



Fair Work  
Commission

# Implementation Report

## Sexual harassment in connection with work

---



# Contents

Contents .....	2
Implementation Report – sexual harassment in connection with work .....	4
Introduction.....	4
Background .....	4
<i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> .....	5
Definitions .....	7
Forms and correspondence .....	8
Case management process for new jurisdiction.....	9
Confidentiality .....	10
Relevant performance measures .....	11
Information resources.....	11
Website information .....	11
Sexual Harassment Benchbook.....	12
Amendments to the Fair Work Commission Rules 2013 .....	12
Training.....	13
Training for Commission Members .....	13
Training for Commission Staff.....	13
Education for the public .....	14
Referrals to other organisations .....	14
Workplace Advice Service .....	14



Fair Work  
Commission

Stakeholder engagement and consultation .....	15
Sexual Harassment Working Group .....	15
ATTACHMENT A: Section 28A of the Sex Discrimination Act 1984.....	17
ATTACHMENT B: New Fair Work Act 2009 provisions .....	18
ATTACHMENT C: Workflow .....	28



Fair Work  
Commission



# Implementation Report – sexual harassment in connection with work

---

## Introduction

1. This Implementation Report discusses the Fair Work Commission’s expanded jurisdiction to deal with disputes about sexual harassment in connection with work following changes to the *Fair Work Act 2009* (the Fair Work Act) made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Secure Jobs, Better Pay Act). The purpose of this report is to support engagement and consultation with stakeholders about implementation of the expanded jurisdiction, including on proposed procedural matters and draft materials.
2. Members of the public are invited to comment on anything contained in this Implementation Report and the draft materials prepared by the Commission. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **4 pm on Thursday 2 March 2023**. In particular, the Commission is seeking feedback on our:
  - New forms F75, F76, F77 and F78
  - New forms F72A, F73A and F74A
  - Draft revised form F80
  - Proposed case management process
3. The Commission will also invite comment on the proposed changes to the *Fair Work Commission Rules 2013* (Rules). The proposed changes will be published in the coming weeks.

## Background

4. In 2018, the Australian Human Rights Commission (AHRC) undertook a national inquiry into sexual harassment in Australian workplaces. This led to publication of *the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (Respect@Work Report) in March 2020, which concluded, among other things, that existing legal and regulatory frameworks for addressing workplace sexual harassment are complex and difficult to navigate. The Respect@Work Report recommended legislative amendments to enhance the ability of employers and workers to effectively address sexual harassment in the workplace.
5. The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the Respect at



Work Act) was introduced into Parliament on 24 June 2021 in response to a number of recommendations made by the Respect@Work Report, including Recommendation 29. The Respect at Work Act received Royal Assent on 10 September 2021 and commenced on 11 September 2021. The amendments made by the Respect at Work Act to the Fair Work Act gave the Commission express power to deal with applications for orders to stop sexual harassment. Information about orders to stop sexual harassment is available on the [Sexual Harassment pages](#) of the Commission's website.

6. The Secure Jobs, Better Pay Act implements Recommendation 28 of the Respect@Work Report by amending the Fair Work Act to include provisions prohibiting sexual harassment in connection with work. These amendments result in a number of further changes for the Commission. These further changes are the subject of this Implementation Report.

## ***Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022***

7. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Secure Jobs, Better Pay Bill) was introduced into Parliament on 27 October 2022.
8. The Secure Jobs, Better Pay Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report by 17 November 2022. Details of the inquiry are at the inquiry [homepage](#).
9. The Secure Jobs, Better Pay Bill passed both houses of Parliament on 2 December 2022 and received Royal Assent on 6 December 2022. A number of amendments commenced on 7 December 2022, with further amendments commencing at different stages throughout 2023. A [statement](#) from Acting President Hatcher was issued on 8 December 2022 about our approach to implementation of the reforms.
10. Part 8 of the Secure Jobs Better Pay Act inserts a new Part 3-5A ('Prohibiting sexual harassment in connection with work') into the Fair Work Act. New s.527A provides a guide to the new part:

'This Part makes it unlawful for a person to sexually harass another person, where:

- (a) the other person is a worker in a business or undertaking, seeking to become a worker in a particular business or undertaking, or conducting a business or undertaking; and
- (b) the harassment occurs in connection with the other person being a person of the relevant kind.

Persons may be liable for acts contravening this Part that are performed by their employees or agents.

Applications may be made to the FWC to deal with a dispute about an alleged contravention of this Part, including by making a stop sexual harassment order.

In most cases, a dispute about an alleged contravention of this Part will be dealt with by a court only if the dispute has not been resolved by the FWC.'



11. New s.527D provides that a person (the first person) must not sexually harass another person (the second person) who is:

- a worker in a business or undertaking
- seeking to become a worker in a particular business or undertaking or
- a person conducting a business or undertaking

if the harassment occurs in connection with the second person being a person of one of the above kinds (s.527D(1) of the Fair Work Act)

12. The Revised Explanatory Memorandum at [445] and [447] states that s.527D(1):

is modelled on subsection 28B(6) of the SD Act [*Sex Discrimination Act 1984* (Cth)], but is slightly broader as it extends to prospective workers (prospective workers are separately protected by subsection 28B(1)–(4) of the SD Act).

