

Workplace harassment – a health issue: Anti-discrimination cases and work compensation claims

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Abstract

This article describes the adverse health-related effects of racial and sexual harassment elicited from files held by the Western Australian Equal Opportunity Commission where the complainant has nominated sexual or racial harassment as a ground of discrimination. Those results are compared with publicly available data on work-related stress claims obtained from the Compendium of Workers' Compensation Statistics Australia 2004–06, arising from allegations of harassment. Information gleaned from a survey of unreported court decisions (from publicly available legal data bases, such as www.austlii.edu.au and www.ohs.alert.com) is also reviewed.

The purpose of examining this data is to consider the links between various forms of unlawful harassment, workplace stress and the evidence of adverse effect upon worker health. The results of this triangulation of data are consistent with that body of research which shows that workplace harassment can give rise to a range of adverse health outcomes. This paper explores how the inter-relationship of anti-discrimination and workers compensation laws may affect claimant behaviours.

Introduction

A review of workers compensation data for the last decade shows that although the recorded rate of injury and accident has fallen in all Australian jurisdictions, the rate of claims for adverse health conditions arising from workplace stress has continued to rise in almost all jurisdictions.¹ Workers compensation laws in all jurisdictions specifically exclude claims for compensation when the worker's stress-related condition occurs while the worker is subject to a reasonable managerial or administrative direction. The effect of these provisions is that workers who suffer a stress-related condition through their work may not be entitled to workers compensation if the reasonable managerial or administrative direction was a significant stressor. These exclusions differ slightly in detail and are more strictly applied in Queensland and the Commonwealth. Their effect may be that workers who have suffered ill health through workplace harassment are

excluded from claiming workers compensation when other managerial-related stressors are involved.²

A literature review of the effects of workplace harassment on the health of workers shows that many workers suffer significant adverse health reactions to harassment. Further, the Compendium of Workers' Compensation Statistics Australia 2004–06 shows that workplace harassment is responsible for about 11% of all workplace stress claims. The duration rates (absence from work) for workplace stress claims are, on average, twice the normal duration of other claims. Consequently, they are also on average twice the cost of other workers compensation claims.

This paper uses data from Western Australian Equal Opportunity Commission (WAEOC) files and publicly available data on workers compensation to investigate the links between harassment, workplace stress and the evidence of adverse effect upon worker health.

Methodology

Access was obtained to a sample of 2006–08 files from WAEOC. These cases covered alleged instances of sexual harassment, racial harassment and bullying in the workplace. A total of seventy-six WAEOC files were analysed which dealt with claims for workplace harassment.

Files which included claims for harassment were identified from the WAEOC hearing lists. These cases dealt with complaints in relation to sexual and racial harassment. Bullying without evidence of any other unlawful harassment, which is also discussed here, was outside the WAEOC jurisdiction at the time of the study. From the hearing lists the relevant WAEOC files were identified and located from archives. These closed files were examined to obtain key information including the form of harassment, the duration and details of lost work time (if any) and the medical evidence filed in support of the application.

These files related to claims which were resolved during the period 2006–08 although they did not comprise all of the harassment cases dealt with by the WAEOC in this time period. Claims which were pending or in still in progress were not examined. All data

examined remained confidential and claimants cannot be identified from the published data.

There are some obvious limitations with this WAEOC study. First, the sample is relatively small, although it is probably a good sample of the overall number of harassment claims made to the WAEOC. Second, some information in the files was vague or incomplete. This is due to the self-reporting nature of complaints to the WAEOC, that is, complainants provide materials they deem necessary for the prosecution of their case. WAEOC attempts to elicit all relevant details from the complainants but in some cases the effects of the harassment may not be fully described medically, the details of the incident may not be complete or medical evidence may not have been furnished. In addition, 'stress' as a descriptor can be a popular form of claim among those who do not provide medical evidence. They may have indeed suffered negative health effects, but stress is generally not an accurate medical description of a medical condition. Stress is a cause or contributor to a range of symptoms, such as anxiety, depression and adjustment disorders. The main focus of the discussion in this paper is directed towards the correlation between the medical evidence and the terms of settlement. It is not the intention to discuss generally the phenomena of racial and sexual harassment.

In addition to examining WAEOC files, a survey of workers compensation cases obtained by interrogating www.austlii.edu.au (Austlii) and www.ohs.alert.com (OHS Alert) dealing with workplace stress, harassment and related claims was undertaken for the period 2006–08. Cases were extracted from a range of data bases, including Austlii and OHS Alert. Cases were identified by key words such as 'stress', 'workplace', 'depression' and 'anxiety' in various combinations on the Austlii and OHS Alert search engines. In addition, Austlii was searched with key phrases from the specific provisions of the workers compensation legislation to do with claims for work-related stress. Seventy-one cases were located by this method.³ These search engines do not locate claims made to tribunals which do not submit judgements to Austlii. Potentially, there are a large number of decided cases which were not located.

For the purposes of this study, sexual harassment was taken to include any unwelcome or unwanted sexual behaviour which made a person feel offended, humiliated and/or

intimidated where that reaction is reasonable in the circumstance. Racial harassment was taken to include behaviour that offended, humiliated or intimidated and that targeted a person or group because of their race.⁴

Although many definitions have been offered, bullying at work was taken here to include repeated, unreasonable or inappropriate behaviour directed towards a worker, or group of workers, that created a risk to health and safety.⁵ Two main arms of bullying have been identified: personal bullying, which involves direct abuse towards a person, and work-related bullying, which involves using work to bully a person through excessive workloads, criticism or the like.

Literature Review

It is well documented that suffering sexual harassment in the workplace is likely to cause a plethora of adverse health effects⁶. It is acknowledged that harassment poses a serious risk to physical and psychological health and wellbeing. Sexual harassment can also affect individual work performance by contributing to decreased morale, increased absenteeism, reduced productivity, decreased job satisfaction and ultimately job loss, resignations and abandonment of career opportunities.

