LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

Evidence Consolidation Report for the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025: Report of the inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

Volume Two

Report 85

May 2025

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Standing Committee on Law and Justice

Evidence Consolidation Report for the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025: Report of the inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

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Evidence Consolidation Report for the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025: Report of the inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

"May 2025"

Chair: Hon Greg Donnelly MLC

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Terms of reference

That the Committee inquire into and report on proposed changes to liability and entitlements for psychological injury in New South Wales, specifically:

(a) the overall financial sustainability of the NSW workers' compensation system; and

(b) the provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 as provided by correspondence to the Committee.

The terms of reference for the inquiry were referred to the committee by the Hon Daniel Mookhey MLC, Treasurer, on 8 May 2025 and adopted by the committee on 9 May 2025.

Committee details

Committee members

Hon Greg Donnelly MLC	**Australian Labor Party**	*Chair*
Ms Abigail Boyd MLC*	The Greens	*Deputy Chair*
Hon Susan Carter MLC	Liberal Party	
Hon Anthony D'Adam MLC	Australian Labor Party	
Hon Stephen Lawrence MLC	Australian Labor Party	
Hon Bob Nanva MLC	Australian Labor Party	
Hon Rod Roberts MLC	Independent	
Hon Damien Tudehope MLC**	Liberal Party	

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* Ms Abigail Boyd MLC substituted for Ms Sue Higginson MLC from 9 May 2025 for the duration of the inquiry. Ms Boyd was elected Acting Deputy Chair on 16 May 2025 for the duration of the inquiry.

** Hon Damien Tudehope MLC substituted for Hon Chris Rath MLC from 12 May 2025 for the duration of the inquiry.

Secretariat

Alice Wood, Principal Council Officer
James Ryan, Administration Officer
Gareth Perkins, Council Officer
Arizona Hart, A/Director

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Hon Daniel Mookhey MLC, Treasurer, on 8 May 2025.

The committee received 62 submissions and one supplementary submission.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

This report is contained in two volumes. This volume is to be read in conjunction with Volume One.

Chapter 1 Introduction to Volume Two

1.1 This report is contained in two volumes. This volume contains the hearing schedule from the committee's hearing on Friday 16 May, along with all submissions from witnesses who appeared at that hearing. It is to be read in conjunction with Volume One, especially the transcript from the hearing, which is Appendix 13 in that volume.

LEGISLATIVE COUNCIL

Appendix 1 Hearing schedule from 16 May 2025 hearing

STANDING COMMITTEE ON LAW AND JUSTICE

HEARING SCHEDULE

Inquiry into proposed changes to liability and entitlements for psychological injury

Friday 16 May 2025

Macquarie Room, Parliament House, Sydney

TIME	WITNESS	POSITION AND ORGANISATION	SUB NO.
8.30 am	Hon Daniel Mookhey MLC	Treasurer	
	Hon Sophie Cotsis MP	Minister for Industrial Relations, and Minister for Work Health and Safety	
9.15 am	Mr Mark Morey	Secretary, Unions NSW	20
	Ms Natasha Flores	Industrial Officer Work Health & Safety, Workers Compensation, Unions NSW	
10.00 am	Mr Bernie Smith	Branch Secretary-Treasurer, Shop, Distributive and Allied Employees' Association NSW Branch	2
	Ms Amber Flohm	Deputy President, NSW Teachers Federation	12
	Mr Michael Whaites	Acting General Secretary, NSW Nurses and Midwives' Association	38
	Mr Gerard Hayes	Secretary, Health Services Union NSW, ACT and QLD Branch	6

TIME	WITNESS	POSITION AND ORGANISATION	SUB NO.
	Mr Jack Ayoub	NSW Organiser, Australian Workers' Union NSW Branch	15
	Mr Angus McFarland	Branch Secretary, Australian Services Union NSW & ACT (Services) Branch	26
	Mr Troy Wright	Acting General Secretary, Public Service Association of NSW	11
10.45 am	**MORNING TEA**		
11.00 am	Mr Daniel Hunter	Chief Executive Officer, Business NSW	
	Mr Sam Moreton	General Manager, Government and Corporate Affairs, Business NSW	
11.45 am	Mr Tony Wessling	Group Executive, Workers Compensation, icare	36
	Mr Dai Liu	General Manager, Actuarial Services, icare	
	Ms Sonya Campbell	Deputy Secretary, Commercial, NSW Treasury	
	Ms Andrée Wheeler	Executive Director, State Insurance Schemes, NSW Treasury	
12.45 pm	**LUNCH**		
1.15 pm	Mr Dominic Toomey SC	Senior Vice-President, NSW Bar Association	41
	Mr Tony Bowen	Member of the NSW Bar Association's Common Law Committee	
	Mr Tim Concannon	Chair, Injury Compensation Committee, Law Society of NSW	34
	Mr Shane Butcher	Member, Injury Compensation Committee, Law Society of NSW	
2.00 pm	Mr Ivan Simic	Solicitor, Taylor & Scott Lawyers	48
	Ms Michelle Megan	Solicitor, Taylor & Scott Lawyers	
	Mr David Jones (*via videoconference*)	Partner, Carroll & O'Dea Lawyers	
	Mr Scott Dougall	Partner, Carroll & O'Dea Lawyers	

TIME	WITNESS	POSITION AND ORGANISATION	SUB NO.
	Mrs Ramina Dimitri	Head of Work & Road, NSW ACT + WA, Slater & Gordon Lawyers	42
	Ms Larissa Atkinson	Legal Counsel, Slater & Gordon Lawyers	
	Ms Rita Yousef	Senior Member, NSW Branch Workers Compensation Subcommittee, Australian Lawyers Alliance	18
2.45 pm	Ms Roshana May	Individual with workers' compensation expertise	24
	Mr Kim Garling	Individual with workers' compensation expertise	28
3.30 pm	**AFTERNOON TEA**		
3.45 pm	Dr Julian Parmegiani	Psychiatrist and assessor	
	Dr Anthony Dinnen (*via videoconference*)	Consultant psychiatrist and assessor	
4.30 pm	Mr Chris Gambian	Executive Director, Australians for Mental Health	19
	Professor Pat McGorry AO *(via videoconference)*	Founder, Australians for Mental Health	
5.00 pm	Ms Mandy Young	Chief Executive, State Insurance Regulatory Authority (SIRA)	
	Mr Trent Curtin	A/Deputy Secretary, SafeWork NSW	
	Ms Samantha Taylor PSM	Independent Review Officer, Independent Review Office (IRO)	
5.45 pm	Ms Cara Varian	CEO, NSW Council of Social Service (NCOSS)	37
	Mr Ben McAlpine	Director, Policy and Advocacy, NSW Council of Social Service (NCOSS)	
6.15 pm	**FINISH**		

Appendix 2 Submissions from witnesses at the hearing on 16 May 2025

No.	Author
20	Unions NSW
2	SDA NSW and ACT and SDA Newcastle and Northern Branch
12	AEU NSW Teachers Federation
38	New South Wales Nurses and Midwives' Association
6	Health Services Union - NSW ACT QLD (HSU)
15	Australian Workers' Union NSW Branch
26	Australian Services Union NSW & ACT (Services) Branch
11	Public Service Association of New South Wales
36	Insurance & Care NSW (icare)
41	NSW Bar Association
34	The Law Society of New South Wales
48	Taylor and Scott Lawyers
42	Slater and Gordon Lawyers
18	Australian Lawyers Alliance (ALA) NSW
24	Roshana May
28	Kim Garling
19	Australians for Mental Health
37	NSW Council of Social Service (NCOSS)

Submission No 20

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

Organisation: Unions NSW

Date Received: 15 May 2025

MAY 2025

Submission to the NSW Legislative Council Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

Contents

About Unions NSW

1. Unions NSW is the peak body for trade unions and union members in NSW. We have 47 affiliated trade unions and labour councils who collectively represent over 600,000 union members and essential workers in all industries in NSW.

2. Unions NSW proudly supports the NSW Injured Workers Campaign Network (IWCN). The IWCN is a community campaign led by injured workers, for injured workers, and seeks to drive positive change within the NSW workers compensation system.

3. The IWCN mission statement is: To reform the workers' compensation and rehabilitation system in New South Wales in the interests of injured workers with a view to ensuring dignity, respect, and fairness.

4. In 2023, most NSW State MPs, including members of the Government and NSW Treasurer Daniel Mookhey, signed the IWCN campaign pledge to work toward a workers' compensation and rehabilitation system that:

    a. Returns injured workers to work when it is safe to do so;

    b. Has doctor-led care with timely and appropriate medical treatment;

    c. Protects injured workers from unfair terminations;

    d. Ensures polite, timely & accurate responses to all enquiries and requests;

    e. Provides ongoing medical & financial support for workers unable to return to work by removing s39 & 59A of the *Workers Compensation Act 1987*.

Introduction

5. A sustainable workers compensation scheme is important and in the interests of workers. Proposed reforms require adequate time for consultation to achieve the best public policy outcomes and to avoid unintended consequences.

6. This submission will cover the terms of reference:

    a. the overall financial sustainability of the NSW workers' compensation system; and

    b. The provisions of the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025* (**the Bill**) as provided by correspondence to the Committee.

7. To enable a full and effective consideration of the options to reform workers compensation, we ask the committee to recommend the NSW Government delay implementing its proposals and instead legislate an independent review of the NSW workers compensation system.

8. On Tuesday 18 March 2025, the NSW Treasurer Daniel Mookhey delivered a ministerial statement outlining proposals for reforms to the way the NSW workers compensation scheme deals with psychological claims.

9. The Treasurer in his Workers Compensation Ministerial Statement noted three key principles in reviewing psychological injuries at work:

    a. First, give workers the right to call out a psychological hazard before an injury takes place.

    b. Second, let employees and employers know where they stand by defining ‘psychological injury’ and ‘reasonable management action’.

    c. Third, learn from states like South Australia and Queensland especially in setting the whole-person impairment threshold.

    (NSW Government 2025).

10. Unions NSW embraces the stated intention to reduce workplace psychological injuries. However, the content of the Bill is inconsistent with

this approach and instead focuses on limiting workers' access to compensation after an injury has already occurred. Few of the proposed actions reflect a shift towards prioritising prevention and early resolution; instead, their dominant effect is to significantly hinder workers from seeking and obtaining compensation for psychological injuries.

11. That is, the purpose and effect of the changes will be to drastically reduce the circumstances when a worker with a psychological injury can be compensated, and to place hurdles in the way of making a claim. This is inimical to the stated purpose of reducing psychological hazards by improving prevention. In fact, there is nothing in the Bill which directly goes to improving prevention.

12. Unions NSW questions the need to define 'psychological injury' within legislation, when this should be done by medical professionals. The Bill's definition excludes workers with genuine injuries from compensation if the hazard that caused their injury falls outside an extremely narrow list. This is akin to saying a broken arm is only compensable if you fall over a chair, but not a bench, and will prevent life-saving support for a multitude of injuries.

13. Unions NSW supports greater certainty in the scheme around 'reasonable management action', but not at the expense of mental health care and support. The Bill effectively excludes claims on the basis of reasonable management action, even when other hazards are the main or substantial cause.

14. The most callous and unnecessary proposal with the Bill is to increase the whole person impairment threshold to 31% for all benefits. This is an impossibly high bar that essentially removes all income support for the most psychologically damaged workers after 2.5 years. This proposal does not address any of the Government's stated aims, as it applies only to seriously injured workers, and so it will not reduce minor or unmeritorious claims. The current thresholds already eliminate well over 90% of claims after 5 years.

15. The increase in WPI thresholds is a dangerous and unnecessary measure that will cause real, irreversible harm to vulnerable people, as occurred in 2012. **This Bill if legislated will cost worker lives.**

16. The Bill also fails to align the NSW threshold with the thresholds in other states: on the contrary, it would give NSW by far the harshest workers

compensation scheme in the country by setting a threshold much higher than those in other jurisdictions, including South Australia. Such extreme measures have not been necessary in other jurisdictions, which strongly suggests the problems with the NSW scheme lie not in the level of benefits, but in the widely-reported administration and claims management issues that are not addressed in the Bill.

17. These administrative problems must be addressed before such brutal cuts to benefits are even considered. The proposal has not been justified by financial modelling, and in circumstances where the rapidly increasing operating costs of iCare and SIRA now drain $1.33 billion per annum from the premium pool (iCare 2024, SIRA 2024[1]), there are far better targets for savings than the most vulnerable workers in the state who depend on the scheme just to meet their basic needs.

18. If these problems are not addressed and critically injured workers are denied support, this means they fall through the cracks in the system, pushing them onto their families for care and welfare and charity to survive. In this way, the Bill transfers the cost of poor workplace health and safety risk management to the taxpayer and the federal system.

19. An increase of the threshold to 30% WPI was introduced by the O'Farrell Government in 2012 and proved to operate so harshly that it had to be reversed 3 years later: it makes no sense to revive a proven policy failure. In 2019 then Hon Daniel Mookhey MLC levelled the following criticism at the then Government's reforms, which could just as easily be made against the proposals he himself now makes:

> '*Thousands of injured workers have lost, or will lose, access to income and healthcare arbitrarily after five years because of the pig-headed stubbornness of the current NSW Government*
>
> ...
>
> *I've never heard of any Government, of any political persuasion, at any level of the Commonwealth, deliberately favouring welfare over work until now.*
>
> *It says to employers that you're free of your obligation to rehabilitate workers injured under your care and supervision; and says to taxpayers*

that you now must pay a back door subsidy to big business and pick up the tab for caring for the injured workers.

It's a disgrace'

- Daniel Mookhey (NSW LC 2019, p. 52).

20. Like the current NSW Treasurer did in 2019, Unions NSW rejects the approach taken by the Government through its Bill of saving money by denying legitimate claims, particularly reflected in its harmful measures to:

    a. Force workers who suffer bullying, sexual harassment, and racial discrimination in the workplace to go through lengthy and expensive legal loopholes to access treatment and support,

    b. Make it almost impossible for seriously injured workers to receive long-term care and support,

    c. Denying income support to workers with serious psychological injuries caused by work pressure or burnout, effectively preventing them from accessing the care they need to recover.

21. Instead, Unions NSW embraces the Government's stated intention to improve sustainability by reducing workplace psychological injuries. We recommend alternative measures the Government should implement that can achieve these outcomes.

22. Our recommendations address:

    a. **Part A of this submission:** The poor timing of the Bill, which should be a last resort and not a first step;

    b. **Part B of this submission:** Major issues with the content of the Bill, including,

        i. increasing Whole Person Impairment thresholds for psychological injury claims,

        ii. limiting what is considered a psychological injury,

iii. denying claims involving reasonable management action despite other predominant hazards,

iv. limits on assessing and disputing permanent impairment,

v. removal of provisional liability for psychological injuries,

vi. under- and non-insurance of workers, and

vii. denying reasonably necessary medical treatment.

c. **Part C of this submission:** Alternative recommendations to significantly improve the financial sustainability of the scheme, including:

   i. preventative measures to reduce the number of psychological injuries,

   ii. prioritising return-to-work,

   iii. reducing waste and inefficiency within the scheme;

d. **Part D of this submission:** Next steps, including implementing positive sustainability measures and an independent review of the NSW Workers Compensation scheme;

Summary of recommendations

Part A: Bill timing and independent review of the NSW Workers Compensation Scheme

Timing of the Bill

Recommendation 1: The NSW Government should delay introduction of its proposed changes to workers compensation to provide an opportunity to consider a range of options, in consultation with unions and other key stakeholders. Consideration should be informed by a clearer understanding of the impact that new and recommended measures, strategies, and regulations can have on preventing workplace injuries.

Part B: Major issues with the content of the Bill

Increasing Whole Person Impairment thresholds for psychological injury claims

Recommendation 2: Delete Schedule 1 [18] Section 39A. Savings can be achieved via other less harmful measures.

Recommendation 3: Delete Schedule 1 [22] Section 59A entirely. Savings can be achieved via other less harmful measures.

Recommendation 4: Delete Schedule 1 [29] Section 65A entirely. Savings can be achieved via other less harmful measures.

Recommendation 5: Delete Schedule 1 [97] Section 151H entirely. Savings can be achieved via other less harmful measures.

Limiting what is considered a psychological injury

Recommendation 6: Schedule 1 [3] Section 8G(1) should be deleted.

If it is to remain:

- Section 8G(1)(a) should incorporate amendments recommended below to 'relevant event'.
- Section 8G(1)(b) should be amended to, 'the injury must arise out of, or in the course of employment' (s 4 currently).
- Section 8G(1)(c) should be deleted.

Recommendation 7: Schedule 1 [3] Section 8A should omit the words, 'that causes significant behavioural, cognitive or psychological dysfunction'.

Recommendation 8: Schedule 1 [3] Section 8E should be deleted.

Alternatively:

1. Section 8E should be amended to identify all psychological hazards identified in the *NSW Code of Practice: Managing Psychological Hazards at Work* including:

    a. Role overload
    b. Role underload
    c. Exposure to trauma and traumatic events
    d. Role conflict or lack of clarity
    e. Low job control
    f. Conflict or poor workplace relationships between workers & supervisors, managers and co-workers
    g. Poor support from supervisors & managers
    h. Poor co-worker support
    i. Workplace violence
    l. Bullying
    m. Harassment including sexual harassment
    n. Inadequate reward & recognition
    o. Hazardous physical working environments
    p. Remote or isolated work
    q. Poor procedural justice
    r. Poor organisational change culture

    (SafeWork NSW 2021, pp. 7-8)

Recommendation 9: The requirement to obtain a finding of sexual harassment, bullying or racial harassment should be deleted.

Recommendation 10: Bullying should be determined by reference to the subjective perception of the worker, provided: [the perception has a factual foundation] OR [the perception is reasonable and rational in all the circumstances].

Recommendation 11: Schedule 1 [3] Section 8H should be deleted. Alternatively, s 8H should be amended by: in respect of s8H(1), deleting the words 'with whom the worker has a close work connection-'; in respect of s 8H(2), deleting the subsection.

Recommendation 12: Amend Schedule 1 Section 8E(1)(c) to include workers who attend or respond to the aftermath of a traumatic incident, including those who interact with death or serious injury as part of their duties.

Denying claims involving reasonable management action despite other predominant hazards

Recommendation 13: In respect to Schedule 1 [3] section 8D(1),(2) maintain the current s11A of the *Workers Compensation Act 1987* (NSW).

Recommendation 14: In respect to Schedule 1 [3] section 11A, maintain 'wholly or predominantly' or 'predominantly' and delete section 11A (b) and (c).

Limits on assessing and disputing permanent impairment

Recommendation 15: Amend Schedule 1 [98] Section 153G to include a clear and accountable process for the selection and oversight of assessors on the SIRA register, including input from worker representatives and safeguards to ensure independence.

Recommendation 16: Amend Schedule 1 [98] section 153G to legislate clear grounds and procedures for disputing assessments, including a right for workers to present independent medical evidence and guidance for the Commission in appointing a new assessor.

Recommendation 17: The requirements in Schedule 1 [98] section 153N should be removed. Workers should be able to seek a reassessment of permanent impairment without needing insurer consent, and thresholds for deterioration should reflect medical reality.

Removal of provisional liability for psychological injuries

Recommendation 18: Delete schedule 2 [5] section 280 - Provisional acceptance of liability.

Under- and non-insurance of workers

Recommendation 19: Expand the scope of businesses covered under Schedule 1 [103] Section 173AA (1) to all businesses.

Recommendation 20: Amend the test for an offence under Schedule 1 [103] Section 173AA from recklessness to negligence.

Recommendation 21: Amend Schedule 1 [103] Section 173AA to include a financial penalty for non-compliance that represents three times the financial benefit obtained by employers.

Recommendation 22: Amend the Bill to empower and task iCare with enforcing insurance requirements amongst employers.

Denying reasonably necessary medical treatment

Recommendation 23: Omit Schedule 1 [26] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation & 60AA Compensation for domestic assistance.

Part C: Alternative proposals to improve scheme sustainability

Adopting the best practices from other states to prevent injuries before they happen

Recommendation 24: The NSW Government should empower the NSW Industrial Relations Commission to resolve general WHS disputes over safety and worker protection referred by unions, as already occurs in Queensland and South Australia.

This provides an opportunity to remove workplace trauma hazards before they turn into serious injuries and claims.

Recommendation 25: To prevent workplace injuries, the NSW Government should follow the lead of Queensland and Victoria and make Work Health and Safety Codes of Practice enforceable.

Making it easier for injured workers to return to work

Recommendation 26: Include return-to-work provisions for injured workers as a matter for which unions may lodge a dispute with the NSW Industrial Relations Commission for resolution. This should apply to workers in the public sector, local government and private sector and will assist workers to return to the workplace when they are fit to do so.

Recommendation 27: Reintroduce a loading based on claims performance to restore meaningful incentives for employers to prevent injury and support timely return to work and to reward safety-conscious employers.

Recommendation 28: The NSW Government should legislate to prevent termination of an injured worker unless the injury management plan states the return-to-work goal is a different job with a different employer.

Cleaning up waste and inefficiency within the scheme

Recommendation 29: The lack of accountability amongst insurers is leading to unnecessary waste, inefficiencies, and poor return-to-work outcomes. To improve scheme sustainability, the NSW Government should extend SIRA's regulatory capacity across all insurers in the scheme.

Recommendation 30: Improve SIRA's capacity to enforce compliance of employer insurance obligations and increase the financial penalty for non-compliance to at least three-times the financial benefit obtained by employers.

Recommendation 31: The NSW Government should publish the recommendations of the 2024 Independent Inquiry into SIRA's regulatory operations and consult with stakeholders on their implementation.

Recommendation 32: To promote long-term financial stability and equitable treatment of injured workers, the NSW Government should abolish self-insurer and specialised insurer arrangements in NSW.

Part D: Next steps and independent review of the NSW workers compensation scheme

Recommendation 33: The NSW Government should legislate an independent review of the NSW Workers Compensation scheme with terms of reference to investigate the design of a system that deals with psychological injuries which:

a. is economically sustainable;

b. addresses administration of the system in an efficient manner;

c. deals with psychological injuries in a way that:

    i. maximises prevention;

    ii. maximises injured workers' return-to-work; and

    iii. promotes a process that does not aggravate the underlying injury;

d. considers the most appropriate means of providing long term support to people with a psychological injury; and

e. reviews existing measures and considers further preventative measures.

Part A: Timing of the Bill

23. Unions NSW is concerned that the Government's Bill is rushed. It contains reactive and harmful provisions which **should be considered a last resort and not a first step to improving scheme sustainability.**

24. As a first step and alternative to the Bill, this submission explores numerous practical and common-sense measures the NSW Government can implement to improve scheme sustainability through **three priority areas:**

    a. **Preventing injuries,**

    b. **Helping workers return to work when it is safe to do so, and**

    c. **Reducing waste and inefficiency within the scheme.**

25. Explored in **Part C** of this submission, alternative recommended measures can significantly reduce costs to the scheme while improving mental health, in complete contrast to the impact of the Bill.

Recommendation 1: The NSW Government should delay introduction of its proposed changes to workers compensation to provide an opportunity to consider a range of options, in consultation with unions and other key stakeholders. Consideration should be informed by a clearer understanding of the impact that new and recommended measures, strategies, and regulations can have on preventing workplace injuries.

Part B: Major issues with the content of the Bill

26. The timing of the Bill and short notice of this inquiry has made it impossible to conduct a comprehensive review of all the problems with the Bill.

27. Unions NSW raises the following major issues with the Bill and makes recommendations to address them. We note the numerous problems with the Bill are not limited to those listed below.

28. It is therefore our primary position that the Bill should be delayed in order to consider a range of options through an independent review of the scheme, discussed further in **Part D** of this submission.

Increasing Whole Person Impairment thresholds for psychological injury claims

29. The proposal to increase WPI threshold to 31% for weekly payments, treatment expenses, permanent impairment compensation, and work injury damages will eliminate all income support for almost all psychologically injured workers after 2.5 years.

30. The proposals are callous and draconian and will give NSW the harshest workers compensation scheme in the country.

31. A threshold of 31% WPI is for all intents and purposes impossible to achieve.

32. In correspondence provided to Unions NSW, clinical psychiatrist Dr. Anthony Dinnen asserts that a 30% WPI threshold is extremely difficult to achieve for workers with work-related psychological injuries. According to Dr Dinnen, even severe cases – marked by chronic incapacitation, inability to work, disrupted family life, and long-term psychiatric care, typically do not exceed 20–25% WPI using the Psychiatric Impairment Rating Scale (PIRS).

33. The following is a description of a hypothetical worker with a 22% WPI:

    'An injured worker with a 22% impairment is likely to struggle to live independently without support. They probably cannot prepare their own meals and may need prompting to shower and a community nurse or family

member may be required to regularly visit them to ensure minimum levels of hygiene and nutrition.

They will be withdrawn from sports, hobbies, and other social and recreational activities they enjoyed before their injury. In many instances their capacity to travel beyond their local area or shops will be restricted. Their personal relationships are likely to be severely strained with both a loss of friendships and separation from their partner or spouse likely.

Their ability to read and comprehend more than a newspaper article is restricted and they will find it difficult to follow instructions and may even struggle to concentrate sufficiently to follow a conversation. They will be restricted in their ability to work and will be unlikely to work more than 20 hours per week. If they can work, it will be in a less demanding and less stressful role.'

- Scott Dougal, accredited specialist in personal injury law

34. Under the Government's Bill, this injured worker would be cut off from critical long-term care and support, despite having suffered their injury due to their employment in NSW.

35. The current 15% and 21% thresholds already eradicate more than 90% of claims after 5 years. The increase to 30% WPI will eradicate all but a handful of claims.

36. The Bill reflects a failed policy that was tried by the O'Farrell Government in 2012 and reversed in 2015 because it operated so harshly, with impacted workers back-paid. The current proposal would operate even more harshly, as the *Workers Compensation Legislation Amendment Act 2012* (NSW) only applied after 5 years and did not apply to work injury damages.

37. At Budget Estimates on 11 April 2025, the CEO of SIRA, Ms Mandy Young, told the Committee there were five reported incidents of suicide associated with the transitional arrangements for the 2012 workers compensation reforms, specifically the reduction in the number of weeks workers could receive weekly payments (NSW Parliament 2025, p. 62). As the changes were reversed 3 years later, these were avoidable deaths. This time around, the amendments would **only** impact the psychologically vulnerable.

38. The claim by the NSW Government that the Bill will align the NSW threshold with other states is incorrect. Only South Australia has a 30% WPI threshold, but this is based on more generous guidelines. A 30% WPI under the South Australian guidelines is equivalent to 15% WPI under the NSW guidelines

(where in both cases a worker scores moderate impairment in all categories) (SIRA 2023, pp. 54-59, RTWSA 2015, p. 102). Increasing the threshold to 31% will achieve the opposite of alignment.

39. A comparison between the thresholds set by the Bill and those of other states regarding weekly payments and medical benefits is made below, laying bare the inaccuracy in the Government's claim of alignment.

	Weekly payment after 2.5 years (130 weeks) for psychological injury	WPI requirement for weekly payments after 2.5 years	WPI requirement for medical costs after 3.5 years
NSW now	80% of pre-injury earnings	No requirement until 5 years, then 20%	No requirement until 5 years, then 11% up to 7 years, then 20% up to 10 years, then >21% unlimited.
NSW proposed	80% of pre-injury earnings	30%	30%
Vic	80% of pre-injury earnings	21%	21%
QLD	75% of normal weekly earnings or 70% Queensland full-time adult ordinary time earnings	15%, otherwise single pension rate payment, up to 5 years	No requirement
WA	100% of pre-injury earnings	No requirement	No requirement until $75,817, then 15% up to $250,000
SA	80% of pre-injury earnings	30% (better than proposal due to more generous guidelines).	30% (better than proposal due to more generous guidelines).
TAS	80-85% of pre-injury earnings	No requirement until 9 years, then 15%	No requirement until 10 years, then 15%
NT	75-90% of pre-injury earnings	No requirement until 5 years, then 15%	No requirement until 6 years, then 15%

ACT	65% of pre-injury earnings or national minimum wage	No requirement	No requirement

Legend:
Purple = proposal
Red = worse than proposal
Yellow = aligned with proposal
Green = better than proposal

40. Increasing the threshold disproportionately impacts frontline workers, who are predominantly women, and cannot avoid the traumatic and impairing things they experience for the benefit of the community.

41. Increasing the WPI threshold does not achieve the Government's aim of reducing minor and unmeritorious claims as it only affects seriously injured workers who are unable to work or function normally in society. An extreme measure such as this should not even be considered until all other avenues have been exhausted.

42. Contrary to the NSW Labor Government's proposal, the 2021 *McDougall Review* found that WPI is a poor test for entitlement to compensation and recommended reviewing its use entirely. This review should come before the NSW Labor Government's proposal to increase the WPI threshold. The report concluded:

    'an assessment of WPI does not always yield an appropriate indicator of either capacity for work or the need for and expense of medical treatment.

    The use of the concept of WPI as the test for entitlement to weekly and medical benefits does not reflect the policy objective of ensuring that the most injured workers should receive appropriate support. That policy would be better served by a test that assessed the severity of an injury by reference to the treatment and support necessary to manage its consequences, as well as its impact on the worker's capacity for work.'

    (McDougal 2021, p. 266).

43. More savings will be achieved by addressing mismanagement of claims and iCare admin costs, explored in **Part C** of this submission, without reducing benefits to seriously injured workers.

Schedule 1 [18] Section 39A – Weekly payments

44. Clause [18]-s39A increases the whole person impairment (WPI) threshold for weekly payments to 31% to access payments after 2.5 years. Currently, there is no threshold for first 5 years then 21% for payments after 5 years.

45. The issue with this clause is that because 31% is an impossibly high threshold, virtually no one will be able to access income support after 2.5 years. Workers with 15%+ WPI almost always cannot work and will be left without income support.

Recommendation 2: Delete Schedule 1 [18] Section 39A. Savings can be achieved via other less harmful measures.

Schedule 1 [22] Section 59A – Medical treatments

46. Section 59A increases the WPI threshold for the medical treatment and limit period. For primary psychological injuries, no treatment costs are payable more than 1 year after weekly payments cease (therefore maximum of 3.5 years), unless 31% WPI or more. Currently, treatment is payable for 2 years after last weekly payment if <11% WPI; 5 years after weekly payments if 11% to 20%; treatment payable for life if >20% WPI.

47. The issue with this clause is that because 31% is an impossibly high threshold, virtually no one will be able to access treatment and care after 3.5 years.

Recommendation 3: Delete Schedule 1 [22] Section 59A entirely. Savings can be achieved via other less harmful measures.

Schedule 1 [29] Section 65A – Lump sum compensation for permanent impairment

48. Section 65A increases the threshold for permanent impairment compensation from 15% to 31%.

49. Because 31% is an impossibly high threshold, virtually no one will be able to access permanent impairment compensation.

Recommendation 4: Delete Schedule 1 [29] Section 65A entirely. Savings can be achieved via other less harmful measures.

Schedule 1 [97] Section 151H – Work injury damages

50. Section 151H increases the WPI threshold for work injury damages from 15% to 31%.

51. Contrary to the NSW Government's claims, its Bill does not align NSW with other states regarding whole person impairment (WPI) thresholds for damages:

    a. South Australia's 30% threshold is based on different, more generous guidelines. Their 30% WPI is the same as our 15% WPI (SIRA 2023, pp. 54-59, RTWSA 2015, p. 102).

    b. Queensland has no threshold at all.

    c. ACT has no threshold at all.

    d. Victoria has a narrative test threshold which does not depend on WPI but rather how the injury has impacted the worker's life, especially work capacity.

52. Because 31% WPI is an impossibly high threshold, virtually no one will be able to access damages.

53. Damages in NSW only compensate a worker for loss of earnings and can only be claimed when the employer was negligent – that is, the worker must not merely prove the employer acted *unreasonably*; the worker must prove the employer acted *negligently* – a far higher bar. This already protects the scheme against unmeritorious claims.

54. Workers with a WPI of 15%+ almost always cannot work and will be left without any income support even where injured due to employer negligence.

55. There is no financial justification for increasing the WPI for damages. Work injury damages are not a costs driver in the scheme. The total amount paid in WID benefits in 2024 was $900m (SIRA 2025), mostly for physical injuries. The cost saving will be modest in a scheme where operating costs (i.e. administration costs, not benefits) of iCare and SIRA being funded out of the premium pool are now running at over $1.3 billion per annum and increasing by more than $100m per annum (iCare 2024, SIRA 2024[1]). Work

injury damages claims enable workers to exit the scheme without being compensated for future medical treatment, saving the scheme significant ongoing treatment and administration costs.

56. The availability of negligence claims serves as a deterrence that improves employer conduct, reducing future claims. Removal of the deterrence will only increase injuries.

57. Work Injury Damages (WID's) represent only 15% of the cost of the NSW scheme (SIRA 2025). They represent more than 30% of the Victorian scheme (WorkSafe Victoria 2024 p. 24) where damages are also more generous. There is no evidence that WID claims impact the financial viability of the scheme.

Recommendation 5: Delete Schedule 1 [97] Section 151H entirely. Savings can be achieved via other less harmful measures.

Limiting what is considered a psychological injury

58. The Bill effectively limits what counts as a compensable injury to only those caused by a small list of hazards. This is akin to saying a broken arm is only compensable if you fall over a chair, but not a bench.

Schedule 1 [3] Section 8G(1) – Setting the limits

59. Section 8G(1) of the Bill sets new limits on the type of psychological injury claims that can be made and compensated under the scheme. Section 8G means that no compensation is payable for a primary psychological injury to a worker unless:

    a. A 'relevant event or a series of relevant events' caused the injury;

    b. There is a real and substantial connection between the 'relevant event' and the employment; AND

    c. Employment is the main contributing factor to the injury.

60. Section 8G(1) has various issues, including:

a. It disentitles workers to compensation if the psychological injury was not caused by a relevant event. The issues with the meaning of 'relevant event' are identified below.

b. It imports language from the journey claim section, the necessity for which is unclear.

c. It serves to create an additional hurdle to receive compensation which otherwise does not exist in respect of other kinds of injury.

d. As a matter of drafting, s 8G(1)(c) is otiose, if not inconsistent with s 8G(1)(a).

Recommendation 6: Schedule 1 [3] Section 8G(1) should be deleted.

If it is to remain:

1. Section 8G(1)(a) should incorporate amendments recommended below to 'relevant event'.

2. Section 8G(1)(b) should be amended to, 'the injury must arise out of, or in the course of employment' (s 4 currently).

3. Section 8G(1)(c) should be deleted.

Schedule 1 [3] Section 8A – Significant effect

61. Section 8A of Bill limits the meaning of 'psychological injury' to an injury that is a 'mental or psychiatric disorder' that causes **significant** behavioural, cognitive or psychological dysfunction.

62. This amounts to a narrowing of the definition of psychological injury as it will exclude persons who suffer behavioural, cognitive or psychological dysfunction which is not 'significant'. Additionally, the need for consequent dysfunction to be 'significant' infects the legislation with further legal technicality, ambiguity and areas for dispute.

Recommendation 7: Schedule 1 [3] Section 8A should omit the words, 'that causes significant behavioural, cognitive or psychological dysfunction'.

Schedule 1 [3] Section 8E(1) – Relevant event and legal barriers for bullying and sexual harassment victims

63. Section 8E(1) defines 'relevant event'. 'Relevant event' is a term used in s 8G, Primary Psychological Injuries.

64. The issue is that compensation for primary psychological claims is being confined to certain injuries, being injuries caused by 'relevant events'. Those relevant events do not include common psychological hazards, like: work overload, role conflict or lack of clarity, poor support, poor workplace culture or relationships.

65. Schedule 1 [96] Part 4A 'Special entitlement to expenses for medical or related treatment' does not alleviate these concerns. This section limits compensation for work pressure injuries to medical treatment only, and only for 8 weeks. This prevents meaningful rehabilitation, especially given wait-times for psychological or psychiatric care are far beyond 8 weeks.

66. By limiting compensable injuries to those caused by 'relevant events', the Bill undermines the process of doctor-led care and progress to recognise workplace psychosocial hazards. If implemented, Unions NSW is concerned about how SafeWork NSW will regulate non-compensable hazards, leading to compliance gaps.

67. While the 'relevant events' include bullying and racial harassment, the definitions are limited. Bullying imports the ordinary meaning of the expression, requiring the conduct to be repeated and objectively unreasonable and racial harassment must be determined objectively.

68. Significantly, in order for bullying, sexual harassment and racial harassment to constitute a 'relevant event' it is necessary that the conduct be found to be such by a tribunal, commission or court. How such a finding is to be obtained is entirely unclear. The following questions arise:

    a. Can a worker commence proceedings in their own right under s 8E?

b. Can an industrial organisation commence proceedings on the workers' behalf?

c. Are additional resources being allocated to courts, tribunals and commissions to deal with the increased case load?

d. Will the rules of evidence apply?

e. What is the standard of proof?

f. If a court, commission or tribunal makes such a finding incidental to other proceedings, will that finding be sufficient for the purpose of s 8E?

g. Will a worker be entitled to recover legal costs? If not, how can a worker succeed against a well-resourced employer?

h. How will a worker with a disability, limited literacy, or poor English skills be in a position to represent themselves at a contested hearing against a well-resourced employer?

69. While the NSW Government presents this measure as helping to resolve a safety hazard, in practice it will just serve as a barrier to bullying and sexual harassment victims and survivors accessing workers compensation. Workers would be forced to remain at work experiencing continued abuse, while becoming further traumatised through an adversarial legal process which ruins their relationship with their employer and therefore any prospect of their return-to-work. The Government's proposals will result in less scrutiny of workplace bullying, sexual harassment and racial harassment.

70. This section will cause further psychological harm to injured workers. Forcing workers who have been bullied, physically assaulted, racially vilified or sexually assaulted or harassed, to go before a commission, court, or tribunal, to prove that their injury fits the meaning of 'relevant event,' before they can be financially compensated and medically treated for their injury, will inevitably result in further injury.

71. Unions NSW supports having the ability to dispute bullying and harassment in the NSW IRC, but not as a gateway to accessing workers compensation.

Schedule 1 [3] Section 8E(2) – Definition of bullying and racial harassment

72. Section 8E(2) defines 'bullying' as 'repeated' unreasonable acts. This requires establishing a course of conduct which is objectively unreasonable. This

compounds the legal technicality of a finding under s 8E, as it is not sufficient for the worker to prove that they perceived the conduct as bullying.

73. The definition of racial harassment conflates objective and subjective tests, being an act that is 'reasonably likely' to offend, insult, humiliate or intimidate and done because of the race, colour, national/ethnic origin.

Recommendation 8: Schedule 1 [3] Section 8E should be deleted.

Alternatively:

1. Section 8E should be amended to identify all psychological hazards identified in the *NSW Code of Practice: Managing Psychological Hazards at Work* including:

    a. Role overload
    b. Role underload
    c. Exposure to trauma and traumatic events
    d. Role conflict or lack of clarity
    e. Low job control
    f. Conflict or poor workplace relationships between workers & supervisors, managers and co-workers
    g. Poor support from supervisors & managers
    h. Poor co-worker support
    i. Workplace violence
    l. Bullying
    m. Harassment including sexual harassment
    n. Inadequate reward & recognition
    o. Hazardous physical working environments
    p. Remote or isolated work
    q. Poor procedural justice
    r. Poor organisational change culture

(SafeWork NSW 2021, pp. 7-8)

Recommendation 9: The requirement to obtain a finding of sexual harassment, bullying or racial harassment should be deleted.

Recommendation 10: Bullying should be determined by reference to the subjective perception of the worker, provided: [the perception has a factual foundation] OR [the perception is reasonable and rational in all the circumstances].

Schedule 1 [3] Section 8H – Vicarious Trauma

74. Vicarious trauma is a 'relevant event' for the purpose of s 8G.

75. The section is problematic because the definition does not capture workers who suffer an injury through vicarious trauma in the ordinary sense of the expression, being an injury caused by exposure to another person's trauma. Instead, vicarious trauma is confined to incidents involving a person who is a 'close work connection' with the worker.

76. The definition of 'various trauma' warrants close scrutiny. Instead of legislating 'vicarious trauma', as the expression is ordinarily understood to mean (an injury caused by exposure to another person's trauma), the Government has proposed a unique and narrow form of vicarious trauma conditional upon a 'real and substantial connection' between the worker and victim. The psychological hazard posed by deceased or injured persons exists irrespective of the relationship between the worker and the victim. This hazard is particularly prevalent in respect of public sector workers who are regularly required, in their service to the State, to interact with dead or seriously injured people or to view documents depicting dead or seriously injured people, without having any real or substantial relationship with the person. These workers include correctional officers, judicial associates, administrative and clerical officers, solicitors, tipstaves, sheriff's officers, court officers, regulatory inspectors, crime scene officers, special constables, nurses, RFS officers, and rail workers.

77. The requirement for a 'close work connection' in section 8H excludes those who are traumatised by **responding to or processing the aftermath of serious incidents**, without a direct relationship to the victim. This narrow scope fails to reflect the reality of psychological injury risk for many frontline and support workers.

Recommendation 11: Schedule 1 [3] Section 8H should be deleted. Alternatively, s 8H should be amended by: in respect of s8H(1), deleting the words 'with whom the worker has a close work connection-'; in respect of s 8H(2), deleting the subsection.

Aftermath Claims

78. Section 8E(1)(c) defines a relevant event to include 'witnessing an incident that leads to death or serious injury.' However, this provision excludes workers who attend the aftermath of such incidents, such as first responders, public servants, transport workers and others who are regularly required to respond to or process traumatic scenes after the fact, without having personally witnessed the incident. This is a significant oversight, as after-the-fact exposure is far more commonly the cause of PTSD than witnessing the incident itself.

79. The Bill fails to recognise these 'aftermath claims' and offers no alternative pathway for compensation unless a close work connection under s 8H can be established, which will often not apply in these circumstances.

Recommendation 12: Amend Schedule 1 Section 8E(1)(c) to include workers who attend or respond to the aftermath of a traumatic incident, including those who interact with death or serious injury as part of their duties.

Analysis of the Bill regarding defining psychological injuries

80. The above amendments will limit the ability of psychologically injured workers to access compensation, principally by excluding liability unless the primary psychological injury was caused by a 'relevant event'. The relevant events do not capture a variety of common psychological hazards, for example work overload or poor workplace culture.

81. The requirement on workers to obtain a 'finding' from a court, commission or tribunal of bullying, sexual harassment or racial harassment is problematic for numerous reasons, including:

a. The inevitable cooling effect it will have on the willingness of workers to bring claims – inimical to the stated purpose of reforms, being prevention.

b. The ambiguity as to how those proceedings will work, including whether s 8E contemplates a standalone cause of action or whether such a finding can only occur incidentally to other proceedings.

c. If s 8E contemplates a standalone cause of action, the capacity of the IRC (or other bodies) to hear and determine those applications and the capacity of industrial organisations to represent members in those applications.

d. As a finding is a precondition to bringing a claim, the delay in receiving compensation.

82. Significantly, provisional liability is undermined because of the requirement to take a matter to a court, tribunal or commission before a claim can be made. Provisional liability exists to provide immediate treatment and a better return-to-work outcome.

83. Reference to tribunal, commission or court is found throughout the Bill. This is unclear language. Without clarity this will lead to disputation as to what court, commission or tribunal is the correct avenue for the notification of an injury caused by sexual harassment, racial harassment, or bullying.

84. The concept of 'racial harassment', introduced in this section by the Bill, contradicts other legislation such as the *Anti-Discrimination Act* 1977 (NSW), where the term racial discrimination is used. This will lead to high disputation as the Personal Injury Commission (PIC) determines which authorities relating to race discrimination will apply.

85. Section 8E(2) also provides a new definition of sexual harassment which is not in line with the *Sex Discrimination Act 1984* (Cth) and could cause high levels of disputation as the definition is disputed in a court, commission or tribunal.

86. The Bill undermines the process of doctor-led care and progress to recognise workplace psychosocial hazards. If implemented, we are concerned about how SafeWork NSW will regulate non-compensable hazards, leading to compliance gaps.

Denying claims involving reasonable management action despite other predominant hazards

87. The Bill restricts psychological injury claims which occur in the context of an extended definition of reasonable management action, even when the injury is predominantly caused by another hazard.

Schedule 1 [3] Section 8D(1),(2) – Extending the definition of reasonable management action

88. Section 8D(1),(2) redefines 'reasonable management action'.

89. It significantly extends the current definition, which under s11A (1) of the *Workers Compensation Act 1987* (NSW) is:

    '... reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.'

90. Section 8D(1),(2) makes it easier for an employer to defend an argument of reasonable management action by doubling the number of categories from the current phrase.

91. Section 8D(1)(a) introduces a new concept, 'reasonable way', in relation to reasonable management action. This is untested and will result in high levels of disputation for the courts, tribunals or commissions to build case law to clarify this new term.

Schedule 1 [3] Section 11A – Relevance of reasonable management action to claim

92. Section 11A replaces the current 11A(1) and (3) of the *Workers Compensation Act 1987* (NSW) and redefines when compensation can be paid. Specifically, s 11A replaces:

    '...if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer'.

93. Section 11A – amending 11A of the *Workers Compensation Act 1987* (NSW) – adds a worker's expectation or perception of reasonable management action

as additional grounds for excluding compensation for psychological injury. The removal of the worker's perception as a barrier to an employer's defence of reasonable management action undermines long-standing case law in both work health and safety and workers compensation, much of which predates the *Work Health and Safety Act* 2011 (NSW).

94. Additionally, s 11A replaces 'wholly or predominantly caused by' with 'a significant cause', which weakens the provision for workers and potentially reduces the range of possible claims. This is likely to prevent the injured worker's access to compensation when management action is taken in the context of a worker being exposed to another type of hazard.

Analysis of Schedule 1 [3] Sections 8D & 11A

95. Regardless of sections 8D and 11A, the definition of 'relevant event' under section 8E(1) may substantially or even wholly exclude claims occurring in the context of reasonable management action, except for events that may be prescribed by regulation under 8E (h).

96. Sections 8D & 11A are likely to reduce the capacity for a worker to demonstrate a bullying claim because they:

    a. Expand the definition of reasonable management action,

    b. Remove consideration of a worker's perception of the action, and

    c. Lower the required impact of reasonable management action to 'significant' for an injury to be non-compensable.

97. The interaction between this section and the bullying and harassment jurisdiction in the NSW Industrial Relations Commission is unclear. Where the IRC accepts a claim of bullying, it is unclear whether 11A will still be used as a defence regarding compensation. This means that even if a worker succeeds through the lengthy process of extracting a finding, they may still have their claim denied.

Analysis of reasonable management action in *State Transit Authority of New South Wales v Fritzi Chemler [2007] NSWCA 249* and *Attorney General's Department v K [2010] NSWWCCPD 76*

98. We understand that the NSW Government's justification to amend the definition of reasonable management action stems from the precedent set by two cases. They are:

    a. *State Transit Authority of New South Wales v Fritzi Chemler [2007] NSWCA 249* (***Chemler***) and

    b. *Attorney General's Department v K [2010] NSWWCCPD 76* (***AG v K***).

99. In *Chemler,* the worker perceived racial discrimination in his co-workers making slurs/jokes about Jewish people. The Court of Appeal held that the employer did not have a defence that the jokes were not intended as discrimination directed at the worker – it was the worker's perception that was relevant.

100. In *AG v K,* a solicitor claimed for an injury caused by excessive workload and harassment at work, and the employer's defence was that her condition was due to her 'misperception of events'. Similarly, the Commission found that this was not a defence.

101. The decisions do not stand for the proposition that perception is all that matters – there still needs to be a factual foundation for the perception – that is, the injury needs to be based on real, not imaginary, events. However, the cases do stand for the proposition that the worker's perception does not have to be rational, reasonable, or proportionate in order to give rise to a compensable claim.

102. While it is unlikely that this is a source of a significant number of claims, the Bill goes too far in trying to address this. It would be a very simple amendment to apply an objective test in such cases – that is, to provide that a worker's perception of events needs to be reasonable and rational in all the circumstances. Instead, the Bill does away with the right to make any claim for compensation for psychological injury except in limited defined circumstances.

103. Additionally, the cases do not point to any justification of the Government's proposed changes regarding the changing of wording from 'wholly or predominantly' to 'significant'.

104. In any event, it is difficult to envisage what need there is for the reasonable management action defence if the worker first needs to prove bullying, harassment, threat of violence, criminal conduct, or a traumatic accident (a relevant event under Section 8E(1) in order to claim in the first place. It is therefore hard to justify giving an employer a defence of reasonable management action to a racial or sexual harassment claim or a claim arising from a threat of violence, etcetera. This speaks strongly to reinstating the phrase 'wholly or predominantly' in s 11A.

Recommendation 13: In respect to Schedule 1 [3] section 8D(1),(2) maintain the current s11A of the *Workers Compensation Act 1987* (NSW).

Recommendation 14: In respect to Schedule 1 [3] section 11A, maintain 'wholly or predominantly' or 'predominantly' and delete section 11A (b) and (c).

Limits on assessing and disputing permanent impairment

105. The Bill introduces new limitations on how permanent impairment is assessed and disputed, making it harder for injured workers to access fair compensation and medical care.

Schedule 1 [98] Section 153G – Restricting Assessors

106. Section 153G limits who can assess permanent impairment to assessors on the SIRA-approved list.

107. There is no transparent process for how assessors are selected or removed from this list, raising concerns about potential bias and the lack of independence in assessments.

Recommendation 15: Amend Schedule 1 [98] Section 153G to include a clear and accountable process for the selection and oversight of assessors on the SIRA register, including input from worker representatives and safeguards to ensure independence.

Schedule 1 [98] Section 153G – Costs of permanent impairment assessment

108. While section 153G(2) permits either party to reject an assessment and refer the matter to the Personal Injury Commission, the Bill does not specify:

    d. On what grounds an assessment can be rejected,

    e. Whether a worker can present their own medical evidence,

    f. What process the Commission must follow after referral.

109. These gaps undermine the adversarial and independent nature of workers compensation disputes and could deny workers procedural fairness before the Commission.

Recommendation 16: Amend Schedule 1 [98] section 153G to legislate clear grounds and procedures for disputing assessments, including a right for workers to present independent medical evidence and guidance for the Commission in appointing a new assessor.

Schedule 1 [98] Section 153N – Claims for Deterioration

110. Section 153N creates an almost impossible threshold for workers to make a further claim based on deterioration of their condition. A claim is only allowed if:

    g. The insurer agrees the deterioration was unexpected and material (an unlikely scenario),

    h. The deterioration is at least 20% WPI (a level rarely met),

    i. The deterioration was not reasonably foreseeable (most injuries have some expected deterioration).

111. These conditions are unrealistic and would exclude nearly all genuine cases of long-term deterioration from further entitlements.

Recommendation 17: The requirements in Schedule 1 [98] section 153N should be removed. Workers should be able to seek a reassessment of permanent impairment without needing insurer consent, and thresholds for deterioration should reflect medical reality.

Removal of provisional liability for psychological injuries

Schedule 2 [5] Section 280 - Provisional acceptance of liability

112. The removal of section 280(3) will strip workers with psychological injuries of provisional liability protections, delaying access to early medical treatment and support. While workers can still lodge claims, the lack of early funding for diagnosis and treatment may act as a significant barrier to accessing care and progressing a claim.

Recommendation 18: Delete schedule 2 [5] section 280 - Provisional acceptance of liability.

Under- and non-insurance of workers

Schedule 1 [103] Section 173AA

113. Sections 173AA (1) and (2) create an offence for large employers to fail to give insurers information relevant to underinsurance.

114. Underinsurance currently costs the scheme hundreds of millions of dollars (iCare 2023). Underinsurance represents an important lever the NSW Government can use to improve financial sustainability **and** help ensure injured workers receive care and support. This is explored further in **Part C** of this submission.

115. However, the Bill fails to adequately address the issue of under- and non-insurance of employers.

116. Section 173AA(1) creates an offence when a large employer 'recklessly' fails to provide information which will allow their premiums to be accurately calculated, including but not limited to wages. The problem with 173AA(1) is that the offence is confined to 'large employers', a term undefined in the Bill. The choice to confine the proposed offence to large employers will significantly limit the scope of the clause's practical application. Large employers are more likely to be correctly insured compared with smaller and medium-sized ones.

Recommendation 19: Expand the scope of businesses covered under Schedule 1 [103] Section 173AA (1) to all businesses.

117. The decision to make the offence one of recklessness will severely limit the practical application of the clause. Notwithstanding 173AA (2), which seeks to clarify that the threshold for recklessness will be able to be met with proof of knowledge or intention, it remains true that recklessness is a significantly higher bar to reach than negligence. Requiring actual proof of knowledge or intention will exclude a range of circumstances where businesses are underinsured.

118. Changing the offence from one of recklessness to negligence would make the proposed offence significantly more effective in disincentivising underinsurance, by ensuring that employers must take all reasonable steps to ensure they are appropriately insured.

Recommendation 20: Amend the test for an offence under Schedule 1 [103] Section 173AA from recklessness to negligence.

119. Currently, the penalties for underinsurance are so low as to not deter businesses from participating in this illegal activity. The penalty for this offence must be significant enough to act as real deterrent.

Recommendation 21: Amend Schedule 1 [103] Section 173AA to include a financial penalty for non-compliance that represents three times the financial benefit obtained by employers.

120. Furthermore, the enforcement actions of SIRA do not reflect the extent of underinsurance in the system. The NSW Government should expand the capacity for regulatory oversight, as also explored in **Part C** of this submission.

Recommendation 22: Amend the Bill to empower and task iCare with enforcing insurance requirements amongst employers.

Denying reasonably necessary medical treatment

Schedule 1 [26] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation & 60AA Compensation for domestic assistance

121. Sections 60 and 60AA will limit the treatment and assistance injured workers can receive. Omitting reasonably necessary and replacing with reasonable and necessary creates a higher bar and a different test for medical expenses. The 'reasonably necessary' threshold has been settled law since *Rose v Health Care Commission* (NSW) 1986. The Bill will make accessing some treatments and support more difficult.

122. According to the 2021 *McDougal Review*, the proposal to change the test, from 'reasonably necessary' to 'reasonable and necessary', for access to a medical treatment, was opposed by the Australian Medical Association (AMA). The AMA warned this change would cause delays in the provision of care to injured workers (McDougal 2021, p. 274).

123. Under the current test of 'reasonably necessary', if a doctor certifies that an injured worker needs treatment, their opinion is generally respected. However, if the test were changed to 'reasonable and necessary', insurers may be able to oppose treatments against medical advice based on additional considerations such as cost or perceived effectiveness. This could increase costly disputation and make it harder for workers to challenge

insurers' decisions, especially if courts adopt a deferential approach to what insurers deem 'reasonable'. This risk is illustrated by cases such as *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at 648–650 and *A v Corruption and Crime Commissioner* [2013] WASCA 288 at [123], which highlight the broad discretion afforded to decision-makers under a 'reasonable' standard in administrative law.

124. Ultimately, this section could unjustly deny injured workers reasonably necessary medical treatment.

Recommendation 23: Omit Schedule 1 [26] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation & 60AA Compensation for domestic assistance.

Part C: Alternative proposals to improve scheme sustainability

125. There are better options to improve the financial sustainability of the scheme.

126. The following recommendations are Unions NSW's alternative to the NSW Government's position. Our plan focuses on **our three priority areas** of preventing injuries and trauma, returning injured workers back to work quicker, and reducing waste and inefficiencies within the current scheme.

127. If these problems are not addressed and critically injured workers are denied support, this means they fall through the cracks in the system, pushing them onto their families for care and welfare and charity to survive.

Adopting the best practices from other states to prevent injuries before they happen

128. NSW's current WHS framework is reactive and relies on regulator intervention after an injury occurs. Furthermore, some employers choose not to follow WHS Codes of Practice in their workplaces which contain best-practice hazard reduction measures developed by experts.

Empower the NSW IRC to resolve safety hazards raised by workers

129. Unions can only prosecute Category 1 WHS breaches, which are the most serious type of offense risking death or serious injury/illness. By this stage it's often too late, especially for trauma and psychological injuries which develop over time. We need to remove workplace safety hazards before they cause injuries that leave injured workers dependent on a failing workers compensation system.

Recommendation 24: The NSW Government should empower the NSW Industrial Relations Commission to resolve general WHS disputes over safety and worker protection referred by unions, as already occurs in Queensland and South Australia.

This provides an opportunity to remove workplace trauma hazards before they turn into serious injuries and claims.

Entrenching Codes of Practice in NSW WHS law

130. In NSW, Codes of Practice provide information for employers on how to maintain safe workplaces and practices required under the *Work Health and Safety Act 2011* (NSW). Codes of Practice contain expert material and the best methods for hazard detection and the elimination and/or minimisation of those hazards.

131. However, because Codes of Practice are not mandatory, some employers choose not to follow them and cut corners to save time and money at the expense of workers' safety.

Recommendation 25: To prevent workplace injuries, the NSW Government should follow the lead of Queensland and Victoria and make Work Health and Safety Codes of Practice enforceable.

Making it easier for injured workers to return to work

132. Return to work rates have continued to fall over recent years which places pressure on the financial sustainability of workers compensation. Unions NSW has received feedback from workers regarding the multiple barriers they face to a successful return-to-work.

Empowering the NSW Industrial Relations Commission to resolve return-to-work disputes

133. Returning to work after an injury is in the interest of employers and workers. The barriers to a successful return-to-work process are often just as complex

and difficult for an employer as they can be for an employee. In some cases employers may wish to avoid having to accommodate the needs of an injured worker returning to the workplace. There needs to be more support to assist employers manage injured workers returning to work.

134. Situations where an employee would be able to return to work, but is prevented from doing so, often lead to a dispute with their employer. This often remains unresolved when there is no avenue for the worker to have their case resolved.

Recommendation 26: Include return-to-work provisions for injured workers as a matter for which unions may lodge a dispute with the NSW Industrial Relations Commission for resolution. This should apply to workers in the public sector, local government and private sector and will assist workers to return to the workplace when they are fit to do so.

Incentivising employers to prioritise safety and return to work

135. Currently, employers have little incentive to provide suitable duties to enable injured workers to return-to-work. The current premium model is industry-based and does not reward good employers who facilitate return-to-work for injured employees. Nor does it address the issue of employers who unnecessary keep employees on workers compensation.

136. Such practices lead to reduced return-to-work outcomes and diminished employer engagement in injury management. The NSW Government's reliance on rehabilitation providers to bridge this gap has proven costly and ineffective, adding hundreds of millions of dollars to the scheme without improving outcomes.

Restructuring premiums to promote return to work

137. The NSW workers compensation scheme should return to a premium model which takes into account an employer's individual claims history. Prior to the 2012 reforms to the scheme, employers with a higher incidence of injuries faced higher premiums, creating a financial incentive to improve workplace safety, provide suitable duties, and facilitate early return-to-work. This system contributed to significantly better return-to-work rates, as employers were

commercially incentivised to minimise lost time and offer meaningful alternative duties.

Recommendation 27: Reintroduce a loading based on claims performance to restore meaningful incentives for employers to prevent injury and support timely return to work and to reward safety-conscious employers.

Preventing employers from sacking injured workers

138. Currently, employees can be terminated if, after 6-months, they still have not received 'suitable duties' from their employer which enable them to return-to-work. This means some employers simply 'wait out the clock' rather than making a genuine effort to provide suitable duties.

Recommendation 28: The NSW Government should legislate to prevent termination of an injured worker unless the injury management plan states the return-to-work goal is a different job with a different employer.

Cleaning up waste and inefficiency within the scheme

Expanding the powers of SIRA to reduce insurer waste and inefficiency

139. Insurers are not being held accountable for declining return-to-work rates and increasing costs to the scheme.

140. The NSW Auditor General has criticised iCare for not focusing on making improvements in these areas (NSW AG 2024, pp. 4-5). In recent years iCare has directed its resources to outsourcing claims management and developing a new IT system, both of which have contributed to declining return-to-work rates (NSW AG 2024, pp. 4-5).

141. Between 2018-19 and 2022-23, the fees iCare paid to outsourced claims service providers increased by around 40% (NSW AG 2024, p. 5). Between

2020-21 and 2022-23, iCare's spending on labour-hire increased to more than $100 million per year (NSW AG 2024, p. 6).

142. The lack of effective regulation has allowed inefficiencies and non-compliant practices amongst insurers to persist. In 2024, there was only one civil penalty issued of $11,000 to an insurer for breaching its regulatory obligations (SIRA 2024[2]).

Recommendation 29: The lack of accountability amongst insurers is leading to unnecessary waste, inefficiencies, and poor return-to-work outcomes. To improve scheme sustainability, the NSW Government should extend SIRA's regulatory capacity across all insurers in the scheme.

Stop bad employers increasing everyone's premiums by under- or non-insuring workers

143. When employers under-insure (e.g. insure for significantly less workers than they employ), the costs of their claims are absorbed by the scheme, effectively redistributing the risk and financial costs to compliant employers and the broader system. As of December 2023, uninsured employers were expected to cost the system around $191 million in unpaid workers' compensation claims (iCare 2023).

144. However, this illegal behaviour is not adequately policed. When employers are caught, the fines are so low they are not a disincentive to future bad behaviour and are seen by some employers as 'the cost of doing business'.

145. The Bill does not adequately address this issue, as explored in **Part B** of this submission.

Recommendation 30: Improve SIRA's capacity to enforce compliance of employer insurance obligations and increase the financial penalty for non-compliance to at least three-times the financial benefit obtained by employers.

Improving SIRA's complaints handling process

146. In 2024, an independent inquiry examined SIRA's handling of long-standing, unresolved complaints against insurers. The findings of the inquiry are yet to be made public.

Recommendation 31: The NSW Government should publish the recommendations of the 2024 Independent Inquiry into SIRA's regulatory operations and consult with stakeholders on their implementation.

Diversify the insurance pool to make iCare sustainable long-term

147. Unions NSW has for many years expressed its concern about the negative financial impact of extending specialised insurance licences and the increasing number of self-insurers. Private insurers target better performing policyholders, making the nominal insurer the 'insurer of last resort' and negatively impacting its financial sustainability.

148. Consolidating all employers into the nominal insurer's pool would diversify risk, enhance scheme sustainability, and ensure consistent claim management standards. This reform would protect both workers and the broader workers' compensation system from the adverse impacts of risk segmentation and insurer cherry-picking.

Recommendation 32: To promote long-term financial stability and equitable treatment of injured workers, the NSW Government should abolish self-insurer and specialised insurer arrangements in NSW.

Part D: Next steps and independent review of the NSW Workers Compensation scheme

150. Instead of its harmful Bill, the NSW Government should focus on improving the sustainability of the scheme by addressing the following **three priority areas:**

    a. **Preventing injuries,**

    b. **Helping workers return to work when it is safe to do so, and**

    c. **Reducing waste and inefficiency within workers compensation insurers.**

151. After years of campaigning by Unions NSW, some measures consistent with these priorities are now in the process of being implemented. However, these measures still must be given the time they need to generate the foreseen improvements to the financial condition of the scheme. This includes:

    a. The employment of 50-60 new SafeWork NSW inspectors to support WHS compliance (Safework NSW 2024, p. 14);

    b. SafeWork NSW targets to increase compliance visits by 25% yearly and deliver mental health training to 21,000 employees by 2026 (Safework NSW 2024, p. 14);

    c. The 'Whole of Government Return to Work Strategy' which has just begun implementation.

152. These new measures will help take pressure off the scheme, but must be given time to do so.

153. In **Part C** of this submission, Unions NSW recommended further measures which are likely to have significant positive impacts on the financial sustainability of the scheme.

154. Such measures, new and recommended, should be implemented and reviewed as a first step. This should occur before legislating the content of the Bill, which should be considered a harmful last resort in that it will reduce

the access of seriously injured workers to life-saving mental health support and care.

155. Following this current inquiry Unions NSW supports:

a. Legislating preventative measures with funding and set times for implementation agreed through a consultation process with the NSW Government;

b. Legislating agreed reforms arrived at through a consultation process with the NSW Government;

c. Legislating an independent review for proposed measures or reforms that are not agreed.

Recommendation 33: The NSW Government should legislate an independent review of the NSW Workers Compensation scheme with terms of reference to investigate the design of a system that deals with psychological injuries which:

a. is economically sustainable;

b. addresses administration of the system in an efficient manner;

c. deals with psychological injuries in a way that:

i. maximises prevention;

ii. maximises injured workers' return-to-work; and

iii. promotes a process that does not aggravate the underlying injury;

d. considers the most appropriate means of providing long term support to people with a psychological injury; and

e. reviews existing measures and considers further preventative measures.

156. The independent review would have an agreed timeframe in which to produce a final report. However, where specific opportunities for reform were

identified prior to the final report, the independent review could bring forward recommendations for immediate action.

Conclusion

157. Recent increases in workers compensation mental health claims are extremely concerning. The first step the NSW Government should take is to focus on preventing injuries before they occur. There are common-sense measures available, such as a general WHS jurisdiction and entrenched Codes of Practice. These operate in other jurisdictions and the NSW Government should adopt them before considering its current proposals,

158. Falling return-to-work rates are another concerning outcome of a poorly structured workers compensation scheme. We can help workers get back to work by enabling the NSW Industrial Relations Commission to resolve return-to-work disputes. We can also increase return-to-work rates through individualised premiums and by making it harder to sack injured workers, both of which would incentivise employers to facilitate return-to-work. Employers should not be able to block a worker returning to work after recovering from a workplace injury, shifting the costs to the NSW workers compensation scheme. Conversely, the system should reward safe employers with good return-to-work practices.

159. The NSW Government can save millions of dollars by reforming insurance industry practices, especially regarding return-to-work practices. SIRA should be empowered to make insurers accountable to their responsibility to improve return-to-work rates and reduce their costs to the scheme. This must include removing private insurers which drive up premiums within the nominal insurer.

160. In contrast to these aims, the Bill does nothing to directly help prevent workplace injuries, does nothing to help workers return-to-work when safe to do so, and does nothing to reduce the waste and inefficiency of insurers. If implemented, the Bill will be extremely harmful to mental health in NSW and will very likely cause the death of workers. We ask the Committee to recommend against introducing the Bill to parliament.

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Submission No 2

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

Organisation: SDA NSW and ACT and SDA Newcastle and Northern Branch

Date Received: 14 May 2025

Joint SDA submission to the

Inquiry into proposed changes to liability and entitlements for psychological injury in NSW

LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

May 2025

SDA NSW Branch
Level 3, 8 Quay Street
Haymarket NSW 2000

Mr Greg Donnelly MLC

Committee Chair
Standing Committee On Law And Justice
NSW Parliament
6 Macquarie Street
SYDNEY NSW 2000

By email to:

RE: Inquiry into proposed changes to liability and entitlements for psychological injury in NSW

Introduction

The Shop, Distributive and Allied Employees' Association is one of the largest trade Unions in NSW with over 65,000 members. This is a combined submission of the Shop, Distributive and Allied Employees' Association NSW Branch and the Shop, Distributive and Allied Employees' Association Newcastle & Northern Branch ("the SDA"). The majority of SDA members are young people and women and there is also a large proportion who live and work in regional NSW. We are the union for workers in shops, warehouses, fast food, online retail, pharmacies and pharmaceutical manufacturing.

The retail industry is Australia's second largest industry employer, employing approximately 10% of the nation's labour force. Retail workers face a range of challenges in the workplace, including excessive workloads, understaffing, high levels of customer abuse and violence, low job control, and inadequate support. These issues are exacerbated by significant changes in technologies and processes which rather than augmenting and alleviating workloads produce unrealistic, unsustainable and damaging expectations. Recent SDA research reveals an industry under pressure from mounting psychosocial hazards leading to a higher risk of psychological injury.