...

The prohibition would include sexual harassment perpetrated by third parties, such as customers or clients, for example. Sexual harassment of third parties by workplace participants (e.g. by a worker against a customer) is prohibited under the SD Act and is enforceable via the compliance framework that applies to contraventions of that Act.

13. Contravention of the prohibition on sexual harassment in new s.527D(1) attracts a civil penalty (up to 60 penalty units for an individual and 300 penalty units for a body corporate).

14. The prohibition is supported by a new dispute resolution framework based on the framework for dealing with general protections dismissal disputes. If a dispute is not settled through conciliation at the Commission, parties may proceed to consent arbitration at the Commission or make an application to Court. If a matter proceeds to consent arbitration in the Commission, the Commission may deal with the dispute by making one or more of the following orders:

- an order for the payment of compensation to an aggrieved person in relation to the dispute
- an order for payment of an amount to an aggrieved person in relation to the dispute for remuneration lost
- an order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by an aggrieved person in relation to the dispute.

15. The Commission may also express one or more of the following opinions:

- an opinion that a respondent in relation to the dispute has sexually harassed one or more aggrieved persons in contravention of Division 2;
- an opinion that a respondent in relation to the dispute has contravened Division 2 because of the operation of subsection 527E(1);
- an opinion that it would be inappropriate for any further action to be taken in the matter.

16. Part 8 of the Secure Jobs Better Pay Act also includes a new provision for orders to stop sexual harassment modelled on the provisions presently in Part 6-4B ('Workers bullied or sexually harassed at work'). Applicants will be able to make applications for the Commission to issue stop orders, to deal with a dispute about sexual harassment or both. Part 6-4B reverts to dealing only with orders to stop bullying at work.



17. The Revised Explanatory Memorandum at [464] and [466] states:

‘A stop sexual harassment order is intended to prevent any future harassment, while an application for the FWC to otherwise deal with the dispute is intended to remedy past harm caused by sexual harassment.

...

Subclause 527F(1) would provide flexibility for a person to make different kinds of applications at different times. For example, a person could make a single application seeking both a stop sexual harassment order and a remedy for past harm caused by sexual harassment. Alternatively, a person could initially seek a stop sexual harassment order and later amend their application, or make a new application, to seek a remedy for sexual harassment. Legislative note 2 would clarify this.’

18. Applications in the new sexual harassment jurisdiction can be made from 6 March 2023. Applications can be made jointly by one or more aggrieved persons against one or more individuals or principals and would enable an industrial association to represent an aggrieved person or persons.
19. The new provisions are underpinned by the external affairs power and consequently have broader coverage than the present provision for orders to stop sexual harassment.
20. The transitional provisions in Part 26, item 660 of the Secure Jobs Better Pay Act provide that the present stop sexual harassment provisions in Part 6-4B of the Fair Work Act continue to apply after commencement (6 March 2023), to sexual harassment of a worker at work before commencement, and to sexual harassment of a worker at work that is part of a course of conduct that began before commencement.
21. The new prohibition of sexual harassment does not apply to sexual harassment that is part of a course of conduct that begins before commencement. This means that for sexual harassment that occurs or commences prior to 6 March 2023, people should continue to make applications for stop sexual harassment orders under Part 6-4B of the Fair Work Act (as preserved in relation to sexual harassment).

## Definitions

22. The following definitions are inserted into the Fair Work Act:

**aggrieved person** in relation to an alleged contravention of Division 2 of Part 3-5A (prohibiting sexual harassment in connection with work): see subsection 527F(1).

**first person**: see subsection 527D(1)

**notifying parties**: see subsection 527S

**principal**: see subsection 527E(1)

**respondent** in relation to an alleged contravention of Division 2 of Part 3-5A (prohibiting sexual harassment in connection with work): see subsection 527F(1).



Fair Work  
Commission

**second person:** see subsection 527D(1)

**sexual harassment court application:** see subsection 527T(2).

**sexual harassment FWC application:** see subsection 734A(3).

**stop sexual harassment order:** see subsection 527F(1)(a).

**worker** in a business or undertaking: see subsection 527D(3).

23. In Part 3-5A 'employee' and 'employer' have their ordinary meanings (new s.527B).

24. 'Sexually harass' is already defined in s.12, as having the meaning given by s.28A of the Sex Discrimination Act 1984 (Cth) (SD Act)(see Attachment A). The new s.527D prohibits sexual harassment 'in connection with' work (see Attachment B).

## Forms and correspondence

25. The proposed new forms for Part 3-5A (Prohibiting sexual harassment in connection with work) are:

- *F75 – Application for the Fair Work Commission to deal with a sexual harassment dispute*
- *F76 – Individual Respondent's response to an application to deal with a sexual harassment dispute*
- *F77 – Response from employer/principal to an application to deal with a sexual harassment dispute*
- *F78 – Notice of agreement to consent arbitration of a sexual harassment dispute*

26. The form will ask whether the aggrieved person, or an industrial association that is entitled to represent] the industrial interests of an aggrieved person, wants the Commission to deal with a sexual harassment dispute:

- by making a stop sexual harassment order
- by otherwise dealing with the dispute, or
- both by making a stop sexual harassment order and by otherwise dealing with the dispute.

