



CRIMES LEGISLATION AMENDMENT (ASSAULTS ON RETAIL WORKERS) BILL 2023



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WHAT IS THE BILL?

The objects of this Bill are to:

- (a) amend the *Crimes Act 1900* (NSW) to create new offences in relation to assaults on, and other actions in relation to, retail workers; and
- (b) amend the *Criminal Procedure Act 1986* (NSW) to provide for certain of the new offences to be triable summarily.

WHAT IS A SHADOW SPI?

The Shadow SPI is a new initiative of the Susan McKinnon Foundation that builds upon the work of the Evidence Based Policy Research Project. It seeks to support parliamentarians in the Legislative Council of NSW during the legislative consideration and voting process, to inform decision making and robust parliamentary debate. It is also intended to improve the quality of tabled SPIs and their usefulness, and to shine a light on the importance of transparency in policy making. Each Shadow SPI is collectively developed by a collaborative team from two ideologically differentiated think tanks (Per Capita and Blueprint Institute) and intended to be utilised as a companion to the tabled Government Statement of Public Interest in the Legislative Council of NSW.

Need: Why is the policy needed based on factual evidence and stakeholder input?

The Crimes Legislation Amendment (Assault on Retail Workers) Bill 2023 (NSW) (the **Bill**) seeks to introduce three new offences into pt 3 of the *Crimes Act 1900* (NSW) (The **Crimes Act**). These will make it an offence to:

- assault, throw a missile at, stalk, harass or intimidate a retail worker in the course of the worker's duty, even if no actual bodily harm is caused to the worker, with a maximum penalty of 4 years' imprisonment;¹
- assault a retail worker in the course of the worker's duty and cause actual bodily harm to the worker, with a maximum penalty of 6 years' imprisonment;² and
- wound or cause grievous bodily harm to a retail worker in the course of the worker's duty, being reckless as to causing actual bodily harm to the worker or another person, with a maximum penalty of 11 years' imprisonment.³

The Bill defines *retail worker* broadly to capture any person 'whose duties primarily involve working in an area of a shop open to the public'.⁴ A *shop* includes 'the whole or part of a building, place, stall, structure, tent, vehicle or yard in which goods are sold, offered or exposed for sale'.⁵

Introducing increased penalties for assaults and abuse against retail workers was a NSW Labor election commitment in the lead up to the 2023 NSW State Election.⁶ This commitment came in response to a long campaign by the Shop, Distributive and Allied Employees' Association (**SDA**) who has been raising awareness about the persistent abuse and violence that retail and fast food workers face at work.⁷ The SDA's *No One Deserves A Serve* campaign was officially launched in 2017.⁸

The need for a policy to protect front facing retail workers from customer abuse, and the SDA claim that consumer abuse is a serious health issue for workers is supported by surveys and research evidence.

An initial 2016 SDA members survey of over 6,000 workers found 88% of respondents had experienced verbal abuse over the previous year, and 11.6% had experienced incidents of customer abuse that was *sexual in nature*.⁹ The proportion of workers who have experienced verbal abuse in this sector remained consistent between the 2016 members survey and a later 2021 members survey, but 70% of respondents in the 2021 members survey said that the frequency of incidents increased during the COVID-19 pandemic.¹⁰

Similarly, 2021 research conducted by the Australian National University and the University of Sydney into customer-staff relations during the pandemic, found that 56% of respondents had experienced a notable increase in customer abuse during the pandemic.¹¹ Those most impacted by the increase in customer abuse were women and people from non-English speaking backgrounds.¹² A research project commissioned by the SDA, and undertaken by the McKell Institute in 2021, which analysed NSW crime data, found that incidents of intimidation, stalking and harassment at retail and wholesale premises had increased by 22% since before the pandemic (2018-19 to 2020-21).¹³

¹ Crimes Legislation Amendment (Assault on Retail Workers) Bill 2023 (NSW), amending *Crimes Act 1900* (NSW) s 60G(1).

² Ibid s 60G(2).

³ Ibid s 60G(3).

⁴ Ibid s 60F.

⁵ Ibid.

⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2023, 23 (Michael Daley).

