Submission No 49

INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NEW SOUTH WALES

Organisation: Redfern Legal Centre

Date Received: 15 May 2025

Submission on proposed changes to liability and entitlements for psychological injury in New South Wales

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Date: 15 May 2025

Acknowledgment

We acknowledge the Gadigal and Bidjigal Clans, the traditional custodians of the Sydney Coast. We pay respect to Elders, past and present, and express gratitude for the opportunity to work and learn on their lands.

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1. Introduction

1.1 Redfern Legal Centre

Redfern Legal Centre (**RLC**) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in New South Wales (**NSW**) and the second in Australia. We provide free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs - to our local community as well as state-wide. Our specialist legal services focus on international students, employment law, tenancy, credit, debt and consumer law, financial abuse, First Nations justice, police accountability, and we provide outreach services including through our health justice partnership.

1.2 RLC's Employment Law Practice

RLC's Employment Practice provides clients across NSW with free employment law advice and representation.

We are part of the Employment Rights Legal Service (**ERLS**), which is a joint initiative of RLC, Inner City Legal Centre and Kingsford Legal Centre. ERLS provides clients, particularly migrant workers, across New South Wales with free employment law advice and representation. ERLS aims to address and remove the systemic barriers that prevent access to justice and allow for the exploitation of workers across New South Wales.

RLC's Employment Practice provides dedicated advice to workers across NSW who have been subjected to sex discrimination and sexual harassment at work. We also provide advice and representation to international students across NSW as part of RLC's International Student Legal Service NSW (**ISLS**).

We assist migrant workers, First Nations people, people with disabilities, and low-income workers, with a particular focus on ensuring that people living in regional, remote, and rural communities have access to legal resources and assistance. Through our policy, reform and advocacy work, we aim to address and remove systemic barriers that prevent access to justice and allow for the exploitation of workers across NSW.

2. Summary

The changes proposed by the *Workers Compensation Legislation Amendment Bill 2025* (NSW) (**Bill**) to the existing workers compensation scheme in New South Wales (**NSW**) will not make workplaces safer, or workers healthier. The Bill proposes to effectively strip workers of rights in relation to psychological injuries sustained in connection with work.

Concerningly, the Bill seeks to undermine a core principle of workers compensation – as a non-contentious and strict liability scheme. The Bill anticipates workers' compensation coverage only for a select few workers with a psychological injury, significantly reducing the number of workers who will benefit from the scheme. Further, if the Bill is passed, victim-survivors of sexual harassment, racial harassment, and bullying will only be able to access workers' compensation if a court, commission, or tribunal has made a finding in their favour. Such legal processes are inherently contentious, often carry costs risks, and are more often than not, highly traumatising. The Bill will disproportionately affect women and people of colour.

The Bill explains that it is intended to "*improve the effective operation of the workers compensation scheme*". The Bill will not achieve this; it will simply cease the operation of the workers' compensation scheme for most workers who have sustained a psychological injury at work. While the Bill may reduce workers' compensation costs, we anticipate any costs saving will instead be shifted onto injured workers and increase the burden on the legal system more broadly. The NSW Government has alternate options to manage rising premiums for businesses and ensure the workers' compensation scheme is sustainable for generations to come.

We recommend the NSW Government focuses on preventative measures to improve the psychological health of workers across the State.

Recommendations

1. That the NSW Government better resources SafeWork NSW to enforce employers' obligations under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**) relating to psychosocial hazards;
2. That the NSW Government resources SafeWork NSW with a dedicated team to prosecute employers who do not comply with their obligations under the WHS Act.
3. That the NSW Government amends the WHS Act, to allow individuals who have suffered an injury as a result of their employer's failure to comply with the WHS Act, to bring their own claims.

3. Psychological injury

Currently, section 4(a) of the *Workers Compensation Act 1987* (NSW) (**Act**) defines an 'injury' as a "*personal injury arising out of or in the course of employment*". Of note, the definition of injury does not exclude a psychological injury. Sections 9 and 9AA of the Act provide that *any* worker who receives an injury shall receive workers' compensation. This is limited only by section 11A(1) of the Act, which provides that workers' compensation is not payable to workers who sustain a psychological injury that is caused by reasonable action taken by the employer. Reasonable action includes (non-exhaustively) performance appraisals and dismissals, and generally refers to formal workplace processes. This is the **only** exclusion to workers' compensation for workers with a psychological injury.