27. The draft form *F75– Application for the Fair Work Commission to deal with a sexual harassment dispute* does not currently include any information about application fees. If the *Fair Work Regulations 2009* are amended to include application fees for the new jurisdiction, the form will be updated to include any relevant fee.

28. A response form is available for respondents named in an application to respond. Respondents and employers/principals must lodge a response form.

29. Under the new jurisdiction, parties will now need to lodge different forms for anti-bullying, and sexual





harassment stop orders and disputes.

30. Each of these forms has been designed to reduce complexity and regulatory burden, drawing on user experience, behavioural insights and using plain language. They also direct parties to relevant information on the Commission's website.
31. [Draft versions of the forms](#) F75, F76, F77, and F78 are published on the Commission's website. We invite interested parties to send their comments on the draft forms to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **4pm on Thursday 2 March 2023**.
32. The final approved forms will be published on the Commission's website from 6 March 2023.
33. The Commission will also create new forms for the retained stop sexual harassment jurisdiction that will apply to sexual harassment that occurred prior to 6 March 2023. These forms will be:
  - *F72A- Application for an order to stop sexual harassment that occurred prior to 6 March 2023*
  - *F73A - Response from an employer/principal to an application for an order to sexual harassment that occurred prior to 6 March 2023 and*
  - *F74A - Response from a person named in an application for an order to stop sexual harassment that occurred prior to 6 March 2023*
34. Correspondence that will be sent to parties during the case management process is also being updated using plain language. The purpose of drafting in plain language is to help parties understand the Commission's processes and to reduce the stress that many people feel when they are involved in a legal case.

## Case management process for new jurisdiction

35. Commissioner McKinnon is the National Practice Leader for the sexual harassment jurisdiction. A small implementation project team has been established to support the National Practice Leader with implementation of the expanded jurisdiction.
36. When the Respect at Work Act amendments to the Fair Work Act came into effect applications for an order to stop bullying were merged with the sexual harassment stop order jurisdiction with the prefix-'SO'. Bullying matters will now revert to the 'AB' prefix (for bullying matters) and new 'SH' prefix will be used for sexual harassment stop order and dispute applications.
37. All terminology will be updated in the Commission's information materials including the relevant benchbooks.
38. Commission staff with experience in the case management of applications for orders to stop sexual harassment will also manage applications for the extended sexual harassment disputes jurisdiction. The current intensive case management model which is underpinned by the principles of trauma-informed practice will continue to apply. Further information about training for Commission staff on trauma-informed practice is set out later in this Report in the chapter titled 'Training' below.
39. When an application to deal with a sexual harassment dispute is made to the Commission,



a case manager will:

- process the application and enter it into the Commission's case management system
- liaise with the applicant to ensure the application is complete (for example, all questions on the form are answered, contact details of relevant parties provided, form signed)
- identify any apparent jurisdictional issues with the application.

40. Once the case manager has confirmed the applicant's intention to proceed, the case manager will:

- speak with each respondent (and any employer/principal) named in the application to let them know we have received an application and to explain the process
- serve the respondent and any named employer/principal with the F75 application form
- notify the respondent and any named employer/principal that they must respond using the relevant F76/F77 form within 7 days.

41. Responses received from the respondent(s) and any named employer/principal(s) will be served on the applicant and other parties to the case.

42. Once this has been done, or the time for responses has passed, the matter will be assigned to the National Practice Leader who will review the file and either retain it or further allocate the matter. Initially, applications about sexual harassment will be allocated only to Commission Members. In the longer term, some applications may first be referred to a staff conciliator where appropriate.

43. Once a matter is allocated to a Member, the Member decides how to deal with the matter, including any preliminary or jurisdictional issues. Members will have a broad discretion to deal with applications for stop orders and sexual harassment disputes, including listing matters for a conference or a hearing.

44. A new email address: [ABSH@fwc.gov.au](mailto:ABSH@fwc.gov.au) will be available for parties to file documents with the Commission and to contact case managers. From 6 March 2023, this will replace the email address [stoporders@fwc.gov.au](mailto:stoporders@fwc.gov.au) which will no longer be monitored. Emails addressed to this inbox will instead be redirected to [ABSH@fwc.gov.au](mailto:ABSH@fwc.gov.au).

45. A simplified process workflow is set out at Attachment C to this Report.

## Confidentiality

46. New s.527R(2) provides that any conference conducted for the purposes of dealing with the sexual harassment dispute must be conducted in private.

47. The Commission can also make confidentiality orders under s.594 of the Fair Work Act. Members may decide to make confidentiality orders in appropriate cases, for example by restricting the publication of certain evidence or de-identifying a party in a published decision or other document on the public record, such as a hearing and conference list.

48. Where an application to deal with sexual harassment in connection with work is settled, the parties



Fair Work  
Commission

may contemplate the inclusion of a 'non-disclosure' or 'confidentiality' clause in the terms of settlement or Deed of Release.

49. Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints (the Guidelines) were published by the Australian Human Rights Commission on 19 December 2022. The Guidelines are intended to guide the use of confidentiality clauses in settlement agreements concerning workplace sexual harassment claims.
50. Under the Guidelines, confidentiality clauses should be clear, fair, in plain English and translated or interpreted where necessary. The guidelines recommend that the use of confidentiality clauses should be considered on a case-by-case basis and limited in scope and duration. The guidelines also recommend that the person who made the allegation should have access to independent support and advice and negotiations about the terms of a settlement agreement should be trauma informed, culturally sensitive and intersectional.
51. The Guidelines are relevant to persons who allege sexual harassment, as well as employers, respondents, employer organisations, unions, legal practitioners, mediators, insurers and anyone else involved in the process of resolving a workplace sexual harassment dispute.
52. Confidentiality clauses may no longer be a standard term in draft settlement terms provided by the Commission to assist parties resolve workplace sexual harassment disputes.

## Relevant performance measures

53. Under s.527J(2) of the Fair Work Act, the Commission 'must start to deal with the application, to the extent that it consists of an application for a stop sexual harassment order, within 14 days after the application is made.'
54. The Commission may 'start to deal with the application' through the initial staff contact as part of the case management process or by a Member dealing with the matter, for example by making inquiries about an application, requiring the provision of information under s.590 of the Fair Work Act, or by holding a conference.
55. The 14 days performance measure only applies to applications under s.527J for a stop sexual harassment order.

## Information resources

### Website information

56. Detailed information on the Commission's role under new Part 3-5A will be available on the Commission's website from 6 March 2023.
57. The website will provide information on:
  - What is sexual harassment in connection with work
  - The definition of sexual harassment



Fair Work  
Commission

- Who can apply for the Commission to deal with a sexual harassment dispute
- Sexual harassment and discrimination, the general protections and work health and safety
- What to do if you're sexually harassed in connection with work
- The process to resolve sexual harassment

## Sexual Harassment Benchbook

58. The Commission has published a sexual harassment benchbook. This document provides employees, employers, representatives and other parties with detailed information about the Commission's current role dealing with applications for stop sexual harassment orders. This Benchbook will be updated to reflect the Commission's retained stop sexual harassment order jurisdiction.
59. A new Sexual Harassment Disputes Benchbook will be created. A draft of the new Benchbook will be published in March for consultation.
60. Updates to the existing Benchbook and the new Sexual Harassment Disputes Benchbook will be reviewed by the National Practice Leader and approved by Acting President Hatcher. The Benchbook will include information about the Commission's jurisdiction and its processes for dealing with sexual harassment disputes.
61. Benchbooks are reviewed and updated over time with relevant case law. A draft of the new Benchbook will be published on the Commission's website for comment once available. The Commission will notify subscribers via the announcements subscription service when this happens.

## Amendments to the Fair Work Commission Rules 2013

62. The Rules will be amended to reflect the expanded jurisdiction.
63. Amendments to the Rules will be required:
  - to specify service requirements for the new forms discussed above
  - to deal with sexual harassment disputes and the parties to disputes (see new s.527F(4)).
64. Amendments to the following rules are proposed at this stage:
  - Rule 5 – new definition of sexual harassment dispute application
  - Rule 12(2)(–) - regarding representation by lawyers and paid agents in applications made under s.527F
  - Rule 12(4) – to include reference to an application made under s.527F
  - Rule 23 – two or more applications concerning same or substantially similar conduct
  - new Rule 23(1)(–) - to cover sexual harassment dispute applications



Fair Work  
Commission

- New Rule 23B – to require a response to an application for the Commission to deal with a sexual harassment dispute from respondents
  - Rule 45(2) – add sexual harassment disputes to the matters requiring service of an application
  - Schedule 1 – separate service rules for anti-bullying forms (F72, F73 and F74) and sexual harassment forms (F75, F76, F77 and F78), noting that respondents will be required to lodge a F76 response,
  - New rules about joint applications, withdrawal of parties to the dispute and treatment of disputes if there are two or more different disputes with different parties (s.527F(4)).
65. A consultation draft and an outline of the proposed changes will be published on the Commission's website and interested parties will be invited to send their comments on the proposed changes. When the draft is available the Commission will notify subscribers via the announcements subscription service.

## Training

### Training for Commission Members

66. Members of the Commission participated in training facilitated by the AHRC on the nature, drivers and impacts of sexual harassment in 2021. This training involved the completion of online modules as well as a half-day workshop.
67. A number of professional development sessions were also undertaken by Commission Members, including a session run by Dr Helen Szoke and Ms Kylie Nomchong on a Review of Sexual Harassment in Victorian Courts.
68. Training will be provided to Members of the Commission on the new sexual harassment provisions, which will also be included as part of the standard induction training for new Members.