In the 2003 Australian survey, *Taking It Seriously: Contemporary Experiences of Sexual Harassment in the Workplace*, half of the respondents stated that they had suffered emotionally as a result of sexual harassment.⁷ Studies conducted in the European Union found that 46 to 80% of complainants experienced negative health effects. The same studies found that 11% reported negative impacts on their career.⁸ A Canadian study estimated that between 25 and 75% of women who are harassed experience emotional or physical consequences of harassment.⁹

In one study, women who had experienced high levels of harassment had much worse job-related and psychological outcomes than those who had not experienced any harassment. Those who had only experienced a moderate level of harassment also reported significantly worse outcomes than those who had not been harassed.¹⁰ This shows that harassment does not necessarily have to be particularly severe in order to

result in negative health outcomes. However, higher levels of harassment have been linked to higher levels of distress.¹¹

The effect of being in an environment where sexual harassment is prevalent and witnessed should not be discounted either. One study examined the effect of 'background' sexual harassment and found that indirect exposure may have negative health effects similar to those experienced by the victims of actual sexual harassment.¹² This 'ambient sexual harassment' is negatively correlated with health satisfaction and positively correlated with psychological distress. Such observations may help to explain why employees who do not necessarily suffer adverse health effects from harassment still end up resigning.

Sexual harassment has been clearly shown to severely impact on enjoyment of work and relationships among workers. It reduces job satisfaction, productivity, morale and other indicators of quality of work. Sexual harassment has also been shown to be a possible trigger for alcohol abuse,¹³ which is another serious health issue with a wide range of negative consequences of its own.

The literature supports a finding that a link exists between being harassed in the workplace and suffering adverse health reactions. Further, research shows that these effects can be found across socio-economic and cultural groups, across age and gender groups, at any level of education and in any country in the world. The negative effects of sexual harassment may well be universal.¹⁴

A survey conducted by the Australian Human Rights and Equal Opportunity Commission (HREOC) in 2003 estimated that 28% of Australians aged between 18 and 64 had experienced sexual harassment.¹⁵ A total of 18% of Australians aged between 18 and 64 experienced sexual harassment at work, according to the survey. A follow-up HREOC survey in 2008 estimated that 20% of Australians aged between 18 and 64 had experienced sexual harassment, with a total of 13% of Australians aged between 18 and 64 experiencing sexual harassment at work.¹⁶

The figure of 13% of workers suffering harassment at work can be interpreted to suggest that one in seven employees is likely to face sexual harassment in their working life.

Given the potentially serious health effects of harassment this is a cause for concern. Prevalence rates for sexual harassment differ from study to study. This can be attributed to a variety of reasons including methodology, sample size, definition of harassment and country of study. Table 1 summarises the estimates of prevalence of harassment in the workplace found in eight Australian and overseas studies.

Table 1. Prevalence of harassment in the workplace as reported in eight Australian and international studies

Authors of the study/literature	Location of study	Prevalence of harassment
Schneider, Swan, Fitzgerald ¹⁷	USA	One in two working women experience harassment in their working life.
European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs ¹⁸	European Union	30 to 50% of women and 10% of men have experienced sexual harassment.
McDonald, Backstrom, Dear ¹⁹	Australia	28% of adult Australians have experienced sexual harassment (41% of women and 14% of men). Prevalence rates have been reported as high as 50%.
Willness, Steel, Lee (meta-analysis) ²⁰	Canada	American estimates indicate 40 to 75% of women and 13 to 31% of men experience some form of sexual harassment in the workplace.
ACTU submission to the Senate Legal and Constitutional Affairs Committee ²¹	Australia	Over half of all working women experience sexual harassment.
Glomb, Richman, Hulin, Drasgow, Schneider, Fitzgerald ²²	USA	Between 40 and 68% of female employees experience sexually harassing behaviours in their workplaces.
Richman, Rospenda, Nawyn, Flaherty, Fendrich, Drum, Johnson ²³	USA	Studies have shown substantial rates of sexual harassment: 42% among female federal workers and 53% among female workers in the general population.
Von Roosmalen, McDaniel ²⁴	Canada	A 1993 survey found 2.4 million Canadian women experienced work-related sexual harassment.

Lastly, mention should be made of the cost of sexual harassment. Workers compensation data from Australia (2003–04) shows that the median direct cost of work-related stress claims was \$13 900 for females and \$12 900 for males.²⁵ Harassment claims are included in that category of claims, making it reasonable to surmise that the average cost to employers when a worker makes a workers compensation claim for workplace harassment is about \$13 000 per claim. Given the apparent propensity in Australia of employees to make such claims, sexual and racial harassment claims can be very expensive. There are many costs associated with sexual and racial harassment, including workers compensation, hiring new staff and training new staff, as well as the economic costs associated with harassment, for example, absenteeism and lower productivity. It is estimated that in 1988 the US military lost half a billion dollars a year as a consequence of sexual harassment claims.²⁶ The cost to the US federal government in the early 1990s was estimated to be \$267 million over a two-year period.²⁷ In Canada it is estimated that the nation is losing millions of dollars a year as a result of sexual harassment.²⁸

Bullying is another form of harassment with attendant adverse health effects. According to one study, over three-quarters of the individuals being bullied reported that their health was negatively affected. Twenty-nine per cent reported they were suffering from stress-related conditions and a further 18% specifically reported they were suffering from depression.²⁹ Bullying can have such severe affects on health that bullying victims have significantly higher levels of Post Traumatic Stress Disorder (PTSD) symptoms than people who have been involved in a specific traumatic event. A Scandinavian study found that three-quarters of long-term bullying victims developed PTSD symptoms.³⁰ The World Health Organization found that people experiencing anxiety or depression, which can commonly be caused by bullying, find it harder to do daily tasks than people diagnosed with physical conditions such as arthritis.³¹ Victims of bullying were more likely to use sleeping pills and sedatives than people who have not been targets of bullying.³² In a worst-case scenario, exposure to ongoing bullying can result in psychological trauma similar to that suffered by domestic violence victims and torture victims.³³ Bullying has also been linked to suicidal thoughts and suicide; it has been estimated that one in seven adult suicides is due to bullying.³⁴