Section 8A of the Bill proposes to amend the definition of a 'psychological injury' to include only mental or psychiatric disorders that cause "significant behavioural, cognitive or psychological dysfunction." This amendment would unnecessarily impose the requirement that a psychological injury (within the ordinary meaning) be assessed as significant in order to be considered a psychological injury for the purposes of the Act. This proposal is inconsistent with the Government's intention to take a more proactive approach towards psychological injuries in the workplace. The proposal may prevent workers who have suffered moderate or mild psychological injuries from accessing medical treatment, potentially causing their injuries to worsen unnecessarily. In turn, injuries which otherwise were mild or moderate are likely to become more severe, ultimately requiring greater compensation from the scheme.

Recommendation

4. That the NSW Government does not amend the Act to include section 8A of the Bill.

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4. A relevant event

Section 8G(1)(a) of the Bill sets out that compensation will only be payable to a worker who has sustained a psychological injury if "*a relevant event or series of relevant events caused the primary psychological injury*". This will drastically limit the scope of compensable psychological injuries.

Section 8E(1) of the Bill defines a 'relevant event' as meaning:

(a) being subjected to an act of violence or a threat of violence, or

(b) being subjected to indictable criminal conduct, or

(c) witnessing an incident that leads to death or serious injury, or the threat of death or serious injury, including the following—

  a. an act of violence,

  b. indictable criminal conduct,

  c. a motor accident, a natural disaster, a fire or another accident, or

(d) experiencing vicarious trauma within the meaning of section 8H of the Bill, or

(e) being subjected to conduct that a tribunal, commission or court has

(f) found is sexual harassment, or

(g) being subjected to conduct that a tribunal, commission or court has

(h) found is racial harassment, or

(i) being subjected to conduct that a tribunal, commission or court has

(j) found is bullying, or

(k) another event prescribed by the regulations.

The combined effect of sections 8E(1) and 8G(1)(a), is that some of the most common psychological injuries at work will no longer be covered by the workers' compensation scheme in NSW.

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Safe Work Australia reported that in the 2017-18 financial year,[1] workers' compensation claims were accepted in relation to a psychological injury arising from:

(a) work related harassment and/or bullying, in 2,280 cases;

(b) work pressure, in 2,075 cases;

(c) exposure to workplace or occupational violence, in 1,130 cases;

(d) exposure to a traumatic event, in 820 cases;

(e) other mental stress factors, in 715 cases;

(f) other harassment, which includes victims or sexual or racial harassment, in 190 cases;

(g) suicide or attempted suicide, in 20 cases.

If an injured worker has a psychological injury arising from any of the above categories, aside from those at (c), (d) or (g), there would be **no** basis under the proposed changes for a worker to obtain compensation, unless the worker had obtained a judgment from a court, tribunal, or commission that the worker had experienced sexual harassment, racial harassment, or bullying. We address this requirement more in depth below, however even if a worker was able to eventually obtain such a judgment, the proposed scheme would make it impossible for the injured worker to obtain any compensation immediately after sustaining the injury.

We can also infer that a workplace psychological injury arising from:

(a) discrimination on the basis of sex, but that was not sexual harassment;

(b) discrimination on the basis of sexual orientation, but that was not sexual harassment;

(c) discrimination on the basis of gender or gender identity, but that was not sexual harassment;

(d) discrimination on the basis of intersex status, but that was not sexual harassment;

(e) discrimination on the basis of marital or relationship status, but that was not sexual harassment;

(f) discrimination on the basis of pregnancy or potential pregnancy, but that was not sexual harassment;

(g) discrimination on the basis of breastfeeding, but that was not sexual harassment;

(h) discrimination on the basis of family responsibilities, but that was not sexual harassment;

[1] Safe Work Australia, 'Psychosocial health and safety and bullying in Australian workplaces Indicators from accepted workers' compensation claims Annual statement', 6th edition, 2021.