The result is a volatile work environment where stress, burnout, and customer aggression are common. Our members were recognised as essential workers critical to the supply of daily essential items during the pandemic, but do not feel treated as essential when it comes time for respect, care or financial support.

We adopt and support the submissions and recommendations of Unions NSW in relation to the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025* ("the Bill") and set out below additional comments and recommendations by the SDA.

SDA supports reform that prevents psychological injuries not changes to prevent claims

The NSW Treasurer recently stated "*The government will soon present to Parliament bills designed to curb the rising number of psychological injuries people are experiencing at work*". The NSW Treasurer in his "*Workers Compensation Ministerial Statemen*t" ("Ministerial Statement") noted three key principles in reviewing psychological injuries at work:

1. First, give workers the right to call out a psychological hazard before an injury takes place.
2. Second let employees and employers know where they stand by defining "psychological injury" and "reasonable management action"

3. Third learn from states like South Australia and Queensland especially in setting the whole-person impairment threshold.

The SDA welcomes the sentiment of curbing the number of psychological injuries but not artificially reducing the number of claims by restricting access to making a psychological claim.

The SDA would support a shift from a system that primarily deals with the aftermath of psychological injuries in the form of compensation to a preventative framework that prioritises the elimination or mitigation of risks to prevent injuries from occurring in the first place.

However, we are concerned that many elements from the Bill are not focused on preventing injuries from occurring but rather preventing claims being made. This will not address the root cause of the rising number of psychological injuries nor the ultimate need for the community to in some way care for, support and provide treatment for people with psychological injuries. Shifting injured workers from workers compensation to social security does not address the problem, it merely shifts a financial cost whilst potentially exacerbating a social and health cost to the community.

The SDA believes that to reduce the number of psychological injuries within a sustainable system requires a two-phase approach to reform on this serious issue:

(i) Legislating a suite of preventative measures with sufficient time allowed for them to be evaluated as effective or not;

(ii) Legislating an independent review of the sustainability of the scheme including the efficacy of the preventative measures implemented in Phase 1, the administration of the system and options to ensure long term treatment, care and support where needed.

The two-phase approach is necessary to ensure a proper process that will deliver a better and fairer outcome for workers, their employers and for Government while avoiding unintended consequences. The two-phase approach ensures any workers who may be injured, or their injury may manifest, during the implementation of preventative measures are not denied access to compensation.

Below we set out:

A. Specific comments on some key issues arising from the Bill that need to be addressed or withdrawn;
B. Preventative measures SDA recommends be adopted in any final legislation; and
C. A proposal for ongoing review

A. Key issues

1. Definition of compensable injury

The NSW Treasurer in his Ministerial Statement claimed that "*unlike other states - we prefer an inclusive definition of psychological injury. Not an exclusive definition.*" Unfortunately, the effect of sections 8E and 8G in the Bill is far from being inclusive and will actively exclude many workers. The definition of a "relevant event" is unduly narrow and excludes many instances where genuine and serious psychological injury occur. Below are just two examples that are not exhaustive of the shortcomings of the definition:

(i) Abusive communication from a "customer" may not fall within the remit of a relevant event. Customer abuse is at endemic levels across all service industries including retail and fast food. See Appendix 1 "Case Study 1 – CW" for a practical real life example of an SDA member who may potentially fall outside the "relevant event" definition, but even if they did would then fall well short of the proposed 31% WPI for ongoing treatment and support.

(ii) Systematic over work, workload and excessive work demands are not included as a "relevant event". The Aldi and Amazon effect is creating a psychosocial crisis in retail. The rise of Aldi and Amazon has intensified pressure across the Australian retail industry, leading other retailers to adopt aggressive cost-cutting models. Aldi's low staffing and physically demanding workloads, alongside Amazon's algorithm-driven micromanagement, have introduced extreme forms of labour intensity from opposite ends of the technological spectrum. In response other retailers cut staff, increase workloads, and import a Taylorist mentality into customer-facing roles, leaving workers physically drained and psychologically strained. A long term SDA member on the NSW mid north coast recently met with the NSW Branch Secretary. This member is normally a thoughtful, relaxed and happy person. As a result of unreasonable work demands, in March this year when they met the member was not their normal self but instead heavily medicated, unable to maintain a conversation, recall recent events with any clarity and appeared depressed. They would be excluded by this definition and proposed s148B Special Work Pressure Payment in no way adequately addresses this issue.

2. Require an order from a tribunal or court for claims of sexual harassment, racial harassment or bullying

The establishment of a bullying and harassment jurisdiction in the IRC NSW as a preventative measure would be welcome. However, to use such a jurisdiction, or the equivalent FWC jurisdiction, as a gateway to making a workers compensation claim requiring "*the worker provides a copy of the finding of harassment or bullying made by the tribunal, commission or court*" is inappropriate and likely to further damage the worker forced to go through this process for support. For SDA members who would have to use the FWC it would take a minimum of 16 weeks to obtain an order, the system would be likely to be flooded with applications and the NSW Government has no ability to resource this jurisdiction to meet such an increase. This proposed change is impractical and likely to further exacerbate the time required for workers to recover. This proposal is not a trauma informed way to assist victims of sexual harassment or other forms of harassment or of bullying.

The imposition of a new gateway (hurdle) through which already traumatised workers must traverse before they are able to apply for or access benefits under the system is unnecessarily cruel and may retraumatise workers who have already suffered. It further raises issues of relative unfairness and the additional financial and legal costs borne by the worker to ensure they secure the relevant finding before they are permitted to make a workers compensation claim.

3. WPI thresholds

The proposal to increase the WPI thresholds to 31% on the PIRS scale to be eligible for ongoing weekly payments, lump sum payments or negligence will effectively exclude all SDA members who are currently entitled to these entitlements. An experienced workers compensation solicitor who represents SDA members has reviewed his files for the last 20 years and has only had one client who exceeded 30% on the PIRS scale. See Appendix 1 "Case Study 1 – CW" and Appendix 2 "Case Study 2 – DH" for practical real life examples of SDA members who exceed the current thresholds who would fall well short of the proposed 31% WPI for ongoing treatment and support. Changing the threshold will not change the fact that these members will need ongoing care and support, it will just reduce the support available.

The proposal to remove medical support 12 months after weekly payments cease will not reduce the need for medical treatment. There are already excessive waiting times to access psychologists and psychiatrists. These changes will push injured workers from their health providers back on to the already stretched public mental health system. Whilst we oppose any changes to WPI thresholds we strongly recommend that if any change is made that ongoing medical support is not made dependent on any changed WPI threshold.

The SDA also supports all of the comments of the Unions NSW submission.

B. Preventative measures to implement to reduce psychological injuries

If the primary aim of the reform is to reduce the number of psychological injuries rather than restricting access to making a psychological claim there is a need to introduce preventative measures.

The retail industry is currently stretched to breaking point with high levels of reported psychosocial hazards. The SDA has conducted extensive research on the key psychosocial risks in the retail industry and measures to eliminate or mitigate the risks.

Retail workers face excessive workloads, understaffing, customer aggression, and inadequate managerial support, worsened by rapid workplace changes. These issues contribute to high stress, burnout, and mental health struggles.

To address key psychosocial risks and curb psychological injuries in the retail industry the SDA advocates for the following preventative measures to be legislated in phase 1 of any reform aimed at curbing the number of psychological injuries:

a) Legislate for the Industrial Relations Commission of NSW to have the power to conciliate and arbitrate unresolved WHS disputes referred to it on application by a registered organisation. Such jurisdictions exist in Queensland (https://www.worksafe.qld.gov.au/laws-and-compliance/dispute-resolution); and in South Australia (https://www.safework.sa.gov.au/workers/whs-issue-resolution#:~:text=If%20the%20dispute%20is%20urgent,the%20Registry%20on%208177%203500).

b) Reinstate the standing for registered organisations to prosecute for breaches of WHS laws, including breaches of arbitrated outcomes of WHS disputes, before the NSW Industrial Court.

c) Implement Recommendations 1, 2, 3, 5, 6, 7, 8 and 13 of "*Final Report - Workforce Surveillance and Automation*" by the NSW Legislative Council Select Committee on the Impact of Technological and Other Changes on the Future of Work and Workers in NSW. These recommendations address issues around workplace surveillance; work intensification; the allocation of work by software/platforms/code/algorithms/apps; and automation.

d) Legislate Workplace Protection Orders modelled on ACT laws [see s32 *Personal Violence Act 2016 (Australian Capital Territory)*].

e) Legislate further controls on the storage and retail sale of bladed items.

f) Review and reform the current working with children checks system to include WWCC in the retail industry to protect young workers from the risk of working with known offenders.

g) Recognise the preventative benefits of shared community time for the mental health and wellbeing of workers and address the current imbalance of shared time in NSW in the form of public holidays compared to other jurisdictions like SA, Qld, Vic and ACT by introducing a new public holiday.

The SDA also supports all of the recommendations of the Unions NSW submission.

C. Ongoing review

Most stakeholders accept the need to have a sustainable system. The SDA supports an independent review of the scheme that is focused on ongoing reform that prioritises the prevention of injuries, the return to work of injured workers and long term care and support where needed.

A legislated review must avoid the unfair consequences suffered by workers in previous reviews such as the Coalition Government's harsh 2012 cost cutting measures. An Independent Review should include terms of reference to look at the design of a system that deals with psychological injuries which:

(i) is economically sustainable;

(ii) addresses administration of the system in an efficient manner;

(iii) deals with psychological injuries in a way that:

- maximises prevention;
- maximises injured workers return to work; and
- promotes a process that does not aggravate the underlying injury;

(iv) considers the most appropriate means of providing long term support to people with a psychological injury; and

(v) reviews preventative measures implemented and considers further preventative measures.

The Independent Review should have a set time period to produce a final report, however where specific opportunities for reform are identified prior to the final report, the Independent Review should also be able to bring forward recommendations and a supporting paper (ahead of a final report.

Conclusion

SDA supports reform that prevents psychological injuries and prioritises return to work but not changes that prevent claims and leave injured workers without medical care or financial support.

The current proposed changes have been rushed. A proper process will deliver a better and fairer outcome for workers, their employers and for Government while avoiding unintended consequences.

The SDA believes a phased approach will provide:

- a shift to a preventative framework; and
- a detailed review of all aspects of the system to provide considered proposals for systemic reform with the care and support of workers with psychological injuries at the forefront whilst avoiding unintended consequences.

The SDA looks forward to engaging constructively with the Parliament on this very important public policy issue.

David Bliss
Branch Secretary
SDA Newcastle & Northern

Bernie Smith
Branch Secretary
SDA NSW Branch

APPENDIX 1

CASE STUDY 1 - CW

Circumstances of Injury

On 24 April 2020 CW a female, at 7.00pm, was wheeling a cage down an aisle in a store in regional NSW, when a customer covered in tattoos from the eyes down said to the worker (CW):

'*Are you going to move that and its f…ing cage?*'

'*Are you going to move the f…ing cage you dumb f…ing c…*'.

'*F…wit*'.

The worker reported the incident to her manager.

Following this incident, the customer then put threatening comments on Facebook and another employee the store informed the customer of CW's identity.

The customer was not banned or reprimanded and continued to come into the store. When the customer would come into the store CW was directed to go out the back to avoid interaction. CW continued working however eventually she went off and has not returned to work.

Ongoing symptoms

Initially CW was treated by her general practitioner and then a psychiatrist and she is continuing to take anti-depressants and sees a psychologist every 4-6 weeks.

Symptoms include not wanting to leave her home, shaking and heart palpitations whenever she does leave her home. Any social interactions exacerbate her symptoms and she avoids family events including weddings and funerals.

CW ablutes herself three or four times a week and although she occasionally cooks, often eats frozen and defrosted meals prepared by her partner. CW rarely goes to any social or recreational activities and only when prompted by a family member.

CW is able to travel to local areas without a support person but anything beyond that she needs to be accompanied by her partner or close family member. CW has not worked for four years and has persistent low mood and anxiety. She has been assessed by the Approved Medical Specialist, appointed by the Personal Injury Commission, as being totally incapacitated.

Whole person impairment

CW was assessed by the Personal Injury Commission Approved Medical Specialist, a truly independent doctor, as being 19% whole person impaired and totally incapacitated.

APPENDIX 2

CASE STUDY 2 – DH

Circumstances of Injury

On 21 October 2021 DH, a female, was taking her break from work at at a store in regional NSW. She was walking to take her break outside the store when two customers who were standing at the smoke counter recognised her, allegedly due to knowing DH's son, who the customers greatly disliked. The customers called to her, but she ignored them and continued outside.

The two customers followed DH outside, where they physically assaulted her, strangling and punching her until being separated by bystanders.

Following this, the customers in question continued to attend the store, where they would intimidate DH. DH requested that the store manager ban them from the premises, but they refused to do so, despite a Personal Violence Order (PVO) being taken out against the perpetrators. As a result, DH was required to continue working at the store, constantly anxious that the perpetrators may appear again at any time.

DH was simply advised to avoid the customers if she saw them.

Ongoing symptoms

DH attends upon a general practitioner, a psychologist and a psychiatrist for treatment of her ongoing depression and anxiety. She takes anti-depressants on a daily basis.

Symptoms include greatly decreased motivation to attend to her own appearance, failure to eat for up to several days on end, anxiety attacks when leaving her home, inability to perform shopping for herself, inability to watch violent movies or television shows, inability to perform her pre-injury work and difficulties with sleeping.

Whole person impairment

DH is awaiting assessment by an IME in the coming months, but we anticipate that she will receive an assessment of whole person impairment of between 18–25%.

Submission No 12

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

Organisation: AEU NSW Teachers Federation

Date Received: 15 May 2025

New South Wales Teachers Federation
a branch of the Australian Education Union
AEU NSW Teachers Federation Branch ABN 86 600 150 697

15 May 2025

In reply please quote: 401/2025/AF/bm

The Hon. Greg Donnelly, MLC
Committee Chair
Standing Committee on Law and Justice

Dear Mr Donnelly,

Re: Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

The Australian Education Union NSW Teachers Federation Branch (the Federation) writes in relation to the above matter.

The Federation greatly appreciates the opportunity to come before you, Chair, and the other members of the Committee, at tomorrow's public hearing.

At the outset, the Federation places on record its strong support and endorsement of the submission to the Committee provided by Unions NSW on behalf of its affiliates and their members.

This is a critical matter for the Federation's membership.

The NSW Treasurer's proposed changes have the potential to significantly impact the capacity to, and way in which, mental health injuries suffered at work are assessed and supported across the public education system.

There are better ways to fix the system than cutting support for injured workers. Mental health injuries are real.

In both public schools and TAFE, the NSW government since its election has publicly committed to initiatives to address the burnout of teachers and to reverse the sky-rocketing resignation rates of teachers, amongst other measures.

This follows the evidence of the State Insurance Regulatory Authority (SIRA) previously before this Committee that the number one cause of teachers' psychological injuries from burnout is "work pressure".

Suddenly cutting support for teachers whose mental health is suffering would be a massive betrayal and would undermine the gains achieved so far in addressing the significant challenges to end the teacher shortage and to the rebuilding TAFE.

The Federation cannot ignore the evidence that the NSW Treasurer's attack on mental health support is gendered. Of the Federation's approximately 60,000 members, 80% are women.

It is our women members who will suffer the most from these changes:

- Thresholds for serious psychological injury are proposed to more than double in order to be eligible to receive income support and medical benefits, drastically impacting the long-term care and support for teachers who sustain mental health injuries at work;

- The proposed new definition of psychological injury excludes a number of current psychosocial hazards identified by Safework NSW, as well as the Department of Education and TAFE NSW;

- Teachers will be required to have a finding from either the NSW Industrial Relations Commission or the existing jurisdiction at the Fair Work Commission before being able to make a claim for Bullying, Harassment (including Sexual Harassment), denying teachers access to immediate and early medical interventions to support their mental health, which could seriously undermine their return-to-work outcomes;

- A new definition of reasonable management action further limiting the scope of compensable injuries; and

- Limited medical benefits only for work pressure claims, a significant cause of the burnout being experienced by teachers and acknowledged by the NSW government.

The Federation looks forward to appearing before the Committee tomorrow to provide further details on the impacts of these proposed changes on our members, including case studies where possible, and their ability to deliver quality teaching and learning for our students across NSW public schools and TAFE.

Ms Amber Flohm, Deputy President, is the Officer with responsibility for this matter.

Yours sincerely

Maxine Sharkey
General Secretary

Submission No 38

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

Organisation: New South Wales Nurses and Midwives' Association

Date Received: 15 May 2025

SUBMISSION BY THE
NSW NURSES AND MIDWIVES' ASSOCIATION

Inquiry into the proposed changes to liability and entitlements for psychological injury

MAY 2025

NSW NURSES AND MIDWIVES' ASSOCIATION
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NSW BRANCH

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This response is authorised by the Elected Officers of the New South Wales Nurses and Midwives' Association.

Contact details

NSW Nurses and Midwives' Association

Introduction

1. The New South Wales Nurses and Midwives' Association (NSWNMA) is the industrial and professional body for nurses and midwives in New South Wales, representing over 80,000 members across the full spectrum of health care services in NSW, including public and private hospitals, midwifery, corrective services, aged care, disability, and community settings.

2. NSWNMA strives to be innovative in our advocacy to promote a world-class, well-funded, integrated health system by being a professional advocate for the health system and our members. We are committed to improving the quality of all health and aged care services, whilst protecting and advancing the interests of nurses and midwives and their professions.

3. We work with our members to improve their ability to deliver safe and best practice care, fulfil their professional goals and achieve a healthy work/life balance.

4. Our strong and growing membership and integrated role as both a trade union and professional organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions, and see us uniquely placed to defend and advance our professions.

5. Through our work with members, we not only strengthen the contributions of nurses and midwives to improve Australia's health and aged care systems but also advocate fiercely for the rights of those harmed by systemic failures. We achieve this by advocating for safe workplaces, mental health equity, and fair treatment for all workers.

6. The NSWNMA thanks the NSW Legislative Council's Standing Committee on Law and Justice for the opportunity to provide feedback on the proposed changes to liability and entitlements for psychological injury in New South Wales.

Overview

7. The NSW Government's proposal to restrict access to workers' compensation for psychological injuries shows a fundamental misunderstanding of how these injuries occur. For nurses and midwives, psychological harm is rarely caused by a single event, it is the result of cumulative exposure to trauma, stress, and unsafe working conditions. Between 2013-2015 and 2019-2021, there was a 150.6 % increase in psychological injury claims in this workforce, the highest growth rate of any profession.[1] This is not due to the malingering of nurses and midwives but reflects systemic failures. The committee must place this reality front and centre in its consideration of these amendments to workers compensation legislation.

8. Nurses and midwives are routinely exposed to multiple psychosocial hazards in the course of their work, these risks are compounded and exacerbated by systemic understaffing. When there are not enough nurses or midwives on shift, patient needs go unmet, which can lead to frustration, agitation and escalating behaviour, creating a higher risk of occupational violence. There are often too few staff to safely manage aggressive patients, increasing the likelihood of nurses being assaulted. Excessive overtime and missed meal breaks contribute to fatigue and burnout, which in

turn fuel interpersonal tension, incivility and conflict among colleagues. **Understaffing also results in moral injury, as nurses are forced to witness and participate in care that falls below professional standards, not due to a lack of skill or commitment, but because the system has failed to provide the necessary resources.** This convergence of hazards creates a dangerous and unsustainable working environment, placing nurses at serious risk of psychological harm.

9. The health sector fails to manage psychosocial hazards – identification of psychosocial hazards is generally reactive rather than systematic, based on individual workers reporting issues (or worse, only noticed when someone is injured). Reporting systems are time-consuming and don't lend themselves to psychological hazards, and when issues are identified, there is a failure to implement adequate controls to manage the risk. Members who report psychosocial hazards often report extremely poor responses from managers not trained in management of psychosocial hazards or how to take a trauma-informed approach to injured workers. This lack of support is a psychosocial hazard in its own right and causes significant harm, often being the tipping point for workers making a claim.

10. The NSWNMA expresses serious concerns regarding the proposed amendments to the workers compensation legislation. These changes would significantly limit access to compensation for workers who suffer psychological injuries unless they are able to prove that their injury was caused by a defined "relevant event".

11. The NSWNMA is particularly concerned about the implications for nurses and midwives, who are frequently exposed to occupational violence, bullying, harassment, chronic understaffing and poor procedural justice, all of which create an unsafe and high-risk work environment. The draft Bill's provisions create numerous legal and procedural barriers that will make it extraordinarily difficult for healthcare workers to access support following psychological harm. These barriers will disproportionately impact female nurses and midwives.

12. The reforms proposed by the NSW Government prioritise cost containment over the protection of frontline workers, including nurses and midwives. If enacted, these changes will remove income and medical support from many nurses and midwives psychologically injured while caring for others and force other traumatised healthcare professionals to navigate additional administrative burden while they are in recovery, compounding their harm and delaying their return to work. In our view, the Government could considerably contain cost within the workers' compensation scheme without attacking injured workers by focusing on preventative measures and ensuring employers abide by their obligations to provide safe and suitable work.

13. Removing access to income support and medical treatment for nurses and midwives with psychological injuries and introducing further barriers to those seeking support will have devastating and far-reaching consequences. These measures risk compounding the harm experienced by workers already at breaking point, leaving them without the financial means or therapeutic resources to recover. As the average Australian nurse and midwife is a 42 and 45-year-old female, respectively the financial impact of these proposed changes would have a flow-on effect on single-parent families, as 78% of Australian single-parent families are headed by women.[2] [3] For many, the inability to access timely treatment or maintain a livelihood during periods of psychological ill health can lead to social isolation, worsening mental health and, in some cases, self-harm or suicide. **Nurses and midwives dedicate their working lives to caring for others; failing to care for them when their work injures them is not only unjust, but also dangerously negligent.**

Summary of Recommendations

14. Reject the proposed eligibility restrictions that would deny compensation to psychologically injured workers unless they can prove their injury arose from a narrowly defined "relevant event".

15. Remove the proposed 31% whole person impairment (WPI) threshold for psychological injuries.

16. Empower the Industrial Relations Commission (IRC) to oversee employer compliance with return-to-work obligations, especially in cases where suitable duties are refused.

17. Mandate an independent review of employer decisions regarding suitable duties (including decisions to cease providing suitable duties) to ensure fair treatment and faster return-to-work outcomes, with the onus placed on the employer to demonstrate that suitable duties cannot be provided.

18. Focus on addressing the systemic causes of psychological injury in healthcare, such as role overload, chronic understaffing and proper systems for managing risk associated with workplace aggression.

19. Reinforce SafeWork NSW's authority and capacity to regulate psychosocial risks in healthcare workplaces by establishing a dedicated well-resourced healthcare and social assistance sector team of inspectors within SafeWork NSW and by implementing the proposed changes to the Model Work Health and Safety Act in relation to notifiable incidents as a matter of priority to ensure regulatory oversight of the key sources of serious harm to our membership.

20. Take proactive steps to prevent workers' compensation legislative changes from having disproportionate deleterious impacts on female workers including failure to align with the aims of the federal "Respect at Work" law reforms which have given women greater protections for reporting experiences of sexual harassment in connection to the workplace.

21. Amend the workers' compensation laws to introduce a presumption in favour of nurses and midwives experiencing psychological injury.

22. Bestow financial incentives for employers to provide suitable work to injured workers. This could come in the form of a reduced premium.

23. Impose severe penalties on employers and individuals who refuse to provide work to injured workers where such work is available. A financial disincentive could also be imposed by way of an increased premium.

24. Give insurers the capacity, and then oblige them, to rigorously examine whether their clients can provide suitable work to an injured worker prior to termination or suitable work being withdrawn and prior to requiring that worker to seek work elsewhere.

25. That it be an offence for an employer to require a prospective employee to declare whether they had previously suffered a workers' compensation injury unless that injury would prevent him or her from performing the inherent requirements of the role.

26. Make it an offence for an employer to inform another prospective employer that a former employee has suffered a workers' compensation injury.

27. The Government implement programs designed to educate employers regarding their obligation to provide suitable work to injured employees.

28. Remove the requirement in section 49, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) for workers to request suitable work from their employer before the employer has an obligation to provide that work. Requiring a request of this kind is illogical and inconsistent with the strong return-to-work focus in the legislation.

29. Require recalcitrant employers to reimburse insurers for weekly payments of compensation which would not have been paid had the employer complied with its return-to-work obligations.

30. Adopt the five-point plan proposed by Unions NSW, which focuses on enforceable prevention strategies, insurer accountability, access to justice, and sustainable funding models,

Workplace Psychological Injury of nurses and midwives

31. Nurses and midwives face a higher risk of psychological injury than many other workers due to the inherently demanding and emotionally charged nature of their roles. Their work frequently involves exposure to trauma, suffering and death, as well as the need to provide compassionate care under time pressures and resource constraints. They often work in environments characterised by high workloads, shift work, inadequate staffing and exposure to occupational violence, all of which contribute to elevated psychosocial risk. Additionally, the ethical and emotional burden of balancing patient needs with systemic limitations can result in moral distress. These conditions, compounded over time, place nurses and midwives at significantly greater risk of developing psychological injury compared to workers in less complex and lower-pressure settings.

32. Psychological injuries among nurses and midwives are not isolated incidents. They arise from persistent, systemic issues embedded within the structure and culture of healthcare. These injuries are most often caused by the cumulative effects of role overload, occupational violence, bullying and harassment, and moral distress. Insufficient action is being taken to address these risks and prevent injuries from occurring.

Role Overload

33. One of the most widespread and deeply rooted contributors to psychological injury in healthcare is role overload, which exists where the demands placed on workers consistently and significantly exceed the time, staffing and support available to meet them. In nursing and midwifery, this often manifests as chronic understaffing, where nurses and midwives are routinely expected to care for too many patients at once, manage complex clinical presentations, navigate administrative burdens and provide emotional support to patients and their families, all without adequate resources or rest. Inadequate skill mix, combined with limited supervision and inappropriate delegation, significantly contributes to role overload and fatigue.

34. Wage suppression in NSW has significantly contributed to chronic understaffing and poor retention of nurses and midwives, creating a cascading impact on the entire healthcare system. As experienced staff leave, new recruits are discouraged from entering or staying in the profession, and those who remain are forced to absorb increasing workloads. This intensifies role overload, reduces the capacity for safe and effective care, and heightens the risk of psychological injury.

Without fair wages and conditions, the workforce will continue to dwindle, further cementing systemic pressures that harm nurses, midwives and their patients.

35. When less experienced or underqualified staff are expected to perform tasks beyond their scope without proper support, the burden falls on nurses and midwives to oversee, correct and absorb the additional workloads. This not only compromises patient safety, but also pushes experienced staff beyond their limits, accelerating psychological injury. The intensity of these workloads leaves little time for breaks, reflection or recovery, which is then compounded by the effects of shiftwork and unsafe levels of overtime. This forces nurses and midwives to operate in a near-constant state of high alertness and fatigue.

36. The unrelenting pressure can lead to decision fatigue, where mental resources required for safe clinical reasoning is depleted. Over time, this contributes to emotional exhaustion, a key contributor to burnout. Role overload often results in moral injury, which is the internal conflict and psychological harm that arises when workers are unable to uphold their professional and ethical standards of care. Inability to meet patient needs not due to effort but due to system failures leads to feelings of guilt, shame and helplessness.

37. This does not occur in isolation. Excessive workload increases the likelihood of interpersonal conflict, staff tension and communication breakdowns. These factors degrade team functioning and psychological safety. Heavy workloads and inadequate staffing act not only as primary stressors but also as key predictors of workplace bullying, which compounds psychological harm. When nurses and midwives are stretched beyond capacity, frustrations increase, collegial support deteriorates and opportunities for constructive feedback and mentoring are diminished.

38. Over time, these stressors contribute to toxic cycles, raising rates of sick leave, burnout and attrition, which further intensify staffing shortages and workloads for those who are left behind. The cumulative impacts of this overwork not only erode psychological safety but also reflect a broader pattern of systemic neglect, where the failure to provide safe and sustainable working conditions directly contributes to burnout, moral distress and long-term psychological injuries.

39. Workers' compensation data vastly underestimates the rates of workplace psychological injury experienced by nurses and midwives (and other health professionals), with many injured workers too frightened to make a claim for fear of potential impacts on their registration and hence their careers. These concerns arise from a widespread misunderstanding about the operation of mandatory reporting of healthcare workers who are "impaired", with impairment defined as "*a physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect the person's capacity to practice the profession".* Unfortunately, there are many within the sector who will report other workers as impaired if they seek mental health support or receive a mental health diagnosis.

40. Ahpra and the Nursing and Midwifery Board of Australia are responsible for the regulation of the nursing and midwifery professions nationally. In NSW the management of impaired practitioners is delegated under the *Health Practitioner Regulation National Law* (NSW) (the National Law) to the Nursing and Midwifery Council of NSW. The process for management of impaired practitioners is described in National Law, but this can result in conditions or restrictions being imposed on the professional registration affecting the practice of nurses and midwives at a much lower threshold than in other professions. In many cases, this means that they cannot work or find employment within the nursing or midwifery professions. Increasing the threshold at which workers who are

nurses or midwives can access workers' compensation would place on them a much more severe injustice due to the nature of the professions in which they work, which are often in high-risk environments where they are at risk of physical or psychological injury.

41. Nurses and midwives are likely to be unable to continue in their work at a much more restrictive threshold than many other professions due to various regulatory factors affecting their ability to work to the requisite professional standards. It is questionable whether the public good would be served by restricting access to workers' compensation insurance to protect the health and well-being of nurses and midwives who are the victims of work-related injury and much more sensitive to regulator-imposed restrictions on their ability to return to their workplace and support themselves and their families.

42. A recent iCare funded research project examining psychological injury workers' compensation data across the healthcare sector in NSW identifies the three key causes of psychological injury for nurses and midwives as harassment or bullying (38.4%), work pressure (23.1%) and occupational violence (18%). It also found that, after adjusting for all other factors, workers in healthcare and social assistance industries had 32% higher likelihood of a workers' compensation claim for psychological injury than workers in other industries.[4]

43. While the claims data has shown that these are the three key causes of psychological injury, it is known that the situation is more complex than this, as workplace psychological injury most frequently arises not from exposure to a single, isolated psychosocial hazard, but from the cumulative and prolonged exposure to multiple hazards over time. These may include excessive workloads, patient/client deaths and dying processes, lack of control, poor workplace relationships, inadequate support, job insecurity, workplace violence and exposure to bullying or harassment. While each hazard individually poses a risk, it is the interaction and accumulation of these factors, particularly when left unaddressed, that significantly increases the likelihood of psychological harm. This complex and compounding nature of psychosocial factors underscores the problem with having a limited list of "events" to determine eligibility for access to income and medical support.

44. Data from SafeWork Australia (2024) showed that health care workers had the highest number of serious claims for work-related mental health conditions than any other industry over the last five years.[5] The data also highlights a disturbing gendered dimension where women are significantly more likely to be exposed to harmful behaviours at work, including violence, bullying and harassment. This reinforces the urgent need for strong protections and trauma-informed approaches in predominantly female workforces.

45. Suicide risk has been found to be higher for nurses and midwives than those in other occupations in an evidence review by the Sax institute.[6] The National Coronial Information Service, which provides reports on intentional self-harm deaths of health professionals in Australia, designates nursing and midwifery as a known high-risk sector.[7] Research from the Nurse Midwife Support service shows that female nurses and midwives are 192% more likely to commit suicide than females in other occupations, and male nurses and midwives are 52% more likely to commit suicide than males in other professions.[8] The factors contributing to this statistic include the high job demands that lead to poor work–life balance and increased experiences of anxiety. The NSWNMA is aware of many member suicides. Most of these members had been receiving support from the NSWNMA in relation to concerns about psychosocial hazards including workloads,

exposure to violence, poor supervisor/manager support and experiences of poor procedural justice.

46. Given the significant and well-documented risk of psychological harm faced by nurses and midwives due to the nature of their work and the poorly managed risks, there is a compelling case for amending the workers' compensation legislation to include a presumption in favour of these workers when claiming for psychological injury. A presumption provision would recognise the cumulative impact of repeated exposure to trauma, occupational violence, high workloads and moral distress and would ensure timely access to support and treatment without unnecessary delays caused by contested liability. Such a reform would not only acknowledge the unique challenges of the nursing and midwifery professions but also improve recovery and return-to-work outcomes by reducing the administrative and psychological burden placed on injured workers.

Occupational Violence and Aggression

47. Nurses and midwives are among the most assaulted professionals in Australia. They face physical violence, verbal abuse and intimidation, particularly in high-risk areas like emergency departments, mental health units and aged care. These experiences often lead to significant physical harm as well as anxiety, post-traumatic stress disorder (PTSD) and a desire to leave the profession. However, violence is frequently normalised as "part of the job", resulting in under-reporting and minimal support.

48. The SafeWork Australia *Workplace and work-related violence and aggression in Australia report (2024)* provides the table below showing occupations with the most claims for exposure to workplace violence or being assaulted, with a female share of employment.[9]

Occupation	Number of serious claims	Female share of employment
Registered nurses	1,848	88%
Welfare support workers	1,701	74%
Aged and disabled carers	1,501	77%
Police	1,476	29%
Nursing support and personal care workers	1,386	79%

Figure 1. Occupations with most claims for exposure to workplace violence or being assaulted with female share of employment, NDS (2017-18 to 2021-22p) and ABS Census (2021).

Workplace Bullying, Harassment and Discrimination

49. Workplace bullying is a pervasive issue in healthcare settings, where high-stress environments and chronic understaffing often intensify interpersonal tensions. Among the various antecedents, role overload has been identified as a significant predictor of bullying. Role overload is linked to emotional exhaustion, reduced coping capacity and increased workplace aggression. [10] [11] [12]

50. In healthcare, where staff frequently report excessive workloads and time pressure, these conditions can heighten the risk of intraprofessional bullying behaviours emerging, highlighting role

overload as one critical factor to address in promoting safe and respectful relationships and preventing psychological injuries.

51. Common behaviours include verbal abuse, exclusion, reduced opportunity for professional progression and unreasonable expectations. Early-career nurses and midwives are particularly vulnerable, often experiencing "horizontal violence" from colleagues. These behaviours are not isolated but are symptoms of broader cultural dysfunction.

52. Culturally and linguistically (CALD) nurses and midwives face additional layers of risk. The NSWNMA's 2018 Cultural Safety Gap Survey found that a significant proportion of CALD members experienced racism in the workplace, from both patients and colleagues.[13] Many reported being treated as "less capable" due to their accent or background, while others were excluded from social and professional opportunities. Alarmingly, less than one--third had reported incidents of racism, and 21% did not feel confident to do so.

53. Sexual harassment and sexual assault are also common workplace hazards experienced by nurses. The instigators of such behaviours are often patients or aged-care facility residents, with nurses frequently expected to continue to provide care for people despite repeated indecent assaults.

54. These experiences have tangible impacts. Exposure to bullying, racism, sexual harassment and assault and exclusion erodes professional confidence, contributes to long-term psychological distress and undermines workforce retention. When any group of workers is not adequately supported, the health system suffers a loss of skill, morale and cohesion. Addressing these patterns requires more than individual strength, it demands system-wide cultural change centred around safety, equity and accountability. Rather than acknowledging and addressing the systemic causes of harm, the proposed amendments shift responsibility back onto injured workers.

Moral Distress and Vicarious Trauma

55. Moral distress occurs when nurses and midwives are unable to act in accordance with their ethical and professional values due to systemic constraints, such as unsafe staffing levels or inadequate resources. This can lead to enduring feelings of guilt, shame and helplessness. Vicarious trauma is also widespread, as nurses and midwives regularly witness or are involved in traumatic events, such as patient deaths, child abuse or aggressive resuscitations. Without access to structural support the emotional burden accumulates, leading to emotional numbing, complex PTSD and professional disengagement. There is a strong correlation between moral distress and burnout, particularly in high-pressure clinical settings.

Organisational Culture and Systemic Failures

56. Toxic workplace culture is a common denominator across all these contributors to psychological harm. When healthcare organisations fail to manage psychosocial hazards, nurses and midwives experience the compounding effects of exposure to multiple psychosocial hazards, greatly increasing the risk of harm. Contributing factors include a focus on patient needs to the exclusion of the WHS of workers, inadequate risk management, including failure to identify foreseeable risks or to implement effective controls, inadequate reporting mechanisms, lack of staff consultation on WHS matters including workload, a blame-focused response to adverse events and insufficient access to trauma-informed psychological support.

57. Nurses and midwives bear the emotional, psychological and moral cost of systemic organisational and industry-wide shortcomings without meaningful support. As the 2024 SafeWork Australia data illustrates, harmful workplace behaviours disproportionately affect women, compounding risk in a female-dominated profession.[3]

58. Preventing psychological injury must go beyond resilience training; it requires commitment to reforming the environment that enables these harms to persist. The proposed amendments fail to address these systemic drivers instead leaving injured workers to bear the costs.

Trauma-Informed Reporting

59. Trauma-informed reporting acknowledges the high prevalence of trauma in healthcare and seeks to minimise the risk of retraumatisation when healthcare workers report adverse or distressing events. For nurses and midwives, reporting is not a neutral or purely administrative task. It often involves recounting experiences of workplace violence, clinical deterioration, system failures, bullying or ethically distressing situations, all of which carry a significant emotional burden.

60. However, existing incident reporting systems are predominantly procedural, designed to serve compliance and risk-management purposes, and often fail to recognise or support the emotional and psychological impacts on nurses and midwives. These systems and their related processes frequently require repeated retelling of traumatic events, lack psychological safety, and offer little-to-no meaningful response or follow-up. As a result, nurses and midwives commonly report feeling unsupported, disbelieved or even blamed, which discourages accurate and timely reporting.

61. Of particular concern is the failure to act on WHS reports. Even when staff disclose significant incidents affecting their wellbeing or patient safety, these reports often result in no tangible change. This not only undermines trust in organisational processes but can deepen harm by reinforcing a culture of silence and inaction. The lack of responsive, trauma-informed systems contributes to moral injury, psychological distress and professional withdrawal.

62. Nurse and midwife managers are rarely provided with the training and resources needed to prevent or respond to psychological injuries experienced by their staff. Despite working in environments where illness, trauma and death are daily realities, there are no standardised or mandatory mechanisms for debriefing after critical incidents. This absence of structural support leaves healthcare workers to cope in isolation, compounding stress and increasing the risk of psychological harm.

63. The implications for the nursing and midwifery workforce are profound. Ongoing exposure to trauma, combined with unsupported reporting experiences, increases the risk of burnout, vicarious trauma and attrition. When trauma is not adequately addressed, it negatively impacts the safety and quality of patient care, with broader consequences for workforce retention and system sustainability.

64. The NSWNMA advocates that all health systems embed trauma-informed principles in reporting processes. These include creating psychologically safe environments, ensuring transparency and follow-up, enabling staff choice and control of how they report, and recognising the need for emotional as well as procedural support. Employers have a responsibility to receive these reports

and to act on them. Failure to do so not only increases the psychological burden on workers but also perpetuates unsafe environments and institutional harm.

The Impacts of the Proposed Legislation on Nurses and Midwives

65. As outlined in the previous section, healthcare is a high-risk industry where workers are exposed to the cumulative effects of multiple psychosocial hazards, resulting in high rates of psychological harm. Nurses and midwives are regularly exposed to distressing and often traumatic events, including patient deaths, aggression from patients and families and workforce pressure stemming from unsafe staffing levels and skill mix. Rather than supporting workers in distress, the proposed legislation would reduce access to compensation and impose procedural hurdles that are both unnecessary and harmful.

Meaning of psychological injury

66. The Bill introduces terms that are likely to see a further increase in insurers seeking legal and Independent Medical Examiner reports prior to claim approval as well as an increase in legal disputation leading to delays in provision of income support and medical treatment for injured workers. Such delays in treatment and lack of support, as well as the adversarial nature of such conduct, causes further harm to psychologically injured workers.

67. The Royal Australasian College of Physicians research regularly cited by Australian health and safety regulators advises that the longer that people are off work, the less likely they are to return to work, not only to their original position, but to any job. It shows that workers who are off work for 20 days have a 70% chance of returning to work, with this declining to a 50% chance of return to work for those off for 45 days, and only a 35% chance of returning to work for those off work for 70 days or longer. Introducing additional processes such as the need for a finding by a court or tribunal will see workers off work for extended periods, reducing the likelihood of durable return to work.

68. The proposed new section 8A as set out in the Bill introduces a new definition of psychological injury: *"an injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction".* The introduction of this definition will give NSW the most restrictive definition of psychological injury for the purposes of workers' compensation in Australia (in line with the changes introduced in Victoria in 2024). The introduction of the word "significant" in this context will lead to medical and legal disputation, delaying access to care for those who are eventually deemed to demonstrate "significant" dysfunction, and excluding many more whose dysfunction is not deemed significant enough, from any access to support.

Relevant Event

69. The draft Bill seeks to severely limit access to psychological injury compensation by restricting eligibility to a narrow list of "relevant events". These include:

- Being subjected to an act or threat of violence, or
- Being subjected to indictable criminal conduct, or

- Witnessing incidents resulting in death or serious injury, or the threat of death or serious injury, including the following – an act of violence, indictable criminal conduct, a motor accident, a natural disaster, a fire or another accident, or
- Experiencing vicarious trauma within the meaning of section 8H, or
- Being subjected to conduct that a tribunal, commission or court has found is sexual harassment, or being subject to conduct that a tribunal, commission or court has found is racial harassment, or
- Being subjected to conduct that a tribunal, commission or court has found is bullying, or
- Another event prescribed by the regulation.

70. This list of "relevant events" for the purpose of workers' compensation is the most restrictive in Australia and ignores the well-established evidence around the psychosocial factors in workplaces that are known to cause psychological harm. It also fails to recognise that most psychological injuries sustained by nurses and midwives result not from one singular traumatic event but from the cumulative exposure to multiple psychosocial hazards over time.

71. In an assessment undertaken by the NSWNMA of psychological injury workers' compensation claims we have assisted members with in the last 12 months, we have identified that only 44% would potentially meet the new criteria to be eligible for support, with 53% of those required to appear before a court, commission or tribunal prior to application.

72. The concept of limiting compensation for workplace psychological injury to a narrow list of "eligible events" is both arbitrary and deeply flawed. Psychological harm does not discriminate based on whether it fits into a predetermined category. Whether an injury stems from a sudden traumatic incident or the insidious build-up of unlisted psychosocial hazards, the distress and functional impairment experienced by the worker are equally real and debilitating. By excluding injuries that arise outside these narrow definitions, the system will effectively deny support to those most in need, undermining recovery. Nurses and midwives, who are already at heightened risk, deserve comprehensive access to income support and therapeutic services when their work harms their mental health, not only when their experience matches an arbitrary event on a list.

73. The proposed list of categories leaves many questions unanswered, for example:

    Being subjected to indictable criminal conduct – how would this be demonstrated by the injured worker? Would their word that they had been subjected to such conduct be adequate for the purposes of accessing compensation? Would it require a police report? Would police need to lay charges? Would the offender need to be prosecuted? Nurses are frequently subjected to indictable criminal conduct, including incidents such as sexual touching by patients. It is extremely rare for the police to lay charges in these circumstances. Including additional requirements to demonstrate that they have been subjected to indictable criminal conduct for nurses who have been sexually touched is not trauma-informed and will create barriers to accessing support when required, compounding the harm.

    Witnessing incidents resulting in death or serious injury, or the threat of death or serious injury, including the following an act of violence, indictable criminal conduct, a motor accident, a natural disaster, a fire or another accident – is the inclusion of the second part of this clause (from "act of violence" onwards) intended to place restrictions on the types of deaths or serious injuries that workers may witness that would be compensable or is this list included for illustrative purposes?

There are many situations that nurses face that may involve witnessing an incident resulting in death or serious injury, but may not be covered by the second section of the clause.

Nurses in a metropolitan Sydney emergency department witnessed a patient attempt to self-decapitate. As the patient ran around the ED, spraying blood from a severed artery, they needed to try to physically restrain the person and provide immediate medical care to prevent them from bleeding to death.

74. The NSW Code of Practice for Managing Psychosocial Hazards at Work (the Code of Practice) acknowledges the broad range of psychosocial hazards associated with psychological harm. This code was developed in conjunction with industry experts and academics and psychosocial hazards were only included where there was a substantial evidence base that linked them with psychological harm to workers. It includes:
    - Role overload (workload/understaffing)
    - Role underload
    - Role conflict/lack of role clarity
    - Low job control
    - Conflict/poor workplace relationships
    - Poor support from supervisors and managers
    - Poor coworker support
    - Violence
    - Bullying
    - Harassment including sexual harassment
    - Inadequate reward and recognition
    - Hazardous physical working environments
    - Remote or isolated work
    - Poor procedural fairness
    - Poor organisational change consultation

75. Under the proposed amendments, injuries caused by these common workplace psychosocial hazards would be excluded from support. This is particularly alarming in healthcare, where workers face many of these hazards in a sector already under strain, and where persistent understaffing, violence, moral injury and burnout are endemic.

Role Overload

Nurses caring for an adolescent mental health patient suffered injuries arising from role overload and exposure to trauma (that doesn't fit the proposed definition). The patient was admitted to their unit following an extensive (13 months) prior admission. The patient had developed several maladaptive attachment styles following severe trauma experienced as a child, and as a result, was only receptive to a limited number of nurses, especially when highly distressed. This left a small number of nurses involved in the majority of serious self-harm attempts by this patient leading to intense burnout.

A theatre nurse was psychologically injured following a prolonged period of short staffing. There were no attempts by the facility to reduce theatre lists in line with available staffing resources leading to excessive overtime including 18hr shifts and working on days off. Burnout was rampant and sick leave was increasing at a steep rate. The nurse had booked annual leave for her honeymoon 12 months prior but had her leave revoked 3 months before her wedding due to the staffing shortages. Additionally, Increased errors and unsafe workplace practices were occurring to manage the job demands, causing nurses significant anxiety. The nurse sustained a significant psychological injury as a result.

Hazardous Physical Environment

76. The Code of Practice includes a hazardous physical environment as a psychosocial hazard, and this is reflective of the experiences of NSWNMA members.

Covid 19 – Early in 2020, at the start of the pandemic, and with images from overseas of hospitals under collapse and temporary morgues being set up to deal with the mounting death toll, nurses were providing care to ill and dying patients. There was no vaccine, and frequently insufficient PPE. Some workers were immunocompromised or lived with loved ones who were and were terrified that their workplace exposures would kill their family members.

Blood borne virus exposure – a nurse had blood squirt in her eye while doing a dressing. The patient she was caring for had a history of injecting drug use. When she contacted her manager to find out what she should do, she found that the organisation she worked for had no internal procedures, and when she called the NSW Blood and Body fluid exposure hotline for advice, she found it had been shut down. As there were no processes for seeking consent for testing from the patient, she had to wait for many months to find out if she had contracted a bloodborne virus.

Cancer nurses work with hazardous drugs that are known to be carcinogenic, mutagenic and toxic to reproduction. When there is a lack of appropriate risk management in place, nurses can be psychologically injured. For example, a

pregnant nurse was exposed to a cytotoxic drug spill, without appropriate PPE. Nurses working with chemotherapy drugs (hazardous drugs) have a 100% increase in risk of miscarriage compared to nurses who do not work with chemotherapy drugs, as well as elevated rates of stillbirths and congenital birth defects. While it may be some time before the nurse knows if there has been harm to her unborn child or whether she will develop cancer herself, many nurses sustain psychological injuries arising from anxiety about the physical risks they have been exposed to.

Poor Support from Managers and Supervisors

A nurse was stalked and harassed by a male colleague for 9 months. She reported the incidents to human resources and her line manager 13 times during this period. No attempts were made to manage the risk to her safety, nor was any investigation commenced. On one occasion she was advised to confront the perpetrator and request that he stop stalking her, and another time was offered a hug. This poor handling of her report resulted in a psychological injury. Research shows that victims of sexual and gendered based harassment should not be required to partake in mediation or to confront the harasser in resolving the matter due to the power imbalance and the likelihood of causing further psychological injury to the victim.

A nurse was advised that a patient's father had made a serious death threat about her and her family. The threat included mention of her children (including ages and gender) and the suburb she lived in. No measures were put in place to ensure her safety at work. The nurse used her personal leave to stay away from the workplace for the rest of the patient's hospital admission. 2 years later the nurse discovered that the father was back on premises with another sick child. At this point the nurse had a psychological breakdown arising from her belief that her life was at risk from this person and that her employer would not take the necessary action to ensure her safety. This psychological injury was predominantly caused by her belief of poor safe workplace controls to ensure her physical and psychological safety.

Poor Procedural Justice

A nurse was assaulted by a visitor in a racially motivated attack. The nurse defended himself and used force to get out of a headlock. Consequently, the nurse was suspended from duties and was reported to the regulatory authorities without notice, despite a pending investigation and reports from witnesses indicating the use of reasonable force in a dangerous incident. It took his employer 10 months to deliver a decision to the nurse following the investigation process. The nurse suffered a serious psychological injury following the failure of his employer to investigate allegations using procedural fairness principles, including the failure to undertake the investigation in a fair and transparent manner, to offer a support person or to conclude the

investigation within a reasonable timeframe. This nurse had to be treated medically for his psychological injury.

Vicarious Trauma

77. The draft Bill provides a list of circumstances in which a worker will be considered to have experienced vicarious trauma that would be compensable. This list provides a further narrowing of access to workers' compensation. An incident will be considered vicarious trauma for the purpose of compensation in the following circumstances: "*where the worker becomes aware of any of the following acts or incidents that resulted in the injury to, or death of, a person (the victim) with whom the worker has a close work connection— (a) an act of violence, (b) indictable criminal conduct, (c) a motor accident, a natural disaster, a fire or another accident, (d) an act or incident prescribed by the regulations.*"

78. Recent examples from members that would not meet that definition:

A nurse discovered a patient who had died by suicide by hanging himself and as she cut him down, his body fell on her and she was pinned underneath him.

Nurses who have patients pass away because of a medical error, for example nurses caring for a woman living in residential aged care who died after an error in medication packaging by the pharmacist led to her death.

Mental health nurses work with patients who frequently intentionally self-harm, e.g. nurses were required to physically restrain a 16-year-old who was attempting to swallow pieces of glass multiple times per shift and for up to 35 minutes per occasion. Incidents like this have profound impacts on staff and are not uncommon. Further, mental health nurses work with people with traumatic histories of sexual assault, neglect, and physical abuse. Hearing these stories repeatedly dramatically increases the likelihood of developing psychological injuries through vicarious trauma.

During the Covid-19 pandemic, ICU nurses were using personal phones to facetime family members to allow them to say goodbye to their dying patients during the prolonged NSW Health no visitor policy. These experiences caused many nurses to experience psychological injuries, especially following cumulative exposure to distressed families who were denied physical visitation of their deteriorating loved ones. Concomitantly, these nurses were wearing full body PPE and N95/P2 masks for 12-hour shifts without adequate breaks and PPE shortages which led to exhaustion, burnout, anxiety and physical injuries. Many nurses were psychologically injured as a result.

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79. In a further narrowing, an event will be considered vicarious trauma only in circumstances where the worker has a "close work connection" with the victim. This disregards the complex nature of trauma exposure in the healthcare setting. For example: emergency staff who repeatedly attempt to resuscitate fatally injured patients, or nurses who must provide intimate care to victims of

violence, all may experience profound vicarious trauma even if they do not meet the Bill's rigid definition. The proposed language fails to account for the realities of healthcare work, where emotional labour and moral distress are daily experiences.

Requirement to First Attend a Tribunal, Commission or Court who has Confirmed they have been Subjected to Sexual harassment, Racial Harassment or Bullying for Compensation to be Payable

80. A key provision in the draft Bill imposes a new procedural barrier for workers who suffer from a psychological injury arising from bullying, harassment or racism. Under these proposed changes, affected workers must first obtain a formal finding from a tribunal, commission or court that the incident occurred before they can access any form of workers' compensation. The NSWNMA asserts that this is deeply concerning and problematic. This imposes a significant burden onto already traumatised individuals and introduces a delay that can severely impede recovery, as well as reducing the likelihood of a durable return to work. For many, this process will be retraumatising, intimidating and ultimately prohibitive. Rather than supporting injured workers, this change is likely to deter them from lodging claims.

81. The Bill obliges injured workers to commence and complete preliminary litigation before proceeding with psychological injury claims relating to sexual harassment, racial harassment or bullying. It is difficult to identify another area within the legal system where one cause of action depends upon the separate and distinct resolution of another cause of action in a different forum. In our view this is not only wrongheaded but is illustrative of intent to severely reduce the rights and entitlements of injured workers.

82. Litigation of all kinds is stressful, time-consuming and often traumatic for litigants. Forcing victims of sexual harassment, racial harassment and bullying to undergo such litigation as a precondition for claims is distressing, with the potential risk of increasing trauma. Victims of sexual harassment are often reluctant to pursue claims against perpetrators due to both the well-known difficulties associated with proving such claims, as well as the distressing factual circumstances. It is, in the NSWNMA's view, nothing short of a disgrace to force victims of sexual harassment to undergo the time, expense and trauma of litigation prior to proceedings with a workers' compensation claim.

83. The NSWNMA believes that a victim of sexual harassment will be unlikely to receive trauma-informed treatment within an industrial court or tribunal, with the probable expectation that victims be cross-examined, which research demonstrates can lead to experiences of shame, humiliation and guilt. It is a proposal which will potentially undermine the federal Respect at Work laws, reintroducing barriers to sexual harassment reporting with the potential to increase the perception that victims will not be believed or will be victim-blamed when reporting their experiences of sexual harassment in relation to the workplace. Adding another obstacle to workplace sexual harassment investigative processes will disproportionately affect the health and safety of all workers, but particularly in these largely female-dominated professions, to their detriment.

84. The NSWNMA frequently supports members experiencing extreme behaviours from others that may be referred to as sexual harassment by the worker and their employer. These behaviours are often criminal in nature and include sexual touching, stalking, sexual assault, sexually menacing comments, indecent texts and use of social media. The members who contact us have generally already reported to their employers who have failed to take any action, leaving members exposed to ongoing behaviours and compounding the harm due to the lack of support provided. In our

experience, members in this situation are often extremely mentally unwell (some have been hospitalised). They are certainly not able to appear before a tribunal hearing.

85. Currently, many employers fail to uphold trauma-informed principles when conducting investigations following sexual harassment reports. This often results in the victim being subjected to repeating the details of the incident(s) repeatedly to different managers, employee resources (ER) representatives or others. Additionally, there have been many occasions where female victims of sexual harassment have been assigned male representatives of ER or management to undertake the investigation of the alleged harassment without confirming if the victim is comfortable communicating the details of the harassment with a male. It is similarly disgraceful for victims of racial harassment and bullying to face the same requirements. It should be patently obvious that victims of bullying and harassment are some of the State's most vulnerable workers. Their claims for compensation associated with psychological injury should be met with compensation and care, not a series of distressing legal hurdles.

86. If a finding of a tribunal, commission or court is required for such claims to proceed, measures should be put in place to ensure that claimants are not subjected to the brutality of the adversarial system. Fully arbitrated hearings or the like, involving the collation of evidence and cross-examination of victims, should not be required. Instead, the Government should consider more informal options such as conciliation or paper-based reviews which do not subject claimants to trauma. However, the NSWNMA reiterates its opposition to any such barriers to justice.

Work Pressure

87. The Bill introduces the concept of a "work pressure disorder". Workers who are diagnosed with a "work pressure disorder" will not be eligible for compensation under the new reforms, but may receive a "special work pressure payment" for medical treatment for up to eight weeks from the date of the reported injury.

88. It is unconscionable for the Government to refuse compensation for psychological injuries arising from workload pressures, particularly when those pressures are the direct result of its own policy and funding decisions. Chronic understaffing, excessive overtime, and unmanageable patient loads are not accidental – they are systemic and ongoing failures to adequately resource our public hospitals. Nurses and midwives are routinely expected to fill the gaps, working in unsafe conditions that compromise both their wellbeing and patient care. For the government to then deny support to those who are psychologically harmed by these very conditions is not only unjust – it is a betrayal of the workforce that holds our health system together.

89. A short-term "work pressure disorder" payment fails to appropriately support injured workers. Further, due to critical workforce shortages, in many parts of NSW a worker may be unable to attend a first appointment with a mental health professional in those timeframes let alone to have concluded any meaningful treatment.

Changes to Whole Person Impairment Threshold

90. The Bill proposes raising the Whole Person Impairment (WPI) threshold for ongoing compensation from 15% to 31% for psychological injuries as a condition for accessing lump sum entitlements. The NSWNMA asserts that this threshold is both medically and ethically indefensible.

91. The current approach to quantifying compensation entitlements for psychological injuries under NSW legislation mirrors that of physical injuries, yet there are key distinctions in establishing a compensable psychological injury.

92. To qualify, a psychological injury must possess a specific diagnosis related to a psychological or psychiatric disorder. It is necessary to demonstrate that the condition exceeds mere "stress" but instead is a recognised psychiatric condition that can be diagnosed and treated. The DSM (Diagnostic and Statistical Manual of Mental Disorders, currently in its fifth edition), created by the American Psychiatric Association, although not mandated by legislation, is often relied upon for these diagnoses.

93. Psychiatric conditions are considered "*diseases of the mind*" and under the legislation establishing entitlement to compensation for a disease condition has a stricter test than that for a discrete physical condition in that, having identified a psychiatric condition that arose out of or in the course of employment, a worker would need to establish that employment was the "*main contributing factor*" to that condition.

94. Once these requirements are met, workers may encounter challenges from employers attempting to refute liability for the recognised psychological injury and any resulting incapacity, often by referencing section 11A of the *Workers Compensation Act 1987* (NSW):

    "No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers."

95. Section 11A of the *Workers Compensation Act 1987* (NSW) was introduced in 1992 and has since been the focus of extensive judicial discussion. The essential elements that have emerged are:
    - The employer bears the onus of proving its application.
    - The categories identified, transfer, demotion, etc, are distinct and need to be formal processes.
    - The employer needs to not only prove that the processes were formal processes but that the actions were *reasonable* and that the actions were the *whole or predominant cause* for a worker's psychological decompensation.
    - The actions by the employer are to be looked at objectively from the employer's viewpoint rather than from a worker's subjective view of the motivation behind steps taken by an employer.

96. In summary, s.11A of the *Workers Compensation Act 1987* (NSW) as presently framed places a burden on employers as far as proving all the elements above and very often an employer will prove their actions fall within the relevant classes identified in the section but fail to confirm those actions were "*reasonable"* and the "*whole or predominant"* cause. The latter definition is a critical protection for workers.

97. The Court of Appeal in *Heggie* emphasised that in determining if actions were "*reasonable"* the analysis is an objective one from the employer's perspective rather than a worker's subjective view as to why certain action was taken. In *Heggie*, employers have had more success in defending their actions but there are still significant protections available for workers within the current definition.

98. The South Australian legislation also incorporates the "*whole or predominant"* cause requirement. Adopting the proposal to replace the specific categories in NSW's section 11A with the broader term "administrative action" from South Australia is not considered a major concern, provided that the "whole or predominant" requirement in the current definition is maintained.

The Assessment of Whole Person Impairment

99. In 2002, the NSW government implemented new legislation related to the *Workers Compensation Act 1987* (NSW), introducing a system designed to assess lump sum compensation for permanent non-economic losses stemming from work-related injuries, commonly referred to as "pain and suffering" compensation. This new framework mandated that medical practitioners conduct objective assessments of lump sum compensation, following established Guides and Guidelines. The eligibility for compensation was contingent upon the injured worker's determined level of WPI.

100. Prior to this change, judges evaluated lump sum compensation claims for workplace injuries based on the Table of Maims (established in 1926) and, in more recent times (post-1987), the Table of Disabilities. With the introduction of the WPI method in 2002, workers could claim lump sum compensation for physical injuries with an impairment of less than 10% WPI, but psychiatric injuries required a minimum of 15% WPI to qualify for compensation. Subsequent legislative revisions in 2012 adjusted the threshold for physical injuries to 11% WPI.

101. A negligence claim for a psychiatric injury requires a worker to establish that an employer was aware or ought to have been aware that a worker was exposed to events or actions in the workplace that were likely to give rise to injury and failed to take steps to reduce or ameliorate the risk of suffering that injury. If negligence is established, a worker is entitled to recover damages from their employer for the economic loss caused by the injury.

102. The Government is proposing, for psychiatric injuries, to lift the threshold that establishes an entitlement to lump sums for "pain and suffering" and/or to bring a negligence claim from 15% WPI to 31% WPI.

103. This proposed modification would necessitate that workers demonstrate a level of impairment so severe that an estimated 95% of workers with psychiatric injuries would be denied lump sum compensation or, if assessed over 30% WPI, may be discouraged from pursuing a negligence claim due to the potential impact on their treatment and care funding.[14] Consequently, the proposed changes in NSW will prevent those with psychological injury from accessing lump sum compensation and negligence claims related to psychological injuries.

104. The assessment of WPI concerning psychological injuries in NSW employs the Psychological Injury Rating Scale (PIRS). To be classified with a WPI of over 30%, a worker would need to attain specific impairment levels according to the relevant PIRS categories set out in the below table:

Self-Care and Personal Hygiene	
Class 4 Severe Impairment	*Needs supervised residential care. If unsupervised, may accidently or purposely hurt self.*
Class 5 Totally Impaired	*Needs assistants with basic functions such as feeding and toileting*
Social and Recreational Activities	
Class 4 Severe Impairment	*Never leaves place of residence. Tolerates the company of a family member or close friend but will go to a different room or garden when others come to visit family or flatmate.*
Class 5 Totally Impaired	*Cannot tolerate living with anybody, extremely uncomfortable when visited by close family member.*
Travel	
Class 4 Severe Impairment	*Finds it extremely uncomfortable to leave own residence even with trusted person*
Class 5 Totally Impaired	*Cannot be left unsupervised, even at home. May require two or more persons to supervise when travelling*
Social Functioning	

Class 4 Severe Impairment	*Unable to perform or sustain long term relationships. Pre-existing relationships ended e.g. loss partner, close friends. Unable to care for dependents, e.g. own children, elderly parents.*
Class 5 Totally Impaired	*Unable to function within society. Living away from populated areas, actively avoid social contact.*
Concentration, Persistence and Pace	
Class 4 Severe Impairment	*Can only read a few lines before losing concentration. Difficulties following simple instructions. Conversation deficits obvious even during brief conversations. Unable to live alone or needs regular assistance with relatives and community services.*
Class 5 Totally Impaired	*Needs constant supervision and assistance within an institutional setting.*
Adaption/Employment	
Class 4 Severe Impairment	*Cannot work more than one or two days at a time, less than 20 hours per fortnight, pace is reduced, attendance is erratic.*
Class 5 Totally Impaired	*Cannot work at all.*

105. For a worker to be assessed at 31% WPI or worse the process under PIRS would require a score of 5 in 6 of the above categories.

106. In effect, a worker in this situation may become nearly catatonic and, as identified within the classes of impairment, would necessitate considerable supervision and medical care. Even if assessed with a greater than 30% WPI, a negligence claim would not be viable due to the resolution of such claims terminating the entitlement to medical treatment.

107. The establishment of a 30% WPI threshold effectively denies a worker's right to compensation for impairment or pain and suffering, as well as the ability to sue their employer for negligence that resulted in a permanent injury.

108. The argument from the Government that South Australia has a 30% WPI for psychological injuries fails to recognise that SA uses a different impairment scale to assess psychological injury to that used in NSW. A 30% WPI under the NSW impairment scale looks very different to a 30% WPI under the SA impairment scale. Of the other jurisdictions that use the PIRS scale used in NSW most have no impairment threshold for psychological injury claims. Tasmania has the second highest after NSW and this is 10%.

109. The proposed threshold of 30% WPI would effectively eliminate any entitlement to impairment compensation or the ability to pursue a negligence claim against the employer. The NSWNMA would be interested to see the percentage of workers making claims for impairment due to psychiatric injury that are assessed above 30% WPI.

110. Therefore, the Government's proposal to raise the threshold for receiving lump sum compensation or pursuing a negligence claim for psychological injuries to 30% WPI would likely result in very few, if any, claims for negligence related to workplace injuries involving psychological conditions.

111. Unlike physical injuries, psychological conditions are complex, often episodic, and rarely reach such a high level of impairment on standard medical/legal assessment tools. Mental health conditions do not lend themselves easily to quantification using physical impairment frameworks. As a result, almost all legitimate psychological injury claims would be excluded from lump sum compensation. Unions NSW confirmed that the proposed threshold will block “95 per cent of legitimate mental health claims”.

112. In practice, this would mean that only the most severely and permanently disabled individuals, those least likely to ever return to work, would qualify for compensation, leaving the vast majority of injured workers without recognition or meaningful support. This reform risks entrenching stigma and inequity by treating psychological injuries as less valid or deserving than physical injuries.

113. In addition to the lack of access to lump sum compensation, the WPI is used to determine ongoing access to income and medical support. This means workers suffering from serious psychological injuries will be cut off from financial support after approximately 2.5 years of income payments and 3.5 years of medical coverage, regardless of the severity of their condition, effectively abandoning them at their most vulnerable.

114. The NSWNMA sought expert advice from Dr Anthony Dinnen, an accredited WorkCover assessor and consultant psychiatrist, regarding the proposed amendments to the Bill. Dr Dinnen, in his correspondence with the NSWNMA (see Appendix A), noted:

> *I can say without any equivocation that the proposed increase will mean that no individual suffering work-related psychological injury will be eligible for compensation with that 30% threshold. The cases that I am asked to assess often are the most serious. They are individuals with chronic incapacitating psychiatric illness preventing them from working, restricting their quality of life to the extent that family life is disrupted, so that they are often housebound, unable to enjoy social and recreational activities, and requiring long-term psychiatric care. Such individuals seldom are assessed as having more than a 20% WPI according to the current PIRS scale. It is most unusual in my experience for an individual to rate between 20% and 25%. I repeat, I have almost never seen an individual rate at anywhere near 30% WPI.*

The Role of Suitable Duties, Tribunals/Industrial Relations Commission and Employer Accountability

The Failure of Employers to Facilitate a Return to Work

115. The main problems with the current workers' compensation scheme are the fault of employers, not workers. Whilst there are some employers show a great deal of compassion toward their injured employees, there are also many who view such workers as liabilities that need to be removed from their business. In our experience, this is even more prevalent in relation to workers suffering psychological injuries.

116. Over many years the NSWNMA has encountered a persistent reluctance from both NSW Health and private sector employers to provide injured workers with suitable work. Such attitudes result in injured workers being either dismissed, pressured to risk re-injury by returning to work too early or pressured to seek work elsewhere. Generally, this tends to occur:;

a. 6 months after an injury,
b. after a worker has been certified as permanently unfit for pre-injury duties,
c. after an insurer has made a decision to deny liability, or

d. after a worker has received compensation for a few years.

117. It is not uncommon for the NSWNMA to be contacted by a member at these times, advising that they believe their employer is taking steps to dismiss them. Generally employers begin to pressure their employees at these times in a range of ways. For example:

- Employers often advise their injured workers that unless they become fit for pre-injury duties, they may be terminated.
- Employers often withdraw any suitable work which is being provided and claim that no further work exists.
- Employers often advise workers that unless they become fit for pre-injury duties, they will have to seek work elsewhere.

118. The reason why such action tends to occur six months after an injury is because there is a common misconception among employers that they are able to terminate injured workers after that time. This misconception emanates from section 248 of the *Workers Compensation Act 1987* (NSW).

119. Whilst it is not generally an offence to dismiss an injured worker more than six months after becoming unfit for employment, this does not mean that employers have no obligation to provide suitable work after that time. Furthermore, there is widespread ignorance of the fact that the six-month period only relates to periods when a worker is totally unfit (see *Banning v Great Lakes Council* [2002] NSWIRComm 47).