⁷ Ibid.

⁸ SDA, 'No One Deserves a Serve', SDA (Web Page).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ariadne Vromen et al, *Pandemic Pressures: Job Security and Customer Relations for Retail Workers* (Report, November 2021) 13.

¹² Ibid.

¹³ McKell Institute 'Data Briefing Series – Retail Harassment', McKell Institute (Web Page, September 2021)

Research conducted by the National Retail Association in 2020 found that 72% of NSW residents agreed the government should consider harsher penalties to address retail crime;¹⁴ and 67% of surveyed workers in the same study agreed that abuse and crime in the retail sector are reasons why retail staff look for other jobs.¹⁵

Increased protections for customer service workers has support from key stakeholders across the retail sector. In 2019 the SDA, the National Retail Association, and the Australian Retailers Association, released an *Industry Statement* committing to eradicating customer abuse in the retail and fast-food industry. This was signed by all major retail and fast-food employers including Coles, Woolworths, ALDI, McDonalds and Kmart.¹⁶

Research shows that customer abuse and violence has long-lasting effects on workers' mental and physical health.¹⁷ During the pandemic, retail and fast food establishments were essential for ensuring the community could continue to obtain essential items. Workers persisted on the frontline while the violence and abuse perpetrated against them increased. This reform seeks to address the risks retail workers face by sending a clear message that violent and abusive behaviour is unacceptable by imposing tougher penalties on perpetrators.

Objectives: What is the policy's objective couched in terms of the public interest?

Protecting retail workers from violence and abuse at work is in the public interest, not only because it protects the rights and wellbeing of these workers, but also because it supports economic stability, community safety, and the overall health of society.

Increasing penalties for customer abuse against retail workers in this Bill is intended to deter offenders and protect potential victims. As Michael Daley commented in the Bill's second reading, it 'is intended to send a strong message of support to retail workers... [and] send a strong message of warning to those who commit assaults or other acts of violence against retail workers that such behaviour will not be tolerated'.¹⁸

Assaults and acts of violence perpetrated against retail workers can cause immense suffering and lead to injury, fear, and trauma, for victims, their families, and the broader community.¹⁹ It is in the public interest to deter would be offenders, and protect victims, to mitigate the potential suffering of those directly affected by these acts.

Shops are often central to communities, providing essential goods and services. When retail workers are protected, it contributes to the overall wellbeing and quality of life in these communities. This is supported by research which shows a high degree of public support for increased penalties for instances of customer abuse.²⁰ Thus, the policy is in the public interest because it promotes community confidence and wellbeing.

Retail workers are essential for the proper functioning of our economy. They play a role in keeping the NSW economy running so residents can obtain essential goods.²¹ Protecting these workers is in the public interest because it helps maintain economic stability by ensuring the continuity of business operations. Violence against retail workers can create an environment of fear and insecurity for both employees and customers, thus taking steps to decrease incidences of violence in these settings serves the public interest by fostering consumer confidence. This is crucial for a healthy retail sector.

Among other things, a robust labour market supports financial stability for individuals and families. Evidence suggests that abuse and violence against retail workers is a significant factor in their choice to leave their jobs. Safeguarding retail workers from acts of violence at work so they are less likely to leave their jobs is in the public interest because it contributes to the maintenance of a robust labour market.

¹⁴ National Retail Association, 'Support for Harsher Retail Crime Penalties' (Fact Sheet, 2020)

¹⁵ National Retail Association, 'Abuse is Forcing Workers out of Retail' (Fact Sheet, 2020)

¹⁶ SDA, 'Industry First – Major Employers, Shopping Centres and Unions Pledge to Eradicate Customer Abuse for Good' (Media Release, 14 October 2019).

¹⁷ Ibid.

¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2023, 23 (Michael Daley).

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 June 2023, 20 (Hugh McDermott).

²⁰ Ibid 21.

