

## DRAFT CODE OF PRACTICE

### Sexual and gender-based harassment

#### Public consultation

The draft Code of practice, *Sexual and gender-based harassment*, has been developed by the Work Health and Safety Commission.

The Code provides guidance on how to manage health and safety risks arising from sexual and gender-based harassment at work. It contains material adapted from Safe Work Australia's *Model code of practice: Sexual and gender-based harassment* and incorporates changes in practices brought about by the adoption of work health and safety (WHS) laws and the introduction of regulations for the management of psychosocial risks.

The Code should be used by persons conducting a business or undertaking (PCBUs) and others who have duties under the WHS laws to manage the risks of sexual and gender-based harassment in all workplaces across Western Australia.

The *Work Health and Safety Act 2020* (WHS Act) provides for the approval, variation and revocation of codes of practice by the Minister for Industrial Relations. Under section 275 of the WHS Act, the Minister may only approve a code of practice if it was developed by a process involving consultation between the unions and employer organisations.

The Work Health and Safety Commission invites public submissions on the draft Code of practice: *Sexual and gender-based harassment*.

Unless advised by the submitter, all submissions may be collectively made available to the public in a consultation summary. Published submissions will be verbatim with the submitter listed.

**Submissions close: 5.00 pm WST, Friday 5 December 2025.**

*Please use this cover sheet and feedback template to submit your comments to [wspublications@lgirs.wa.gov.au](mailto:wspublications@lgirs.wa.gov.au).*

## Section 1: Submission details

Full name:

Position:

Organisation:

Email:

Telephone number:

### Internet publication

Public submissions may be published in full on the website, including any personal information of authors and/or other third parties **contained in the submission.**

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## Section 2: Feedback

### 1. General comments and suggestions

## 1. About Circle Green

- 1.1 Circle Green Community Legal (**Circle Green**) is a community legal centre in WA providing statewide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people from marginalised communities and who face disadvantage in gaining access to justice. You can find more information about Circle Green's services on our website: <https://www.circlegreen.org.au/>.
- 1.2 Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, information, referrals and education on state and national workplace law, including workplace discrimination and harassment. This means Circle Green has expertise in providing legal assistance to WA workers targeted by discrimination and harassment in connection with their work.
- 1.3 Circle Green delivers the Workplace Respect Project (**WRP**) in Western Australia as part of the Commonwealth Government's response to the Respect@Work Report, which identified the prevention of and response to workplace sexual harassment as an urgent priority due to the widespread and pervasive nature of its occurrence in Australian workplaces. The WRP seeks to address workplace sexual harassment by working across the spectrum of prevention, as well as providing confidential free legal advice to people who've been targeted by workplace sexual harassment and discrimination.

## 2. Focus of this submission

- 2.1 We commend the Department of Local Government, Industry Regulation and Safety (**DLGIRS**) and WorkSafe Western Australia (**WorkSafe WA**) for their ongoing work in addressing the issue of psychosocial hazards, including workplace sexual harassment, at work.
- 2.2 We are specifically pleased to see the implementation of Recommendation 35 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces report* (**Respect@Work report**), namely the development of a Code of Practice on sexual harassment. This follows the recent introduction of the Federal *Work Health and Safety (Sexual and Gender-Based Harassment) Code of Practice 2025* (**Federal Code**) in March 2025, on which we understand the Western Australian *Draft Code of Practice: Sexual and gender-based harassment* (**Draft Code**) is modelled.
- 2.3 We thank DLGIRS and WorkSafe WA for the opportunity to provide feedback on the Draft Code. Our feedback will focus on the importance of specifically and adequately addressing workplace sexual harassment in the Draft Code. As we do not deliver services relating to work health and safety laws, we will not comment on operational detail or propose specific wording.