### Training for Commission Staff

69. Training will be provided for client service representatives on the Helpline and responding to written enquiries about the new sexual harassment provisions.
70. In 2021 staff attended mandatory online training on sexual harassment by Comcare as well as training on the nature, drivers and impacts of sexual harassment facilitated by the AHRC.
71. Staff conciliators and case managers attended training on 'Building Trauma Awareness' and 'Managing Wellbeing and Resilience' (facilitated by Blue Knot Foundation). New staff will have the opportunity to undertake this training when commencing with the Commission.
72. In the longer term, further training may be arranged for staff conciliators conducting conferences under delegation about sexual harassment disputes.



Fair Work  
Commission

73. “Understanding workplace sexual harassment training” facilitated by the AHRC will be a mandatory training package for Commission staff in 2022-23.

## Education for the public

74. The Commission released a public [online training module about sexual harassment](#) at work on 12 December 2022, following a successful soft launch to internal and external stakeholders. The module is currently being updated to incorporate the expanded sexual harassment jurisdiction.
75. This module is part of a growing suite of resources available on the Commission’s Online Learning Portal.

## Referrals to other organisations

76. The Commission has information on its website for users who may require legal assistance, information from another government agency or additional support. The [‘what to do if you’re sexually harassed at work’](#) page includes a range of referral links to other organisations including the AHRC, Safe Work Australia, Comcare, state and territory work health and safety bodies, state and territory anti-discrimination bodies and select telephone counselling services.

## Workplace Advice Service

77. The Workplace Advice Service (Service) offers up to 1 hour of free legal advice about an application to the Commission for eligible employees and employers. The Commission coordinates the Service in collaboration with a partner network of legal organisations.
78. The Commission will expand the Service to cover applications to deal with sexual harassment in connection with work.
79. This will involve:
- contacting Service partners to advise them of the new sexual harassment jurisdiction and to provide further information, support and training to partner organisations on the expanded jurisdiction and the principles of trauma-informed practice,
  - seeking expressions of interest from within the Service about providing pro-bono legal advice on the sexual harassment jurisdiction, and
  - holding online Teams information sessions about the new jurisdiction in February 2023.
80. At this stage, 25 of our 90 partner organisations have self-identified that they have subject matter expertise in relation to sexual harassment since November 2021. These partners will continue to be available to provide advice on the expanded sexual harassment jurisdiction when it commences on 6 March 2023.



Fair Work  
Commission



## Stakeholder engagement and consultation

81. The Commission is committed to consultation with relevant stakeholders about implementing the Commission's expanded jurisdiction to deal with sexual harassment in connection with work. Our actions include:

- Establishing the Sexual Harassment Working Group
- sharing information with the Fair Work Ombudsman and the Department of Employment and Workplace Relations
- engaging with the Respect@Work Council

### Sexual Harassment Working Group

82. The Commission acknowledges the high burden of taking part in legal proceedings for people who have experienced sexual harassment, and the difficulties faced by those dealing with allegations of sexual harassment in ensuring appropriate support to all concerned in the process.

83. The Commission has convened a Sexual Harassment Working Group that includes representatives from organisations that represent the interests of, or advocate for:

- people with lived experience of sexual harassment
- workers who are at increased risk of experiencing sexual harassment, and
- organisations with experience dealing with sexual harassment claims.

84. The working group will have an opportunity to guide implementation of the new jurisdiction and support the Commission to:

- understand and define the problems people who experience sexual harassment encounter when accessing legal services
- refine elements of the case management process (within the confines of the legislative regime) to support the needs of parties involved in sexual harassment cases, and
- review case management processes post-implementation

85. At this stage membership comprises of the following

- Fair Work Commission (Chair)
- CEO, Diversity Council Australia
- Representative, Full Stop Australia
- Representative, Migrant Workers Centre
- Director, National Women's Safety Alliance
- Director, Working Women's Centre



Fair Work  
Commission

- Representative, Australian Council of Trade Unions
- Representative, Shop, Distributive & Allied Employees' Association
- Representative, Australian Services Union
- Representative, Community & Public Sector Union
- Representative, Australian Nursing and Midwifery Federation
- Representative, Australian Industry Group
- Representatives from the Commission's Small Business Reference Group:
  - Representative , Motor Trades Association
  - Representative Master Grocers Association
  - Representative, Pharmacy Guild of Australia

86. The working group will meet twice prior to commencement of the new sexual harassment jurisdiction on 6 March 2023 and then again 3 and 6-months post implementation. We anticipate the working group will meet on 3 to 4 occasions in 2023.

87. Members of the public are invited to comment on the Commission's plans for consultation or anything else contained in this Implementation Report. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **4pm on Thursday 2 March 2023**.





# ATTACHMENT A: Section 28A of the Sex Discrimination Act 1984

## 28A Meaning of sexual harassment

- (1) For the purposes of this Division, a person sexually harasses another person (the person harassed) if:
  - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
  - (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
  - (c) any disability of the person harassed;
  - (d) any other relevant circumstance.
- (2) In this section:

conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.



Fair Work  
Commission

# ATTACHMENT B: New Fair Work Act 2009 provisions

(The main new provisions have been extracted here – please see [the Secure Jobs Better Pay Act](#) for full details of the new provisions.)

