



Fair Work  
Commission

# Implementation Report

## Orders to stop sexual harassment at work

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# Implementation Report – Orders to stop sexual harassment at work

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## Introduction

1. This Implementation Report discusses the Fair Work Commission's (Commission) expanded jurisdiction to deal with sexual harassment in the workplace following changes to the *Fair Work Act 2009* (the Fair Work Act) made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the Respect at Work Act).
2. The purpose of this Report is to support engagement and consultation with stakeholders about the implementation of the expanded jurisdiction, including on proposed procedural matters and draft materials.
3. 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 **Monday 1 November 2021**. In particular, the Commission is seeking feedback on our:
  - Draft revised forms F72, F73, and F74
  - Proposed case management process
  - Draft orders to stop sexual harassment bench book.
4. The Commission is also inviting comment on the proposed changes to the *Fair Work Commission Rules 2013*. Feedback on the proposed rule changes is to be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Monday 25 October 2021**.

## Background

5. 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 Report (the R@W 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 R@W Report recommended legislative amendments to enhance the ability of employers and workers to effectively address sexual harassment in the workplace.
6. Specifically, Recommendation 29 of the R@W Report recommended that the Australian Government: *'Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.'*



7. In April 2021, the Australian Government published its response to the R@W Report, titled ‘A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces’. The Government ‘agreed-in-principle’ with Recommendation 29 of the R@W Report and stated:

*‘It is important for workers to have effective avenues to raise complaints about sexual harassment quickly, however, the Government is of the view that the objective will be achieved with greater simplicity by clarifying that a ‘stop bullying order’ is available in the context of sexual harassment.’*

## ***Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021***

8. The *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (the Bill) was introduced into Parliament on 24 June 2021 in response to a number of recommendations made by the R@W Report, including Recommendation 29.
9. The Bill was referred to the Senate Education and Employment Legislation Committee for report. The Committee issued its report on the Bill on 6 August 2021.<sup>1</sup>
10. The Bill passed both houses of Parliament on 2 September 2021. The Respect at Work Act received Royal Assent on 10 September 2021 and commenced on 11 September 2021. While the Respect at Work Act also amends the *Australian Human Rights Commission Act 1986* and the *Sex Discrimination Act 1984*, this Report only discusses changes to the Fair Work Act, and particularly those related to orders to stop sexual harassment at work.
11. Under the Respect at Work Act, applications for orders to stop sexual harassment at work can be made to the Commission from 2 months after commencement. The Commission will accept applications for orders to stop sexual harassment at work on and from 11 November 2021.<sup>2</sup>

### **New definitions**

12. The Respect at Work Act inserts new definitions into s.12 of the Fair Work Act:<sup>3</sup>
- **sexually harass** has the meaning given by s.28A of the *Sex Discrimination Act 1984*.<sup>4</sup>
  - **sexually harassed at work**: see s.789FD(2A) of the Fair Work Act.
  - New s.789FD(2A) provides: ‘A worker is **sexually harassed at work** if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker’.

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<sup>1</sup> See [Report – Sex Discrimination and Fair Work \(Respect at Work\) Amendment Bill 2021](#)

<sup>2</sup> *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* at Schedule 1, Part 1, item 6

<sup>3</sup> *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* at Schedule 1, Part 1, item 6

<sup>4</sup> Section 28A of the *Sex Discrimination Act 1984* is set out at Attachment A to this Report.



## Amendments to Part 6-4B

13. Under Part 6-4B of the Fair Work Act, the Commission can make orders to stop sexual harassment at work.
14. Applications for orders to stop sexual harassment at work can be made on and from 11 November 2021.
15. The detail of the amendments to ss.789FC, 789FD and 789FF–789FH of the Fair Work Act are set out at **Attachment B** to this Report.<sup>5</sup>

## Valid reason for dismissal

16. Section 387 of the Fair Work Act sets out the factors the Commission must consider when deciding whether a dismissal was harsh, unjust or unreasonable, including whether there was a valid reason for the dismissal related to the person's capacity or conduct.
17. The Respect at Work Act inserts a new legislative note to s.387 of the Fair Work Act, stating that sexual harassment can be conduct amounting to a valid reason for dismissal.
18. Section 387 of the Fair Work Act, including the new legislative note, is set out at **Attachment C** to the Report.