120. Similarly, employers also frequently pressure injured workers after they have been certified as permanently unfit for pre-injury duties despite being fit for other work. This highlights another misconception among employers: that their obligation to provide work to an injured worker ceases when that worker is found to be permanently unfit for pre-injury duties. However, section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) imposes a positive obligation on employers to provide suitable work to injured workers. In our experience, many employers are either unaware of this provision, or willfully ignore it.

121. The result is that injured workers either have their employment terminated or are simply not provided with work. This then forces them to rely upon weekly workers' compensation payments whilst they search for work elsewhere. It is notoriously difficult, however, for an injured worker to find work with a new employer, particularly if they suffer from a psychological injury. Many employers require potential employees to declare whether they have ever suffered a workers' compensation injury. It is also not uncommon for prospective employers to be informed by a previous employer that a job applicant has suffered an injury. Employers are generally reluctant to employ injured workers for the following reasons:

- Injured workers are seen as a workers' compensation risk, that is, employers fear that a re-injury may occur at their workplace.
- Injured workers are seen as an occupational health and safety risk
- An injured worker's medical restrictions (both in terms of the number of hours which can be worked and the kind of work which can be performed) will not generally match the nature of any available positions. It is understandable that employers seeking to fill a vacancy will generally advertise for and appoint the most suitable candidate. For example, an employer seeking an employee to work 30 hours per week, is unlikely to engage an injured worker who is unable to work more than 26 hours per week. Equally, an employer is unlikely to consider engaging an injured worker who would be able to fulfil an advertised role only if they were provided with additional support and training.
- Injured workers are not seen as, and may not be, as productive or valued as employees who have not suffered an injury.

122. By refusing to provide their injured workers with suitable duties, employers can shift the cost burden of injured workers entirely to their insurers, who are then liable to pay weekly benefits which would either not otherwise be required or not be of the same quantum. The injured workers themselves then face an uncertain future living on a weekly workers' compensation benefit whilst they attempt to obtain work in a labour market where their value is seen as diminished.

123. In the NSWNMA's view, insurers are in the ideal position to prevent this cost shifting by employers. However, it is the NSWNMA's experience that insurers are unable to exert sufficient influence on employers to comply with their obligations to injured workers, other than by the use of premium adjustment. Our understanding is that insurers do not conduct a rigorous analysis of whether their clients are able to provide suitable work to injured workers. Insurers generally are left to accept at face value the employer's indication that no such work is available. Consequently, the insurer then sends the injured worker a letter identifying their obligation under section 38 of the *Workers Compensation Act 1987* (NSW) to seek suitable employment, that is,with another employer. By ignoring their obligation to provide injured workers with work, employers are able to trigger their insurer to invoke section 38 and impose an obligation on the worker to look for work elsewhere.

124. In the NSWNMA's view there is a double standard within our workers' compensation system. Whilst injured workers are constantly tested and examined by medical practitioners in order to justify their entitlement to workers' compensation benefits, there are no such checks and balances in place for employers. At no stage in the workers' compensation process is the employer's capacity to provide suitable work to their injured employee tested or examined. In our view, the responsibility for rehabilitating and caring for injured workers is a joint responsibility; whilst the worker has a responsibility to seek work and comply with their return-to-work plan, so too should the employer comply with their responsibility to provide work to that worker if possible prior to that worker being required to job seek.

125. The NSWNMA believes that the Government has a responsibility to intervene in the market to ensure injured workers are properly supported. An economist may view injured workers as a form of market failure. Currently, the extent to which injured workers are provided with suitable work is largely left to the market and this inevitably results in such workers being disadvantaged.

126. Unfortunately, the NSWNMA is frequently compelled to invoke dispute resolution procedures with employers who move to offload injured workers. Such disputes are not easily resolved because it is often difficult to prove that an employer has suitable work available.

127. It is particularly disappointing that such disputes are often with NSW Health, which holds itself as a model employer. The NSWNMA finds it remarkable that in a health system which needs nurses, public health organisations are frequently unwilling to provide an injured nurse with a few days of partial duties per week. Given that the relevant public health organisation is often the largest employer in the area and NSW Health is the largest employer in the state, it is astonishing that they continue to claim that suitable work cannot be accommodated.

128. Many employers are also unaware of, or ignore, their obligation pursuant to section 41A of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW)to continue to treat a worker's injury as work related in circumstances where an insurer's decision to deny liability is to be disputed. Employers often rely on a disputed claim to justify treating a worker's injury as non-work related by withdrawing suitable work. This then further delays the rehabilitation process in relation to medical treatment and return to work. The NSWNMA's experience is that employers do this without making any attempt to determine whether the worker intends to dispute this decision. Often the withdrawal of suitable duties in these circumstances will be accompanied by a notification to the worker that termination of employment will occur unless they become fit for pre-injury duties within a specified time.

Psychological Injury and Suitable Duties

129. The failure of employers to abide by their obligations in relation to the provision of suitable duties to injured workers is a significant contributor to the exacerbation of such injuries. It is obvious that psychological injuries are different to physical injuries. Whilst the failure to provide suitable work to a worker suffering a physical injury is unlikely to exacerbate that injury, there is a very significant risk that such failures will either cause or exacerbate psychological injuries.

130. In light of this, the NSWNMA asserts that the Government should not attempt to reduce the number of psychological injury claims by disenfranchising injured workers through a series of legal and administrative hurdles to justice. Such an approach shifts responsibility away from the systems that cause harm and place it squarely on those who are already suffering. Instead, the Government should invest in robust, preventative strategies that address the root cause of psychological harm and reduce the frequency and severity of these injuries.

131. One of the most effective ways to prevent psychological harm and promote recovery would be to require that any case in which an employer has refused to provide suitable duties be automatically listed before a tribunal, such as the Industrial Relations Commission of New South Wales. That tribunal should be tasked with reviewing the circumstances of each case and facilitating timely, safe and meaningful return-to-work outcomes.

132. It is the NSWNMA's experience that many employers find it difficult to deal with employees who have suffered a psychological injury. These difficulties arise not only from the complexity of the injuries themselves but also from inadequate human resource practices and a widespread reluctance to engage with the interpersonal dimensions of psychological harm, especially when the injury stems from bullying, harassment or poor organisational cultures. Too often, employers default to excluding the injured worker rather than navigating the more difficult process of accommodation and reintegration. Refusal to provide suitable duties is frequently treated as the path of least resistance.

133. As a result, nurses and midwives with psychological injuries are often left without structure, purpose or connection for sometimes months. It is well understood and accepted that prolonged absences from the workplace significantly worsen psychological outcomes and reduce the likelihood of recovery. Quite apart from the damage to the worker and the associated social cost, the financial effect on the workers' compensation scheme itself is obvious.

134. If refusal to provide suitable duties to injured workers were subject to prompt review by an independent tribunal with appropriate powers, it would introduce a long-overdue mechanism for accountability. Such a process would help ensure employers uphold their obligations and reduce the incidence of psychological injury by supporting early and appropriate return-to-work. Importantly, it would also reaffirm the principle that workers who are injured by the workplace deserve support, not exclusion.

135. It is the NSWNMA's view that this is a far more constructive and just use of tribunal resources, particularly those of the IRC, than what is proposed under the current amendments to the Workers Compensation Bill. Under the scheme, injured workers face scrutiny at every turn, medical certificates must be provided accounting for every day of absence, medical appointments must be attended, work capacity must be assessed and medical evidence be obtained justifying claims. These requirements demand adherence by injured workers under threat of benefits being withdrawn. By comparison, there is a paucity of scrutiny on employers' decisions regarding the provision of suitable duties. Insurers exert no pressure on employers to provide duties and employers are generally left to self-assess as to whether they can provide work.

136. Whilst it is true that proceedings can be brought in the Personal Injury Commission, such proceedings are rare. We acknowledge that some progress was made in this area under the *Workers Compensation Legislation Amendment Act 2012*(NSW); whilst the vast bulk of this

amending legislation was detrimental to workers, there were some positive amendments relating to suitable duties. However, the problem is far from resolved.

137. The fact remains that there is no systematic scrutiny of employers' return-to-work decisions. In a system where the body parts and minds of humans have been attributed monetary worth and compensation is dependent on the impossible task of assessing percentages of impairment, the question of whether work can be provided to an existing employee by their employer is seemingly all too hard.

138. The NSWNMA urges the Government to use this opportunity not to penalise workers, but to hold employers to account. Mandating transparency and review of return-to-work decisions would not only reduce harm of and improve outcomes for injured workers, it would also ease the financial burden on the scheme. More importantly, it is a necessary and overdue act of fairness in a system that too often fails the workers it is designed to protect.

The Unions NSW Five-Point Plan

139. The NSWNMA urges the Committee to adopt the five-point plan put forward by Unions NSW, which would provide practical, enforceable, and evidence-based reforms:

    1) Empowering the IRC to deal with safety hazards reported by workers and making WHS Codes of Practice enforceable;

    2) Making it easier for injured workers to return to work by, for instance, enabling the IRC to resolve return-to-work disputes and prohibiting the termination of their employment;

    3) Incentivising employers to prioritise safety and return-to-work efforts by reintroducing premium loadings based on claims performance, which reward safety-conscious companies;

    4) Reducing waste and inefficiency within the scheme by expanding the State Insurance Regulatory Authority's powers to reduce insurer waste and addressing under-insurance by employers; and

    5) Diversifying the insurance pool and creating a more sustainable funding model by abolishing self-insurance and specialised insurer arrangements.

Conclusion: Protect Those Who Protect Us

140. The proposed reforms to psychological injury compensation in NSW represent a fundamental shift away from a system designed to protect injured workers towards one that silences and marginalises them. Narrower eligibility, higher impairment thresholds and complex legal hurdles will make support harder to access. These reforms ignore the everyday reality of nurses, midwives and workers. One-off violent events do not cause most psychological injuries in healthcare. They stem from chronic understaffing, moral distress, role overload, bullying, harassment and systemic failures.

141. This proposed legislation does not promote prevention. It does not hold employers accountable. Instead, it punishes workers for being harmed by the system that they work for and will contribute to further psychological injury. If passed, these laws would send a clear message: the Government is more interested in reducing claim numbers than supporting injured workers.

142. We must push for a fair, transparent, and accountable system. One that focuses on safe workplaces, not legal barriers. One that values the mental health of workers. One that achieves safer workplaces nurses and midwives and removes barriers to reporting experiences of sexual harassment. No injured nurses, midwives, or workers should be left behind or abandoned.

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Appendix

Appendix A

Submission No 6

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

Organisation: Health Services Union - NSW ACT QLD (HSU)

Date Received: 14 May 2025

Health Services Union NSW/ACT/QLD
14 May 2025

The Hon Daniel Mookhey MLC
Treasurer of New South Wales
NSW Government
52 Martin Place
Sydney NSW 2000

Dear Treasurer,

Re: Exposure Draft – *Workers Compensation Amendment Bill* and Psychosocial Reforms

The Health Services Union (HSU) welcomes the opportunity to respond to the Exposure Draft of the *Workers Compensation Amendment Bill* (2025), which includes long-overdue reforms to better prevent, identify, and respond to psychosocial injury in the workplace.

Psychological injury is real. Its consequences are often invisible but lifelong, devastating the lives of workers and their families. Members across our union, including paramedics, hospital workers, disability carers, and aged care staff, are disproportionately affected. They report high rates of burnout, trauma, bullying and moral injury, often resulting in complex claims that are not easily resolved within a system designed around physical harm.

We acknowledge that the existing scheme and framework to deal with psychological injuries is deeply flawed. The retrofitting of psychological injuries to the same processes that exist for physical injuries was a terrible decision that has caused the suffering of thousands of workers across NSW, at extreme expense to the NSW Government and employers. The status quo as it currently exists is not an option.

We strongly support the NSW Government's renewed focus on prevention, as this must be the system's first priority. The proposed reforms to SafeWork NSW, new mental health programs, and a shift in the *NSW Industrial Relations Act* (1996) toward addressing bullying, harassment and discrimination are welcome steps in this direction. However, the system must also remain financially sustainable. The exponential growth in psychological injury claims places mounting pressure on the scheme's financial reserves, risking a future where the funds simply run out, leaving the most vulnerable workers without the support they urgently need.

HSU supports the creation of clearer thresholds, stronger early intervention powers, and clarified definitions around "reasonable management action", but only if these measures are designed to ensure fair, evidence-based outcomes for workers. Any changes must not result in higher barriers for those with genuine and often complex mental health injuries to access the support they deserve.

The union also supports efforts to prevent misuse of the system, whether by individuals, corporations, or insurers. However, let us be clear: the greater systemic risk is not fraudulent claims, but unsafe workplaces that push more workers to the brink. Reforms must focus on holding employers to account, especially those who create or tolerate environments that harm their staff.
We also note the proposal to expand dispute resolution pathways. Timely, fair resolution of claims is essential to recovery. Too many of our members have languished in bureaucratic limbo, retraumatised by delays and adversarial tactics. A just compensation system must be accessible, transparent, and centred on the needs of injured workers, particularly the most vulnerable.

The HSU makes the following comments on elements of the Exposure Draft of the *Workers Compensation Amendment Bill* (2025):

i. Under Part 4A, we recommend making allowance for time off work in the framework around a worker's entitlement of an 8-week medical treatment period under "special work pressure" payment. Existing sick leave could be used initially but if this leave is exhausted there should be the possibility of further time off up to the 8 weeks considered as a medical treatment rather than compensation. We suggest that the entitlement be expressed more flexibly, allowing for case-by-case assessment by medical professionals in line with the enhanced guidelines for medical practitioners suggested elsewhere in the act This approach would take into account the worker's available sick leave and the specific circumstances of their work pressure.

ii. Under Part 4A of the bill, we recommend expanding the definition of "special work pressure" to include a distinct category of "extreme work pressure." This addition would ensure that workers experiencing severe and sustained work pressure are eligible for an 8-week compensation period, as outlined in the current proposed section.

iii. We also recommend that workers be allowed to make more than one claim for work pressure, as the current one claim per worker threshold disadvantages long-term employees and is not reasonable considering that changes in management and practice within an organisation, as well as movements a worker may make within an

organisation, may leave them exposed to the differing management cultures which cause this injury. Allowing one possible claim per year would fully rectify this issue.

iv. We recommend implementing a scalable framework to determine which psychological injury claims under bullying, sexual harassment and racial harassment require tribunal involvement. To ensure tribunal resources are allocated appropriately, injury claims that can be effectively resolved at a local level should not automatically proceed to a tribunal. In contrast, more serious cases, such as those involving severe bullying or significant work pressure, should be directed to the tribunal for resolution.

A scalable framework may be best related to guidelines issued to clinicians. Where a diagnosed injury is of a shorter length (between 0-12 weeks), guidelines for proof/acceptance could be left up to the insurer, with provision of evidence from the injured worker and employer and where behaviour is admitted, cases can be resolved with support and no further testing of evidence. When an injury is of a more significant nature, tribunal-based testing of evidence appropriate with the level of seriousness could be utilised. If an injury evolves to need a longer period of treatment and compensation, tribunal proceedings could be required at a later date.

v. The work pressure elements of the act could also be integrated into this more flexible early-stage consideration of injury, that is not likely to result in longer term treatment or time off.

vi. In almost all cases of psychological injury that go beyond a certain threshold, there will be significant issues in terms of management culture or worker mental health which affect resolution. In cases where management culture is the cause of unresolvable claims, they should be referred to SafeWork for corrective action. In cases where the worker is the cause of the injury being unresolved, removing the current perception test and replacing with a reasonable person test will effectively resolve many cases and ensure those cases which do require longevity are appropriately treated and compensated.

vii. Regarding amendments to Division 3A, we note that the current framework does not clarify on whether a tribunal must substantiate a claim before it can proceed. We recommend that provisional liability is granted from the moment a claim is referred to

the tribunal to ensure delays in tribunal processes do not hinder treatment for psychological injury.

viii. In recognition that workers who are presenting to the tribunal are already experiencing psychological distress, we recommend a tribunal structure as a simple, non-legalistic forum focused on assessing evidence and making quick determinations, without requiring legal representation or cross-examination.

ix. The proposed changes, including controlling the nature of psychological injuries and improving management of entry points, are likely to reduce costs associated with psychological injury in workers' compensation. Therefore, increasing the Whole Person Impairment (WPI) threshold should be considered in the context of these changes. The system entry changes contemplated in the Act should first be implemented. These changes, along with the significant additional focus on prevention, will reduce the number of injuries continuing through to the WPI threshold point. The need for any change to the WPI threshold should then be examined in the context of the likely new and lower cost structure of the scheme.

If introduced, we recommend a staggered approach to any increase in the WPI threshold, allowing for regular reviews and adjustments through regulation. We fundamentally reject the idea that if a worker has been found to be injured psychologically at work, that support should cease if they do not meet the significant impairment required by a 30% threshold. Whilst this mechanism is neat in terms of the cost reduction it will provide to the scheme, it is heartless and will cause significant distress to the workers and families of people injured through no fault of their own, who are still suffering significant impairment.

If the costs of a system are unsustainable, rather than moving the goalposts to deny all support, other options which allow for treatment and support (and likely far better outcomes than the current scheme) should be considered. There is an opportunity to apply actuarial analysis and an opportunity to creatively consider clinical best practice in the treatment of psychological injury. We strongly advocate that the latter approach is adopted by the Labor Government.

Finally, we encourage the NSW Government to ensure that any reforms made today are accompanied by robust public data, strong compliance and enforcement, and ongoing consultation with workers and their unions. HSU is committed to working with the NSW Government and NSW Parliament to deliver a system that genuinely protects workers, one that is both preventative and sustainable, and which ensures support is there for those who need it most, now and into the future. Any changes should be subject to ongoing and fluid

review, with regular opportunities for amendment, as the system and framework for dealing with psychological injuries on a system-wide basis are relatively untested in any jurisdiction.

Yours sincerely,

Gerard Hayes AM
Secretary – Health Service Union, NSW/ACT/QLD

Submission No 15

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

Organisation: Australian Workers' Union NSW Branch

Date Received: 15 May 2025

May 2025

NSW Parliament Inquiry: Proposed changes to liability and entitlements for psychological injury in New South Wales

Submission of the Australian Workers' Union NSW Branch

AUSTRALIAN WORKERS' UNION
NSW Branch

Written and prepared by the Australian Workers' Union NSW Branch

First published May 2025

Prepared for the NSW Parliament's Inquiry into the proposed changes to liability and entitlements for psychological injury in New South Wales

RECOMMENDATIONS

Remove the vicarious trauma test

Remove the vicarious trauma test to support frontline workers and first responders who are at high risk of psychosocial injuries.

Revise the definition of vicarious trauma

Revise the definition of vicarious trauma to ensure frontline workers and first responders are supported in NSW's workers compensation scheme.

Delay proposed changes

Delay proposed changes to allow for further consultation with key stakeholders, particularly trade unions.

Adopt recommendations by Unions NSW

Adopt recommendations and adequately address concerns outlined in the Unions NSW submission to remove legal and financial barriers to injured workers seeking fair compensation and support.

PART ONE:
INTRODUCTION

The Minns Labor Government recently released its proposed reforms to the NSW workers compensation system, including an exposure draft of the *Workers Compensation Legislation Amendment Bill 2025*.

Following careful consideration of the exposure draft, it is the express view of the Australian Workers Union that these changes are not in the interests of workers in NSW. In fact, it is our view that these changes will make it harder for seriously injured workers to access long-term critical care, particularly in response to psychosocial injuries.

To be clear, the Australian Workers' Union NSW Branch does not support the proposed changes to workers' compensation by the Minns Labor Government.

We do not support the proposed increase to the permanent impairment threshold which would make it harder for injured workers seeking fair compensation and support.

We do not support the significant legal and financial loopholes created by this proposed amendment, effectively stripping the rights of all workers to claim fair compensation in the event of a work-related injury.

We do not support the continued and sustained attack against the rights and conditions of our first responders through the introduction of an arbitrary and poorly defined vicarious trauma test.

This submission builds on and supports the submission by Unions NSW, the peak body for unions in NSW, responding to the

Minns Labor Government's proposed changes to workers compensation.

As such, the Australian Workers' Union makes the following recommendations:

- Remove the vicarious trauma test to support frontline workers and first responders who are at high risk of psychosocial injuries,
- Revise the definition of vicarious trauma to ensure frontline workers and first responders are supported in NSW's workers compensation scheme,
- Delay proposed changes to allow for further consultation with key stakeholders, particularly trade unions,
- Adopt recommendations and adequately address concerns outlined in the Unions NSW submission to remove legal and financial barriers to injured workers seeking fair compensation and support.

PART TWO:
VICARIOUS TRAUMA

They'll have to actually see the **accident occur.**

The proposed changes outlined in the exposure draft of the *Workers Compensation Legislation Amendment Bill 2025* introduces several problematic changes to workers impacted by vicarious trauma as a result of their work and their ability to claim compensation. The Australian Workers' Union is particularly concerned about these changes, as well as the potential to exclude first responders.

The following is an excerpt from the exposure draft on vicarious trauma:

8H - Vicarious trauma
1. A worker experiences vicarious trauma if the worker becomes aware of any of the following acts or incidents that resulted in the injury to, or death of, a person (the victim) with whom the worker has a close work connection—
a.an act of violence,
b. indictable criminal conduct,
c. a motor accident, a natural disaster, a fire or another accident,
d.an act or incident prescribed by the regulations.
2. The worker has a close work connection with the victim only if—
a. there is a real and substantial connection between the worker and the victim, and
b. the connection arose because of the worker's employment.[1]

Definition of Vicarious Trauma

The exposure draft's section on vicarious trauma poses several major issues, including the creation of a new legal barrier that an injured worker will need to prove before they can receive compensation or support, a lack of clarity and a potential conflict around the definition of vicarious trauma.

The previously accepted legal definition of vicarious trauma in the context of liability for psychological injury in the workplace derives from *Kozarov v State of Victora [2022] HCA 12*. Notably, the ruling

[1] NSW Government, 2025. Workers Compensation Legislation Amendment Bill 2025 Exposure Draft, Sydney: NSW Government. P.6.

found that the employer had duty of care over its employee in minimising risks where the workplace carried an inherently high risk of psychological injury.[2] The proposed definition of vicarious trauma differs from that recognised in *Kozarov v Victoria [2022] HCA 12*, creating a lack of clarity and potential conflict on how the proposed definition would operate.[3]

Furthermore, it is unclear, under current wording, what constitutes a close work connection and, thus, how this test would be properly satisfied. Unions NSW suggests that the poorly defined 'close work connection' test will cause a high level of disruption as many workers would not be compensated for serious trauma and PTSD. Without legal precedent for this test and proposed definition, it could be near impossible to claim for vicarious trauma.

Exclusion of First Responders and Frontline Workers

These proposed changes will significantly reduce the rights of high-risk first responders and frontline workers to claim fair compensation for psychological injuries sustained from work. This is particularly disappointing given the Minns Labor Government's previous commitments to protect these key workers.

These proposed changes are a betrayal of frontline workers and first responders by the NSW Government.

The introduction of a new test for vicarious trauma, requiring the worker to prove 'a close work connection', limits the ability for many workers suffering from serious trauma and PTSD from claiming workers compensation. Workers negatively impacted could include several frontline workers and first responders, particularly firefighters and road maintenance workers employed under NSW Transport who clean up debris following crashes and incidents – many of whom are covered by the Australian Workers' Union NSW Branch.

Seemingly, road workers who attend motor accident schemes and suffer PTSD [or other psychological injuries] are excluded. In fact, it

[2] Kozarov v State of Victoria (2022) HCA 12.
[3] Ibid.

appears under current wording, they have to actually see the accident occur to be eligible to workers compensation.

For over a decade, the Australian Workers' Union NSW Branch has been running a successful campaign to improve mental health support for first responders. The campaign sought for reclassification and recognition of non-traditional first responders and the much-needed improvement of mental health support for NSW first responders.

This advocacy centred around feedback provided by AWU members and forest responders working in Forestry Corporation (FCNSW), NSW National Parks and Wildlife (NPWS) and Transport for NSW (TfNSW). These workers are often required to complete the work of first responders in emergency situations; fighting the forest fires that ripped through NSW's South Coast in 2020 or cleaning up following major road incidents and disasters as was the case following the Hunter Valley Bus Crash in 2023.

This campaign builds on various commitments made by the Minns Labor Government and NSW Labor, including a resolution at the 2022 NSW Labor Conference which provides for the expansion of workers recognised as first responders.

In 2023, Premier Chris Minns also committed to supporting the mental health and wellbeing of frontline emergency responders, triggering a review of support services available.

These commitments culminated in the 2025 launch of a new mental health and wellbeing strategy to better support first responders in NSW. This includes taking steps to implement Psychological First Aid training for employees and, notably, recognises relevant workers employed at FCNSW, NPWS and TfNSW as first responders.
It is therefore particularly disappointing that the Minns Labor Government would attack first responders and frontline workers with this proposal, months after a successful and constructive campaign to recognise such workers.

The current wording of section 8H, particularly in introducing a test for 'close work connection', casts doubt on whether frontline

workers and first responders will be able to claim fair compensation having suffered the adverse impacts of vicarious trauma.

CASE STUDY

In 2020, a professional firefighter and AWU member from Forest Corp NSW heard the call, risking their life to battle the devastating blazes that ripped through NSW.

For four months, they worked 14-hour days – often weeks at a time – saving houses, businesses and entire towns. It was physically and mentally exhausting.

On New Years Eve that year, the wildfire reached home. They lost their family home of 25 years. On New Years Day, they were left with nothing.

Though they escaped the blaze, the effects of that day can still be felt.

This worker shared their story under the condition of anonymity. But they are one of many frontline workers and first responders in high-risk jobs who would lose out on workers compensation payments – or the right to claim compensation itself – as a result of the Minns Government's proposed changes.

PART THREE:
INCREASE TO PERMANENT IMPAIRMENT THRESHOLDS

This is an impossibly high threshold.

Everyone will be cut off benefits after 2.5 years.

The proposed amendments to workers compensation by the Minns Labor Government also include a concerning increase to whole of person impairment and permanent impairment thresholds. In the case of psychological injuries, this threshold doubles from 15% to 30%. This increase to the permanent impairment thresholds form a key pillar in the Minns Labor Government's attempt to restrict access to workers compensation.

Impacts of Increased Thresholds

Whole Person Impairment or WPI is a measurement often used to assess the severity of permanent impairment following an injury. As noted by Unions NSW, workers under the current operating scheme can access income support and medical treatment without any WPI threshold but must meet a 15% WPI threshold to access lump sum payment or work injury damages.

In response to these proposed changes, Unions NSW consulted clinical psychiatrists who asserted that the 30% WPI would be "extremely difficult to achieve".[4] In fact, it was noted that even in severe cases where workers are unable to work and require long-term psychiatric care, a 20% threshold may not be met. A 30% WPI threshold would be arbitrarily difficult and near impossible to meet by injured workers seeking support and fair compensation. This is corroborated by Unions NSW's submission which notes that "nearly all psychologically injured workers" would be excluded from compensation under this proposal.

In addition to excluding almost all psychologically injured workers, many frontline workers and first responders will be denied compensation after 130 weeks. This is in addition to the introduction of more severe limitation of weekly payments – slashing the maximum timeframe from 5 years to 2.5 years.[5]

Comparison with Interstate Models

Under this proposal, NSW will have the highest permanent

[4] Unions NSW, 2025. Unions NSW Briefing - NSW Labor Government proposed changes to workers compensation, Sydney: Unions NSW.
[5] Ibid.

impairment threshold of any workers compensation scheme in Australia.

Queensland and the ACT currently operate similar workers compensation schemes which do not require WPI thresholds for damages, while Victoria operates on the basis of a narrative test which considers but does not require WPI.

The Minns Labor Government has in the past drawn comparisons with South Australia which does implement a threshold of 30% WPI. However, Unions NSW notes that the Minns Labor Government's proposal is incomparable with South Australia's WPI threshold of 30% as South Australia has adopted a different and far more generous guideline for calculating WPI. It has been noted that a 30% WPI under South Australia's guidelines would "align with 15% under the NSW Guidelines".[6]

[6] Ibid.

PART FOUR:
FURTHER CONSULTATION AND DELAY OF PROPOSED CHANGES

The Government is now cutting benefits from workers to fund this out-of-control bureaucracy.

None of these savings go to workers.

Finally, it is abundantly clear that the conduct of the Minns Labor Government in rushing through this flawed proposal aims to sideline genuine consultation and consensus building with key stakeholders, particularly trade unions

The short timeframe allowed for this submission to be drafted is an example of this. With submissions open for the inquiry into proposed changes to liability and entitlement for psychological injury in NSW open on 9 May 2025 and closing by 15 May 2025, the Minns Labor Government has allowed less than one week to receive submissions.

It does not allow for a sufficient review and assessment of the exposure draft, compilation of qualitative evidence and case studies, or proper consultation of key stakeholders.

Importantly, it does not allow for the in-depth analysis of this proposal's hypocrisy in contradicting their own commitments, reviews, frameworks or strategies. This includes the findings of the Independent Review into iCare and the State Insurance and Care Governance Act 2015 by Hon. Robert McDougall QC which found that the WPI is a poor test for entitlement to compensation and should be subject to review.[7]

This proposal is also made worse when the proposed restriction of frontline workers' and first responders' ability to claim workers compensation comes following and possible in response to the NSW Government's own finding in 2025 that cases by such workers rose by 28% between 2007 and 2020.[8]

The Australian Workers' Union **thus strongly recommends a delay of these proposed changes** to allow for a proper evidence review, assessment of the proposals impacts on frontline workers and first responders, and proper consultation with key stakeholders.

[7] QC, R. M., 2021. icare and State Insurance and Care Governance Act 2015 Independent Review, s.l.: NSW Government.
[8] Anon., 2025. NSW Mental Health and Wellbeing Strategy for First Responders 2025-2029, s.l.: NSW Premiers Department

CONCLUSION:
THE ROAD AHEAD

This submission outlines some of the key concerns by the Australian Workers' Union NSW Branch in response to the Minns Labor Government's proposed changes to workers compensation. It is also our view that this proposal is deeply flawed and concerns around how it will negatively impact workers in NSW extend beyond the issues covered by this submission.

As it is currently written, Australian Workers' Union does not support the proposed changes to workers' compensation by the Minns Labor Government.

For further information, please contact the Australian Worke s Union
mpaigner and Policy Officer Kai He

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Submission No 26

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

Organisation: Australian Services Union NSW & ACT (Services) Branch

Date Received: 15 May 2025

15 May 2025

Hon Greg Donnelly MLC
Chair
Legislative Council Standing Committee on Law and Justice
By email:

Dear Mr Donnelly

INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NSW

The ASU provides this summary of our more detailed submission which will follow by COB today.

The Australian Services Union NSW & ACT (Services) Branch (the ASU) represents workers in a wide range of occupations across a diversity of industries including transport, water, information and technology, and community and disability.

The proposed changes to the NSW Workers Compensation will impact workers and their safety in all of the industries ASU members work in. There are, however, workers in occupations in the community and disability sector that will suffer the greatest impact. In particular, the ASU is gravely concerned about the impact on workers in the following types of services:

a. Family, domestic and sexual abuse
b. Residential and refuge care
c. Out of home care
d. Child protection
e. Disability Support
f. Community Mental Health
g. Alcohol and other drug workers
h. Migrant, refugee and settlement
i. Housing and homelessness

The ASU does not support the proposed changes to liability and entitlements for psychological injury in NSW.

In our view, it is not only unconscionable, but also counterproductive for the State Government to provide obstacles to employees who suffer workplace injury. This is particularly the case where evidence demonstrates that those workers at highest risk of occupational exposure to psychological injury, are doing work that is generally funded through Government tender, to the state's most vulnerable people.

Like other unions, the ASU has taken a very active approach to protecting the workplace health and safety of our members. However, given the nature of the work that our members do, they are much more likely to be exposed and exposed repeatedly to psychosocial hazards. The facts that underpin our submission are:

- There has been an insufficient time for consultation with unions and other key stakeholders on the proposed legislation.
- There has been a prohibitive lack of time for preparation of submissions to the Law and Justice Committee Inquiry.

- Frontline workers, including those who are likely to be members of the ASU are more likely to be exposed and repeatedly exposed to psychosocial hazards that lead to psychological injury.
- Frontline workers are not always, but likely to be low paid women workers who are also likely to be supporting themselves and a number of dependents.
- The disproportionate impact on low paid frontline workers, particularly those supporting dependents, points to a much broader and alarming impact of the proposed legislation, reducing or eliminating the income for those workers and their dependents, providing little if any options for a sustainable return to work or alternate income source. In turn, these factors impact access to support and treatment for their injuries and impose a greater burden on the community and community resources.
- Worker's compensation insurance is intended to provide income support to workers who are injured or become ill due to occupational exposure to injury, including psychological injury.
- Workers' compensation is also intended to provide an opportunity for rehabilitation and return to work, reducing the period when a worker is unable to work and earn an independent income to support themselves and their dependents.[1]
- The purpose of the proposed changes to the NSW workers compensation system instead appear to be motivated by and focused on containing the cost of the scheme rather than preventing injury, improving recovery or sustainable return to work for injured workers.
- The proposed changes to access and entitlements for workers compensation do not address the issues leading to high risk of exposure for any group of workers, and most certainly do not address these issues for frontline workers who are likely to be members of the ASU.
- The proposed changes support a perverse incentive to bad and recalcitrant employers and workplaces with a poor safety record. Without an effective incentive to improve safety, or prevent injury, and a positive disincentive for their employees to make a claim for works compensation, rogue employers are more likely to calculate workplace injury as a 'cost of doing business', simply discarding injured workers who are no longer capable of working productively or efficiently, rather than committing resources to preventing injury and then facilitating their return to the workplace as healthy and productive employees.

In view of the very serious nature of our concerns about the Government's proposed amendments, we thank you for the opportunity to make this submission and would be pleased to meet with you and your Committee, should the opportunity be available to provide further information or evidence.

To assist the Committee in its time limitations, we provide this preliminary submission that summaries the ASU's concerns and lists our recommendations. A more detailed submission will follow by COB 15 May 2025. The ASU supports the submission and recommendations of Unions NSW.

ASU Recommendations

The proposed legislation should not be introduced.

A comprehensive independent review should be undertaken with key industry stakeholders, including unions to develop a safety culture, underpinning a sustainable workers compensation scheme

The State Government should work with key stakeholders, including unions, injured workers, relevant health care professionals and rehabilitation providers to develop strategies for the prevention and management of psychological injury in sectors and industries across the state as the best means to developing a sustainable safety culture and workers compensation system for workers in NSW.

Provide better funding for SafeWork NSW

SafeWork NSW is the statutory authority with education and compliance functions in relation to workplace health and safety. SafeWork needs to have a significantly expanded budget to enable it to develop and implement effective education and training packages to support managers and staff employed in the healthcare, community, and disability sectors to implement workplace safety strategies.

[1] https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/help-with-getting-people-back-to-work/what-to-expect-from-your-workplace-rehabilitation-provider

Recognition of mental health risk, trauma and vicarious trauma support
Frontline and essential services workers are most likely to be at risk of occupational exposure to psychological injury, trauma, vicarious trauma and other mental health issues. These serious and debilitating risks to physical and mental health need to be recognised. Specialist strategies and services must be funded for both public and community sector workers.

Yours sincerely

Angus McFarland
Branch Secretary

Submission No 11

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

Organisation: Public Service Association of New South Wales

Date Received: 15 May 2025

Submission to the Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

The Public Service Association of New South Wales (**PSA**) is the primary union within the New South Wales public sector, representing more than 40,000 members. We have a significant interest in the matters before this Inquiry.

In presenting our case, we draw upon data from several sources. The PSA's Work, Health, and Safety (**WHS**) professional, Marko Petrovic, has experience in the areas of WHS and Risk Management. If afforded an opportunity to do so, it is our intention to have Mr Petrovic attend a public hearing to support our submission.

Executive summary

On 19 June 2012, then NSW Government Treasurer Mike Baird, in the second reading speech of the *Workers Compensation Legislation Amendment Bill 2012*, outlined the need to introduce urgently needed reforms to the New South Wales workers' compensation (**WC**) scheme. He claimed these were required to address the scheme's ongoing sustainability issues.[1] The purpose of the bill and its cognate, the *Safety, Return to Work and Support Board Bill 2012*, included the objectives of ensuring better protection for injured workers, saving businesses from unnecessary premium hikes, and getting the scheme back into surplus.[2]

The changes, which also were applied retrospectively, included cuts to weekly payments, cuts to medical expenses,[3] cuts to cover during travel[4], and limits to occupational diseases.[5] These changes did not achieve the primary objective of reducing costs, with the WC deficit hitting $3.6 billion as of 2025. The increasing costs, growing by $1.8 billion in 2024 alone, are an indication that cuts to WC entitlements did not work towards increasing the sustainability of the scheme.

Further reforms in 2015 outline the current structure of the WC system arises from legislative changes in 2015 with the commencement of the *State Insurance and Care Governance Act*. This led to the formation of a tripartite approach with Insurance and Care NSW (**ICARE**), the State Insurance Regulatory Authority (**SIRA**), and SafeWork NSW (**SW**).[6] The WC system saw an additional agency established in 2021 in the form of the Independent Review Office (**IRO**).[7] The bulk of the work these agencies undertake was predominantly managed by WorkCover NSW prior to these reforms.[8]

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[1] Mike Baird, '*Second Reading Speech: Workers Compensation Legislation Amendment Bill 2012'* (Parliamentary Speech, Legislative Assembly, 19 June 2012).
[2] Ibid.
[3] *Workers Compensation Legislation Amendment Bill 2012* (NSW) sch 4
[4] Ibid sch 4.
[5] Ibid sch 7.
[6] *State Insurance and Care Governance Act 2015* (NSW) sch 4 pt 2 div 1.
[7] *Personal Injury Commission Act 2020* (NSW).
[8] *State Insurance and Care Governance Act* 2015.

A decade later, on 18 March 2025, the current Treasurer Daniel Mookhey, echoed similar remarks to Mr Baird in 2012, of the need to introduce reform and address the WC schemes ongoing sustainability issues and the way the system deals with psychological claims.[9]

The proposed amendments are principally directed towards limiting the ability of workers who suffer primary psychological injuries to access workers' compensation and work injury damages. The reforms achieve this purpose by, saliently: narrowing the definition of '*psychological injury'*,[10] limiting compensation to psychological injuries caused by certain '*relevant events'*,[11] expanding the concept of '*reasonable management action*'[12] as a defence and by increasing the Whole Person Impairment (**WPI**) threshold.[13] The purpose and effect of the changes will be to drastically reduce the circumstances when a worker with a psychological injury can be compensated, and to place hurdles in the way of making a claim. This is the predominant method the Government proposes to improve WC sustainability.

These proposals come amid ongoing reform of the NSW Industrial Relations System, with future important and significant changes yet to be finalised in the areas of bullying and harassment, return to work provisions, and amendments to freedom from victimisation provisions. There has also been ongoing reform in the Work, Health, and Safety space, with SW finally becoming an independent Agency[14] and becoming increasingly focused on psychosocial hazards and risks. These changes are intended to improve return to work (**RTW**) rates and serve as injury-prevention measures, taking financial pressure off WC. Any proposed changes would be premature without allowing these reforms to come into effect.

None of the proposed actions reflect a shift towards early resolution of workplace psychological issues; the dominant effect would be to significantly hinder workers seeking, and being able to obtain compensation, for psychological injuries.

Our submission will outline our opposition to any wholesale changes to legislation which will adversely affect all public sector workers who proudly serve the State, many of whom risk their lives in protecting the public and deliver essential services. The changes to WC as proposed by the Government are premature given the significant reforms that should be undertaken in the regulatory framework, in addition to allowing recent reforms to take place which will relieve some of the strain that the system has been experiencing for decades.

Below we respond to the individual Inquiry Terms of Reference.

a. The overall financial stability of the WC scheme has been an issue which has plagued successive governments. Successive amendments and policy decisions such as the cuts in 2012, and establishment of numerous agencies to administer the system have failed to

[9] Daniel Mookhey (NSW), '*Workers Compensation Reform to Address Psychological Safety'* (Media Release, 18 March 2025).
[10] *Workers Compensation Legislation Amendment Bill 2025 (NSW)* s 8G.
[11] Ibid sch 1 s 8E.
[12] Ibid sch 1 s 11A.
[13] Ibid sch 1 ss 59A, 65A, 151H
[14] *Work Health and Safety Amendment (Standalone Regulator) Bill 2025* (NSW).

deliver on the goals of stemming costs of WC claims and abysmal RTW rates within the public sector. As referenced in the *SIRA Annual Report 2023-24*, the proportion of new psychological injury claims has also risen.[15] The report outlines that NSW Government workers are disproportionately affected, accounting for 44% of all new psychological injury claims in the NSW Workers' Compensation Scheme.[16] Their rate of psychological injury claims is significantly higher at 19% in comparison to 8.5% in the private sector.[17] SIRA data further shows that people with psychological injuries are less likely to return to work than those with non-psychological injuries. Specifically, by the 13-week mark in 2023-24, 79% of people with non-psychological injuries had returned to work, while only 41% of those with psychological injuries had done so.[18]

Despite falling RTW rates, SIRA has not seen an increase in funding, and a review of SIRA's handling of long-standing, unresolved complaints which was conducted in 2024 has yet to be made publicly available.

A case for better regulation?

Both ICARE[19] and SW[20] have also been subject to reviews, with all recommendations yet to be implemented in full.

ICARE itself in a 2021 Independent review was criticised for its '*sloppy'* execution of its program,[21] including the disregard for establishing and following proper and prudent procurement practices.[22] Further, it is our understanding that SIRA is currently undergoing a '*functional review'* into its practices. After nearly 10 years of existence, it is struggling to clearly establish its mandate and reliance on SW inspectors to assist with investigations.

As it stands, the current system inherently relies on a standard of double handling when it comes to investigating and resolving issues within the WC scheme. An example of such can be found in the disparate rates of inspectors at SIRA and reliance on SW to assist in investigations. As it currently stands, SIRA has a total of seven inspectors in comparison to SW with over 300.

Despite this, it appears that the government does not seem to have the appetite to address these systemic issues and is instead focused on demonising injured workers and driving them towards financial destitution.

[15] State Insurance Regulatory Authority, *SIRA Annual Report 2023–24* (Report, 2024) 36.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] The Hon Robert McDougall KC, *iCare and State Insurance and Care Governance Act 2015* Independent Review (30 April 2021).
[20] The Hon Robert McDougall KC, *The Independent Review of SafeWork NSW: Final Report* (15 December 2023).
[21] The Hon Robert McDougall KC, *iCare and State Insurance and Care Governance Act 2015 Independent Review* (n 19) para 4.
[22] Ibid para 6.

b. The increase in WPI for compensation after two-and-a-half years or for work injury damages[23] will, in effect, exclude all but the most catastrophically injured. The amendments will also have a particularly unfair effect on areas of the public service with high workloads and poor workplace culture or support as these psychological hazards would not be considered as '*relevant events.*'[24]

Decorated for valour but left to fend for themselves.

On 2 October 2015, a 15-year-old boy carried a S&W .38 revolver to the street outside NSW Police Headquarters at Parramatta, walking past an unarmed plainclothes female detective.

At 4:30pm, the assailant killed 58-year-old unarmed police civilian accountant Curtis Cheng as he was walking out of the building. The shooter remained at the scene and continued firing into the police headquarters. He was shot dead by one of three special constables who responded to the shooting.

This special constable, who is one of our members, was awarded the *New South Wales Police Commissioner's Valour Award* in recognition of their efforts, without any pomp and ceremony due to the requirement to suppress his identity for his safety.

This incident had a serious psychological impact on our member, and they have not been fit to return to work since the incident. Despite the seriousness of the incident and the recognition of the bravery of our member, they currently have a WPI of less than 20% and will likely never be able to return to work again due to crippling post-traumatic stress disorder. In fact, they face the likelihood that they will be medically retired within the next year or so, left to pick up the pieces without any further support from the WC system.

The PSA has had to step in and fill the gaps of the WC system to ensure that they, along with many others are not left behind. Champions of the State are treated as villains by the WC system.

c. The proposed narrow definition of '*vicarious trauma'* will exclude members who suffer vicarious injuries without having a '*real and substantial relationship'* with the victim.[25] The requirement for members to establish that they have been the victim of '*repeated'* and '*unreasonable'* bullying[26] will also have a broad and adverse effect. Either because the conduct does not match the definition of bullying or because the member is not prepared to seek a finding of bullying from a court/commission/tribunal before making a claim.[27]

[23] *Workers Compensation Legislation Amendment Bill 2025 (NSW)* s 39A.
[24] Ibid s 8E.
[25] Ibid s 8H.
[26] Ibid s 8E.
[27] Ibid.

Frontline workers make the ultimate sacrifice, but proposed changes to the WPI and vicarious trauma will leave them left behind.

On the morning of Saturday 19 December 2020, a serious hostage incident occurred at the Mid North Coast Correctional Centre. Two inmates – aged 20 and 23 – armed with makeshift weapons, assaulted two Prison Officers, taking one Officer hostage.

Following extremely intense negotiations and assistance from the Corrective Services NSW (**CSNSW**) Special Operations Group, the situation was resolved around 6:00pm. The Officer was treated at the scene by NSW Ambulance paramedics before being taken to Port Macquarie Base Hospital for treatment for several serious injuries.

The inmates were arrested at Goulburn Police Station on 4 February 2021 and charged with the offences including; '*Cause wounding/grievous bodily harm to person with intent to murder,' 'Detain person in company with intent to obtain advantage,' 'Cause grievous bodily harm to law enforcement officer reckless as to actual bodily harm,' 'Take/detain in company with intent to get advantage occasion actual bodily harm,' 'Assault law enforcement (not police) inflict actual bodily harm,' and 'Intentionally or recklessly destroy or damage property in company.'*

In a lengthy victim impact statement read to the NSW District Court, an officer described the long aftermath of the incident, which left him with permanent loss of feeling in his feet and hands, partial blindness, and major burns on his body. '*I once believed that scars were tattoos that told better stories*,' The officer wrote.

'*The scars that cover my body tell a different story: one of abuse and trauma and events beyond my control*.' The constant, writhing pain from his injuries made it impossible for him to touch anyone else and severely impacted the lives of his friends, family, and partner.

'*The actions of others have sent both of our lives' trajectories spiralling into a place no one should have to tread*,' he said. '*Every day I deal with a mind-boggling sense of betrayal ... the people I trusted should not have had that trust*.'

Such extraordinary testimony led to Judge Wendy Strathdee being visibly emotional when reading the statement and thanking the officer for his bravery. Despite this ordeal, as it stands both officers would not meet the 30% WPI threshold as proposed.

This and the earlier example are two of many which reinforce the manifestly absurd outcome that will arise from raising the WPI threshold.

d. Our members frequently report negative experiences, particularly when claims managers change frequently or when communication is poor. Some practices such as using '*reasonable excuse'* provisions to delay payments[28] can still create unnecessary hardship

[28] *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 268.

and delay recovery. The workplace environment in CSNSW and within other areas remains challenging, with a significant proportion of psychological injuries linked to workplace culture and interpersonal conflict.[29]

The case below highlights both the risks of adversarial and profit-driven claims management and the potential for system improvement through regulatory oversight and organisational reform. While past practices included collusion to deny claims and manipulation of evidence, recent reviews suggest these are no longer systemic. However, ongoing vigilance, transparent processes, and a focus on worker wellbeing remain critical to ensuring the workers compensation system functions as a genuine safety net.

An example of a broken system: WC in CSNSW leads to multiple investigations.

In 2015, three CSNSW employees lodged workers' compensation claims for psychological injury, alleging bullying and harassment at the Silverwater Correctional Facility. Their claims became the subject of a forensic investigation by KPMG, commissioned by ICARE, after allegations that CSNSW and QBE colluded to deny these claims.

The KPMG draft report uncovered a conversation where Corrective Services urged QBE to reject a claim so the worker would *'be left short of money and has to return to work due to… financial hardship.'* QBE responded affirmatively, indicating awareness and complicity in this approach.

The draft report also highlighted practices such as altered evidence, *'doctor shopping'* (using medical examiners likely to reject claims), missing files, and directed questioning of doctors to support claim denial.

Media at the time reported that the final KPMG report, however, was *'watered down,'* with several recommendations and findings-including the incriminating conversation-removed. The report stopped short of finding collusion, citing lack of documentation, but called for further investigation.

One of the affected workers, described feeling ostracised, unsupported, and left to *'rot'* by both his employer and insurer. The experience led to significant psychological distress and ongoing legal action for damages.

The investigation revealed that such adversarial tactics can worsen workers' mental health, delay recovery, and undermine trust in the compensation system.

The ABC *Four Corners* investigation found that financial incentives for insurers to close claims can drive questionable practices, such as prematurely terminating payments or disputing legitimate claims at key milestones (e.g., the 130-week mark).

[29] State Insurance Regulatory Authority, *Corrective Services NSW review* (Report, Updated 4 March 2025) 4.4.3.

The Victorian Ombudsman and other inquiries have identified similar issues in other jurisdictions, suggesting broader systemic problems in Australia's workers' compensation schemes.

SIRA's 2020 investigation confirmed a '*concerted approach by CSNSW and QBE to dispute and deny the workers' claims,*' often defending claims on the basis that no work injury occurred or that the injury was a reasonable employer action.

Following these findings, SIRA conducted a broader 2022 review of 100 CSNSW claims.

This review found that opportunities for improvement remain, particularly in timely communication of injuries, use of surveillance and investigations (especially for psychological injuries), high turnover of claims managers, and record-keeping. The review highlighted that almost half of psychological injury claims were due to interpersonal conflict or workload issues, and nearly 40% were due to bullying and harassment.

e. There are two key themes which are dominant here: the overriding need to maintain a sustainable WC system, and the ongoing erosion of injured workers entitlements rather than fixing a broken system. These proposed changes will not improve workers health but will instead exacerbate their injuries and cause further harm. This will also lead to more workers who will be unable to find a job and rely on government or other assistance, thus shifting the problem into another area such as health and social services which will inevitably cost the taxpayer much more in the long run.

f. Proposed changes to defining a psychological injury will effectively carve out a substantial class of workers and create uncertainty. The proposed amendments would limit a primary psychological injury to be compensable if (1) the injury is caused by a '*relevant event*,' (2) there is a real and substantial connection between the event and the employee's work, and (3) the employment is the main contributing factor to the injury.[30]

   The proposed changes are significant.

Changes to what is a '*relevant event*'.

A '*relevant event'* is confined to specific events which include being the subject to an act of violence or indictable criminal conduct, witnessing a death or serious injury, experiencing '*vicarious trauma,'*[31] being subject to conduct that a court, tribunal, or commission has found to be sexual harassment, bullying or racial harassment.[32]

There are various difficulties with the '*relevant event'* definition, including:

[30] *Workers Compensation Legislation Amendment Bill 2025* (NSW) s 8G
[31] Ibid s 8H.
[32] Ibid s 8E.

1. the absence of common psychological hazards such as workload, poor work culture, lack of administrative or organisational support.

2. the requirement that a court or commission must make a finding of bullying, sexual harassment, or racial harassment to be entitled to claim compensation in respect of injuries caused by those events.

3. The definition of '*bullying'* being repeated unreasonable acts. Whether an act is '*unreasonable'* must be determined objectively (i.e., would a reasonable person with knowledge of all the circumstances consider the act unreasonable), rather than by reference to the worker's perception of the conduct.[33] The definition also ignores injuries caused by one-off unreasonable acts.

4. The definition of vicarious trauma requires the worker to have a '*close work relationship'* with the person who died or was injured. Close work relationship means a *'real and substantial connection'* which arose because of employment.[34]

Additionally, '*psychological injury'* is defined as a '*mental or psychiatric disorder that caused significant behavioural, cognitive or psychological dysfunction'*. That is, if the consequent behavioural, cognitive, or psychological disfunction is not significant, the injury is not recognised as a psychological injury and would not be compensable.[35]

For example, would a government solicitor be considered to have a close work relationship with the victim of crime, or whether an emergency services officer would have a close work relationship with a volunteer?

g. The definition of '*vicarious trauma'* warrants scrutiny. Instead of legislating '*vicarious trauma'*, as the expression is ordinarily understood to mean (an injury caused by exposure to another person's trauma), the Government has proposed a unique and narrow form of vicarious trauma conditional upon a '*real and substantial connect'* between the worker and victim. The psychological hazard posed by deceased or injured persons exists irrespective of the relationship between the worker and the victim. This hazard is particularly prevalent in respect of public sector workers who are regularly required, in their service to the State, to interact with dead or seriously injured people or to view documents depicting dead or seriously injured people without having any real or substantial relationship with the person, including: correctional officers, school teachers, judicial associates, administrative and clerical officers, solicitors, tipstaves, sheriff's officers, court officers, regulatory inspectors, crime scene officers, special constables, nurses, RFS officers, and rail workers.

h. The issue of greater uncertainty and exclusion manifests itself again in the proposed amendments regarding Reasonable Management Action. Section 11A is being amended

[33] Ibid s 8E.
[34] Ibid s 8H.
[35] Ibid s 8G.

significantly. Currently, no compensation is payable where the psychological injury is '*wholly or predominantly'* caused by a reasonable management action, with reasonable management action being confined to action by the employer with respect to '*transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers'*. The replacement of '*wholly or predominantly*' to '*significantly'* would, on the face of the amendment, disentitle a worker to compensation where one of multiple contributing factors to an injury included reasonable management action.[36] The '*transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers'* is being replaced with a general definition of '*management action that is taken in a reasonable way and is reasonable in all circumstances.*'[37] Reasonable management action is also defined to include action taken or proposed to be taken, the worker's expectation of action being taken and the worker's perception of action.[38]

i. These proposals from the Government have the propensity to be inhumane and illogical. There are at least five known incidents of suicide associated with the transitional arrangements for the 2012 workers' compensation reforms, specifically the reduction in the number of weeks workers could receive weekly payments.[39] As the changes were reversed three years later, these were avoidable deaths. This time around, the amendments are *directed* at the psychologically vulnerable.

j. The claim that WC fails to support individuals with psychological injuries-leaving them '*languishing in the system*,'[40] as stated by the Treasurer is based on a false premise. Such assertions not only undermine the real and pressing health needs of these workers but also disregard the dedicated care provided by health practitioners. The suggestion that individuals receiving psychiatric care are malingering or not genuinely unwell is outdated, unfounded, and perpetuates harmful stigma. Rather than fulfilling the intended purpose of WC, these proposed amendments risk denying essential care to vulnerable patients, thereby increasing the likelihood of serious long-term health and social consequences. These may include the worsening of psychological conditions, heightened risk of substance use disorder, and even suicide as evidenced above. Extensive scientific research has demonstrated a strong link between unemployment and poor physical and mental health,[41] with insecure work often eroding family stability, social connections, and personal relationships.[42]

[36] Ibid s 11A.
[37] Ibid s 8D.
[38] Ibid s 11A(1)(a)-(c).
[39] New South Wales, Parliamentary Debates, Legislative Assembly, 18 March 2025, 62.
[40] Daniel Mookhey, Workers Compensation Ministerial Statement, New South Wales Parliament, 18 March 2025.
[41] Pier Alberto Bertazzi, *'Il lavoro come bisogno umano e fattore di salute'* [Work as a Basic Human Need and Health Promoting Factor] (2010) 101(Suppl 2) La Medicina del Lavoro 28, 28–43.
[42] Select Committee on Job Security, '*The Job Insecurity Report'* Parliament of Australia, February 2022, ch 1, 1.51.

k. Unions play a significant and well-documented role in improving WHS standards across Australia. Their involvement has led to higher awareness, stronger protections, and more effective enforcement of safety regulations.

There has been an increasing academic interest into the phenomenon where unionised workplaces generally have better health and safety outcomes than their non-unionised counterparts. Although there has been limited research in Australia to date, insights can be gleaned from research conducted abroad.

The '*union safety effect*'.

A substantial body of research from the UK and internationally has demonstrated the positive impact of unions on workplace health and safety. Multiple studies have found that union involvement, particularly through health and safety committees and representatives, leads to significantly lower rates of workplace injuries and improved compliance with safety policies.[43]

For example, a landmark 1995 study in British manufacturing found that employers with trade union health and safety committees experienced only half the injury rate compared to those where safety was managed solely by management or without union input.[44]

Subsequent analyses of the same data consistently concluded that the highest injury rates occurred in workplaces where management addressed health and safety issues without consulting workers or involving unions.[45]

Further evidence shows that unions are particularly effective in high-risk environments. A 1998 study found that unions often form in more hazardous workplaces and then actively reduce injury rates-union presence was associated with a 24% lower injury rate compared to non-unionised workplaces.[46]

The benefits of union involvement extend beyond injury prevention to reducing work-related ill-health. A 2000 study demonstrated that higher trade union membership was positively and significantly associated with lower rates of both injury and illness. The study concluded that union-associated arrangements *'lower the odds of injury and illness when compared with arrangements that merely inform employees of OHS* [WHS] *issues'*.[47]

[43] Trades Union Congress, *How Unions Make a Difference on Health and Safety: The Union Effect-A TUC Guide to the Evidence* (12 February 2016).
[44] Reilly, Paci and Holl, '*Unions, Safety Committees and Workplace Injuries'* (1995) 33 British Journal of Industrial Relations.
[45] Beaumont and Harris, '*Occupational Health & Safety'* (1993) 23; Millward et al, Workplace Industrial Relations in Transition (1992).
[46] Grazier, '*Compensating Wage Differentials for Risk of Death in Great Britain'* (Swansea University, 2007).
[47] Robinson and Smallman, *The Healthy Workplace?* (Judge Institute of Management Studies, 2000).

A study into a part of the Canadian construction industry found that unionisation was associated with a lower risk of lost-time workers' compensation injury claims, corroborating a similar study from an earlier time.[48]

Australian data supports these findings. The '*Work Shouldn't Hurt survey*,' completed by more than 25,000 workers, found a strong positive correlation between the presence of Health and Safety Representatives (**HSRs**) – a role typically supported by unions – and better health and safety compliance. For instance, 79% of workers with an HSR reported that their workplace complied with safety policies, compared to just 51% in workplaces without an HSR.[49]

In summary, the evidence overwhelmingly supports the conclusion that trade unions play a critical role in improving workplace health and safety. Their presence not only reduces injuries and fatalities but also fosters a culture of safety, empowers workers, and ensures better compliance with health and safety standards.

l. Although unions in NSW are able to Investigate suspected breaches of WHS laws, consult with and advise workers on WHS matters, and inspect relevant documents, systems, and equipment, the NSW Government has not legislated for unions to have the same powers as in other jurisdictions. These namely are the recognition of unions as *'eligible persons'* for the purposes of seeking internal and external reviews of SafeWork NSW decisions, including decisions to not take enforcement action; and reinstating standing for unions to prosecute breaches of WHS laws, including arbitrated WHS dispute outcomes, before the NSW Industrial Relations Commission ('**IRC**'), and regrant unions access to a moiety of any penalties awarded. Such reform would empower unions to continue to hold employers accountable and ensure workers health and safety.

m. We feel that the wide range of issues which are outlined within the Unions NSW submission adequately addresses further concerns that we have in relation to the proposal. We are however more than willing to respond to and provide additional material and commentary should the Inquiry wish.

Summary

The purpose and effect of the proposed changes in the *Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025* as it currently stands will be to significantly reduce the circumstances when a worker with a psychological injury can be compensated, and to place hurdles in the way of making a claim.

The Government's predominant method towards improving WC sustainability should be geared towards stopping workplace injury before it occurs. When dealing with the system itself, the focus

[48] Robson LS, Landsman V, Latour-Villamil D, et al, 'Unionisation and Injury Risk in Construction: A Replication Study' (2022) 79 Occupational and Environmental Medicine 169.
[49] Australian Council of Trade Unions, *Work Shouldn't Hurt: The State of Work Health and Safety in Australia 2021* (ACTU D No. 56/2021).

should be on addressing a complex and inefficient system with better regulation and administration, rather than relying on denying injured workers entitlements as currently proposed.

The PSA would welcome the opportunity to be involved in developing a new path which will contribute to improving the fiscal outlook for the WC scheme in a way which will not outcast injured workers. It is clear from the evidence provided, that many aspects of the WC scheme require meaningful reform.

Recommendations

In addition to the recommendations proposed by Unions NSW, the PSA recommends:

1. The NSW Government should delay considering introduction of its proposed changes to workers compensation until it has a clearer understanding of the impact that its other new strategies and regulations are having on preventing workplace injuries.

2. The NSW Government should conduct a holistic review of the current system and ensure that it is fit for purpose, including:

    A. review the funding of SafeWork NSW against its targets and outcomes and increase funding where necessary to ensure it has the capacity to meet its goals

    B. to increase the capacity of SafeWork NSW to prevent injuries and increase the number of its inspectors who are specialised in, and have appropriate training and qualifications to deal with psychosocial hazards

    C. review the funding and functions of SIRA NSW and increase funding where necessary to ensure it has the capacity to meet its goals as well as its enforcement obligations

    D. following Recommendation 37 of the SW McDougall Review and conduct a study into the WPI threshold test, as well as explore alternatives to WPI assessments

    E. implement Recommendations 14 and 15 of the 2023 Review of the Workers Compensation System and Review finding 1 of the SIRA, Pre-injury Average Weekly Earnings post-implementation review report.

3. To improve RTW rates and WC sustainability, the NSW Government should:

    A. work with unions and SIRA to review and improve SIRA's vocational programs

    B. empower SIRA's Return to Work Inspectorate to enforce the employer's responsibility to find suitable duties where possible

C. legislate clear boundaries for employers and insurers attending medical appointments and processes for workplace injuries

D. by requiring employers to provide injured workers with suitable alternative duties wherever possible

E. amend Part 8 of the *Workers Compensation Act 1987* (NSW)[50] to require the IRC to make a *'reinstatement order'* if it is satisfied that a worker has capacity for work and the work is available or can possibly be made available

F. encourage employers to facilitate RTW by legislating to extend the time before an injured workers can be dismissed.

4. The NSW Government should help prevent physical and psychological injuries and improve WC sustainability by:

A. empowering the NSW IRC to conciliate and arbitrate unresolved WHS disputes referred to it by unions, as already found in other jurisdictions

B. amending sections 223 and 229 of the *Work Health Safety Act 2011* to recognise unions as '*eligible persons'* for the purposes of seeking internal and external reviews of SafeWork NSW decisions, including decisions to not take enforcement action

C. reinstate standing for unions to prosecute breaches of WHS laws, including arbitrated WHS dispute outcomes, before the NSW IRC, and regrant unions access to a moiety of any penalties awarded.

5. In identifying psychosocial hazards, the SafeWork NSW *Code of Practice: Managing Psychological Hazards at Work* should form the principal guiding material and injuries caused by all hazards should be compensable.

6. The NSW Government should not amend s11A which would risk undermining its successful operation and risk undermining provisional liability for psychological claims under s 247 of the *Workplace Injury Management Act 1998* (NSW).

7. The NSW Government should not deny injured workers reasonably necessary medical treatment through its proposal to change to the test for accessing medical treatment, from '*reasonably necessary'* to '*reasonable and necessary'*.

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Submission No 36

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

Organisation: Insurance & Care NSW (icare)

Date Received: 15 May 2025

Submission to the NSW Legislative Council Standing Committee on Law and Justice's inquiry into *Proposed changes to liability and entitlements for psychological injury in New South Wales*

Insurance and Care NSW (icare)

May 2025

INTRODUCTION

icare welcomes the opportunity to provide a submission to the NSW Legislative Council Standing Committee on Law and Justice's inquiry into *Proposed changes to liability and entitlements for psychological injury in New South Wales*.

icare provides insurance and care for around 4 million workers, 338,000 private employers and 166 NSW Government agencies under our Nominal Insurer (NI) and Treasury Managed Fund (TMF) workers compensation schemes. Every year we support approximately 90,000 people who have sustained injuries in the workplace, and at any one time there are around 110,000 claims under management.

icare was established under the *State Insurance and Care Governance Act 2015*, and the principal objectives in the exercise of icare's functions are to:

- maintain the affordability of insurance and the efficiency and viability of State insurance and compensation schemes established under Acts under which icare exercises functions consistent with any objectives of the schemes;
- promote early and appropriate treatment and care for injury and illness that optimises the recovery and return to work or other activities of persons injured at work or in motor accidents; and
- to promote efficiency, transparency and accountability in the conduct of icare's operations.

Since the establishment of compulsory workers compensation the nature of work has changed, in response to technological, economic and demographic shifts. Manufacturing and manual labour jobs have decreased and there have been significant increases in health, community, education, professional and financial services. In addition, the workforce is ageing and becoming increasingly casualised. There is significant impact from technology which has changed the way many industries and people work. At the same time, there is increasing mental ill-health in the broader community and a complex range of factors impacting workplaces, individuals, and their recovery.

A combination of factors have contributed to a workers compensation system in NSW that is not sustainable in its current design and needs to be modernised to reflect these societal changes.

There is extensive research about the benefits of good work and the impacts it has on a person's health, wellbeing and recovery from injury; and that remaining at work during recovery, or returning to work as soon as it is safe to do so, has a positive impact on a person's long-term health, social connection, financial stability, and overall quality of life.

icare is a signatory to the *Health Benefits of Good Work* statement, which is part an initiative by the Australasian Faculty of Occupational and Environmental Medicine (AFOEM) of The Royal Australasian College of Physicians (RACP).

icare is continuing work on improvements to the claims model, which emphasises specialised psychological claim management, case manager capability and is focused on improving RTW and other claim outcomes over time. We are also reviewing pathways to expand suitable work opportunities across Government agencies and looking at opportunities for injury prevention through the reduction of workplace risks and staff engagement, as part of our work on the NSW Government's *Whole-of-Government Return to Work Strategy*.

Further details on icare's psychological claims and prevention initiatives are provided at Appendix 1. These will be reviewed with Safework NSW and SIRA to ensure they meet the needs of modern workplaces.

Despite the extensive work already underway, the issues associated with increasing psychological claim numbers will persist in the absence of both further concerted management

action and reform. icare has been providing information to SIRA, Treasury and Ministers to support work on potential options to facilitate better outcomes for workers and employers in the private and public sectors and ensure our schemes remain sustainable and able to continue supporting those we serve well into the future.

Further information on the challenges associated with psychological injury claims is provided throughout this submission. It is important to note that the poorer outcomes attached to these claims are not unique to NSW and are seen across all other Australian workers compensation jurisdictions.

We welcome the opportunity to discuss these matters further with the Committee at the upcoming public hearing.

FINANCIAL SUSTAINABILITY OF THE SCHEMES

The current balance between premiums, benefits and claims management is unsustainable. The NI valuation as at December 2024[1] shows the experience is deteriorating. The number of claims reaching a WPI of more than 15 per cent is increasing, higher inflation and changes to interest rates and combined with other uncertainties have adversely impacted the financial performance of the NI and TMF.

The increase in the outstanding claims reserves for the TMF workers compensation portfolio in the December 2023 valuation results was predominantly due to higher claims numbers, lower return to work and an increase in psychological claims mostly in the non-emergency portfolio. The strengthening in the outstanding claims reserves for the TMF workers compensation portfolio in the June 2024 valuation results was due to slower work injury damages finalisations and higher weekly active claims in the NSW Police portfolio, and higher numbers of claims emerging at higher WPI thresholds in the non-emergency portfolio[2].As both schemes continue to deteriorate and experience is not stable, the ability to return the schemes to stability in the medium term is unlikely which will put pressure on employer premiums.