## 3. Feedback

### Definition, examples and impact of workplace sexual harassment

- 3.1 Section 1.1 of the Draft Code defines workplace sexual harassment and gender-based harassment. Whilst the Draft Code later identifies that harassers can include managers, co-workers, customers, clients, patients, etc., this should be made clearer earlier in the section. It should also be made clearer that "repeated" behaviour can involve one, or multiple harassers.
- 3.2 We recommend that Section 1.1 clearly states that:

- (a) workplace sexual harassment can be one-off, or several incidents involving one or multiple harassers; and
  - (b) harassers can include managers, co-workers, customers, patients, students, visitors and other third parties.
- 3.3 Further, it should be clearly emphasised in section 1.1 that a single incident of workplace sexual harassment is still unlawful and actionable under State (*Equal Opportunity Act 1984* (WA), and *Industrial Relations Act 1979* (WA) (**IR Act**)) and federal (*Sex Discrimination Act 1984* (Cth) (**SD Act**), and *Fair Work Act 2009* (Cth) (**FW Act**)) legislation. It should also be noted that sexual harassment is defined as serious misconduct under the FW Act and *Fair Work Regulations 2009* (Cth).<sup>1</sup>
- 3.4 Section 1.3 of the Draft Code identifies particular groups that may be more likely to be targeted by workplace sexual harassment. First, we recommend that the wording in this sentence be changed to “affected” or “targeted” by sexual or gender-based harassment. We adopted this specific wording after careful consideration and consulting persons with lived experience of sexual harassment.
- 3.5 The Draft Code also defines sex- or gender-based harassment a second time in Appendix A. This definition is more expansive than the earlier definition in 1.1. The Draft Code should be amended so that the two definitions match.
- 3.6 We also recommend the Draft Code specifically address the fact that that forms of marginalisation create power imbalances in the workplace (and in society) that drive sexual harassment. The current commentary on intersectionality is insufficient as there is no further discussion of *how* workplaces can mitigate the risks posed by power imbalances.
- 3.7 We recommend that the Draft Code include the following:
- (a) Recognition of power imbalances and misuse of power as risk factors for workplace sexual harassment, drawing on evidence from the Respect@Work report and the ‘*Enough is Enough*’ *Sexual harassment against women in the FIFO mining industry* report (**Enough is Enough report**), and specifically identifying groups of marginalised workers (e.g. young workers, women and gender-diverse workers, Aboriginal and Torres Strait Islander workers, culturally and linguistically diverse workers, workers with a disability).
  - (b) Guidance on how organisations can mitigate the risks posed by power imbalances, such as implementing policies that protect vulnerable workers, providing training for managers on how to recognise and address power dynamics, and ensuring that workers have access to safe, confidential and anonymous reporting options. We acknowledge that the Draft Code mentions the importance of policies and of training managers to model appropriate behaviour and respond to risks and incidents, but this appears too late in the document and is in our view not directive enough.
  - (c) Commentary on the intersectional nature of sexual harassment, which often co-occurs with other forms of discrimination such as racial or sex-based harassment. The Respect@Work report and the Enough is Enough report both emphasised that women from marginalised groups, such as Aboriginal women or LGBTQIA+ individuals, are at increased risk of harassment and often face additional barriers to reporting. Again we acknowledge intersectionality is mentioned in the Draft Code but in our view it must incorporate more comprehensive strategies for addressing the unique vulnerabilities faced by these groups, including targeted training and support systems that consider the intersectional nature of harassment.

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<sup>1</sup> *Fair Work Act 2009* (Cth), s 12; *Fair Work Regulations 2009* (Cth), reg 1.07(c).