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

19. The *Fair Work Regulations 2009* (the Regulations) have been amended by the *Fair Work Amendment (Respect at Work) Regulations 2021*. The amendments were registered on 10 July 2021 and, among other things, amend the definition of 'serious misconduct' to include sexual harassment.
20. The Commission's updated information materials will make it clear that sexual harassment is conduct that can constitute 'serious misconduct'.

## Forms and correspondence

21. The Commission's F72, F73 and F74 forms are used to deal with applications to stop bullying at work. These forms have been revised and updated so that they can also be used to deal with applications to stop sexual harassment at work. Applicants will use a single form to apply for orders to stop bullying, to stop sexual harassment or to stop bullying *and* sexual harassment. The form will ask applicants to select which of these applications they are making. Respondents will then be able to respond to the application(s) as made.
22. The amended forms titles are:
  - F72 – Application for an order to stop bullying or sexual harassment (or both)
  - F73 – Response from an employer or principal to an application for an order to stop bullying or sexual harassment (or both)

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<sup>5</sup> *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* at Schedule 1, Part 1, items 19–27.



- F74 – Response from a person named as having engaged in bullying or sexual harassment (or both)
23. Minor amendments will be made to the F80 form. The F80 is for applicants to request a waiver of the application fee when they apply for orders to stop bullying or sexual harassment at work (or both).
  24. Each of these forms has been redesigned to reduce complexity and regulatory burden, drawing on user experience, behavioural insights and using plain language. The forms are simpler so that they are easier for parties to use. They also direct parties to relevant information on the Commission’s website.
  25. Draft versions of the amended F72, F73 and F74 forms are published on the Commission’s website at [www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work](http://www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work). We invite interested parties to send their comments on the draft forms to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **1 November 2021**.
  26. The final approved forms will be published on the Commission’s website from 11 November 2021.
  27. Correspondence to parties that is sent during the case management process is also being updated using plain language. Using plain language throughout these pieces of correspondence helps parties understand the Commission’s processes and minimise the confusion and anxiety that many people feel when they are involved in a legal case.

## Case management process

28. Justice Ross is the National Practice Leader for stop-bullying and sexual harassment. Commissioner McKinnon is the Deputy Practice Leader. A small implementation project team has been established to support the National Practice Leader and Deputy Practice Leader with implementation of the expanded jurisdiction.
29. In the past, applications for an order to stop bullying under s.789FC of the Fair Work Act were known as ‘anti-bullying applications’. The prefix ‘anti’ will no longer be used. Applications will be known as applications for an ‘Order to Stop’ bullying, sexual harassment or both (depending on which is appropriate in the circumstances). All terminology will be updated in the Commission’s information materials including the relevant benchbooks.
30. Commission staff with experience in case management of applications for orders to stop bullying will also manage applications for orders to stop sexual harassment. 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’.
31. When an application for an order to stop bullying or sexual harassment (or both) 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



- speak to the applicant to provide information about the application process and confirm their intention to proceed.
32. Once the case manager has confirmed the applicant's intention to proceed, the case manager will:
- speak with each employer (or principal) named in the application to let them know we have received an application and to explain the process
  - serve the employer/principal with the F72 application form
  - notify the employer/principal that they must respond using the F73 form within 7 days.
33. The following business day, a case manager will speak to individuals named in the application as having engaged in bullying or sexual harassment (or both) at work and provide them with information about the process and the opportunity to respond using the F74 form. The case manager will advise any persons named in the application that their employer (or principal) has been given a copy of the application.
34. The matter will then be assigned to the National Practice Leader (or Deputy Practice Leader) who will review the file and either retain it or further allocate the matter. Initially, applications to stop sexual harassment will be allocated only to Commission Members. In the longer term, some applications will first be referred to a staff conciliator where appropriate.
35. Staff conciliations are conducted over the telephone. Staff conciliators are trained in the principles of trauma-informed practice. For further information about this see the chapter titled 'Training'.
36. Once a matter is allocated to a Member, the Member decides how to deal with the matter, including any preliminary or jurisdictional issues. Members have a broad discretion to deal with applications for orders to stop bullying or sexual harassment (or both), including listing matters for a conference or a hearing.
37. A new email address: [stoporders@fwc.gov.au](mailto:stoporders@fwc.gov.au) will be available for parties to file documents with the Commission and to contact case managers. From 11 November 2021, this will replace the email address [antibullying@fwc.gov.au](mailto:antibullying@fwc.gov.au) which will no longer be monitored. Emails addressed to this inbox will instead be redirected to [stoporders@fwc.gov.au](mailto:stoporders@fwc.gov.au).
38. A simplified process workflow is set out at **Attachment D** to this Report.