Premium settings, benefits and management actions to promote injury prevention and recovery are required. The opportunity for modernisation will include greater coordination between SIRA, Safework, NSW Treasury and icare.

icare is continuing to review CSP remuneration, claims and prevention initiatives including rolling out of a specialised model for psychological injuries. Whilst we understand these measures will assist in improving performance, broader reform is required. It is important that there is a balance between premiums, benefits and claims service provider actions with a clear focus on improving the number of injured workers being returned to work earlier.

Scheme sustainability requires incentives for employers that reflect risk, implementing anti-fraud measures and supporting employers in injury prevention. These measures provide for those workers who are injured at work to receive claim benefit payments. Our CSPs are required to deliver efficient and effective return to work and health outcomes.

Financial sustainability for the NI is primarily measured by the Funding Ratio. This measure has been declining for several years. The NI currently has a funding ratio of 82 per cent as at December 2024[1]. In the TMF, whilst the funding ratio was 106 per cent as at June 2024, this does not account for the grant of funding from NSW Treasury[3].

[1] Nominal Insurer Liability Valuation as at 31 December 2024
[2] icare Annual Report 2023-24 Financials, p155
[3] icare Annual Report 2023-24

Psychological injury claims have been continuing to increase year-on-year across both schemes. There were approximately 5,300 psychological claims reported for the NI and 4,600 claims reported for the Treasury Managed Fund in FY2023-24. For the NI, this represents an increase of over 40 per cent from the previous year and an increase of 15 per cent for the TMF from the previous year.

Average claims costs are three to five times higher for psychological injury claims than for physical injury claims, indicating workers are staying off work for longer periods. Over the past two years, higher numbers of psychological claims have increased the NI's liabilities by approximately $400 million, and the TMF's liabilities by approximately $500 million[3].

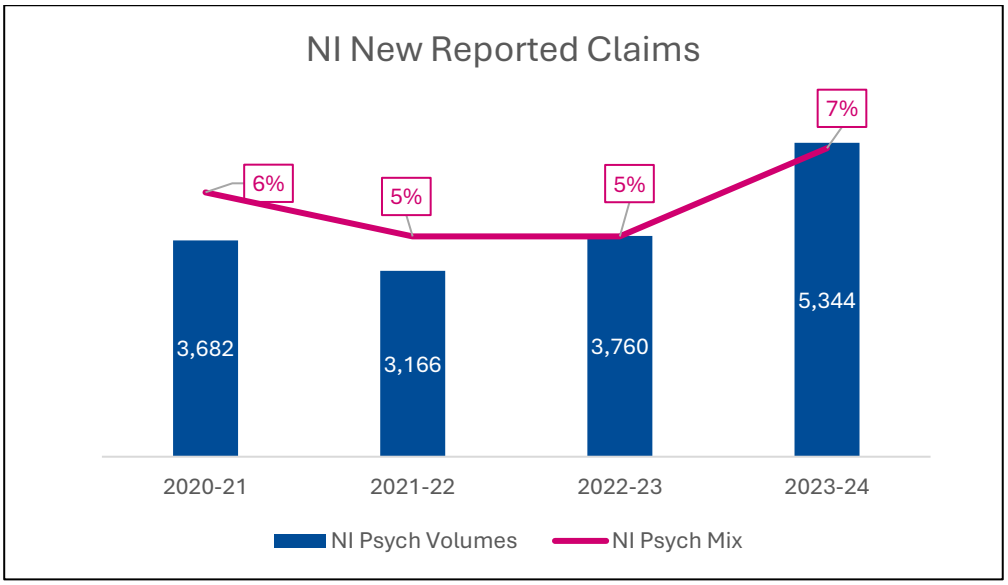
INCREASING PSYCHOLOGICAL CLAIMS

The number of psychological injuries continues to grow year on year in both the NI and TMF.

Return to work (RTW) performance in both the NI and the TMF continues to be challenged by the growing number of psychological injury claims. Psychological injuries now account for seven per cent in the NI and 21 per cent in the TMF, of reported injuries. As can be seen in the charts on newly reported claims below, psychological injuries have increased year-on-year[4].

Nominal Insurer

In the six months to December 2024, psychological injuries for the NI reached an historically high level, accounting for almost nine per cent of reported injuries.



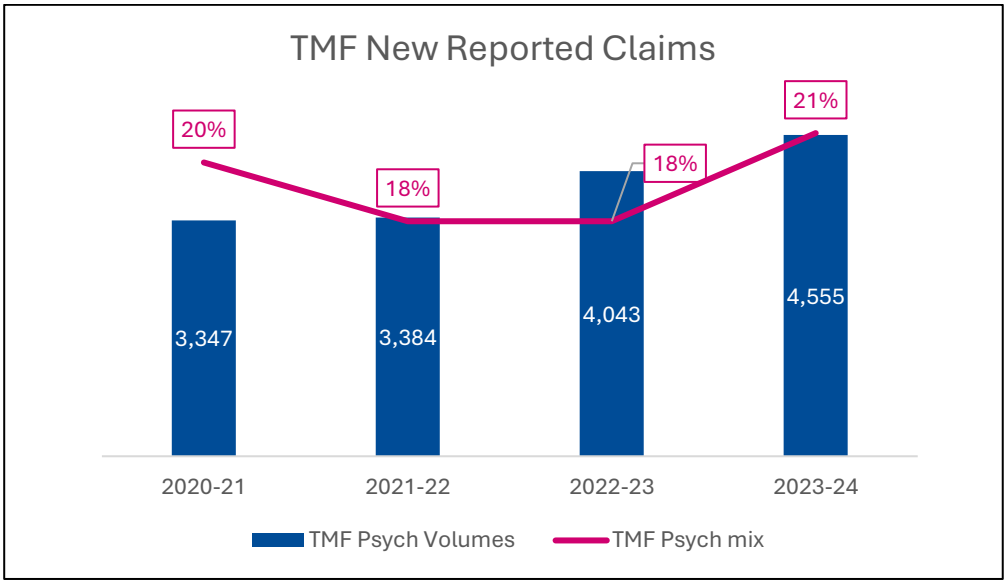
Treasury Managed Fund

In the six months to December 2024 in the TMF, psychological claims accounted for 25 per cent of reported injuries and up to 30 per cent of new claims lodged in some Government agencies.

The proportion of psychological injury claims for non-emergency services (NEMER) agencies has risen from approximately 18 per cent in FY2019-20 to 23 per cent to December 2024.

[4] icare Annual Report 2023-24, p47

The proportion of psychological injury claims for emergency services (EMER) agencies has risen from approximately 20 per cent in FY2019-20 to 29 per cent to December 2024.



RETURN TO WORK

In a workplace setting, the relationship between a worker and employer is often fractured when a psychological injury claim is made. This can delay recovery and RTW, resulting in poorer health outcomes for workers.[5] Delays in returning to work are often compounded by community-wide difficulties accessing timely psychological treatment.

The table below demonstrates the variation between physical and psychological injuries at different return to work points[6].

Proportion returned to work

Time since injury	Physical injuries	Psychological injuries
13 weeks	84%	38%
52 weeks	92%	58%
104 weeks	93%	59%

WHOLE PERSON IMPAIRMENT

For both psychological and physical injuries, a greater proportion of injured workers are being assessed with higher whole person impairment (WPI). Assessments of impairment are being completed at earlier points in time when compared to prior years.

[5] Royal Australasian College of Physicians (RACP), *It Pays to Care: Bringing evidence-informed practice to work injury schemes helps workers and their workplaces*, April 2022

[6] SIRA Open Data website, accessed 15 May 2025

Trends in physical and psychological injury claims show that more claims are exceeding the WPI to access permanent impairment and ongoing benefits.

MODERNISING NEW SOUTH WALES WORKERS COMPENSATION

Since the establishment of workers compensation in the early 1900's, the workers compensation system has been periodically reformed to respond to modern workplace risk and practices. The legislative framework that is currently in place needs to better reflect the changing nature of work and workplace injuries.

Potential changes to workers compensation are part of an end-to-end approach to modernising NSW workplaces which includes a focus on prevention, inspection, regulation and industrial relations. Modern workers compensation systems need to be designed to prevent injuries and deliver the best possible recovery support and provide for effective and efficient return to work for workers injured at work at appropriate points in their recovery. Prolonged absence from work creates more significant health impacts on workers, their families and the communities they live in.

The legislative framework, regulation and management actions of icare need to support and create stronger mutual obligations on both the worker and employer to facilitate the best possible return to work. Data provides insights that some workers are not consistently returning to work earlier and receiving effective support for their recovery. icare publish claims service provider performance information, and icare will continue reviewing performance closely to align resources and priorities to deliver better outcomes.

It is critical that a modern workers compensation system provides incentives for integrated prevention and positive return to work obligations through Safework NSW, SIRA and icare. There is an opportunity to modernise the way that the workers compensation system manages the data collected, the insights gathered and the way that schemes are managed with a focus on clarity of roles.

Modernising the scheme will help prevent future premium increases, securing a sustainable workers compensation scheme that is affordable, focuses on prevention, provides the best possible recovery support to those injured at work, and enables support to those that may be injured into the future.

APPENDIX 1: ICARE'S PSYCHOLOGICAL CLAIMS INITIATIVES

Initiative	Overview
Mental Health Claims Hub	The Launched in late 2022 and available through icare's website. Includes online tools and references to industry leading information regarding mental health in the workplace.
Prevention Hub	The Prevention Hub on the icare website offers a range of free workplace safety resources accessible to any organisation.
Front of Mind	The Front of Mind program aims to develop a range of tailored, innovative interventions to reduce first responders, and frontline workers' risk and severity of psychological injury and associated injury claims. The initiative aims to put research-into-practice and, using knowledge generated over five years, address gaps in the research and provide agencies with new support services. The program involves collaboration between icare and a consortium of leading experts in mental health and four participating NSW agencies: Department of Communities and Justice, Fire and Rescue NSW, NSW Ambulance and NSW Police. Through the program, the NSW Police Force trained their sergeants (managers) to detect and support personnel showing signs of PTSD, promoting early help for frontline officers. Research partners, the University of New South Wales and the Black Dog Institute, developed the program to teach police sergeants the importance of mental health, how to discuss mental health issues with frontline officers, and make recommendations for direct referral to mental health support services.
Design for Care	Design for Care uses Curtin University's SMART (Stimulating, Mastery, Agency, Relational, Tolerable) work design model to address psychosocial risk factors associated with work-related psychological injuries in the Healthcare and Social Assistance industry. Macarthur Disability Services, a not-for-profit community organisation providing support services for people with a disability, trialled this worker participatory approach to improving mental health. Preliminary findings indicate workers involved in the redesign groups were associated with high mental health and wellbeing scores including thriving at work.
Connect and Care	Connect and Care is based on guidelines developed with academic and industry experts and was developed to strengthen leader-injured worker relationships in government agencies exposed to complex trauma.

Submission No 41

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

Organisation: NSW Bar Association

Date Received: 15 May 2025

NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV25/385

15 May 2025

The Hon Greg Donnelly, MLC
Chair, Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: Law@parliament.nsw.gov.au

Dear Chair,

Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

1. The New South Wales Bar **Association** thanks the Standing Committee on Law and Justice for the opportunity to make a submission regarding **the inquiry** into proposed changes to liability and entitlements for psychological injury in New South Wales.

Background

2. On Friday 9 May 2025, the NSW Treasurer and the Ministers for Industrial Relations and Customer Service issued a joint media release, which included an "Exposure Draft" of the Workers Compensation Legislation Amendment Bill 2025 (**the draft Bill**). That media release advised that the draft Bill was referred to the Standing **Committee** on Law and Justice in the Legislative Council for further inquiry.

3. On Friday 9 May 2025, the Committee also advised the community that the Terms of Reference for this inquiry were:

   That the Committee inquire into and report on proposed changes to liability and entitlements for psychological injury in New South Wales, specifically:

   (a) the overall financial sustainability of the NSW workers' compensation system; and

   (b) the provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 as provided by correspondence to the Committee.

4. On Monday 12 May 2025, the Committee invited stakeholders and the community to provide submissions to the inquiry by midday on Thursday 15 May 2025.

5. This is an unreasonable timeframe for stakeholders and the community to provide appropriate consideration of the draft Bill and formulate submissions that will be of assistance to the work of this Committee.

6. In the Treasurer's address to the Legislative Council on 18 March 2025, he noted that NSW's workplace health and safety laws and workers compensation scheme may directly impact as many as 4 million workers and 338,000 businesses. A genuine and considered consultation process with stakeholders and the wider community is critical for ensuring that any reforms of this potential scope and significance are fit-for-purpose and meet the needs of the NSW community. A rushed inquiry process, imposed by the NSW Government, is unsatisfactory for the community, for businesses and for the millions of workers who rely on the workers compensation scheme.

7. Despite the short period of time, the Association has prepared the following submission to assist the Committee and the Parliament to understand some of the practical problems with the workers

compensation scheme and the proposed approach set out in the draft Bill. An extension of time, for stakeholders to provide additional submissions, would be welcomed, so that the draft Bill can be appropriately considered.

8. Rushed legislation can produce unintended, harsh and embarrassing consequences. For example, the Workers Compensation Legislation Amendment Bill 2012 brought about the extraordinary situation that certain amputees were unable to obtain replacement prosthetic limbs. The Standing Committee subsequently had to devote a great deal of time to identifying and amending the provisions which had that effect.

The NSW Government's rationale for the proposed reforms

9. A media release from the Treasurer, dated 18 March 2025, and an address by the Premier to the Legislative Assembly on 19 March 2025 raised concerns about an increase in the projected deficit of the scheme as a result of payments being made for psychological injuries. The media release and the Premier's address contemplate a range of potential reforms to address the issue.

10. It is assumed that the increasing deficits referred to by the Premier and Treasurer were identified via actuarial advice. That advice, and its underlying assumptions, appear to have been kept confidential. This prevents stakeholders and the community from understanding the assumptions underlying that advice and the extent of the projected deficit. The quantum of the payments made for psychological injuries also appears to have been kept confidential.

11. This approach should be contrasted with what occurs in the field of motor accident insurance, where law reform proposals are routinely discussed in conjunction with released actuarial information.

12. The suggested changes referred to in the Premier's address can be summarised as:

    (a) Giving "*the Industrial Relations Commission a bullying and harassment jurisdiction, requiring those claims to be heard first before compensation is applied for and paid out.*"

    (b) "*Reform of workplaces*".

13. The Premier, in his address, also stated that in addition to these reforms, "*a proper jurisdiction in the Industrial Relations Commission will fix these problems root and branch, rather than paying people out and hoping the problem goes away.*"

14. The Treasurer's media release referred to the following reforms:

    (a) Defining "*psychological injury*" and "*reasonable management action*".

    (b) Setting a different "*whole-person impairment threshold*" like that in South Australia and Queensland,

    (c) Adopting "*some of the anti-fraud measures recently adopted by the Commonwealth to protect the National Disability Insurance Scheme.*"

    (d) Implementing "*many of the recommendations Robert McDougall made in his independent review of Safe Work NSW. As well as recommendations the State Insurance Regulatory Authority and our own Law and Justice Committee have made too.*"

15. The Treasurer's media release described the intention behind the proposed change to be to:

    (a) "*curb the rising number of psychological injuries people are experiencing at work*"; and

    (b) "*treat those with psychological injuries quickly.*"

Comments about the causes of the problems and some potential solutions

16. The Treasurer's media release observed that the rise in psychological injury cases seemed to be "*coinciding with social and technological changes and growing awareness of mental health*". The Association agrees with these observations and notes that a practical consequence of technological change and increasing mechanisation in NSW is that fewer workers are engaged in strenuous physical activities and more are engaged in sedentary work of a clerical nature. The incidence of physical injuries is therefore decreasing, and psychological injuries represent a larger proportion of the claims being made.

17. It is also worth observing that a proportion of workplace psychological injuries results from what are essentially interpersonal conflicts that occur over a period of time. Another proportion of these injuries is the result of more dramatic events – such as devastating traumatic events witnessed by emergency service workers, or the traumatic incidents experienced by workers such as teachers, when they are assaulted in the workplace. Moreover, recently there has been significant media attention devoted to similar trauma suffered by workers in the hospitality and retail sector, arising from harassment and assault in workplaces involving customer service. This aspect underscores that the risk of psychological injury is not confined to any particular occupation and illustrates that changes to the workers compensation regime will have far-reaching consequences across all NSW workplaces.

18. The government's general comments and proposed legislation appear to be directed at matters involving interpersonal conflict. If this is the intention, care needs to be taken that unintended changes are not made to the entitlements of workers who are exposed to sudden and significant trauma.

19. The causes of such interpersonal conflict are numerous. In the Association's view, there is a range of different approaches to trying to reduce the incidence and severity of such conflicts, without resorting to the mechanisms proposed in the draft Bill.

20. The Premier's speech refers to "*Reform of workplaces*" and giving "*the Industrial Relations Commission a bullying and harassment jurisdiction*" as two approaches.

21. In referring to workplace reform, the Premier may be indicating a range of activities by government and other interest groups to try to reduce the incidence and degree of interpersonal conflicts in the workplace. Some activities which may assist, include:

    (a) Education campaigns (perhaps in conjunction with industry groups and unions) which better inform employees about the risks of causing psychological harm to their colleagues and how to reduce that risk.

    (b) Endeavouring to ensure organisations have sufficient human and other resources to perform their tasks, so as to avoid overwork and fatigue contributing to mental illness or conflict.

    (c) A sufficiently resourced NSW Ombudsman, and/or other Ombudsman type office, which can suitably enquire into organisations that generate complaints of conflict and overwork. The Association would welcome discussions about whether this could potentially be performed within the Industrial Relations Commission (**IRC**).

    (d) Aggrieved employees being able to approach the IRC for suitable relief. In providing for this, consideration needs to be given to how the required degree of professional assistance can be appropriately provided. Unions can play a very practical role with such matters, but of course many employees do not have union membership.

Reducing the costs of psychological claims

22. Members of the Association observe a range of matters which are inflating the costs of psychological injury claims. They include:

    (a) Workers delaying seeking treatment because of the stigma associated with mental health issues and making a complaint or a claim.

    (b) Actions by insurers and scheme agents which delay the provision of medical care and/or result in the inappropriate early withdrawal of medical care.

    (c) The practical reality that the health system (public and private) does not have the resources to supply the frequently required medical care and, in many regional areas, any care at all. This issue was explored in the recently-concluded Special Commission of Inquiry into Healthcare Funding, the report of which has not yet been released by government.

    (d) The reluctance of the colleagues and supervisors of injured workers to fairly describe what their actions have been.

    (e) Insurers and scheme agents wasting money on unnecessary consultants.

    (f) The inability of insurers and scheme agents to collate the required evidence to successfully defend claims by utilising the existing section 11A *Workers Compensation Act 1987* (**WCA**).

    (g) The practical difficulties associated with injured workers obtaining alternative employment.

23. In the Association's view, addressing these matters is likely to make a significant difference to the apparent cost of the scheme, while avoiding the far reaching consequences that this draft Bill will have on workers across NSW who suffer a psychological injury at work.

24. Workplace education activities would greatly assist with the issue described in [22(a)]. For example, if workers were made aware of the early symptoms of worsening anxiety and depressive type conditions, early confidential treatment through their GP might prevent the condition worsening. It can also prompt individuals, where possible, to remove themselves from situations that are damaging their health.

25. The Treasurer's media release, quoted at [15] above, observed that it is important to "*treat those with psychological injuries quickly*." The Association strongly agrees. According to the Association's members, the Scheme is often failing to achieve this. For many workers, early treatment will often support a quick return to work. If it is delayed, psychological injuries can drastically worsen, preventing or significantly delaying a return to work.

26. The Association suggests that this is an area worthy of particular attention. On its face, the existing legislation seems to facilitate this with provisional payments. However, the reality is often that many workers struggle to obtain early treatment. The reasons for this are numerous, and defy a simple answer. Availability and affordability of treatment are further important considerations.

27. However, one thing is clear - if a worker had to successfully take a bullying and harassment allegation to the IRC before any compensation could be "*applied for and paid out*" (as the Premier's address, quoted at 12(a) above, stated), there would be no practical possibility of the worker receiving quick treatment. It would instead be delayed by months, and perhaps longer. The existing problem of delay in accessing treatment will, without doubt, be exacerbated.

28. In the Association's view, this sort of approach, leading as it would to delay in the provision of medical treatment, would have the obvious potential to increase the overall cost of claims, and prevent the laudable aim of facilitating quick treatment so that injured workers might return to work. In a similar vein, the

provision of weekly compensation benefits should not be delayed, as a continuing income stream is essential to maintain health and to facilitate a quicker return to work.

29. As referred to in 22(c) above, the health system (public and private) is unable to provide the typical care required. That of course is a matter affected by general State and Commonwealth resourcing, and market forces, but it is worth observing that rational economic theory dictates the costs of treating injured workers should be borne by the activity that causes the damage. That is, the economic activities of employers. Imposing the cost on employers as a collective group has historically been done through requiring workers compensation insurance. Employers should not be excused from collectively paying for the needs their activities create.

30. The reluctance of fellow employees and supervisors to describe fairly what occurred (see 22(d) above) can be partially addressed through workplace education that encourages all employees to be fairer and more balanced in what they describe. This includes education that employees and supervisors will not and should not be penalised for simply being truthful.

31. Any practice of insurers and scheme agents wasting funds on unnecessary consultants is one that iCare and SIRA should address. From the observations of the Association's members, there is one practice which has questionable value. This is the use of so-called "Vocational Capacity Reports" by insurers and scheme agents. It is understood these reports can cost between $3,000 to $5,000 each. They are produced by what has become a small industry of consultants, who are paid the report fees by insurers and scheme agents. The report fees are then included in the claim costs for the worker in question.

32. The reports are written by various authors with varying qualifications. Many of them simply describe themselves as "Rehabilitation Consultants", and typically hold a Bachelor of Arts with a major in psychology. Some disclose no qualifications. A few are registered nurses, and a small number are occupational therapists or physiotherapists. Very occasionally a medical practitioner is described as being a joint author, although the extent of their contribution to the report is often unclear.

33. These reports assert that a worker has the ability to work in some kind of employment and to earn a certain weekly amount. Some of the authors self-describe that they do not have the expertise to provide an opinion on the degree of fitness of a worker, and they typically adopt an identified medical opinion, and then set out various salary and wage rates for certain jobs which they assert come within the expressed degree of fitness. Some of the authors advance their own purported opinion as to the degree of fitness, despite having no medical qualifications.

34. These types of report did not exist before the 1990s, but the vocational capacity report writing industry has been successful in purveying its services since that time. Claims managers are now used to seeing them and seem to think they are required for the purposes of normal claims management.

35. Before such reports existed, claims managers would note the sort of work medical practitioners were describing that an individual was fit to perform and then look at relevant job advertisements in local newspapers to form an administrative decision as to what the worker could earn in the open labour market. They would then adjust or end the workers weekly compensation accordingly (which the worker was at liberty to dispute in the then Workers Compensation Commission). There was no added cost to the scheme from this administrative process. In contrast, what happens now is that claims officers are spending up to $5,000 of iCare's money to engage an 'expert' to tell them something that they could find by simply looking at "Seek" on their desktop computer and keeping a copy of the online advertisement on the claim file.

36. The sometimes limited and often non-existent medical expertise of the authors of these reports means that decision makers in disputed claims (i.e., judges or Personal Injury Commission members) essentially never

accept the expressed opinions on work fitness contained in these reports. In other words, they are a waste of iCare's funds.

37. Significant funds are also spent on rehabilitation consultants. The experience of the Association's members is that longer term recipients of weekly benefits often have persuasive stories about impractical rehabilitation efforts. The reasons surrounding such failures are varied and also escape simple analysis. The Association urges the Committee and the government to examine the reasons behind such expenditures, with a view to limiting the waste.

38. The current section 11A WCA provides a complete defence to a workers compensation claim if the worker's psychological injury is wholly or predominantly caused "*by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*."

39. The task of collating the evidence that can establish this defence is now left to the claims officers working for insurers and scheme agents. It is a concern that these officers are often not legally-qualified, and do not necessarily have the training to collate the required evidence in a persuasive admissible form, so as to mount an effective defence under section 11A. The current funding arrangements for scheme agent solicitors do not provide any fees for such external solicitors to be used for such purposes. Lawyers are therefore not used to perform the task. The claims officers are however allowed to retain loss assessors to prepare reports about such matters, and do that.

40. The loss assessors seem typically to charge around $3,000 to $5,000 for such reports. The sub-contracting investigators who undertake the work are likely to be paid around $1,000 to $2,000. This investigator will be a licensed enquiry agent, but would not typically be legally qualified. The quality of the evidence they collate is variable. They often fail to obtain statements from important witnesses, or the statements they do obtain are of poor quality, and the evidence carries little weight. As a result, defences which may otherwise have successfully relied on section 11A will fail, and the scheme will acquire a large liability it could otherwise have avoided.

41. In contrast, if the scheme has simply spent the same $3,000 to $5,000 on an external solicitor to interview the relevant individuals and obtain the required statements, the chances of completely defending the claim would be much improved.

42. One potential solution would be to enable iCare and scheme agents to pay external solicitors to do such work.

43. The difficulty of workers finding alternative employment is also worthy of consideration. In psychological injuries of any consequence, the individual is often unable to return to the workplace where they were injured, as it may provoke anxiety about events recurring. Large employers, like the Department of Education, can address this by posting returning teachers to alternative schools. However, smaller employers typically only have one place of employment. The only practical solution in such cases is to find work with another employer.

44. Although certain changes favourable to employers have been made with a view to containing premiums, many employers are still reluctant to take on new employees who have been away from employment for a period on workers compensation. This is because they still perceive they are at risk of their premiums increasing if they employ the individual, as they (rightly or wrongly) assume they are more likely to make a further claim than some other possible employee. Further educative steps could be undertaken to try to reduce this prejudice.

45. The Association would welcome the opportunity to discuss these potential mechanisms for reducing unnecessary costs.

The NSW Government should not reduce the cost of claims by reducing the level of benefits

46. The Association does not support the NSW Government reducing the costs of claims by reducing benefits to injured workers.

47. In particular, medical treatment expenses should not be reduced. They are fundamental to any fair and sensible workers compensation scheme. From 1926 to 2012, there were no time limits or threshold requirements with respect to medical expenses. It is noteworthy that the time limits and threshold requirements introduced in 2012 resulted in workers in NSW being entitled to less compensation for medical expenses than their forbears did 100 years ago. The current entitlements should not be eroded further. In the Association's view, they should be restored to what they were before 2012.

General comments about the Workers Compensation Acts[1]

48. Virtually all recent reviews of the Acts have found that legislation in this area has become unnecessarily complex. The Acts now contain numerous redundant provisions, and even provisions that conflict with each other. The Acts should be simplified and consolidated into a single Act. Doing this would improve the performance of the scheme. The government should not make the current, unsatisfactory situation worse by adding further unnecessary provisions.

49. Legislative changes to the Acts in recent decades have proceeded on the assumption that defining concepts in detail, and trying to codify required matters, will improve the scheme. There is a role for both approaches, but they have not, overall, improved matters. Especially when first introduced, detailed definitions and unnecessary codification tends to create uncertainty, which adds to delays, legal costs, appeals and the like.

50. The definition of some concepts, such as injury or reasonable conduct, is in the Association's opinion best kept concise and general.

51. The practice of setting out required functional detail in future supporting regulations, rather than in the body of the proposed Acts, is unfortunate. It prevents parliament and individuals or organisations understanding, and scrutinising, how a Bill will ultimately operate. It is preferable to include the details in the Bills.

52. The proposed changes are directed to psychological injures and not physical injuries. The expressed reasoning behind this is that psychological injuries are becoming more common and that therefore the benefits payable for them need to be reduced. This approach is predicated on the peculiar proposition that psychological injuries should be treated differently from physical injuries. It is informative to compare this with physical conditions that are increasing in frequency. For example, there is (appropriately in our view) no suggestion that the significantly increasing rates of silicosis caused by dust inhalation by construction workers requires a reduction in the benefits that are payable to them.

The draft bill

53. In the limited time available, the Association is unable to provide more than preliminary, and likely incomplete, comments as to specific provisions in the draft Bill. The Association's decision not to provide comments in response to certain provisions should not be understood as agreement or disagreement with those provisions.

54. Proposed subsection 8A attempts to define "*psychological injury*". This is not required. All parties rely on the medical profession in relation to such matters. They spend a great deal of time producing analytical

[1] Abbreviations used in the following sections of this submission: 'WCA' – *Workers Compensation Act 1987*; 'WIM' – *Workplace Injury Management and Workers Compensation Act 1998*; and 'The Acts' – the combined provisions of WCA and WIM.

texts which describe and provide diagnostic terms for various psychological conditions. The existing Acts refer to psychological injuries in general terms (with section 11A(3) containing a minor exception). This has been adequate for some time and remains appropriate.

55. Proposed subsection 8A also adds a requirement that to be a psychological injury the relevant dysfunction has to be "*significant*". This interposes a further threshold that a worker is required to prove, and hence a further area of potential preliminary factual dispute which will increase delays and costs. The Association defers to the expertise of medical professionals. However, it may reasonably be assumed that a particular condition would not be diagnosed unless it were significant in the first place. As such, the proposed provision does not serve a useful purpose.

56. Proposed subsections 8B and 8C attempt to define "*primary psychological injury*" and "*secondary psychological injury*". This is also unnecessary. The terms already exist in section 65A of the WCA, and in the Association's experience, there have not been problems with decision-makers distinguishing between primary and secondary psychological injuries.

57. Proposed subsection 8D attempts to define "*reasonable management action*", which is then reused in revised subsection 11A to provide that compensation is not payable for certain employment-related psychological injuries. Subsection 11A in the current Act has been in operation for a long time. It has a short general phrase in it which provides that compensation is not payable for psychological injury that is "*wholly or predominantly caused by reasonable actions taken with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*."

58. The meaning of subsection 11A, and its practical application, has been well-clarified by appellate decisions. It provides a complete defence to employers in these situations, if the employer can prove that its requirements are satisfied. As discussed above, in the experience of the Association's members, the main practical problem with the attempted use of the defence is the inadequate evidence that has been collated by the insurer or scheme agent – rather than the words of the subsection itself.

59. The proposed subsection 11A in the draft Bill will make it easier for employers to avoid paying compensation. This is largely because it reduces the causative requirement previously imposed. Instead of the employer's reasonable disciplinary or other actions having to be the whole or predominant cause of the injury, the various expanded set of reasonable actions only need to be a "*significant cause of the psychological injury*". This is an easier evidentiary requirement to discharge. Although as already noted, there is not any point in reducing the evidentiary requirement, unless the scheme provides for a system that can competently collate the required evidence to do this.

60. In other words, this statutory effort to reduce the amount of compensation that is payable will not work, unless the individuals with the required skills to collate the evidentiary statements and medical reports that are needed, are able to do so. This means the insurers and scheme agents need to be able to retain solicitors who are paid sufficient fees to permit this to occur.

61. Proposed subsection 8E in the draft Bill attempts to define what is a "*relevant event*". These are events such as being assaulted, witnessing gruesome scenes, sexual or racial harassment, or being bullied. There are then further provisions that attempt to define harassment and bullying.

62. The purpose in creating a new defined term of a "*relevant event*" is then found in proposed subsection 8F which provides that "*notification*" of a psychological injury caused by sexual or racial harassment or bullying is "*taken not to have been given*" unless the worker has provided a "*finding of harassment or bullying made by the tribunal, commission or court*". The identity of the tribunals, commissions or courts being referred to does not seem to be described in the draft Bill. Whatever the body is, it would need to have the jurisdiction to make such a finding. At the present time this would seem to be limited to the Personal Injury Commission and (for some workers, such as coal miners) the District Court of NSW.

63. The Premier's address, referred to previously, seems to indicate that the IRC would be given the role of making these findings. It is therefore assumed that some other Bill is being prepared which gives it the required jurisdiction.

64. In considering these proposed sections it must be appreciated that section 254(1) of the WIM provides that compensation is not recoverable by an injured worker unless "*notice of the injury is given*". Hence, what the proposed subsection 8F does is to prevent a worker, who has been injured by bullying or sexual or racial harassment, from receiving any workers compensation, including medical expenses or weekly benefits, until that worker has obtained a finding from a tribunal, commission or court confirming that the person has been subject to bullying or such harassment.

65. There are several serious difficulties with this proposal.

66. The first has been referred to in the preliminary commentary to these submissions. As noted by the Treasurer in his speech to the Legislative Council, it is desirable for psychologically injured workers to receive prompt medical treatment. This has the obvious potential to promote a quick recovery and return to paid employment. This proposed section will prevent that laudable aim being achieved. A worker may never have the resources to bring the required proceedings in the tribunal, commission or court. Even if the worker does, they will be delayed by the many months that are required for the relevant body to come to its decision. This also prevents quick treatment being provided and prevents the worker from receiving any income in the form of weekly compensation.

67. It is appreciated that the proposed new subsection 148B seems to be an attempt to ameliorate this situation by creating a new concept of a "*work pressure disorder*" and "*a special work pressure payment*" for medical expenses for a limited period of 8 weeks. The significant problem is that it assumes the worker can obtain a finding from a tribunal, commission or court within 8 weeks. That is entirely unrealistic.

68. It is also not clear whether the "*work pressure disorder*" payment will in fact cover injuries alleged to have been caused by sexual harassment, racial harassment and bullying and harassment as it is specifically defined to mean *"a mental or psychiatric disorder caused by or arising from the pressures placed on a worker in the course of the worker's employment but only if the employment was the main contributing factor to the worker experiencing the disorder"*. This definition appears to be targeting overwork/excessive workloads, rather than harassment, unless harassment here includes unreasonable workloads.

69. Another problem concerns matters where the insurer or scheme agents quickly determine that a worker has been psychologically injured by bullying or sexual or racial harassment. There is often no preliminary factual dispute about this. In these situations, the proposed provisions would have the perverse effect of preventing the insurer from paying the compensation it has administratively decided it should be paying. That is because the proposed subsection 8F does not provide for any alternative - it mandates that notice has not been given until the finding has been obtained. This will result in pointless proceedings that will involve unnecessary costs.

70. Proposed subsection 8H attempts to define a new term "*vicarious trauma*". Under the proposed subsection, this essentially involves a worker becoming aware that a closely connected individual (such as a work colleague) has been injured or killed in a workplace accident. The preceding proposed subsection 8G then provides that no compensation is payable for a psychological injury caused by such "vicarious trauma". These provisions are not required, because the law, as described by the Court of Appeal, already produces that result: *Zinc Corporation Ltd & Anor v Scarce* (1995) 12 NSWCCR 566.

71. Proposed subsection 39A provides that workers who have suffered a "*primary psychiatric injury*" cannot receive weekly benefits for more than a combined period (which is usually cumulative) of 130 weeks. This limit does not apply if the worker is assessed as having a degree of permanent impairment (**WPI**) of 31% or more.

72. Virtually no workers are ever assessed as having a psychological injury that produces an impairment of 31% or more. This is an extremely harsh provision that significantly changes the benefits payable. In short, this provision will effectively end workers compensation for psychological injury in NSW.

73. The current situation is that any injured worker, including those with primary or secondary psychological injuries, can receive benefits for up to 260 weeks, as long as they are totally unfit for all work or, if they have residual work capacity, are working for at least 15 hours a week. In addition, any worker who has a WPI of 21% or more, can potentially access weekly benefits to 68 years of age.

74. Workers, who have been devastated by a workplace injury, would be required to rely on Centrelink benefits to live after only 130 weeks, despite being unfit for any work as a result of conditions such as post-traumatic stress disorder. This will include police officers, fire brigade members, nurses, doctors, security guards, teachers, care workers and so on. In the Association's view, this is an unacceptable outcome and will fail to meet community expectations.

75. Proposed subsection 39A(4) is also an entirely unreasonable provision, as its clear intention is to cut costs at the worker's expense. Currently, if a person is assessed at greater than 20% WPI, they are entitled to ongoing weekly benefits beyond 260 weeks, as if there were no cessation of weekly benefits. This new provision states that when the assessment of 31% or more occurs, weekly benefits will start again, but only from the date of the assessment. If a worker's weekly compensation had ceased because 130 weeks expired, and the assessment is not for another year, the worker could be left without compensation for a year. Centrelink ought not to be required to pay to support a worker in circumstances where the employer is liable to pay.

76. The proposed change to subsection 59A is also very harsh to workers who suffer a primary psychiatric injury. Under the current Act, which as noted above is already inferior to the Acts that applied between 1926 and 2012, such workers can have their medical expenses paid for 2 years after they cease to be entitled to weekly benefits. Hence most workers have cover for 130 weeks plus 2 years – which is a total of 4 ½ years. This is extended to 7 ½ years if they have a WPI between 11% and 20%, and lifetime cover if they are 21% or more.

77. The proposed new subsection 59A is very different. It would create a situation where workers with a primary psychiatric injury are only entitled to 3 ½ years of cover for medical expenses. This applies regardless of their eventual WPI. After that, they would have to privately fund their medical care, or more likely, seek treatment from an already overloaded public health system. This too is unacceptable. The Association does not accept that the scheme is unable to fund the medical expenses of such workers.

78. Furthermore, there is no legitimate or logical reason why workers with a primary psychological injury should be treated differently from workers with physical injuries and secondary psychological injuries.

79. The proposed revision to subsection 65A also significantly changes the potential entitlement to lump sum compensation for primary psychiatric injury under section 66. The current threshold, before any lump sum compensation is payable, is a 15% WPI. The proposed revision will impose a threshold of 31%. As a practical matter, this will essentially abolish lump sum compensation for such injuries, as virtually no one is ever assessed as having an impairment that high for a primary psychiatric injury.

80. By virtue of a proposed revision to subsection 151H, this new 31% threshold will also apply to any damages claim. For similar reasons, this will have the practical effect of abolishing damages claims for such injuries.

Provisions in the Bill which apply generally to all injuries and which are not directed to psychological injuries

81. As noted previously, the Treasurer's address referred to implementing certain recommendations made in the "McDougall review". The Bill does that in a number of ways, as discussed below.

82. Proposed subsections 32AA, 32AB and 32AC provide a method of entering into a compromise settlement relating to certain death benefit claims. This is a useful addition to the Act.

83. Certain other provisions (such as a revision to section 25) also amend the Act to change the amount of certain benefit levels. It is useful for a reader of the Bill to appreciate that these amendments do not actually increase the amount of any benefits. This is because the higher figures already apply, by virtue of the routine indexing of the Act's benefits that reside in various statutory instruments. The purpose of them is to bring the substantive text of the WCA temporarily up to date with those changes.

84. Subsections 87EA to 87I contain provisions which reintroduce generally available overall lump sum commutation settlements. This is a promising development. The main problem with the provision in the draft Bill is that the circumstances where a liability can be commuted are to be "*prescribed by the regulations*". It would be preferable for these to be set out in the body of the draft Bill, as without that detail, it is impossible to know the practical effects of these proposed amendments. In recent years, a near identical provision did not pass the Legislative Council for this reason.

85. Another problem is that the sensible safeguard of requiring independent approval is a task to be performed by the President of the Personal Injury Commission. In reality, this task would be given by the President to their delegates. With some exceptions, these tend to be less experienced decision-makers in that jurisdiction. It is suggested the approval process should lie with the Personal Injury Commission, rather than the President. That way the approval process would be performed by the Members of the Commission, who tend to be far more experienced and hence would be better able to consider the wide range of matters referred to in proposed subsection 87EA(2A).

Conclusion

86. As noted, the limited time available has not permitted the Association to consider the other proposed changes to the Acts and the scheme. Genuine consultation and community consideration is required on reforms of this significance and scope, rather than a rushed and unsatisfactory inquiry process, which has been imposed by the NSW Government.

87. The Association thanks the Committee for considering this correspondence and for the opportunity to appear before the inquiry on 16 May 2025. If you wish to discuss, or if the Association may be of further assistance, please do not hesitate to contact Sean Robertson, Director, Policy and Law Reform, at

Yours sincerely

Dr Ruth Higgins SC
President

Submission No 34

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

Organisation: The Law Society of New South Wales

Date Received: 15 May 2025

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC/ELC:JBsb150525

15 May 2025

The Hon. Greg Donnelly MLC
Chair, Standing Committee on Law and Justice
Legislative Council
Parliament House
SYDNEY NSW 2000

By e-mail: law@parliament.nsw.gov.au

Dear Mr Donnelly,

WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2025

Thank you for the opportunity to provide a submission to the Standing Committee on Law and Justice (**Standing Committee**) on the exposure draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW) (**Draft Bill**). The Law Society's Injury Compensation and Employment Law Committees contributed to this submission.

The Draft Bill proposes significant changes to liability and the ability of claimants to commence claims for compensation for workplace psychological injury in New South Wales. Given this, the Law Society expresses concern about the lack of consultation and transparency in respect of the development of the Draft Bill. Broad consultation at earlier stages would have assisted in ensuring proposed changes to the workers compensation scheme were based on strong evidence and informed by a wide range of stakeholders, including the legal profession. In our view, the truncated timeline to provide a submission for this inquiry is also inadequate for changes of this scale which will impact many employers and workers across NSW.

Basis for changes to psychological liability and entitlements

Our members, who represent claimants, insurers and employers, understand that reform of the NSW workers' compensation scheme is overdue. We appreciate that it is important to ensure the long-term financial viability of the scheme in order that businesses, including small to medium sized businesses, can thrive, and contribute to productivity in NSW and Australia. Further, we support the principle that employees, if they are injured at work, should be supported through treatment, rehabilitation and appropriate compensation. For the reasons outlined below, however, we are concerned that the policy options for reform of the scheme as a whole are not appropriately tailored, and that the proposed reforms, rather than focusing on a shift towards prevention and early recovery at work[1], appear to be directed to limiting the ability of workers to make a claim on the basis of psychological injury.

[1] Explanatory Note, Workers Compensation Legislation Amendment Bill 2025, 1.

We appreciate concerns have been raised by business and employer groups about the cost to the scheme due to a rise in the number of psychological claims made in NSW. We agree that it is important to establish a mechanism to limit unmeritorious psychological claims, which have consequences for the operating costs of businesses, and may affect the viability of small businesses. It is in the interests of transparency, accountability and sound law reform and policy-making, that the Government provide statistical data on psychological claims which may assist in providing a more nuanced understanding of the pressures facing the scheme.

Evidence provided to the Standing Committee in the context of the 2023 Review of the Workers Compensation Scheme, for example, showed that the 'growth in psychological claims as a proportion of active claims is more pronounced for some insurer types', including the Treasury Managed Fund, which represents the public sector in NSW.[2] We suggest that before the enactment of legislation designed to limit access to workers compensation, the Government should investigate and measure the impact of bespoke, systemic responses around psychological safety and supports for different workplaces, including the agencies in its remit.[3] We also suggest that the results of SIRA's 2024 audit into the claims management practices at iCare be made available to inform the reform process.

Use of delegated legislation

As a rule of law matter, we are concerned that the Draft Bill relies too heavily on delegated legislation to achieve its objectives. Examples include the definitions of 'reasonable management action' (s 8D of the *Workers Compensation Act* 1987 (NSW) (**Act**)), 'relevant event' (s 8E), and 'vicarious trauma' (s 8H), all of which can include 'any action prescribed by the regulations'. Further, s 8G proposes that the regulations may provide for matters relating to primary psychological injuries, including the type of matters or circumstances an insurer must take into account when determining whether an injury is a primary psychological injury, and the evidence a worker must provide for a claim in relation to a primary psychological injury. As discussed below, it is also left to the regulations to determine the classes of matters appropriate for commutations (s 87EA(2)).

The reliance on delegated legislation concerning significant matters of substance and policy is concerning in the context of a piece of legislation that directly impacts the legal rights, interests and livelihoods of injured people. It is preferable to promote and maintain Parliamentary oversight and public scrutiny over the legislative process, and we encourage the Standing Committee to consider this issue in its review of the Draft Bill.

Change to the Whole Person Impairment (WPI) threshold

The Draft Bill proposes that weekly payments cease after 130 weeks for primary psychological injuries unless the injury is at least 31 per cent WPI (s 39A); that the permanent impairment threshold is increased to 31 per

[2] Standing Committee on Law and Justice, *2023 Review of the Workers Compensation Scheme*, December 2023, 26: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2988/Report%20No%2084%20-%20Law%20and%20Justice%20-%202023%20Review%20of%20the%20workers%20compensation%20scheme%20-%205%20December%202023.pdf
[3] For example, this could include greater resourcing and powers for SafeWork NSW to conduct investigations around harassment, including sexual harassment in the workplace.

cent (s 65A(3)); and that damages for primary psychological injuries are unavailable unless they are greater than 31 per cent WPI (s 151H).

There is no data available to illustrate the number of claims to date which involve a WPI threshold of greater than 31 per cent in the context of a psychological injury. We suggest that it is in the interests of transparency that such data is published to illustrate the extent of the impact that the proposed changes will have to psychological claims in the scheme.

In our members' experience, the number of cases involving impairment at 31 per cent or greater would be so rare that this threshold effectively abolishes the right of workers in NSW to pursue work injury damages claims against a potentially negligent employer even after they have successfully navigated the additional hurdles introduced by the other amendments. We have been provided with anonymised case studies of members' clients who are experiencing ongoing, persistent and severely disabling symptoms associated with various recognized psychological disorders, but have been assessed at between 17 and 22 per cent, including clients who have required significant periods of in-patient treatment in hospital settings.

Given that each area of function described in the Psychiatric Impairment Rating Scale (**PIRS**) is given an impairment rating which ranges from Class 1 to 5, with the median then calculated by averaging the two middle scores, we suggest that it is probable most claimants will be excluded from making a claim for damages or weekly benefits beyond 130 weeks, as they will fail to be assessed at a median class 4 for any indicators, and therefore fail to reach impairment of greater than 31 per cent. Severe impairment (Class 4) includes indicators such as:

- Needs supervised residential care. If unsupervised, may accidentally or purposefully hurt self.
- Never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room or garden when others come to visit family or flat mate.
- Finds it extremely uncomfortable to leave own residence even with trusted person.
- Unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).
- Can only read a few lines before losing concentration. Difficulties following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone, or needs regular assistance from relatives or community services
- Cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.[4]

As the level of impairment demanded by the PIRS to reach 31 per cent will conceivably exclude nearly all workers with psychological injury from making a claim, we suggest the Government consider whether a change to 21 per cent or greater would be more appropriate. This would ensure that some workers generally recognised by community standards as being severely impacted by mental ill-health would be able to make a claim, who would otherwise be excluded under the current proposal.

While we understand the Government is seeking to emulate impairment thresholds in the workers compensation systems of other States such as South Australia and Queensland, significantly different

[4] SIRA, Psychiatric and psychological disorders (Website): https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment/11.-psychiatric-and-psychological-disorders

assessment criteria are used and applied by practising psychiatrists in these jurisdictions.[5] We suggest that it is inadvisable to simply transplant the percentage figure into a very different scheme.

Definition of 'relevant event'

We are concerned that the proposed definition of 'relevant event' is drawn too narrowly, which may lead to frontline workers (e.g., nurses, teachers, train drivers, call centre operators) who develop a mental health condition as a consequence of confrontations and experiences in the workplace being prevented from making a claim. We suggest that further consultation is required to ensure that other types of traumatic events experienced in the course of their work are appropriately captured by the legislation.

Assessment Process

Proposed s 153G sets out that a principal assessment must be made by an assessor included on SIRA's register of permanent impairment assessors, who is either agreed by the insurer and worker or otherwise appointed by SIRA. The Law Society does not support this change, and suggests that providing workers and insurers with the flexibility to choose an independent medical examiner is preferable. In the experience of our members, if two disparate views are reached by the medical examiners, this can often encourage settlement, which benefits both parties. This is particularly the case given the complexity of the method of assessment, which demands consideration of AMA5 and the SIRA Guidelines for the Evaluation of Permanent Impairment, as well as the scope for the exercise of the examiner's discretion. We suggest the change will substantially increase the risk of capricious outcomes.

There is typically a significant amount of work and advice required to be given to a worker or employer prior to the formal assessment process and there is no acknowledgement of this in the legislation. It is unclear from the Draft Bill whether letters of instruction will be permitted to be tailored to individual circumstances by each party, or will need to be agreed between the parties before the assessment. Further, there is no guidance on supplementary reports and/or amendments to the original assessment.

We are concerned that the provision on the unexpected and material deterioration in the worker's condition (s 153N) will operate in an obtuse manner by preventing workers with physical injuries who are likely to have surgery in the future from having a further assessment, given the deterioration in their condition may be held to be foreseeable. We note that the word "unexpected" can carry a variety of connotations and suggest that it would be appropriate to define the term to remove this element of subjectivity. Further, there should be an avenue for the Personal Injury Commission to review whether a deterioration is unexpected and material.

Special provisions for primary psychological injuries caused by sexual or racial harassment or bullying

We acknowledge the desire to ensure that compensation is provided only in support of injuries incurred as a result of substantiated harassment or bullying. However, we suggest that the special provisions for primary psychological injuries caused by sexual or racial harassment or bullying are not the most effective way to do

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

so. In our view, they also do not promote psychological safety in the workplace, nor "return to work" objectives of the reform package. Section 280AAB restricts the recovery of compensation unless a claim for the compensation has been made within six months after a finding by a Tribunal, Commission or Court that the relevant injury was caused by conduct that is sexual harassment, racial harassment or bullying. In the experience of our members, favourable applicant outcomes are rare in the Federal bullying jurisdiction. The inherent difficulties and legal complexities associated with prosecuting/bringing a claim for applicants in sexual harassment complaints, both at the State and federal levels, will in practice prevent the vast majority of workers compensation claims for psychological harm stemming from this form of assessment, particularly for those experiencing greater than 31 per cent WPI.

First, it is unclear why these provisions are restricted to injuries caused by sexual or racial harassment or bullying, but do not take into account discrimination/harassment on the basis of other personal characteristics, such as age and disability.

Second, the proposed definitions of "sexual harassment", "racial harassment" and "bullying" are not fully aligned to the current definitions contained in the *Anti-Discrimination Act 1977* (NSW) or under Federal laws. The definition of "bullying" is potentially broader than that contained in the *Fair Work Act 2009* (Cth), with no reference being made to the requirement for a continuing risk to health and safety. The term "racial harassment" is also not one which is used in other legislation.

Third, the Law Society is concerned that this will cause unacceptable delays for persons experiencing psychological injuries caused by bullying and harassment. We are aware of the long timeframes in both the NSW and Commonwealth jurisdictions for harassment and bullying matters to be considered or heard, and suggest that this requirement will also present a significant financial and psychological impost on people who may have existing vulnerabilities. This is particularly the case given there is no provision for payment of any type while a worker pursues proceedings in a Tribunal, Commission or Court to establish the mechanism of injury. In addition, those delays may result in further unintended consequences for employers, including the need to manage persons who are required to take increased personal leave during those periods, require the employer to manage the ill/injured employee directly (and outside of the workers compensation regime), and in some circumstances the cost of having an alleged victim and an alleged perpetrator continuing to work together in the same workplace prior to any determination.

Fourth, it is also unclear how the relevant Tribunal, Commission or Court will be resourced to deal with a potential influx of claims caused by workers needing to access these jurisdictions. In the Australian Human Rights Commission, for example, it may take 6-18 months to deal with a complaint of sexual harassment, and it could easily take up to 24 months from the date of making the initial application to get a determination by a Court.

Fifth, the practical impact of relying on a relevant event in the form of a bullying or sexual harassment decision or "finding" also has the flow-on effect of preventing a worker making a compensation claim, if the matter settles in a Tribunal, Commission or Court so that no finding is in fact made. It is likely that claims that would otherwise settle will now run to determination so that claimants have an opportunity to bring a workers

compensation claim. This in turn will place considerable stress on the limited resources of the Courts, Tribunals and the Commissions.

Sixth, there may also be negative consequences for employers, including the cost and time of defending the claims workers will be forced to commence to secure a determination, in what is largely a no-cost jurisdiction; and the cost to settle these claims without mitigation through the worker's compensation regime. This cost will be in addition to any costs which have been incurred by the employer already, including in funding internal investigations into complaints, as well as arising from the individual's absence from the workplace.

There appears to be no mechanism for an injured person to apply for an exemption from the 6-month timeframe, for example if their failure to comply was occasioned by ignorance, mistake, absence from the State or other reasonable cause. We suggest this needs to be clearly set out for the avoidance of friction in the scheme and unnecessary disputes.

The Law Society is concerned that the significant barriers currently associated with harassment or bullying claims will result in many psychologically-injured workers opting not to lodge claims. This may mean they are denied the required treatment and placed at increased risk of self-harm or long-term absence from the labour market. Ultimately, for a class of injured workers, this will result in compensation costs shifting to other sectors, including longer term health care, and social security.

39A Cessation of weekly payments after 130 weeks – primary psychological injuries

Proposed s 39A(4) has presumably been inserted in response to the findings of the NSW Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113, where it was held that liability for permanent impairment dates from the time of the employment injury, regardless of when the degree of permanent impairment is ascertained.

It is unclear why the Government, in the case of primary psychological injury, intends to legislate against the well-established principle, enunciated in other sections of the Act (e.g. ss 9(1) and 39), that 'injury and impairment are not necessarily concurrent' and 'entitlements to compensation…vest upon the occurrence of the injury, even though those entitlements may not be immediately ascertainable': see Brereton JA at [52].

Work Pressure provisions

Section 148B introduces a special entitlement for medical or related treatment for the concept of 'work pressure' which is limited to 8 weeks. As a 'work pressure' disorder is not a claim for compensation, it only requires the employer to pay for medical and other related treatment. We are concerned that this provision represents a band-aid solution which fails to address issues of psycho-social safety in the workplace. It is also unclear why a person who is ostensibly injured in the workplace due to "work pressure" is denied weekly payments by their employer and is treated differently from other claimants.

We can also foresee difficulties associated with workers accessing these payments if the employer (not the insurer) is small or otherwise unaware of these obligations. It is also possible that this provision may increase

costs to businesses, given that a 'work pressure' payment would be required to be made, in addition to the making of workers compensation premiums.

Other provisions affecting the broader workers compensation scheme

We note that some of the changes in the Draft Bill affect all injury types and not just psychological injuries. In addition to our comments on the "assessment process" above, we make the following brief comments on several issues of concern below.

'Reasonably necessary' versus 'reasonable and necessary'

We note that the Draft Bill at ss 60 and 60AA of the Act reflects the recommendation of the Independent Review of icare and State Insurance and Care Governance Act 2015 Review (**McDougall Review**) to replace the words 'reasonably necessary' with the words 'reasonable and necessary'.[6]

The Law Society opposes this change. We consider that the requirement for treatment to be both 'reasonable and necessary' as opposed to 'reasonably necessary' imposes a higher bar for medical payments and represents a more demanding test. We suggest that evidence has not been made out, in the McDougall Review or otherwise, that the "reasonably necessary" test results in harmful outcomes and funding of low value treatments.

Allied Health Consultants

New s 45B of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**WIMA**) allows SIRA to register and regulate allied health consultants. It is possible that the formalised use of allied health professionals in claim management is likely to lead to greater levels of disputation between treating doctor opinions or treating allied health practitioner opinions. It would be helpful to obtain more clarity on how these disputes will be resolved without leading to further delays in the scheme.

Timing of Lump sum compensation claims

Section 280AAD of the WIMA requires all claims for permanent impairment compensation for a relevant injury to be made at the same time. Subsection 2 states that a legal practitioner or agent who acts for a worker when a claim is made is not entitled to recover costs from the worker or the employer in relation to a claim made later, including a claim made by later amendment of proceedings, unless there is a good reason for the claim being made later.

We suggest the phrase 'good reason' is subjective and may result in friction. The phrase should be defined with examples, while leaving discretion to the Personal Injury Commission or Court to make its own decision outside of those definitions.

[6] The Hon Robert McDougall QC, *Independent Review of icare and State Insurance and Care Governance Act 2015 Review* (30 April 2021), Recommendation 39: https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf.

Permanent Impairment Agreements

Proposed s 153P of the Act introduces the concept of a permanent impairment agreement, which allows for the insurer and injured worker to accept or reject the principal assessment. If rejected, there is provision for the dispute to proceed to the Personal Injury Commission.

We are concerned that this provision may encourage tactical denials which will impact on the workload of the Personal Injury Commission.

Amendments to death benefits and commutations

The Law Society supports amendments that enable parties to a dispute about liability for death benefit compensation to settle the dispute if it has been referred to the Personal Injury Commission.[7]

Similarly, we support the provisions on commutations but continue to oppose ascribing classes of claims by regulation, an approach which lacks transparency and may create unfairness. If only certain classes and cohorts are permitted to commute, this may result in many workers for whom commutation would be beneficial being denied this opportunity. A further consideration is that by naming certain classes of claim, some workers may feel pressured to enter a commutation. This is contrary to the notion that a commutation relies on the voluntary participation of the parties.

Pre-injury average weekly earnings (PIAWE)

The Law Society supports the proposal to remove PIAWE from the definition of work capacity.

Thank you for the opportunity to contribute. In light of the significant concerns existing about the current proposed model for reform, the Law Society suggests that this process return to a design stage for further consultation to ensure that an appropriately balanced approach is reached.

Should you have any further queries in relation to this submission, please contact Sophie Bathurst, Policy Lawyer, at or

Yours sincerely,

Jennifer Ball
President

[7] See, however, comments in Law Society, 2022 Review of the Workers Compensation Scheme – Supplementary Submission, 13 September 2023: https://www.lawsociety.com.au/sites/default/files/2023-09/Letter%20to%20Standing%20Committee%20on%20Law%20and%20Justice%20-%202022%20Review%20of%20the%20Workers%20Compensation%20Scheme%20%E2%80%93%20Supplementary%20Submission%20%E2%80%93%2013%20September%202023.pdf

Submission No 48

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

Organisation: Taylor and Scott Lawyers

Date Received: 16 May 2025

TAYLOR &SCOTT LAWYERS

YOUR REF:
OUR REF: IAS
DIRECT LINE:
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15 May 2025

By Email:

www.taylorandscott.com.au

Dear Committee

Re: **INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NSW:**

EXPOSURE DRAFT – WORKERS COMPENSATION LEGISLATION AMMENDMENT BILL 2025

We **enclose** herewith our written submissions to the Standing Committee on Law and Justice, Parliament of NSW

Yours faithfully
TAYLOR & SCOTT LAWYERS

Ivan Simic
Partner

TAYLOR & SCOTT
LAWYERS EST 1905

SUBMISSIONS BY TAYLOR & SCOTT LAWYERS

INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NSW: EXPOSURE DRAFT – WORKERS COMPENSATION LEGISLATION AMMENDMENT BILL 2025

Index

1. Introduction

Section 5 of the *Constitution Act 1902 (NSW)* has vested the Honourable Members of this Parliament with the "*power to make laws for the peace, welfare and good government of New South Wales".*

In the writer's humble opinion the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025* (save for some proposed amendments concerning the resolution of death benefit claims) is not law reform that will provide any "*peace, welfare and good government"* for the people of NSW as illustrated by the real life cases studies in the attached annexures to this submission.

We note the extraordinary short notice provided by the Parliament to the legal profession of NSW to address this Committee on this proposed Bill.

We further note we have had the benefit of reading the written submissions provided to the Committee by the Australian Lawyers Alliance and the Construction Forestry Mining Energy Union (Construction & General Division). We agree with the comments and recommendations made in those submissions.

2. Proposed Section 8F - Waiting for a 'finding' – Justice Delayed is Justice Denied.

See Case Study A in Annexure "A" and consider how the proposed laws will affect people like "Rebecca" having to wait until some other jurisdiction makes a finding before she can access basic statutory benefits under the *Workers Compensation Act* in a timely manner that may help mitigate the damage she has suffered.

3. The WPI threshold Issue for Victims of Serious Trauma and Violence

See Case Study B and C in the annexures and consider how the proposed laws will affect people like James, Danny and their families given what they have lost and the farce of the purported protections provided in the Bill to them as victims of serious trauma and/or violence at work through no fault of their own.

In reality they will be rightly advised by their lawyers that despite the loss and injury they have suffered as the result of an extraordinary physical trauma and/or violence at work there is no hope of any just compensation given a ridiculously high threshold of 30% that will apply to their claim like any other claim for a psychiatric injury.

4. Retrospectivity Unknown

The silence of the Bill on retrospectivity is concerning. Any fair and just law reform requires that the issue of retrospectively be dealt with in a clear and transparent manner without further aggravating the difficult circumstances faced by those persons affected by the proposed legislation.

5. Proposed Section 153N – A Gross Denial of Rights to Fair Compensation

This amendment has nothing to do with controlling the gateway for psychiatric injuries and claims and should simply be deleted. On the contrary Its presence in this Bill is embarrassing at best and dishonest at worse in that it will deny some workers left with serious medical conditions as a result of their PHYSICAL INJURIES the right to claim fair and just compensation for their loss of work capacity and earnings.

For example, a young apprentice has a partial amputation of their foot/toe or hand/finger as result of a workplace accident that results in a modest sub 15% Whole Person Impairment (WPI) assessment. He or she returns to work but medical issues and/or complications with the injury down the track arise that cause deterioration of the condition and may necessitate further surgery/amputation that eventually result in a substantial work incapacity.

Under the current statutory scheme the worker is entitled to have their Whole Person Impairment (WPI) assessed again and if now over 15% WPI and bring a further claim that reflects the true loss of earning capacity as a result of their serious physical injury.

This proposed section would deny workers making such a claim by requiring a further 20% WPI on top of the original assessment and whole number of other hurdles before a further claim could be made. It leaves no grace for the injured worker who on the first medical assessment of their WPI has basically received a medical certificate that is not allowed to or even as a matter of medical science capable of ascertaining in that WPI percentage the future medical outcome with the injury.

This proposed section is in complete denial of medical reality and the complexities posed with treatment of serious physical injuries. It is in complete denial of .how despite the best efforts of workers (and their medical treaters) with such serious physical injuries a substantial loss of work capacity and earnings may be inevitable.

TAYLOR & SCOTT LAWYERS

per Ivan Simic, Partner

Dated 15 May 2025

ANNXURE "A"

Case A - Young female worker "Rebecca" (name changed)

1. "Rebecca" worked in a retail outlet in a regional NSW town. She was the subject of intimidation, sexually suggestive comments, sexual touching and ultimately an indecent physical assault by an older male co-worker who denied the conduct.
2. At no stage was Rebecca in any sort of relationship with the perpetrator. The entire conduct complained of by Rebecca occurred in the workplace during working hours.
3. The perpetrator had been seen by other workers in the establishment inappropriately touching other female employees and making inappropriate suggestive comments to other females before his assault on Rebecca.
4. These other incidents were known or ought to have been known to the management of the retail outlet before the assault on Rebecca but no effective disciplinary action was ever taken to address such inappropriate sexual conduct by the perpetrator in the workplace despite the employer's workplace policies.
5. After the assault on Rebecca the employer commenced an investigation of the perpetrator's conduct and the assault. The perpetrator remained working in the establishment during the investigation by the employer but before the employer took disciplinary action against him he resigned.
6. Rebecca ceased working and went off work initially on sick leave and then workers compensation. She was unable to return to this workplace due to her medical condition and eventually found work with another employer
7. The matter became the subject of a Police investigation who charged the perpetrator with three (3) offences including the indecent assault of Rebecca.
8. In the criminal proceedings the perpetrator agreed to plead guilty to a lesser charge of "common assault" if the Prosecution withdrew the other more serious charges and on this basis he was eventually sentenced and convicted.
9. The experience of the assault gave rise to serious anxiety and depression for Rebecca and severely affected her life and relationships with others.
10. The perpetrator was convicted for common assault some 2 years and 7 months after the incident. At the time Rebecca made her claim for benefits under the Workers Compensation Act there were no "findings" by a Court or Tribunal about the perpetrator's conduct..

11. **The Whole Person Impairment assessment of the psychiatric injury suffered by Rebecca was certified by an Approved Medical Specialist appointed by the Personal Injury Commission as under 15% .**

12. **BUT at least the current statutory scheme allowed Rebecca to access weekly compensation and reimbursement for medical treatment when most needed. It gave her time to regather her life albeit in a different job and industry without being forced to wait for a "finding" from a Court or Tribunal completely beyond the reach of the Workers Compensation Act. The proposed amendments will deny the victims of such genuine workplace injuries basic statutory benefits of weekly compensation and reimbursement for medical treatment.**

ANNEXURE "B"

Case B - James

1. James was a formwork carpenter and was working on a building site when his workmate fell to his death from a crane.

2. James was one of the first aid officers on site. James grabbed a first aid bag from the site shed and proceeded to climb the crane to the level where the body of his work mate was situated.

3. There was blood on the ladders and he had to climb through the blood to get to his body. He assisted others rendering first aid and directed ambulance officers.

4. His work mate died at the scene that morning before lunch. Earlier on in the day of the accident, James and the deceased worker had agreed to catch up over the lunch break.

5. James became depressed and started suffering panic attacks. James took up an offer for counselling, organized by his union (the CFMEU) with Foundation Blue and had some time off work after the death.

6. James returned to work on the construction site but his depression worsened and his panic attacks became more acute and frequent. He ultimately suffered a "break down" at work resulting in him becoming totally unfit for work.

7. Following his break down James was admitted to for in-patient treatment. He was diagnosed with a Major Depressive Disorder with Anxiety. He was found to have significant suicidal ideation and placed into care.

8. James had no less than 4 admissions to psychiatric clinics for in-patient treatment and on two occasions his treatment consisted of a total of 18 sessions of electroconvulsive therapy due to his condition becoming resistant to medication.

9. James was placed under the care of treating psychiatrist and psychologist when not an in-patient and was required to take various medications for his condition.

10. At the time of the workplace death James and his wife had young children in primary school and high school. says the workplace death their lives forever.

11. James never returned to work on construction sites. He eventually managed to return to full time work albeit in a job with a substantial loss of income and a much lower risk work environment.

12. **The Whole Person Impairment assessment of the psychiatric injury suffered by James was certified by an Approved Medical Specialist appointed by the Personal Injury Commission as 17%. This is well below the proposed threshold of 30% and outside the protection of the proposed amendments purporting to protect rights of workers suffering medical conditions caused by traumatic and violent events in the workplace.**

ANNEXURE "C"

Case C - (aka Danny)

1. Danny was employed by a crane company as a rigger and dogman. Most of his working life he had spent in construction having left school early with no tertiary education. At time of his workplace accident Danny was in his 50s having spent the best part of his life working with or around heavy plant and machinery.

2. In 2018 Danny was tasked with the job of dogging a mobile crane lifting large heavy precast concrete in the construction of commercial premises. During one lift, the precast concrete panel suspended from the crane that Danny was dogging failed. The precast concrete panel snapped down the middle with pieces of concrete crumbling and suddenly swayed and fell towards Danny.

3. Danny was pinned up against the outrigger of another crane by the failed precast concrete panel that weighed in excess of a ton. He was struck in the head by the concrete pieces that crumbled rendering him unconscious. A work mate stated that when he saw Danny pinned against the crane, he was so pale that he looked "white" contrary to Danny's normal skin colour. He thought the snapped precast concete panel had cut Danny in two.

4. Danny was taken to hospital and survived the accident. After being discharged he took 10 days off work to recover from his physical injuries. He began to suffer flash backs and nightmares about the accident. He would ruminate constantly about the accident and how he could have been killed.

5. He became paranoid that his family members would be killed. He began consuming excessive amounts of alcohol. He attempted a return to work on two occasions but was gripped with such fear he could not concentrate. His GP certified him unift for work and referred him for psychological and psychiatric treatment. He was diagnosed with severe Post Traumatic Stress Disorder and Major Depression.

6. Danny's psychiatric condition continues to causes him to be depressed, he still has thoughts of suicide and is prone to angry outbursts. His sleep is frequently disrupted by nightmares and he has periods where he will have "episodes of disassociation" and not sleep for 3-4 days.