²¹ Ibid.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Since 2017 the SDA has been raising community awareness about the abuse and violence retail and fast-food workers experience at work. This has involved advertisements and other promotional material. In 2019 all major employers and employee bodies in the retail sector signed an industry statement pledging to eradicate customer abuse in Australia. These actions have helped raise awareness to policymakers and government, but according to later research and worker surveys, they have not been successful in deterring abuse or minimising the frequency of incidents. As a result, increasing penalties for assaults, threats and abuse against retail workers formed part of the NSW Labor election platform. There are no other options to implement this commitment, as increased penalties for criminal offences can only be achieved through legislative amendment.

Analysis: What were the pros/cons and benefits/costs of each option considered?

The benefit of this option is that it protects retail workers with minimal financial costs for the NSW government. Costings associated with the legislative change proposed by the Bill were published in March 2023 by the Parliamentary Budget Office. The Office stated that 'any change to the legislation... can be done with existing agency resources'.²² The Office also stated that while the change could increase the number of matters heard by the court system, this effect would not significantly impact the budget.²³

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The provisions contained in the Bill commence upon assent.²⁴ The Department of Communities and Justice will be responsible for the general oversight of the implementation of these changes, as well as monitoring the reforms to ensure the 'new offences are working as intended to protect retail workers without disproportionately affecting Aboriginal people or people with mental health or cognitive impairment'.²⁵

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

The policy was developed in response to campaigning by the SDA who have strongly advocated for standalone protection of retail workers in NSW criminal law.

²² Parliamentary Budget Office, Parliament of New South Wales, Retail Worker Protections (Costings) 1.

²³ Ibid.

²⁴ Crimes Legislation Amendment (Assault on Retail Workers) Bill 2023 (NSW) cl 2.

²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2023, 24 (Michael Daley).

The SDA is the largest trade union in Australia, with branches in all states and over 230,000 members.²⁶ Early consultation involved discussion with delegates from various NSW retail outlets at a Town Hall meeting in October 2021.²⁷ The SDA also help national roundtables to bring 'industry groups and employers together to work toward industry wide solutions.'²⁸ The Department of Communities and Justice also assisted in the development of the Bill.

²⁶ Australian Unions, 'Shop, Distributive and Allied Employees Association', *Worksite* (Web Page, 2023)

²⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 June 2023, 27 (Sophie Cotsis).

²⁸ SDA, 'No One Deserves a Serve' (n 8).

PER CAPITA COMMENT:

The amendments provided in the Bill are necessary to include a standalone provision in the *Crimes Act* with specific offences for assaults and other actions on retail workers. The information in the Government SPI adequately answers the required questions set out in Standing Orders, however more detail could have been provided.

More detail could have been provided as to how this amendment is in the public interest. The Government SPI notes the role retail workers play in a functioning economy and society but fails to give detail on how the intended outcome of the Bill (i.e. deterrence and protection) is in the public interest or how it will support a functioning economy and society. This may have been useful in assisting members to understand the rationale for the criminal amendments, as opposed to other potential options like government run education and awareness campaigns.

Information about the financial impact of these proposed changes was also absent from the Government SPI. The small financial impact could have been included in the question about how the policy objective benefits the public interest, or in the question about the pros/cons of each option.

Whilst it is true that legislative amendments are the only way to increase penalties for abuse against retail and shop workers in the *Crimes Act*, the SPI could have discussed why other options would not have been adequate by pointing to the increased frequency of incidents which SDA and industry campaigns were unable to reduce.

The government consulted with the SDA but did not consult with the Retail and Fast Food Workers Union, meaning there was no opportunity for them to comment on the proposed changes and how they may or may not benefit their members. It seems that members of the public were not invited to make submissions regarding this policy proposal, or the Bill itself, nor was it reviewed by the NSW Legislative Review Committee (NSW LRC), prior to its passage through Parliament. The NSW LRC raised concerns about the application of the new offences, but because they were unable to report prior to the Bill's passage, their concerns could not be addressed in drafting.²⁹

A public consultation may have allowed for the scope of the Bill and the clarity of the proposed terms to be considered by the public, or given weight to the policy through input from academics, researchers and other interest groups. It may also have aided in establishing an evidence basis for the targeted increases to sentencing as the influence of penalty increases on crime deterrence is contested.³⁰

The consultative process for this amendment stands in stark contrast to the process undertaken by the former government prior to their introduction of the Crimes Legislation Amendment (Frontline Emergency and Health Workers) Bill 2022 (NSW). This was introduced following the NSW Sentencing Council's (NSW SC) report, *Assaults on Emergency Service Workers* (the Report),³¹ commissioned by the then Attorney General to review the sentencing for offences involving assaults on police officers. This review invited public submissions and made recommendations including a new offence for assaults against frontline health workers in the *Crimes Act*.³² In addition to stakeholder input during the NSW SC, the NSW government consulted a number of key stakeholders on their response to the Report, and on subsequent drafting.