## Part 3-5A—Prohibiting sexual harassment in connection with work

### Division 1—Introduction

#### 527A Guide to this Part

This Part makes it unlawful for a person to sexually harass another person, where:

- (a) the other person is a worker in a business or undertaking, seeking to become a worker in a particular business or undertaking, or conducting a business or undertaking; and
- (b) the harassment occurs in connection with the other person being a person of the relevant kind.

Persons may be liable for acts contravening this Part that are performed by their employees or agents.

Applications may be made to the FWC to deal with a dispute about an alleged contravention of this Part, including by making a stop sexual harassment order.

In most cases, a dispute about an alleged contravention of this Part will be dealt with by a court only if the dispute has not been resolved by the FWC.

#### 527B Meaning of employee and employer

In this Part, *employee* and *employer* have their ordinary meanings.

#### 527C Object of this Part

The object of this Part is to give effect, or further effect, to:

- (a) the Convention on the Elimination of All Forms of Discrimination Against Women, done at New York on 18 December 1979 ([1983] ATS 9); and
  - (b) Articles 2 and 7 of the International Covenant on Economic, Social and Cultural Rights, done at New York on 16 December 1966 ([1976] ATS 5); and
  - (c) the ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12);
- by prohibiting sexual harassment of workers, persons seeking to become workers and persons conducting businesses or undertakings, and providing remedies when that happens.



Fair Work  
Commission

Note: The Conventions and the Covenant could in 2022 be viewed in the Australian Treaties Library on the [AustLII](#) website..

### 527CA Concurrent operation of State and Territory laws

- (1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.
- (2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:
  - (a) the law makes an act or omission:
    - (i) an offence; or
    - (ii) subject to a civil penalty; and
  - (b) that (or any similar) act or omission constitutes a contravention of a civil remedy provision of this Part.
- (3) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that the law allows an application to be made to a person, court or body:
  - (a) for an order or other direction (however described) to prevent a person from being sexually harassed; or
  - (b) to deal with a dispute relating to an allegation that a person has been sexually harassed (whether or not by arbitration).

For this purpose, it is irrelevant whether:

- (c) sexual harassment has a different meaning for the purposes of the law to the meaning it has for the purposes of this Act; or
- (d) the law describes the conduct prevented, or to which the dispute relates, as sexual harassment.

Note 1: An order made under this Part, or under Division 2 of Part 4-1 in relation to a contravention of this Part, will prevail over any order or other direction made by a person, court or body under a law of a State or Territory, to the extent of any inconsistency.

Note 2: Generally, section 734B prevents multiple applications or complaints under both this Act and State and Territory anti-discrimination laws in relation to the same conduct.

### Division 2—Prohibiting sexual harassment in connection with work

#### 527D Prohibiting sexual harassment in connection with work

##### *Prohibition*

- (1) A person (the **first person**) must not sexually harass another person (the **second person**) who is:
  - (a) a worker in a business or undertaking; or
  - (b) seeking to become a worker in a particular business or undertaking; or
  - (c) a person conducting a business or undertaking;



Fair Work  
Commission

if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c).

Note: This section is a civil remedy provision (see Part 4-1).

#### *Meaning of worker*

- (2) For the purposes of this Part, **worker** has the same meaning as in the *Work Health and Safety Act 2011*.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

#### *When a person is a worker in a business or undertaking*

- (3) For the purposes of this Act, if a person (the **first person**) is a worker because the first person carries out work for a person conducting a business or undertaking, the first person is a worker in the business or undertaking.

#### *Other expressions*

- (4) Subject to subsections (2) and (3), an expression used in this section that is defined for the purposes of the *Work Health and Safety Act 2011* has the same meaning in this section as it has in that Act.

### **527E Vicarious liability etc.**

- (1) If an employee or agent of a person (the **principal**) does, in connection with the employment of the employee or with the duties of the agent as an agent, an act that contravenes subsection 527D(1), this Act applies in relation to the principal (subject to subsection (2)) as if the principal had also done the act.
- (2) Subsection (1) does not apply if the principal proves that the principal took all reasonable steps to prevent the employee or agent from doing acts that would contravene subsection 527D(1).
- (3) Subsection (1) does not limit section 550 or 793.

### **Division 3—Dealing with sexual harassment disputes**

#### **Subdivision A—Applying for the FWC to deal with sexual harassment disputes**

#### **527F Application for the FWC to deal with a sexual harassment dispute**

- (1) If a person (the **aggrieved person**) alleges they have been sexually harassed in contravention of Division 2 by one or more other persons (a **respondent**), a person referred to in subsection (2) may apply for the FWC to do either or both of the following to deal with the dispute:
- (a) make an order (a **stop sexual harassment order**) under section 527J;
- (b) otherwise deal with the dispute.



Fair Work  
Commission

Note 1: A person has limited ability to make a sexual harassment court application unless the FWC has dealt with the dispute as mentioned in paragraph (b) and is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful (see section 527T).

Note 2: The FWC may allow an application to be amended if, for example, the applicant wishes the FWC to deal with the dispute in a way not initially applied for (see section 586).

(2) The persons are as follows:

- (a) the aggrieved person;
- (b) an industrial association that is entitled to represent the industrial interests of the aggrieved person.