The impact of bullying can be very serious for victims. A 2003 survey conducted by the Australian Council of Trade Unions (ACTU) found that 73% of bullying victims felt stressed, 59% felt depressed and 48% had sleeping difficulties. Sixty per cent said it had affected their home and social lives, while 44% said they had to take time off work due to the bullying.³⁵ Statistics from the Victorian WorkCover authority indicate similar results: in 2004, 33% of respondents took time off work due to workplace bullying.³⁶ These figures show that the victims of bullying are likely to suffer adverse reactions and require time off work or are likely to suffer physical and mental symptoms of ill health. UK research shows that between a third and a half of all stress-related illnesses are due to workplace bullying.³⁷ There is also evidence that suggests (as with sexual harassment), being a witness to bullying is harmful to health in its own right.³⁸ The effects of bullying have been found to persist sometimes months and years after the bullying has ceased.

The effects of bullying behaviour on working life include reduced job satisfaction, morale and productivity, and can harm relationships among co-workers and create a hostile environment. It has been suggested that a quarter of bullying targets will leave their jobs, and that a fifth of witnesses will also leave their jobs.³⁹

In Australia, it is estimated that 350 000 people are subject to long-term bullying and that 2.5 million people will experience bullying at some point in their working careers. An ACTU survey conducted in 2000 had 54% of respondents report intimidating behaviour in their workplace.⁴⁰ The Beyond Bullying Association of Australia estimates that 2.5 to 5 million workers have been bullied at some point in their career.⁴¹ The prevalence of bullying differs between studies and is summarised in Table 2.

Estimates suggest that in Australia, the annual cost to the economy of workplace bullying is between \$6 billion and \$13 billion, assuming a conservative prevalence rate of 3.5% of the workforce affected.⁴² If that figure is expanded to a less conservative prevalence rate, the cost to the Australian economy rises to between \$17 and \$36 billion a year.⁴³ These costs have been widely replicated and there is evidence to suggest they are still conservative.

Claims for stress in Australia are expensive – they make up only 7% of the total number of compensation claims yet account for 27% of the total cost.⁴⁴ New South Wales

workers compensation statistics reveal that the average cost to industry for mental disorders (which includes workplace bullying and harassment but does not exclude other causes of mental disorders) is \$20 617 and nineteen lost weeks for each case, amounting to a total cost to the industry of \$33 million a year.⁴⁵

The suggested costs in other parts of the world are also extensive. The UK is estimated to lose 4 billion pounds annually to lost working time and legal fees associated with dealing with bullying.⁴⁶ The UK loses 40 million working days each year according to a report tabled in the UK parliament.⁴⁷ Up to a third of stress-related claims in the UK are due to bullying, at a cost of 1.5 billion pounds. In 1988 it was estimated that the average Fortune 500 company lost \$6.7 million annually as a result of bullying – and the costs can be expected to have risen significantly since then.⁴⁸

Table 2. International literature review of the prevalence of bullying in the workplace

Authors of the study/literature	Location of study	Prevalence of harassment
Turney ⁴⁹	Australia	Bullying has been experienced by half of all workers in Australia.
Cartwright, Cooper ⁵⁰	UK	A 2003 survey for BBC reported one-third of respondents had been bullied. Large scale survey found 10% of respondents had been bullied in the six months leading up to the survey.
Kelly ⁵¹	Australia	UK nurses survey: 17% in year before survey. Other employees survey: 38% had experienced bullying. NSW survey: half had experienced bullying in last year. NZ bank workers: 43% UK personnel and HR managers: 87%
McAvoy ⁵²	Australia	Half of employees will experience bullying in their working lives; up to 38% annual prevalence rates.
ACTU ⁵³	Australia	EU: 9% of workforce is bullied in any 12 month period. Scandinavia, UK, USA suggest up to 38% in any 12-month period.
Lee ⁵⁴	Canada	Incidence rate varies from 4–5% in Norway to 10–20% in UK and USA.

Findings from WAEOC Files

Data from seventy-six⁵⁵ WAEOC files is considered against the above discussion on the prevalence and cost of workplace harassment and bullying. Sixty-two of these files involved sexual harassment and 17 involved racial harassment (three involved both sexual and racial harassment and one of these also included eight other grounds).

Table 3 summarises the number of files where no, mild or severe ill health was claimed and in the cases where ill health was claimed whether partial or substantial evidence supporting the claim was provided. Mild ill health typically involved claims of stress, which as noted in the introduction is often an indicator of a range of medical conditions. Several applicants mentioned loss of confidence and self esteem and nervousness. One case mentioned that a chronic condition had been caused by workplace harassment, but did not elaborate any further on the effects of the condition or what it was. One other case mentioned that the harassment endured was partially to blame for depression. As the mild ill health was often self reported with incomplete medical evidence using the label 'stress' may have been convenient but does not paint an accurate picture of the total effects of the harassment the complainant allegedly suffered.

Table 3. Number of WAEOC files according to severity of ill health and medical evidence

Description	Number
No claimed ill health	32
Mild ill health claimed, partial supporting evidence	20
Mild ill health claimed, substantial supporting evidence	5
Severe ill health claimed, partial supporting evidence	4
Severe ill health claimed, substantial supporting evidence	15
Total cases	76

Cases of severe ill health were more specific and the medical effects of harassment mentioned varied more widely. In one case the complainant had trouble sleeping and was on anti depressants, another was suffering from an unspecified illness and possibly depression, while another two cases were unable to work due to psychological conditions

and were seeing counsellors or seeking other help. Some of the self-reported conditions in the sample of files were:

- depression requiring medication
- distress
- humiliation
- loss of confidence and self esteem
- strained relationships with co-workers and friends and family outside of the workplace
- loss of sleep
- loss of weight and appetite
- headaches and migraines
- fear of workplace
- fear of male bosses
- lack of desire and motivation to work
- anxiety
- sadness and isolation
- anger and frustration.