## Confidentiality

39. Sections 592-3 of the Fair Work Act require conferences to be conducted in private and hearings to be conducted in public, unless otherwise determined by a Member. The Commission can also make confidentiality orders under s.594 of the Fair Work Act.
40. 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.
41. Where an application to stop bullying or sexual harassment (or both) at work is settled, the parties may contemplate the inclusion of a 'non-disclosure' or 'confidentiality' clause in the terms of settlement or Deed of Release. Recommendation 38 of the R@W Report states:



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*“The Commission [AHRC], in conjunction with the Workplace Sexual Harassment Council, develop a practice note or guideline that identifies best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development of a regulation on NDAs.”*

42. The General Manager of the Commission is a member of the Respect at Work Council and the Commission is engaging with the Council and the Attorney-General’s Department about this recommendation, which is relevant to the settlement of applications to stop sexual harassment at work.

## Timeliness

### FWC to deal with applications promptly – s.789FE

43. Under s.789FE of the Fair Work Act, the Commission ‘must start to deal with an application under s789FC within 14 days after the application is made.’ This currently applies to applications to stop bullying at work and will also apply to applications to stop sexual harassment at work. The Commission can start to deal with the application through 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 hearing or a conference.
44. Currently, the median timeframe for the Commission to start dealing with applications for an order to stop bullying is 1 business day.
45. Applications for an order to stop sexual harassment will be subject to the Commission’s current finalised and reserved decisions timeliness benchmarks. These are:

Reserved decisions	File closure
<ul style="list-style-type: none"><li>• 90% within 8 weeks</li><li>• 100% within 12 weeks</li></ul>	<ul style="list-style-type: none"><li>• 50% of matters to be closed within 90 days</li><li>• 90% of matters to be closed within 180 days</li></ul>

## Information resources

### Website information

46. Detailed information on the Commission’s role in dealing with applications to stop sexual harassment at work will be available on the Commission’s website from 11 November 2021.
47. The website will provide information on:
- what is sexual harassment at work
  - who can apply to stop sexual harassment at work
  - sexual harassment and discrimination, general protections and Work Health and Safety
  - what to do if you’re sexually harassed at work
  - the Commission’s process to resolve sexual harassment at work
  - how to make an application





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- how to respond to an application
  - conciliation about sexual harassment at work
  - conferences and hearings about sexual harassment at work
  - where to get help.
48. The Commission is currently undertaking a website redevelopment project to make it easier for users to navigate and access relevant information. The new website is due to be launched shortly.
49. As part of the website redevelopment project, information on the current website has been reviewed and revised using plain language principles. This includes text proposed for inclusion on the new pages dealing with orders to stop sexual harassment at work. When the new website is launched, there will be a feedback option contained on each webpage. Interested parties are encouraged to use this function when the new site goes live to provide feedback.