7. Danny will require medication and treatment for his psychiatric injury for the rest of his life. He requires the full time care of his family and in particular his wife Prior to his accident Danny's wife operated a childcare centre from her home. She was required to give up this business to look after Danny.

8. Danny will never work again according to many medical opinions. His wife says the accident and his psychiatric injury have aged him well beyond his years and totally compromised his physical health including his heart function for which he now receives treatment from a cardiologist.

9. **The Whole Person Impairment assessment of the psychiatric injury suffered by Danny was certified by an Approved Medical Specialist appointed by the Personal Injury Commission as 24%. This is well below the proposed threshold of 30% and outside the protection of the proposed amendments purporting to protect rights of workers suffering medical conditions caused by traumatic and violent events in the workplace.**

Submission No 42

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

Organisation: Slater and Gordon Lawyers

Date Received: 15 May 2025

Submissions to the Parliamentary Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

Submitted by
Slater and Gordon Lawyers

15 May 2025

Hon Greg Donnelly MLC
Chair, Legislative Council Standing
Committee on Law and Justice
Parliament House Macquarie Street SYDNEY
NSW 2000

Dear Chair,

Submission to the Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

Slater and Gordon welcomes the opportunity to make this submission to the Legislative Council Standing Committee on Law and Justice's *Inquiry into Proposed Changes to Liability and Entitlements for Psychological Injury in New South Wales* (the Inquiry).

This inquiry was referred to the Committee by the Treasurer, the Hon Daniel Mookhey MLC, to examine and report on the proposed changes outlined in the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025*. We understand the Committee may make recommendations as part of its final report, and we respectfully urge it to do so in a manner that protects access to justice for psychologically injured workers. We encourage the Committee to focus not only on safeguarding workers' rights, but also on addressing the underlying causes of psychological injury claims, to help ensure that any reforms contribute to a fair, sustainable workers compensation system; one that avoids creating further unintended harm for injured workers and the broader New South Wales community.

WHO WE ARE

Slater and Gordon is a leading Australian consumer law firm with a proud legacy of standing up for the rights of working people. Our mission is to deliver access to justice for all – ensuring that all Australians, regardless of income or background, can enforce their legal rights and obtain fair compensation.

For more than 90 years, we have advocated for injured workers and their families. We provide expert legal services in personal injury, workers compensation, superannuation and insurance, employment law, and class actions. Our clients come from all sectors of the economy, including healthcare, construction, education, transport, emergency services, and retail.

In New South Wales, Slater and Gordon has one of the largest specialist workers compensation teams in the state. We work closely with unions, treating practitioners, and community groups to support clients navigating the complex process of claiming entitlements. Each year, we assist thousands of injured workers – many of whom are dealing with life-altering psychological trauma.

We are values-driven, legally rigorous, and deeply committed to a fair and sustainable compensation system. We have a strong history of contributing to legal and policy reform through evidence-based submissions and constructive engagement with government. That includes active collaboration with the Australian Lawyers Alliance and other stakeholders who share our commitment to improving health and safety outcomes and ensuring justice for injured workers.

OUR POSITION

Slater and Gordon is deeply concerned by the pace at which these reforms have been introduced, particularly in the absence of meaningful consultation with the legal profession, injured worker advocates, or medical experts. To date, no data or actuarial modelling has been made publicly available to support the proposition that psychological injury claims including whole person impairment (WPI) claims are placing unsustainable pressure on the scheme. Without clear evidence that such claims are contributing to systemic pressures, the rationale for targeting them in the Exposure Draft is unclear. Greater transparency and broader consultation would support confidence in the reform process and help ensure that any changes strike the right balance between sustainability and fairness for injured workers.

We are also concerned that the proposed changes fail to address the root causes of psychological injury claims in New South Wales, including systemic issues within the public sector — such as poor return-to-work (RTW) support and management practices within NSW Government agencies and the Treasury Managed Fund (TMF). Instead, the reforms risk shifting the burden onto injured workers, limiting their entitlements and access to justice. By curtailing WPI claims, the legislation may reduce accountability for negligent employers, undermining both worker protections and broader public confidence in the system. These unintended consequences will have long-lasting effects not only on psychologically injured workers, but on the fairness and integrity of the workers compensation scheme as a whole.

Slater and Gordon supports the submission made by the Australian Lawyers Alliance and endorses its recommendations in their entirety. Our submission is intended to supplement that material by highlighting specific legal, practical and clinical concerns – particularly as they relate to the clients we represent and the scheme's frontline operation.

We are especially concerned about the proposed increase in the Whole Person Impairment (WPI) threshold for psychological injury to 31%, which would simultaneously affect access to extended weekly payments, work injury damages, and lump sum compensation. In practice, it would operate as a near-complete exclusion for workers with psychological injuries.

In addition to the WPI threshold, our submission identifies further provisions that would increase legal complexity, delay access to care, and shift discretion away from treating professionals and injured workers. We include three case studies to illustrate the real-world impact of these changes on workers whose lives have been permanently altered by psychological injury.

KEY CONCERNS

While Slater and Gordon acknowledges the NSW Government's objective of improving the financial sustainability and preventative focus of the workers compensation system, we hold serious concerns about the impact of the Exposure Draft on injured workers – particularly those suffering psychological harm. We highlight three principal issues for the Committee's consideration.

1. Narrowing the Definition of Psychological Injury

We are particularly concerned about the proposed amendment to the definition of "psychological injury" under section 8A of the Act, which would redefine psychological injury as a "mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction".

This change introduces a fundamentally different and more restrictive threshold than the current scheme and represents a marked departure from long-established common law principles that have underpinned the legal understanding and assessment of psychological injuries. Rather than focusing on clinical diagnosis and functional impairment assessed by medical professionals, the proposed definition imposes a legally ambiguous and clinically undefined threshold that dysfunction must be "significant" before a psychological injury will be recognised at all.

There is a lack of clinical clarity and practical implications: The inclusion of the term *"significant"* is undefined in the legislation and lacks clinical grounding. It creates ambiguity as to what symptoms or impairments qualify, opening the door for inconsistent interpretation by insurers and courts. Psychiatric conditions often present in varying degrees and evolve over time; symptoms may begin as "minor" but can escalate rapidly without early intervention. The revised definition ignores this clinical reality and risks delaying access to treatment and support until the condition deteriorates substantially – effectively requiring workers to become more unwell before they can seek help.

In practice, this may prevent workers from making claims in the early stages of psychological distress; (for example, exposure to vicarious trauma or cumulative work-related stress), even when prompt support would enable recovery and return to work. For example, a nurse experiencing early signs of burnout, anxiety, or trauma might currently be eligible for temporary treatment and time off. Under the proposed definition, that same nurse would not be able to lodge a claim until their symptoms had

escalated to a “significant” dysfunction at which point recovery becomes far more complex, and the costs to the system increase dramatically.

There is increased administrative burden and judicial uncertainty: This ambiguous threshold will inevitably increase administrative complexity and legal disputes. Courts and tribunals will be tasked with determining what constitutes “significant” dysfunction an inherently subjective assessment that will vary between cases, judges, and jurisdictions. These disputes will add unnecessary cost and delay to the system, strain the judiciary, and prolong workers’ suffering.

Furthermore, insurers will likely challenge claims more frequently on the basis that a worker’s symptoms are not “significant” enough to meet the threshold. This will result in higher volumes of rejected claims, internal reviews, medical disputes, and appeals. The costs associated with this increased contestation for insurers, the system, and most importantly, the injured worker are difficult to quantify but will be substantial.

There is a risk to system sustainability and financial modelling: There is also a fundamental lack of transparency about the financial or actuarial modelling that underpins this definitional change. As the ALA submission notes, one of the significant risks is that the scheme may fail to account for “latent” claims workers who initially develop minor symptoms but delay lodging a claim until their condition deteriorates and meets the new definition. Since these workers may not report their injury early (because they don’t yet meet the “significant dysfunction” threshold), there will be no accurate data on their numbers or their trajectory, making it harder for actuaries to properly model future liabilities.

This creates a paradox: while the change appears aimed at cost-containment, it may actually increase long-term costs by encouraging delayed claims, worsening injuries, and generating more complex and expensive claims over time. These so-called “long-tail” claims are more difficult to manage and costlier for the scheme.

The proposed definition also risks arbitrarily excluding workers who have sustained legitimate psychological injuries that do not manifest in traditionally defined “significant” dysfunction. These could include injuries caused by:

- chronic overwork (such as in hospitals or emergency services);
- high-stress environments leading to gradual psychological breakdown; and/or
- customer abuse or repeated low-level workplace stressors.

Under the current framework, these scenarios can give rise to compensable injuries if supported by medical evidence. Under the new definition, they may be excluded entirely, not because they aren’t real injuries, but because they don’t meet a subjective threshold imposed by law rather than medicine.

Recommendations:

We strongly urge the Committee to reject the proposed redefinition of psychological injury under section 8A. The current, clinically grounded approach allows treating professionals to assess psychological harm in a nuanced and case-sensitive manner. Introducing the term “significant dysfunction” without clear clinical criteria, legal precedent, or actuarial backing will only serve to delay treatment, increase disputes, elevate system costs, and harm workers.

In our submission, if any changes are to be made to the definition of psychological injury, they must:

- *be based on robust clinical evidence and actuarial analysis;*
- *preserve access to early treatment and return-to-work pathways;*
- *avoid imposing arbitrary thresholds that exclude legitimate injuries; and*
- *minimise the administrative and judicial burden by offering clear, objective criteria.*

We also support the ALA's call for expert psychiatric evidence to be presented to the Committee regarding how psychological injuries are diagnosed, how symptoms progress, and the consequences of delaying treatment.

2. Excessive WPI Threshold for Psychological Injuries and the Impact on Common Law Rights

The proposed increase of the Whole Person Impairment (WPI) threshold for psychological injuries to **31%** represents a fundamental and unjustified restriction on access to key workers compensation entitlements. This change would significantly limit access to:

- weekly payments beyond 130 weeks (s 39A);
- medical and treatment expenses beyond one year from claim or weekly payment cessation (s 59A);
- lump sum compensation for permanent impairment (s 65A and s 66); and
- work injury damages (WID) claims for employer negligence (s 151H).

We do not support the 31% WPI threshold for the following reasons:

(a) 31% WPI is functionally unattainable and exclusionary

Under the *Psychiatric Impairment Rating Scale* (PIRS), only the most extreme cases of psychiatric injury typically involving near-total incapacity, residential care, or complete social withdrawal reach or exceed 31%. Workers suffering from major depressive disorder, PTSD, or anxiety disorders even when permanently disabling rarely meet this threshold. The current 15% standard is already stringent and ensures only seriously injured workers are eligible for compensation.

Raising the threshold would exclude the vast majority of workers with legitimate psychological injuries from accessing the support and remedies they need.

(b) No evidence or data supports this change

There is no clear data or evidence in the Exposure Draft or supporting materials to demonstrate that common law claims are driving cost pressures in the NSW workers compensation scheme. To the contrary, publicly available information and stakeholder experience strongly suggest that the financial strain stems primarily from the no-fault statutory scheme, particularly the growing volume of long-tail psychological injury claims and declining return-to-work rates, especially within the Treasury Managed Fund (TMF), which covers government employees.

In the absence of detailed financial modelling or actuarial analysis disaggregating the cost impacts of statutory versus common law claims, it is premature and unjustified to increase the WPI threshold for accessing common law remedies.

(c) Raising the threshold will increase costs, not reduce them

Counterintuitively, this proposal could increase the long-term cost burden on the scheme by keeping psychologically injured workers trapped in the statutory system for longer periods without closure. In contrast, common law claims often resolve disputes earlier, enabling workers to exit the scheme entirely and move forward. This can:

- Reduce long-tail liabilities;
- Lower the overall cost of medical and income support;
- Improve psychological outcomes for workers;
- Provide greater certainty for employers and insurers in premium setting.

(d) This reform would erode the deterrent effect of common law and reduce employer accountability

Access to common law damages serves a broader public purpose and holds negligent employers accountable and incentivises safer workplace practices. Raising the threshold to 31% WPI would severely undermine this deterrent, removing any real consequence for employer negligence in the majority of psychological injury cases. The long-term implications for workplace psychological safety and public sector risk exposure are significant.

(e) The Government's attempt to align with other jurisdictions is flawed

Impairment thresholds across jurisdictions are not directly comparable. Other states use different impairment assessment tools, legal frameworks, and medical standards. Transplanting a 31% threshold into NSW without accounting for these differences will only deepen systemic inequities and create further confusion.

The 31% threshold is not just an actuarial decision, it is a policy shift that will have lasting consequences for vulnerable workers, psychological safety standards, and the sustainability of the compensation scheme itself. We urge the Committee to approach this issue with caution, and to prioritise fairness, evidence, and public accountability in its recommendations.

Client Case Studies: The Human Impact of a 31% WPI Threshold

The following case studies illustrate the profound consequences of raising the WPI threshold for psychological injuries. Each worker below has been assessed at under 20% WPI, yet suffers from severe, permanent psychiatric injuries that have left them unable to work or function in daily life. Under the proposed 31% threshold, all of these individuals would be excluded from accessing the very benefits intended to support them.

'Dylan' (Sales Manager), WPI: 17%

Dylan sustained a psychological injury due to prolonged workplace bullying, including verbal abuse, threats, and exclusion. He was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood, requiring ongoing psychiatric treatment and multiple hospital admissions. He is now severely incapacitated, reliant on his wife for daily care, and socially withdrawn. Despite the enduring nature of his condition, Dylan would be excluded from common law damages under the proposed 31% WPI threshold, illustrating the harsh impact on workers with serious but sub-threshold impairments.

'John' (Retail Manager), WPI: 19%
John developed Post-Traumatic Stress Disorder after witnessing a fatal workplace accident in which a colleague was crushed by machinery. He had worked in the industry for nearly 30 years and had recently undertaken training to expand his skills. Following the incident, he experienced severe psychological symptoms including flashbacks, suicidal ideation, and anxiety, leading to hospitalisation. John has not returned to work and remains reliant on his partner for day-to-day care. His case shows that, under the proposed changes, a worker exposed to an extreme and traumatic workplace event – with enduring consequences – would not meet the threshold for ongoing compensation or support.

'Sarah' (Primary School Teacher), WPI: 20%
Sarah was employed at a NSW government primary school when she sustained multiple psychological injuries, including Major Depressive Disorder with psychotic and paranoid features, resulting from prolonged workplace bullying and unfounded allegations. In 2018, she attempted suicide and underwent an eight-week inpatient stay. Since that time, she has been unable to care for her children independently or leave her home without assistance and remains dependent on her husband for daily living support. Her case illustrates that, under the proposed reforms, a worker with severe, permanent psychological impairment would not be eligible for ongoing entitlements or work injury damages.

Recommendations:

We urge the Committee to:

1. *Reject the proposed 31% WPI threshold for psychological injuries. It is functionally unattainable for the vast majority of affected workers, clinically inappropriate, and unsupported by evidence.*
2. *Maintain and preserve the current 15% WPI threshold, which already filters out less serious claims and ensures only workers with substantial, lasting impairments can access lump sum compensation and common law remedies.*
3. *If the Committee considers reform necessary, the Government should:*

a) *Release comprehensive modelling and disaggregated data on the cost drivers of scheme instability — specifically distinguishing between statutory and common law claims.*
b) *Consider a lower threshold (e.g. 21% WPI) as a compromise, although we maintain this is still too high and may continue to exclude many genuinely injured workers.*
c) *Explore a tiered system that reflects both the severity and permanency of injury, rather than relying on a blunt numerical cut-off.*
d) *Preserve access to common law for those injured due to employer negligence, a foundational principle of our civil justice system that promotes both fairness and deterrence.*

3. Lack of Transitional Provisions and Uncertainty Around Retrospectivity

The Exposure Draft does not contain any transitional provisions, nor does it make clear whether the proposed reforms will apply prospectively to new claims only, or retrospectively to existing claims and entitlements. This omission creates substantial legal and practical uncertainty for thousands of workers who are currently receiving weekly payments, treatment, or pursuing claims for compensation based on the current legislative framework.

There is no clarity around whether:

- the new 130-week limit on weekly payments for psychological injuries (s 39A) will apply to current recipients;
- the proposed 31% WPI threshold will apply only to newly injured workers or also to those already in the system;
- current “exempt” workers, such as emergency service personnel, will continue to retain existing protections or be brought under the new regime.

The absence of transitional provisions raises serious concerns about the fairness and legality of retrospective application. Applying these reforms to current claims would result in the sudden removal of entitlements from workers who have relied on the existing system, potentially cutting off income and medical treatment overnight. This would not only be unjust but could give rise to legal and constitutional challenges, particularly where workers’ rights have vested under existing law.

Retrospective laws that strip individuals of existing legal entitlements without proper notice or justification are inherently unfair. Workers who are already psychologically injured – often as a result of employer negligence – should not have the rules changed mid-way through their recovery or claim process.

Recommendation:

We urge the Committee to recommend the inclusion of clear and robust transitional provisions that protect the rights of current workers and ensure that no part of the proposed reforms apply retrospectively or to the exempted category of workers. The legislation should apply only to new claims made after the commencement date, and transitional arrangements should be explicitly set out to avoid legal uncertainty, unnecessary disputes, and further harm to injured workers.

4. Definition of "Relevant Event" and Jurisdictional Concerns with the IRC

The Exposure Draft introduces a new requirement that, in order for a psychological injury caused by bullying, sexual harassment, or racial harassment to be compensable, a tribunal, commission or court must make a factual finding that the worker was subjected to a "relevant event" as defined in proposed section 8E. Specifically, conduct such as bullying, racial harassment, or sexual harassment will only be considered a relevant event if a tribunal, commission or court has made a prior determination affirming that such conduct occurred.

This change represents a fundamental shift in how psychological injuries linked to workplace harassment are treated under the workers compensation scheme. It requires workers to first litigate the facts of their injury mechanism, often in a separate jurisdiction, before they can access even basic entitlements like weekly payments or treatment.

From the Explanatory Note, it appears that these factual determinations will fall to the Industrial Relations Commission (IRC). However, the IRC is not traditionally equipped either procedurally or culturally to manage highly sensitive, trauma-informed matters involving sexual harassment, racial harassment, or bullying. These matters frequently involve vulnerable witnesses, complex psychological evidence, and power imbalances, and are more appropriately handled by bodies with specialist jurisdiction, such as the NSW Civil and Administrative Tribunal (NCAT) or the Federal Circuit and Family Court of Australia.

There are serious procedural, legal and practical concerns about this approach:

- The legislation provides no detail on how IRC proceedings will operate: whether workers or employers will be entitled to legal representation; whether costs orders will be available; whether evidence can be tested or cross-examined; and whether decisions will be binding or appealable.
- The proposed model may require injured workers to engage multiple legal representatives one to run the IRC matter and another to pursue the workers compensation claim creating confusion and increasing costs for both parties.
- If workers are self-represented, as is likely in the IRC, the process may cause additional psychological harm, particularly where workers must directly face or be cross-examined by their alleged harasser.
- The prospect of needing a tribunal finding before a claim is accepted will result in delays, during which no compensation is payable. For a psychologically injured worker, this gap in support is not only medically counterproductive but may risk further deterioration or harm.
- The risk of issue estoppel and evidentiary consequences for future common law claims is high and workers may inadvertently prejudice their civil claims by participating in proceedings with different procedural rules or evidentiary standards.
- There is no explanation has been provided for why only sexual harassment, racial harassment, and bullying are included often ignoring other forms of discrimination or psychological harm, such as that based on age, disability, gender identity, or religion.
- This system is not only procedurally confusing and duplicative, but it runs contrary to the principles of trauma-informed justice. It adds complexity and delay to an already difficult process for vulnerable workers and risks significantly undercutting access to compensation for survivors of workplace harassment.

We also adopt and support the concerns raised by the ALA, which have similarly emphasised the procedural gaps, lack of jurisdictional clarity, and potential for re-traumatisation embedded in this proposed model. The ALA has further pointed out that it is unclear why these claims could not be dealt with within the existing Personal Injury Commission (PIC) jurisdiction, through an expedited process with proper representation and oversight. This would provide a more coherent, efficient, and fairer model for handling such claims.

Recommendation:

We recommend that the Committee:

1. *Urge the Government to reconsider the requirement for prior factual findings by a tribunal, commission or court before allowing a psychological injury claim based on workplace harassment.*

2. *If such a requirement is retained, the Government must ensure that:*

a) *A dedicated, properly resourced, trauma-informed jurisdiction is established or designated (e.g. a specialised harassment division within the PIC);*
b) *Legal representation is guaranteed for workers and employers;*
c) *Procedural fairness and protections (e.g. from direct cross-examination) are built into any hearing process;*
d) *Interim benefits (such as treatment and provisional payments) are made available prior to the final finding;*
e) *A flexible limitation period is provided, with scope for extension in appropriate circumstances.*

Without these safeguards, the proposed "relevant event" requirement risks delaying justice, denying access to entitlements, and compounding the trauma experienced by psychologically injured workers.

5. Definition of "Reasonable and Necessary" Medical Treatment (s60 and s60AA)

The Exposure Draft replaces the long-established "reasonably necessary" test for medical expenses with a new requirement that treatment be "reasonable and necessary". Although similar on the surface, this shift in language may enable insurers to impose stricter standards for treatment approval.

The dual qualifier invites semantic arguments (e.g., that treatment is reasonable but not necessary), which may increase disputes, particularly in cases involving psychological care, domestic assistance or longer-term therapies.

Recommendation:
That the Committee recommend either retaining the existing "reasonably necessary" standard or requiring the Government to provide detailed justification – grounded in case law or cost-benefit evidence – for the new test, including assurance that it will not be interpreted more restrictively in practice.

CONCLUSION

Slater and Gordon supports the goal of a more sustainable, effective, and accessible workers compensation scheme in New South Wales. However, the proposed reforms raise serious concerns – both in substance and process – that risk undermining the rights and recovery of psychologically injured workers.

These sweeping changes have been introduced without meaningful consultation, engagement with legal or medical stakeholders, or transparency around the data and modelling said to justify them. In the absence of this evidence, it remains unclear whether the reforms are a targeted response to cost drivers or a blunt policy shift likely to result in inequitable and harmful outcomes.

The proposed increase in the WPI threshold for psychological injuries to 31% is particularly troubling. It is functionally unattainable for most workers, regardless of severity, and would exclude them from four key entitlements – including income support, medical treatment, lump sum compensation, and access to common law damages. No comparable threshold exists for physical injuries, making this a discriminatory and regressive measure without a clear evidentiary basis.

Additional changes in the Exposure Draft risk legal uncertainty, delayed intervention, and poorer outcomes for injured workers. These include a narrower definition of psychological injury, jurisdictional

shifts to unsuitable forums, capped benefits irrespective of need, vague legal tests, and increased thresholds without clinical or financial justification.

This package represents a significant move away from a therapeutic, evidence-based approach. Far from addressing the root causes of scheme pressure – such as poor injury management and return-to-work rates in the public sector – it may exacerbate harm to some of the most vulnerable members of the NSW workforce.

We therefore urge the Committee to recommend the publication of all data, modelling, and impact assessments underpinning these reforms. If that evidence does not exist, the reforms should not proceed.

Overall Recommendations

Slater and Gordon respectfully recommends that the Committee:

1. *Reject the proposed 31% WPI threshold and retain the current 15% standard—particularly for common law claims;*
2. *Remove or substantially amend provisions that restrict access to benefits without evidentiary support or clinical rationale;*
3. *Treat psychological injuries with parity to physical injuries across all entitlements and legal pathways;*
4. *Publish all relevant modelling, data, and financial assumptions used to support the proposed reforms; and*
5. *Ensure adequate transitional provisions to protect existing workers and prevent retrospective harm.*

Every day, people leave their homes and families to contribute their labour for the benefit of their employers including the NSW Government. To now propose that these same individuals be denied basic rights when they suffer a psychiatric injury in the course of their work is not only unjust, but fundamentally out of step with contemporary medical understanding and the expectations of a fair and decent society.

We thank the Committee for the opportunity to contribute to this Inquiry and stand ready to assist further including through anonymised case examples, expert clinical evidence, and detailed commentary on scheme design and function.

Yours faithfully,

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Submission No 18

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

Organisation: Australian Lawyers Alliance (ALA) NSW

Date Received: 15 May 2025

Proposed changes to liability and entitlements for psychological injury in New South Wales: Exposure Draft - Workers Compensation Legislation Amendment Bill 2025

Submission to the Standing Committee on Law and Justice, Parliament of NSW

15 May 2025

Level 7, 321 Kent Street, Sydney NSW 2000 I GPO Box 7052, Sydney NSW 2001 I **ABN** 96 086 880 499

Protecting and promoting justice, freedom and the rights of the individual.

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Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Standing Committee on Law and Justice ('Standing Committee') on the NSW Government's proposed changes to liability and entitlements for psychological injury, as detailed in the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW) ('Exposure Draft').

2. The media release accompanying the Exposure Draft asserts that there had been "[r]ounds of formal consultation" that began in March 2025. Insofar as the ALA is concerned, there has been no formal consultation in relation to any proposed changes to the workers compensation system in NSW. Any such consultation with the ALA could only have been said to have occurred through the media. The ALA understands that there has been very limited consultation with the legal profession.

3. ALA members, as legal practitioners who represent injured workers, are extremely concerned about the changes proposed in the Exposure Draft and the impact those changes will have on all injured workers in NSW. The ALA submits that the changes proposed in the Exposure Draft are significant and will impact all workers injured physically or psychologically in NSW. All injured workers will face increased and unnecessary obstacles in accessing the support those workers need to recover and return to work. ALA members are very concerned that a significant number of injured workers in NSW will have no entitlement to claim compensation and seek the support they need, if the changes in the Exposure Draft are enacted.

4. Instead of drastically stripping away rights from injured workers, the ALA contends that the NSW Government should instead be progressing measures which address prevention of injuries (both physical and psychological) in workplaces across NSW, as well as measures which support the rehabilitation and return to work for workers who are injured in NSW.

5. With regards to the Terms of Reference for this inquiry, the ALA's submission will address the following matters:

    a. The overall financial sustainability of the NSW workers compensation system; and

    b. The provisions of the Exposure Draft, specifically:

        i. General observations from ALA members;

ii. Definition of psychological injury;

iii. Sexual harassment, racial harassment and bullying;

iv. A Principal Assessment;

v. “Reasonably necessary” versus “reasonable and necessary”;

vi. WPI threshold, including the WPI threshold and common law entitlements;

vii. Further assessment;

viii. Commutations;

ix. Death benefits;

x. Increased disputation; and

xi. Legal costs.

The overall financial sustainability of the NSW workers' compensation system

6. At the outset the ALA acknowledges that psychological injuries have increased and continue to increase across the scheme. The ALA acknowledges that there is a need to bring these costs down but we have not been provided with sufficient information and data for us to meaningfully comment on the specific drivers of the increased costs and how the Exposure Draft addresses those drivers to improve the overall financial sustainability of the NSW workers compensation scheme.

7. The practical experience of ALA members is that psychological harm in workplaces is a serious and widespread issue arising from poor systems of work and management. Rather than eliminating compensation rights, the ALA contends that the workplace problems leading to injuries need to be addressed.

8. The observation that we can make is that the Exposure Draft does not seem to take a nuanced approach to solving the problem, as we would have hoped, but rather appears to

slash benefits and introduce barriers to accessing those entitlements across the board in a shotgun approach aimed at solving the problems.

9. If one were to take a more nuanced approach to the solution, the starting point would be to consider the evidence and findings of the 2023 Standing Committee Review of the Workers Compensation Scheme ('2023 Review'). As current members of this Standing Committee would be aware, the 2023 Review paid particular attention to the rise in psychological injuries. It was clear then, as it is clear now, that the increasing psychological claims are particularly pronounced for the Treasury Managed Fund (TMF) as compared to the Nominal Insurer, self-insurers or specialised insurers.

10. The ALA contends that nothing has changed.

11. If the increasing costs of the TMF is the true driver of the wide-ranging reforms in the Exposure Draft, then the ALA submits that the NSW Government, as an employer, should work to get its house in order before attacking the benefits of all workers. As the employer of the largest group, the NSW Government should be leading by example on providing safe workplaces, injury management and return to work options for their employees. Serious psychological injuries are not restricted to exempt workers. Workers all over the state and in many industries are affected by serious psychological injuries suffered in the workplace.

12. Over the years there have been many recommendations aimed at improving the return to work rates of the TMF, recommendations which have yet to be implemented. For example, in the 2023 Review, this Standing Committee recommended:

> Recommendation 6
> That the NSW Government:
> - investigate and look to implement opportunities to support injured public sector workers to return to work.
> - develop a whole of government return to work strategy for the public sector to facilitate the placement of staff who have sustained an injury, in particular a psychological injury, but cannot return to their usual workplace.

13. Far too little work has been made on these recommendations. We still have a nurse suffering from an injury in one public hospital unable to return to suitable duties in another public hospital, or an injured teacher unable to return to suitable duties at another public school.

14. It is unacceptable for the NSW Government to fail to manage its own workplaces, to the extent that it has, only for the NSW Government to come to the people of NSW, not to announce

how they are going to do better as an employer, but to strip away the rights of all injured workers. The people of NSW should be outraged that they will be picking the tab for this failure.

15. If the Exposure Draft is introduced and passed without amendment, the ALA anticipates that it could improve the financial position of the scheme but that would be at enormous costs to the injured worker. A cost, the entirety of which, should not need to be incurred.

The provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025

16. Unfortunately, one of the consequences of removing the peak legal bodies from the consultation process and then providing a short time frame to review and comment on an Exposure Draft that contains significant and complex changes to an already complex legislative framework, is that there is insufficient time for the ALA to consider the Exposure Draft as carefully as would be required to identify and advise on any unintended consequences.

17. Our general observation is that, taken as a whole, this package goes too far and brings a sledgehammer to solve a problem that may be solved with a hammer. The proposal does not place one hurdle in front of workers to obtain benefits – it actually places multiple hurdles. The combined effect of which is to make it so hard to obtain compensation that it would be simpler and less cruel if the NSW Government were to simply state that it intends for no one to claim compensation for a psychological injury.

18. The ALA appreciates the intent behind the amendments, but the pendulum will swing too far away from the system objectives of supporting injured workers. Our submission seeks to draw out a discussion on what we see as some of the key issues that should be considered by the Standing Committee. Failure to comment on any single provision should not be taken as an expression by the ALA that it supports or endorses it.

19. Hopefully, these submissions assist the Committee in understanding the perspective of our members and the injured workers of NSW. We encourage the Standing Committee to have the courage to make recommendations to the NSW Government that will result in a more nuanced solution being adopted. Or at the very least an incremental approach to solving the problem that does not decimate the rights of injured workers and their families.

Definition of psychological injury

20. The Exposure Draft proposes to introduce section 8A creating a definition of psychological injury. Given the significant impact of this proposed section, it is worth setting it out in full:

> *In this Act, **psychological injury** means an injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction.*

21. That is, a worker in NSW does not even have an injury unless and *until* they have a "mental or psychiatric disorder" that causes "**significant** behavioural, cognitive or psychological dysfunction" [emphasis added]. It is not medically possible for significant behavioural, cognitive or psychological dysfunction to be immediately obvious following a traumatic event. A worker will therefore have no "injury" to report or claim they can make until such time as their behavioural, cognitive or psychological dysfunction is 'significant'. In some cases, this could take weeks or months to appear and be present. When a claim is lodged it will make the insurer's investigation of the claim significantly more difficult as a result of the passage of time. Witnesses may no longer be available and where they are recollections may no longer be clear.

22. The term "significant" will ultimately be a matter for judicial interpretation but it is clear that inclusion of the term is intended to raise the bar and exclude minor behavioural, cognitive or psychological dysfunction. Defining "minor" will likely also create further obstacles for injured workers. One of the challenges with adopting this approach is that minor symptoms, without treatment, develop into significant symptoms.

23. Take, for example, a nurse who through significant work pressure and vicarious trauma of working in a challenging environment begins to develop minor symptoms. With a short time off work and treatment, the nurse would be able to return to work in a reasonable timeframe, whilst undergoing the treatment. With the new definition of psychological injury, that nurse will not have an 'injury' and will be prevented from accessing treatment and wage support, therefore most likely prolonging the symptoms and hindering any return to work.

24. The ALA would encourage this Standing Committee to call for expert evidence from a psychiatrist as to the expected impact on injured workers in not receiving the treatment that they need at an early stage, as well as in relation to how diagnoses are made and the usual timeframes required before diagnoses can be made. The experience of ALA members and their clients tells us that we should expect that the nurse will continue to push on until they

eventually reach breaking point at which time the system has turned an employee with minor impairment and symptoms into a worker who is likely to face significant challenges in returning to work and ultimately become a long tail claim for the scheme to have to finance.

25. Further, the ALA submits that the combined effect of proposed sections 8G and 8E is that there is no compensation payable for a primary psychological injury outside of the "relevant event(s)" identified by proposed section 8E. That means there would be no compensation payable for psychological injuries caused, for example, by:

    a. overwork (for example, doctors and nurses);

    b. a single event, regardless of how serious (short of violence or criminal conduct – see more below regarding the definition of bullying); or

    c. abuse from customers or clients of a business.

26. It is unclear to the ALA how the scheme actuaries can properly assess the financial risk to the scheme of workers who develop minor symptoms potentially developing into a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction. These will be workers who have not lodged a claim as they do not meet the definition of 'psychological injury' but may later lodge a claim once their symptoms are 'significant'. Because they haven't lodged a claim or made notification of injury there will be no record of how many workers of this type there are. Failure to properly assess that risk will result in the scheme being potentially over or under funded in years to come and result in further amendments needing to be made.

Sexual harassment, racial harassment and bullying

27. The effect of proposed sections 8E and 8G is that a worker who is subject to bullying, racial harassment or sexual harassment is required to prove that conduct in a tribunal, commission or court.

28. There has been too little information provided on exactly how this will work for the ALA to have specific comments on how the system will work. We understand from the Explanatory Note that there will be another bill to follow that will contain more detail and somehow puts

the jurisdiction in the Industrial Relations Commission of New South Wales (IRC). For now, we make the following observations:

a. We assume that the worker and the employer will both be unrepresented at the IRC.

b. It is unclear what incentive there would be for the employer to turn up and engage in the proceedings at the IRC.

c. Whilst the IRC is typically a no costs jurisdiction it is unclear if the either party will be entitled to representation and if the successful party will obtain a costs order.

d. If representation is anticipated, it is unclear whether any consideration has been given to the fact that these changes may result in a worker needing two separate lawyers – one for the IRC proceeding and one for the workers compensation claim.

e. Regardless of whether the worker and/or employer will be entitled to representation there will be an increase in costs on the employer. This will occur either through increased legal costs or loss of productivity with the employer representing themselves.

f. It is unclear if the decisions of the IRC will be appealable.

g. It is unclear if there will be estoppel issues that arise from decisions of the IRC and bind employer (and consequently the WC insurer later on).

h. It is unclear how evidence will be taken and if there will be a right of cross examination. Would this allow an employer to directly cross examine a worker who has accused them of sexual harassment, racial harassment or bullying.

i. It is likely to add trauma to an employee who has to engage in litigation directly with their employer.

j. If there is no legal representation at the IRC then the case management of large numbers of unsophisticated self-represented applicants with psychological symptoms will prove challenging.

k. It will effectively ensure that any employee who lodges an application will not return to work with their employer.

l. It is unclear why the Personal Injury Commission could not resolve disputes of this nature through an expedited application process with the employee and employer being represented by solicitors and the insurer maintaining some input into how the matter is, or is not, defended. The idea of having a "one stop shop" to resolve disputes involving workers compensation is nothing new and has been the subject of recommendations by the Standing Committee in the past.

A Principal Assessment

29. The Exposure Draft introduces the concept of 'Principal Assessment' into the workers compensation scheme. It appears that the idea for these amendments has its genesis in complaints made by icare that a settlement by way of complying agreement does not have the same force as those disputes resolved by way of assessment by the Personal Injury Commission. If that was the concern the problem can be solved by methods other than the adoption of 'principal assessments'

30. The initial, fundamental, problem with principal assessments is that SIRA should not, in any way, be actively involved in dispute resolution. This has been discussed at length in the 2015 Standing Committee Review of the Workers Compensation System ("2015 Review") and the ALA refers this Committee to the findings of that review. SIRA is the regulator and dispute resolution should be left to the parties or, failing that, the judiciary.

31. A further problem arises from the complex nature of assessment of whole person impairment under the AMA V. The way the provisions are currently set out appears to contemplate that neither the worker nor the insurer will have the ability to obtain their own independent medical assessment for the purposes of trying to resolve the dispute. It is not always easy for a lawyer, let alone an unsophisticated injured worker, to fully appreciate what ratable impairment they may have without having obtained expert medical evidence. Without that independent expert evidence injured workers are likely to miss out on ratable impairments simply because they are not aware that they should be seeking agreement with the insurer to be referred for assessment.

32. The proposed section 153H(3) refers to items that 'must' be agreed between the parties before the principal assessment can occur but does not seem to provide any guidance on how a dispute will be resolved where one of the items cannot be agreed. Is it intended that SIRA

would resolve the dispute, or is it intended that an application will be made to the PIC? Disputes of this nature are currently resolved in the PIC by a member with the benefit of expert medical evidence being relied upon by the parties.

"Reasonably necessary" versus "reasonable and necessary"

33. The Exposure Draft replaces "reasonably necessary" with "reasonable and necessary" in sections 60 and 60AA for treatment and rehabilitation expenses as well as domestic assistance. This applies to all injured workers.

34. It appears that these amendments adopt the recommendations in the *icare and State Insurance and Care Governance Act 2015 Independent Review (McDougall Review)*, which suggests that the "reasonably necessary" test has led to poor outcomes and the funding of low value treatments. However, there does not appear to be any data to support this.

35. This amendment will make it more difficult for <u>all</u> injured workers to access treatment and therefore hinder their rehabilitation as well as their chances of returning to work. It sets a higher bar than the "reasonably necessary" test, without a clear benefit to injured workers.

36. It is submitted that if the "reasonable and necessary" test is adopted, that the entitlement to treatment and care should be extended, and not remain dependent on the receipt of weekly benefits or on a worker's degree of permanent impairment. It should be based on the injured worker's needs and the benefits to be gained from the treatment and care.

WPI threshold

37. The Exposure Draft limits weekly payments to 130 weeks for psychological injuries, unless the worker's degree of permanent impairment is at least 31% (sections 38, 39 and 39A).

38. The Exposure Draft also prevents workers with psychological injuries from making lump sum permanent impairment claims and from making work injury damages claims, unless their degree of permanent impairment is at least 31% (sections 65A and 151H).

39. In commenting on the effect of thresholds and the entitlement to one claim, the independent reviewer observed in his report that (at page 269, paragraph 111):

> *It is hardly surprising to learn that this encourages workers to put off the assessment for as long as possible.*

40. Putting off the assessment for as long as possible has the effect of creating uncertainty for participants in the scheme and uncertainty for the actuaries looking to set premiums. It is akin to the uncertainty that the scheme currently endures with respect to the unknown number of workers who may return for payments following a section 39 dispute. Continuing in his analysis the independent reviewer also observed (at page 269, paragraph 112):

> *It is also hardly surprising that the deferral of WPI assessment might lead to unnecessary medical interventions during the period when compensation is available. Workers with an injury that may or may not require further medical treatment in future years have an obvious and understandable incentive to seek that treatment during the period, rather than waiting to see if it is needed.*

41. The ALA anticipates that workers will delay their assessment until they can be confident they will have reasonable prospects of success in reaching the 31% threshold.

42. No doubt this Committee will hear a number of submissions from stakeholders about how few workers are currently assessed at 31% WPI or higher in the current system. That is, injured workers who are being provided the treatment and financial support they need are typically assessed lower than 31% WPI.

43. Moving forward we will not be operating in the current environment. We will be operating in an environment where workers who do not meet the 31% threshold will be cut off. They will be isolated, without treatment and without financial support from the workers compensation system. They will be left to fend for themselves.

44. The ALA encourages this Standing Committee to seek the expert opinion of psychiatrists on what they anticipate will be the impact on injured workers cut off from their benefits. The experience of our members tells us that those who are isolated and without treatment are at risk of rapid deterioration. As this Standing Committee would no doubt be aware there have been a number of reported suicides attributable to workers being cut off from benefits that flowed from the 2012 amendments. There is no reason to believe that the same risks will not surface here.

45. It is submitted that these amendments are likely to eliminate most claims for psychological injuries. In the experience of our members, workers with psychological injuries are rarely assessed as having a degree of permanent impairment that is at least 31%. Reaching a degree

of permanent impairment of at least 31% for a psychological injury is near impossible. That is not because psychological injuries do not cause significant disabilities and incapacities. The rarity is more of a reflection of the restrictions imposed by the Psychiatric Impairment Rating Scale (PIRS) used to assess whole person impairment arising from psychological injuries. Indeed, there are many examples of workers with an agreed or assessed degree of permanent impairment of 15% or less that are suffering from permanent incapacity due to their injuries and have not been able to return to any form of work.

46. Comparing the threshold adopted in one state versus another is problematic as not all states adopt the same assessment criteria. 31% in one state can mean a very different experience compared to 31% in another state.

47. Our members routinely represent injured workers who are unable to return to work at all or in any capacity resembling their pre-injury capacity, due to the far reaching and permanent impact of their psychological injuries. To restrict their ability to continue to receive weekly payments beyond 130 weeks and to make claims for lump sum permanent impairment compensation, will result in significant disadvantage to these workers.

48. Moreover, many psychological injuries arise from the negligence of employers in failing to implement safe systems of work and failing to address bullying and harassment. To prevent workers with psychological injuries from making work injury damages claims unless their degree of permanent impairment is at least 31% will likely result in a decline in work health and safety measures, rather than improvement.

49. It is submitted that if amendments are made to the above mentioned sections, the threshold of at least 21% permanent impairment should be considered. While the threshold of at least 21% is also difficult to meet, it would not have the far reaching disadvantageous consequences of the proposed “at least 31%”.

The WPI threshold and common law entitlements

50. The proposed amendments to section 151H(2) provides for an increase in the threshold required to make a common law damages claim to 31% WPI.

51. As pointed out above, increasing the threshold for (including for work injury damages)creates uncertainty and unintended consequences. The solution to the uncertainty and lack of

support is to maintain the threshold for work injury damages of at least 15% WPI. There is no reason why the threshold for common law damages needs to be increased.

52. It is the long tail nature of the scheme and the falling return to work rates for injured workers with psychological injuries that has increased year on year and is putting the financial pressure on the scheme. The ALA has not seen a single submission by any stakeholder that it is the number of common law claims causing the financial pressure. Allowing workers to bring a common law claim:

    a. reduces the psychological impact on injured workers by giving them closure, removing them from the scheme, and thereby allowing them to move on and reduce the burden on the public.

    b. closes the loop on the claim thereby reducing uncertainty in premium setting by knowing workers will not comeback many years later to assert they have reached the 31% threshold.

Further assessment

53. Restriction to one assessment and one claim was first introduced in the 2012 amending legislation. Even before its introduction there was concern that restricting workers to one assessment would cause problems. The Joint Select Committee in its 2012 Report stated:

> *[t]he Committee however believes that in some isolated cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition.*

54. The Joint Select Committee recommended as follows:

> *That the NSW Government ensure that, under the Workers Compensation Scheme, after the determination of a claim for whole person impairment, only [sic] up to two further claims be permitted and in each case only if there has been a deterioration of whole person impairment of at least 5 per cent since the last determination.*

55. Over the years that followed many submissions have been made and considered. Once such review that considered the issue was the Independent Review of the icare and *State Insurance and Care Governance Act 2015* by the Hon Robert McDougall QC. In his report, following careful consideration made the following recommendation:

> *That the legislature give consideration to amending the Workplace Injury Management and Workers Compensation Act 1998 to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.*

56. The issue was once again the focus of consideration during the 2023 Review in which the following recommendation was made:

> *That the NSW Government considers amending the workers compensation legislation to:*
> - *enable a further assessment of whole person impairment where there has been a significant deterioration in relation to an injury.*
> - *ensure there is a consistent threshold for whole person impairment regardless of whether the injury is physical or psychological in nature.*

57. The ALA supports this recommendation, and we note that the NSW Government's response was to support it in principle.

58. The point of contention is how you define "significant deterioration". The Exposure Draft seeks to do this by adopting the language "unexpected and material deterioration" and limits defining it to only occur if

> *(a) At the time the original principal assessment there was no reasonable cause to believe the worker's condition would deteriorate, and*
>
> *(b) The deterioration results in an increase in the worker's degree of permanent impairment of at least a further 20 percentage points.*

59. The first issue arises in subsection (a) around whether 'there was no reasonable cause to believe the worker's condition would deteriorate'. In many cases this will effectively rule out access to a further assessment on the basis that most deteriorations can be reasonably foreseen. For example, a worker who has had a left knee replacement and is advised that in due course he is likely to sustain damage to the right knee due to overuse will, if that comes to pass, be unable to establish that there was 'no reasonable cause to believe' their condition would deteriorate.

60. The ALA anticipated that these provisions will result in increased disputation around what the question whether there was or was not reasonable cause to believe. Presumably these disputes would need to occur before the further principal assessment occurs.

61. The second issue arises in respect to the requirement to establish a further 20% WPI. With the threshold to make a lump sum claim under section 66 for a physical injury currently sitting at 11% WPI the requirement to establish a further 20% WPI before a further principal

assessment is made is so unreasonably high to effectively be meaningless and near impossible. With a proposed threshold of 31% in psychological claims a further 20% would be so high as to effectively make it impossible. In either case this change would only open further assessments up to workers with highest needs.

62. As stated above, from as far back as 2012 consideration had been given to opening up of a claim for deterioration of at least 5% WPI. No sound policy reason has been given as to why 20% has been adopted in this bill and we can only assume it has been put there to create the illusion of an entitlement of a right to a further deterioration. The ALA submits that the 20% threshold is so high as to be capricious and does not meet the spirit of the recommendations previously made by this Committee and the independent reviewer.

63. Leaving aside the threshold itself, the drafting of the clauses creates some potential issues that may have the unintended consequence of creating a circular barrier to accessing the further principal assessment. That circular barrier arises because you can only get a further principal assessment if the worker and insurer agree there has been a deterioration of at least 20% WPI but in forming their view neither can get an assessment to determine if the worker has reached that threshold.

64. Presumably the worker could not be in a position to ask the insurer to concede the point with the benefit of their own assessment and the insurer could only agree to the point if they have seen or obtained a report to support the claim. If all that occurs, it then begs the question, if the worker and the insurer do happen to agree that the worker has incurred a greater than 20% WPI deterioration and that there was no reasonable cause to believe would eventuate then why should we force the parties to the costs of attending a further principal assessment.

65. The ALA recommends that the requirement to establish that there was reasonable cause to believe the worker's condition would deteriorate be removed and the threshold be amended to 5%.

Commutations

66. The Exposure Draft makes several amendments to Division 9 Part 3 of the Act which deals with commutation of compensation. The ALA supports the intention to modify the process of commutation payments under the scheme.

67. The benefit of a commutation payment is that they provide greater clarity as to the overall cost of a claim to the scheme as the payment of a commutation benefit ends once and for all, all entitlements to compensation as a consequence of a workplace injury and prevents future claims for compensation benefits.

68. The ALA submits that the pre-conditions for consideration of a commutation payment be removed so as to allow all potential claims to be the subject of a commutation payment.

69. The ALA submits that provided that an injured worker is legally represented and understands the nature and effect of a commutation payment, then with the additional safeguard of the payment being approved by the President, there is sufficient protection to ensure that the payment is in the best interests of the worker.

70. The Exposure Draft continues the current requirement that the ability for a commutation payment to be made continues to be subject to a 15% WPI threshold. The ALA submits that no threshold should apply to prevent a commutation payment being made; however, if a threshold should apply, then the threshold should be reduced to 11% which is the equivalent percentage for what is required for a Section 66 permanent impairment payment for physical injuries.

71. The Exposure Draft at clause 87EA(2) seeks to extend the ability to commute benefits for cases which will be prescribed by regulation as a "case is of a class prescribed by the regulations to which this subsection applies,…". The ALA submits that the proposed amendment not be made as the prescribing of a class of cases is only likely to create legal argument as to what is or is not a case that is prescribed.

72. The ability for workers to receive a commutation payment to enable them to exit the workers compensation system has been the subject of several submissions by previous persons/organisations to this Standing Committee and has also been suggested when reform of the scheme has been previously discussed. The ALA supports amendments to the Act so as to make the process of approval and receipt of commutation payments simpler and less bureaucratic for injured workers to access an approval for a payment than is currently the case and what is proposed by the Exposure Draft.

Death benefits

73. The introduction of sections 32AA, 32AB and 32AC into the 1987 Act are welcome by the ALA. The ability to navigate a resolution in a death benefit claim is long overdue and reflects previous submissions that have been made by the ALA.

74. The one comment that the ALA wished to make on the point is in relation to what will ultimately be contained in the savings and transitional provisions. That is, in our view, there is no good policy reason as to why these provisions could not be applied to all claims no matter when the death occurred and at least from 5 August 2015.

75. Any suggestion that this will open up the "floodgates" is misguided. These provisions will only be applicable where a worker has died and the death benefit claim has not yet been resolved. The claims that have not yet been resolved are the very ones that have complex factual and causation issues that are being litigated and are the very claims that these provisions are aimed at. The ability to compromise claims will ensure that grieving families can look at the commercial reality of long protected litigation on a very difficult subject and make a decision to resolve that dispute or not.

76. To the extent that there is any concern that a family who would otherwise not have pursued a hopeless claim will now pursue one in the hope of achieving a compromised settlement then this concern should be dismissed. The provisions do not create a right to make a claim. They merely create a mechanism to resolve the dispute. If an insurer is faced with a claim with no merits it is not forced to make an offer of settlement they can, and should, run their defence if the situation merits it.

77. The ALA submits that should the provisions on compromising death benefits be introduced in the same terms as set out in the Exposure Draft then they should apply to all deaths occurring on or after 5 August 2015.

Increased disputation

78. Many of the proposed provisions in the Exposure Draft, if enacted, will necessarily increase disputation between workers and employers/insurers and, hence, the flow-on effect will be reduced return to work rates, delays in treatment, delays in the restoration of health, and significantly increased costs of the system.

79. The ALA submits that increased disputation must be resisted in a system that already encourages disputes and is adversarial by its nature.

Legal costs

80. The Exposure Draft moves the setting of maximum costs for legal costs provided by the ILARS scheme from IRO to being determined by the regulations. This decision undermines the functions and independence of the IRO. Administering the ILARS scheme is a large part of the IRO's functions. Removing the ability to administer it as it sees fit effectively makes the IRO a caretaker with no responsibility for the success or failure of the system it runs.

81. There has been no suggestion by anyone that the ILARS guidelines and rates of pay represent a failure that need rectifying. Quite the contrary, the vast majority of submissions from all stakeholders go to the unsuitability of schedule 6 and point to the ILARS guidelines as representing an improvement on the current schedule.

82. The only criticism that has ever been made has been in relation to the increase costs of the scheme. But this is not surprising given the increasing number of claims- this is hardly the fault of the IRO.

83. Clause Part 5, Schedule 5 of the *Personal Injury Commission Act 2020* (NSW) and the requirement that ILARS guidelines are to be tabled before both houses of NSW Parliament already provide sufficient protection and oversight as to the guidelines.

84. Accordingly, the ALA submits that this Standing Committee should recommend that the proposed changes to section 337 be removed.

Conclusion

85. The Australian Lawyers Alliance (ALA) acknowledges that reform is required to the scheme; however, it is respectfully submitted that the Exposure Draft is not the solution to the problems which are being considered by the Standing Committee.

86. If legislation is enacted in accordance with the Exposure Draft, it will more likely than not result in significant impact on the rights of not only psychologically injured workers but all

injured workers. In addition it will result in increased complexity in navigating the scheme for all stakeholders, including many employers and insurers.

87. The ALA submits that the Exposure Draft appears to be a hastily prepared response to the problems facing the scheme, and the better approach would be for there to be extensive consultation with all stakeholders to explore scheme reform which will result in the desired outcomes.

88. The ALA welcomes the opportunity to have input to the Standing Committee on Law and Justice on the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW).

89. The ALA is available to provide further assistance to the Standing Committee, including by giving evidence at a public hearing, on the issues raised in this submission.

Genevieve Henderson
President, NSW Branch Committee
Australian Lawyers Alliance

Shane Butcher
Chair, NSW Workers Compensation Subcommittee
Australian Lawyers Alliance

Submission No 24

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

Name: Roshana May

Date Received: 15 May 2025

Introduction

My name is Roshana May**.** I am a lawyer and Accredited Specialist in Personal Injury Law with a 40 year career in NSW personal injury law specialising in workers compensation.

I have actively participated in workers compensation reform processes since 1987.

From 2005 to 2011 I was one of four nominated lawyers in the WorkCover Legal and Regulatory Reference Group, a joint Committee to develop a new legal costs regulation. The resulting Schedule 6 of the Workers Compensation Regulation remains today (although no longer fit for purpose due to intervening reforms of the legislation and the dispute relation mechanisms).

I have been heavily involved in the post 2012 reform Taskforces, numerous committees and consultation groups discussing implementation and further reform of the legislation.

I was the Director of the Parkes Inquiry from 2014 until its closure in 2015 and the author of the Discussion Papers to inform the stakeholders participating in the Inquiry.

From 2017 to 2021 I was the Director of the Independent Legal Assistance and Review Service (ILARS) of the (Workers Compensation) Independent Review Office (WIRO) with responsibility for administering the ILARS, including developing the ILARS Funding Guidelines and lawyer approval processes, and managing and facilitating grants of funding for injured workers. In addition, I advised the Officer on policy, assisted in the writing of submissions, and participated in government consultation processes and roundtable discussions.

In March 2021 I became the Director Policy Systems and Support and held that role until I left the IRO in late 2021. My role included responsibility writing and publication of the current ILARS Funding Guidelines and Lawyer Approval process documents.

I have co-authored many submissions to the Standing Committee on Law & Justice reviews of the workers compensation scheme and have given evidence in several inquiries.

I am a former President of the NSW Branch of the Australian Lawyers Alliance and the current NSW Director. I am a member of the Law Society of New South Wales Injury Compensation Committee and sit on the Law Society's Specialist Accreditation Committee for Personal Injury.

I remain an advocate for the rights of workers and a passionate observer and participant in workers compensation law reform.

Executive Summary

Injuries occur in every workplace every day every year and have for thousands of years. The first workers compensation schemes developed during the building of the pyramids. Very early on in civilisation it was recognised that workers could expect a workplace that was protective of their safety and where their safety couldn't be protected and where, as a consequence of a work injury, they were unable to work then they would be supported financially and with medical treatment and assistance.

The "modern" workers compensation system places restoration of health at work at its centre. It embraces many different ways of working and the many different ways in which injuries can occur. It accepts that the worker is at the centre of the system and it seeks to strike a balance between compensation benefits and the amount paid by employers in premium. It does not benefit employers to the detriment of workers.

Our workers compensation system currently embraces all personal injuries sustained in the workplace. No worker is presently precluded from making a claims for compensation arising out of an injury. That does not mean insurers are obliged to accept liability in every claim. Each claim is assessed on its merits and in accordance with the legislation. Workers and insurers can dispute decisions in a dedicated Commission.

Mental illness, mental disorders and psychological injury have been rising in Australia since 2020. The Government recognises an increase in the number of psychological injury claims (particularly in its own workforce) and seeks to deter and prevent psychological injuries from occurring in the workplace.

The Exposure Draft pays no heed to prevention or deterrence. In order to stem the increase in claims, for the first time a worker who sustains a psychological injury at work will be prevented from making a claim unless the injury results from specific incidents or specific behaviours. Thousands of workers who will sustain a psychological injury through circumstances beyond their control will be barred from making a claim, will receive no compensation and be left to fend for themselves under their own means.

The one saving grace is that workers who may be terminated for failure to return to work after injury will still be afforded the protections available under Part 8 of the *Workers Compensation Act 1987* to seek reinstatement to employment in the Industrial Relations Commission of New South Wales. Part 8 is available to all NSW workers.

Whilst the government is to be commended for their renewed holistic approach to workplace health and safety – a whole of government Return to Work initiative enabling public servants to return to work in places other than their original place of work, strengthening SafeWork NSW as an independent agency and expanding the powers and jurisdiction of the Industrial relations Commission – the provisions in the Exposure Draft do not enhance the government's work. By seeking to avoid premium increases and so serve the business community of New South Wales and itself as the major employer, the government has sacrificed the workers of new South Wales.

This Bill is not just about psychological injuries and their "impact" on the 'system. This Bill is about saving money at the expense of all injured workers' rights. It erodes benefits, regardless of the workers employer and regardless of their injury. The changes which affect all workers capriciously reduce access to early and prompt treatment, and remove supports and place onerous burdens on workers which can only lead to increased disputation and increased costs to the system and fractured and unhappy workplaces.

I thank the Committee for the invitation to present to this inquiry.

Up until the release of the Exposure Draft Bill (Bill) I had not been invited to participate, nor have I participated in or contributed to the consultation process concerning the contents of the Bill.

Inquiry Terms of Reference

This inquiry is bound by very narrow terms of reference:

> That the Committee inquire into and report on proposed changes to liability and entitlements for psychological injury in New South Wales, specifically:
>
> (a) the overall **financial sustainability** of the NSW workers' compensation system; and
>
> (b) the **provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025** as provided by correspondence to the Committee.

Acknowledgement

I acknowledge the Standing Committee on Law and Justice Report 84 "2023 Review of the Workers Compensation Scheme, December 2023" (SCLJ Report 84). The Terms of Reference reflect the Committee's resolve to focus on the increase in psychological claims in the workers compensation system and seek an explanation for that increase and suggest solutions.

The Committee identified that there was an increase of psychological injury claims over the previous year and that return to work rates for workers with psychological injuries were poor. The Committee opined that there was more to be done by icare, SIRA and the businesses of New South Wales (in particular the largest employer, the NSW Government) to address the issues. The Committee made 18 Recommendations to the new Government (2023) to ensure financial sustainability of the 'scheme' and that "*all injured workers… be given the support and treatment they require*".

Relevant to the terms of reference here, the Committee observed from paragraph 2.59 Report 84 that the financial position of the scheme needed to be addressed through significant improvement to return to work rates and better claims management. This Committee indicated that they would "prefer to see the financial sustainability of the scheme addressed through further administrative efficiencies and operations improvements to icare, rather than an increase to premiums. A key recommendation in this regard was recommendation 3: That SafeWork NSW as the work health and safety regulator collaborates more closely with the State Insurance Regulatory Authority and Insurance and Care NSW to ensure safer workplaces reducing workers compensation claims.

There are a number of submissions made to the 2023 Review of the Workers Compensation Scheme that contain data, information, reports and proposals that are relevant to this Inquiry.

Specifically, the following submissions are in the author's opinion most valuable:

Submission 2	Prof John Buchanan (specifically attachment 3-A report to icare on "Understanding changing return to work (RTW) trends in NSW – First report on progress from the University of Sydney Research Team"
Submission 26	Insurance and Care NSW (particularly paragraphs 7, 21, and 35 – 36)
Submission 31	Independent Review Office 29 July 2022

Those submissions contain relevant information and statistics that may be beneficial to this Inquiry.

As I have not been able to access information relevant to inform the financial *sustainability* of the system this submission will only address limb B of the terms of reference in any detail.

At the time of submitting I have read and endorse and support the submissions to this inquiry of:

Mr Kim Garling

Australian Lawyers Alliance

Law Society of New South Wales

CFMEU, Construction and General Division NSW Divisional Branch.

Addressing the Terms of Reference

I have not been able to access information relevant to the financial *sustainability* of the system this submission will only address limb B of the terms of reference in any detail.

Data sources

Any data referred to in this submission has been obtained from the SIRA open data analytics tool https://www.sira.nsw.gov.au/open-data/system-overview , SIRA reports, the icare annual reports, and the Australian Bureau of Statistics.

The NSW workers compensation system objectives

The objectives of the New South Wales workers compensation system are set in section 3 1998 Act :

> "The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives -
>
> (a) to ***assist*** in securing the ***health, safety and welfare of workers*** and in particular ***preventing*** work-related injury,
>
> (b) to ***provide***—
>
> - ***prompt*** treatment of injuries, and
> - ***effective*** and ***proactive management*** of injuries, and
> - necessary medical and vocational rehabilitation following injuries,
>
> in order to ***assist*** injured workers and to ***promote their return to work as soon as possible,***
>
> (c) to ***provide*** injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for ***reasonable treatment and other related expenses***,
>
> (d) to be fair, affordable, and financially viable,
>
> (e) ***to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,***
>
> (f) to deliver the above objectives efficiently and effectively."

The objectives (quite correctly in the author's opinion) emphasise and can be distilled to:

- immediacy of assistance ("prompt" treatment, "effective and proactive management"),
- promotion of early return to work
- necessary supports (income etc)
- return to work that meets work health and work safety standards,
- prevention of injury
- fairness
- future proofing through affordability and balancing risk to contributions.

In this submission I propose to examine the provisions of the draft exposure bill (Bill) through the lens of the objectives taking into account the stated intent and purpose of the proposals in the Bill.

Fundamental principle of the NSW workers compensation system

In 1926 the *Workers Compensation Act* was enacted with the purposes of amending the law in relation to workers compensation, constituting the Workers Compensation Commission, providing for **compulsory insurance** by employers against their liabilities for workers and for

the regulation and licencing of insurers. In addition, a central fund was established to the meet the costs of administration of the Commission.

The current workers compensation legislation (comprising two Acts - *Workers Compensation Act 1987* (1987 Act) and the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). The 'ecosystem' includes a standalone regulator (SIRA), a fund manager (icare), an independent ombudsman (the IRO), a work health and safety regulator (Safework NSW), a tribunal (the Personal Injury Commission (PIC)) and other entities.

The 1987 Act states the fundamental principle of the system:

> **"A worker who has received an injury (and, in the case of the death of the worker, his or her dependants) shall receive compensation from the worker's employer in accordance with this Act.**
>
> **Compensation is payable whether the injury was received by the worker at or away from the worker's place of employment."[1]**

It is therefore a matter for the Government to decide: what injuries are to be covered and what compensation is to be paid?

- **Personal Injury**

The New South Wales workers compensation system has always recognised all personal injuries. Over time, adjusting to the nature of injuries and the nature of claims, the legislation has been amended to impose or relax restrictions on payment of compensation determined **by the extent of the contribution of employment to the injury**.

Some examples of this mechanism, which is used to regulate access to benefits, are:

- Section 4(b) "includes a ***disease injury***, which means—

  (i) a disease that is contracted by a worker in the course of employment *but only if the employment was the main contributing factor to contracting the disease,*

- section 9A 1987 Act "No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a *substantial contributing factor to the injury.*"

- Section 9B 1987 Act "No compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a *significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature*."

- Section 10(3A) 1987 Act "A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if *there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.*

- Section 11A (current) 1987 Act "No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was *wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.*

[1] Section 9 WCA 1987 "Liability of employers for injuries received by workers – general"

This 'regulating mechanism' does not in any way declare that an injury does not 'exist' nor give rise to a claim, nor does it say that an injury is not recognised under the legislation. Presently the 1987 Act recognises all injuries but restricts access to compensation for some injury types through the lens of workplace contribution.

The stated intent and purpose of the Bill

The official statement made of the intent and the purpose of the Bill is contained within the Explanatory note and Media Release accompanying the Bill.

The explanatory note released with the bill in titled "Proposed Reforms to the NSW Workers Compensation System" provides statements of intent:

> ***"to address the fact that the NSW workplace health and safety, and workers' compensation laws are failing to prevent psychological injuries and failing to treat those with psychological injuries quickly."***

The purpose of the bill is said to:

- Clarify and update important concepts, such as reasonable management action and thresholds for accessing long-term payments.
- Shift the "workers compensation laws towards *prevention*"
- Expand early intervention powers to support rehabilitation and return-to-work plans *sooner*
- Strengthen anti-bullying protections, allowing workers to bring claims for bullying or harassment through the industrial relations system
- Establish clearer dispute resolution pathways, improving access to timely outcomes
- Modernise benefits and compensation thresholds to better reflect the cost of living and community expectations.

In the Ministerial Statement to Parliament made by the Treasurer on 18 March 2025 it was said that **"The bill is designed to curb the rising number of psychological injuries people are experiencing at work."**

The Treasurer states that 'NSW's workplace health and safety and workers compensation laws are failing to both *prevent* psychological injuries, and *treat* those with psychological injury quickly.' Further, that as a consequence the system is 'becoming increasingly expensive', that businesses are suffering because *the system* "sends staff they've recruited and trained home, and impairs their ability to manage interpersonal conflict and run productive workplaces."

Reference is made the Government's "comprehensive strategy to ensure that the workers compensation system, the workplace health and safety system, and the industrial relations system all work together… And all remain fit for purpose."

Data

- **Coverage**

NSW has the highest population of any state in Australia with approximately 8,500,000 residents.

NSW has the largest workforce in Australia with approximately 4,494,500 people employed as at March 2025.[2]

Table 1 Workforce participation Source: Australian Bureau of Statistics, Labour Force, Australia March 2025

	NSW	VIC	QLD	SA	WA	Tas	NT	ACT
Employed people	4,494,500	3,785,600	2,981,400	963,100	1,646,600	282,400	140,400	272,400

Annual population growth in New South Wales is approximately 1.4 - 2% per annum.

There were 4,528,817 workers[3] covered by the NSW workers compensation system in the 2023-2024 as follows:

Nominal insurer	3,529,013
Treasury Managed Fund	382,133
Specialised insurers	247,151
Self insurers	370,520
TOTAL	**4,528,817**

- **Increase in claims**

The Data reveals that there has been an increase in all claims across the system since at least 2022. (Table 2)

There has also been an increase in psychological injury claims across the system since 2022. (Table 3)

Table 2 All Claims made by financial Source: SIRA OpenData to January 2025

Insurer type	2024 - 2025	2023 - 2024	2022 - 2023	2021 - 2022
Government self-insurers (TMF)	13,359	21,776	22,961	19,341
Nominal insurer	41,503	72,321	68,961	62,205
Self-insurers	7,074	11,655	10,956	11,227
Specialised insurers	4,413	8,122	8,643	7,985
Total	**66,349**	**113,874**	**111,521**	**100,758**

Table 3 Claims made by financial year for 'mental health condition' Source SIRA OpenData to January 2025

Insurer type	2024 - 2025	2023 - 2024	2022 - 2023	2021 - 2022
Government self-insurers (TMF)	3,044	4,572	4,061	3,376
Nominal insurer	3,507	5,305	3,790	2,993
Self-insurers	917	1,414	612	525
Specialised insurers	302	525	488	393
Total	**7,770**	**11,816**	**8,951**	**7,287**

The increase in claims is best demonstrated by the percentage of claims for mental health conditions over all claims by financial year by insurer. (Table 4)

[2] https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#states-and-territories

[3] insurer recovery through Work performance report as at December 24, State Insurance Regulatory Authority https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/sira-reports/insurer-recovery-through-work-data-reports

Table 4 Percentage of claims for mental health conditions over all claims by financial year by insurer

Insurer type	FY24-25	FY23-24	FY22-23	FY21-22
TMF (Government Self Insurers)	22.79%	21%	18%	17%
Nominal Insurer	8.45%	7%	5%	5%
Self Insurers	12.96%	12%	6%	5%
Specialised Insurers	6.84%	6%	6%	5%
TOTAL	**11.71%**	**10%**	**8%**	**7%**

The Nominal Insurer has experienced a moderate 2% increase in claims from 5% of all claims to 7% in 2023-2024.