There is a significant relationship between the severity of the disclosed ill health and the strength of the evidence provided ($P < 0.001$, Fisher's Exact test). When the alleged ill health was mild, 20% (5/25) of the cases were substantially supported with medical evidence. When the alleged ill health was severe, 80% (15/19) of the cases were substantially supported with evidence.

Absence from work due to harassment

The time taken off work can be an indicator of the effect of sexual harassment and its impact on its victims. Victims who suffer severe consequences of sexual harassment would be expected to need more time off work due to adverse health issues. This hypothesis is largely supported by the data. The proportion of cases reporting a positive number of days off work rather than no days off work were significantly related to the

severity of illness claimed ($P < 0.001$, Fisher's exact test). The proportion of cases where days were lost was 2/17 (12%) with no disclosure of ill health, 8/13 (62%) with disclosure of mild ill health and 11/12 (92%) with disclosure of severe ill health. Furthermore, when days off work were required, then mean number of days were 0.8, 11.8 and 48 respective (maximum number of days were 1, 26 and 210 respectively). In the case of severe ill health this mean of 26 days is over one month and the maximum is nearly 10 months off work, reflecting the severity of the disclosed ill health. Hence the severity of ill health is positively associated with both the likelihood of days off work and, when days off work occurs, the number of days off work. Similarly, the proportion of cases where days were lost when the evidence of ill health is weak, 45% (5/11) or strong, 100% (14/14), are significantly different ($P = 0.003$, Fisher's Exact test).⁵⁶

The time lost from work has other impacts on victims. They may lose income, if they are casual employees who do not have benefits such as sick leave. Employees who are entitled to sick leave may be forced to use it in order to overcome the effects of the harassment; a number of files examined showed evidence of this effect. There may also be medical expenses which may not be met if workers compensation claims are not successful, leaving the victims out of pocket.

Employees who resigned (16 cases) or were dismissed (11 cases) could also be considered to have lost time from work, as they would not work for the same employer again. These employees were numerous, making up over one-third of the cases.

There is a significant relationship between the severity of the disclosed ill health and resignation by the applicant ($P = 0.021$, Fisher's Exact test). Of the cases where no ill health was disclosed, 38% (12/32) resulted in a resignation but when the ill health was mild or serious the percentages were only 9% (2/22) and 11% (2/19) respectively. This is consistent with applicants removing themselves from an undesirable workplace, rather than risking ill health. It might also suggest that these applicants have sought or obtained alternative employment, and pursued a case as a form of complaint against their treatment.

The data suggests it is the disclosure of any ill health that is related to a resignation, not the severity of any disclosed ill health. The rates of resignations of 9% and 11% when

mild or severe ill health is disclosed are not significantly different ($P = 1.000$, Fisher's Exact test).

Although the rate of dismissal was lower when severe ill health was disclosed ($1/19 = 5\%$) compared to disclosure of mild ill health ($6/24 = 25\%$) or no disclosure of ill health ($4/32 = 12\%$), these differences are not statistically significant ($P = 0.217$, Fisher's Exact test). It can be concluded that dismissal is not associated with disclosure of ill health or evidence of ill health in harassment claims. Likewise, rates of dismissal are not significantly related to the strength of evidence ($P = 0.209$), with 24% ($6/25$) and 6% ($1/18$) dismissed when presenting weak or strong evidence of ill health.⁵⁷ This may suggest that the prompt for claiming in some cases is the fact of dismissal rather than the state of the applicant's health.

Resolutions of cases

The seventy-six cases that were investigated resulted in eighty-one separate case resolutions. Resolutions refer to the final outcome of the case, and it is possible to have more resolutions than cases or files because for a single action of complaint, the complainant can bring action against the alleged harasser(s) as well as their employers. Usually, actions against harassers and employers are resolved with one resolution, but sometimes separate agreements are reached between the complainant and the alleged harasser(s) and the complainant and their employer.

Thirty-two resolutions were settled (nine privately and twenty-three through conciliation⁵⁸), twenty-four were dismissed (thirteen were withdrawn⁵⁹ by the complainant, thirteen lapsed⁶⁰ and eight were formally dismissed⁶¹) and fifteen were referred to the State Appeals Tribunal (SAT).⁶²

The strength of the evidence of ill health was significantly related to the resolution of a claim ($P = 0.030$, Fisher's Exact test). When strong evidence of ill health was presented, 64% ($14/22$) of the cases were settled, 23% ($5/22$) were dismissed and 14% ($3/22$) were referred to the SAT. When weak evidence was presented, 26% ($7/27$) were settled, 52% ($14/27$) were dismissed and 22% ($6/27$) were referred to SAT. Therefore, substantial

evidence of ill health is associated with more positive outcomes for the complainant. Where there was no disclosure of ill health, 34% (11/32) were settled, 47% (15/32) dismissed and 19% (6/32) were referred to SAT. There is insignificant evidence of an association between the resolution of a case and disclosure of no, mild or serious ill health ($P = 0.956$), whether the case involved days off work ($P = 0.119$), a resignation ($P = 0.615$) or dismissal ($P = 0.328$) of the applicant

The twenty-three cases that were resolved by conciliation typically involved monetary payments and/or apologies from the employers and/or harassers to the victims. Eleven of these involved a monetary payment only, five involved an apology only⁶³ and six involved both monetary payments and an apology⁶⁴. Seventeen conciliations involved an exchange of money. The total payments amounted to \$82,842 for fifteen cases (ranging from \$300 to \$11,100 with a mean of \$5,522), and the other two cases involved paying one week's wages and two weeks' wages, respectively.

Adverse health affects of workplace harassment

The bulk of the cases examined asserted sexual harassment as the grounds for complaint, that is, fifty-nine out of seventy-seven files (76%). Most of the remainder was made up with racial harassment claims. There were also two cases that dealt with the joint grounds of sexual and racial harassment. Forty-four out of the total of seventy-seven files examined (57%) resulted in noticeable adverse health effects (category 4 to 7 cases). Seventy-eight per cent had some adverse effects on their health or their employment. It is noteworthy that while negative impacts on employment do not necessarily directly adversely affect health, the impact of job loss can lead to a change in lifestyle (due to reduced income, temporary upheaval in personal life and possible stress in finding other employment) which can in turn have negative health affects.

