravention allegedly occurred or is not a defence member when the application is made
- where the respondents to the dispute are defence members, and the applicant has exhausted internal complaint processes under sections 37G and 37C of the *Defence Regulation 2016* to obtain a Stop Sexual Harassment Direction (SSHD)
- where internal complaint resolution processes to obtain a SSHD are not available to the person, or
- where internal complaint resolution processes to obtain a SSHD are available, but are not suitable because the respondent in relation to the alleged contravention would be involved in conducting the internal complaint resolution process.

Pathways to address sexual harassment promote safer and healthier workplaces and discourage behaviours that can cause both physical and psychological harm. The associated dispute resolution mechanism for the FWC will support individuals to address sexual

harassment where it occurs in connection with work through quick and inexpensive processes.

These provisions extend access to applications for a SSHO. Currently, defence members are prevented from applying for an order by section 527F(3) of the Fair Work Act. Other military sanctions which could address sexual harassment in the workplace exist and are accessible to most defence members. However, allowing defence members to apply to the FWC for a SSHO will allow them equitable access to this efficient and inexpensive remedy.

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.

Measures expanding access to the FWC's Stop Sexual Harassment Order jurisdiction

As noted in the *Respect@Work: Sexual Harassment National Inquiry Report 2020* (Respect@Work Report), sexual harassment in the workplace can have significant negative effects on an individual's health and wellbeing.

The Instrument promotes the right to enjoyment of the highest attainable standard of physical and mental health by extending access to SSHOs to defence members under certain circumstances. This could provide a means of early intervention to stop and prevent sexual harassment suffered by defence members.

Right to an effective remedy and right to a fair hearing

Article 2(3) of the ICCPR and Article 2 of the CEDAW provides 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.

Measures expanding access to the FWC’s Stop Sexual Harassment Order jurisdiction

The Instrument positively engages the right to a fair remedy by extending access to SSHOs to defence members under certain circumstances. A defence member making an application in relation to alleged sexual harassment by another defence member will be required to exhaust internal complaint resolution processes to obtain a SSHD before they can apply to the FWC (where that internal process is available to them). This is similar to requirements under s 527J(3) of the Fair Work Act, where the FWC must, in considering the terms of any order, consider any final or interim outcomes arising out of an investigation into the matter that is being undertaken by another person or body, and other procedures available to the aggrieved person. The provisions ensure defence members have equitable access to the remedies established under Part 3-5 of the FW Act.

Criminal process rights

Article 14 of the ICCPR protects criminal process rights. Article 14(1) provides that all persons shall be equal before the courts and tribunals, and that in the determination of any criminal charge against a person, that person is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

Amending infringement notice schemes

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.

Item 20 of Schedule 1 will make contraventions against the prohibition on the advertising of certain non-compliant rates of pay (under subsections 536AA(1) and 536AA(2) of the Fair Work Act) subject to the infringement notice scheme under the Act.

Item 23 of Schedule 1 will make contraventions of the specified provisions of the *Fair Work (Registered Organisations) Regulations 2009* subject to the infringement notice scheme under the *Fair Work (Registered Organisations) Act 2009*.

These provisions engage the right to a fair and public hearing because infringement notice schemes provide recipients with the option of paying an ‘on the spot fine’ in lieu of court proceedings. The right is preserved as recipients are given an option, but not required to forego, court proceedings and would be advised of their options when given the notice. This ensures that recipients are aware of their right to have the matter heard by a court.

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)

- 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.

Measures expanding access to the FWC's Stop Sexual Harassment Order jurisdiction

While sexual harassment can affect anyone, it disproportionately affects women (as noted in the Respect@Work Report). The Instrument will expand access to SSHOs to more women by providing defence members the ability to apply for SSHOs in certain circumstances. It will ensure that remedies are available to stop sexual harassment in the workplace where it occurs to a defence member, and other measures have failed to stop the harassment.

Conclusion

The Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Tony Burke, Minister for Employment and Industrial Relations

FAIR WORK AND OTHER LEGISLATION AMENDMENT REGULATIONS 2023

EXPLANATION OF PROVISIONS

Section 1 - Name

This section provides that the title of the Regulations is the *Fair Work and Other Legislation Amendment Regulations 2023*.