(3) Despite paragraph (1)(a), a person referred to in subsection (2) cannot, except as provided by the regulations, apply for the FWC to make a stop sexual harassment order in relation to the dispute if the aggrieved person was a defence member (within the meaning of the *Defence Force Discipline Act 1982*) at the time the sexual harassment allegedly occurred.

(4) Without limiting section 609, the procedural rules may provide for the following:

- (a) the making of applications under subsection (1) by:
  - (i) 2 or more persons of the kind referred to in subsection (2) acting jointly; or
  - (ii) a single industrial association that is entitled to represent the industrial interests of 2 or more aggrieved persons;being applications made in relation to the same alleged contravention, or related alleged contraventions, of Division 2;
- (b) the joinder of the following as parties to the dispute:
  - (i) one or more aggrieved persons in relation to alleged contraventions of Division 2;
  - (ii) one or more industrial associations each of which is entitled to represent the industrial interests of one or more aggrieved persons in relation to alleged contraventions of Division 2;
  - (iii) if an aggrieved person in relation to the dispute alleges the aggrieved person has been sexually harassed in contravention of Division 2, other than because of the operation of subsection 527E(1), by a person who is an employee or agent of another person (the *principal*)—the principal;
  - (iv) if a party to the dispute alleges another party (the *principal*) has contravened Division 2 because of the operation of subsection 527E(1)—an employee or agent mentioned in that subsection in relation to the principal;
- (c) the withdrawal of persons as parties to the dispute;
- (d) the treatment of the dispute under this Act as if there were 2 or more different disputes (instead of a single dispute), with different parties to each of the disputes.

### 527G Time for application

The FWC may dismiss an application that is made under section 527F more than 24 months after the contravention, or the last of the contraventions, of Division 2 is alleged to have occurred.



Fair Work  
Commission

Note: For another power of the FWC to dismiss an application under section 527F, see section 587.

### 527H Application fees

- (1) An application to the FWC under section 527F must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under section 527F; and
  - (b) a method for indexing the fee; and
  - (c) the circumstances in which all or part of the fee may be waived or refunded.

### Subdivision B—Stop sexual harassment orders

#### 527J Stop sexual harassment orders

- (1) If:
  - (a) an application made under section 527F includes an application for a stop sexual harassment order; and
  - (b) the FWC is satisfied that:
    - (i) the aggrieved person has been sexually harassed in contravention of Division 2 by one or more persons; and
    - (ii) there is a risk that the aggrieved person will continue to be sexually harassed in contravention of Division 2 by the person or persons;then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed in contravention of Division 2 by the person or persons.
- (2) The FWC must start to deal with the application, to the extent that it consists of an application for a stop sexual harassment order, within 14 days after the application is made.

Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.
- (3) In considering the terms of a stop sexual harassment order, the FWC must take into account:
  - (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
  - (b) if the FWC is aware of any procedure available to the aggrieved person—that procedure; and
  - (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the aggrieved person to resolve grievances or disputes—those outcomes; and
  - (d) any matters that the FWC considers relevant.



- (4) Despite subsection (2), the FWC may dismiss an application made under section 527F, to the extent that it consists of an application for a stop sexual harassment order, if the FWC considers that the application might involve matters that relate to:
- (a) Australia's defence; or
  - (b) Australia's national security; or
  - (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
  - (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

Note: For another power of the FWC to dismiss an application under section 527F, see section 587.

#### **527K Contravening a stop sexual harassment order**

A person to whom a stop sexual harassment order applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

#### **527L Actions under work health and safety laws permitted**

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application made under section 527F that includes an application for a stop sexual harassment order.

Note: Ordinarily, if a person makes an application under section 527F for a stop sexual harassment order in relation to particular conduct, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the same conduct. This section removes that prohibition.

#### **527M This Subdivision is not to prejudice Australia's defence, national security etc.**

Nothing in this Subdivision requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to:

- (a) Australia's defence; or
- (b) Australia's national security; or
- (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
- (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.



### **527N Declarations by the Chief of the Defence Force**

- (1) Without limiting section 527M, the Chief of the Defence Force may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a specified activity.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

### **527P Declarations by the Director-General of Security**

- (1) Without limiting section 527M, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

### **527Q Declarations by the Director-General of ASIS**

- (1) Without limiting section 527M, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

## **Subdivision C—Dealing with sexual harassment disputes in other ways**

### **527R Dealing with a sexual harassment dispute (other than by arbitration)**

- (1) If:
  - (a) an application is made under section 527F for the FWC to deal with a dispute; and
  - (b) the application does not consist solely of an application for a stop sexual harassment order;then the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).
- (2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.
- (3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:
  - (a) the FWC must issue a certificate to that effect; and





Fair Work  
Commission

- (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 527S, or a sexual harassment court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

