

Submission re Exposure draft of the *Workers Compensation Legislation Amendment Bill 2025*

14 May 2025

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About Women's Legal Service NSW

Women's Legal Service NSW ('WLS NSW') advocates for an end to gender-based violence and for gender equality in Australia. As a state-wide specialist women's legal service, we assist women across NSW by providing legal advice and representation from our trauma informed, holistic legal practice across a range of practice areas including family law, domestic/family and sexual violence, compensation and victims support for victims of crime, discrimination, employment and sexual harassment. We prioritise women who are experiencing deep and persistent disadvantage.

Our specialist programs include:

- First Nations Women's Legal Program, led by First Nations staff and supported by a First Nations Women's Consultation Network,
- Women's Rights, and
- Working Women's Centre.

All three programs focus on responding to legal issues faced by women with a particular focus on responding to gender-based violence and addressing women's safety, economic security and intersecting discrimination.

We use our experience gained from working with over one hundred thousand women and our feminist analysis of social issues and the law to determine where we can make the most impactful and positive change. We advocate for systemic change through policy and law reform, strategic litigation and providing education and training to the legal profession, the community services sector, and other key stakeholders.

Acknowledgments

We acknowledge the Traditional Custodians of the lands on which we work across NSW and on which we live. We pay deep respects to Elders past and present. Is, was and always will be Aboriginal land.

We acknowledge the many women subjected to gender-based violence with whom we work and whose voices and experiences inform our advocacy in the hope for positive change.

Endorsements

This report is endorsed by:

1. Community Legal Centres NSW
2. Employment Rights Legal Service
3. HIV/AIDS Legal Centre
4. Inner City Legal Centre
5. Justice Support Centre
6. Redfern Legal Centre
7. South Coast and Country Community Law
8. Tenants' Union of NSW
9. Welfare Rights Centre
10. Western NSW Community Legal Centre Inc
11. Western Women's Legal Support

Opening comments

We thank NSW Treasury for the opportunity to comment on the exposure draft of the *Workers Compensation Amendment Bill 2025* (NSW) ('the Bill') regarding claims for psychological injury in the workplace.

The Working Women's Centre NSW ('WWC') provides advice, support and representation to women who are experiencing issues related to employment, such as discrimination, sexual harassment, unfair dismissal, underpaid wages or superannuation, or difficulty accessing flexible work arrangements or domestic violence leave. We advocate for gender equality and safety in the workplace and economic security for women throughout NSW and Australia. We provide a variety of education, training and capacity building for stakeholders, including for employers, legal and affiliated professionals, and community members. A significant part of the work of the WWC is responding to sexual violence, including sexual harassment in the workplace.

In principle, we welcome improvements to the way psychological injury is dealt with in NSW workplaces, in particular, focussing on the responsibility and obligations of employers to prevent psychological injury in the workplace, and to prevent the kinds of behaviours and practices, such as sexual harassment, that are likely to cause psychological injury in the first place. However, we are very concerned the proposed reforms in the Bill will have a radical and disproportionate impact on working women in NSW.

It is incumbent on governments to take concrete steps to end sexual harassment by holding perpetrators and employers to account, rather than taking steps to end remedy, restitution and recovery pathways for victim-survivors.

