

# **FAIR WORK AMENDMENT (RESPECT AT WORK) REGULATIONS 2021**

## **EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General and Minister for Industrial Relations  
under section 12, paragraph 625(2)(i) and subsection 796(1) of the *Fair Work Act 2009*

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The *Fair Work Amendment (Respect at Work) Regulations 2021* (Amending Regulations) implement recommendation 31 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work Report) and support amendments that would be made to the *Fair Work Act 2009* (Fair Work Act) by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Respect@Work Bill).

The Sex Discrimination Commissioner's Respect@Work Report recommended legislative and regulatory amendments to simplify and clarify the overarching legal frameworks to ensure that employers and workers can effectively address sexual harassment in the workplace.

The Government's response to the Respect@Work Report is contained in 'A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces'.

Recommendation 29 of the Respect@Work Report is to 'Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act'. The Government committed to implementing recommendation 29 in-principle by clarifying that a 'stop bullying order' is available in the context of sexual harassment.

Recommendation 31 of the Respect@Work Report is to amend the definition of 'serious misconduct' in the *Fair Work Regulations 2009* (Principal Regulations) to include sexual harassment. The Government committed to implementing this recommendation.

Subsection 796(1) of the Fair Work Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Fair Work Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Fair Work Act. Section 12 of the Fair Work Act defines 'serious misconduct' as having the meaning prescribed by the Principal Regulations.

Subsection 625(2) of the Fair Work Act provides that the President of the Fair Work Commission (FWC) may delegate certain functions or powers to persons in subsection 625(3). Paragraph 625(2)(i) of the Fair Work Act provides that the FWC President may delegate any function or power prescribed by the Regulations to a person in subsection 625(3).

The purpose of the proposed Regulations is to amend the Principal Regulations to:

- add sexual harassment to the list of conduct falling within the definition of 'serious misconduct' in the Principal Regulations, consistent with recommendation 31 of the Respect@Work Report;

- define ‘sexually harass’ (and other grammatical forms such as ‘sexual harassment’) as having the meaning given by section 28A of the *Sex Discrimination Act 1984* (the Sex Discrimination Act);
- support amendments that would be made by the Respect@Work Bill to include ‘sexual harassment’ in the existing stop-bullying jurisdiction; and
- enable fee waiver applications to be delegated with respect to applications under Part 6-4B of the Fair Work Act.

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

## CONSULTATION

The Government consulted with state and territory government officials under the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector* as well as state and territory officials from relevant Attorney-General and Justice departments and anti-discrimination bodies on an exposure draft of the Amending Regulations.

The Government also consulted with the Respect@Work Council, the Law Council of Australia, the Council of Small Business Organisations Australia and unions and employer representatives through the Committee on Industrial Legislation on an exposure draft of the Regulations.

## REGULATION IMPACT STATEMENT

Consistent with the Government’s Regulatory Impact Analysis requirements, the Respect@Work Report has been certified by the Attorney-General’s Department as meeting the requirements of a Regulation Impact Statement. The Respect@Work Report was tabled in the House of Representatives on 5 March 2020 and is available online at: [https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/a922593b-2c01-4e73-a23a-bd1f24ea3345/upload\\_pdf/AHRC\\_wsh\\_report\\_2020.pdf;fileType=application%2Fpdf#search=%22respect@work%20publications%22](https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/a922593b-2c01-4e73-a23a-bd1f24ea3345/upload_pdf/AHRC_wsh_report_2020.pdf;fileType=application%2Fpdf#search=%22respect@work%20publications%22)

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

The *Fair Work Amendment (Respect at Work) Regulations 2021* (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

The Amending Regulations amend the *Fair Work Regulations 2009* (Principal Regulations) to implement recommendation 31 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work Report) and to support amendments to the *Fair Work Act 2009* (Fair Work Act) that would be made by the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Respect@Work Bill).

The Amending Regulations amend the Principal Regulations to:

- add sexual harassment to the list of conduct falling within the definition of ‘serious misconduct’ in the Principal Regulations, consistent with recommendation 31 of the Respect@Work Report;
- define ‘sexually harass’ (and other grammatical forms such as ‘sexual harassment’) as having the meaning given by section 28A of the *Sex Discrimination Act 1984*;
- support amendments that would be made by the Respect@Work Bill to include ‘sexual harassment’ in the existing stop-bullying jurisdiction; and
- enable fee waiver applications to be delegated with respect to applications under Part 6-4B of the Fair Work Act.

### **Human rights implications**

The Amending Regulations engage the following rights:

- the right to work and rights in work under Articles 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 11(1) of *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); and

- the right to the enjoyment of the highest attainable standard of physical and mental health under Article 12 of the ICESCR.

Articles 6(1) and 7 of the ICESCR and Article 11(1) of the CEDAW provide the right to work and rights in work, including the right to safe and healthy working conditions, and the right not to be unjustly deprived of work. The International Labour Organisation's (ILO) Termination of Employment Convention, 1982 (No. 158), relevantly provides that a person whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless the person is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

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 safe and healthy working conditions.

#### *Serious misconduct*

The Amending Regulations will promote the right to safe and healthy working conditions and to physical and mental health by clarifying that sexual harassment in the course of employment can be conduct amounting to serious misconduct. The definition of serious misconduct reflects the ordinary meaning of serious misconduct and includes the non-exhaustive list of conduct in subregulation 1.07(3). The definition also states that whether or not the listed conduct is serious misconduct depends on whether the employee's continued employment in the period of notice is reasonable.

Where serious misconduct is established, certain Fair Work Act entitlements, such as the entitlement to notice of termination, do not apply. The amendment signals that sexual harassment can be conduct that is serious enough to warrant termination without notice. This will deter employees from engaging in workplace sexual harassment and clarify for employers that in the appropriate circumstances they may respond quickly to remove harassers from the workplace, thereby improving safety in Australian workplaces.