(i) discrimination on the basis of disability;

(j) discrimination on the basis of race, but that was not racial harassment;

(k) discrimination on the basis of age;

(l) unlawful adverse action, within the meaning of the *Fair Work Act 2009* (Cth) (**FW Act**);

(m) a breach of the FW Act, for example, failing to pay a worker correctly,

would not be covered if the Bill passes.

By drastically limiting the causes of compensable injuries, workers will be pushed into pursuing other claims which are always contentious, and often costly, such as personal injury, FW Act, or discrimination claims. This will lead to an unnecessary and costly influx of matters in both the NSW and federal legal systems.

The proposal will also lead to worse outcomes for injured workers. Most workers we assist at Redfern Legal Centre are not Australian citizens, and therefore do not have access to Medicare or Centrelink if they sustain a workplace injury that requires treatment or time off work. Considering the systemic underpayment of migrant workers in NSW and the specific risks to migrant workers in asserting their workplace rights, this proposal is likely to result in many injured workers being untreated and remaining in unsafe workplaces.

Recommendation

5. That the NSW Government does not amend the Act to include sections 8E or 8G of the Bill.

5. Having to prove you were harassed

We oppose the requirement proposed by the Bill that a worker with a psychological injury arising from sexual harassment, racial harassment, or bullying, must obtain a positive determination from "*a Tribunal, Commission or Court*" that:

(a) the conduct did in fact occur;

(b) the conduct was sexual harassment, racial harassment, or bullying; and

(c) the conduct was the cause of the relevant injury,

before they can make a workers' compensation claim.

In the best-case scenario, a victim-survivor of workplace sexual harassment, racial harassment, or bullying, will engage in a protracted and contentious legal process before obtaining necessary medical treatment (or reimbursement for medical costs if the worker is in a financial position to fund it themselves initially) or paid time off work to recover. The proposed amendment may lead to a victim-survivor not pursuing any claims at all, leaving them without medical treatment, and without income. Even the best-case scenario will likely result in a delay in medical treatment and a period of time without income if leave is required.

We address issues associated with each anticipated claim below.

Sexual harassment claims

The Australian Human Rights Commission's (**AHRC**) 2018 National Survey revealed that 39% of women and 26% of men had experienced sexual harassment in the workplace in the preceding five years.[2] Those figures are significantly higher for First Nations people, with 53% of First Nations women and 32% of First Nations men having experienced workplace sexual harassment in the past five years.[3] However, since 1984 there have only been 444 sexual harassment cases brought to court across federal and state/territory jurisdictions.[4] A combination of that data suggests that only 1 in 230,000 victim-survivors of workplace sexual harassment bring proceedings in an Australian court or tribunal. Of those 444 sexual harassment cases, a vast majority of cases do not proceed to a final hearing.[5]

Redfern Legal Centre provides countless advice to victim-survivors of workplace sexual harassment. In our experience, most victim-survivors do not bring sexual harassment claims

[2] AHRC, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australia Workplaces* (Report, September 2018)
[3] Ibid.
[4] Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation' (Study Conducted for Respect@Work Secretariat, Australian National University, 24 October 2022): https://www.ag.gov.au/rights-and-protections/publications/damages-and-costs-sexual-harassment-litigation-doctrinal-qualitative-and-quantitative-study.
[5] Ibid.

because of the fear of being retraumatised throughout the proceeding, retaliation they may face as a result of complaining about the sexual harassment, and the potential costs associated with the proceedings.

The requirement for a person who has been subjected to workplace sexual harassment to first obtain a finding from a tribunal, commission, or court that the relevant injury was caused by conduct that is determined to be sexual harassment creates an onerous hurdle to accessing healthcare and is unnecessary considering the reality that most insurers already conduct fact-finding investigations before accepting liability for such injuries.

