

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations
Work Health and Safety Act 2011

Notice of a Disallowable Instrument

Work Health and Safety (Sexual and Gender-Based Harassment) Code of Practice 2025

The purpose of this instrument is to approve the *Work Health and Safety (Sexual and Gender-based Harassment) Code of Practice 2025* (the Code). The Code provides practical guidance to duty holders on meeting their obligation to manage the hazards and risks arising from sexual and gender-based harassment in the workplace under the *Work Health and Safety Act 2011* (Cth) (the Act) and the *Work Health and Safety Regulations 2011* (Cth) (the Regulations).

The Code provides practical guidance to persons conducting a business or undertaking in the Commonwealth jurisdiction on how to:

- identify sexual and gender-based harassment
- assess the risk of sexual and gender-based harassment
- implement appropriate control measures for sexual and gender-based harassment
- maintain and review control measures for sexual and gender-based harassment
- respond to reports, complaints, or incidents regarding sexual or gender-based harassment, and
- conduct investigations into reports of incidents involving sexual or gender-based harassment.

The Act and Regulations provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction. They are based on the model WHS laws (model laws) developed by Safe Work Australia (SWA) under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the Intergovernmental Agreement). The model laws provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces, in part by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work. The model laws have been implemented in all jurisdictions across Australia, except for Victoria which has laws that are similar.

Subsection 274(1) of the Act provides that the Minister may approve codes of practice for the purposes of the Act. Section 275 of the Act provides that an approved code of practice is admissible in proceedings under the Act as evidence of whether a duty or obligation under the Act has been complied with. A court may:

- have regard to the code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates; and
- rely on the code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

Approving this code of practice in the Commonwealth jurisdiction gives effect to an agreement in September 2023 between SWA Members to approve and publish the model *Code of Practice: Sexual and Gender-based Harassment* (the model Code) developed by SWA, published on the SWA website in December 2023. It also supports implementation of recommendation 35 of the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report*. Under this recommendation, WHS Ministers were to agree to amend the model WHS Regulations to deal with psychological health, as recommended by the review of the model WHS laws by Ms Marie Boland, and to develop guidelines on sexual harassment with a view to informing the development of a code of practice on sexual harassment.

This Code is intended to be read and applied in conjunction with the *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* (Cth). Sexual and gender-based harassment often occurs in conjunction with other psychosocial hazards and duty holders must consider the interaction between these hazards when managing risks to the health and safety of workers and others.

In accordance with paragraph 273B(1)(d) of the Act, this instrument is a legislative instrument within the meaning of the *Legislation Act 2003* (Cth) (the Legislation Act).

Consultation

Subsection 274(2) of the Act provides that prior to approving a code of practice, the Minister must be satisfied that the code has been developed by a process that involved consultation between the governments of the Commonwealth and each state and territory, and with unions and employer organisations.

The Code substantially adopts the model Code which was developed through SWA's tripartite consultation process involving representatives from the Commonwealth, each state and territory, the Australian Council of Trade Unions, Australian Industry Group and the Australian Chamber of Commerce and Industry.

To ensure the Code is fit for the nature of the Commonwealth jurisdiction, including the requirement to use the hierarchy of controls when managing psychosocial hazards, minor targeted departures from the model Code were necessary. The Commonwealth conducted consultation on minor departures from the model Code with Commonwealth stakeholders including the Australian Council of Trade Unions, Australian Industry Group, the Australian Chamber of Commerce and Industry, Comcare, the Department of the Prime Minister and Cabinet, the Australian Public Service Commission, the Attorney-Generals' Department and the National Indigenous Australians Agency and state and territory governments, incorporating feedback as appropriate.

Incorporated documents

Subsection 274(3) of the Act provides that approved codes of practice made under the Act may apply, adopt, or incorporate material from other documents in force at a particular time or from time to time. This expressly displaces the presumption under subsection 14(2) of the Legislation Act that documents will not be incorporated from time to time.

The Code references a number of other documents to provide guidance to readers about where to find additional information on particular hazards and risks. These include other codes of practice approved under the Act and guidance material developed by SWA.

Under paragraph 273B(1)(d) of the Act, these approved codes of practice are legislative instruments and are available on the Federal Register of Legislation and on the website of the Commonwealth WHS regulator, Comcare at www.comcare.gov.au/scheme-legislation/whs-act/codes-of-practice. As legislative instruments, these codes of practice are incorporated as in force from time-to-time.