### Identifying sexual and gender-based harassment

- 3.8 Section 3 of the Draft Code discusses how to identify sexual and gender-based harassment in the workplace, including where work tasks and design of work, the physical work environment, and work and behaviours, may indicate a greater risk of sexual and gender-based harassment.
- 3.9 One significant omission from this section is commentary on the elevated risks for fly-in-fly-out (**FIFO**) workers in the resources and construction sectors. The Enough is Enough report exposed the alarming prevalence of workplace sexual harassment particularly in the FIFO mining industry in WA, and therefore it would be inappropriate to have a Draft Code on workplace sexual harassment without *either*:
- (a) a detailed discussion of the prevalence of workplace sexual harassment in the resources and construction sectors, drawing on evidence from the Respect@Work report and the Enough is Enough report, and emphasising how the characteristics of FIFO work arrangements increases the risk of sexual harassment; or
  - (b) a specific reference to the separate Code of Practice relating specifically to FIFO workers. Circle Green provided feedback to DLGIRS (formerly the Department of Energy, Mines, Industry Regulation and Safety) in 2024 on the draft code of practice: *Psychosocial hazards at work for fly-in fly-out workers in the resources and construction sectors*. We understand that this Code of Practice is yet to be published, and urge DLGIRS and WorkSafe WA to publish this as soon as possible, or in conjunction with this Draft Code.
- 3.10 Later in section 3 the Draft Code identifies the need for PCBUs to have appropriate reporting mechanisms and encouraging reporting. On page 25 the Draft Code suggests PCBUs can encourage reporting by '*providing workers with a range of accessible and user-friendly ways to report harassment informally, formally, anonymously and confidentially*'. As the Federal Code states, we recommend that this sentence instead be: "*providing workers with a range of accessible, trauma-informed and user-friendly ways to report harassment informally, formally, anonymously, and confidentially*".
- 3.11 It is of critical importance that reporting options are trauma-informed, and that staff who are points of contact for these reporting pathways are provided with appropriate training in trauma-informed and culturally sensitive practice. The Respect@Work report and the Enough is Enough report both highlighted the importance of having robust and accessible reporting systems in place, particularly in remote FIFO work environments where workers may feel isolated and cut off from their usual support networks.<sup>2</sup>
- 3.12 We understand trauma-informed approaches are discussed in section 7.3 of the Draft Code, but the focus of section 7.3 is on investigation processes. A trauma-informed approach must be implemented at every step of the process, including the reporting stage. Having trauma-informed investigation processes is not helpful if workers are not reporting the conduct in the first place because they feel that the reporting pathway itself is not trauma-informed.
- 3.13 We recommend that section 3 of the Draft Code include a discussion on trauma-informed reporting pathways (separately, and in addition to section 7.3).

### Workplace policies on harmful behaviours

- 3.14 Section 5.8 of the Draft Code, at pages 39 to 40, addresses workplace policies on harmful behaviours. We propose that the wording of this paragraph be amended to reflect that duty holders should, if not already, have a policy (and training) on workplace sexual harassment,

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<sup>2</sup> Respect@Work Report, page 21; Enough is Enough Report

to ensure they are compliant with the duty to eliminate unlawful sex discrimination and sexual harassment (see, for example the Australian Human Rights Commission (**AHRC**)’s *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)*<sup>3</sup>).