Recommendations

1. We are gravely concerned that the proposed changes set out in the Bill to the way psychological injury is regulated in NSW will have a deleterious and disproportionate effect on women. We recommend the Government reviews the gendered and discriminatory impacts of this Bill, and amends the Bill accordingly.
2. We recommend that any change to the way psychological claims are regulated must be based on research and evidence. Multiple inquiries and reports over the last six years have recommended that the regulatory framework treat claims for psychological injury more, not less, akin to claims for physical injury. We support this approach.
3. We oppose the requirement that employees must have a positive determination from "a Tribunal, Commission or Court" that "sexual harassment, racial harassment or bullying" has occurred prior to making a claim for psychological injury in the workplace stemming from the above. This will present an almost insurmountable barrier, especially for women, to obtain workers compensation for psychological injury.
4. We oppose the raising of the Whole Person Impairment ('WPI') threshold from 15% to 31%, as this will effectively end appropriate and/or ongoing compensation for WPI for psychological injury claims.
5. We oppose the use of the 'reasonable and necessary' standard in place of 'reasonably necessary', on the basis that curtailing the coverage provided for medical and psychological care even once someone has made a successful claim will have a punitive and exiling effect, rather than encourage someone to return to the workplace sooner.
6. We are concerned that these reforms will effect a backwards step in the journey to end sexual harassment and violence in the workplace.
7. We agree and recommend that greater onus must be placed on employers to prevent psychological injury. In particular, to prevent:
    a. sexual harassment in the workplace by placing the onus on the employer for prevention and holding perpetrators to account;
    b. harm and injury resulting from sexual harassment and/or sexual violence in the workplace;
    c. harm and injury resulting from employers' inadequate response to sexual harassment and/or sexual violence in the workplace; and
    d. harm and injury resulting from employers' inadequate response to employees who are experiencing domestic and family violence at home.
8. We recommend, as per the *Respect@Work* report recommendations, workers compensation bodies and WHS regulators should undertake training in the drivers and impacts of sexual harassment and role of gender inequality in sexual harassment to inform their work. Greater resourcing for and rollout of this training needs to be prioritised.[1]

[1] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020), recommendations 36 and 37 <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

9. We recommend that the Bill be amended to include:
    a. compulsory training in the federal sexual harassment Positive Duty and *WHS (Sexual and Gender-based Harassment) Code of Practice 2025*;
    b. that investigations of sexual harassment matters are an allocated priority for SafeWork NSW;
    c. that SafeWork NSW is required to collect and publicly report annually on data, including number and type of complaints made regarding sexual harassment, number of site visits, number of investigations, prosecutions and outcomes;
    d. that SafeWork NSW be adequately resourced to have a dedicated, effective investigations and prosecutions team in relation to sexual harassment in the workplace; and
    e. a Positive Duty under state WHS legislation that is specific to sexual harassment.

Disproportionate effect on women

10. We are gravely concerned that the proposed changes in the Bill significantly narrow the avenues and circumstances through which claims for psychological injury can be made and this will have a deleterious and disproportionate effect on women. This is due to the fact that:
    - the majority of claims for psychological injury in Australia are made by women.[2] We know that "[w]orkplace psychiatric injury is suffered at a disproportionately higher rate by women, particularly in sub-categories of mental stress such as work-related harassment, workplace violence, bullying and work pressure where women suffer injuries at more than twice the rate of men."[3]
    - a not insubstantial portion of those injuries stem from sexual harassment or bullying. Of the approximately 10,000 serious mental stress claims in 2021–22, the highest proportion was attributed to work-related harassment and/or workplace bullying (27.5%), followed by work pressure (25.2%) and exposure to workplace or occupational violence (16.4%)."[4]
    - sexual harassment is rife, and its unabated proliferation in Australian workplaces is a scourge. The Australian Human Rights Commission's ('AHRC') fifth national survey on sexual harassment in Australian workplaces found that:

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[2] "By gender, females accounted for about 58% of work-related mental health claims in comparison with 42% for males on average between 2012–13 and 2016–17." See Productivity Commission, *Mental Health: Inquiry Report* (Report No 95, 30 June 2020) vol 2, 311 <https://www.pc.gov.au/inquiries/completed/mental-health/report>.

[3] Kylie Burns, 'Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions' (2023) 45(2) *Sydney Law Review* 157, 158–9, citing Safe Work Australia, *Psychosocial Health and Safety and Bullying in Australia Workplaces: Indicators from Accepted Workers' Compensation Claims* (Annual Statement, 2021) 2 <https://www.austlii.edu.au/au/journals/SydLRev/2023/7.pdf>. See also Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, September 2018) 8, cited in Burns (n 3) 159, which showed disparity between sexes in sexual harassment in the workforce <https://humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf>.

[4] Safe Work Australia, *Psychological Health and Safety in the Workplace* (Report, February 2024) 8 <https://data.safeworkaustralia.gov.au/sites/default/files/2024-02/Psychological-health-in-the-workplace_Report_February2024.pdf>.