Section 2 - Commencement

This section provides for Sections 1 to 4 of the Regulations to commence the day after registration on the Federal Register of Legislation.

Schedule 1, Part 1, Divisions 1 and 2 of the instrument commence the day after registration on the Federal Register of Legislation.

Schedule 1, Part 1, Division 3 of the Regulations commences on 1 April 2023, immediately after the commencement of the *Federal Court and Federal Circuit and Family Court Regulations 2022*.

Schedule 1, Parts 2 and 3 of the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 - Authority

This section provides that the *Fair Work and Other Legislation Amendment Regulations 2023* is made under the *Fair Work Act 2009* (Fair Work Act), the *Fair Work (Registered Organisations) Act 2009*, the *Federal Circuit and Family Court of Australia Act 2021* and the *Federal Court Act 1976*.

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 the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Part 1—Sexual harassment

Division 1—Main amendments

Fair Work Regulations 2009

Item 1—In the appropriate position in Chapter 3

This item inserts a new Part 3-5A into the Fair Work Regulations, setting out matters relevant to the FWC’s powers to make Stop Sexual Harassment Orders (SSHOs).

Subregulation 3.29A(1) specifies circumstances in which a defence member is not prohibited by subsection 527F(3) of the Fair Work Act from applying to the FWC for a SSHO.

Subregulation 3.29A(2) specifies that a defence member is not prevented from bringing an application under section 527F of the Fair Work Act where one or more of the respondents to the alleged contravention 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. This provision allows applicants who are defence members to access an efficient mechanism for the resolution of their complaints where one or more of the respondents to the complaint are not bound by internal Defence dispute resolution processes. Persons who are defence members can also be named as respondents to an application where they engaged in the same conduct as a non-defence member who is named as a respondent to an application.

Subregulation 3.29A(3) specifies circumstances in which a defence member is permitted to make an application under section 527F of the Fair Work Act where a respondent to the alleged contravention was a defence member at the time the alleged contravention occurred.

An aggrieved person is permitted to make an application where they have first applied under section 37G of the *Defence Regulation 2016* for review of a decision made in response to their application for a stop sexual harassment direction under section 37C of those regulations and a direction is not issued in response to their application, or a direction is issued but the applicant is dissatisfied with the direction. This provision is intended to enable defence members to access the FWC to obtain an SSHO, but only where the applicant has exhausted the internal dispute resolution process to stop sexual harassment in the workplace available to them under the *Defence Regulation 2016*.

An aggrieved person is also permitted to make an application where they are not eligible to apply to use the process under Part 6A of the *Defence Regulation 2016* to resolve the dispute. A legislative note indicates that this paragraph will apply to defence members who do not have access to the process under Part 6A because they are undertaking a placement in a workplace that is not a Defence workplace.

An aggrieved person is also permitted to make an application where the process under Part 6A of the *Defence Regulation 2016* is available but is not suitable because a respondent in relation to the alleged contravention is involved in conducting the process and there is no other person is authorised or empowered to conduct that process in place of the respondent. This provision ensures that applicants in these circumstances are able to efficiently access

dispute resolution mechanisms to prevent an ongoing risk of sexual harassment in the workplace.

Subregulation 3.29A(4) defines *defence member* by reference to the meaning of that term in the *Defence Force Discipline Act 1982*.

Item 2—Part 6-4B (heading)

Item 3—Division 2 of Part 6-4B (heading)

These items makes technical amendments to remove the words “or sexually harassed” from the heading of the Part and Division respectively. This is as a result of the SSHOs being relocated within the Fair Work Act as a result of amendments made by the Secure Jobs, Better Pay Act.

Division 2—Court fees (amendments of sunseting instrument)

Federal Court and Federal Circuit and Family Court Regulations 2012

Division 3—Court fees (amendments of new instrument)

Federal Court and Federal Circuit and Family Court Regulations 2022

Item 4—After paragraph 2.08(2)(b)

Item 10—After paragraph 2.08(2)(b)

These items insert paragraph 2.08(2)(ba) into Division 2 and Division 3 of the *Federal Court and Federal Circuit and Family Court Regulations 2012* and *2022* respectively. Section 2.08 of those Regulations lists certain Federal Court proceedings which do not attract a fee. These items establish that a fee is not payable by an applicant if they are lodging an appeal from a judgment made by a person under section 539 of the Fair Work Act for orders in relation to an alleged contravention of Division 2 of Part 3- 5A of that Act.