#### Investigating and responding to reports

- 3.15 Section 7 of the Draft Code, which addresses processes for investigating and responding to reports of sexual or gender-based harassment, is in our view not consistent with the approach that should be taken for incidents of workplace sexual harassment.
- 3.16 The Draft Code must recognise that workplace sexual harassment and other psychosocial hazards require tailored reporting, support systems and investigation processes that are specific to the nature of the conduct. It is in our view insufficient for a PCBU to simply rely on generic systems in place to address physical WHS hazards.
- 3.17 The first sentence of Section 7 of the Draft Code states ‘[a] PCBU’s internal WHS investigation should focus on protecting workers and others from harm by identifying whether there is a risk of sexual or gender-based harassment that has not been controlled so far as is reasonably practicable, or there are more effective and reliable control measures available’. Whilst this is one important consideration from a traditional work health and safety perspective, the first step in an internal investigation following a report of sexual harassment should be to focus on the needs of the complainant and ensure there are appropriate supports in place for that individual.
- 3.18 Further, section 7.1 of the Draft Code states that: ‘[a] formal investigation may not always be the most appropriate option. For example, a first incident of a worker using inappropriate language may be addressed through immediate informal discussions with the workers involved.’ This approach is problematic for two reasons:
- (a) it undermines the seriousness of workplace sexual harassment, by suggesting that:
    - (i) a “first incident” of workplace sexual harassment may not warrant a formal investigation, which is incorrect; and
    - (ii) low-level instances of workplace sexual harassment, such as “inappropriate language”, may not warrant a formal investigation and can be resolved between the workers involved; and
  - (b) it suggests that addressing a complaint of workplace sexual harassment through “immediate informal discussions” between the workers may be appropriate. This approach is not appropriate and in fact, requiring a worker to face their perpetrator of workplace sexual harassment without their express consent or request, is a psychosocial hazard in itself. This should be noted in the Draft Code.
- 3.19 A complaint of workplace sexual harassment, *in any form*, must be taken seriously and an investigation should be undertaken in a fair and timely manner. Remedial action may take various forms, for example a warning to the offending employee if appropriate in the circumstances, but it is critical that the complaint process remain trauma-informed, transparent and reflective of the seriousness of any report of workplace sexual harassment.
- 3.20 Workplace sexual harassment can also be, and often is, a pattern of conduct that escalates over time. It is crucial that even “first instances” and “low-level” instances of inappropriate

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<sup>3</sup> <https://humanrights.gov.au/media/documents-files-PDFs/documents-archived/2023-08/guidelines-for-complying-with-the-positive-duty-2023.pdf>.

behaviour are addressed and investigated when reported, to prevent the conduct from continuing or escalating.

- 3.21 Further, the Draft Code does not adequately address the importance of trauma-informed approaches to managing reports of workplace sexual harassment. Section 7.1 ends with the sentence '[w]hile WHS investigations are not focused on individual action, but on the risks to health and safety from the action...'. Reports and investigations into workplace sexual harassment should always be focused on the individual action for the reasons outlined above.
- 3.22 Workers' experiences described in the Enough is Enough report are consistent with those our clients report to us. One noteworthy example is that many workers in the mining industry do not trust their employers' internal reporting systems and are reluctant to report harassment due to fear of retaliation or not being taken seriously.<sup>4</sup> These highlight the absolutely crucial importance that the Code guide appropriate responses to reports of WSH.
- 3.23 We have seen matters where managers on site try to address reports of workplace sexual harassment by requiring the parties to attend a meeting together to resolve the issue. This is inappropriate, as we point out above. Requiring a worker to face their perpetrator of workplace sexual harassment does not reflect a trauma-informed approach and is a psychosocial hazard in itself.
- 3.24 We also often see persons targeted by workplace sexual harassment relocated to another site after making a complaint (without an investigation into the incident) whilst the perpetrator remains on the original site, or complainants required to take unpaid leave during or even after an investigation. This is another inappropriate response to a complaint, as it isolates and unsettles a worker at an already vulnerable time. Meanwhile, the alleged perpetrator is allowed to continue their working life without consequence. This creates the perception that our clients often report to us, that the employer will default to 'protecting the perpetrator' and turning against them for making a complaint. If the Code were to guide managers as to what would constitute an appropriate response to a WSH complaint, such inappropriate situations could be avoided.
- 3.25 Section 7.3 of the Draft Code discusses trauma-informed approaches to responding to complaints of sexual or gender-based harassment. In our view, this should be moved earlier in the document, ideally before section 7.1, to emphasise that traditional approaches to dealing with physical WHS incidents are not appropriate when dealing with incidents of workplace sexual harassment, and that trauma-informed approaches should be at the forefront of any duty holder's mind when complaints of such conduct are made.
- 3.26 Further, the discussions of trauma-informed approaches in section 7.3 are too general. We recommend that section 7.3 include a more prescriptive and detailed description of trauma-informed approaches to managing reports of workplace sexual harassment. These should refer to the discussions in section 6 of the Respect@Work Report (preventing and responding to sexual harassment in the workplace)<sup>5</sup>.
- 3.27 Section 7.4 of the Draft Code discusses the use of confidentiality clauses in settlement agreements. The negative impacts of misusing non-disclosure agreements, including confidentiality and non-disparagement clauses, is now widely known and documented.<sup>6</sup>
- 3.28 The Draft Code's guidance on the use of confidentiality clauses is, in our view, too broad. Instead of the current wording, we propose adopting a modified version the wording of the