The Treasury Managed Fund (the Government) has experienced a 4% increase over the same period. Of note, the number of psychological injury claims in the TMF almost match the number of claims in the NI.

This financial year the TMF is on track to record approximately one quarter of all claims being related to mental health conditions.

Since this Committee's report in 2023 there has been a review of the Treasury Managed Fund by SIRA (TMF Fund Review) examining "the performance of the TMF, particularly in relation to psychological injuries. SIRA conducted a compliance audit and performance review of 100 claims arising in the Corrective Services (less than 2% of psychological injury claims) and reported in April 2024.[4]

The Report records:

> "*the TMF, which represents approximately eight per cent of workers covered by workers compensation insurance in NSW, was responsible for 20 per cent of claims in the 2021/22 financial year. Significantly, the review has confirmed that in the same period, active psychological injury claims in the TMF represent 48 per cent of all active psychological injury claims in the system and of those 48 per cent, Stronger Communities represented over half. Eight out of ten psychological injury claims are from preventable workplace behaviours like work stress, bullying and harassment, and other mental stress factors."*[5]

Between March and April 2023 SIRA conducted an audit of 10 Government employers for compliance with workers compensation **employer** obligations. The TMF Fund Review report identifies that nine of the 10 Government employers **failed to have a compliant return to work program** and 5 government employers **failed to notify all injuries within the required timeframe of 48 hours or did not notify at all.**

These findings reinforce this Committee's concern that the Government has not done enough to ensure the Government employers are meeting their obligations with regard to ensuring the health safety and welfare of their workers, particularly ensuring they receive sufficient support after injury and are returned to work as soon as possible.

- **First responders/'exempt workers'**

Caution must be applied when looking at the number of psychological injury claims within the TMF. That is because public sector workers covered by the TMF include first responders such as active police, firefighters and paramedics all of whom are **exempt** from the 2012 reforms.

[4] State Insurance Regulatory Authority Treasury Managed Fund Review Report April 2024
[5] Ibid page 5

The proposed amendments do not appear to affect their preserved workers compensation rights as there is no amendment to the benefits provisions that affect them. This remains to be seen as there are no savings and transitional provisions available and only media reports that the Police are not affected by the Bill.

If the exempt workers are **not affected** by the Bill then the numbers of workers with psychological injury claims within the public sector (Government/TMF) to whom the bill is addressed is ***significantly reduced*** due to the fact that the largest number of psychological injury claims arise in 'Public Administration and Safety' (Table 5).

I am unable to say what number of claims are attributable to the exempt workers. Regardless, the number of workers making claims for psychological injuries is small compared with the overall number of claims each year.

There are many Public Administration and Safety public sector workers *not exempt* from the 2012 reforms likely to experience psychological injury similar to the police for example, call centre operators (000), nurses, doctors, prison guards, train drivers.

- **Government self insurers**

Noting the TMF Fund Review, which provides information by NSW Government cluster, the Open Data available does not so report on the TMF.

The responsibility for workers in the public sector falls on The Public Service Commissioner and the heads of the relevant departments.

The TMF Report[6] discloses the head count in the Government sector.:

Figure 4: Head count of employees by cluster

Cluster	Head count	% of public sector workforce
Health	202,362	37%
Education	181,121	34%
Stronger Communities	66,459	12%
Transport	37,096	7%
Planning & Environment	18,046	3%
Customer Service	13,607	3%
Treasury	6,909	1%
Regional NSW	6,222	1%
Enterprise, Investment & Trade	5,923	1%
Premier and Cabinet	2,163	0%

Source: Public Service Commission[6]

[6] Ibid page 17, Figure 4 Head count of employees by cluster

The Open Data reports by industry, NOT BY government sector or Government Employer (specific Department /Agency).

The TMF Review Report identifies that the three main clusters with high numbers of claims as at 2021/2022 are Stronger Communities, Health and Education. An analysis of the 2017 financial year and the 2022 financial year discloses that 62% of all claims in the TMF arose from six occupations:

6.3.3. Occupation

Between 2016/17–2021/22, 62 per cent of all claims in the TMF arose from the following six occupations:

Police officers	23,806
School teachers	19,500
Registered nurses	9,809
Prison and security officers	6,863
Fire and emergency workers	5,710
Ambulance and paramedics	5,140

It is recognised that the duties performed by police, prison and security officers, fire and emergency workers, ambulance and paramedics contain inherent risks such as exposure to unpredictable hazards, traumatic events and workplace violence. Despite this, psychological injury claims due to exposure to trauma and workplace violence make up only 25 per cent of psychological injury claims for these workers.

Whilst I appreciate this data is old it gives an indication of the prevalence of claims in the TMF within the workforce **exempt from the 2012 reforms** which is an important consideration for the Committee.

SIRA OpenData reveals that in the last financial year approximately 40% of all psychological injury claims in the TMF arise in Public Administration and Safety, approximately 31% of all in Education and Training and approximately 22% in Health Care and Social Assistance. See Table 5.

Table 5 Mental Health Conditions in the Treasury Managed Fund: Source SIRA OpenData April 2025.

Industry	2024 - 2025	2023 - 2024	2022 - 2023	2021 - 2022
A. Agriculture, Forestry and Fishing	Restricted	6	Restricted	Restricted
C. Manufacturing	Restricted	Restricted	Restricted	6
D. Electricity, Gas, Water and Waste Services	Restricted	Restricted	Restricted	
E. Construction	6	9	Restricted	8
I. Transport, Postal and Warehousing	102	99	42	19
J. Information Media and Telecommunications	37	22	27	Restricted
K. Financial and Insurance Services	Restricted	Restricted		Restricted
L. Rental, Hiring and Real Estate Services				Restricted
M. Professional, Scientific and Technical Services	25	37	27	16
N. Administrative and Support Services	6	20	13	21
O. Public Administration and Safety	1,367	1,931	1,876	1,619
P. Education and Training	800	1,430	1,266	945
Q. Health Care and Social Assistance	670	984	792	721
R. Arts and Recreation Services	18	14	7	9
S. Other Services	Restricted	11	Restricted	Restricted
Total	**3,044**	**4,572**	**4,061**	**3,376**

THE EXPOSURE DRAFT BILL

1. SCHEDULE 1 CLAUSES 1 TO 4 - PSYCHOLOGICAL INJURIES (MENTAL HEALTH DISORDERS)

Schedule 1 clauses [1] to [4] of the Bill insert two new Divisions into Part 1 of the 1987 Act.

Division 1 General now contains existing sections 1 to 7A. New definitions are inserted into section 3 including a definition for "indictable criminal conduct".

Division 2 'Interpretation provisions-psychological injuries' contains sections 8 to 8I. Section 8 provides that the Division provides interpretive provisions relating to psychological injuries and other matters relating to the application of the Workers Compensation Acts to psychological injuries.

To fully appreciate the effect of the proposals on workers who presently can bring a claim arising from a psychological injury, one must have an understanding of how a claim for compensation is initiated or commenced.

- **How is a claim for compensation commenced?**

Currently, a worker after experiencing an event at work would:

1. Perhaps, discuss their feelings with their employer, but more than likely would not. The worker is required to provide notice of injury to their employer as soon as possible after the injury happened and before the worker has voluntarily left their employment.[7]
2. Consult their GP, discuss their feelings, emotional and behavioural state.
3. Receive from their GP a Certificate of Capacity containing a description of the injury ("not stress"), the cause of injury, the likelihood of the worker's employment being a substantial contracting factor to the injury or whether the worker's condition is consistent with his or her employment being such a factor. The certificate will also contain a statement that the worker is not capable of working over a period of time.[8]
4. Provide that certificate to their employer and provide a "notification of injury" if not already provided and remain off work until such time as they have some capacity to return to work.

The employer would provide that notification and certificate to their insurer within seven days of receipt[9]. This is the commencement of the claim. The insurer would commence to consider both liability and commencement of income support and payment of the treatments proposed.

Provision of a GP's certificate of capacity would be sufficient to ground a claim for compensation and allow the worker to access provisional weekly payments (income support) promptly (within 7 days of notification)[10].

[7] Section 254(1) 1998 Act
[8] Sections 260 and 270 1998 Act and Workers Compensation Guidelines.
[9] Section 264 1998 Act
[10] Section 267 1998 Act

The insurer can raise a 'reasonable excuse' which would prevent provisional liability payments from commencing[11].

Provisional liability only covers weekly expenses . medical expenses are to be commenced within 21 days after a claim is made by the insurer determining the claim by accepting or disputing liability.[12]

The effect of the Division 2 provisions

The combined effect of the new division 2 provisions **is that no worker in NSW can access compensation benefits for a primary psychological injury** when they will need them most immediately upon sustaining injury**.**

As will no doubt be discussed by many others making submissions to this inquiry, there is **NO COMPENSATION** payable for a primary psychological injury unless:

- a relevant event or a series of relevant events caused that injury , and
- there is a real and substantial connection between the relevant event and employment, and
- employment is the main contributing factor to the psychological injury.

> **The definition ("Meaning") of psychological injury (being a 'mental disorder') is onerous and requires a diagnosis by a doctor trained in the use of the *Diagnostic and Statistical Manual of Mental Disorders 5th Edition***

The "meaning" of primary psychological injury (section 8A) requires there to be a "mental or psychiatric disorder" that causes "significant behavioural, cognitive or psychological dysfunction". This definition invokes the definition of mental disorder in the *Diagnostic and Statistical Manual of Mental Disorders 5th Edition* (DSM-5.

DSM-5 is a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders. It is a standard reference in clinical practice in Australia and the world.

The definition of mental disorder in DSM-5 is:

> *A mental disorder is a syndrome characterised by clinically significant disturbance in an individual's cognition, emotion regulation or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g. political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above."*[13]

In the introduction to DSM-5, it is stated "*clinical training and experience are needed to use DSM for determining a clinical diagnosis. The diagnostic criteria identify symptoms and signs comprising aspects, behaviours, cognitive functions, and personality traits along with the*

[11] Section 268 1998 Act
[12] Section 279 1998 Act
[13] Diagnostic and Statistical Manual of Mental Disorders Fifth Edition Text Revision DSM-five-TR, 2022 American Psychiatric Association, page 14

physical signs, symptom combinations (syndromes), and durations that require clinical expertise to differentiate from normal variation and transient responses to stress."[14]

It is practically impossible for a worker to obtain a diagnosis from a doctor trained in the use of DSM-5 immediately upon first consultation following the event or series of events that may trigger a psychological response. Most GPs would not be trained in the use or application of DSM-5.

> Only psychological injuries caused by a very limited set of 'relevant event or series of relevant events' are compensable

In addition to the requirement that employment be a substantial contributing factor than use the 'regulating mechanism' described earlier in this submission (defining the extent to which employment factors must contribute to the injury), the Division provides that only injuries *caused* in a certain way will be compensable.

If an injury is *caused* in any other way other than as specified as a relevant event in section 8E, the injury is **not compensable**.

'Relevant events' are in an extremely narrow compass and split into two categories:

(a) those that are accepted as causative of a psychological injury, (Section 8E(1)) essentially traumatic events: being subjected to an act of violence or a threat of violence, or to indictable criminal conduct or witnessing an incident that leads to death or serious injury or the threat of death of or serious injury, including an act of violence, indictable criminal conduct, a motor accident, a natural disaster, fire or another accident, or experiencing vicarious trauma within the meaning of section 8H [where a worker becomes aware of an act of violence, indictable criminal conduct, a motor accident, a natural disaster, fire or another accident that results in injury to or the death of a person with whom the worker has a close work connection].

or

(b) those where a *finding* is required by a tribunal, commission or court as to the existence of the event *before a notification of injury* will be accepted for the purposes of making a claim under the workers compensation legislation: bullying, racial harassment or sexual harassment.

Whilst there is a provision for further events to be prescribed by regulation (a Henry VIII Clause – see below), the relevant events currently prescribed are extremely narrow.

There is no relevant event of racial discrimination, discrimination by any other means, unreasonable or onerous work conditions, or which captures the experiences of (for example) 000 Call centre operators, nurses and hospital administrative staff, or teachers. Interpersonal conflict (not bullying) is not included and neither is actions by the employer considered to be "reasonable management action'.

I refer to the SCLJ Report 54 paragraphs 3.34 to 3.36 for the only published information regarding the causes of psychological injury across the Nominal Insurer and the TMF.

> Work pressure disorder not considered an injury nor able to ground a claim (Bill Clause [96])

A new part 4A 'special entitlement to expenses for medical or related treatment' provides a new section 148B Work Pressure. The section provides for a worker who experiences a "work

[14] DSM-5 page 5

pressure disorder" to receive a "special work pressure payment" of medical or related treatment expenses for a period of no more than 8 weeks after the worker first commences medical or related treatment.

"Work pressure disorder" is defined in the Bill as "a mental or psychiatric disorder caused by or arising from the pressures placed on a worker in the course of the worker's employment but only if the employment was the main contributing factor to the worker experiencing the disorder". The DSM-5 contains no definition of "work pressure disorder".

However, a special work pressure payment is not a claim for compensation, a work pressure disorder is not an injury and "an application for payment of a special work pressure payment is not a payment for compensation", work pressure is not described as a relevant event..

Whilst I wholeheartedly support workers with psychological injuries arising from work pressure, "special work pressure payments" are potentially ultra vires the legislation. As a special work pressure payment is not a payment of compensation it is difficult to comprehend how such a payment can be made out of the system.

> **Notification of a psychological injury where the cause is sexual harassment, racial harassment or bullying is not notification of a claim until such time as a finding has been made by a tribunal, commission or court.**

A notification is the first step under the legislation to a claim for compensation. Where a worker alleges sexual harassment, racial harassment or bullying is the cause of their psychological injury, they must have first obtained a finding from a relevant tribunal before any notification is accepted as the making of a claim. Until the finding is made, section 8F provides that there is no initial notification of an injury and hence no claim can be made.

For public servants the explanatory note suggests there will be a new jurisdiction in the Industrial Relations Commission of New South Wales similar to the bullying and sexual harassment jurisdiction in the Fair Work Commission. Private sector workers would be required to obtain a finding in the Fair Work Commission before they could notify of an injury and make a claim. As there is no relevant event based on discrimination, workers would be prevented from *making a claim* for psychological injury arising out of racial, gender, religious or other discrimination in the workplace.

I leave it for others to explain the processes currently available to establish harassment and bullying in the existing jurisdictions.

Icare in its submission to the 2022 Review state:

> "35. icare's data suggests that work pressure, and harassment and bullying, are a key causal mechanism in more than half of the psychological injury claims we receive (figure 8 and 9).
>
> 36. Exposure to a traumatic event is less prevalent as the initial cause of a psychological injury, linked to one in five cases in the TMF (21 %), and less than one in 10 cases in the NI (7%). However, we know that proactive and supportive responses to these events can help to reduce the long-term impact on the individual."

This precondition for the most prominent of injury causes (according to icare) will necessarily involve time delay, the amassing and giving of evidence, facing the aggressor, , potential conflict with the employer, cost and potential retraumatising and additional distress. And while the requisite proceedings are taken and until the finding is made and passed across to the insurer the psychologically injured worker is not entitled to income support or medical and treatment supports other than that their own cost.

There is no hint as to whether the worker is entitled to legal advice or representation to navigate the path in obtaining the "finding" and whether such advice or representation will be paid.

The prerequisite of obtaining a finding ***before*** a worker's psychological injury is even recognised by the employer/insurer is so onerous and likely to cause further insult to the worker that it is tantamount to a complete bar to a claim. In the meantime, one can only assume that the bullies and the harassers will continue to pick targets and slowly erode the harmony of the workplace.

> No other circumstances leading to injury are declared causative of an injury

There is no relevant event of racial discrimination, discrimination of any other type, unreasonable or onerous work conditions, or which captures the experiences of (for example) 000 Call centre operators, nurses and hospital administrative staff, or teachers. Interpersonal conflict (not bullying) is not included.

Despite workers sustaining a psychological injury at work they will be unable to notify of that injury and will be unable to claim compensation benefits.

> Reasonable management action

The incorporation of a definition of reasonable manner management action (definition in new section 8D) within section 11A 1987 Act to replace Section 11A(1):

> *No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*.

does not materially change the defence for employers to a claim for compensation arising out of psychological injury.

It remains to be seen whether this defence will have any utility given there is no relevant event related to management actions.

Opinion

The new Division 2 provisions will not stop workers sustaining psychological injury in the workplace. Rather, workers who sustain injuries that do not meet either the definition or fit within a relevant event, or are not successful in obtaining the requisite finding, will be forced to rely on accrued leave (if they have any), work with injury or leave their employment. The only conclusion that can be drawn is that this is a cost shifting exercise to push workers onto other work entitlements or Commonwealth benefits.

The New Division 2 provision are contrary to the fundamental principle stated in section 9 of the 1987 Act, contrary to the system objectives, will not achieve the stated intent of the Bill (unless preventing injury means ignoring injury), do nothing for prevention of injury, do nothing for deterrence of injury and create an even greater burden on employers to find a stable and productive workforce.

Given the combined effect of the meaning of psychological injury and the meaning of relevant event it is hard to conjure up a circumstance where the reasonable management action defence in section 8D can be used by an employer.

We don't know precisely the causes of workplace psychological injury. There is no open data apart from anecdotes or bold statements as to what proportion of the roughly 12,000

psychological injury claims made per year are caused by what mechanism, be workplace/occupational violence, exposure to a traumatic event work pressure, harassment or bullying (there is no current definition of either harassment or bullying in the workers compensation legislation hence caution should be placed on harassment and bullying described as a cause of injury), work pressure stressors within the workplace. Before the Government can sincerely make such drastic changes to the legislation there needs to be a thorough examination of the true cause of workplace psychological injuries.

It is preferable for the Government to use any other means available to restrict the number of claims for psychological injury, than those within Division 2. Given the other proposals in the Bill designed to limit access to lump sum payments for permanent impairment, weekly payments of compensation and medical and treatment expenses, and given that the Government's stated intention of providing a work health safety, industrial relations and workers compensation system that works harmoniously, there must be other ways of managing the increase in psychological injury claims other than by so severely constricting the ability to and lodge a claim for compensation.

The proposed bullying and harassment jurisdiction in the Industrial Relations Commission is welcomed but not as a gateway to a notification or claim for compensation. Just as in the private sector, public servants should be able to raise workplace issues in a forum where pressure can be brought to bear on the Government to adjust and rectify the workplace.

2. SCHEDULE 1 CLAUSE [10] DEATH BENEFITS COMPROMISE

The Bill proposes new sections 32AA. 32AB, 32AC which permit a party to a death benefit dispute to either agree with the insurer or receive a Commission decision as to a compromised resolution of a claim for the death benefit lump sum. These provisions were proposed in 2022 in a bill that did not progress in the Parliament.

Presently section 25 of the 1987 Act provides for a lump sum of $955,950 as a lump sum death benefit. It is an all or nothing provision as there is no ability to compromise the sum where there may be a dispute about liability.

These new provisions are therefore a welcome but long overdue enhancement.

There are no savings and transitional provisions within the Exposure Draft. Previously the savings and transitional provision provided application from the date of assent to the Bill. That would rule out a small number of death benefit claims arising from deaths before assent that have not yet resolved due to the complicating circumstances of the claim.

There are no more than 120 deaths recorded in New South Wales workplaces every year. Claims arising from those deaths are generally advanced within six months of the death and whilst they take some time to resolve (there is no time limit provided for an insurer to respond to a claim for death benefits) at best there would be 20% of outstanding claims that would remain resolved (I can find no data to support this contention and so this stands is an opinion).

My recommendation is that the savings and transitional provisions to commence from **5 August 2015**, date on which the death benefit lump sum substantially amended to $750,000 deaths occurring since that date where a claim has not been resolved for example food delivery driver death claims (or made) due to concerns with liability or other factors. The cost to the scheme of this proposal could be easily assessed by icare.

3. Schedule 1 clauses [29] [18] [97] WHOLE PERSON IMPAIRMENT FOR PSYCHOLOGICAL INJURIES

The bill proposes that in relation to psychological injuries the impairment threshold contained within sections of the 1987 Act permitting access to continuing weekly payments beyond 130 and 260 weeks, permanent impairment compensation and work injury damages should be increased from 15%WPI or 20%WPI (where stated) to "at least 31%".

The accepted tool for measuring whole person impairment related to a psychological injury is the Permanent impairment rating scale" (PIRS) contained within the NSW workers compensation Guideline for the Evaluation of Permanent Impairment. **Annexure A** to this submission is a paper prepared by me "Whole person impairment and the Psychiatric Impairment Rating Scale".

It is readily accepted and is demonstrated in other submissions that by use of the PIRS, an impairment of greater than 30% is virtually impossible to reach. SIRA advises that some of the indicators required to reach the requisite median of 'class 4' under the PIRS are:

- Needs supervised residential care. If unsupervised, may accidentally or purposefully hurt self.
- Never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room or garden when others come to visit family or flat mate.
- Finds it extremely uncomfortable to leave own residence even with trusted person.
- Unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).
- Unable to read more than newspaper articles. Finds it difficult to follow complex instructions (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting.
- Cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced; attendance is erratic.[15]

These demonstrate the extent to which a worker's function would have to be impaired.

The increase of the impairment threshold will not *prevent* psychological injuries from occurring in the workplace, neither will such claims be prevented from being notified or made.

Whole person impairment of 31% is not a gateway, it is a bar and a very high bar, so high as to be virtually unattainable. If it is the intention of the Government to let significantly impaired workers with psychological injuries have access to the same or similar benefits to equally impaired workers with physical injuries then the threshold should be increased from 15% to 'more than 20%' given that the whole person impairment assessment methodology (impairment of the whole person) is designed to provide injuries of different types to different body parts and systems an equivalent ranking an assessment outcome.

[15] SIRA, Psychiatric and psychological disorders: https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment/11.-psychiatric-and-psychological-disorders

4. Schedule 1 clauses [18] – [22] CESSATION OF BENEFITS

> Workers with psychological injuries

The Bill carves out psychologically injured workers from workers with other injuries by providing a significantly restricted period of weekly benefits and limited access to treatment expenses once weekly benefits cease. Currently, the psychologically injured worker with no capacity for work is entitled to weekly payments after 130 weeks if they can demonstrate whole person impairment of more than 20%.[16]

New section 39A proposes that unless a worker has at least 31% whole person impairment arising from their psychological injury, they will receive a maximum of 130 weeks of weekly **benefits**.

In addition, whereas currently the psychologically injured worker is entitled to receive either 2 years, 5 or lifetime medical and treatment expenses (lifetime if their whole person impairment is assessed at more than 20%) the bill provides a further limitation on the payment of medical and treatment expenses for a psychologically injured worker to 1 year commencing on the day their weekly payments cease.

In my submission, these provision should be removed. A worker with an injury should receive the same access to benefits based on the same impairment ratings, no matter the injury type.

> No back payment where impairment asserted after cessation of weeklies at 260 weeks (130 weeks for psychological injuries)

New section 39A(4) providing for no back payment of weekly compensation where a worker with a psychological injury subsequently establishes an impairment of more than 31% the 130 week limit, responds to the findings of the NSW Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113, where the Court of Appeal held that a worker who subsequently establishes that there impairment exceeds the section 39 threshold (of greater than 20%) after the maximum 260 weeks of weekly payments has ceased is entitled to receive weekly benefits backdated to the date of cessation. The court found that the liability for a permanent impairment compensation payment arises on the date of injury and not the date when the degree of impairment is determined.

Subsection 39(4) affects workers with psychological injuries only however a similar amendment is made in clause [17] to section 39 in relation to all other injured workers.

5. Schedule 1 Clauses [25] and [26] CHANGING REASONABLY NECESSARY TO 'REASONABLE AND NECESSARY'.

The Bill provides for the omission of the phrase "reasonably necessary" and replacement with the phrase "reasonable and necessary" in sections 60 and 60AA of the 1987 Act.

This proposal goes far beyond the stated intent of the bill. It will affect every single worker in the workers compensation system.

Other than in a brief discussion in the McDougal Review prompted by a submission by icare, there has been no consultation or discussion around this amendment.

Annexure B to this submission is a paper ""Reasonably Necessary" v "Reasonable and Necessary" 2025" authored by me concerning the proposal.

[16] Section 38 1987 Act and definition of worker with high needs in section 32A 1987 Act.

In my submission a change to the test for access to payment for medical treatment will:

- unnecessarily and unfairly reduce benefits
- result in a significant deterioration of worker's outcomes
- result in a significant deterioration delay to treatment and recovery
- increase disputation over medical treatments
- render provisional liability for medical expenses unworkable
- render section 297 1998 Act (interim payment directions for medical expenses) difficult to administer
- result in a significant adverse effect on worker's outcomes by virtue of delay and disputation

  will increase the administrative costs of the scheme.

The more onerous test would permit insurers to arrange IME appointments to test the necessity of any treatment, thereby providing further delays in a system where delay in treatment is already prevalent, with an increase in denials of treatment and consequent increases in disputation.

In order for an Interim Payment Direction to be sought, the test in section 297 1998 Act would need to be reformulated and would likely prevent IPDs being sought by workers.

The knock on effect of delays will impact return to work and the overall costs of the scheme.

The guiding principles and the well-settled formulated tests to determine what is "reasonably necessary" mitigate against harmful treatments. They incorporate a workability component, that is, if treatment assists a worker remaining at work or maintains an equilibrium with the patient then it can be considered reasonably necessary.

There are already restrictions and limitations on access to prompt medical treatment, adopting this recommendation would increase the difficulty in accessing treatment. **There will be delays in treatment provision occasioned by scrutiny of necessity**, the early approval free treatment types in the Guidelines will be significantly reduced, and workers will wait longer for access to treatment. As a consequence, return to work outcomes will deteriorate and the already significant disputation over medical treatments especially surgery will likely increase. A consequent increase in timeliness and cost will also impact the scheme.

There is no data that demonstrates that a change to the phrasing after so many years in use will deliver a significant financial saving to the system.

Restriction on rights and entitlements is very difficult once written into the legislation. Employing a more restrictive test than has existed for over 60 years ought to undergo significant scrutiny before it is adopted.

The' reasonable and necessary test is the antithesis of the objectives of the system and will erode workers' benefits. It should not be adopted without careful consideration and assessment of the impact.

6. Schedule 1, Clauses [75] –[94] COMMUTATIONS

> What is a Commutation?

Division 9 of Part 3 of the WCA 1987 is titled "Commutation of Compensation". There is no definition of 'commutation' therein provided however s87D defines ***commutation agreement*** as meaning "an agreement to commute a liability to a lump sum, as provided by section 87F."

Dictionary definitions vary little with synonyms being 'modification, exchange or substitution'. A commutation is the replacement of a greater amount by something lesser. To commute periodic payments means to substitute a single payment for a number of payments, or to come to a 'lump sum settlement'. Settlement and finality are important considerations in a commutation agreement.

The SIRA Workers Compensation Claims Management Guide[17] contains this definition:

> *A commutation is an agreement between a worker and insurer to commute or **'buy-out' any future liabilities for weekly compensation** payments and medical, hospital and rehabilitation expenses associated with the injury, through the payment of a lump sum to the worker.*

Deloittes described a commutation in 2010 as:

> A commutation is a commercial agreement between two parties, (re) insured and (re) insurer, where, subject to the payment of a mutually agreed sum to the (re) insured, the (re) insurer is discharged of all past, present and future claims arising from the contracts ceded by the insured or reinsured, which form the subject of the commutation.[18]

Icare publishes this definition:

> *Under some circumstances, you can get your workers insurance payments in one lump sum if your employer and insurer agree.*
>
> *The official term is a 'commutation' which means that you accept a single lump sum to cover all of your agreed entitlements including medical, hospital and rehab payments.*
>
> *It also replaces any future weekly payments you may be eligible to receive*.[19]

A **commutation** requires a worker to agree to accept and an insurer agree to pay, a lump sum in exchange for complete discharge of future obligations to make periodic and other payments which are exchanged by receipt of the lump sum. The right to receive further payments of any kind (including work injury damages) is extinguished.

> What is the purpose of commutation or 'commuting one's rights'?

In 1990, a working group of Actuaries reported *"a commutation as "the means outside litigation, arbitration, repudiation or liquidation, whereby both parties to a potential dispute can arrive at an acceptable financial settlement." The report recognised the importance of commutations in resolving issues which might otherwise lead to lengthy and costly legal actions."*[20]

Whilst not clearly articulated anywhere, other reasons for agreeing to a commutation are:

- To bring finality to a longstanding payment arrangement
- To restore financial and medical autonomy and dignity to a worker
- To put the worker in circumstances that they can 'move on'
- To avoid further 'injury' and insult to an injured worker
- To resolve or compromise a disputed claim

[17] https://www.sira.nsw.gov.au/workers-compensation-claims-guide/understanding-the-claims-journey/other-compensation-payable/commutation
[18] 'Achieving Finality: The Commutation Process', Lucy Simpson and Alex Kwa, https://www.actuaries.asn.au/library/events/GIS/2010/GIS10_Paper_Simpson%20and%20Kwa.pdf
[19] https://www.icare.nsw.gov.au/injured-or-ill-people/workplace-injuries/payments/commutation-payments#gref
[20] 'Achieving Finality: The Commutation Process', Lucy Simpson and Alex Kwa, op cit, page 3

- To settle a disputed claim
- To release the insurer from ongoing administration and management of a claim.

> The existing preconditions to commutation

The existing preconditions to commutation are contained in section 87EA(1) of the 1987 Act and are at present a considerable barrier to commutation being used as an effective exit strategy.

They are:

(a) the injury has resulted in a degree of permanent impairment of the injured worker that is at least 15% (assessed as provided by Part 7 of Chapter 7 of the 1998 Act), and

(b) permanent impairment compensation to which the injured worker is entitled in respect of the injury has been paid, and

(c) a period of at least 2 years has elapsed since the worker's first claim for weekly payments of compensation in respect of the injury was made, and

(d) all opportunities for injury management and return to work for the injured worker have been fully exhausted, and

(e) the worker has received weekly payments of compensation in respect of the injury regularly and periodically throughout the preceding 6 months, and

(f) the worker has an existing and continuing entitlement to weekly payments of compensation in respect of the injury (whether the incapacity concerned is partial or total), and

(g) the injured worker has not had weekly payments of compensation terminated under section 48A of the 1998 Act[21].

> Recommendations and suggestions made since 2012

In the 2012 Amending Act, schedule 8 proposed amending section 87EA by inserting two subsections in identical terms to those contained in the Bill at clause [78] save for the Authority being nominated as the approving party rather than the President of the Commission. These proposed amendments to section 87EA were criticised by the legal profession for providing the Authority the responsibility for determining the "classes of cases" (not defined anywhere) that could be considered for commutation outside of the subsection 1 preconditions and for doing so by regulation (beyond the direct scrutiny of the Parliament). Schedule 8 was never commenced.

In 2014 the Report of the Statutory Review of the 2012 Workers Compensation Legislative Amendments conducted by the Centre for Internation Economics provided:

"Addressing barriers to return to work

- **Providing better tools and supports to enable return to work outcomes. This may include:**

– *amending return to work criteria around geographic and career transfers to impose only 'reasonable' requirements on injured workers. This is likely to require some recognition of the costs of relocation and retraining.*

[21] Section 48A deals with failure to comply with the obligations of worker which may result in suspension or termination of payments.

– *removing barriers to commutations where they provide a workable and mutually agreed outcome for employers and injured workers. The existing restrictions to commutations reflect a reluctance to expose the Nominal Insurer Scheme to funding risk, but for self-insurers and specialised insurers these risks are internalised, and if both parties should seek to enter into a voluntary and mutually agreeable commutation arrangement it seems reasonable that they should not be prevented from doing so (as is currently happening under existing workers compensation legislation), so long as workers are protected (receive proper legal advice) and are not coerced into suboptimal agreements."*

The Parkes Inquiry conducted by the WIRO, Mr Kim Garling in 2015 issued a Discussion Paper titled "Settlement and Finalisation of Claims" Discussion Paper which informed the unanimously endorsed Principle that "*Workers should be entitled to exit the Scheme on a fair and reasonable basis with minimal constraints."*

In 2020 His Honour Justice Robert McDougall QC (McDougall) in his independent review of the *State Insurance and Care Governance Act* 2015 (Report dated 30 April 2021) received a submission from icare which identified the benefits of commutation as being voluntary and non-adversarial; providing an opportunity to exit the NSW workers compensation scheme with dignity and choice, and minimises financial distress; and providing an injured worker with control over their future.

Icare identified in paragraph 62 :

> *"In particular, in the case of injured workers impacted by the cessation of weekly entitlements pursuant to section 39 of the 1987 Act, the option to commute their medical entitlements may provide injured workers with greater financial choice. Further, commutation is often a superior alternative to WID disputes, as it encourages a more timely resolution of the claim from time of offer to payment."*

Icare called for reform by the imposition of less stringent eligibility criteria to encourage uptake of commutation by injured workers. Modelling conducted by icare suggested that a relaxation of the 87EA(1)(d) requirement to exhaust all opportunities for injury management and return to work to "no likelihood of return to work" and a reduction in the impairment threshold of 15% to "greater than 10%" (87EA(1)(a)) and alternatively making commutations available to certain classes of claims would on the basis of financial modelling result in significant potential net savings to the system. Icare also expressed the opinion that removing the Authority from the approval process would lead to an increased uptake in commutation.

McDougall made recommendation 40: *"That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission."*

In late 2022 SIRA hosted small group meetings to consult with stakeholders to discuss "expanding access to commutations in the New South Wales workers compensation scheme". Topics for discussion were provided:

- *what your views are on the **benefits** and **risks** associated with broadly opening access to commutations in the NSW Scheme;*
- *whether you think there are **any workers whose claims should not be commuted**;*
- *how we ensure the **"right workers" exit the Scheme** and avoid any shift in focus away from scheme objectives;*
- *what you believe an option or approach is that provides **sustainable, expanded access** to commutations in the Scheme;*

- *your views on **claims (or cohorts of claims)** that would be appropriate for commutation as part of **a targeted strategy** and why; and*
- *your views on appropriate **protections** and **controls**.*

Despite promising feedback and outcome of the consultation, none was provided. However, in October 2022 the *State Insurance and Care Legislation Amendment Bill* 2022 came before the Parliament and in the first print the precise amendments now being pressed were contained in Schedule 2, clause 4. The second print of the Bill omitted the amendments to section 87EA.

In the 13 years since 2012, there have been very few instances of commutations meeting the preconditions and being approved by the Authority. Only very recently is there evidence that claims managers are approaching workers to determine if they are interested in commuting their rights. However, as demonstrated there has been a call for the reinstatement and widening of availability of exit options by way of commutation by successive reviews over the same period.

Opinion

Commutations present an opportunity for significant savings to be made in the system. This has been demonstrated by icare in the McDougall Review.

The proposed amendment to section 87EA does **not** open up commutations sufficiently.

Permitting the regulator SIRA to define "classes of cases" *by regulation*, without defining what a class or a case is, so as to relax the preconditions to commutation does not provide greater opportunity for workers and insurers.

I prefer and endorse the opinion of the Law Society of New South Wales in its letter to the SIRA 2022 Consultation: "*We are of the view that all workers should be given the option to leave the scheme through commutation arrangements. In obtaining the necessary legal advice, workers will be in a position to make an informed and considered decision. It should be borne in mind that agreeing to a commutation is voluntary. Further, if only certain classes and cohorts are permitted to commute, this may result in many workers for whom commutation would be beneficial missing out. A further consideration is that by naming certain classes of claim, some workers may feel pressured to enter a commutation. This is contrary to the notion that a commutation relies on the voluntary participation of the parties."*[22]

The only relevant interested parties to a Commutation are the 'insurer' and the 'worker'. The regulator should not be assigned the responsibility of determining what class of worker can circumvent the preconditions.

The requirement for the provision of independent financial advice is an unnecessary and onerous requirement previously within the Act and removed due to cost and delay.

I support the call for settlement options in the system and note previous suggestions by the Australian Lawyers Alliance, specifically the removal of all the restrictions in section 87EA of the *Workers Compensation Act 1987* so that the parties have the ability to resolve statutory compensation entitlements on a final basis. In the ALA's view, the only restrictions that should be imposed are that the requirement that a claimant obtain legal advice on any such settlement and that such settlement be the subject of approval from the Personal Injury Commission.

[22] Law Society of NSW Letter to Christian Fanker, Director Scheme Design Policy and Performance SIRA dated 5 October 2022 "Expanding Access to commutations in the NSW Workers Compensation Scheme."

> Alternative drafting Recommendation

That either all of the preconditions in section 87EA subsections (a) to (g) be omitted, proposed subsections 2 and 2A be omitted, and the substance of subsection 2A(a) to (d) be placed in subsection (1)

OR

Proposed Subsection (2) be amended to read:

"(2) Despite subsection (1), a liability in relation to an injury may be commuted to a lump sum under this division in a particular case if the President is satisfied the lump sum to which the liability will be commuted is not inadequate and not excessive."

Omit proposed 87F(2A)

7. Schedule 1 Clause [98] DETERMINATION OF THE DEGREE OF PERMANENT IMPAIRMENT AND ASSESSMENT PROCESSES

The Bill inserts a new Part 6 into the 1987 Act 'Determination of degree of permanent impairment' comprising sections 152 to 153O. The provisions **affect all injured workers**.

Part 6 provides a whole new process for the assessment of impairment under the responsibility and to be conducted by the regulator SIRA.

> Current 'assessment process'

Workers seek legal advice and legal assistance to pursue their claims for lump sum compensation or to assert a threshold impairment.

In order to pursue a claim for lump sum compensation or to assert a threshold impairment, a worker has to undergo examination and evaluation by a trained assessor of permanent impairment (an assessor on the SIRA list). The cost of a trained assessor's report is regulated by SIRA in their Independent Examination and Reports Fee Order.

The Workers Compensation Guidelines 2021 in Part 7 provides for Independent medical Examinations and Reports and in Part 8 deals with lump sum compensation setting the procedure to assert a claim.

With the resulting report, the worker will make a claim for lump sum compensation with the insurer. More often than not the insurer will not accept the worker's assessment and will arrange their own assessment by a trained assessor.

Up until fairly recently negotiation and compromise between parties as to whole person impairment percentage has not been permitted by the regulator. The parties can come to an agreement and execute a "Complying Agreement". Where the parties disagree as to the extent of impairment, the worker will lodge an application for consideration and assessment by a medical assessor appointed by the President of the Commission.

The 1998 Act in Part 7 contains the existing medical ***assessment*** processes. Section 322 of

322 Assessment of impairment

(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.

(2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.

(3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.

Note— Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.

(4) A medical assessor may decline to make an assessment of the degree of permanent impairment of an injured worker until the medical assessor is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made.

A medical assessment certificate that emanates from an assessment in the Commission is final and binding subject to appeal rights.

Section 327 provides for appeals against medical assessment. An appeal must be made within 28 days of the medical assessment unless the appeal is on the grounds of either:

> "deterioration of the worker's condition that results in an increase in the degree of permanent impairment"
>
> or "availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against)."

The current process is complete and satisfactory and provides an opportunity for workers with deterioration of the condition to appeal from a medical assessment certificate.

Annexure C to this paper is a copy of Part 7 Medical Assessment 1998 Act.

> Proposed principal assessment process to be conducted by SIRA

The new Part 6 provisions mandates a whole new assessment process replacing that contained within the guidelines and section 322 of the 1998 Act for the assessment of the degree of permanent impairment.

The new process which is to be conducted by SIRA permits only one assessment by a single trained assessor of permanent impairment either agreed to between worker and insurer or appointed by SIRA.

Section 153A requires an injured worker to obtain independent legal advice about the full "legal implication of the assessment" including advice in relation to any other entitlement the injured worker may be able to access under any other law and "the desirability of the worker obtaining independent financial advice about the financial consequences of the impact of the assessment". I presume that the cost of independent financial advice is to be borne by workers themselves. There is no indication as to whether the legal advice required prior to assessment will be paid for out of the Fund.

The processes to be managed by SIRA replicate the processes currently utilised in the Personal Injury Commission by the medical assessors.

The SIRA permanent impairment assessment process replicate the processes and conditions contained in Part 7 Medical Assessment 1998 Act. Sections 322 is omitted through the Bill and there is a slight amendment section 322A 1998 Act. Section 322(1) provides that the assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Act is to be made in accordance with the Workers Compensation

Guidelines. Section 322(2) and sub paragraphs (3) and (4) are omitted but reproduced and lengthened in the new Part 6 provisions.

New section 153K permits an Assessor to consult with any medical practitioner or healthcare professional treating or who has treated the worker. There is no provision for the worker to be party to any such consultation. The ability of an assessor to discuss a worker with another medical practitioner outside of the worker's presence and without their express consent could constitute a breach of privacy.

In a capricious and unnecessary provision, workers who obstruct an examination by a permanent impairment assessor will have their "right to weekly payments" and their "right to recover compensation in relation to the injury" suspended.

Following an assessment by a SIRA appointed permanent impairment assessor a certificate will issue setting out the details of the degree of permanent impairment, the facts on which the assessment is based and certifying as to the assessment of the degree of permanent impairment with reasons for that assessment.

A dispute about the degree of permanent impairment can be referred to the Commission for review.

I oppose the change to what is a simple, fair and equitable existing process.

Both insurers and workers enjoy the ability to choose their own independent medical examiner and explore resolutions and settlements that benefit the system and the parties. The comparison of two competing opinions can often facilitate resolution or at least identify outliers amongst the trained assessors of permanent impairment. There can be no assurances that this new process will result in fairer assessments, better outcomes for workers or a saving to the system.

Another consideration is the cost of establishing a new process that sits with the regulator. The regulator already has responsibility for the training of assessors and maintaining of a trained assessor list. That list has not been maintained well for at least the last 10 years. The regulator does not currently have the resources to run the assessment process and such a change in process should undergo thorough costing and analysis before it replaces what is a clear and simple procedure.

By taking the "permanent impairment assessment process" into the regulator, there will be a loss of any transparency into the process and an inability to correct any deficiencies.

> Further principal assessments on the basis of deterioration of condition

Section 153N is seemingly in response to requests by workers that they can undergo a further assessment where there is a deterioration in their condition which may lead to an impairment assessment that will permit them to exceed a threshold and pursue further rights,

At present a worker can only undergo the equivalent of a further principal assessment only by bringing an appeal against a Medical Assessment Certificate on the basis of "deterioration of their condition that results in an increase in the degree of permanent impairment". Such an appeal is not limited by time and there is no requirement for the deterioration to be "significant". However, ILARS will not grant funding to a worker for an appeal unless the worker can demonstrate that the deterioration is such that they will either meet or exceed a threshold gain access to for further benefits.

Further assessment will only be made in very confined circumstances. Either the worker and insurer have to agree that "it appears there has been an unexpected and material

deterioration" in the worker's condition. "Unexpected and material deterioration" can only occur if at the time of the original principal assessment there was no reasonable cause to believe the worker's condition would deteriorate, and that deterioration results in an increase of at least a further 20% WPI.

Workers should be entitled to a further assessment for the purposes of asserting a threshold but the bar set is far too high. Firstly, given the constraints on every single benefit contained within the legislation and the imposition of thresholds for access to benefits requirement that there an 'unexpected and material deterioration' in a workers condition is unduly and inappropriately onerous. Secondly, requiring an increase of at least a further 20% WPI puts further assessments out of the reach of most if not all injured workers.

A significant deterioration of at least 5% should be sufficient to justify a further principal assessment.

I maintain, however that the current arrangements regarding medical assessments should remain in place. All assessments should be conducted through the current process in the Personal Injury Commission and not by SIRA

> Why SIRA should not be involved in dispute resolution

In the Law and Justice Committee' s 2014 **Review of the exercise of the functions of the WorkCover Authority**[23] review participants were concerned about a conflict of interest between the functions of the Authority as insurer, regulator, and prosecutor. The Committee stated at paragraph 3.22 – 3.23 of their report:

> *The committee shares the concerns of review participants regarding the potential for conflicts of interest to arise in the current situation of WorkCover undertaking the role of both nominal insurer and scheme regulator. While we note the undertaking by WorkCover to more clearly distinguish between these two roles when communicating with stakeholders, we believe more needs to be done to eliminate any real or perceived conflict.*
>
> *The committee believes that the Minister for Finance and Services, in consultation with WIRO and other relevant stakeholders, should consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable*.

The Committee made Recommendation 1 "That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable."

At the time WorkCover had a role in reviewing work capacity assessments. In the review process of a work capacity assessment there were three tiers of review: firstly, an internal review by the insurer, secondly a merit review by WorkCover and finally a review by WIRO.

During the Inquiry, questions were raised and discussed over independence and impartiality of the merit review process and the inherent conflict in WorkCover's multiple roles. Recommendation 2 was made that the Authority review the segregation of functions and

[23] Report 54 - September 2014 Standing Committee on Law and Justice

delegations around its role in work capacity decisions. In 2018 the role of reviewing a work capacity decision was passed to the Commission.

Various stakeholders expressed an opinion that the Authority should retain responsibility as the licensing and potential regulator with no role in the dispute resolution process. In 2015, WorkCover was disbanded be the enactment of the *State Insurance and Care Governance Act 2015*.

The concerns and arguments remain the same: SIRA should have no role in the dispute resolution process. Permanent impairment assessment is part of the dispute resolution process. There is a distinct perception of conflict of interest if that process is conducted by the regulator.

8. Schedule 2 Clause [19] FUNDING OF ILARS

The proposed amendment to section 3371) are for the regulations to:

- provide for "funding for ILARS" (being the total amount from the Operational Fund to be allocated to the ILARS), and
- provide a scale for the maximum legal and associated costs provided by the IRO, including providing for no costs to be payable for certain matters in certain circumstances

It is not clear what is intended by the proposed amendments other than the Regulator assuming the function of ILARS and potentially imposing a scale of costs for administering by ILARS. This amendment is unnecessary and appears to be interference with the functions of the ILARS and the independence of the Independent Review Officer (IRO).

The IRO is responsible for managing and administering ILARS (including by issuing Guidelines)[24]. The purpose of ILARS (ILARS) "is to provide funding for legal and associated costs **for workers** under the Workers Compensation Acts seeking advice regarding decisions of insurers for those Acts and to provide assistance in finding solutions for disputes between workers and insurers."[25]

The IRO can issue Guidelines with respect to "the allocation and amount of funding for legal and associated costs under ILARS".[26] In addition can revoke and replace ILARS Guidelines and adopt the provisions of other "publications, whether with or without modification or addition and whether in force at a particular time or from time to time."[27] The IRO is given agility through the making of Guidelines. Removal of the ability of the costs or amend their Guidelines is an attempt to fetter the independence and constrain the functions of the IRO.

Any Guidelines issued must be published on the NSW legislation website and can be disallowed by Parliament.

and is a direct interference with the independence of the IRO and the IRO's functions and must be resisted.

The IRO must prepare an Annual Report each financial year which is tabled in Parliament. The Annual Report must provide information on the operation of ILARS and any information as the Minister directs. In addition, any Guidelines (including the amounts paid under a grant of funding) are subject to the scrutiny of Parliament.

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[24] Schedule 5, Part 5, clause 8(d) *Personal Injury Commission Act 2020*
[25] Schedule 5, Part 5, clause 9(2) *Personal Injury Commission Act 2020*
[26] Schedule 5, Part 5, clause 10(1)(b) *Personal Injury Commission Act 2020*
[27] Schedule 5, Part 5, clause 10(2) & (3) *Personal Injury Commission Act 2020*

If the intention is to impose funding envelope for the ILARS then that must be resisted. The total ILARS spend is affected by many factors: the number of workers seeking grants of funding, the number of claims, the numbers of disputed claims, the changing requirements of the legislation.

If the intention is for ILARS to pay under Schedule 6 of Workers Compensation Regulation then that must be resisted. Schedule 6 is simply not fit for purpose and has not been so since the 2012 reforms.

The rationale for this amendment is not apparent and has the proposed amendment has neither been consulted on or subject to scrutiny. There does not appear any justification for making this change to an accepted and valuable service for **workers** which provides them with access to independent legal assistance and advice at no cost to them. Any attempt to disrupt the function of ILARS without evidence as to the need must be resisted.

9. INCREASED DISPUTATION.

Many of the proposed provisions in the Exposure draft provisions if enacted will necessarily increase disputation between workers and employers/insurers and hence the knock on effect is reduced return to work rates, depleted workforces, reduced productivity, delay in treatment, delay in restoration of health, and significantly increased costs to the system.

Increased disputation must be resisted in a system that already encourages disputes and is adversarial by its nature.

10. DRAFTING ISSUES

> Insertion of current rates in existing provisions

the Bill contains amendments to almost every provision within both acts where a dollar amount has increased as a consequence of indexation or other measures. In the context of what is described as very complex legislation which requires a dedicated review, inserting current values into existing provisions adds to the complexity and confusion, both because it is hard to determine whether or not the new rate quoted relates to old existing claims and from when that payment commenced.

It is far preferable that the drafters do not make such amendments as provided for in Shcedule 1 clauses 8, 9, 11, 13, 15, 32 to 41, and 108 to 117.

> Henry VIII Clauses

In its Report 7 – October 2020 the Legislative Council's Regulation Committee "Inquiry into the making of delegated legislation in New South Wales", the Committee reported at Chapter 3 (The potential for executive overreach) that "the chief concern raised in the inquiry with regard to executive overreach centred on the use of Henry VIII clauses, shell legislation and quasi-legislation."

> "*The term 'Henry VIII clause' is generally used to describe a clause in a principal Act of Parliament that allows for the making of delegated legislation and confers the ability for the delegated legislation to amend the principal Act of Parliament*".

Almost every submission to the Inquiry, including from the Parliamentary Counsel's Office, eminent legal experts and members of legal academia, raised concerns with respect to Henry VIII clauses.

The Committee concluded that there is a potential for executive overreach in the delegation of legislative power particularly arising from the use of Henry VIII clauses. In its comment at

paragraph 3.62 it is stated “use of these legislative tools carries with it the risk that the executive may determine significant elements of statutory schemes in ways that the parliament may not have intended. Why does this matter? In our view, it matters because the legitimacy of the laws made by the delegated legislation may be adversely affected if the public perception is that the accepted balance between Parliamentary and executive power has become skewed. At the end of the day, it is in the interests of good government that the potential for executive overreach is managed.”

Henry VII clauses are used throughout the Bill. Those that deserve attention subject to whether the substantive provision remains in the Bill are set out in Table 6.

Table 6 – List of potential Henry VIII clauses

Section	Section title	Words
8D(2)(o)	Meaning of reasonable management action	Another action prescribed by the regulations
8E(h)	Meaning of relevant event	Another event prescribed by the regulations
8G(3)	Primary psychological injuries	The regulations may provide for matters relating to primary psychological injuries, including- (a) The type of matters or circumstances an insurer must take into account when determining whether an injury is a primary psychological injury, and (b) The evidence a worker must provide for a claim in relation to a primary psychological injury
19B(5)	Presumptions relating to certain employment in relation to COVID-19	The regulations may provide for when a worker is incapable of work for subsection (5).
44BB	Regulations	The regulations may provide for the procedures to be followed by insurers in connection with— (a) the making of work capacity decisions, including the adjustment of an amount of weekly payments a result of work capacity decisions, and (b) the making of decisions about pre-injury average weekly earnings, including the adjustment of weekly payments as a result of decisions.
87EA(2)(a)	Preconditions Commutations	Despite subsection (1), a liability in relation to an injury may be commuted to a lump sum under this division in a particular case if the President is satisfied— (a) the case is of a class prescribed by the regulations as a class to which this subsection applies, and (b) the circumstances of the case satisfy the requirements prescribed by the regulations as requirements that must be satisfied for this subsection, and (c) unless the regulations otherwise provide, the lump sum to which the liability will be commuted is not inadequate and not excessive.
87F(2A)	Commutation by Agreement	(2A)The regulations may require the provision of independent financial advice to a worker, at the expense of the insurer, before the worker enters into a commutation agreement and the

		requirement applies despite any other provision of this section.
153N(1)(c)	Further principal assessments	(c) in circumstances prescribed by the regulations

> Consistency

The Bill lacks consistency in drafting with the 1987 Act and the 1998 Act. The Parkes Inquiry held in 2015 by the WIRO drew attention in its unanimous statement of principles and recommendations to the existing discrepancies in drafting within the 1987 and 1998 Acts. The Parkes "Definitions" Discussion Paper (**Annexure D**) identifies the existing inconsistent terminology within the Acts, relevantly the use of "greater than" and "more than" when expressing a threshold of degree of impairment. The drafters of this Bill have added a further expression which only adds to the confusion and inconsistency by the use of "at least …".

In an already confusing and complex matrix of legislative provisions there must be consistency of language and drafting style. The legislation should be clear on its face as to its meaning and intention. Introduction of expressions which further display inconsistency only contribute to ambiguity and may lead to unnecessary disputation.

Closing

I thank the Committee for the opportunity to provide this Submission, albeit in a very short timeframe. Should the Committee require clarification of any of the matters or opinions expressed in this submission I am happy to oblige.

Roshana May

15 May 2025

ANNEXURE A

WHOLE PERSON IMPAIRMENT AND THE PSYCHIATRIC IMPAIRMENT RATING SCALE

Use of 'Whole person impairment' in the NSW workers compensation system

- **Background**

Since 1911 the NSW Workers Compensation Scheme has included a lump sum payment to injured workers to compensation for permanent impairment arising from injury.

Since 1998 the NSW Workers Compensation system objectives have included an objective to "*provide injured workers and their dependants with income support during incapacity, **payment for permanent impairment** or death, and payment for reasonable treatment and other related expenses*".

The 1987 Act introduced sections 66 and 67 which provided in section 66 for a payment of a lump sum for permanent impairment, and in section 67, subject to meeting a threshold[1], a lump sum payment for pain and suffering[2]. The policy behind the introduction of section 67 arose from the abolition of common law rights in 1987. In 1989 common law rights were reintroduced and in November 2001, broad common law rights were abolished and replaced by 'Work Injury Damages', where access to common law damages was limited only to past and future economic losses. Section 66 and 67 lump sum compensation became the 'substitute' for the abolished 'non-economic loss damages' for work injury damages claimants.

Between 1987 and 2002 the method of assessment of impairment was relatively subjective and subject to wide variation in medical opinion. Impairment was assessed by the body part subject to a table of 'disabilities'. Each body part was assigned a proportion of the whole body, with compensation awarded by body part (for example: permanent loss of efficient use of the left leg at or above the knee, permanent impairment of the back).

In 1 January 2002 the method of determining impairment and quantifying the section 66 payment changed. It was at this time the concept of 'whole person impairment' (WPI) was introduced and an impairment evaluation method imposed by Guides[3] (the Permanent Impairment Guides). Impairment was to be measured of the affected body part but evaluated against the whole person in accordance with the Permanent Impairment Guides.

In addition, 'thresholds' for access to benefits were introduced: "*In New South Wales the current thresholds for accessing statutory permanent impairment lump sums are 1 per cent for general whole person impairment, 6 per cent WPI for binaural hearing loss and 15 per cent WPI for psychological injury*"[4].

Between 2002 and 2012 there had been one increase in the quantum of permanent impairment compensation (in 2007) but no increase in pain and suffering lump sum compensation.

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1 The threshold for section 67 compensation was $10,000 of section 66 compensation to 1 January 2002 and thereafter 10% WPI (whole person impairment) to 19 June 2012.

2 From 1987 the maximum payment for pain and suffering was $50,000 paid as a proportion of "a most extreme case"

3 WorkCover Guides for the Evaluation of Permanent Impairment

4 Joint Select Committee on the NSW Workers Compensation Scheme Report 1 – June 2012 paragraph 3.126

In 2012 a major reform package increased the 'threshold' for lump sum compensation for permanent impairment to greater than 10% for physical injuries and hearing loss. This significantly reduced the number of lump sum compensation payments.

Most importantly in 2012, for the first time, impairment was introduced as the threshold for determining access to weekly payments of compensation and ongoing medical treatment. Specifically, workers with an impairment of greater than 20% are said to be able to access weekly payments beyond five years to retirement age and additionally those workers with a greater than 30% impairment are not required to participate in a work capacity assessment (but can be the subject of a work capacity decision). Workers with more than 20% WPI are considered workers with high needs and enjoy certain relief from proving capacity after 130 weeks. Workers with more than 30% WPI are considered workers with highest needs and enjoy special benefits. There are only a relatively small number of workers with greater than 30% WPI in the NSW scheme (compared to the number of workers with significantly lower WPI).

- **WPI as threshold determinant to access benefits**

In NSW, since 2012, an 'assessment' whole person impairment is required to access:

- weekly payments beyond 130 weeks (2.5 years)
- domestic assistance,
- medical expenses and treatment for more than 2 years
- a lump sum payment for permanent impairment
- a commutation of rights and entitlements, and
- determining access to modified Common Law damages (Work Injury Damages).

Read below as to the use of WPI as a measure for 'capacity for work',

The Psychiatric Impairment Rating Scale (PIRS)

The "Psychiatric Impairment Rating Scale" (PIRS) was introduced in 2001 when the workers compensation legislation was amended to include a lump sum payment for impairment acquired through psychological injury.

Previously psychological injury had been evaluated through a subjective measure with no guidance under the table of disabilities issued by WorkCover NSW.

In 2002, with the shift to the adoption of 'Whole Person Impairment" (WPI) as basis for determining permanent impairment lump sum compensation and 'thresholds' to certain benefits and damages, WorkCover first adopted the American Medical Association Guides to the Evaluation of Permanent Impairment Fifth Edition (fourth edition for eyes) (AMA5) for the Principles of Assessment and method of assessment for most physical injuries.

WorkCover issued Guideline for the evaluation of permanent impairment which adopted the assessment principles of AMA5 but modified some of the assessment methodology to NSW employment conditions and set a different method for some Body Systems, in particular ***psychological injury***. The method of assessment adopted by WorkCover NSW was the "Psychiatric Impairment Rating Scale" (PIRS) developed by Doctors Parmigiani, Skinner, Lovell and Milton and adopted by WorkCover NSW in 2001 for the NSW Workers compensation scheme. [The PIRS was originally used in NSW under the Motor Accidents scheme to compensate those with psychological injuries arising in motor vehicle accidents].

The PIRS

The NSW Guidelines for the evaluation of permanent Impairment – Fourth Edition set out Chapter 11 the method of evaluating and assessing impairment as a result of psychiatric and psychological disorders and injury and the PIRS.

The PIRS is repeated at the end of this paper.

Critique and analysis of the efficacy of the PIRS

Most recent critique of the PIRS has been demonstrated by the Parliament in the report 84 **Standing Committee on Law and Justice** report on the 2023 Review of The Workers Compensation Scheme. Recommendation of the Report states "that the State Insurance Regulatory Authority review the use of the Psychiatric Impairment Rating Scale within the workers compensation scheme, to assess whether it is the most effective tool for calculating whole person impairment in relation to psychological injuries."

The committee reported that icare considered that the PIRS tool should be reviewed as to its challenges and to assess whether the PIRS is the best and most effective way of calculating WPI within the workers compensation system (P85 SCLJ Report 84)

- **Davies, G. R. (2008) The Psychiatric Impairment Rating Scale: Is it a valid measure?** *Australian Psychologist*

In August 2008, Dr Gordon Robert Davies first published an article entitled "the Psychiatric Impairment Rating Scale: is it a valid measure?". Republished in 2011 in the publication Australian Psychologist, the Abstract states:

> "The Psychiatric Impairment Rating Scale (PIRS) was introduced as part of the Workcover legislation in NSW and has since been adopted in other States. There has been significant criticism of its validity and structure, but no supporting research. This study was undertaken to examine the validity of the use of the PIRS to assess psychiatric impairment. This study assesses the concurrent validity of the PIRS by comparing it with the Comcare and Social Security scales and the Health of the Nation Outcome Scale, together with two self-report measures. It also examines the relationship between the PIRS subscales. A high level of ordinal concordance was demonstrated between all scales although the ratings obtained had major systematic variations between scales in both level and distribution. The scoring technique in the PIRS transforms normally distributed scores to a skewed distribution with a preponderance of low scores. The PIRS is a valid scale for ordering the severity of psychological disability but it measures disability rather than impairment. The form of scoring does not provide a proportionate or statistically meaningful measure."

- **Davies, G. R. (2013). The reliability of the Psychiatric Impairment Scale (PIRS) in Valuing Psychological Impairment, *Psychiatry, Psychology and Law***

In a further article published in Psychiatry, Psychology and Law, Volume 20, 2013-issue 5, titled "The Reliability of The Psychiatric Impairment Scale (Pirs) In Valuing Psychological Impairment**"**, the Abstract states:

> This study examines the validity of valuations made using the descriptors in the subscales of the Psychiatric Impairment Scale (PIRS). Estimates of the item valuations on a 0–100 scale made by a group of psychiatrists trained in the use of the PIRS and a comparative group of patients with psychiatric disorders were compared. The results are contrasted with impairment ratings resulting from the use of the prescribed valuations of the descriptors. There was good agreement between the groups on the

valuation of classes 1 and 2, but a substantial loss of discriminative ability for classes 3, 4 and 5. Valuations of the degree of disability for each class were, in all cases, much larger than the value obtained using the standard scoring system, **suggesting that the level of impairment measured by the PIRS is undervalued.** Questions are also raised regarding the reliability of the PIRS in use.

- **A Report on the Ratings of Psychiatrists Using the Psychiatric Impairment Rating Scale: Some Australian Data**, James A Athanasosu

Athanasou concludes that the PIRS is not a perfect measure and "It was designed with a specific purpose, namely to assess psychiatric outcomes in a standardised fashion and in a way that is broadly consistent with the medico-legal system of physical impairment ratings." However, it is arguably not the best tool for determining the extent of psychiatric injury in "compensable cases."

Athanasou cites a number of studies or papers which are not available e.g**. Parmegiani, J.** (2009). Psychiatric Impairment Rating Scale. The last ten years and the next ten years. Sydney: Author.

- **The usage of the AMA Guides for the determination of psychological injury within the state and federal workers' compensation systems, Pamela A Warren Published: 25 November 2016, Psychological Injury and The Law Volume 9, pages 313–340, (2016)**

  [USA]

This paper is not accessible due to a firewall and relates to use of the AMA % Guides for the assessment of psychological injury in states and territories of the USA.

Comment

The lack of empirical studies on the PIRS highlights a need for more research to assess its reliability and validity, especially in the context of evolving mental health needs.

There has not been an appropriate evaluative study published in Australia or NSW about the efficacy and accuracy of the PIRS. Commentary so far, including from the author Dr Parmegiani, suggest that the tool is harsh.

The American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition (AMA5)

The NSW Guidelines adopt the principles of the AMA5.

Chapter 1 of the AMA5 sets out the ***philosophy, purpose and appropriate use*** of the Guides.

AMA5 define *impairment* as "a loss, loss of use, or derangement of any body part, organ system, or organ function". Chapter 1 deals with the features of **impairment.**

> *A medical impairment can develop from an illness or injury. An impairment is considered permanent when it has reached* ***maximal medical improvement (MMI),*** *meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term impairment in the Guides refers to* ***permanent impairment,*** *which is the focus of the Guides.*
>
> *…determining whether an injury or illness results in a permanent impairment requires a medical assessment performed by a physician. An impairment may lead to functional limitations or the inability to perform activities of daily living. [Chapter 1.2a]*

The difference between definitions and interpretations of ***impairment*** and ***disability*** (as far as they relate to the USA) are contained in Table 1-1

Table 1-1 Definitions and Interpretations of Impairment and Disability

Organization	Impairment	Disability	Physicians' Role	Comments
Guides to the Evaluation of Permanent Impairment (5th ed, 2000)	A loss, loss of use, or derangement of any body part, organ system, or organ function.	An alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment.	Determine impairment, provide medical information to assist in disability determination.	An impaired individual may or may not have a disability.
World Health Organization (WHO) (1999)	Problems in body function or structure as a significant deviation or loss. Impairments of structure can involve an anomaly, defect, loss, or other significant deviation in body structures.	Activity limitation (formerly disability) is a difficulty in the performance, accomplishment, or completion of an activity at the level of the person. Difficulty encompasses all of the ways in which the doing of the activity may be affected.	Not specifically defined; assumed to be one of the decision-makers in determining disability through impairment assessment.	Emphasis is on the importance of functional abilities and defining context-related activity limitations.
Social Security Administration (SSA) (1995)	An anatomical, physiological, or psychological abnormality that can be shown by medically acceptable clinical and laboratory diagnostic techniques.	The inability to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment(s), which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.	Determine impairment; may assist with the disability determination as a consultative examiner.	Physicians and nonphysicians need to work together to define situational disabilities.
State Workers' Compensation Law (typical)[5]	"Permanent impairment" is any anatomic or functional loss after maximal medical improvement has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability. (*Idaho Code* section 72-422)	"Temporary disability" means a decrease in wage-earning capacity due to injury or occupational disease during a period of recovery. (*Idaho Code* section 72-102[10] "Permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. (*Idaho Code* section 72-423)	"Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. (*Idaho Code* section 72-424)	Purpose is to provide sure and certain relief to those who become injured by accident or suffer effects of disease from exposure to hazards arising out of and in the course of employment.

AMA5 define **disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment.**

> *"An individual can have a disability in performing a specific work activity but not have a disability in any other social role. Physicians have the education and training to evaluate a person's health status and determine the presence or absence of an impairment. If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. For example, an occupational medicine physician who understands the job requirements in a particular workplace can provide insights on how the impairment could contribute to a workplace disability. The*

impairment evaluation, however, is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications. Assessing these factors can provide a more realistic picture of the effects of the impairment on the ability to perform complex work and social activities. If adaptations can be made to the environment, the individual may not be disabled from performing that activity."[Chapter 1.2b]

Importantly, the Guides state:

> ***Work*** *is not included in the clinical judgment for impairment percentages for several reasons:*
>
> *(1) work involves many simple and complex activities;*
>
> *(2) work is highly individualized, making generalizations inaccurate;*
>
> *(3) impairment percentages are unchanged for stable conditions, but work and occupations change; and*
>
> *(4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability.*
>
> *For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual labourer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability. As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.*

The distinction the Guides make between disability and impairment are:

> *"An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others stop for example, severe degenerative disc disease may impair the functioning of the spine of both the licensed practical nurse and a bank president in a similar fashion when performing their activities of daily living. However, in terms of occupation, the bank president is less likely to be disabled by this impairment and the licensed practical nurse. An individual who developed rheumatoid arthritis may be disabled from work as a tailor but may be able to work as a childcare aid a pilot who developed a visual impairment, correctable with glasses, may be able to perform all of his daily activities but is not a longer able to fly a commercial plane stop an individual with repeated hernias and repairs may no longer be able to lift more than 20 kg but could work in a factory where mechanical lifts are available stop the guides is not intended to be used for direct estimates of work disability.*
>
> ***Impairment percentages derived according to the guides criteria do not measure work disability. Therefore, it is inappropriate to use the guides criteria or ratings to make direct estimates of work disability****.[Chapter 1.2b, page 9]*

Comment

In other words, WPI should not be used to determine **capacity *for work*. In the context of the NSW workers compensation system, that means WPI should not be used as a gateway or threshold to determine access to weekly payments.**

11. Psychiatric and psychological disorders

AMA5 Chapter 14 is excluded and replaced by this chapter. Before undertaking an impairment assessment, users of the Guidelines must be familiar with (in this order):

- the Introduction in the Guidelines
- chapters 1 and 2 of AMA5
- the appropriate chapter(s) of the Guidelines for the body system they are assessing. The Guidelines replace the psychiatric and psychological chapter in AMA5.

Introduction

1.1 This chapter lays out the method for assessing psychiatric impairment. The evaluation of impairment requires a medical examination.