Item 5—After subsection 2.10(2)

Item 11—After subsection 2.10(2)

These items insert paragraph 2.10(2A) into Division 2 and Division 3 of the *Federal Court and Federal Circuit and Family Court Regulations 2012* and *2022* respectively. Section 2.10 of those Regulations provides that only the filing fee is payable in relation to particular proceedings. The items establish that fees mentioned in Schedule 1 (other than a filing fee mentioned in item 103A or 209A) are not payable by an applicant if they are lodging an appeal from a judgment made by a person under section 539 of the Fair Work Act for orders in relation to an alleged contravention of Division 2 of Part 3- 5A of that Act.

Item 6—Subsection 2.20(1)

Item 12—Subsection 2.20(1)

These items amend Division 2 and Division 3 of the *Federal Court and Federal Circuit and Family Court Regulations 2012* and *2022* respectively to exclude a reference to the new table item 103A which will be inserted into Part 2 of Schedule 1. This will mean that both table items 103A and 209A will be subject to annual fee increases. Item 12 makes a further minor correction relating to the full fee and reduced fee in table item 201A.

Item 7 – Paragraph 2.20(1B)(a)

This item makes an amendment to the *Federal Court and Federal Circuit and Family Court Regulations 2012* to exclude a reference to the new table item 103A which will be inserted into Part 2 of Schedule 1. Both table items 103A and 209A will be subject to the indexation and rounding calculations at subsections 2.20(2) and (3).

Item 8—Part 1 of Schedule 1 (after table item 103)

Item 13—Part 1 of Schedule 1 (after table item 103)

These items insert item 103A into the table which establish the fees payable by an applicant in relation to proceedings brought in the Federal Court in relation to an alleged contravention of Division 2 of Part 3-5A of the Fair Work Act. Upon commencement, this fee is set at \$77.80.

Item 9—Part 2 of Schedule 1 (after table item 209)

Item 14—Part 2 of Schedule 1 (after table item 209)

These items insert item 209A into the table which establish the fees payable by an applicant in relation to proceedings brought in the Federal Circuit and Family Court (Division 2) in relation to an alleged contravention of Division 2 of Part 3-5A of the Fair Work Act.

Item 15—In the appropriate position in Part 5

This item inserts regulation 5.06, which is an application provision clarifying that the amendments of this instrument made by Division 3 of Part 1 of Schedule 1 apply only in relation to fees for services on or after 1 April 2023.

Part 2—Advertising rates of pay

Fair Work Regulations 2009

Item 16—Regulation 4.03 (paragraph (a) of the definition of civil remedy provision)

This item prescribes subsections 536AA(1) and (2) of the Fair Work Act (which are the provisions referred to at item 29AA of the table at subsection 539(2) of the Act), which prohibit certain non-compliant job advertisements, to make the provisions subject to that Act's infringement notice scheme. This provides the regulator—the Fair Work

Ombudsman—with a lower-cost and quicker alternative to litigation, in cases where enforcement action is considered necessary.

These contraventions have been identified by applying the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 9 January 2013, which states that ‘an infringement notice scheme may be employed for relatively minor offences’. The specified contraventions are relatively minor, and a Fair Work Inspector can make an assessment of whether a contravention has occurred using straightforward and objective criteria.

Part 3—Additional registered organisations enforcement options

Fair Work (Registered Organisations) Regulations 2009

Item 17—Part 9 (heading)

Item 18—Before regulation 168

These items insert titles for a new part and division respectively dealing with compliance and enforcement, and civil penalties.

Item 19—At the end of Part 9

This item prescribes certain provisions of the regulations to make them subject to the infringement notice scheme under the Registered Organisations Act.

These contraventions have been identified by applying the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 9 January 2013. The specified contraventions are relatively minor, and an infringement notice officer can make an assessment of whether a contravention has occurred using straightforward and objective criteria.