This Bill, if passed, will:

(a) disempower victim-survivors of sexual harassment and limit their choices;

(b) effectively presume a worker's injury was not as a result of workplace sexual harassment, until they can prove otherwise;

(c) force victim-survivors into legal system which is:

a. slow-moving and unequipped to deal with an influx of sexual harassment claims (in our experience, conciliation dates from the AHRC are commonly set more than 12 months after the complaint is first made); and

b. often retraumatising and dehumanising for victim-survivors of sexual harassment; and

(d) result in injured workers not receiving medical treatment, which is often life-saving.

Bullying claims

Because the Bill does not set out the proposed framework of how a new bullying jurisdiction would operate in NSW, we can only be guided by insights into the FWC's bullying jurisdiction.

In the 2022-23 financial year, the Fair Work Commission's (**FWC**) relatively new bullying jurisdiction received only 883 Stop Bullying applications, and of those applications, only one Stop Bullying Order was made.[6] In our experience, there is minimal incentive for employees to commence Stop Bullying claims at the FWC.

First, if an employee is successful with their claim, they will not receive any compensation; a Stop Bullying Order will be made, 'ordering' the bully to cease bullying the employee. In our experience, most employees who complain of bullying have already taken informal steps at their workplace to stop the bullying, and yet the bullying persists. The effectiveness of a Stop Bullying Order in addressing bullying has not yet been effectively tested.

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

Second, to be successful in a Stop Bullying Order claim, it must be determined both that there was bullying, and that is an ongoing risk of the bullying continuing. In our experience, most employees who have sustained a psychological injury as a result of bullying are either not attending work (because they are on leave or have resigned), or should not be attending work. It follows then, that the more serious the bullying and psychological injury, the less risk of the bullying continuing, and the less likely a person would be successful in their claim.

Considering the Bill's imposition of a requirement that a Tribunal, Court or Commission find not only that the bullying conduct occurred, but that it also caused the injury, we query how the FWC's current model could be mirrored or utilised effectively to make such findings.

Racial harassment claims

Section 8E(2) of the Bill defines 'racial harassment' in relation to a worker as "*an act that is—*

(a) reasonably likely in all the circumstances to offend, insult, humiliate or intimidate the worker, and

(b) done because of the race, colour or national or ethnic origin of the worker."

The definition appears to mirror section 18C(1) of the *Racial Discrimination Act 1975* (Cth) (**RD Act**), however crucially does **not** exclude an act that is done in public. Under the RD Act, victim-survivors of offensive behaviour on the basis of race that occurs in non-public workplaces, such as private offices, are not entitled to relief. While we support the removal of the requirement that racial harassment be done in private to amount to an offence, the Bill is inconsistent with current law. As a result, a worker who was subjected to racial harassment in a private workplace would not be able to obtain a positive finding under the RD Act, and would therefore be ineligible to obtain workers' compensation in relation to an associated injury. This would leave the worker with only the option to pursue a State-based discrimination claim, which carries a costs risk. While the ordinary rule at NCAT is that each party bears its own costs, the Tribunal may award costs orders in special circumstances.

Recommendations

6. That the NSW Government does not amend the Act to include the new:
    a. section 8F; and
    b. Divisions 1AA and 3A,

    proposed by the Bill.

6. WPI from 15% to 31%

Currently, if a worker sustains an injury at work which results in a permanent impairment, and the impairment is greater than 11% whole person impairment (**WPI**) for a physical injury or 15% whole person impairment for a primary psychological injury, the worker is entitled to receive a lump sum payment as compensation. There is currently no lump sum payment compensation available to workers who suffer a secondary psychological injury, being a psychological injury which arises as a result of a physical workplace injury (for example, a person may develop depression as a result of being immobilised by a physical injury).

The workers' compensation scheme already inadequately compensates workers who have suffered workplace psychological injuries. The percentage of WPI should not vary according to whether the injury is physical or psychological – the assessment requires consideration of the person as a whole, and so the degree to which the injury impairs the person will vary depending on the injury, but the test itself is consistent regardless of the nature of the injury.