- one in three workers (33%) had experienced sexual harassment at work in the last five years;
- women (41%) were far more likely than men (26%) to experience workplace sexual harassment;
- more than three quarters of harassers were men (77%); and
- the reporting of workplace sexual harassment remains alarmingly low at 18%.[5]

Evidence base to inform change

11. We strongly encourage that any proposals to change the way psychological claims are regulated must be based on rigorous research and evidence, of which there is now a substantial canon.

12. We acknowledge that the past decade has seen an increase in the number of claims for psychological injury, and the corresponding increase in cost for employers, insurers and the Government. Research also shows that the average time away from work for people with psychological injuries tends to be longer than that for people with physical injuries.[6] However, none of the above justifies arbitrarily restricting psychological injury claims. There may be several reasons as to why psychological claims have increased in recent years, such as:

    a. decreasing stigma over mental health in the workplace;

    b. increasing levels of harassment, bullying, violence and workplace pressure; and/or

    c. lack of awareness on the part of employers as to how to work with employees who may be experiencing psychological distress.

13. Furthermore, despite certain preconceptions, getting a claim for psychological injury approved is not easy. Psychological injury claims are much more likely to be rejected than physical injury claims. State and territory workers compensation schemes reject 24–60% of claims related to mental health, compared to 6–10% of physical injury and disease claims.[7]

14. Multiple recent government inquiries and reports have drawn attention to the failure of Australian law, including workers compensation and WHS laws, to adequately recognise, respond to and compensate workplace psychological injury. Many of the recommendations have

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[5] Australian Human Rights Commission, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, November 2022) <https://humanrights.gov.au/time-for-respect-2022>.

[6] Per State Insurance Regulatory Authority, 'Recovery at Work Insider: Psychological Injury Warning Signs' (updated 20 January 2025) <https://www.sira.nsw.gov.au/news/recovery-at-work-insider-september-2024>: "Employers report that they become aware of potential psychological injury by observing the behaviour of their employee and/or employee self-disclosure but that they often feel uncertain or have a lack confidence to raise the topic.

- 43% of workers with a psychological injury felt that they were discouraged from putting in a claim compared to 15% for a physical injury.
- 20% of workers with a psychological injury said they received assistance prior to lodging a claim compared to 60% for a physical injury.
- These factors were associated with delayed recovery and poorer return to work outcomes for psychological injury."

[7] Productivity Commission (n 2) vol 2, 310. See discussion of how workers compensation schemes restrict compensation recovery for psychiatric injury claims: at 312–14. See also Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand: 2021* (Report, August 2022) 204–8 (Table 4.18) <https://www.safeworkaustralia.gov.au/doc/comparison-workers-compensation-arrangements-australia-and-new-zealand-2021>.

urged governments to treat claims for psychological injury with the same gravitas as those for physical injury. The reports include:

a. 2018 review of the model WHS laws ('Boland Review');[8]

b. 2019 report by the Senate Education and Employment References Committee on the mental health and suicides of first responders;[9]

c. 2020 report by the Productivity Commission on mental health;[10]

d. 2021 report of the Royal Commission into Victoria's Mental Health System;[11]

e. 2020 report of the AHRC on the inquiry into sexual harassment in Australian workplaces ('*Respect@Work*');[12]

f. 2022 report of the AHRC on the independent review into Commonwealth parliamentary workplaces;[13]

g. 2022 Western Australian Legislative Assembly Report on sexual harassment in the fly-in, fly-out mining industry;[14] and

h. 2023 Independent Review into SafeWork NSW ('McDougall Review')[15].

15. In 2022, the NSW Government introduced the WHS Amendment Regulations[16] to give effect, in part, to the recommendations of the Boland Review and echo the Model WHS Regulations in setting a new standard and obligations for managing psychosocial hazards in the workplace. Safe Work Australia's Codes of Practice, "Managing psychosocial hazards at work" and "Sexual and Gender-Based Harassment" (issued in 2022 and 2025 respectively), provide practical guidance to employers on their obligations and complement the Positive Duty under section 47C of the *Sex Discrimination Act 1984* (Cth). We are concerned that the current proposed reforms will discourage employers from taking proactive steps to prevent sexual harassment and other psychosocial hazards, effectively winding back years of reform.