Sunsetting

The *Legislation (Exemptions and Other Matters) Regulation 2015* at section 12, item 68, provides that an instrument made under subsection 274(1) of the Act is a legislative instrument that is not subject to sunsetting. The Code is a legislative instrument made under subsection 274(1) of the Act and is therefore exempt.

Commonwealth approved codes of practice are exempt from sunsetting because they form part of an intergovernmental scheme for a nationally consistent framework to secure the health and safety of workers and workplaces. They are part of a system of nationally harmonised WHS laws. As such, the codes of practice form part of an intergovernmental scheme and it is appropriate to exempt them from sunsetting.

Regulation Impact Statement and other matters

The Office of Impact Analysis advised that a Regulation Impact Statement was not required to implement the Code in the Commonwealth jurisdiction (OIA25-09276).

A Statement of Compatibility with Human Rights has been completed for this Legislative Instrument, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the instrument is compatible with human rights. A copy of the Statement is attached.

In accordance with the Act, the Minister is required to notify the approval of the Code in newspapers. Copies of the Code (and applied, adopted, and incorporated documents) are available for inspection, without charge, at Comcare offices during normal business hours. Copies are also published on the Comcare website www.comcare.gov.au/scheme-legislation/whs-act/codes-of-practice.

The Code commences on the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Work Health and Safety (Sexual and Gender-based Harassment) Code of Practice 2025

This Legislative Instrument is compatible with 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 Legislative Instrument, to which this Human Rights Compatibility Statement relates, approves the *Work Health and Safety (Sexual and Gender-Based Harassment) Code of Practice 2025* (the Code). The Code provides practical guidance to duty holders on meeting their obligations under the *Work Health and Safety Act 2011* (the Act) and the *Work Health and Safety Regulations 2011* (the Regulations).

The Act and Regulations provide the primary work health and safety (WHS) legislation for the Commonwealth jurisdiction and are based on the model WHS laws (model laws) developed by Safe Work Australia (SWA) under the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the Intergovernmental Agreement). The model laws provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces, in part by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work. The model laws have been implemented in all jurisdictions across Australia, except for Victoria which has laws that are similar.

This Code is intended to be read and applied in conjunction with the *Work Health and Safety (Managing Psychosocial Hazards at Work) Code of Practice 2024* (Cth). Sexual and gender-based harassment often occurs in conjunction with other psychosocial hazards and duty holders must consider the interaction between these hazards when managing risks to the health and safety of workers and others.

Section 274 of the Act provides that the Minister may approve codes of practice for the purposes of the Act. Section 275 of the Act provides that an approved code of practice is admissible in proceedings under the Act as evidence of whether or not a duty or obligation under the Act has been complied with. A court may:

- have regard to a code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code of practice relates; and
- rely on a code of practice in determining what is reasonably practicable in the circumstances to which the code of practice relates.

Human rights implications

This disallowable legislative instrument engages the following human rights:

- the right to 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 enjoyment of the highest attainable standard of physical and mental health under Article 12 of the ICESCR
- the right to freedom of expression under Article 19(2) of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right of women not to be discriminated against based on gender under Articles 2 and 3 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), and
- the right to privacy under Article 17 of the ICCPR.

Right to just and favourable conditions of work and the right to enjoyment of highest attainable standards of physical and mental health

Article 6 of the ICESCR provides that everyone has the right to work and article 7 of the ICESCR provides that everyone has the right to the ‘enjoyment of just and favourable conditions of work, which ensure, in particular...[s]afe and healthy working conditions.’

The prevention and management of workplace hazards and risks is a fundamental aspect of the right to just and favourable conditions of work. Australia complies with its obligation under Article 7 of the ICESCR through its system of Commonwealth, state and territory WHS laws. The Act and Regulations provide the Commonwealth framework to secure the health, safety and welfare of workers engaged in businesses and undertakings conducted by the Commonwealth, public authorities, and non-Commonwealth licensees.

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.

The Australian Human Rights Commission *Respect@Work: Sexual Harassment National Inquiry Report* noted that sexual harassment in the workplace can have significant negative effects on an individual’s health and wellbeing.