According to the NSW workers compensation guidelines for the evaluation of permanent impairment,[7] to determine a person's WPI, you need to calculate both the person's 'Median Class', and their aggregate score. For a psychological injury to be assessed as resulting in WPI of 31%, the person needs to have both a Median Class of 4, and an aggregate score of '17' across the six distinct categories.[8] As an indicator of the seriousness of such a psychological injury, we have provided the 'Class 4' descriptions for each category below:[9]

1. In relation to self-care and personal hygiene: Needs supervised residential care. If unsupervised, may accidentally or purposefully hurt self;
2. In relation to social and recreational activities: Never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room

[7] State Insurance Regulatory Authority, *NSW workers compensation guidelines for the evaluation of permanent impairment - Fourth edition*, (catalogue no. WC00970), 1 March 2021: https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/NSW-workers-compensation-guidelines-for-the-evalution-of-permanent-impairment.pdf

[8] Ibid. (There are six function categories, which then each have a description of the 'Classes' (being, 1-5) within that category. The six categories are: self-care and personal hygiene, social and recreational activities, travel, social functioning, concentration, persistence and pace, and employability. Each category has a description of each 'Class' (being, 1-5) within that category. The Class within each category converts to a 'score' (e.g. Class 1 being 1 score, and Class 5 being 5 scores). A qualified medical professional will assess the person according to the different functions, and indicate which 'Class' they fit into under each category, and score them accordingly. To calculate the Median Class, the two middle scores are averaged. For example, someone whose scores are 1, 2, 3, 3, 4, 5 would have a Median Class of 3, and someone whose scores are 1, 2, 3, 5, 5, 5, would have a Median Class of 4. For completeness, if a score falls between two classes, it is rounded up to the next class. To calculate the 'aggregate score', you add all the scores together.)

[9] Ibid.

or garden when others come to visit family or flat mate;
3. In relation to travel: Finds it extremely uncomfortable to leave own residence even with trusted person;
4. In relation to social functioning: Unable to form or sustain long term relationships. Pre-existing relationships ended (e.g. lost partner, close friends). Unable to care for dependants (e.g. own children, elderly parent);
5. In relation to concentration, persistence and pace: Can only read a few lines before losing concentration. Difficulties following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone, or needs regular assistance from relatives or community services;
6. In relation to employability: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.

Being assessed as having an injury with a Median Class of 4, and an aggregate score of 17, is an incredibly high, and for most, insurmountable bar.

This change will result in significantly and permanently injured workers not being compensated properly.

Retired psychiatrist Dr Julian Parmegiani, who led the design of the Psychiatric Impairment Rating Scale in the late 1990s has said that the proposal to increase the percentage of WPI from 15% to 31% will effectively end the workers' compensation scheme for psychological injuries in NSW. He stated "*At 15 per cent, a person is not functioning in their day-to-day life. You're not able to enjoy yourself, you're not leaving the house, your marriage has broken down, you're not showering or looking after yourself…At 30 per cent, you've basically got to be in an institution, or at home with carers.*"[10]

Recommendations

7. That the NSW Government does not amend the Act to include the:
    a. new section 38(9); and
    b. the amendment of 65A(3) to replace "15%" with "31%",

    proposed by the Bill.

[10] Michael McGowan, 'Experts say mental health payouts may become impossible', 28 April 2025, The Sydney Morning Herald: https://www.smh.com.au/politics/nsw/experts-say-mental-health-payouts-may-become-impossible-20250427-p5luhn.html

7. 260 weeks to 130 weeks

The Bill proposes the halve the current period a worker with a psychological injury can obtain weekly compensation payments. Currently, as set out in section 39 of the Act, an injured worker has no entitlement to weekly payments of compensation after 260 weeks, unless the worker's injury results in WPI greater than 20%. The Bill proposes to amend the Act to include a new section 39A, disentitling workers with a psychological injury from continuing to receive weekly compensation payments after a period of 130 weeks, unless the worker's injury has resulted in the person being assessed as having at least 31% WPI.

In circumstances where the period for weekly compensation payments is not being reduced for workers with a physical injury, the proposal is inconsistent with social, governmental, and legal trends in recent years which acknowledge the importance of psychological health, and the vital role employers place in maintain a safe workplace for employees.

Recommendations

8. That the NSW Government does not amend the Act to include the new section 39A proposed by the Bill.