### 527S Dealing with a sexual harassment dispute by arbitration

- (1) This section applies if:
  - (a) the FWC issues a certificate under paragraph 527R(3)(a) in relation to a dispute; and
  - (b) 2 or more of the parties (the *notifying parties*) jointly notify the FWC that they agree to the FWC arbitrating the dispute; and
  - (c) the notifying parties include at least one party that is:
    - (i) an aggrieved person in relation to the dispute; or
    - (ii) an industrial association that is entitled to represent the industrial interests of a person who is an aggrieved person in relation to the dispute; and
  - (d) the notifying parties include at least one party that is a respondent in relation to the dispute; and
  - (e) the notification:
    - (i) is given to the FWC within 60 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 60 days; and
    - (ii) complies with any requirements prescribed by the procedural rules.
- (2) The FWC must:
  - (a) remove as a party to the dispute a party that is not one of the notifying parties; and
  - (b) notify a person who is removed under paragraph (a) of the removal.
- (3) After doing so, the FWC may deal with the dispute by arbitration, including by:
  - (a) making one or more of the following orders:
    - (i) an order for the payment of compensation to an aggrieved person in relation to the dispute;
    - (ii) an order for payment of an amount to an aggrieved person in relation to the dispute for remuneration lost;
    - (iii) an order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by an aggrieved person in relation to the dispute; and
  - (b) expressing one or more of the following opinions:
    - (i) an opinion that a respondent in relation to the dispute has sexually harassed one or more aggrieved persons in contravention of Division 2;
    - (ii) an opinion that a respondent in relation to the dispute has contravened Division 2 because of the operation of subsection 527E(1);
    - (iii) an opinion that it would be inappropriate for any further action to be taken in the matter.
- (4) A person to whom an order under paragraph (3)(a) applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).



### 527T Limitation on taking a sexual harassment dispute to court

- (1) A person who is entitled to apply under section 527F for the FWC to deal with a dispute (whether by making a stop sexual harassment order or otherwise) must not make a sexual harassment court application in relation to the dispute unless:
  - (a) both of the following apply:
    - (i) the FWC has issued a certificate under paragraph 527R(3)(a) in relation to the dispute;
    - (ii) the sexual harassment court application is made within a period specified in subsection (3);or
  - (b) the sexual harassment court application includes an application for an interim injunction.

Note: Generally, if parties to the dispute notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 527S(1)), a sexual harassment court application cannot be made by a notifying party in relation to a contravention of Division 2 by another notifying party where the contravention is the subject of the dispute (see section 734A).

- (2) A **sexual harassment court application** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of Division 2 of this Part.
- (3) For the purposes of subparagraph (1)(a)(ii), the following periods are specified:
  - (a) 60 days after the day the certificate is issued;
  - (b) if the person is removed under paragraph 527S(2)(a) as a party to the dispute—14 days after the person is given notice under paragraph 527S(2)(b) of the removal;
  - (c) such period as the court allows on an application made during or after a period mentioned in paragraph (a) or (b) of this subsection.

Note: For the purposes of paragraph (c), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

...

### Subdivision D—Sexual harassment applications

#### 734A Sexual harassment court applications—interaction with sexual harassment FWC applications

- (1) A person (the **first person**) who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A by another person (the **second person**) must not (subject to subsection (2)) make a sexual harassment court application in relation to particular conduct if:
  - (a) a sexual harassment FWC application has been made by, or on behalf of, the first person in relation to the conduct; and
  - (b) a certificate in relation to the dispute has been issued by the FWC under paragraph 527R(3)(a) (which provides for the FWC to issue a certificate if the FWC is satisfied that all reasonable attempts to resolve a dispute (other than by arbitration) have been, or are likely to be, unsuccessful); and



- (c) 2 or more of the parties (the *notifying parties*) have jointly notified the FWC as mentioned in paragraph 527S(1)(b) that they agree to the FWC arbitrating the dispute; and
  - (d) paragraphs 527S(1)(c), (d) and (e) apply in relation to the notification; and
  - (e) the notifying parties include both the first person and the second person.
- (2) Subsection (1) does not apply in relation to a sexual harassment court application that includes an application for an interim injunction.
- (3) A *sexual harassment FWC application* is an application under section 527F for the FWC to deal with a dispute that relates to a contravention of Division 2 of Part 3-5A.

#### **734B Sexual harassment FWC applications and sexual harassment court applications—interaction with anti-discrimination laws**

- (1) A person who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A must not make either of the following applications:
- (a) a sexual harassment FWC application (other than an application that consists solely of an application for a stop sexual harassment order);
  - (b) a sexual harassment court application;  
in relation to particular conduct if:
  - (c) an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* has been made by, or on behalf of, the person in relation to the conduct; and
  - (d) the application or complaint has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction.
- (2) A person who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A must not make an application or complaint under an anti-discrimination law or the *Australian Human Rights Commission Act 1986* in relation to particular conduct if:
- (a) either of the following applications has been made by, or on behalf of, the person in relation to the conduct:
    - (i) a sexual harassment FWC application (other than an application that consists solely of an application for a stop sexual harassment order);
    - (ii) a sexual harassment court application; and
  - (b) the application referred to in paragraph (a) has not:
    - (i) been withdrawn by the person who made the application; or
    - (ii) failed for want of jurisdiction.



# ATTACHMENT C: Workflow