Eleven of the seventy-seven cases which did not disclose any evidence of ill health effects nevertheless resulted in resignations from the workplace. Five of the cases claimed to have had no ill health effects but still suffered adversely as they claimed that they were dismissed as a result of being harassed (whether for complaining or alienating people in higher positions). In all, ten people claimed that they were dismissed from their employment as a result of the harassment that they had endured (13%) which, when

combined with the data from those who resigned, suggests that being harassed is not only a threat to one's health but also to one's employment.

There appears to be an inverse relationship between the severity of the effects and the availability of evidence to back up the claims. Cases that had mild health effects numbered twenty-four, yet only one-sixth of them (four) were able to produce medical evidence to support their claims. By contrast, there were twenty cases which led to severe health effects (category 6 and 7 cases), and three-quarters of these (fifteen) were able to produce medical evidence which substantiated their claims. There were forty-four cases that yielded negative health effects, but the split between cases which produced serious health effects and those that produced milder health effects was almost equal. There were twenty-four of the milder cases, but twenty of the more serious cases. This suggests that victims of harassment are just as likely to suffer very serious effects as they are to suffer milder (yet still noticeable and significant) negative health effects. However, these figures do not take into account the individual makeup of the people involved. Some people may be more sensitive to harassment than others, as shown by the fact that one person broke down when harassed just once because it brought back memories of childhood sexual abuse. Nor do the figures account for the duration or intensity of the harassment.

It is significant that forty-four out of seventy-six cases studied resulted in significant health effects for the claimants, a 57% incidence rate. The effects reported varied. At the lower end of the scale, stress was a commonly reported occurrence (though the possibility that this self-reporting was inaccurate should not be discounted). Almost all of the cases in the lower half of health effects showed a disposition towards some form of mental harm: stress, loss of confidence and self esteem. However, few claimants reported physical effects (which were much more noticeable in category 6 and 7 cases).

Effects which were in the upper half of the effects scale (category 6 and 7 cases) were more varied. Physical symptoms as well as the mental symptoms started to become noticeable and more frequent. Depression was mentioned on a number of occasions. Weight loss, chest pains and a lack of sleep were also reported. It is also significant that,

among the examined cases, it was almost as likely (45%) that those who suffered health effects from being harassed would suffer serious ones.

Cost of harassment claims

Of the nineteen cases where employees were able to verify their claims with medical evidence only one was dismissed and even then only one of the actions (against the employer) was dismissed. Of the twenty-three conciliations, seventeen involved monetary payments, and these payments amounted to in excess of \$82 000. This shows that the monetary cost of harassment is also significant to employers and that victims may obtain significant compensation.

It should be noted, however, that the conciliation process may be drawn out and usually involves legal assistance for one or both parties, which may affect the outcome. Some parties have given up conciliation because they feel their employer is stonewalling the process through use of lawyers and the like. Others have given up because the pain of reliving their experiences is too much for them. On the other hand, 15 cases of the 77 were referred to SAT, suggesting that in some cases complainants are either unhappy with the offer or settlement made during conciliation, or that the matters of fact and law are in dispute. In such cases, the process of litigation will continue. It is not possible to establish the level of compensation paid to those cases which went to the SAT without following up these matters with SAT which was outside the scope of this examination.

A comparison of the findings from the WAEOC cases correlates with the results noted in the literature review above. First, the reported health effects, which included mental and physical symptoms, correlate with those suggested by the literature. Depression, anxiety, weight loss, sleep disturbances and stress were just some of the reported outcomes, and these (along with other, more severe outcomes) are found in most of the literature on the subject. In the WAEOC study, 18% of claimants voluntarily left their job. This corresponds roughly with the studies noted above which found that substantial numbers of bullying victims (a form of harassment) left their job. The figure of 57% of cases examined that resulted in noticeable health effects is also similar to the literature's findings that 73% of bullying victims felt at least stressed, and between 46% and 80% of sexual harassment victims suffered emotionally or otherwise from their harassment. The

literature also suggests that harassment need not be particularly severe to give rise to serious health problems. This was supported by the fact that of the cases examined that resulted in health problems there was almost an even split between milder health issues and severe health issues.

Of the seventy-six WAEOC cases examined, twenty-four complainants directly lost some time from work as a result of the harassment (took sick leave). This amounted to 31% and was again roughly close to the literature's findings that 44% of those bullied had to take time off work to recover. Overall, it is clear that monetary compensation was significantly higher when substantial evidence of ill health was presented ($P = 0.020$). When substantial evidence was presented, 62% (8/13) of claims resulted in monetary compensation while the corresponding percentage was only 24% (10/41) when partial or no evidence was provided.⁶⁵ Importantly, the presence of monetary compensation was not significantly associated with disclosure of ill health ($P = 0.504$), days off work ($P = 0.106$), dismissal ($P = 0.372$) or resignation ($P = 0.719$) of the applicant.

Statistical Background to Workers Compensation Claims for Mental Stress

As was noted in the introduction, there is, in Australia, an inter-relationship between workers compensation claims for stress-related conditions and claims made for workplace harassment. This part of the paper explores that relationship. The discussion includes reference to the most currently available national data in relation to workers compensation and some reflections on the survey conducted by the authors of this paper of litigated work-related stress claims. Regrettably, this data does not entirely align with the periods of study in relation to the information collected from WAEOC. However, it is submitted that sufficient trend information emerges from the workers compensation data to afford some useful comparisons.