A public consultation could have aided public awareness of the issue of retail worker abuse and proposed changes to the law. A lack of public awareness could minimise any possible deterrent effects of new penalties. We note that in their Report on Assaults on Emergency Service Workers, the NSW SC commented that in order for any deterrent effect to arise from increases in penalties a strong public awareness campaign must accompany any legislative changes.³³

The Government SPI itself is not intended to establish an evidence base for the legislation, thus in assessing the SPI Per Capita notes that it adequately responded to the required questions set out in Standing Orders. It could have provided more detail about how the Bill was drafted and who was consulted, considering there was no opportunity for a public consultation. This should not be taken as criticism of the aims of the Bill, only that it is difficult to determine to what extent it is in the public interest without more detail about how the scope of the provisions was decided and why decisions were made in drafting. This is lacking in the Government SPI.

²⁹ Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (Digest No 2/58, 22 August 2023) 17.

³⁰ See, eg Office of the Director of Public Prosecutions, Submission No 11 to New South Wales Sentencing Council, *Assaults on Police and Emergency Workers* (September 2020) 13; Australian Lawyers Alliance, Submission No 6 to New South Wales Sentencing Council, *Assaults on Police and Emergency Workers* (14 September 2020) 8; New South Wales Sentencing Council, *Assaults on Police and Emergency Workers* (Report, July 2021) 97 (*Assaults on Police and Emergency Workers*).

³¹ *Assaults on Police and Emergency Workers* (n 30).

³² *Ibid* recommendation 7.1.

³³ *Ibid* recommendation 9.1.

BLUEPRINT INSTITUTE COMMENT:

Blueprint agrees with Per Capita that the government's SPI makes a convincing, albeit obvious, case that retail workers deserve a safe working environment, and certainly protection against crimes, particularly those involving violence.

However, the government's SPI has several deficiencies. First, it provides no statistical evidence that the incidence of crime against retail workers has increased. Instead, the SPI only refers to anecdotal 'firsthand accounts from retail workers across New South Wales who have suffered abuse and violence in their workplace'. The lack of statistical evidence proving that retail workers are now subject to a greater risk of abuse than in the past significantly weakens the case for legislating an increase in maximum legal penalties for offenders.

Further, although we recognise that this Bill was an election commitment, there are clearly other options to reduce crimes against retail workers. As Per Capita notes, education and awareness campaigns are arguably an option that could be just as effective.

At the very least, the government's SPI should have offered some evidence that increasing maximum penalties would deter potential offenders. It is not at all a settled issue amongst legal scholars that increasing the severity of punishment results in less crime.

In this particular case, the theory that the Bill will have a deterrent effect rests on the shaky presumption that abuse and violence directed at retail workers is primarily premeditated. After all, in order to be deterred offenders must have undertaken the necessary research in advance to know that this Bill has passed, that maximum legal penalties have increased, and thus make a rational calculation that it is no longer worth it to commit the relevant crimes. However, given that there is no payoff to abusive behaviour toward retail workers, common sense would suggest that the conduct is motivated by spontaneous emotional outbursts as opposed to a rational and premeditated act.

The government's SPI lacks statistical evidence justifying the need for the Bill. It also offers no evidence to support its contention that the provisions of the Bill—increasing maximum penalties for offenders—will achieve its stated objectives.

Blueprint concurs with Per Capita that there is significant room for improvement in the government's SPI, and therefore can only, at best, rate it as adequate.

Assessment of the tabled Statement of Public Interest (SPI)

Exemplary	Good Practice	Adequate	Insufficient
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