The Code promotes the right to safe and healthy working conditions, and the right to enjoyment of the highest attainable standard of physical and mental health by providing practical guidance for duty holders on how to meet their obligations to manage sex and gender-based harassment risks under the Act and Regulations. The Code provides practical guidance to persons conducting a business or undertaking (PCBUs) in the Commonwealth jurisdiction on how to:

- identify sexual and gender-based harassment
- assess the risk of sexual and gender-based harassment
- implement appropriate control measures for sexual and gender-based harassment
- maintain and review control measures for sexual and gender-based harassment
- respond to reports, complaints, or incidents regarding sexual or gender-based harassment, and
- conduct investigations into reports of incidents involving sexual or gender-based harassment.

The Code is intended to provide guidance to PCBUs on how to meet their WHS duties and effectively ensure a physically and psychologically safe environment. This will operate to enhance the right to safe and healthy working conditions, by ensuring that psychological health is prioritised and managed to the same standard as physical health and recognises the psychological and physical risk to health that sexual and gender-based harassment poses.

The Code will help PCBUs promote safer and healthier workplaces and discourage behaviours that can cause physical and psychological harm.

By helping PCBUs to make workplaces safer, the Code will help prevent more Australians from experiencing sexual and gender-based harassment.

The right to freedom of expression

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

The Code may limit a person's right to freely express themselves in a workplace. Under the Commonwealth's WHS laws, a PCBU has a duty to provide, so far as is reasonably practicable, the health and safety of workers while they are at work in their business or undertaking. This includes protecting a worker from sexual or gender-based harassment. In discharging their duties, a PCBU may limit a person's expression of words or conduct that meet the definition of sexual or gender-based harassment.

This is consistent with other anti-discrimination legislation and criminal law which seek to achieve the appropriate balance between protecting against discrimination and harassment, and protecting the right of an individual to express themselves. The duties under the WHS Act and the Code do not limit freedom of expression beyond existing limitations on conduct amounting to sexual harassment that already exist under anti-discrimination legislation or under criminal law.

Further, the limitation on the right of expression is necessary to achieve a legitimate objective: protecting workers and prospective workers from sexual and gender-based harassment. The limitation on the right of freedom of expression is reasonable, necessary and proportionate to this objective. The extent to which the right to freedom of expression is limited is the least restrictive way of achieving the objective. The Code's definition of sexual harassment is based on the definition contained in the *Sex Discrimination Act 1984* (Cth), which includes an objective reasonable person test and the requirement to consider any relevant circumstances. This provides an important safeguard to limiting the right to freedom of expression.

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).

The Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report* (2020) notes that sexual harassment disproportionately affects women.

This instrument positively engages with the rights of women in work by providing practical guidance for protecting women from sexual and gender-based harassment in connection with work.

Right to privacy

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

Part 7 of the Code provides guidance to PCBUs on how to handle and respond to reports, complaints, or incidents regarding sexual and gender-based harassment. This includes keeping records of reports, complaints or incidents relating to sexual and gender-based harassment. Information regarding sexual and gender-based harassment risks could be personal information or sensitive personal information under the *Privacy Act 1988* (Cth) (the Privacy Act).

To the extent that this guidance may limit the right to privacy, it would be a permissible limitation. There are a range of protections which apply to the information once it is received:

- The Commonwealth WHS jurisdiction is unique in that it applies to the Commonwealth, public authorities, and non-Commonwealth licensees (large companies), all of which are subject to the Privacy Act. In addition, contracted service providers for an Australian Government contract are also subject to the Privacy Act, which would apply where such

contractors are provided with information due to a shared responsibility between the Commonwealth and that contractor for a worker's health monitoring.

- Information obtained by Comcare in performing functions under the Act is subject to strict confidentiality provisions (section 271). Information collected by Comcare that is personal information is also subject to the requirements of the Privacy Act which governs its collection, use, disclosure, storage, and disposal.

The guidance in the Code is reasonable and proportionate to the extent that it seeks to ensure that reports and complaints about psychosocial hazards are addressed seriously and confidentially. Recording information on psychosocial hazards is reasonable, necessary, and proportionate to achieving the legitimate object of maintaining safe and healthy working conditions, as described in Article 7 of the ICESCR above.

Conclusion

This Legislative Instrument is compatible with human rights because it promotes the right to safe and healthy working conditions by providing practical guidance to PCBU's on how to manage psychosocial hazards at work. To the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

Minister for Employment and Workplace Relations, Senator the Hon Murray Watt