In Australia the annual number of workers compensation claims decreased by 13% between 1996–97 and 2003–04 (the most current national data available at the time of writing).⁶⁶ However, that same data, collected by the Australian Safety and Compensation Commission under the National Online Statistics Interactive (NOSI), shows a general trend of increased workers compensation claims for stress-related conditions and mental disorders, as well as an increased duration of claims and claims

costs. For example, the number of claims for mental disorders in Australia increased from 5700 in 1997–98 to 8260 in 2004–05. In 1996–97 mental stress claims represented 3% of all claims; by 2004–05 they represented 6% of all claims. As a consequence, mental stress claims rank sixth in the hierarchy of injury and disease mechanisms.⁶⁷ In other words, this represents not just a rise in claims but a proportionate rise in mental health disorder claims as against all other workers compensation claims.⁶⁸

Mental stress claims have significantly higher duration rates than all other forms of workers compensation claims, with over twice the average time absent from work. NOSI classified the causes of mental stress into a number of mechanisms, including exposure to a traumatic event or occupational violence, harassment, work pressure, workplace bullying, suicide or attempted suicide and other factors. These classifications are generally consistent with academic literature which notes the stressors may be physical or psychological and may affect physical and psychological health. NOSI data establishes that approximately 22% of mental stress claims relate to harassment in the workplace.⁶⁹

Gender is a significant determinant of work-related stress. Statistically, while men generally dominate work injury claims, women make up the majority of mental stress claims with 59% of all such claims. Table 4 illustrates the predominance of women in relation to claims arising from work pressure, harassment, other stress factors and exposure to workplace violence, while men have greater statistical presence in relation to exposure to traumatic events and suicide claims.

Table 4. New mental stress claims: number and percentage by gender and sub-category (2003–04 and 2004–05)⁷⁰

Category of mental stress	Male (No.)	Female (No.)	Total	Female (%)
Work pressure	2740	4075	6815	59.8
Harassment	1205	2315	3520	65.8
Other mental stress factors	1140	1425	2560	55.6
Exposure to workplace violence	1045	1485	2535	58.7
Exposure to traumatic event	595	385	975	38.2
Suicide or attempted suicide	40	15	50	25.5
Total	6760	9695	16 455	58.9

These differences can be explained having regard to the different nature of work for men and women. The predominance of women in the categories of work pressure, harassment, other mental stress factors and exposure to workplace violence correlates with the tendency of women to be in less powerful positions than men and performing work often under the management of men. The 5 below shows the differences between claims by women and men across industries and points to particular concerns in Health, Education and Personal Services industries.

Table 5 New mental health stress claims: number, percentage and frequency rate by gender and industry (2003–04 and 2004–05)⁷¹

Industry	Males (No.)	Females (No.)	Total	Percentage of overall claims	Frequency rate: Males ⁷²	Frequency rate: Females
Health and community services	805	2675	3480	21.11	122	135
Education	920	2145	3065	18.6	116	151
Personal and other services	1050	750	1795	10.9	177	181
Government administration and defence	605	840	1450	8.8	74	120
Retail trade	460	800	1260	7.7	23	51
Property and business services	450	640	1090	6.6	20	44
Transport and storage	805	210	1015	6.2	70	67
Manufacturing	550	340	895	5.4	20	43
Accommodation, cafes and restaurants	270	360	630	3.8	42	57
Finance and insurance	130	460	585	3.6	22	77
Wholesale trade	200	170	370	2.2	19	48
Construction	240	50	285	1.7	13	29
Cultural and recreational services	105	120	225	1.4	31	42
Communication services	50	65	115	0.7	14	38
Mining	55	15	65	0.4	15	34
Agriculture, forestry and fishing	30	35	65	0.4	6	24
Electricity	45	15	60	0.4	19	36
Total claims ⁷³	6760	9695	16 455	100.00	40	87

The high proportion of claims in relation to mental stress workers compensation claims for harassment correlates with the higher proportion of women who lodge claims with

anti-discrimination tribunals for the various gender-based forms of harassment. Women are three times as likely to have a claim attributed to harassment and twice as likely as men to have a claim attributed to work pressures.⁷⁴ Women are dominant in the caring professional as nurses and police, in education as teachers (particularly in primary schools) and in customer services (particularly health services and child care). These three forms of employment rate highest in the frequency rates for female workers and account for about 66% of new mental health stress claims for women.⁷⁵ At the other end of the scale where men figure more prominently the difference can probably be traced to the tendency of men to dominate in areas such as construction, agriculture, electricity, gas and water, road and rail transport where the nature of the tasks suggests a greater likelihood of witnessing accidents such as building collapses, machinery malfunctions causing bodily harm and road and rail accidents.

Against this background some consideration of the data collected in relation to litigated workplace stress claims is warranted. As noted above in the introduction and discussion of methodology, an attempt was made to locate litigated workplace stress claims using two key legal data bases to locate unreported decisions. This approach is limited by the fact that only those cases entered into the data bases are available. Many cases decided in state and territory tribunals are not supplied for uploading because many workers compensation tribunals either do not refer written decision to the major databases or as in the case of Western Australia only publish those decisions on state based WorkCover authority websites making collection of data extremely difficult.

These limitations however do not prevent some interesting parallels emerging when comparing this data with that published by NOSI. The following data set out in Table 6 below was collected from the legal data bases previously mentioned. Sorting of cases was based on the stressors identified in the literature reviews noted above. The sorting was based on the allegations made upon claiming although not all claims successfully established these allegations. Large numbers of claims included issues relating to management actions which are discussed further below.

Table 6. Cases identified as claims by workers alleging workplace stress-related conditions⁷⁶

Year of decision	Workplace violence	Exposure to trauma/suicide	Work pressure/ adjustment disorder	Harassment or bullying	Reasonable/ Unreasonable management actions	Cases identified
2006		3		3	2	13 ⁷⁷
2007	2	6	1	8	8	27 ⁷⁸
2008	1	1	10	8	11	31

As seen from this raw data, a considerable number of claims relate to issues arising out of what have been broadly classified as ‘management actions’. In all jurisdictions workers may claim compensation for workplace stress-related conditions where it is established that they have suffered injury within the meaning of the relevant legislation. However, all jurisdictions exclude, in one form or another claims for stress-related conditions which arise through the reasonable exercise of management directions, instructions or actions. Not surprisingly, these provisions are a focal point for litigation in relation to the legal interpretation of the particular sections as well as are the determination of the facts which are asserted by the employer to give rise to what amounts to a statutory defence to a workplace stress claim. The cluster of cases in this category are those where the employer has raised this defence, although not always successfully.