## Orders to Stop Sexual Harassment Benchbook

50. The Commission will publish a Benchbook for orders to stop sexual harassment, to provide employees, employers, representatives and other parties with detailed information about the Commission's role dealing with applications to stop sexual harassment at work under the Fair Work Act.
51. The Benchbook will be similar in content and layout to the current Anti-Bullying Benchbook. It will also include information about the following topics:
- What is workplace sexual harassment?
  - Who is covered by workplace sexual harassment laws?
  - When is a worker sexually harassed at work?
  - Making an application
  - Commission processes
  - Evidence
  - Possible outcomes
  - Costs
  - Appeals
  - Role of the court.
52. Content covering the topic 'When is a worker sexually harassed at work' has been reviewed by the Deputy National Practice Leader and Senior Counsel. The Benchbook will also be reviewed by the Commission's Rules and Benchbook Committee, in line with the Commission's usual process for the publication of benchbooks. The Benchbook reflects proposed changes to the Fair Work Commission Rules 2013. Further information about the proposed rule changes is set out at 56 – 57 of this Report.
53. The Benchbook will be reviewed and updated with relevant case law as the Commission begins to receive applications and make decisions and orders about sexual harassment at work.
54. The draft Orders to Stop Sexual Harassment Benchbook is available on the Commission's website at [www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work](http://www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work). Interested parties are invited to review the benchbook and provide any comments to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Monday 1 November 2021**.



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55. Separate updates will be made to the current Anti-Bullying Benchbook, to reflect the amendments to the Fair Work Act, the expanded jurisdiction and changes in terminology.

## Amendments to the *Fair Work Commission Rules 2013*

56. The *Fair Work Commission Rules 2013* will be amended so that rules that deal with applications for an order to stop bullying at work also deal with applications for an order to stop sexual harassment at work (and applications to stop both bullying and sexual harassment at work). Amendments are proposed to:

- rule 12, which provides that permission is not required for a person to be represented by a lawyer or paid agent in a conference conducted by a Commission staff member in relation to an application for an order to stop bullying at work
- rule 23A, which deals with requirements for lodging responses to applications for orders to stop bullying
- rule 45(2), which requires that if the Commission is to serve a copy of an application for orders to stop bullying, it must omit the part of the application dealing with the application fee
- Schedule 1, which deals with service requirements for forms F72, F73 and F74.

57. A consultation draft and an outline of the proposed changes has been published on the Commission's website at [www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work](http://www.fwc.gov.au/about-us/consultation/stopping-sexual-harassment-at-work). We invite interested parties to send their comments on the proposed changes to the Fair Work Commission Rules to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Monday 25 October 2021**.

## Training

### Training for Commission Members

58. In coming months, Members of the Commission will participate in training facilitated by the AHRC on the nature, drivers and impacts of sexual harassment. This training will involve the completion of online modules as well as a half-day workshop.

59. A number of professional development sessions are also being undertaken by Commission Members, including a session run by Dr Helen Szoke and Ms Kylie Nomchong on the recent *Review of Sexual Harassment in Victorian Courts*.

### Training for Commission Staff

60. Commission staff are undertaking a range of training activities.

61. Staff of the Commission are currently undertaking mandatory online training on sexual harassment (provided by Comcare) and will undertake training on the nature, drivers and impacts of sexual harassment (facilitated by the AHRC). As with the sessions for Commission Members, the AHRC training will involve online modules followed by a half-day workshop.



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62. Some staff recently attended training on responding to allegations of sexual assault, including trauma informed practice (run by the Centre Against Sexual Assault in Victoria). In September, staff including staff conciliators and case managers also attended training on 'Building Trauma Awareness' and 'Managing Wellbeing and Resilience' (facilitated by Blue Knot Foundation).

## Referrals to other organisations

63. The Commission will publish information on its website for users who may require legal assistance, information from another government agency or additional support. Referral links will include 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

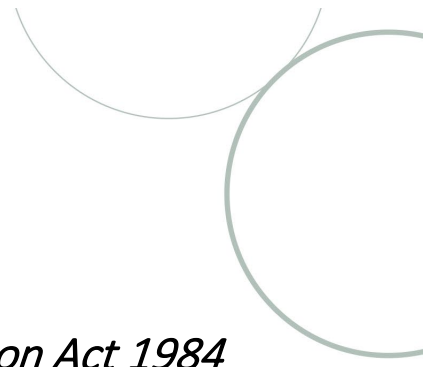
64. The Workplace Advice Service (Service) offers up to 1 hour of free legal advice about an application to the Commission for eligible employees and employers. The Commission coordinates the Service in collaboration with a partner network of legal organisations.
65. The Commission will expand the Service to cover applications for orders to stop sexual harassment at work. The Commission has sought expressions of interest from partner organisations who have experience in providing legal advice to clients about workplace sexual harassment.
66. The Commission will provide further information, support and training to its partner organisations on the expanded jurisdiction and the principles of trauma-informed practice. At this stage, approximately 23 of our 90 partner organisations have self-identified that they have subject matter expertise in the area and are ready to accept referrals from 11 November 2021.