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<sup>4</sup> Community Development and Justice Standing Committee Report 2: *'Enough is Enough' Sexual harassment against women in the FIFO mining industry* (June 2022), p. 63

<sup>5</sup> In particular, pages 677 to 684.

<sup>6</sup> See, for example: Respect@Work Report; Bargon & Featherstone, [Let's talk about confidentiality: NDA use in sexual harassment settlements since the Respect@Work Report](#) (2024); and, Australian Human Rights Commission, [Speaking from Experience Report](#) (2025).



Federal Code, which states specifically to: *'[a]void the use of confidentiality clauses in settlement agreements except where to protect the person [targeted by workplace sexual harassment]. Where used, the scope and duration of confidentiality clauses should be as limited as possible'*.<sup>7</sup> We recommend adding that a confidentiality clause should be included in an agreement only at the specific request of the person targeted by workplace sexual harassment.

### Resources in Appendix B

- 3.29 Appendix B of the Draft Code includes helpful information for workers about reporting and complaint options related to workplace sexual harassment.
- 3.30 To ensure accuracy and utility of the information in the appendix, we recommend making the following amendments:
- (a) Under the AHRC and WA Equal Opportunity Commission (**EOC**) sections, clarify that both the AHRC and the EOC can help resolve complaints / disputes about workplace discrimination and sexual harassment. We note that it should be made clearer that workers can make complaints to the AHRC or EOC and have their complaints resolved with the assistance from the commission. This is distinct from the EOC and AHRC's investigative function.
  - (b) Under the AHRC section, clarify that it can consider, accept, and assist with resolving complaints made under the SD Act (currently states '*under federal law*'). As discussed below, workplace sexual harassment is unlawful under other federal laws (e.g. the FW Act), so the distinction should be made clearer.
  - (c) Since 6 March 2023 workplace sexual harassment is unlawful under the FW Act.<sup>8</sup> The appendix should identify that workers can make an application to the Fair Work Commission (**FWC**) to deal with a sexual harassment dispute. The appendix currently only states that workers who have been treated unfairly or punished by an employer for reporting sexual harassment, and those looking for a stop sexual harassment order, can access the FWC for assistance. These pathways still exist, but workers should also be made aware of the additional option to bring a sexual harassment dispute to the FWC.
  - (d) Since 31 January 2025 workplace sexual harassment is also unlawful under WA industrial legislation, the IR Act, for employees covered by the state system of employment laws.<sup>9</sup> This means that eligible workers can make a claim to the WA Industrial Relations Commission or the Industrial Magistrates Court of WA for resolution of a workplace sexual harassment dispute. This information should be added to the appendix.

## **4. Further contact**

- 4.1 Thank you for considering our submission.
- 4.2 We would be very pleased to discuss any aspect further. Please contact Imogen Tatam, Senior Lawyer (Law Reform) – Workplace, at [imogen.tatam@circlegreen.org.au](mailto:imogen.tatam@circlegreen.org.au) or (08) 6148 3660 to do so.

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<sup>7</sup> *Work Health and Safety (Sexual and Gender-based Harassment) Code of Practice 2025* (Cth), 7.4.

<sup>8</sup> *Fair Work Act 2009* (Cth), s 527D.

<sup>9</sup> *Industrial Relations Act 1979* (WA), s 51BR. See also: <https://www.wa.gov.au/organisation/private-sector-labour-relations/sexual-harassment-connection-work>.