Another significant group of cases is grouped under the category of harassment and bullying. There were no cases in the sample which expressly alleged (unlawful) sexual or racial harassment. Harassment in this sense is used in its broadest sense to include behaviour which is persistently overbearing, causing harm. Bullying claims have been included because in some cases there are explicit allegations of bullying. Not all allegations are made out and in some cases, although allegations are made out, the employer is able to make out a defence of reasonable management action. Workload pressure cases include any claims which do not explicitly claim any of the other categories in Table 6.

It is probably unsafe to place too much emphasis on this raw data, given the small sample and the obvious weaknesses in collection. However, it is possible to assert with some confidence that a significant proportion of workplace stress cases will involve allegations

of interactions between staff (including supervisors) which are overbearing or unfair in some way. In many cases the litigation of such claims is drawn out and expensive and involves presentation of cases which often resemble industrial matters. Further, it also appears that women will be statistically dominant in the health, education, personal services and government administration sectors.

Specific Workers Compensation Issues

When drawing some links with the WAEOC and NOSI data, it is important to note that under the Commonwealth and Queensland workers compensation legislation the application of the 'management action' defence is of considerable significance in relation to harassment and bullying claims. In these jurisdictions the courts have interpreted the management action defence broadly.

In Queensland a line of cases suggest that when the employer is able to show the presence of reasonable management action as a significant stressor, the workers claim is excluded even if the worker is able to point to other work-related stressors, and even if those other stressors are significant. In *Q-Comp v Education Queensland*⁷⁹ it was held that it is no longer possible to accept an injury as compensable if it is caused by multiple stressors where at least one or some of those stressors are through reasonable managerial action. Once an injury is in any way touched by reasonable management action, by reason of section 32(5) of the *Workers Compensation and Rehabilitation Act 2003* (Qld), it is completely non-compensable.

It follows that mixed aetiology claims cannot be sustained under these provisions. Likewise, under the *Safety, Rehabilitation and Compensation Act 1988* (Cwlth) sections 4 and 14 have been held in *Hart v Comcare*⁸⁰ and *Wiegand v Comcare (No. 2)*⁸¹ to preclude any claim where injury results when reasonable management action is one of the stressors, even in a multi-causal claim. The only suggestion that the effects of these cases may have been mitigated appears in the Queensland decision of *Gillam v Q-Comp*⁸² where Swan DP applied a 'global' approach to the assessment of the management actions. It was held that repetitive blemishes could over time be considered as representing unreasonable management action so as to negate a defence of reasonable management action. Under the Commonwealth provisions the Administrative Appeals

Tribunal in *Caldwell v Comcare*⁸³ declined to find that the defence of reasonable management action applied because on the facts the management action could not be seen as a material stressor. The *Gillam* case suggests that some legal distinctions might be made to avoid the hard effects of these preclusions. The *Caldwell* case suggests that the assessment of reasonable management action as a stressor might be downplayed in some instances.

It follows that notwithstanding the mitigating effects of *Gillam* and *Caldwell*, in Queensland and under the Commonwealth workers compensation provisions it is possible for a worker suffering stress-related illness through the harassment and bullying of a co-worker to be disentitled to compensation if that stressor coexists with stress arising from a reasonable management action. This might occur, for example, where the management action is to transfer the worker to another workplace consequent upon allegations of harassment and the transfer itself gives rise to stress. That said, where harassment is established as a stressor, in most circumstances this will be indicative of unreasonable management action, either because the employer has been directly implicated or indirectly through failing to take action to prevent harassment. Such was the situation in *Fairley v Q-Comp*⁸⁴ where the employer's defence of reasonable management action as a material stressor failed because Swan DP held that the worker's supervisor was 'controlling, aggressive, domineering and confronting' and consequently had acted unreasonably. Clearly, this worker had been bullied and as the stress-related condition arose from this action she had a compensable claim.

Conclusions

What the excursus in relation to the discussion of workers compensation claims suggests is that in the first instance workers who are subject to harassment and bullying at work probably have valid workers compensation claims and will only be excluded if the reasonable management action defence can be made out. The best prospects of establishing such a defence are in Queensland and the Commonwealth, but there are suggestions that other Australian jurisdiction may follow the lead of the Commonwealth in particular by legislating to toughen there so called stress-claim provisions.⁸⁵

Whether workers compensation claims are made either successfully or unsuccessfully, there remains an alternative forum of the anti-discrimination tribunals in each jurisdiction. Those tribunals are unaffected by exclusions which affect the workers compensation jurisdictions and can award damages where the evidence of harassment is properly made out, whether or not there is evidence of reasonable management action or direction. Naturally, harassment of a worker could not ever be a reasonable management action or direction. Thus workers may have cumulative claims for workers compensation as well as damages because the award of workers compensation does not take account of pain and suffering or humiliation caused by harassment. This alternative form of damages can be sought from the anti-discrimination tribunals. In short, while an employer may be able to avoid some workers compensation liabilities it is likely that at least some liability will attach as a claim for discriminatory action.

It follows that it is short-sighted to focus on harassment only as an issue of discrimination. The effect on the worker who has been subject to discriminatory action by harassment is likely to generate considerable costs to an employer as a health issue as well. The survey of unreported decisions which were identified as claims by workers alleging workplace stress-related conditions noted in Table 6 shows that the bulk of litigation for stress-related claims concerns the issue of reasonable management action, harassment and bullying. Often, as in the case of *Fairley* noted above, the facts disclose that the employer's unreasonable management action was a form of bullying, which gives rise to a dual claim for workers compensation and/or harassment for a worker. This suggests that the focus on the exclusion of workers compensation claims based on reasonable management action may be wrong-headed. As the cases show, there is a reasonable prospect that a worker may succeed against this defence. Even when the worker is not successful the employer is still, in many cases, responsible for attempting to rehabilitate the worker somehow. This is so because the vast bulk of stress-related claims occur in public service industries where workers have rights to continuing or long-term employment and termination of the worker to remove ongoing liability is not an option (Table 5).