## Stakeholder engagement and consultation

67. The Commission is committed to consultation with relevant stakeholders about implementing the Commission's expanded jurisdiction to deal with sexual harassment at work. Our actions include:
- a. collaborating with the AHRC
  - b. sharing information resources with the Fair Work Ombudsman
  - c. engaging with the Respect@Work Council
  - d. engaging with key stakeholders and peak bodies.
68. Members of the public are invited to comment on anything contained in this implementation report and the draft materials prepared by the Commission.
69. Feedback can be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Monday 1 November 2021**.
70. The Commission is also inviting comment on the proposed changes to the Fair Work Commission Rules (see paras 56-57 of this Report). Feedback on the proposed rule changes is to be sent to [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au) by **Monday 25 October 2021**.



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## 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.



## ATTACHMENT B: Amendments to ss.789FC, 789FD and 789FF– 789FH of the Fair Work Act 2009

### Division 2—Stopping workers being bullied or sexually harassed at work

#### **789FC Application for an FWC order to stop bullying or sexual harassment**

- (1) A worker who reasonably believes that he or she has been bullied or sexually harassed at work may apply to the FWC for an order under section 789FF.
- (2) For the purposes of this Part, **worker** has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.

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.

- (3) The application must be accompanied by any fee prescribed by the regulations.
- (4) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under this section; 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.

#### **789FD When is a worker *bullied at work* or sexually harassed at work?**

- (1) A worker is ***bullied at work*** if:
  - (a) while the worker is at work in a constitutionally-covered business:
    - (i) an individual; or
    - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(2A) A worker is ***sexually harassed at work*** if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
  - (a) the person is:
    - (i) a constitutional corporation; or
    - (ii) the Commonwealth; or
    - (iii) a Commonwealth authority; or



- (iv) a body corporate incorporated in a Territory; or
  - (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;
- then the business or undertaking is a *constitutionally-covered business*.

#### **789FF FWC may make orders to stop bullying or sexual harassment**

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) either or both of the following apply:

- (i) the FWC is satisfied that the worker has been bullied at work by an individual or a group of individuals, and the FWC is satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group;
- (ii) the FWC is satisfied that the worker has been sexually harassed at work by one or more individuals, and the FWC is satisfied that there is a risk that the worker will continue to be sexually harassed at work by the individual or individuals;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to:

- I if subparagraph (b)(i) applies—prevent the worker from being bullied at work by the individual or group; or
- (d) if subparagraph (b)(ii) applies—prevent the worker from being sexually harassed at work by the individual or individuals; or
- (e) if subparagraphs (b)(i) and (ii) apply:
  - (i) prevent the worker from being bullied at work by the individual or group; and
  - (ii) prevent the worker from being sexually harassed at work by the individual or individuals.

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) the FWC is satisfied that:

- (i) the worker has been bullied at work by an individual or a group of individuals; and
- (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an 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 worker to resolve grievances or disputes—that procedure; and



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- (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
- (d) any matters that the FWC considers relevant.

**789FG Contravening an order to stop bullying [or sexual harassment](#)**

A person to whom an order under section 789FF applies must not contravene a term of the order.

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

**789FH 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 under section 789FC.

Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied [or sexually harassed](#) at work, 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 bullying [or sexual harassment](#). This section removes that prohibition.



## ATTACHMENT C: Section 387 of the *Fair Work Act 2009*

### **387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

- (a) the person sexually harasses another person; and
- (b) the person does so in connection with the person's employment.





## ATTACHMENT D: Workflow