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[8] Marie Boland, *Review of the Model Work Health and Safety Laws* (Final Report, December 2018) 34 <https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-final-report>.

[9] Senate Education and Employment References Committee, Parliament of Australia, *The People Behind 000: Mental Health of Our First Responders* (Report, February 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Mentalhealth/Report/>.

[10] Productivity Commission (n 2) vol 2.

[11] Penny Armytage AM, Allan Fels AO, Alex Cockram and Bernadette McSherry, *Royal Commission into Victoria's Mental Health System* (Final Report, February 2021) vol 2 <https://www.vic.gov.au/royal-commission-victorias-mental-health-system-final-report>.

[12] Australian Human Rights Commission (n 1).

[13] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, November 2021) <https://humanrights.gov.au/set-standard-2021>.

[14] Community Development and Justice Standing Committee, Parliament of Western Australia, *'Enough is Enough': Sexual Harassment Against Women in the FIFO Mining Industry* (Report No 2, June 2022) <https://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/EF1DF1A3F5DF74A848258869000E6B32>.

[15] Robert McDougall KC, *The Independent Review of SafeWork NSW* (Final Report, 15 December 2023) <https://www.safework.nsw.gov.au/about-us/mcdougall-review>.

[16] *Work Health and Safety Amendment Regulation 2022* (NSW) <https://www.safework.nsw.gov.au/legal-obligations/legislation/accordians/work-health-and-safety-amendment-regulation-2022>.

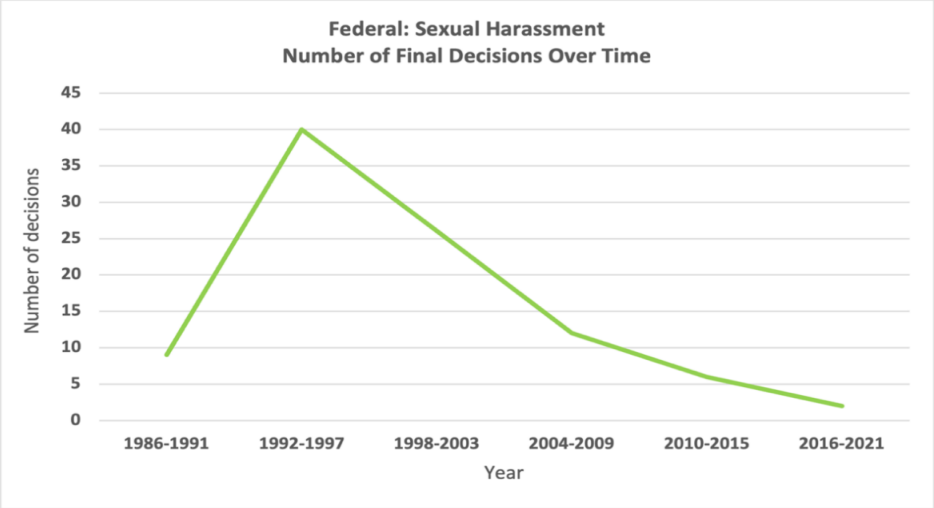
Positive determination prior to any claim

16. We strongly oppose the requirement in Divisions 1AA and 3A of the Bill that employees must have a positive determination from "a Tribunal, Commission or Court" that "sexual harassment, racial harassment or bullying" has occurred before a person can make a claim for psychological injury in the workplace. The requirement presents an insurmountable and unconscionable barrier to claims:

    a. This presents a significant time, cost, psychological and logistical barrier for people who are likely already in a precarious psychological and financial state.

    b. Favourable applicant outcomes are notoriously difficult in the federal bullying jurisdiction. In the 2023–24 financial year, 883 Stop Bullying applications were filed with the Fair Work Commission, yet only one Stop Bullying Order was made.[17]

    c. Similarly, it is hugely difficult to obtain a positive outcome for applicants in sexual harassment complaints, both at state and federal levels. Very few matters proceed to final decision and the Australian Human Rights Commission and its State and Territory counterparts are not fact finding or determination bodies. Requiring a positive determination of sexual harassment or bullying will effectively prevent the vast majority of workers compensation claims for psychological harm from being made in the first place. See the following graph from the Thornton, Pender and Castles study, 'Damages and Costs in Sexual Harassment Litigation'[18]:



[17] Melini Pillay, 'Bullying or Reasonable Management Action: The Stop Bullying Jurisdiction', *Mondaq* (31 March 2025) <https://www.mondaq.com/australia/employee-rights-labour-relations/1604728/bullying-or-reasonable-management-action-the-stop-bullying-jurisdiction?email_access=on>.

[18] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Study conducted for Respect@Work Secretariat, 24 October 2022) 21 (Graph 5) <https://www.ag.gov.au/rights-and-protections/publications/damages-and-costs-sexual-harassment-litigation-doctrinal-qualitative-and-quantitative-study>.

Whole Person Impairment ('WPI') threshold – from 15% to 31%

17. We oppose raising the WPI threshold from 15% to 31% as per new subsections 65A(3) and 38(9), and the cessation of payments for psychological injury after 130 weeks for anyone who does not meet the new threshold (new section 39A). This will effectively end such claims, leaving many women who are never able to work again, let alone socialise, form relationships, leave the house, travel or concentrate, in destitute circumstances.

We note that NSW Treasury has stated that it is basing the new figure on South Australian and Queensland impairment thresholds, but according to Dr Julian Parmegiani, retired psychiatrist who led the design of the Psychiatric Impairment Rating Scale in the late 1990s, **very different criteria is used** and applied amongst different states, and raising the percentage to 31% is **'tantamount to ending the scheme'**.

'Reasonably necessary' to 'reasonable and necessary'

18. We are concerned that replacing 'reasonably necessary' with 'reasonable and necessary' in relation to costs for hospital stays and rehabilitation, along with compensation for domestic assistance in sections 60 and 60AA, may result in inferior healthcare and rehabilitation outcomes. The question must be asked, necessary for what? For optimal wellness, for complete rehabilitation, for a functional quality of life? The use of the stand-alone 'necessary' in particular may result in swathes of healthcare, rehabilitation and domestic assistance not being covered because it is not deemed 'necessary'.

Backwards step – sexual harassment

19. This Bill will in fact disincentivise employers from taking proactive action to prevent sexual harassment and bullying, as they will be armed with the knowledge that any claims for psychological injury under workers compensation will be likely doomed to fail, and/or may not get past the starting blocks.

Prevention requirement for employers – sexual harassment

20. We agree that greater onus must be placed on employers to prevent psychological injury. In particular, to prevent:
    a. sexual harassment in the workplace by placing the onus on the employer for prevention and holding perpetrators to account;
    b. harm and injury resulting from sexual harassment and/or sexual violence in the workplace;
    c. harm and injury resulting from employers' inadequate response to sexual harassment and/or sexual violence in the workplace; and

d. whilst this does not relate to sexual harassment in the workplace, employers also have a responsibility in preventing harm and injury resulting from employers' inadequate response to employees who are experiencing domestic and family violence at home.

21. We recommend that the Bill be amended to include:

    a. compulsory training in the federal sexual harassment Positive Duty and *WHS (Sexual and Gender-based Harassment) Code of Practice 2025*;

    b. that investigations of sexual harassment matters are an allocated priority for SafeWork NSW;

    c. that SafeWork NSW is required to collect and publicly report annually on data, including number and type of complaints made regarding sexual harassment, number of site visits, number of investigations, prosecutions and outcomes;

    d. that SafeWork NSW be adequately resourced to have a dedicated, effective investigations and prosecutions team in relation to sexual harassment in the workplace; and

    e. a Positive Duty under state WHS legislation that is specific to sexual harassment.

Thank you for the opportunity to comment on the Bill. Please don't hesitate to reach out to Emily Gray at emily.gray@wlsnsw.org.au or (02) 8745 6900 should you wish to discuss any aspect of this submission.

Yours sincerely

Women's Legal Service NSW



Philippa Davis

Principal Solicitor