Finally, to link the first and second parts of this paper, the WAEOC files disclose that workers who support their claims for harassment with medical evidence have a greater chance of resolving their claims. There is also a correlation between those workers who resign and the absence of medical evidence, which suggests that employers who hope to achieve a cheap resolution of claims through obtaining the resignation of a worker may in fact misjudge the situation and provoke a form of claim for workplace harassment. The case has also been made to establish that mental stress in the workplace caused by harassment is predominantly a women's health issue. In the end result, harassment at work is also a health issue for it relates to issues of power, gender and ethics.

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⁵² McAvoy B R (2005) 'Workplace Bullying – the facts' 32 *New Zealand Family Physician* 127.

⁵³ Australian Council of Trade Unions (2003) *Occupational Bullying in Australia* See <http://www.actu.asn.au/OccupationalHealthSafety/Campaigns/Bullying/OccupationalBullyingInAustralia.aspx> Retrieved 19 January 2009.

⁵⁴ Lee R T (2005) 'Dealing with Workplace Harassment and Bullying: Some Recommendations for Employment Standards of Manitoba' See http://www.gov.mb.ca/labour/labmgmt/emp_standards/submissions/lee.pdf Retrieved 19th January 2009.

⁵⁵ An additional WAEOC file involved a case of bullying, however at the time the file was lodged WAEOC did not have jurisdiction to deal with bullying claims so it was referred to the Western Australian Industrial Relations Commission for consideration under the *Occupational Health and Safety Act 1984* (WA).

⁵⁶ This is not surprising since days off work will tend to be documented and hence part of the documentation of ill health. If the cases where no ill health was disclosed are included as no evidence of ill health, this 45% becomes 25% (7/28), which is still significantly different to the 100% (P < 0.001, Fisher's Exact test).

⁵⁷ The rate of dismissal when there is no claimed ill health (4/32 = 12%) does not differ significantly from these rates.

⁵⁸ Conciliation is a process whereby WAEOC mediates between the two (or sometimes three) parties involved and attempts to come to a legally binding but confidential agreement between the parties, without resorting to legal action. Agreements may form any basis, but monetary payments and apologies are common.

⁵⁹ Complainants may withdraw their complaint at any time.

⁶⁰ Should the WAEOC lose contact with the complainant for a significant period of time, their complaint may lapse and thus the matter can be deemed closed.

⁶¹ After investigating a case, the Commissioner has the discretion to dismiss cases which are frivolous, vexatious, misconceived on the part of the complainant, or otherwise not in breach of the *Equal Opportunity Act*. These seven cases exclude an eighth case which was dismissed by the Commissioner but was appealed to SAT by the complainant.

⁶² SAT is the State Administrative Tribunal, to whom the Commissioner can refer cases that are unable to be conciliated or otherwise determined by WAEOC. Individuals who are unsatisfied with WAEOC ruling on their case may also appeal to SAT. Indeed, these 15 cases include one which was dismissed by the Commissioner but was appealed to SAT by the complainant.

⁶³ One of these five cases also involved the employer imposing a penalty on the harasser.

⁶⁴ One of these six cases also involved an undertaking for the harassers to undergo Equal Opportunity Training.

⁶⁵ This result is confirmed if the value of compensation is analysed instead of the presence of monetary compensation (P=0.016 Mann-Whitney test).

⁶⁶ Compendium of Workers' Compensation Statistics Australia 2004–05 (May 2007) 'Feature Article Part E: The Mechanism of Mental Stress' See http://www.ascg.gov.au/NR/rdonlyres/A6032DB3-4F7B-4834-9D1E-C21E14605F04/0/PartEFeatureMentalStress_WorkCompStats0405.pdf Retrieved 3 November 2008 p. 71.

⁶⁷ Compendium of Workers' Compensation Statistics Australia 2005–06 (June 2008) 'Part A: Summary of Serious Claims' See <http://www.safeworkaustralia.gov.au/NR/rdonlyres/56B40AF3-C5E8-4D7B-8CFA-ED91966DFE6F/0/Compendium200708.pdf> Retrieved 3 November 2008 pp. 14–5.

⁶⁸ Compendium of Workers' Compensation Statistics Australia 2004–05 (May 2007) *op cit* p. 73.

⁶⁹ *Ibid* p. 72.

⁷⁰ *Ibid* 3 November 2008 p. 73.

⁷¹ *Ibid* p. 77. Shaded areas highlight the prevalence of stress claims in particular industries and dominance of women as claimants.

⁷² Frequency rate is calculated as the number of claims per 100 million hours worked. It removes confounding rate for part-time work among women.

⁷³ Includes some claims where industry is not stated.

⁷⁴ Compendium of Workers' Compensation Statistics Australia 2004–05 (May 2007) *op cit* p. 73.

⁷⁵ Compendium of Workers' Compensation Statistics Australia 2004–05 (May 2007) 'op cit p. 76.

⁷⁶ Such conditions would include, for example, anxiety, depression, PTSD and adjustment disorders.

⁷⁷ Four cases dismissed for lack of evidence.

⁷⁸ Two cases dismissed for lack of evidence.

⁷⁹ [2005] QIC 46; 176 QGIG 492.

⁸⁰ (2005) 145 FCR 29.

⁸¹ (2007) 94 ALD 154. Finn J noted in *Wiegand* that he was bound by Hart although he thought its effect was harsh.

⁸² (WC/2007/38) 25 January 2008.

⁸³ [2008] AATA 450.

⁸⁴ (WC/2007/72) 28 March 2008.

⁸⁵ This seems to be the case in Victoria for example with a proposal in the early part of 2010 to amend s82(2a) of the *Accident Compensation Act 1985*, by adding additional preclusions described as "contemporary management practices" which would most likely make claims more difficult for workers