1.2 Evaluation of psychiatric impairment is conducted by a psychiatrist who has undergone appropriate training in this assessment method.

1.3 Permanent impairment assessments for psychiatric and psychological disorders are only required where the primary injury is a psychological one. The psychiatrist needs to confirm that the psychiatric diagnosis is the injured worker's primary diagnosis.

Diagnosis

1.4 The impairment rating must be based upon a psychiatric diagnosis (according to a recognised diagnostic system) and the report must specify the diagnostic criteria upon which the diagnosis is based. Impairment arising from any of the somatoform disorders (DSM IV TR, pp 485–511) are excluded from this chapter.

1.5 If pain is present as the result of an organic impairment, it should be assessed as part of the organic condition under the relevant table. This does not constitute part of the assessment of impairment relating to the psychiatric condition. The impairment ratings in the body organ system chapters in AMA5 make allowance for any accompanying pain.

1.6 It is expected that the psychiatrist will provide a rationale for the rating based on the injured worker's psychiatric symptoms. The diagnosis is among the factors to be considered in assessing the severity and possible duration of the impairment, but is not the sole criterion to be used. Clinical assessment of the person may include information from the injured worker's own description of his or her functioning and limitations, and from family members and others who may have knowledge of the person. Medical reports, feedback from treating professionals and the results of standardised tests – including appropriate psychometric testing performed by a qualified clinical psychologist and work evaluations – may provide useful information to assist with the assessment. Evaluation of impairment will need to take into account variations in the level of functioning over time. Percentage impairment refers to whole person impairment (WPI).

Permanent impairment

1.7 A psychiatric disorder is permanent if, in your clinical opinion, it is likely to continue

indefinitely. Regard should be given to:

- the duration of impairment
- the likelihood of improvement in the injured worker's condition
- whether the injured worker has undertaken reasonable rehabilitative treatment
- any other relevant matters.

Effects of treatment

1.8 Consider the effects of medication, treatment and rehabilitation to date. Is the condition stable? Is treatment likely to change? Are symptoms likely to improve? If the injured worker declines treatment, this should not affect the estimate of permanent impairment. The psychiatrist may make a comment in the report about the likely effect of treatment or the reasons for refusal of treatment.

Co-morbidity

1.9 Consider comorbid features (eg bi-polar disorder, personality disorder, substance abuse) and determine whether they are directly linked to the work-related injury, or whether they were pre-existing or unrelated conditions.

Pre-existing impairment

1.10 To measure the impairment caused by a work-related injury or incident, the psychiatrist must measure the proportion of WPI due to a pre-existing condition. Pre-existing impairment is calculated using the same method for calculating current impairment level. The assessing psychiatrist uses all available information to rate the injured worker's pre-injury level of functioning in each of the areas of function. The percentage impairment is calculated using the aggregate score and median class score using the conversion table below. The injured worker's current level of WPI% is then assessed, and the pre-existing WPI% is subtracted from their current level, to obtain the percentage of permanent impairment directly attributable to the work-related injury. If the percentage of pre-existing impairment cannot be assessed, the deduction is 1/10th of the assessed WPI.

Psychiatric impairment rating scale (PIRS)

1.11 Behavioural consequences of psychiatric disorder are assessed on six scales, each of which evaluates an area of functional impairment:

1. Self care and personal hygiene (Table 11.1)
2. Social and recreational activities (Table 11.2)
3. Travel (Table 11.3) } Activities of daily living
4. Social functioning (relationships) (Table 11.4)
5. Concentration, persistence and pace (Table 11.5)
6. Employability (Table 11.6).

1.12 Impairment in each area is rated using class descriptors. Classes range from 1 to 5, in accordance with severity. The standard form must be used when scoring the PIRS. The examples of activities are examples only. The assessing psychiatrist should take account

of the person's cultural background. Consider activities that are usual for the person's age, sex and cultural norms.

Table 11.1: Psychiatric impairment rating scale – self care and personal hygiene

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population
Class 2	Mild impairment: able to live independently; looks after self adequately, although may look unkempt occasionally; sometimes misses a meal or relies on take-away food.
Class 3	Moderate impairment: Can't live independently without regular support. Needs prompting to shower daily and wear clean clothes. Does not prepare own meals, frequently misses meals. Family member or community nurse visits (or should visit) 2–3 times per week to ensure minimum level of hygiene and nutrition.
Class 4	Severe impairment: Needs supervised residential care. If unsupervised, may accidentally or purposefully hurt self.
Class 5	Totally impaired: Needs assistance with basic functions, such as feeding and toileting.

Table 11.2: Psychiatric impairment rating scale – social and recreational activities

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: regularly participates in social activities that are age, sex and culturally appropriate. May belong to clubs or associations and is actively involved with these.
Class 2	Mild impairment: occasionally goes out to such events eg without needing a support person, but does not become actively involved (eg dancing, cheering favourite team).
Class 3	Moderate impairment: rarely goes out to such events, and mostly when prompted by family or close friend. Will not go out without a support person. Not actively involved, remains quiet and withdrawn.
Class 4	Severe impairment: never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room or garden when others come to visit family or flat mate.
Class 5	Totally impaired: Cannot tolerate living with anybody, extremely uncomfortable when visited by close family member.

Table 11.3: Psychiatric impairment rating scale – travel

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: Can travel to new environments without supervision.
Class 2	Mild impairment: can travel without support person, but only in a familiar area such as local shops, visiting a neighbour.
Class 3	Moderate impairment: cannot travel away from own residence without support person. Problems may be due to excessive anxiety or cognitive impairment.
Class 4	Severe impairment: finds it extremely uncomfortable to leave own residence even with trusted person.
Class 5	Totally impaired: may require two or more persons to supervise when travelling.

Table 11.4: Psychiatric impairment rating scale – social functioning

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population: No difficulty in forming and sustaining relationships (eg a partner, close friendships lasting years).
Class 2	Mild impairment: existing relationships strained. Tension and arguments with partner or close family member, loss of some friendships.
Class 3	Moderate impairment: previously established relationships severely strained, evidenced by periods of separation or domestic violence. Spouse, relatives or community services looking after children.
Class 4	Severe impairment: unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).
Class 5	Totally impaired: unable to function within society. Living away from populated areas, actively avoiding social contact.

Table 11.5: Psychiatric impairment rating scale – concentration, persistence and pace

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population. Able to pass a TAFE or university course within normal time frame.
Class 2	Mild impairment: can undertake a basic retraining course, or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops headache.
Class 3	Moderate impairment: unable to read more than newspaper articles. Finds it difficult to follow complex instructions (eg operating manuals, building plans), make significant repairs to motor vehicle, type long documents, follow a pattern for making clothes, tapestry or knitting.
Class 4	Severe impairment: can only read a few lines before losing concentration. Difficulties following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone, or needs regular assistance from relatives or community services.
Class 5	Totally impaired: needs constant supervision and assistance within institutional setting.

Table 11.6: Psychiatric impairment rating scale – employability

Class 1	No deficit, or minor deficit attributable to the normal variation in the general population. Able to work full time. Duties and performance are consistent with the injured worker's education and training. The person is able to cope with the normal demands of the job.
Class 2	Mild impairment. Able to work full time but in a different environment from that of the pre-injury job. The duties require comparable skill and intellect as those of the pre-injury job. Can work in the same position, but no more than 20 hours per week (eg no longer happy to work with specific persons, or work in a specific location due to travel required).
Class 3	Moderate impairment: cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful).
Class 4	Severe impairment: cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.
Class 5	Totally impaired: Cannot work at all.

Using the PIRS to measure impairment

1.13 Rating psychiatric impairment using the PIRS is a two-step procedure:

1. Determine the median class score.
2. Calculate the aggregate score.

Determining the median class score

1.14 Each area of function described in the PIRS is given an impairment rating which ranges from Class 1 to 5. The six scores are arranged in ascending order, using the standard form. The median is then calculated by averaging the two middle scores eg:

Example A: 1, 2, 3, 3, 4, 5 Median Class = 3

Example B: 1, 2, 2, 3, 3, 4 Median Class = 2.5 = 3*

Example C: 1, 2, 3, 5, 5, 5 Median Class = 4

*If a score falls between two classes, it is rounded up to the next class. A median class score of 2.5 thus becomes 3.

1.15 The median class score method was chosen as it is not influenced by extremes. Each area of function is assessed separately. While impairment in one area is neither equivalent nor interchangeable with impairment in other areas, the median seems the fairest way to translate different impairments onto a linear scale.

Median class score and percentage impairment

1.16 Each median class score represents a range of impairment, as shown below:

Class 1 = 0–3%

Class 2 = 4–10%

Class 3 = 11–30%

Class 4 = 31–60%

Class 5 = 61–100%

Calculation of the aggregate score

1.17 The aggregate score is used to determine an exact percentage of impairment within a particular median class range. The six class scores are added to give the aggregate score.

Use of the conversion table to arrive at percentage impairment

1.18 The aggregate score is converted to a percentage score using the conversion Table 11.7, below.

1.19 The conversion table was developed to calculate the percentage impairment based on the aggregate and median scores.

1.20 The scores within the conversion table are spread in such a way to ensure that the final percentage rating is consistent with the measurement of permanent impairment percentages for other body systems.

Table 11.7: Conversion table

Aggregate score

% Impairment	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
Class 1	0	0	1	1	2	2	2	3	3																
Class 2				4	5	5	6	7	7	8	9	9	10												
Class 3								11	13	15	17	19	22	24	26	28	30								
Class 4												31	34	37	41	44	47	50	54	57	60				
Class 5																66	65	70	74	78	83	87	91	96	100

Conversion table — explanatory notes

a. **Distribution of aggregate scores**

- The lowest aggregate score that can be obtained is: 1+1+1+1+1+1=6.
- The highest aggregate score is 5+5+5+5+5+5= 30.
- The table therefore has aggregate scores ranging from six to 30.
- Each median class score has an impairment range, and a range of possible aggregate scores (eg class 3 = 11-30 per cent).
- The lowest aggregate score for class 3 is 13 (1 + 1 + 2 + 3 + 3 + 3 = 13).
- The highest aggregate score for class 3 is 22 (3 + 3 + 3 + 3 + 5 + 5 = 22).
- The conversion table distributes the impairment percentages across aggregate scores.

b. **Same aggregate score in different classes**

- The conversion table shows that the same aggregate score leads to different percentages of impairment in different median classes.
- For example, an aggregate score of 18 is equivalent to an impairment rating of
  - 10% in Class 2,
  - 22% in Class 3,
  - 34% in Class 4.

- This is due to the fact that an injured worker whose impairment is in median class 2 is likely to have a lower score across most areas of function. They may be significantly impaired in one aspect of their life, such as travel, yet have low impairment in social function, self-care or concentration.
- Someone whose impairment reaches median class 4 will experience significant impairment across most aspects of his or her life.

Examples: (Using the previous cases)

Example A

PIRS scores						Median class
1	2	3	3	4	5	= 3

Aggregate score						Total	% Impairment
1 +	2 +	3 +	3 +	4 +	5 =	18	22%

Example B

PIRS scores						Median Class
1	2	2	3	3	4	= 3

Aggregate score						Total	% Impairment
1 +	2 +	2 +	3 +	3 +	4 =	15	15%

Example C

PIRS scores						Median class
1	2	3	5	5	5	= 4

Aggregate score						Total	% Impairment
1 +	2 +	3 +	5 +	5 +	5 =	21	44%

Table 11.8: PIRS rating form

Name		**Claim reference number**	
Date of birth		**Age at time of injury**	
Date of injury		**Occupation before injury**	
Date of assessment		**Marital status before injury**	

Psychiatric diagnoses	1.	2.
	3.	4.
Psychiatric treatment		
Is impairment permanent?	☐ Yes ☐ No (Tick one)	

PIRS category	Class	Reason for decision
Self care and personal hygiene		
Social and recreational activities		
Travel		
Social functioning		
Concentration, persistence and pace		
Employability		

Score class

Median

=

Aggregate score

							Total %
+	+	+	+	+	+	=	
Impairment (%WPI) from Table 11.7							
Less pre-existing impairment (if any)							
Final impairment (%WPI)							

ANNEXURE B

"REASONABLY NECESSARY" V "REASONABLE AND NECESSARY" 2025

Note: This paper is written following consideration of the Parkes Inquiry Discussion Paper on Medical and Treatment Expenses (attached) and the McDougall Review 2021

Contents

1. The Legislation

Part 3, Division 3 of the WCA 1987 provides for compensation for medical, hospital and rehabilitation expenses etc.

The phrase "***reasonably necessary***" is contained within section 60 which provides:

> Section 60 **Compensation for cost of medical or hospital treatment and rehabilitation etc**
>
> (1) If, as a result of an injury received by a worker, it is **reasonably necessary** that—
>
> (a) any medical or related treatment (other than domestic assistance) be given, or
>
> (b) any hospital treatment be given, or
>
> (c) any ambulance service be provided, or
>
> (d) any workplace rehabilitation service be provided,
>
> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2).
>
> **Note.**
>
> Compensation for domestic assistance is provided for by section 60AA.
>
> (2) If it is necessary for a worker to travel in order to receive any such treatment or service (except any treatment or service excluded from this subsection by the regulations), the related travel expenses the employer is liable to pay are—
>
> (a) the cost to the worker of any fares, travelling expenses and maintenance necessarily and reasonably incurred by the worker in obtaining the treatment or being provided with the service, and
>
> (b) if the worker is not reasonably able to travel unescorted—the amount of the fares, travelling expenses and maintenance necessarily and reasonably incurred by an escort provided to enable the worker to be given the treatment or provided with the service.
>
> (2A) The worker's employer is not liable under this section to pay the cost of any treatment or service (or related travel expenses) if—
>
> (a) the treatment or service is given or provided without the prior approval of the insurer (not including treatment provided within 48 hours of the injury happening and not including treatment or service that is exempt under the Workers Compensation Guidelines from the requirement for prior insurer approval), or
>
> (b) the treatment or service is given or provided by a person who is not appropriately qualified to give or provide the treatment or service, or

(c) the treatment or service is not given or provided in accordance with any conditions imposed by the Workers Compensation Guidelines on the giving or providing of the treatment or service, or

(d) the treatment is given or provided by a health practitioner whose registration as a health practitioner under any relevant law is limited or subject to any condition imposed as a result of a disciplinary process, or who is suspended or disqualified from practice.

(2B) The worker's employer is not liable under this section to pay travel expenses related to any treatment or service if the treatment or service is given or provided at a location that necessitates more travel than is reasonably necessary to obtain the treatment or service.

(2C) The Workers Compensation Guidelines may make provision for or with respect to the following—

(a) establishing rules to be applied in determining whether it is reasonably necessary for a treatment or service to be given or provided,

(b) limiting the kinds of treatment and service (and related travel expenses) that an employer is liable to pay the cost of under this section,

(c) limiting the amount for which an employer is liable to pay under this section for any particular treatment or service,

(d) establishing standard treatment plans for the treatment of particular injuries or classes of injury,

(e) specifying the qualifications or experience that a person requires to be ***appropriately qualified*** for the purposes of this section to give or provide a treatment or service to an injured worker (including by providing that a person is not appropriately qualified unless approved or accredited by the Authority).

(3) Payments under this section are to be made as the costs are incurred, but only if properly verified.

Operation of the Section is qualified by limits on payment imposed under section 59A.

1.1 System Objectives

The NSW Workers Compensation system objectives (in section 3 of the WIM Act 1998) include:

(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,

(b) to provide—

- *prompt treatment of injuries, and*

- *effective and proactive management of injuries, and*
- ***necessary** medical and vocational rehabilitation following injuries,*

in order to assist injured workers and to promote their return to work as soon as possible,

Subsection 60(1) WCA 1987 provides that an insurer is to pay for ***reasonably*** necessary medical or related treatment, hospital treatment, ambulance services or workplace rehabilitation services required as a result of an injury to a worker.

Section 60 meets the guiding principles of the system because in its very heart is early access to treatments that

1.2 Provisos, restrictions and safeguards

1.2.1 Prior approval of insurer

Subsection 60(2C) WCA 1987 restricts payment of such expenses by providing that an employer is *not liable* to pay the cost of any treatment or service if that treatment or service is **given or provided without the prior approval of the insurer** (not including treatment provided within 48 hours of the injury happening and not including treatment or service that is exempt under the Workers Compensation Guidelines from the requirement for prior insurer approval)

1.2.2 The Workers Compensation Guidelines

The Workers Compensation Guidelines:

- establish rules to be applied in determining whether it is reasonably necessary for a treatment or service to be given or provided
- list treatments exempt from prior insurer approval
- place caps treatments exempt from prior insurer approval
- can establish standard treatment plans for the treatment of particular injuries or classes of injury
- specify the qualifications or experience that a person requires to be appropriately qualified to give or provide a treatment or service to an injured worker (allied health service providers)
- can limit the kinds of treatment and service that an employer is liable to pay and the cost thereof (All subsection 60(2C)).

Current Guidelines (2021) provide in Part 4.2 :

"*When considering the facts of the case, the insurer is to understand that:*

- *what is determined as reasonably necessary for one worker may not be reasonably necessary for another worker with a similar injury*
- *reasonably necessary does not mean absolutely necessary*
- *although evidence may show that a similar outcome could be achieved by an alternative treatment, it does not mean that the treatment recommended is not reasonably necessary.*

- *In most cases, the points above should be enough for an insurer to determine what is reasonably necessary treatment*

If the insurer remains unclear whether a treatment is reasonably necessary, than the following factors may be considered:

- *the appropriateness of the particular treatment*
- *the availability of alternative treatment*
- *the cost of the treatment*
- *the actual or potential effectiveness of the treatment*
- *the acceptance of the treatment by medical experts."*

1.2.3 Section 59A WCA limits and thresholds

One must not forget **section 59A** WCA 1987 which serves to limit the payment of compensation by providing for compensation periods during which medical and treatment expenses can be considered by the insurer and outside which an insurer is not required to make payment.

In 2012 the base period during which medical treatments could be paid was 12 months after the last day on which weekly payments of compensation ceased. In 2015 the Government delivered a package of premium relief and "benefits" by extending the base compensation period to 2 years after the day on which weekly compensation ceases for those with a degree of permanent impairment of 10% or less and 5 years for those with a degree of permanent impairment greater than 10% and not more than 20%.

Section 59A is a "difficult" section in terms of drafting and certainty. Firstly, it relies on WPI thresholds for the payment and delivery of medical and other treatments; secondly, efficacy of its operation relies on the insurer dealing with a request for treatment in a timely way; thirdly, due to the way it operates it causes injured workers to consider undergoing invasive treatments well before conservative treatments have been exhausted.

The Parkes Inquiry examined medical and treatment expenses in some detail and unanimous principles and recommendations were made in relation to section 59A that remain valid today (see paper attached).

2. "Reasonably Necessary"

2.1 Formulation of the test for reasonably necessary

The test for reasonably necessary was clarified in the decision of ***Rose v Health Commission (NSW)*** [1986] NSWCC 2. The section of the 1926 Act under consideration was section 10, effectively the equivalent of the current section 60 of the *Workers Compensation Act* 1987.

The dilemma for Judge Burke was to determine what was meant by "reasonably necessary". His Honour formulated the following guiding principles:

> "In determining whether a particular regimen is medical treatment and whether it is reasonably necessary that such be afforded to a worker and that such necessity results from injury, it appears to me some general principles can be stated:
>
> 1. Prima facie, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.
> 2. However, though falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the party seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.
> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition."

2.2 Embracing the test in the Workplace Injury Management and Workers Compensation Act 1998

The guiding principles as formulated by Burke CCJ have stood as the 'test' since the decision. They were enshrined in the *Workplace Injury Management and Workers Compensation Act 1998* in section 297 (first inserted in 2001):

> **297 Directions for interim payment of weekly payments or medical expenses compensation**
>
> (1) When a dispute to which this Part applies concerns weekly payments of compensation or medical expenses compensation, the President can direct the person on whom the claim is made to pay the compensation concerned. Such a direction is referred to in this Part as an interim payment direction.

(1A) Section 298 does not apply to a dispute concerning a decision by the insurer to discontinue or reduce weekly payments of compensation on the basis of a work capacity decision under Division 2 of Part 3 of the 1987 Act.

(2) An interim payment direction for payment of medical expenses compensation cannot be for an amount of more than $7,500 or such other amount as may be prescribed by the regulations.

Note—

The amount of $7,500 is subject to adjustment under Division 6 of Part 3 of the 1987 Act.

…

4) If an injury management plan for the worker is in place or the insurer has accepted that the worker has received an injury (as defined in this Act), the President is to presume that an interim payment direction for **medical expenses compensation** is warranted if satisfied that the treatment or service to which the compensation relates is reasonably necessary—

(a) to prevent deterioration of the worker's condition, or

(b) to promote an early return to work, or

(c) to relieve significant pain or discomfort, or

(d) for such other reason as may be prescribed by the regulations.

(5) Subsections (3) and (4) do not limit the circumstances in which an interim payment direction can be given.

(6) An interim payment direction can be given subject to conditions.

(7) A further interim payment direction or directions can be given after the expiry of any earlier direction.

Since the inception of Interim Payment Directions in the 1998 Act it a little used provision largely because the limitations of maximum cost and the requirement of an IMP being in place. IPDs are not reported by the Commission and only few decisions are available.

2.3 Restatement of the standard test for 'reasonably necessary'

The most recent restatement of the 'test' for 'reasonably necessary' is the decision of Deputy President Bill Roche in ***Diab v NRMA Ltd [2014]*** **NSW WCC PD 72 (10 November 2014).**

The case involved a left knee injury sustained in initially in 2005 by Mr Diab originally as he worked as a road service patrol officer for NRMA Ltd. A second and third insult to the left knee 2012 within the course of employment. Following examination by a specialist including MRI studies surgery to the left knee was recommended. The insurer is specialist did not consider the recommended surgery to be reasonably necessary or related to the 2005 injury, concluding that the injury to be treated by surgery was degenerative rather than work-related.

The worker underwent operation in late 2012. Following surgery he developed deep vein thrombosis which required further hospitalisation and treatment.

When the matter came before the Commission the only issue in dispute was whether the cost of medical treatment was reasonably necessary as a result of the accepted injuries to Mr Diab's left knee.

The worker lost before an Arbitrator who concluded that the surgery was not reasonably necessary as a result of the pleaded injuries. The worker appealed the Arbitrator's determination.

In his decision, DP Roche recited "the standard test adopted in determining if medical treatment is reasonably necessary as a result of a work injury is that stated by Burke CCJ in ***Rose v Health Commission."***

He recited some of the cases in which the test has been applied and noted that in addition, the Commission had been guided by and generally followed the later decision of Burke CCJ in *Bartolo V Western Sydney Area Health Service* [1997] NSWCC 1 where he distilled the 'test' to: "*the question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."*

DP Roche considered the Arbitrator's approach in following *Bartolo,* and then stated that subsequent appellant Authority suggested that this approach was not strictly correct.

He discussed the judgment of the Court of Appeal in the matter of ***Clampett v WorkCover Authority*** [2003] NSWCA 52 where Grove J considered the dictionary definition of "necessary" and stated: "*the essential issue is what effect flows from conditioning such qualities as 'reasonably'. The consequence is to moderate any sense of the absolute which might otherwise be conveyed by the word 'necessary' if it stood alone."* Roche DP considered that the approach in *Clampett* is consistent with the modern approach to statutory interpretation, which is to construe the language of the statute, not individual words. **Thus, "reasonably necessary" is a composite phrase in which necessity is qualified so that it must be a *reasonable necessity***.

DP Roche concluded the following:

- "Reasonably necessary" does not mean "absolutely necessary". If something is necessary in the sense of indispensable, it will be 'reasonably necessary'. That is because reasonably necessary is a lesser requirement than "necessary".
- Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish the treatment claimed is *one of those treatments*.
- a worker certainly does not have to establish the treatment is "reasonable and necessary", which is a significantly more demanding test than many insurers and doctors apply.

- In the context of section 60, the relevant matters, (useful heads for consideration[the test]) according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ in *Rose* namely:
  - (a) the appropriateness of the particular treatment
  - (b) the availability of alternative treatment, and its potential effectiveness,
  - (c) the cost of the treatment,
  - (d) the actual or potential effectiveness of the treatment, and
  - (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
- With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. The evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.
- The essential question remains whether the treatment was reasonably necessary. It is not simply a matter of asking, as was suggested in Bartolo, "is it better that the worker have the treatment or not".

2.4 Provisional Liability and 'reasonably necessary'

After an insurer has received a notification of an injury and a certificate of reduced capacity for work the insurer must commence provisional weekly payments within 7 days unless it has a reasonable excuse not to. Acceptance of liability on a provisional basis provides a worker with access to up to 12 weeks of income support and up to $10,000 for reasonably necessary medical treatment.

Whilst provisional liability is designed to provide insurers with sufficient time to consider acceptance of liability formally, it provides injured workers with immediate and early income support and access to medical treatments to, hopefully, support and early restoration of health and return to work.

Unlike provisional weekly payments, provisional medical expenses cannot be reasonably excused by the insurer however the treatments must either be one of those preapproved in the Workers Compensation Guidelines or approved as "reasonably necessary" by the insurer.

SIRA states that "early medical or treatment support has been shown to achieve better return to work outcomes for the worker".

3. Consideration of McDougall's Recommendation 39: amend 'reasonably necessary' to 'reasonable and necessary'.

3.1 Background

In 2020 the then Treasurer and the Minister for Customer Service announced an independent review of icare and the *State Insurance and Care Governance Act 2015*. The terms of reference described as the matters in scope for review a comprehensive organisational review of icare, review of the Government managed workers compensation schemes (NI and TMF), the statutory review of the SICG Act and any amendments to the workers compensation legislation **to the extent they relate to those terms of reference.** Out of scope for the review was the workers compensation Acts other than to the extent they relate to icare, the TMF, the NI, insurance, funding, or the powers, functions and statutory independence of SIRA.

3.2 Review Report and Recommendation 39

In the Review report McDougall included Recommendation 39:

Medical treatment	**29.3.4**
39	That the legislature give consideration to amending section 60 of the *Workers Compensation Act 1987* to replace the words 'reasonably necessary' with the words 'reasonable and necessary

Within the review there was no direct or open discussion concerning the formulation of this recommendation. The change from '**reasonably necessary' to reasonable and necessary'** was raised by icare in their submission to His Honour. No discussion was raised in any forum before their submission.

Icare stated in their submission:

> In most Australian workers' compensation jurisdictions, the test for determining whether treatment or services are appropriate is based on the concept of that treatment being "*reasonable and necessary*".
>
> 33. The 1987 Act diverges from this test, and uses the "*reasonably necessary*" test. The test in the 1987 Act differs from similar personal injury schemes in NSW, as well as Commonwealth schemes like the National Disability Insurance Scheme (NDIS), which apply a "*reasonable and necessary*" test.
>
> 34. Although the difference in wording in the 1987 Act may appear innocuous, it has had profound and potentially unforeseen consequences for claimants by creating incentives for medical and allied health service providers around fee-for-services, rather than encouraging the system to take a holistic view of a person's ability to 'function and recover'.
>
> 35. The "*reasonably necessary*" test applied by the 1987 Act allows all manner of treatment to be approved, including those considered as being of low value or potentially harmful. This has contributed to the steadily increasing medical spend, and persistent non-improvement in patient outcomes, over the years.

36. A review of case law relating to "*reasonably necessary*" treatment supports this. It is well-established that the "*reasonable and necessary*" test is more demanding than the "*reasonably necessary*" test. In *State Super SAS Trustee Corp Ltd v Perrin*, the Court of Appeal held that the "*reasonably necessary*" standard did not require absolute necessity for surgery proposed. The adverb "*reasonably*" modified the strictness of what was "*necessary*".

37. One example which demonstrates the implications of the "reasonably necessary" test is the number of spinal fusions being approved and undertaken within the workers compensation system for back injuries, despite the evidence suggesting this is not best practice. In some cases, spinal fusion may even result in permanent reduction of function, which may limit future work ability.

38. The current system therefore provides a financial incentive for providers to recommend surgery, rather than consider conservative treatment options that may lead to better health outcomes in the long-term.

39. The Workers Compensation Guidelines (October 2019),161 which expanded the list of pre-approved medical treatments, has relaxed the "reasonably necessary" test even further, as workers are able to access services and incidental expenses with limited scope for denial under the legislation.

40. These changes have a direct impact on the increase in medical expenditure. As an example, if every claim managed by the Nominal Insurer used the allowable $110 per claim for reasonable incidental expenses (such as strapping tape, TheraBand, exercise putty, disposable electrodes and walking sticks), this would add an additional $6.6 million to annual medical expenditure (based on 60,000 claims per year). If applied across all NSW workers compensation claims, this figure alone would exceed $10 million.

Apart from the AMA, no other submission deals with this proposal. iCare's statements stand unchallenged due to no issue having been raised with stakeholders.

The correlation between the definition and rising medical costs (item costs) was not supported by publicly available data. Medical spend increasing due to the definition was not substantiated. Rather, the increase in the cost of medical services was impacting the scheme and had been the subject of much discussion in the 2012 Issues Paper and Joint Select Committee review leading to the 2012 reforms. [Refer Parkes Inquiry Medical and Treatment Expenses Discussion Paper attached].

3.3 Report commentary regarding recommendation 39

3.3.1 Icare submission

McDougall provided the following commentary in the report:

> "icare submitted that there were three difficulties with the reasonably necessary test:
>
> a) it allows for all types of treatments to be approved, including treatments considered to be ***'low value* or potentially *'harmful'*;**
>
> b) it has led to the deemed pre-approval of a wide range of services and incidental expenses, which in turn has led to increased medical expenditure and costs for the schemes; and

c) its use as a test is inconsistent with the use of a *'reasonable and necessary'* test in similar personal injury schemes in NSW, and in Commonwealth schemes such as the NDIS."

The submission may have been misleading. The pre-approved treatments (in the Guidelines) allow for workers to obtain initial treatments likely to prevent time off work or reduce time off work in circumstances where the insurer must approve all other treatments prior to the worker receiving such treatments.

The pre-approval requirement is already onerous in terms of timeliness of delivery of treatment and assistance to a worker. This is recognised and argued by the AMA in their submission to the inquiry (page 274, paragraphs 144-145). The AMA in its submission states: "*The AMA (NSW) is also concerned by reports from medical professionals regarding insurers refusal of treatments despite doctors' recommendations and clinical evidence which supports intervention. Doctors clinical decisions regarding patient treatment should be supported and the role of the nominated treating doctor needs to be recognised and respected.*"

The rise in the cost of medical services had been attributed to the NSW workers compensation rates being in excess of the AMA rates and considered exceedingly generous.

McDougall does not seem to be aware of actions taken by SIRA to control medical expenditure in the system including:

- reduction of the maximum regulated rates for medical treatments and surgeries in line with the List of Medical Services and Fees issued by the AMA.[See Workers Compensation (Medical Practitioner Fees) Order]
- introduction of the Standards of Practice for insurers including standard 15, approval and payment of medical hospital and rehabilitation services
- introduction of Workers Compensation Guidelines for the approval of treating allied health practitioners (2021, amended 2024).

Nor was McDougall directed to the package of benefits and premium relief given by the Government in 2015 (following the scheme delivering a significant surplus) which included extending the limitations in section 59A providing longer periods of treatment.

3.3.2 Delays in access to treatment

In Chapter 8.2 McDougall is drawn to the **delays in access to treatment**. He attributes delays potentially to two matters:

1. the 21 day approval timeframe for treatments in section 279 of the 1998 Act: "it is not unreasonable to conclude that a 21 day period for consideration and approval may be excessive when there is an urgent need for medical treatment"
2. referrals to Independent Medical Examiners (IMEs) where timeframes to consider material, examine and report are lengthy. At Paragraph 196 he

states "*Unfortunately, **that delay is an unavoidable consequence of the need for a resolution mechanism to decide disputes as to what is reasonably necessary medical treatment***".

A partial solution to this is cited as provisional acceptance of liability in section 280 of the 1998 Act.

> *(1) An insurer can accept liability for medical expenses compensation on the basis of the provisional acceptance of liability for an amount of up to $5,000* or such other amount as may be specified by the Workers Compensation Guidelines.*
>
> *(2) The acceptance of liability on a provisional basis does not constitute an admission of liability by the employer or insurer under this Act or independently of this Act.*

McDougall is persuaded by icare that the reduction of the 20 one day approval timeframe I result in "unintended consequences". He opines "Nor do I think that the statutory regime for approval should be modified without very can careful consideration. Such consideration is beyond the scope of this review." [at paragraph 201, page 51]

3.4 Argument for change?

3.4.1 No change to benefits payable to injured workers?

McDougall states in his discussion of Return to Work Rates and the legislative structure of the system/scheme [at 41-42]:

> *I wish to make it clear that **I am calling for a reform of the legislative structure, not of its incidents**. **There should be no change to benefits payable to injured workers**. What is necessary is that the way to realisation of those benefits be made straight. Nothing put to me in the course of my Review provided evidence of a need for any substantial change to benefits. Workers' benefits under the scheme have been subject to significant change over the past decade. There is no present need for further changes.*
>
> *The current balance between benefits and obligations is the result of significant work and negotiation. Apart from some specific matters, neither workers' representatives nor employer groups submitted to my Review that there was need for wholesale change. The important work of simplifying and reconciling the regulatory regime should not be jeopardised by opening up debate on the fundamental balance in the scheme.*

3.4.2 No significant adverse effect on patients' outcomes?

McDougall states **"On my understanding of the two tests, I see no reason to think that the adoption of the reasonable and necessary test would be likely to have a significant adverse effect on patients' outcomes. However, against the possibility that it may, those outcomes ought to be monitored."**

The statement is equivocal, there being no evidence before him that there is an actual problem to resolve; that there will NOT be a significant adverse effect on

workers outcomes; or that there will be an improvement in the financial position of the nominal insurer by adopting the recommendation.

3.4.3 Alignment with the CTP insurance scheme or other 'schemes'?

Although not expressed in icare's submission to the review, a commonly stated reason for changing the definition from 'reasonably necessary' to 'reasonable and necessary' is to bring it in line with the New South Wales motor accidents compensation scheme. There is no reason to bring the two completely separate and distinct schemes into alignment in terms of definitions. The two schemes are funded completely differently and operate quite differently. Most importantly, the return to work imperative in the workers compensation scheme is a paramount consideration and an integral part of prompt return to work is access to medical treatment quickly. Importing a 'necessity' factor into the workers compensation scheme will slow down access to early medical intervention and slow down return to work. Furthermore, there is no such mechanism in the CTP scheme as 'provisional liability'.

Alignment with NDIS is simply not appropriate. The NDIS is not a compensation scheme it is a social security net for which application is based on disability, and in particular intellectual disability and severe physical disability. The Scheme is funded by the Commonwealth. It is not strictly insurance and it is not compensation. There are limited funds available and the terms and conditions of assistance are different.

3.4.4 Financial pressure on the scheme?

One must bear in mind that the recommendation was made in 2021 after a review that commenced in 2020. It is now five years on and there are significantly different financial concerns with the scheme, most particularly in the TMF.

There is no data to support that medical costs are an issue. There are however multiple reasons for increases in the overall spend on medical treatments and rehabilitation spend:

- Section 59A cut offs (based on impairment not capacity or need) bringing treatment decisions early (particularly surgery) before conservative modes are exhausted to ensure they are paid within the (generally) 2 year period.
- Covid 19 delays to treatment particularly surgery (2020 – 2023)
- Rising costs of treatment
- Thresholds based on WPI driving surgery (we have no evidence of this given the restraints on availability of treatments)
- Number of claims increasing year on year. (note, you cannot simply calculate average treatment costs to determine average cost per claim because claims once in the system will attract a spend potentially for many years)

3.5 Commentary

Adopting Recommendation 39 will result in a significant change to benefits for all injured workers in the NSW workers compensation system including those exempt from the 2012 reforms, regardless of the injury sustained.

A change to the test for access to payment for medical treatment:

- **Will** necessarily **reduce benefits.**
- **will** result in a significant deterioration of worker's outcomes
- **will** result in a significant deterioration delay to treatment and recovery
- **will** increase disputation over medical treatments
- **will** render provisional liability for medical expenses unworkable
- **will** render section 297 1998 Act (interim payment directions for medical expenses) difficult to administer
- **will** result in a significant adverse effect on worker's outcomes by virtue of delay and disputation
- **will** increase the administrative costs of the scheme.

The more onerous test would permit insurers to arrange IME appointments to test the necessity of any treatment, thereby providing further delays in a system where delay in treatment is already prevalent, with an increase in denials of treatment and consequent increases in disputation.

In order for an Interim Payment Direction to be sought, the test in section 297 1998 Act would need to be reformulated and would likely prevent IPDs being sought by workers.

The knock on effect of delays will impact return to work and the overall costs of the scheme.

The guiding principles and the well-settled formulated tests to determine what is "reasonably necessary" mitigate against harmful treatments. They incorporate a workability component, that is, if treatment assists a worker remaining at work or maintains an equilibrium with the patient then it can be considered reasonably necessary.

There are already restrictions and limitations on access to prompt medical treatment, adopting this recommendation would increase the difficulty in accessing treatment. **There will be delays in treatment provision occasioned by scrutiny of necessity**, the early approval free treatment types in the Guidelines will be significantly reduced, and workers will wait longer for access to treatment. As a consequence return to work outcomes will deteriorate and the already significant disputation over medical treatments especially surgery will likely increase. A consequent increase in timeliness and cost will also impact the scheme.

There is no data that demonstrates that a change to the phrasing after so many years in use will deliver a significant financial saving to the system.

Restriction on rights and entitlements is very difficult once written into the legislation. Employing a more restrictive test than has existed for over 60 years ought to undergo significant scrutiny before it is adopted.

The' reasonable and necessary test is the antithesis of the objectives of the system and will erode workers' benefits. It should not be adopted without careful consideration and assessment of the impact.

4. Conclusion

There is currently no persuasive argument articulated anywhere to support a change to section 60 of the Workers Compensation Act to adopt the phrase "in place of "reasonably necessary".

Before such a change were to be adopted an examination of the drivers towards rising medical costs in the scheme must take place.

There are alternatives available to the Government to consider which would alleviate pressure on the system:

1. Adopt the recommendations stated within the Parkes Inquiry:

   Replace the requirement that the treatment be provided or given within the 12 months period with a requirement that the '*claim for medical expenses compensation*' is to be made within the 12 months - as an example :

   > *Section 59A(1) "Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance* ***for which a claim is made*** *more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker."*

2. Remove whole person impairment thresholds for the payment or provision of medical or other treatments thereby removing incentives for workers to undergo potentially unnecessary surgical treatment and making decisions to bring that treatment early in order to exceed the threshold.

MEDICAL and TREATMENT EXPENSES

BACKGROUND

In 2012 the Government expressed the concern that the NSW Workers Compensation Scheme was *"a broken system that does not produce good outcomes for injured workers, and without significant improvements is not financially sustainable."* [1] In particular, the Government highlighted that WorkCover had *'limited power to strongly discourage payments treatments and services that do not contribute to recovery and return to work.'* The Government identified that *"recovery and the health benefits of returning to work are not effectively promoted as there are perverse financial incentives for workers to remain off work and there is not effective work capacity testing".* [2]

The Government's Issues Paper set out as a 'guiding principle' that the object of the workers compensation legislation "*is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.*" [3]

The Paper cited *"International research has consistently found a correlation between early return to work and improved health outcomes. Long term absence and work-disability are harmful to physical and mental health and wellbeing. Recovery and return to work should be the key objects of any workers compensation system."*[4]

The Government (in the Issues Paper) equated fairness, affordability, efficiency and financial sustainability to schemes which were designed to:

"1. enhance NSW workplace safety by preventing and reducing incidents and fatalities;

2. *contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;*
3. *promote recovery and the health benefits of returning to work;*
4. *guarantee quality long term medical and financial support for seriously injured workers;*
5. *support less seriously injured workers to recover and regain their financial independence;*
6. *reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and*
7. *strongly discourage payments, treatments and services that do not contribute to recovery and return to work."*

As at December 2011, the second biggest contributor to the outstanding claims liability was medical expenses.

The Government identified as a potential cause of high medical expenses was that in NSW "workers compensation insurers must meet the cost of all medical and related treatment provided to injured workers, with no cap on cost or duration, provided the treatment relates to a work injury. Treatment costs are met after retirement age", recognising that 'most other schemes cap medical treatment and related treatment expenses by duration or cost'.[5]

The Government proposed 2 options for change:

1. Cap medical coverage *duration* – the rationale provided was that there was no cap on medical and related treatment expenses and "*many workers have access to medical treatment many*

[1] Issues Paper Op Cit, page 5
[2] Ibid, page 4
[3] Ibid, page 5
[4] Ibid, page 6
[5] Ibid, pages 18-19

years after their date of injury".[6]

2. Strengthen regulatory framework for health providers – ensure that the resources are directed to 'evidence based treatments with proven health and return to work outcomes for injured workers rather than on costs that maintain dependency'.

The Issues Paper also canvassed the introduction of step downs to the weekly payments regime and capping *weekly payments duration.*

During the Inquiry by the Joint Select Committee[7] concerns were raised about the rising medical costs in NSW resulting in upward pressure on premium costs, continuation of an upward trend in excess of inflation and the high expenditure of the Scheme on medical treatment and rehabilitation for workers. [8]

The absence of a 'cap' was noted by various stakeholder groups and a suggestion was made to the Inquiry that "the ongoing provision of medical treatment without a cap has at times been misused by some service providers who may propagate a slow recovery and return to work".[9]

In response to the proposal to cap medical coverage duration, the Joint Select Committee noted the duration caps on medical expenses in other jurisdictions and that a conservative position 'must be taken at the present time' given the Scheme's poor financial position, and commented:

> *"The WorkCover scheme should provide a level of reasonable coverage of medical and related treatment, but it is not unreasonable that that coverage be proximate to the date of injury and time off work by the worker. Australia has a comprehensive safety net of medical and hospital coverage for all Australians under Medicare. Injured workers whose workers compensation medical benefits expire after a time cap are not suddenly put on the 'scrap heap'. They will enjoy the benefits of the Medicare system like everyone else, including those whose serious accidents were never covered by any accident compensation scheme (e.g. because they were not in a motor accident or they were outside the work place) and those born with serious disabilities."*

The recommendation made by the Committee was:

> **Recommendation 9**
> That the NSW Government seek to amend the *Workers Compensation Act 1987* to cap reasonable and necessary medical and related treatment expenses to those incurred whilst weekly benefits are paid and for one year after the cessation of those payments

The Committee were careful to recommend exclusion of 'seriously injured workers' from the operation of any duration cap on medical expenses.[10]

The Amending Act introduced substantial amendments to the medical expenses arrangements in the 1987 Act by Schedule 4:

- Introducing Section 59A – Limit on payment of compensation (cap on *duration)*
- Amending section 60 requiring pre-approval of certain treatments or services and providing for conditions for pre-approval and service provision and exemptions therefrom.
- Amending section 61 - Rates applicable for medical or related treatment
- Amending section 63A - Rates applicable for workplace rehabilitation services

The second reading speech recorded the following:

> *"Medical expenses have been an area of increasing cost to the workers compensation scheme. Under the bill payment of an injured worker's expenses for medical, hospital and rehabilitation*

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6 Ibid, Option

7 Joint Select Committee Inquiry into the New South Wales Workers' Compensation Scheme 2012, Report No 1 – 13 June 2012

8 Ibid, paragraphs 2.82-2.84, page 24

9 Ibid, paragraph 2.85 and Submission 142, Australian Industry Group.

10 Ibid, Recommendation 2: That the NSW Government ensure that, under the Workers Compensation Scheme, any time cap on payment of weekly income benefits and medical expenses (apart from the Commonwealth retirement age) not apply to appropriately defined severely injured workers.

> *services will be limited to a 12 month period after the claim is made or 12 months after weekly payments cease, whichever is the earlier. However, consistent with the Government's objective of directing workers compensation benefits to the most serious injured workers, workers with a permanent incapacity of more than 30 per cent will not be subject to the new restrictions for medical and related expenses. They will continue to be eligible for benefits for medical and related treatment until retirement age. An employer's liability for medical and related treatment and rehabilitation services will be made subject to preconditions to ensure that the treatment is appropriate and properly provided and approved. WorkCover guidelines will be able to limit an employer's liability for medical and hospital treatment and rehabilitation services."*

The provisions have now been in place for over 2.5 years. The drafting of the legislation (and not the policy) has caused and continues to cause disputes because of the uncertainty about what it actually means.

There was an appreciation by November 2013 that there was an emerging problem as the legislation required treatment to have been undertaken within the time limit. It was apparent that workers who had received approval for medical treatment could not be guaranteed of the treatment being available prior to the first major cut-off point. In recognition, the Government introduced a Regulation on 20 December 2013[11] however that assisted only those workers who were informed about it and were able to take advantage of the change given the time of year.

Further remedial subordinate legislation [12] was introduced in June 2014 affecting only 'existing claims'[13] which exempted such claims from the operation of section 59A by imposing a threshold of greater than 20% permanent impairment and excluding compensation for certain artificial aids and members and compensation payable in respect of modification of a worker's home or vehicle.

This change was also of very limited application because the claim that was exempted from the time limit was one which had to have been made before 1 October 2012 and still be unresolved almost two years later.

The Statutory Review[14] of the Scheme which reported in June 2014 considered that the amendments introduced greater discipline in the system. However, the report identified that the '12 month cap':

- had the potential to impose a challenge to injured workers who required continuous funding of medical expenses beyond the entitlement period particularly where funding in alternative systems was inadequate, and
- had the potential to disadvantage workers who may benefit from conservative treatment where a 'wait and see' approach was more suitable, and with conditions where the natural history of the resolution of the condition indicated a greater than 12 month period.[15]

Further, the report identified a potential 'unintended consequence' of the amendments that workers may be *"**disincentivised** to return to work for the purpose of extending the time in which medical benefits were payable"*.[16] This is of particular concern given one of the specific functions of the WorkCover Authority is to "to **identify** (**and facilitate or promote the development of programs that minimise or remove) disincentives** for injured workers to return to work or for employers to employ injured workers, or both"[17]

The Statutory Review considered that the pre-approval process may lead to potentially costly delays in 'treatment outcomes' particularly where the approval was delayed by the engagement of independent

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11 Workers Compensation Amendment (Medical Expenses) Regulation 2013
12 Workers Compensation Amendment (Existing Claims) Regulation 2014
13 Existing claim means a claim for compensation in respect of an injury made before 1 October 2012.
14 Statutory review of the Workers Compensation Legislation Amendment Act 2012, The Centre for International Economics, prepared for the Office of Finance and services 30 June 2014.
15 Ibid, page 59
16 Ibid
17 Section 23(1)(f) of the 1998 Act: Specific Functions [of the Authority]

medical examiners. *"This is particularly detrimental where early treatment is required to maximise recovery/function and/or minimise treatment costs".*[18]

In the Upper House Review of the Exercise of the Functions of the WorkCover Authority[19] discussion of the fairness of the new provisions was extensive. The cessation of medical benefits after 12 months was described as "unfair", "harsh and unjust", "artificial and arbitrary". The Committee observed the findings of the Statutory Review[20] of the Scheme, particularly that the 12 month cap on duration of medical expenses *"…has the potential to disadvantage patients that may benefit from conservative treatment of certain conditions including spinal, shoulder and some other known regions, where a 'wait and see' approach is more suitable."*

The Committee requested that the Scheme Actuary calculate the cost to the Scheme of removal of the cap for categories of injured worker. Noting that the Government had introduced some changes to the medical expenses regime, the Committee commented:

> *We acknowledge that the Minister for Finance and Services has recently announced the extension of medical benefits for workers with whole person impairment assessments of between 21 and 30 per cent, until retirement age for injured workers who made claims prior to 1 October 2012. We consider that this decision goes some way towards restoring the balance between financial sustainability of the scheme and providing enhanced support for injured workers*.[21]

Regrettably the amending Regulation did not achieve this result.

Notably the Committee did not consider the validity of introducing 'impairment thresholds' for the purpose of distinguishing who is deserving of access to reasonably necessary medical treatment.

In relation to the requirement for pre-approval of all but essential medical services the Committee noted:

> *"The Committee is of the view that requiring insurer approval before the costs of a medical treatment are incurred is not an unreasonable expectation. However, we firmly believe that insurers must provide a decision regarding treatment as soon as practicable to ensure that injured workers are able to promptly access the necessary treatment to assist them in their rehabilitation in most instances. However there are clearly cases where this is not practical or reasonable and there should be some flexibility built into the system to accommodate this… The committee encourages WorkCover to be more vigilant in enforcing this aspect of the workers compensation scheme, and intend to keep a watching brief on this issue."*

The Standing Committee made the following relevant recommendations:

> **Recommendation 6**
>
> That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for *all injured worker* [emphasis added], noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.
>
> **Recommendation 7**
>
> That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not

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18 Ibid

19 Standing Committee on Law and Justice, Review of the Exercise of the Functions of the WorkCover Authority Report 54 – September 2014

20 Statutory review of the Workers Compensation Legislation Amendment Act 2012, The Centre for International Economics, prepared for the Office of Finance and services 30 June 2014.

21 Standing Committee on Law and Justice, Review of the Exercise of the Functions of the WorkCover Authority, OP CIT, at paragraph 4.49.

reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.

Interpretation of the application of the time caps of section 59A remains unresolved. In *Flying Solo Properties Pty Limited v Collett*, Deputy President Roche commented of section 59A:

> *"in the vast majority of cases, where workers' entitlements to weekly compensation are uncertain and disputed, the provision will create great* ***uncertainty****,* ***unnecessary litigation****, and, potentially,* ***considerable hardship*** *while parties fight about whether compensation was paid or payable and whether, and, if so, when, the worker's entitlement to weekly compensation ceased. It is clearly a provision that is in need of urgent reform.*[22]

The Principles

The principles which inform policy on medical expenses compensation appear to be:

- To provide prompt treatment of injuries (Section 3 of the 1998 Act)
- To provide medical assistance and rehabilitation support to restore the health of an injured worker
- To support a quick, safe and durable return to work
- To promote recovery of health at work
- To meet the medical and treatment needs of injured workers with ongoing need for support to return to work
- To discourage payments, treatments and services that do not contribute to recovery and return to work.

Legislation impacted

The 1987 Act provides for medical, hospital and rehabilitation expenses ("etc") to be met in Division 3 of Part 3 "Compensation – Benefits". The Division encompasses sections 59 to 64A.

Section 41 of the 1987 Act contemplates weekly payments for "injury related surgery" in certain circumstances.

The 1998 Act contains certain provisions related to the provision of medical treatment: Sections 50, 279 and 280.

What are 'Medical services'?

Section 60(1) provides that the employer is to pay for:

- Medical or related treatments (other than domestic assistance)
- Hospital treatments
- Ambulance services
- Workplace rehabilitation services
- Related travel expenses and interpreter services[23]

'Hospital treatments', 'medical or related treatments' and 'workplace rehabilitation services' are defined in the Act.[24]

Establishing liability

It has been stated that to establish liability under section 60, three conditions must be satisfied:

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22 [2015] NSWWCCPD 14 at paragraph 77.
23 Section 64A of the 1987 Act.
24 Section 59 of the 1987 Act

1. That the worker received an injury to which employment was a substantial contributing factor
2. That the relevant treatment or expense was 'as a result of' that injury; and
3. That the treatment was reasonably necessary.[25]

Reasonably necessary

Treatments or services must be ***reasonably necessary*.** [26]

What is reasonably necessary has been determined by the Compensation Court of NSW and the Workers Compensation Commission.

Dealing with the precursor section in the *Workers Compensation Act 1926* (section 10, which relevantly incorporated 'reasonably necessary' with medical treatment), Burke J after discussing "*appropriate*" and "*necessary*"[27] stated relevantly:

> *"In determining whether a particular regimen is medical treatment and whether it is **reasonably necessary** that such be afforded to a worker and that such necessity results from injury, it appears to me some general principles can be stated:*
>
> *1. Prima facie, if the treatment falls within the definition of medical treatment in section 10(2), it is relevant medical treatment for the purposes of this Act. Broadly then, treatment that is given by, or at the direction of, a medical practitioner or consists of the supply of medicines or medical supplies is such treatment.*
>
> *2. However, though falling within that ambit and thereby presumed reasonable, that presumption is rebuttable (and there would be an evidentiary onus on the party seeking to do so). If it be shown that the particular treatment afforded is not appropriate, is not competent to alleviate the effects of injury, then it is not relevant treatment for the purposes of the Act.*
>
> *3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.*
>
> *4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.*
>
> *5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition*."

In *Bartolo v Western Sydney Area Health Service* 14 NSWCCR 233 (3 February 1997) then dealing with section 60 (pre 2012 reforms, but in the same terms as the present section) Burke J considered that:

> *"The question is should the patient have this treatment or not. If it is better that he have it, then it is necessary and should not be forborne. If in reason it should be said that the patient should not do without this treatment, then it satisfies the test of being reasonably necessary."*

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[25] Roche DP in *Bielecki v Rianthelle Pty Ltd [2008] NSW WCC PD 53* cited in Mills Workers Compensation, Lexis Nexis, [WCA 60.1]

[26] Section 60(1) of the 1987 Act

[27] *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32: *"A particular course is "appropriate" when it is expedient, desirable, opportune or meet; where it tends to promote a desired objective; where it is fit and suitable for a particular purpose; where it is proper in all the circumstances. A particular course is "necessary" where it is indispensable, requisite, essential, imperative, mandatory or obligatory; where it cannot be foregone."*

Most recently, Deputy President Roche (in the Workers Compensation Commission) stated:

> "*reasonably necessary does not mean "absolutely necessary"…If something is necessary, in the sense of indispensable it will be "reasonably necessary". That is because reasonably necessary is a lesser requirement than "necessary". Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments. A worker does not have to establish that the proposed treatment is the "optimal treatment" before it can be held to be reasonably necessary."*[28]

'Causation'

The Australian Medical Association (AMA) have repeatedly raised that 'causation' is an issue which is properly resolved by the medical profession and not the legal profession. The medical profession oft refers to the mal alignment between the Motor Accidents CTP Scheme in NSW and the Workers Compensation Scheme in NSW applauding the Motor Accidents scheme for permitting the medical profession to 'determine causation' and criticising the Workers Compensation Scheme for permitting causation to be determined 'by the legal profession'. For example,

> *Dr GLIKSMAN: That is a separate issue to the causation one. I think if this Committee does nothing else but address the causation issue and bring about an alignment between workers compensation and the Motor Accidents Authority it will have done a great service to the State.*[29]

This illustrates a perceived confusion between the 2 Schemes and also the many concepts of 'causation'.

The AMA5 Guides[30] notes that there are multiple meanings of 'causation' and carefully distinguishes between "medical or scientifically based causation" which "requires a detailed analysis of whether 'the factor could have caused the condition, based upon scientific evidence and, specifically, experienced judgement as to whether the alleged factor in the existing environment did cause the permanent impairment" and" the legal standard for causation in civil litigation and in workers' compensation adjudication" which varies from jurisdiction to jurisdiction and which calls on an independent arbiter to determine a question of fact.[31]

Medical opinion providers are required to express expert opinions applying their expert based on a set of facts. The medical profession are not the 'finder of fact'. This point of view is implicit in the Court of Appeal decision in *Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305*: *"so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded."*

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28 *Tray Fit Pty Ltd v Cairney* [2015] NSWWCCPD 2, at paragraph 60.

29 Evidence of Dr M Gliksman before the Joint Select Committee Inquiry into the NSW Workers Compensation Scheme, Monday 28 May 2012, page 5 Corrected Transcript (https://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/3669d4dd25549a10ca257a0d001e86ba/$FILE/120528%20Corrected%20transcript__1.pdf)

30 American Medical Association Guides To the Evaluation of Permanent Impairment, 5th edition (AMA5 Guides)

31 AMA5 Guides Chapter 1.6, Causation, Apportionment, Analysis, and Aggravation

Pre-approval

Medical treatments or services require the **prior approval** of the insurer[32] otherwise, except in certain circumstances, the employer is not liable to pay. However, treatment provided within 48 hours of the injury happening and treatment or services which are exempt under the WorkCover Guidelines[33] are excluded from the requirement for prior insurer approval.[34]

There is no standardised form for a worker to request pre-approval of medical treatment. As a consequence treatment can be delayed and workers become anxious and traumatised with continued delay. This creates an unnecessary burden on claims officers. A simple process (Request for Medical Treatment form) would assist in reducing time spent in obtaining necessary information from treating doctors and the confusion and anxiety around the approval process.

One of the issues which insurers face is the failure by the medical profession to identify the precise treatment being proposed and the reasons why it should be considered as reasonably necessary. This in turn causes further delay and emotional distress. The implementation of a process through insurers would alleviate much of the delay.

There are instances of insurers delaying approval because of a lack of a proper process by which the insurer is accountable which in turn prevents the worker from accessing paid treatment through the effluxion of time. Delays in approval are often created by insurers seeking medical information from treatment providers or alternatively seeking 'independent medical opinions' as to whether the proposed treatment is reasonably necessary. There appears to be no legislative warrant for the seeking of independent medical opinions in these circumstances.

The Claims Guidelines do not prescribe a process for seeking pre-approval nor do they direct insurers as to how to evaluate requests for treatment. Without such a process it is difficult to ensure quick and prompt treatment to an injured worker.

There are examples where claimants in recent disputes in the Workers Compensation Commission have received a declaration that their treatment was reasonably necessary but by the time the decision is made, they are outside the timeframe during which the insurer can be ordered to pay for the treatment.

Exemptions to pre-approval

The treatments or services exempted from pre-approval are identified in the Claims Guidelines[35] and include services provided within the first 48 hours on injury. The exempted treatments or services include *limited* services provided by:

- General practitioners (nominated treating doctor)
- Specialists
- Pharmacy items (for a limited period and/or limited cost)
- Plain x rays
- Public hospital presentations at emergency
- Physiotherapists, osteopaths, or chiropractors
- Psychology treatment or counselling
- Remedial Massage
- Hearing needs assessments

The exemptions also include treatment or services provided to an injured worker:

[32] Section 60(2A)(a) of the 1987 Act
[33] WorkCover Guidelines for Claiming Compensation Benefits - September 2013, amended 6 February 2015, Chapter 3 ("Claims Guidelines")
[34] Section 60(2A) of the 1987 Act
[35] Claims Guidelines, Chapter 3.

- where liability has been initially declined but where the Workers Compensation Commission 'finds for the worker on liability' and it is agreed the treatment or service provided was reasonably necessary, or
- any treatment or service provided where there is a dispute about whether the treatment or service is reasonably necessary where the Workers Compensation Commission finds that the treatment provided was reasonably necessary.

These exemptions are predicated upon the treatment or service having been undertaken and (presumably) paid for.

More recently, by way of regulation, expenses paid for crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and batteries) and any expenses for home or vehicle modification during the period 1 October 2012 to 3 September 2014 have been exempted from pre-approval (presumably restricted to 'existing claims'). This has limited application.

Notably, what is not excluded from pre-approval are medical treatments or services provided in emergency circumstances (other than within the first 48 hours following injury). This can result in consolidated revenue meeting the cost of medical treatments and services which should properly be met by the Workers Compensation Scheme.

Other restrictions on payment of medical and treatment expenses

Other restrictions imposed on the provision of medical treatment are contained in sub-sections 60(2A)(b), (c) and (d) of the 1987 Act. They provide that the worker's employer is not liable to pay the cost of any treatment or service (or related travel expenses) if:

- the treatment or service is given or provided by a person who is not appropriately qualified to give or provide the treatment or service, or
- the treatment or service is not given or provided in accordance with any conditions imposed by the WorkCover Guidelines on the giving or providing of the treatment or service, or
- the treatment is given or provided by a health practitioner whose registration as a health practitioner under any relevant law is limited or subject to any condition imposed as a result of a disciplinary process, or who is suspended or disqualified from practice.

The WorkCover Claims Guidelines require that an insurer approve the payment of reasonably necessary services "*once the need for treatment has been justified in a report or a treatment plan which specifies the services proposed, the anticipated outcome, duration, frequency and the cost of the service.*"[36]

The Claims Guidelines provide that if there is **insufficient or inadequate information** upon which to make a **soundly based decision**, further information should be requested from the treatment provider. Failing this, insurers/agents are directed to obtain an 'independent opinion'.

Neither 'soundly based decision' or 'independent opinion' is defined in the Claims Guidelines.

Delay in pre-approval

Delay in providing pre-approval for medical treatment or services can result in a number of poor outcomes:

- Treatment not being provided at the *optimal time*
- Delay in return to work whilst treatment is being sought
- slower recovery
- extension of rehabilitation periods

[36] Claims Guidelines Chapter 2.7.2.

- extension of the period a worker is away from work
- Cost shifting to the public purse increased financial burden on an injured worker.

Delay in pre-approval coupled with the delay in making a "claim for medical expenses compensation" may result in an injured worker exhausting a period of at least 12 months in establishing the elements that would lead to the insurer meeting their medical and treatment costs.

Delay in the giving of pre-approval was acknowledged by both the Statutory Review of the Workers Compensation Legislation Amendment Act 2012 and the Upper House Inquiry into the Functions of the WorkCover Authority as detrimental to the operation of the scheme and productive of "outcomes that detract from the spirit of the objectives".

Time frames for claims for medical expenses

Section 279 of the 1998 Act contemplates a period of 21 days 'after a *claim for medical expenses compensation*' is made within which liability must be accepted or disputed.

Provisional Liability

Section 280 of the 1998 Act provides for payment of medical expenses compensation up to $7,500 on the basis of provisional acceptance of liability.

A "claim" for medical expenses compensation

The Claims Guidelines contemplate that a 'claim for medical expenses' can be an injury notification (through the insurer's injury notification system and where provisional liability payments have commenced) or a 'claim form'[37].

The Guidelines require a claim form to be provided if a 'reasonable excuse notice' has been issued (to avoid provisional liability payments), compensation is claimed beyond the provisional liability limit (currently $7,500) or an injury notification is made but there is "insufficient information to determine liability".

Disputes over 'small claims'

A dispute concerning the payment of medical expenses compensation for less than $7,500 can be resolved through the expedited assessment process in the Workers Compensation Commission. Section 297 of the 1998 Act provides that an 'interim payment direction' for payment of the expenses is warranted where the Registrar of the Commission is satisfied that the treatment or service is reasonably necessary:

> (a) to prevent deterioration of the worker's condition, or
>
> (b) to promote an early return to work, or
>
> (c) to relieve significant pain or discomfort, or
>
> (d) for such other reason as may be prescribed by the regulations.

This is a very expensive method of resolving minor disputes.

Disputes generally

A dispute concerning liability for medical expenses compensation falls within the jurisdiction of the Workers Compensation Commission.

[37] Claims Guidelines, Op cit, Chapter 2.1 and 2.2

Section 60(5) of the 1987 Act provides;

> *"The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute must be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act, unless the regulations otherwise provide."*

Section 60(5) was introduced in 2010 to ensure that injured workers, who do not have the financial capacity to pay for medical treatment themselves (and then pursue reimbursement), can approach the Commission for a decision "*about whether treatment requested, but not yet received, is reasonably necessary, medically appropriate and in the best interests of the injured worker*".[38]

The subsection **mandates** referral to medical assessment in a dispute about **future or proposed** treatment.[39] The Court of Appeal per Leeming ACJ said at [22] "*The ordinary literal meaning of "Any such dispute" is that it means every such dispute, and not merely disputes confined to particular issues (such as causation). The grammatical meaning of s 60(5) is unambiguous".*

The time taken to resolve such disputes can result in the resolution and determination being made after the expiry of the 12 month period proposed in section 59A discussed below.

Section 60(5) contains a regulation making power which has not been enacted to cure the difficulties associated with delay in outcomes occasioned by the mandatory nature of the referral and the 12 month cap. Section 60(5) would operate more favourably to provide quick outcomes if the referral to medical assessment was discretionary rather than mandatory.

Medical Assessment

in addition to disputes about future or proposed treatment being referred for medical assessment, section 321 of the 1998 Act provides for other 'medical disputes' to be referred for "medical assessment".

Section 319 of the 1998 Act defines a "**medical dispute**" as:

> *"a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:*
>
> *(a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),*
>
> *(b) the worker's fitness for employment,*
>
> *(c) the degree of permanent impairment of the worker as a result of an injury,*
>
> *(d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,*
>
> *(e) the nature and extent of loss of hearing suffered by a worker,*
>
> *(f) whether impairment is permanent,*
>
> *(g) whether the degree of permanent impairment of the injured worker is fully ascertainable.*

Part 7, Chapter 7 of the 1998 Act provides the set of rules regarding medical assessments .

There can be only one medical assessment made of an injured workers degree of permanent impairment.[40] A medical dispute about the degree of permanent impairment of worker as a result of an injury cannot be referred for or be the subject of assessment if a medical dispute about that matter has

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[38] The Hon Dr Andrew McDonald, MP, introducing the *Workers Compensation Legislation Amendment Bill 2010* as cited in *Tolevski v Zanardo and Rodriguez Sales and Service Pty Limited* [2013] NSWWCCPD 9 (28 February 2013)

[39] As interpreted by the Court of Appeal in *Zanardo and Rodriguez Sales and Service Pty Limited v Tolevski [2013] NSWCA 449*

[40] Section 322A(1) of the 1998 Act

already been the subject of assessment and the subject of a medical assessment certificate. However, the one assessment for permanent impairment 'rule' does not affect appeals against medical assessments.[41]

The one assessment 'rule' for permanent impairment 'rule' appears to affect an injured worker's ability to assert entitlement to any benefit where there is an impairment threshold imposed, such as exemption from section 59A for seriously injured workers or for existing claims. The assessment conducted for the purpose of the threshold determination may not be appropriate for the claiming of permanent impairment compensation. For example, an injured worker who seeks to be considered as a seriously injured worker for the purpose of being exempted from the 12 month cap on medical treatment may wish to assert that status to access medical treatment but may not wish to pursue permanent impairment compensation until some future time.

The status of a medical assessment conducted under Part 7, Chapter 7 the 1998 Act is that the certificate is conclusively presumed to be correct in relation to medical disputes about the degree of permanent impairment of a worker (section 319(c)) and those disputes outlined section 319 (d), (e), (f) and (g). In relation to medical disputes of any other kind, including disputes about future treatment, the medical assessment certificate is evidence, but not conclusive evidence, in any proceedings taken regarding that dispute.[42]

The 12 month duration cap – the operation of section 59A

Section 59A of the 1987 Act provides**:**

> **Limit on payment of compensation**
>
> (1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.
>
> (2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.
>
> (3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.
>
> (4) This section does not apply to a seriously injured worker (as defined in Division 2).

Commencement of the 12 months

– **Where no weekly payments are paid or payable[43]**

The 12 months commences when a 'claim for compensation' was first made. The date of the 'claim for compensation' may or may not be the date of injury. [44]

- The 12 months ceases 12 calendar months after the claim for compensation was first made
- The treatment must *be provided* within the 12 month period.

[41] Section 322A(4) of the 1998 Act
[42] Section 326(2) of the 1998 Act
[43] This can be because there is no incapacity for work, or alternatively, there is incapacity but as a consequence of the operation of the weekly payments provisions and calculation of weekly payment entitlements, no weekly payments are payable.
[44] There is considerable confusion already created by the use of the phrase 'claim for compensation' within the Act.

'Claim for compensation' is not defined in the Acts and could be interpreted to be a claim specifically for medical expenses compensation, or a claim for 'any ' compensation or a claim form or injury notification.

- **Where weekly payments are or have been paid or payable**

The operation of section 59A is tied to when weekly payments are '*or have been paid or payable'*. The 12 months commences 'after the worker ceased to be entitled to weekly payments of compensation'.