This amendment also does not limit the right not to be unjustly deprived of work. Sexual harassment can already come within the existing definition of serious misconduct in the Principle Regulations and the amendment is intended to provide clarity and certainty to employers and employees. Existing remedies for employees in relation to their dismissal will continue to be available, and where a court determines proceedings initiated by an employee claiming an entitlement to notice of termination, the validity of the grounds for termination without notice will be independently assessed by the court.

#### **Conclusion**

The Amending Regulations are compatible with human rights.

## NOTES ON SECTIONS

### Section 1 – Name

This section provides that the title of the instrument is the *Fair Work Amendment (Respect at Work) Regulations 2021*.

### Section 2 – Commencement

This section provides for Sections 1 to 4 and Schedule 1, Part 1 of the instrument to commence the day after it is registered.

This section also provides for Schedule 1, Part 2 of the instrument to commence on the later of:

- the start of the day after the instrument is registered; or
- immediately after the commencement of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Respect@Work Act).

However, Schedule 1, Part 2 of the instrument will not commence if the Respect@Work Act does not commence. This section ensures that the new definition of ‘sexually harass’ (which is inserted by item 1 of the instrument) will only be inserted into the *Fair Work Regulations 2009* (Fair Work Regulations) if the instrument is registered on a day before the Respect@Work Act commences. If the Respect@Work Act commences before the instrument is registered, an identical definition of ‘sexually harass’ will be inserted into the *Fair Work Act 2009* (Fair Work Act), which would also apply for the purposes of the Fair Work Regulations.

The amendments at items 5 and 6 of Schedule 1, Part 2 are consequential to the amendments being made to Part 6-4B of the Fair Work Act in the Respect@Work Act. Their commencement is therefore contingent upon the commencement of that legislation.

### Section 3 – Authority

This section provides that the instrument is made under the Fair Work Act.

### 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 – Amendments commencing day after registration**

#### ***Fair Work Regulations 2009***

##### **Item 1 – Regulation 1.03**

This item inserts a definition of ‘sexually harass’ into regulation 1.03, which sets out the definitions that apply for the purposes of the Fair Work Regulations. The new definition provides that ‘sexually harass’ has the meaning given by section 28A of the *Sex Discrimination Act 1984*. The note to the new definition clarifies that other grammatical forms of ‘sexually harass’ including ‘sexual harassment’ have a corresponding meaning.

This item ensures consistency in terminology and definitions across Commonwealth legislation and gives employers certainty about the meaning of ‘sexual harassment’ in the Fair Work Regulations.

##### **Item 2 – At the end of paragraph 1.07(3)(a)**

Regulation 1.07 of the Fair Work Regulations defines the term ‘serious misconduct’ for the purposes of section 12 of the Fair Work Act. Under the Fair Work Act, the term is used when determining eligibility for notice of termination and redundancy under the National Employment Standards, as well as notification requirements that apply to dismissals of 15 or more employees.

Subregulation 1.07(1) defines serious misconduct as having its ordinary meaning. Paragraph 1.07(3)(a) provides that for the purposes of subregulation 1.07(1), serious misconduct includes the employee, in the course of the employee’s employment, engaging in theft, fraud or assault. This item adds ‘sexual harassment’ to the matters listed in paragraph 1.07(3)(a).

This item gives effect to recommendation 31 of the *Respect@Work: National Inquiry into Sexual Harassment in the Workplace* (Respect@Work Report). Generally, employers may respond to serious misconduct by an employee by dismissing them without notice. The Respect@Work Report observed that the intention of recommendation 31 was to provide clarification to assist in ensuring that sexual harassment is understood as conduct that is potentially serious enough to be inconsistent with the continuation of the employment.

##### **Item 3 – at the end of subregulation 5.01(2)**

Item 3 adds new paragraph 5.01(2)(e), to enable fee waiver applications for stop-bullying orders (and upon the commencement of the Respect@Work Act, stop bullying and sexual harassment orders) made under subsection 789FC(1) to be delegated by the Fair Work Commission (FWC) President to the persons in subsection 625(3), who include the General Manager of the FWC, a member of staff of the FWC who is an SES employee or acting SES employee or a member of staff prescribed by the regulations. The delegate would need to be

satisfied that the person making the application will suffer serious hardship if they are required to pay the application fee.

This brings arrangements for fee waiver applications into line with those for general protections, unfair dismissal and unlawful termination fee waiver applications, and increase the efficiency of the FWC to provide its services by removing the requirement for a Member to determine anti-bullying fee waiver applications.

## **Part 2 – Amendments relating to commencement of the Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021**

### ***Fair Work Regulations 2009***

#### **Item 4 – Regulation 1.03 (definition of *sexually harass*)**

This item repeals the definition of ‘sexually harass’ (including the note), which would be inserted by item 1, immediately after the commencement of the Respect@Work Act. This reflects the fact that an identical definition of ‘sexually harass’ would be inserted into the Fair Work Act by the Respect@Work Act, which would also apply for the purposes of the Fair Work Regulations.

#### **Item 5 – Part 6-4B (heading)**

#### **Item 6 – Division 2 of Part 6-4B (heading)**

These items are consequential to the amendments being made to Part 6-4B of the Fair Work Act in the Respect@Work Act to clarify that the FWC’s existing stop bullying jurisdiction is available to stop sexual harassment at work. The amendments insert the words ‘or sexually harassed’ into headings of the Fair Work Regulations that refer to the existing stop-bullying jurisdiction and make it clear that orders can be made where a worker is either bullied or sexually harassed at work.