There is serious doubt about whether the 12 months commences when the worker '**first'** ceases to be entitled to weekly payments, or at some other time, for example at the end of a subsequent period of weekly payments or at the notional end of the second entitlement period (an aggregated 5 years of weekly payments). This has for the time being been resolved by the *Collett*[45] decision which is authority for the proposition that the time commences when weekly payments *first cease* regardless of whether there are numerous sporadic periods of weekly payments or one period of weekly payments.

Argument has focussed on the meaning of 'payable' and whether 'payable' includes future weekly payments, and 'entitled'.

In ***Flying Solo Properties Pty Limited v Matthew Collett*** [2015] NSWWCCPD 14, DP Roche said:

> *"[the] submission that the words "unless weekly payments of compensation are or have been paid or payable to the worker" in s 59A(1) includes potential payments into the future cannot be accepted. That is because the sub-section does not talk about the potential entitlement to weekly compensation in the future. It deals with the period 12 months after the claim for compensation in respect of the injury was first made. Moreover, the entitlement periods defined in s 32A, upon which the Arbitrator relied, only establish periods during which weekly compensation might be "paid or payable". Merely because the entitlement periods have not expired does not establish that weekly compensation is in fact "payable" in that period."*
>
> *"The entitlement periods merely identify periods during which an entitlement to weekly compensation may arise. They direct attention to the method to be used to determine a worker's actual entitlement, if one exists, in each particular period. If a worker's claim for weekly compensation is in the "first entitlement period", that is, the first 13 weeks, one applies one of the four formulas in s 36. If a claim for weekly compensation is in the "second entitlement period", that is, 117 weeks after the expiry of the first entitlement period, one applies one of the six formulas in s 37. Different provisions apply after the expiration of the second entitlement period (see s 38). If the correct application of the relevant formula results in a worker having no entitlement to weekly compensation, no such compensation is "payable".* [46]
>
> "*…[W]eekly compensation is "payable", within the meaning of s 59A, when a worker has an entitlement to actually receive such compensation by reason of a compensable work injury."*[47]
>
> …"*[W]hether a worker is "entitled" to weekly compensation at any particular time, that is, whether weekly compensation is "payable", will depend on the application of the legislation to the particular worker's circumstances. A worker is not "entitled" to weekly compensation just because the entitlement periods have not expired."*[48]

- **Revival of the right to medical expenses compensation: does the 12 months revive?**

Support for the proposition that the 12 month period commences after the worker *first* ceased to receive weekly payments is garnered from Section 59A(3). The section provides for revival of the right to have medical treatment paid but only in respect of any treatment, service or assistance "given or provided during" the period when weekly compensation is "payable" to the worker. Section 59A(3) does not

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45 *Flying Solo Properties Pty Limited v Matthew Collett* [2015] NSWWCCPD 14
46 *Collett* at 57 - 58
47 *Collett* at 59
48 *Collett* at 63

reinvigorate the 12 month period, but merely provides that medical expenses compensation is payable during a period of further weekly payments.

Payment of medical and treatment expenses outside the 12 month 'cap': Section 59(3): chicken or egg?

59(3) provides for treatment expenses to be paid outside the 12 month period and is activated under 2 conditions (which are not mutually exclusive):

- after the 12 month period anticipated in sub sections 1 or 2 has ceased, and
- the worker becomes entitled to weekly payments.

The treatment must be **provided or given** during that period of weekly payments. This is the 'chicken or egg' provision.

The tethering of section 59(3) to weekly payments by requiring the treatment to be 'provided or given' during the weekly payment period makes the subsection practically unworkable. Treatment has to be rendered whilst the worker receives the weekly payments and the weekly payments provision will be enlivened by the incapacity caused by the treatment.

The process is commonly frustrated by workers not taking time off work until such time as their treatment, for example surgery, is programmed. Programming of the treatment requires the insurer to pre-approve the treatment and schedule the treatment to coincide with time away from work.

Essentially, this requires the worker to then seek payment at the cost of the public purse (resulting in further delays) and seek reimbursement for treatment after it occurs. This forces cost shifting and is counterintuitive to the key objectives of the scheme.

Perversely, this section can have the effect of worker not returning to work as quickly as possible in order to preserve their medical treatments for as long as possible. This is particularly so where the injury calls for a conservative treatment plan before a more interventionist or surgical approach (for example, knee and shoulder injuries, back injuries).

'Given or provided'

Section 59A is drafted in such a way that the treatment must be '*given or provided'* within the 12 month period.

This artificially narrows '12 month cap on medical treatment' by virtue of the service having to be given within the 12 months and unfairly restricts the treatment period particularly where a claim for a specific treatment or service is declined or liability is declined.

The requirement that the treatment must be given or provided within the 12 months severely restricts the worker's opportunity for treatment.

There are many instances of insurers delaying approval which in turn prevents the worker from accessing paid treatment through the effluxion of time.

The medical profession have criticised the arbitrariness of the 12 month cap for either forcing workers to rush treatments that would benefit from delay and timing and foregoing a conservative approach to often riskier treatments (for example, spinal surgery), or ignoring best practice clinical protocols in relation to treatment.

Options for treatment where time expires through delay occasioned by declination of liability

Where the claim for medical treatment is declined or liability is declined the worker can either:

- Undergo the medical treatment at their own cost or on the 'public purse' and seek to recover the cost through proceedings in the Workers Compensation Commission
- Not undergo the treatment and seek a determination of the dispute through the Workers Compensation Commission

The tribunal of fact must decide first the issues in contention which may be injury, causation and whether the proposed treatment is (or was) reasonably necessary. Resolution of the dispute may occur well outside the 12 month period. On finding in favour of a worker there then must be consideration of an order to pay under 59A.

If a determination is made favourable to a worker beyond the expiry of the 12 month period, there is no mechanism for the treatment to be paid except that provided for in section 59(3). Compensation is 'not payable in respect of any treatment given or provided more than 12 months after' the claim is made (59A(1) and hence no order may be made requiring payment be made.

Exemptions from the 12 month cap

Exemptions to the 12 month cap in the legislation

Seriously injured workers (those with an impairment of greater than 30%) are exempt from the 12 month cap on the payment of medical expenses *for life*.[49]

The relationship between a need for medical treatment and impairment will be discussed below.

Exemptions to the 12 month cap in the Regulation gazetted in September 2014

The Minister on announcing *"Now that we have pulled the scheme out of Labor's deficit and returned it to surplus, we are in a position to better support the State's workers… we can make meaningful refinements to the Scheme that will better support injured workers"*[50], implemented the 2014 Existing Claims Regulation[51] amending Schedule 8 of the *Workers Compensation Regulation 2010,* which amendments came into force in September 2014.

The amended Regulation provides (retrospectively):

> *28 (1) An existing claim **is exempt** from the operation of section 59A (Limit on payment of compensation) of the 1987 Act in respect of the following compensation until the injured worker reaches retiring age:*
>
> *(a) compensation payable to an injured worker under Division 3 of Part 3 of the 1987 Act if the worker's injury has resulted in permanent impairment **of greater than 20%,***
>
> *(b) compensation payable in respect of the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),*
>
> *(c) compensation payable in respect of the modification of a worker's home or vehicle.*
>
> *(2) A worker's injury is considered to have resulted in permanent impairment of greater than 20% only if the injury has resulted in permanent impairment and:*
>
> *(a) the degree of permanent impairment has been assessed for the purposes of Division 4 of Part 3 of the 1987 Act to be greater than 20%, or*

[49] Section 59A(4) of the 1987 Act
[50] Minister for Finance and Services, Dominic Perrottet MP, Media Release Thursday 26 June 2014
[51] Workers Compensation Amendment (Existing Claims) Regulation 2014 amending Schedule 8 of the *Workers Compensation Regulation 2010.*

(b) an assessment of the degree of permanent impairment is pending and has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

Note : *Paragraph (b) no longer applies once the degree of permanent impairment has been assessed.*

(c) the insurer is satisfied that the degree of permanent impairment is likely to be greater than 20%.

29 (1) An existing claim is exempt from the operation of section 59A (Limit on payment of compensation) of the 1987 Act in respect of compensation for the cost of ***secondary surgery****.*

(2) Surgery is ***secondary surgery*** *if:*

(a) the surgery is directly consequential on earlier surgery and affects a part of the body affected by the earlier surgery, and

(b) the surgery is approved by the insurer within 2 years after the earlier surgery was approved (or is approved later than that pursuant to the determination of a dispute that arose within that 2 years).

(3) This clause does not affect the requirements of section 60 of the 1987 Act (including, for example, the requirement for the prior approval of the insurer for secondary surgery).

Note. This clause only creates an exception from section 59A of the 1987 Act in respect of compensation for secondary surgery that would have been payable (had it not been for section 59A) as part of the original claim for compensation. It does not relate to surgery for an injury that gives rise to a separate claim for compensation.

'Existing claim' means a claim for compensation in respect of an injury made before 1 October 2012.

This means that the exemption only applies to the particular claim made before 1 October 2012. It does not refer to claims made after that date in respect to an injury incurred before that date.

The amendments operate to create 2 types of exemptions:

- Exemptions based on *type* of medical treatment or service:
    - Exempt existing claims from the 12 month cap on the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries) but only to *retirement age*; and
    - Exempt existing claims from the 12 month cap for 'secondary surgery' upon condition that the secondary surgery is claimed within 2 years after the earlier surgery.
- Exemptions based on impairment threshold
    - Exempt workers injured before 1 October 2012 with a greater than 20% impairment but only to retirement age.

In the matter of *Anderson v Canada Bay City Council* [2014] NSWWCC 424*,* the applicant sought approval for knee replacement surgery outside the 12 month period. The Arbitrator accepted a submission that "*the replacement of the knee does include replacement of part of a limb and in the context of the provision of benefits to the worker for reasonably necessary medical expenses, should be considered to be an "artificial member" for the purpose of cl 28(1)(b).*"

The restriction of these exemptions to retirement age is troublesome given that many surgeries and treatments will be delayed until the 6th and 7th decade, or are considered in best clinical practice terms as better delayed, and many aids require continuous adjustment or replacement over time well beyond retirement age (hearing aids, batteries, prostheses, artificial aids).

Impairment as a determinant for medical treatment

The NSW Workers Compensation Scheme now uses permanent impairment evaluations as a threshold for determining access to various types of benefits. This has been discussed earlier in relation to *Weekly Payments*.

With the 2012 reforms, for the first time, impairment evaluation is introduced as the threshold for determining access to ongoing medical treatment and weekly payments of compensation. Specifically, workers with an impairment of greater than 30% whole person impairment are said to be able to access medical treatment expenses for life. Workers with an impairment of greater than 20% whole person impairment injured prior to 1 October 2012 are able to access medical treatment expenses to retirement age.

In NSW, permanent impairment is assessed for *"the purposes of awarding a lump sum payment under the statutory benefits of the NSW Workers Compensation Scheme and also for determining access to Common Law, domestic assistance and commutation of claims.*" [52]

Since 1 January 2002 impairment has been assessed by application of the WorkCover Guides for the Evaluation of Permanent Impairment (WorkCover Guides), currently in its third edition, which relies in the main on the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ('AMA5' Guides).

The AMA5 Guides define **impairment** as *"a loss, loss of use, order arrangement of any body part, organ system, or organ function*."[53] AMA 5 Guides nowhere indicate that impairment can or should be used as a determinant for continuing medical treatment.

Statements contained within the WorkCover Guides for the Evaluation of Permanent Impairment make it clear that impairment measures are not intended to be a basis for assessing access to medical treatment:

> *1.21 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the injured worker is fully ascertainable. The permanent impairment will be fully ascertainable where the medical assessor considers that the person has attained maximum medical improvement. This is considered to occur when the worker's condition has been medically stable for the previous three months and is unlikely to change by more than 3%WPI in the ensuing 12 months with or without further medical treatment (ie further recovery or deterioration is not anticipated).*
>
> *1.23 If the claimant has been offered, but refused, additional or alternative medical treatment that the assessor considers is likely to improve the claimant's condition, the medical assessor should evaluate the current condition, without consideration of potential changes associated with the proposed treatment. The assessor may note the potential for improvement in the claimant's condition in the evaluation report, and the reasons for refusal by the claimant, but should not adjust the level of impairment on the basis of the worker's decision.*
>
> *1.24 Similarly, if a medical assessor forms the opinion that the claimant's condition is stable for the foreseeable future, but that it is expected to deteriorate in the long term, the assessor should make no allowance for this deterioration, but note its likelihood in the evaluation report. If the claimant's condition deteriorates at a later time, the claimant may re-apply for further evaluation of the condition.*
>
> *1.40 As previously indicated, where a claimant has declined treatment which the assessor believes would be beneficial, the impairment rating should be neither increased nor decreased.*

[52] WorkCover Guidelines for the Evaluation of Permanent Impairment 3rd Edition, which are based on the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition, paragraph 1.4.

[53] AMA 5 Guides To The Evaluation Of Permanent Impairment, Chapter 1.2a

Permanent impairment evaluation as a means of determining access to medical treatment is not supported by the medical profession or the accepted professional methodologies of evaluating impairment and should be discouraged.

Interaction between section 41 ('special compensation) and 59A(3)

Section 41 of the 1987 Act provides that a worker who suffers "incapacity from **injury related surgery**" after the 'second entitlement period', that is, after 130 weeks of weekly payments (aggregated, not consecutive), is entitled to "*special compensation"*[54].

Injury related surgery is **surgery** which is undertaken in the course of medical treatment provided as a result of the **initial injury**.

The provision of special (weekly) compensation is dependent on the surgery being related to the injury. The surgery would have to meet the conditions of being reasonably necessary. The payment of special compensation is not dependent on the payment for the treatment being made by the insurer.

In fact, there may be circumstances where the injured worker will not be entitled to payment for the surgery contemplated by section 41, noting that section 59A(3) provides:

> *If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.*

Injury Management Plans

Section 50 of the 1998 Act provides that the payment of the cost of treatment of an injured worker can be provided for in an *Injury Management Plan (IMP).*

"Injury management" is defined in the 1998 Act as *"the process that comprises activities and procedures that are undertaken or established for the purpose of achieving a* ***timely, safe and durable return to work*** *for workers following workplace injuries".*

An IMP is a plan for *"co-ordinating and managing those aspects of injury management that concern the treatment, rehabilitation and retraining of an injured worker, for the purpose of achieving a timely, safe and durable return to work for the worker. An injury management plan can provide for the treatment, rehabilitation and retraining to be given or provided to the injured worker."*

Where the cost of specified treatment[55] is provided for in an IMP, for the **purposes of payment** *"it does not matter that the worker has not made a claim for compensation, the insurer has not accepted liability in respect of the injury or the insurer disputes liability in respect of the injury*".

The intent of the section is that workers will be able to undertake treatment to achieve a ***timely, safe and durable return to work*** without the unnecessary continuous intervention of bureaucratic process (reds tape).

The difficulty with section 50 of the 1998 Act is that the opportunity for 'pre-approval of a treatment plan is not referred to anywhere in section 59A of the 1987 Act or in section 60. It must be assumed that if the cost of the treatment and treatment proposal is noted in an IMP then the pre-approval requirements are met. However, the fact that an IMP refers to a specific course of treatment does not excuse that treatment from the section 59A caps.

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[54] Section 41(1) of the 1987 Act

[55] Section 50(1)(b) of the 1998 Act provides for specification by reference to such factors as the kind of treatment, the identity of the health care professional who provides the treatment, and the circumstances in which the treatment is provided.

IMPs are not often used to their full potential to advance the purpose of section 50(1)(b). The IMPs are used more as a 'tracking device' for the progress of a worker meeting their Chapter 3 'Work Injury Management' obligations rather than a short cut to pre-approval of specific medical treatments.

Workplace rehabilitation services

s.60(1) contemplates a workplace rehabilitation service as a medical expense. Rehabilitation services are thus subject to the restrictions in section 60(2A) as to pre-approval. The return to work plan for a worksite can obligate the provision of rehabilitation or vocational retraining as can an injury management plan. The exemptions to pre-approval (expressed in Part 3 of the Claims Guidelines) do not include rehabilitation services prescribed as part of a RTW Plan or IMP. Similarly, rehabilitation and vocational retraining is subject to the s. 59A restrictions (the 12 month restriction).

Aging Workers

Workers who are injured close to retirement age are disadvantaged by the 12 month cap in that their entitlement to weekly compensation ceases on retirement age and therefore the 12 months of medical treatment concludes exactly one year after retirement age.[56]

Summation

The 2012 reforms saw the implementation of new policy on medical treatment in the workers compensation scheme, the introduction of a 12 month cap on the payment for medical treatment and the use of impairment evaluation to determine exemptions from the cap.

These policy initiatives were coupled with the requirement for pre-approval of most medical treatments or services before incursion of the treatment and 'special compensation'.

The unintended consequences of the legislative framing of the cap (section 59A) is that workers with a legitimate need for medical treatment as a result of a workplace injury are being refused treatment. Even when the treatment is proven to meet the requirements of the legislation there is no means of enforcing payment by the insurer.

In turn, this results in workers being prevented from remaining at work or in delays in return to work (often after periods of return to work).

The 2014 regulatory changes do not 'fix the problem' but rather create further problems, most notably reliance on impairment evaluation to justify exemption from the harshness of the cap.

Legislative redrafting can ameliorate some of these unintended consequences. It is preferable that there be further discussion with a view to a reformulation of policy in relation to the scheme meeting medical and treatment expenses for injured workers.

Solutions

Re Section 59A:

1. Extend the operation of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* [especially Schedule 8, Part 2, R 28(1)] to all claims by amendment of the legislation (currently applies to existing claims only: cf definition of 'existing claims' in 1998 Act).
2. Extend the exemption provided in Clauses 28 and 29 of Schedule 8 of the Regulation for 'life'.
3. Clarify 'claim for compensation' or prescribe that time runs from the date the first claim for medical expenses or treatment is made.

[56] *Air Electrical Pty Ltd t/as DJ Staniforth & Co v Mortimer* [2015] NSWWCCPD 18

4. Replace the requirement that the treatment be provided or given within the 12 months period with a requirement that the '*claim for medical expenses compensation*' is to be made within the 12 months - as an example :

   *Section 59A(1) "Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance **for which a claim is made** more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker."*

5. Amend section 59A(2) to clarify from when the 12 months commences:

   *Section 59A(2) "If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance **for which a claim is made** more than 12 months after the worker **last** ceased to be entitled to weekly payments of compensation."*

6. Delete the words "*but only in respect of treatment… weekly payments are payable to the worker"* from section 59A(3).

7. There should be a general exception to the cap on duration of medical treatment to cover:

   a. Reasonably necessary surgery (to promote return to work)

   b. Treatment required to ensure the worker *remains at work* or is *capable of returning to work*

   c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate

8. Consider a 6 year ultimate cap on medical and treatment expenses (seriously injured workers and those with an impairment of greater than 20% excluded).

Pre-Approval of medical treatment

9. Provide a defined and easier path for pre-approval of specific treatments and courses of treatment including post-operative treatment plans in accordance with clinical practice thereby avoiding unnecessary and repeated requests for pre-approval.

10. Add to the exemptions to pre-approval those services provided on emergency admission to hospital (outside the first 48 hours after injury).

Generally

11. Amend Section 60(5) to make the referral to medical assessment discretionary rather than mandatory.

12. For the purpose of exempting those with an impairment of greater than 20% and seriously injured workers from the 12 months cap:
    a. Provide an eligibility test permitting impairments from all injuries to be aggregated

    b. Provide that a worker who meets the eligibility test does not impact premiums

    c. Provide that the Nominal Insurer meet the medical and treatment expenses

13. Medical treatment and service providers should be clearly informed of the duration cap (expiry date for payment of medical treatment in advance and the grounds, if any for provision of services beyond that date)

14. Consider a reformulation of policy in relation to the payment of medical and treatment expenses for injured workers particularly the 12 months cap and the reliance on impairment evaluation to determine access to benefits.

ANNEXURE C

NSW legislation

Results: Document Types="*Acts*, *Regulations*, *EPIs*", Search In="*All Content*", Exact Phrase="*provisional*", Point In Time="*01/07/2024*" match 15 of 398 provisions

Workplace Injury Management and Workers Compensation Act 1998 No 86

Current version for 1 July 2024 to date (accessed 14 May 2025 at 12:13)

Chapter 7 > Part 7 > Section 319

Part 7 Medical assessment

319 Definitions

In this Act—

medical dispute means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim—

(a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),

(b) the worker's fitness for employment,

(c) the degree of permanent impairment of the worker as a result of an injury,

(d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,

(e) the nature and extent of loss of hearing suffered by a worker,

(f) whether impairment is permanent,

(g) whether the degree of permanent impairment of the injured worker is fully ascertainable.

320 (Repealed)

321 Referral of medical dispute for assessment

(1) A medical dispute (other than a dispute concerning permanent impairment of an injured worker) may be referred for assessment under this Part by a court, the Commission or the President, either of their own motion or at the request of a party to the dispute. The President is to give the parties notice of the referral.

(2) The parties to the dispute may agree on the medical assessor who is to assess the dispute but if the parties have not agreed within 7 days after the dispute is referred, the President is to choose the medical assessor who is to assess the dispute.

(3) The President may arrange for a medical assessor to assess the dispute outside the State—

(a) if requested by a party to the dispute, or

(b) with the consent of the parties to the dispute.

(4) In deciding whether to make an arrangement under subsection (3), the President must consider the following—

(a) the interests and wishes of the parties to the dispute,

(b) the nature and complexity of the dispute,

(c) if the arrangement is necessary for the timely and cost effective assessment of the dispute,

(d) other matters the President considers relevant.

321A Referral of medical dispute concerning permanent impairment

(1) The regulations may make provision for or with respect to—

(a) the circumstances in which a medical dispute concerning permanent impairment of an injured worker is authorised, required or not permitted to be referred for assessment under this Part, and

(b) the giving of notice of a referral to the parties to the dispute.

(2) Without limiting subsection (1), the regulations may provide that a medical dispute may not be referred for assessment under this Part if the dispute concerns permanent impairment of an injured worker where liability is in issue and has not been determined by the Commission.

(3) A medical dispute concerning permanent impairment of an injured worker that is authorised or required by the regulations to be referred for assessment under this Part may be referred by a court, the Commission or the President, either of their own motion or at the request of a party to the dispute.

322 Assessment of impairment

(1) The assessment of the degree of permanent impairment of an injured worker for the purposes of the Workers Compensation Acts is to be made in accordance with Workers Compensation Guidelines (as in force at the time the assessment is made) issued for that purpose.

(2) Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.

(3) Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.

Note—

Section 65A of the 1987 Act provides for impairment arising from psychological/psychiatric injuries to be assessed separately from impairment arising from physical injury.

(4) A medical assessor may decline to make an assessment of the degree of permanent impairment of an injured worker until the medical assessor is satisfied that the impairment is permanent and that the degree of permanent impairment is fully ascertainable. Proceedings before a court or the Commission may be adjourned until the assessment is made.

322A One assessment only of degree of permanent impairment

(1) Only one assessment may be made of the degree of permanent impairment of an injured worker.

(1A) A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.

(2) The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).

(3) Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of—

(a) assessment and a medical assessment certificate under this Part, or

(b) a determination by the Commission under Part 4.

(4) This section does not affect the operation of section 327 (Appeal against medical assessment) or 352 (Appeal against decision of Commission constituted by non-presidential member).

323 Deduction for previous injury or pre-existing condition or abnormality

(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.

(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

Note—

So if the degree of permanent impairment is assessed as 30% and subsection (2) operates to require a 10% reduction in that impairment to be assumed, the degree of permanent impairment is reduced from 30% to 27% (a reduction of 10%).

(3) The reference in subsection (2) to medical evidence is a reference to medical evidence accepted or preferred by the medical assessor in connection with the medical assessment of the matter.

(4) The Workers Compensation Guidelines may make provision for or with respect to the determination of the deduction required by this section.

(5) (Repealed)

Note—

Section 68B of the 1987 Act makes provision for how this section applies for the purpose of calculating workers compensation lump sum benefits for permanent impairment and associated pain and suffering in cases to which section 15, 16, 17 or 22 of the 1987 Act applies.

324 Powers of medical assessor on assessment

(1) The medical assessor assessing a medical dispute may—

(a) consult with any medical practitioner or other health care professional who is treating or has treated the worker, and

(b) call for the production of such medical records (including X-rays and the results of other tests) and other information as the medical assessor considers necessary or desirable for the purposes of assessing a medical dispute referred to him or her, and

(c) require the worker to submit himself or herself for examination by the medical assessor.

(2) If a worker refuses to submit himself or herself for examination by the medical assessor if required to do so, or in any way obstructs the examination—

(a) the worker's right to recover compensation with respect to the injury, or

(b) the worker's right to weekly payments,

is suspended until the examination has taken place.

(3) This section extends to the assessment of a medical dispute in the course of an appeal or further assessment under this Part.

(4) A medical assessor hearing the appeal or who is assessing the matter by way of further assessment has all the powers of a medical assessor under this section on an assessment of a medical dispute.

325 Medical assessment certificate

(1) The medical assessor to whom a medical dispute is referred is to give a certificate (a ***medical assessment certificate***) as to the matters referred for assessment.

(2) A medical assessment certificate is to be in a form approved by the President and is to—

(a) set out details of the matters referred for assessment, and

(b) certify as to the medical assessor's assessment with respect to those matters, and

(c) set out the medical assessor's reasons for that assessment, and

(d) set out the facts on which that assessment is based.

(3) If the President is satisfied that a medical assessment certificate contains an obvious error, the President may issue, or approve of the medical assessor issuing, a replacement medical assessment certificate to correct the error.

(4) A medical assessor is competent to give evidence as to matters in a certificate given by the assessor under this section, but may not be compelled to give evidence.

326 Status of medical assessments

(1) An assessment certified in a medical assessment certificate pursuant to a medical assessment under this Part is conclusively presumed to be correct as to the following matters in any proceedings before a court or the Commission with which the certificate is concerned—

(a) the degree of permanent impairment of the worker as a result of an injury,

(b) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality,

(c) the nature and extent of loss of hearing suffered by a worker,

(d) whether impairment is permanent,

(e) whether the degree of permanent impairment is fully ascertainable.

(2) As to any other matter, the assessment certified is evidence (but not conclusive evidence) in any such proceedings.

327 Appeal against medical assessment

(1) A party to a medical dispute may appeal against a medical assessment under this Part, but only in respect of a matter that is appealable under this section and only on the grounds for appeal under this section.

(2) A matter is appealable under this section if it is a matter as to which the assessment of a medical assessor certified in a medical assessment certificate under this Part is conclusively presumed to be correct in proceedings before a court or the Commission.

(3) The grounds for appeal under this section are any of the following grounds—

(a) deterioration of the worker's condition that results in an increase in the degree of permanent impairment,

(b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

(c) the assessment was made on the basis of incorrect criteria,

(d) the medical assessment certificate contains a demonstrable error.

(4) An appeal is to be made by application to the President. The appeal is not to proceed unless the President is satisfied that, on the face of the application and any submissions made to the President, at least one of the grounds for appeal specified in subsection (3) has been made out.

(5) If the appeal is on a ground referred to in subsection (3) (c) or (d), the appeal must be made within 28 days after the medical assessment appealed against, unless the President is satisfied that special circumstances justify an increase in the period for an appeal.

(6) The President may refer a medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section).

Note—

Section 329 also allows the President to refer a medical assessment back to the medical assessor for reconsideration (whether or not the medical assessment could be appealed under this section).

(7) There is to be no appeal against a medical assessment once the dispute concerned has been the subject of determination by a court or the Commission or agreement registered under section 66A of the 1987 Act.

(8) Clause 2 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* applies to and in respect of the provision of legal services in connection with an appeal under this section in the same way as it applies to and in respect of the provision of legal services in connection with a claim or defence of a claim for damages referred to in that clause.

Note—

Clause 2 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* prohibits a law practice from providing legal services in connection with a claim or defence unless a legal practitioner associate responsible for the provision of those services believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.

328 Procedure on appeal

(1) An appeal against a medical assessment is to be heard by an Appeal Panel constituted by 3 persons chosen by the President as follows—

(a) 2 medical assessors,

(b) 1 member of the Commission who is a member assigned to the Workers Compensation Division of the Commission.

(2) The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made.

(2A) To avoid doubt, any medical re-examination of the worker for the purposes of the review need not be conducted by all of the members of the Appeal Panel if the members agree for it to be conducted by only some of the members.

(3) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment.

(4) When attending an Appeal Panel for the purposes of an assessment, an injured worker is entitled to be accompanied by a person (whether or not a legal adviser or agent) to act as the injured worker's advocate and assist him or her to present his or her case to the Appeal Panel.

(5) The Appeal Panel may confirm the certificate of assessment given in connection with the medical assessment appealed against, or may revoke that certificate and issue a new certificate as to the matters concerned. Section 326 applies to any such new certificate.

(6) The decision of a majority of the members of an Appeal Panel is the decision of the Appeal Panel.

329 Referral of matter for further medical assessment or reconsideration

(1) A matter referred for assessment under this Part may be referred again on one or more further occasions for assessment in accordance with this Part, but only by—

(a) the President as an alternative to an appeal against the assessment as provided by section 327, or

(b) a court or the Commission.

(1A) A matter referred for assessment under this Part may be referred again on one or more further occasions by the President to the medical assessor for reconsideration.

(2) A certificate as to a matter referred again for further assessment or reconsideration prevails over any previous certificate as to the matter to the extent of any inconsistency.

330 Costs of medical assessment

(1) The costs of medical assessments under this Part (including the remuneration of medical assessors) are payable by the employer or insurer, except as otherwise provided by the regulations. The Authority may, for the purposes of meeting those costs, impose fees for the carrying out of medical assessments or make other arrangements for meeting those costs.

(2) If a worker is required to submit himself or herself for examination pursuant to this Part, the worker is entitled to recover from the worker's employer, in addition to any compensation otherwise provided—

(a) the amount of any wages lost by the worker by reason of so submitting himself or herself for examination, and

(b) the cost to the worker of any fares, travelling expenses and maintenance necessarily and reasonably incurred in so submitting himself or herself.

(3) If it is necessary for a worker to travel in order to submit himself or herself for examination but the worker is not reasonably able to travel unescorted, the fares, travelling expenses and maintenance referred to in this section include fares, travelling expenses and maintenance necessarily and reasonably incurred by an escort for the worker provided to enable the worker to submit himself or herself for examination.

(4) If the cost of fares, travelling expenses and maintenance referred to in this section includes the cost of travel by private motor vehicle, that cost is to be calculated at such rate as is fixed for the purposes of section 64 of the 1987 Act.

(5) A reference in this section to a medical assessment includes a reference to a further medical assessment and an appeal against a medical assessment.

331 Commission rules

Medical assessments, appeals and further assessments under this Part are subject to relevant provisions of the Commission rules relating to the procedures for the referral of matters for assessment or appeal, the procedure on appeals and the procedure for assessments.

ANNEXURE D

1 DEFINITIONS

1.1 Background

The 2012 amendments it would be fair to say were in part not considerate of the existing language of the Acts. The amendments (including more recent regulatory reform) in part utilised existing language and terms but also introduced new definitions for existing terminology. This has resulted in the inconsistent use of the same terms, language and expressions, lack of clarity around terminology and confusion leading in turn to unintended consequences of the reforms as the courts attempt to bring clarity to the meaning of the provisions.

As a consequence, the ineffective operation of the amendments has relied on the courts to assign meaning and interpretation to terms and concepts that previously were relatively clearly understood.

The most obvious example is “injury”. There have always been 2 definitions of injury – in the 1987 Act and the 1998 Act. The two Acts are to be read together. The definition of injury in the 1987 Act was amended as part of the 2012 Amending Legislation but was not so amended in the 1998 Act. The 1998 Act takes precedence in the event of conflict. The question to be asked is whether the 2012 amendments to the definition of injury apply?

The word “claim” The 2012 amendments relied on varying assignations of meaning which are not found within the Acts. Judicial interpretation has left 'claim' unresolved. Wherever it is used in the Acts there is now uncertainty as to its meaning in any particular context and ambiguity as to the purpose and intent of the legislation.

The Interpretation Act states simply:

> *“In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.”*[1]

The Act encourages the Courts to consider extrinsic material (material not part of the Act) where that material is “*capable of assisting the ascertainment of the meaning of the provision*.” The material that may be considered includes:

> *(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer,*
>
> *(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the provision was enacted or made,*
>
> *(c) any relevant report of a committee of Parliament or of either House of Parliament before the provision was enacted or made,*
>
> *(d) any treaty or other international agreement that is referred to in the Act,*
>
> *(e) any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made,*

[1] Section 33 of the *Interpretation Act 1987*(NSW)

(f) the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House,

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section, and

(h) any relevant material in the Minutes of Proceedings or the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament. [2]

The High Court recently restated the 'basic' principles around statutory interpretation in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56:

> At 23: It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2011] NSWCA 136*:
>
> > *"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."*
>
> 24: The context and purpose of a provision are important to its proper construction because, as the plurality said in Project Blue Sky Inc v Australian Broadcasting Authority, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of ***all*** the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".
>
> 41: It is not legitimate to identify a legislative purpose not apparent from the text of the relevant provisions (or in this case even expressed in some extrinsic material), to examine extrinsic material and notice that there is nothing positively inconsistent with the identified purpose, and then to answer the question of construction by reference to the purpose that was initially assumed. That reasoning is not sound. It is reasoning of the kind of which Spigelman CJ rightly disapproved in the extra-curial writing set out earlier in these reasons. Statutory *"purpose"* and "*intention"* are to be identified according to the principles that were described earlier under the heading "Some basic principles".

It is telling that in much of the litigation around the confusing terminology in the Acts much time is spent discussing the "rules" of statutory interpretation and their application and exceptions. What was in the mind of the legislative drafters, what was the policy that underpinned the particular provision or term, when is use of one interpretative tool preferred over another?

The extent of the litigation which calls on the courts to interpret the language of the Acts has been profound and the outcomes often not consistent with the assumed 'correct' position: For example *Goudappel*[3].

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[2] Section 34 of the Interpretation Act 1987

[3] *Goudappel v Adco Constructions Pty Limited* [2013] NSWCA 94 (29 April 2013), *Adco Constructions Pty Limited v Goudappel* [2014] HCA 18 (16 May 2014)

For those who seek to exercise the function of insurer or manage claims and for those whose to assist injured workers receive the benefits they deserve the inherent confusion, inconsistency and ambiguity in the text, language and concepts in the Acts is a constant cause of frustration and consternation with the delay in coming to a final resting point and a defined outcome.

1.2 Specific examples

1.2.1 "Injury"

The 2012 Amending legislation introduced a new definition of "injury" in the 1987 Act. As a consequence section 4 of the 1987 Act defines "injury" as follows:

> In this Act:
> **"injury":**
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes a "disease injury", which means:
>
> (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and
>
> (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the *Workers' Compensation (Dust Diseases) Act 1942*, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.

Section 4 of the 1998 Act defines "injury":

> In this Act **"injury"**
>
> (a) means a personal injury arising out of or in the course of employment, and
>
> (b) includes:
>
> (i) a disease contracted by a worker in the course of employment, where the employment was a contributing factor to the disease, or
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration, but
>
> (c) does not include (except in the case of a worker employed in or about a mine):
>
> (i) a dust disease, or
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of a dust disease.

The two Acts now have inconsistent definitions of a **disease** injury because of the failure to recognise that the structure of the Acts is such that they are to construed as if they formed part of the 1998 Act[4], and both Acts carried a definition of injury .

This 'error' is compounded by the fact that s.2A of the 1987 Act states "*in the event of an inconsistency between this Act and the 1998 Act, **the 1998 Act prevails** to the extent of the inconsistency".*

[4] Section 2A (2) of the 1987 Act

The 1998 Act (unamended in 2012) definition of a disease refers to contributing factor, whereas the 1987 Act (*amended in 2012)* of a disease refers to employment being the 'main contributing factor'. Section 9A qualifies that for an injury (other than a disease injury) employment must be a "*substantial contributing factor'.*

The new 'disease injury' definition affects 'older' workers whose injuries are predominantly an aggravation of age related processes affecting their spine. They must satisfy the more onerous definition. The definition is leading to more declinature of liability on the basis that the 'injury' can or should be categorised as a disease injury and therefore satisfy the higher onus.

1.2.2 "Claim"

The 2012 amendments make "claim" central. This represents a move away from the use of date of injury as a reference point for the operation of many of the provisions of the Acts. "Claim" is used in many ways and for many purposes. As a consequence of the confusion created by the many uses and interpretations of 'claim' the notion of claim requires recasting. Insert footnote [5]

Previously the 'claims process' described a continuum by which an injured worker could rely on a date of claim to assist in the determination of benefits. Successive reforms have removed any clarity over that process principally because the concept of making a claim has been removed from the 1998 Act and referred to the Claims Guidelines. The 1998 Act now states that *"a claim must be made in accordance with the applicable requirements of the WorkCover Guidelines*". The WorkCover Guidelines may make provision for all with respect to the following matters in connection with the making of a claim:

(a) the form in which a claim is to be made,
(b) the manner in which a claim is to be made,
(c) the means by which a claim may be made,
(d) the information that a claim is to contain,
(e) requiring specified documents and other material to accompany or form part of a claim,
(f) such other matters as may be prescribed by the regulations.

The regulations deal with requirements in notifying the dispute but do not prescribe what is required to "make a claim".

By way of example: Consider what is meant by 'claim' in section 59A: '12 months after a *claim for compensation* in respect of the injury was first made'.

1.2.3 "Existing claim"

In 2014 the Workers Compensation Regulation was amended and another new term was introduced: "existing claim"[6]. The definition of "existing claim" in the Regulation contradicts an existing definition within Chapter 7 of the 1998 Act[7]. There now coexists to competing and inconsistent definitions of "existing claim". Whilst the definition in the 1998 Act will prevail, that definition does not lend itself to the purpose or meaning required of the Regulation.

1.2.4 Disease Injuries/Disease

The amended definition of "injury" in 1987 Act creates "disease injury" and requires employment to be a 'main contributing factor". The definition in the 1998 Act speaks of 'disease' as a sub category under the umbrella of "injury" and does not reflect the amendments to "main contributing factor.

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[5] . See *Ottomen Pty Limited ATF Labour ADM v Serge Ah-Lam Lee Chee* [2013] NSWWCCPD 42 (14 August 2013)
[6] Clause 25 of Schedule 8 of the *Workers Compensation Regulation* 2010, amended 3 September 2014
[7] Section 250(1) of the 1998 Act

1.2.5 Definition of Paramedic & Firefighter

Clause 25 in Part 19 H of Schedule 6 being the savings and transitional provisions in the 1987 act provides that:

> *The amendments made by the 2012 Amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.*

Neither Act provides a definition of either 'paramedic' or 'firefighter' hence it is unclear as to the extent of those workers who are exempt from the provisions of the 2012 amendments.

- **Firefighter**

In *Ware v NSW Rural Fire Service [2014] NSWCCPD 33* DP Roche stated:

> *"I have concluded that the legal meaning of firefighter corresponds with its normal grammatical (dictionary) meaning and there is nothing in the context, purpose or policy behind cl 25 that leads to a different conclusion. It follows that firefighter means "someone whose activity or employment is to extinguish fires, especially bushfires". As Mr Ware was employed as a mechanic, not a firefighter, he is only a firefighter, for the purposes of cl 25, when he is engaged in providing support at the fire front during a fire."*

In *The Australian Workers Union New South Wales v Office of the Environment and Heritage [2012] NSWIRComm 133* the union sought declaratory relief that certain employees employed in the Government Service in the Forestry Commission and National Parks and Wildlife be declared firefighters for the purpose of being exempted from the 2012 amendments to the Workers Compensation Acts.

Boland J, in the Industrial Relations Commission of NSW, found that persons employed by the Government of New South Wales who perform firefighting duties as part of their work for various government departments and whose employment is covered by various Crown Employees Awards, are "firefighters" for the purposes of clause 25 of Part 19H of Schedule 6 to the Workers Compensation Act 1987, provided that the Employees are only "firefighters" for such purposes whilst they are performing firefighting duties. His honour provided the definition of "firefighting duties".

- **Paramedic**

In *State of New South Wales v Stockwell [2015]NSW WCCPD 9* DP Roche stated:

> *[118 -] The reasoning in Ware is tolerably clear. In that case, I held (at [42]) that, in the absence of a definition of "firefighter", "firefighter" means, based on the dictionary definition, "someone whose activity or employment is to extinguish fires, especially bushfires". As Mr Ware was employed as a mechanic, not a firefighter, he was only a firefighter, for the purposes of cl 25, when he was engaged in providing support at the fire front during a fire.*
>
> *In the present case, if it is ultimately found that, at the time of the psychological injury, the appellant employed Mr Stockwell as a paramedic, then, regardless of the activities he was performing when he was injured, he is entitled to the exemption provided in cl 25. That follows from the clear terms of cl 25, which do not say that a paramedic is only exempt from the 2012 amendments if injured while administering emergency health care to a person in need of such care, or that a firefighter is only exempt if injured while actually fighting a fire, or that a police officer is only exempt while attempting to apprehend a dangerous offender."*

DP Roche observed that in *Stockwell*, the term "paramedic" was defined in the Ambulance Officers' Award, which the parties appear to have accepted governs the employment relationship between them. In that document, paramedic means*: "an employee who has successfully completed the necessary and relevant training and work experience as determined by the [Ambulance] Service to*

become a Paramedic and who is appointed to an approved Paramedic position. Provided that such an employee shall be required to undertake and successfully complete further instruction/in-service courses necessary for the maintenance of their clinical certificate to practice and the reissue of their clinical certificate to practice every three (3) years."

Absent a definition the anomalous situation arises when a trained paramedic may receive different benefits under a different regime (pre-2012 reform, post 2012 reform) depending on what specific activity he is engaged in at the time he receives injury.

The absence of a definition within the Act provides anomalous situations such as the factual circumstances in *Ware* – a mechanic whose duties are only directly related to firefighting for a very small proportion of the time. Similarly, employed paramedics required to perform purely administrative tasks could be found to not be 'paramedics' for the purpose of exempting them from the 2012 amendments. The anomaly is found in that worker sustaining injury whilst performing a specific duty that determines whether their claim is processed in accordance with the pre 2012 rules or post 2012 rules.

There are many workers who may be injured whilst carrying our firefighting duties but whose direct employment is not as a firefighter, for example forestry workers. Similarly there are many qualified paramedics who are required to perform duties of a purely administrative nature in their employment as a paramedic.

1.2.6 "Date of injury"

More certainty is required around "date of injury" similarly to the certainty required for "claim". Anomalies exist depending on when and injury occurred and when the 'claim was made'.

1.2.7 Definition of a "week"

What constitutes a week for the purposes of calculating pre-injury average weekly earnings and weekly compensation is not clear. "Week" is not defined in either the Acts or the Regulation. What constitutes a week or part of a week must be made clear.

1.2.8 Inconsistent terminology

There are many examples of similar but inconsistent terminology throughout the Acts. This appears to be as a consequence of a lack of rigour on the part of the draftpersons. Regardless, the use of dissimilar terminology to describe or define the same process creates further ambiguity and confusion.

- **'greater than' v 'more than'**

these 2 competing expressions are used to describe the threshold of degree of impairment. The choice of one or other of the expressions appears to be stylistic and not reflective of a different meaning or statutory purpose or intention.

Section 66(1) of the 1987 Act states:

> *A worker who receives an injury that results in a degree of permanent impairment **greater than 10%** is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section…*

Section 32A of the 1987 Act states:

> *seriously injured worker means a worker whose injury has resulted in permanent impairment and… the degree of permanent impairment has been assessed for the purposes of Division 4 to be **more than** 30%*

In contrast to section 32A, clause 25 of Part 2, Schedule 8 of the *Workers Compensation Regulation 2010,* introduced by regulation in 2014, states:

> *an existing claim is exempt from the operation of section 59A… If the worker's injury has resulted in permanent impairment of greater than 20%.*

The expressions are used interchangeably and one assumes have the same meaning. The expression "more than" is used in other contexts throughout the 1987 and 1998 Acts, viz:

- "more than"[8]
- "more than one…injury"[9]
- "more than one" (other than reference to injury)[10]

- **'At least' v 'Not less than'**

There is some ambiguity created by the use of these two expressions in the 1987 Act where 'not less than' is used as an absolute*: "not less than 15 hours per week*" "*not less than the required period of notice*" "*not less than 7 days*" .[11]

The expression "at least" is used as a minimum threshold: "*at least one of those other injuries*", "*at least $155 per week*", at "*at least once every 2 years*", "*at least 12 weeks*", "*permanent impairment of the worker of at least 15%*".[12]

- **"Lump sum" compensation v "Permanent Impairment" compensation**

Except for amendments to the savings and transitional provisions in Schedule 6 of the 1987 Act, the phrase "lump sum" is used throughout the 1987 Act to describe the manner in which compensation is payable on death or commutation. 'Permanent impairment' is employed in the 1987 Act as a descriptor of a benefit type (section 66 compensation payable in respect of permanent impairment, 'permanent impairment compensation').

The 2012 amendments include introduced into schedule 6 part 19 H in which clause 15, 'Lump sum compensation', employs the term "lump sum" in reference to claims for "permanent impairment compensation"[13].

The 1998 Act also employs the term 'lump sum' interchangeably with 'permanent impairment compensation' by defining in section 4 that "lump-sum compensation" means compensation under Division 4 (Compensation from Non-Economic Loss) of Part 3 of the 1987 Act [the provisions for permanent impairment compensation].

1.3 Harmonisation of the Workers Compensation Acts[14]

A history of successive amendments to the Acts since the 'split' of the Acts in 1998 have resulted in provisions of similar content and purpose being separated and placed in varying chapters and divisions of the two Acts.

A harmonisation process would result in **collocation** of provisions of similar purpose and a more fluid and purposeful order of provisions. A harmonisation process would clearly identify the rules that govern the scheme and present them in a cohesive and comprehensive manner.

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8 Sections 17, 32, 39, 40, 41, 40 4B, 52, 59A etc of the 1987 Act; Sections 4, 42, 40 8A, 261, 297 & Schedule 1 of the 1998 Act

9 Sections 17, 64, 65A of the 1987 Act; Sections 108 & 322 of the 1998 Act

10 Sections 9AA, 20, 150 A, 155, 156, 175, 170 5F, 175O, 175P 202A, 208, 239AG of the 1987 Act; Sections 39, 30 9A, 62, 107, 108 & 255 of the 1998 Act

11 Sections 37, 38, 41, 54, 141 and 239AG of the 1987 Act.

12 Section 22C, 38, 41, 54, 60AA, 65A, 87EA etc of the 1987 Act

13 Schedule 6 part 19 H clause 15: **Lump sum compensation** An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.

14 The *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*

Issues with the current structure of the two Acts include:

- lack of consistency in drafting style leading to a competing expressions to describe or define the same thing
- anomalies between provisions and between Acts as a consequence of successive amendments to the Acts since 1998
- lack of coherence arising from illogical grouping of unrelated concepts
- scattering of related provisions throughout the Acts and between the Acts
- highly prescriptive provisions making it difficult to adapt to changing circumstances or conditions
- the significant body of guidance material which must be read in conjunction with the Acts to understand important obligations and processes
- a number of spent or obsolete provisions

The interrelationship between the two Acts is although well defined, counterintuitive, in that as a consequence of the subservience of the 1987 Act to the 1998 Act, some of the 2012 amendments may have no application.

The outsourcing of significant aspects of the Act to Guidelines and the complexity of the guidelines made under the Acts cause confusion and frustration for scheme participants

Harmonisation of the Acts may lead to:

- restructured and reordered provisions in a logical sequence (commencing with the most fundamental of issues);
- use of plain language;
- consistency of key terms such as “injury”, “claim”, “claim for compensation”, “existing claim”, and consistency of expressions such as “more than”, “greater than”, “at least”, “no less than”, incapacity and capacity, liability; and
- Removal of redundant and obsolete provisions

1.4 Recommendations/Solutions

1. There should be consistency of language, terminology and drafting throughout the legislation.
2. The legislation should be clear on its face as to its meaning and intention..
3. The structure of the Act(s) should reflect the practical operation of the Scheme.
4. Where possible there should be national consistency or harmony of definitions used in workers compensation legislation.
5. Consolidate terms and expressions used in the legislation to ensure consistency. For example “more than” and “greater than”.
6. Redraft existing provisions of the Acts to provide clarity and where possible, incorporate nationally consistent language.
7. Amalgamate the two Acts into one with the purpose of ensuring that the Act sets out the rules that govern the Scheme in a way that is comprehensive, coherent and readily understood by Scheme participants.

Submission No 28

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

Name: Kim Garling

Date Received: 15 May 2025

Submission to the Law & Justice Committee of the NSW Legislative Council

Reference on the workers Compensation Legislation Amendment Bill 2025 – Exposure Draft

Hearing – 16 May 2025

It is important to confirm that the government may at any time make amendments to legislation that governs the workers compensation scheme. There have been many amendments since the last major reform in 2012.

The result is complex legislation which is not easily understood even by specialist lawyers.

This submission refers to the draft Exposure Bill but also where relevant may contain comment on prior media articles.

While there are 43 pages of proposed amendments I propose to confine my submission to the financial sustainability of the Scheme and the proposed amendments to compensation for psychological injuries.

Background

In the Explanatory Memorandum issued by the Treasurer with an Exposure Draft of a proposed Bill on or about 8 May 2025 it stated:

> "This is to address the fact that the NSW workplace health and safety and workers compensation laws are failing to prevent psychological injuries and failing to treat those with psychological injuries quickly"

And further:

> "stronger definition of compensable psychological injuries so that workers and employers can better navigate the workers compensation system"

There was a shopping list of other changes to the system including modernising benefits and compensation thresholds to better reflect the cost of living and community expectations.

From the public comments by various members of the government and including the opinion piece from Mr Hunter for Business NSW it appears that the major issue is said to be the current and future cost of psychological claims across the whole system.

That reflects one of the reasons for this enquiry and that is to address the financial stale sustainability of the system.

Without specifically addressing every media article which allegedly contain comments[1] by various ministers it may be appropriate to concentrate on comments to the effect that the scheme is not sustainable without these changes for a further two years. Thus these changes are urgent.

The CEO of Business NSW recently set out his opinion in an article in the Daily Telegraph in which he stated:

> "*However, we have a workers' compensation scheme in NSW that is out of control.*
>
> *The workers comp deficit has hit $3.6 billion, growing by $1.8 billion last year alone, or nearly $5 million a day. Injury claims and the associated costs, particularly for psychological claims, are driving the cost of premiums to unacceptable levels.*
>
> *The workers compensation scheme has become an all-to-common entry point for workplace disputes between managers and staff.*
>
> *We have heard dozens of cases recently where the scheme has been used as a defence against low level workplace disputes and underperformance.*
>
> *In one case a worker – already doing only half the workload of other team members – was being performance managed due to poor performance. They logged off after a performance discussion and notified the leader that they had developed a psychological injury.*

[1] I am not suggesting that the comments were actually made.

The claim was denied but the worker won on appeal at the Personal Injury Commission, based on her "perception of being overworked".

Three years later, the claimant is still not fit to work more than 16 hours per week. The business has been forced to pay a significantly higher insurance premium, spent countless hours dealing with the issue and can't replace the worker.

It is no wonder psychological injury claims have skyrocketed, creating a system where businesses with no previous claims at all are facing insurance premium hikes of 36% over the next three years if we do nothing. For a business that has experienced some previous compensation claims the increase will be more like 50 – 100%.

Psychological injury claims have increased by 65% between 2021-22 and 2023-24, according to the State Insurance Regulatory Authority (SIRA).

In 2023-24 alone, there were 11,464 psychological injury claims, with each claim taking longer to process and being more complex than physical injuries."

In order to understand how the workers compensation scheme operates and to appreciate the correct context for the above explanatory note and media comment,

There are in fact at least four separate groups of the scheme which provide funding for workers injured at work. Each of these four separate groups operates differently and have different pressures and reasons as to why workers injured in their employ.

It is not simply one scheme with common factors across the board.

The biggest in the group is the Workers Compensation Insurance Fund which is owned by the Employers and Workers and is held on trust by and managed by Icare.

This is best known as the Nominal Insurer and protects about 350,000 employers against claims against them and through those employers there are over 3.5 million workers.

There are three other groups of employers who are classified as self insurers because they manage their own funds from which their obligations to compensate injured workers under the legislation are met.

The largest of these self insurer funds is that which provides protection to government agencies and departments in their capacity as employers and is known as the Treasury Managed Fund. That fund is managed by Treasury on behalf of the Government and has an arrangement with iCare for external claims managers to manage the claims but under the control of the various agencies and departments.

The other two groups of self insurers have been licensed by the State Insurance Regulatory Authority and whether they operate successfully is a matter for themselves.

In considering the reasons for questioning the sustainability of the whole workers compensation scheme it is important to observe that in the article I refer to there is a statement that in 2023-24 there were 11,464 psychological injury claims. That number is correct however there were 113,874 claims of all types across all employers which gives the context..

That represents just 10% of all claims in the system.

Obviously, that means there are 90% of claims which arise from physical injuries.

When considering in further detail of the areas where these injuries arise it is necessary to observe that in the largest scheme being that of the Nominal Insurer there was only 7% of claims that arose from psychological injuries which of course means that 93% arose from physical injuries.

That part of the scheme being the Treasury managed fund which covers government employers had a significantly different result. Of the 21,776 claims lodged 4,572 were as a result of psychological injuries which represents 21% of the claims against that fund.

It is not entirely clear as to how many of those claims arise from those made by first responders who are exempt from the reforms in 2012 and are not affected by the current proposals. Those claims will continue.

In considering the numbers of claims that are quoted there is no data indicating how many of those claims have actually been accepted and have resulted in payments of weekly income support or medical treatment expenses.

The financial statements for the nominal insurer fund indicate that the fund received more premiums than it paid out in claims for the 2023-24 year.

It is important to address the other allegations set out in the opinion piece

The author of that opinion piece also claimed that it was no wonder that psychological injury claims have skyrocketed. That claim flies in the face of the data available from the iCare annual reports which indicates that four years ago psychological injury claims represented 6% of all claims in the nominal insurer scheme and in the two years following reduced to 5% of all claims.

If that is a skyrocket then it exploded spectacularly somewhere else.

The author of that opinion piece also suggests that there are dozens of claims which arose from low level workplace disputes between employer and worker. As is well known for a worker who claims to be injured than he or she has to attend upon a general practitioner and obtain a certificate of capacity whereby the general practitioner sets out the details of the injury and provides an opinion as to how long the worker will need to recover capacity.

It occurs to me that if there are a substantial number of instances where it may be suggested that a medical practitioner has given a certificate as to the capacity of the worker and the circumstances of the injury which is incorrect then that must occur on the basis of information from the worker which is apparently incorrect or result from an opinion which is wrong.

That can only arise in instances of negligence by the medical practitioner or if there is fraud occurring somewhere in the system.

Given the number of claims that will have been the subject of a certificate of capacity from a medical practitioner it seems unlikely that many of them will have been given by a single practitioner and therefore I would suggest that these cases should immediately be referred to the claims managers in the first instance for further consideration to determine whether the allegations could be justified.

Of course, may be that the concerns raised by the employers are not correct and they have been responsible for the psychological injuries.

The allegations cannot stand as justified without proper investigation of the individual cases.

Financial Sustainability

The Government has already announced that there are significant financial deficiencies with the current funding of the obligations to compensate injured workers and in particular that the scheme is unsustainable in its current form.

The Workers Compensation Scheme in New South Wales currently has a range of individual funding mechanisms which can broadly be categorised as the Nominal Insurer; the Treasury Managed Fund which is a Self Insurer; and other private insurers.

For the purposes of this submission I propose to concentrate on only two:

[A] The Nominal Insurer (NI)

[B] Treasury Managed Fund (TMF)

The Nominal Insurer manages the Workers Compensation Insurance Fund which provides the funding for private businesses and protects about 350,000 private businesses in the State. These businesses employ about 3.5 million workers.

The Treasury Managed Fund is owned and managed by the government through the Treasury. It protects Government Departments and Agencies which employ about 400,000 workers.

The two Funds are completely separate, funded differently, and claims are managed differently even though claims for both are managed by external Claims Managers.

It is completely misleading to try and conflict the management of these two funds or their individual financial position.

The Nominal Insurer

According to the annual report of iCare for the year ended 30 June 2024 being the last audited accounts available.

It reports that in that year there were 72,321 new claims arising from a work injury[2].

It also reports that the volume of psychological injuries in the year ended 30 June 2021 was only 6% of the total claims reported.in the following two years the percentage of overall claims had been reduced to 5%. In the recent year it had increased to 7%.

This is a very minor percentage correction given that 93% remain for other injuries.

There does not appear to be any report of the number of claims admitted or the number denied. I have been unable to determine of the claims denied how many were subsequently admitted. There does not appear to be any data about the outcome of matters denied but which are subsequently agreed to in the Personal Injury Commission.

There does not appear to be any report about the types of injuries and the estimate at the time of notification as to the seriousness all the reasons for the claim. There does not appear to be in the reporting of data concerning return to work rates that measures what the return to work should have been based on the medical information available.

It is difficult to appreciate from that information how it can be suggested that the nominal insurer fund is somehow not sustainable into the future.

I quote from the annual report:

> "psychological injuries have **increased year on year**."

[2] I use work injury as a broad description of the wider definition.

The chart set out below that comment records the number of new claims received in each year as follows:

Y/e 30 June 2021	3687	6%
Y/e 30 June 2022	3166	5%
Y/e 30 June 2023	3760	5%
Y/e 30 June 2024	5344	7%

That statement is simply incorrect as the number of claims declined in 2021/22 and remained at the same percentage of claims.

The report then sets records that for the NI, 70% of the psychological claims reported are caused by harassment and work pressure. These would be relatively minor and straightforward claims however without more detailed statistics it is difficult to comment.

The annual financial statements for the Nominal Insurer fund record that in the year ended 30 June 2024 the fund received $4.482bn in premiums and paid out $3.889bn in claims leaving a cash positive result and compared to the previous year it received $3.793bn in premiums and paid out $3,273bn in claims. Again another positive result

In fact if one considers the financial position of the fund for the year ended 30 June 2020 it demonstrates that the fund held assets of around $19bn against future claims of a similar amount which were estimated to be paid over more than five years.

The financial position of the fund remains much the same. That is it holds sufficient assets to meet its future liabilities over time not all on the one date being the end of the financial year.

This is particularly the case that the fund is held on trust for employers and workers and to the extent that there is any significant shortfall then a levy can be made on employers or a reduction in benefits to accommodate the then financial position.

That is obviously not on the horizon at the present time.

According to the published results the average premium paid by an employer for each worker is under $1500 pa.

When considered in relation to the other operating expenses of a business one has to take into account that in addition to any wage a worker receives the Employer contributes additional monies by way of superannuation, leave provisions and payroll tax.

TMF

According to the annual report of iCare for the year ended 30 June 2024 being the last audited accounts available.

It reports that in that year there were 21,776 new claims arising from a work injury[3].

It also reports that the volume of psychological injuries in the year ended 30 June 2021 was 20% of the total claims reported.in the following two years the percentage of overall claims had been reduced to 18%. In the recent year it had increased to 21%.

Again this data does not reflect an increase in each year.

In order to understand the relevance of these claims the Annual Report also states:

> "While for the TMF, these injuries are increasingly driven by exposure to trauma, occupational violence and assaults. As an example, the emergency services sector, particularly in its claims related to Post Traumatic Stress Disorder (PTSD) is being impacted by these challenges, as many employees with PTSD cannot return to their pre-injury jobs"

It would appear that these figures relate to such high risk occupations such as first responders and nurses and teachers.

There can be no comparison of the causes to those injuries arising in the Nominal Insurerl Fund.

[3] I use work injury as a broad description of the wider definition.

How the Government determines the collection of funds from departments and agencies is entirely a matter for Treasury and themselves and how the Government determines what reserves are necessary within this fund is entirely a matter for them.

It is important to appreciate that in the annual report from iCare for 2020/2021 concerning the Treasury Managed Hund it was reported:

There is ongoing pressure driven by psychological claims with an increase in the number of psychological injuries reaching higher whole person impairment thresholds.

The TMF has experienced a substantial increase in psychological injury claims across Government workers. These claims have a higher average cost compared to physical injury claims, and if the trend continues, the TMF funding ratio will deteriorate further. There is ongoing pressure driven by psychological claims with an increase in the number of psychological injuries reaching higher whole person impairment thresholds

This is has been well known for at least five years and I would expect that the Public Service Commission and the departmental heads of those agencies and departments which have the higher number of claims would have been hard at work to overcome any such increase.

Sustainability of this fund is entirely different to the sustainability of the Nominal Insurer Fund and there can be no comparison.

Draft Legislation regarding psychological claims

Psychological injury is now defined to mean an

"***injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction***"[4].

This amendment of the injury definition impacts over 4 million workers across the whole system but does not include exempt workers which include first responders but does include nurses and teachers.

This definition has caused great concern among medical professionals.

In the relatively short time since the exposure draft was released, I have been informed by a number of consultant psychiatrists, that it would be extremely unlikely that a general practitioner would have the experience or skills to make such a diagnosis.

One response was in the following terms:

> *"The three conditions listed would need a consultant psychiatrist diagnosis. The evidence shows that some GP's struggle to differentiate bipolar depression from recurrent depression or PTSD from adjustment."*

As best as I can tell from the enquiries I have made there is considerable doubt as to whether a diagnosis can be made in less than a month after the incident in question and often may take a year or more.

Obviously, there will be differing views, however it seems probable that a worker who suffers an emotional response to a workplace incident and who is off work and who has no capacity for work will not be able to be assessed immediately.

This worker although maybe satisfying the definition will be off work without any income and will have to wait for at least a month or more to commence being considered by the Claims Manager for eligibility for benefits.

Of course, a worker who may not meet that initial diagnosis will be off work and unsure of whether she or he is ever to be eligible for compensation for their lost income or medical costs (including the fee to the psychiatrist for the assessment).

[4] Section 8A

Whether a worker is diagnosed as satisfying the definition or not they are excluded from receiving any assistance from the Independent Review Officer either by way of general assistance or funding for legal advice to understand their rights and entitlements in a very complex environment.

Where a worker successfully is diagnosed as having satisfied the first gateway and suffers from a psychiatric injury then that worker is not eligible to receive compensation until the following barriers are overcome:

The second stage which has to be considered by the consultant psychiatrist is whether the requirements of Section 8E are satisfied. That refers to the requirement that the psychiatric injury to arise from an event or relevant events:

A relevant event is defined:

[A](1) A worker being subjected to an act of violence or a threat of violence or being subjected to indictable criminal conduct, or

[A](2) witnessing an act of violence, a motor accident, a natural disaster, a fire or another accident which results in death or serious injury or the threat of either; or

[B] experiencing vicarious trauma within the meaning of section 8H,

[C] A worker being subjected to conduct that a tribunal, commission or court has found is sexual harassment, or racial harassment, or bullying

The Psychiatrist undertaking the assessment would then have to determine on the facts as told to her or him by the worker that the psychiatric injury arose from one of the following:

[a] An actual act of violence which may also have evidence of a physical injury;

[b] A threat of violence which may be difficult to determine as it would arise from the worker's point of view and may result from a sensitivity that worker has which may not be otherwise considered as an actual threat. There are also issues about what amounts to a threat of violence.

[c] A worker being subjected to an indictable criminal offence but not an alleged offence.

A short version of an “indictable criminal offence” is an offence that may be prosecuted on indictment in either the Supreme Court or the District Court and include assault; stealing; fraud; murder; robbery, serious sexual offence and some types of burglary.

This simple version is complicated because there are a number of indictable offences which may be dealt with summarily and may therefore not ever be the subject of indictment.

[d] witnessing an act of violence a motor accident a natural disaster or fire or another accident which results in death or serious injury or the threat of death or serious injury.

Having achieved a successful assessment at this second stage the worker is then subject to further assessment by the psychiatrist to whether:

“There is a real and substantial connection between the relevant event or series of relevant events and the worker’s employment”

And then a determination by the psychiatrist that employment is the “main contributing factor to the psychological injury.”

Having achieved success with that assessment and the Claims manager agreeing and accepting that assessment then the worker is entitled to weekly benefits for 130 weeks and medical benefits for only a further 52 weeks.
There are exemptions for workers assessed as having a certified degree of whole person impairment over 31%. I do not propose to dwell on injured workers with such a degree of permanent impairment because the substantial agreement amongst psychiatrists is such a degree is almost unheard of as arising from a psychological injury.

Returning to the requirements of section 8E and moving to

[B] experiencing vicarious trauma within the meaning of section 8H,

Section 8H provides:

Vicarious trauma (1) (2) 8I A worker experiences vicarious trauma if the worker becomes aware of any of the following acts or incidents that resulted in the injury to, or death of, a person (the victim) with whom the worker has a close work connection— (a) (b) (c) (d) an act of violence, indictable criminal conduct, a motor accident, a natural disaster, a fire or another accident, an act or incident prescribed by the regulations. The worker has a close work connection with the victim only if— (a) there is a real and substantial connection between the worker and the victim, and (b) the connection arose because of the worker's employment

[C] categories of psychiatric injury requiring additional findings

A worker who has suffered a psychiatric injury is defined in circumstances where it arose from sexual harassment racial harassment or bullying the injured worker then has to ensure the further step of having that conduct which is caused that injury being subject of a decision of a tribunal, a commission or a court.

It is not clear whether that involves the worker in making an application to a tribunal a commission or a court for a finding that the conduct that caused the psychiatric injury is actually sexual harassment racial her harassment or bullying within the terms of this legislation.

It is not clear whether where a colleague who has subjected the worker to sexual harassment and may be prosecuted for that conduct and found to be guilty is sufficient for the purposes of this section. It is not clear whether it has to be a particular application with a particular finding that the conduct was as alleged.

It is possible that there may be evidence about sexual harassment in other jurisdictions but is not clear whether in that jurisdiction the determination of the tribunal has to be to the effect that the conduct not only amounted to sexual harassment but was a cause of the psychological injury specifically.

Similarly racial harassment can be dealt with by other jurisdictions and a similar comment applies.

However there is no current jurisdiction for a finding to be made about bullying unless it involves some physical injury and could be the subject of a prosecution in the local Court.

It has been suggested by the Treasurer in a media release that there is to be a new jurisdiction in the Industrial Commission however that legislation has yet to be the subject of any draft legislation.

There has been no public comment about the funding necessary for applications to the Commission or the infrastructure necessary to manage applications.

At the present time that would only apply to public servants subject to that jurisdiction and on the current figures that may be as high as 2000 applications annually which would be 40 each week and may spread across the whole state.

There has not been any public announcement or suggestion as to how workers who claimed to be injured as a result of sexual harassment racial harassment or bullying should meet the cost of those applications and no suggestion as to how the alleged perpetrator would also be represented for the purpose of any such application.

Having achieved a pass in the first two stages of the journey to be eligible for compensation the worker who is off work because of a suspected injury still has to satisfy other tests.

Assuming that the suggestion which I have just referred to is only partially correct and there is evidence to show that such a diagnosis can be easily made and also be made by a general practitioner then the following situation may apply.

The assessment by the medical practitioner in this scenario having concluded that the injury meets the definition of psychiatric injury then the medical practitioner would also have to consider whether the cause of the injury had a real and substantial connection between the relevant event or series of relevant events and the worker’s employment.

If the psychiatrist determines that an injured workers condition satisfies the test in the definition then the following provisions apply but only if the injured worker meets that test.

The next fundamental requirement is that a relevant event or series of relevant events must have caused the primary psychological injury

Notifying the employer of any psychological injury arising from [C] is not a notification for the purposes of commencing a claim for weekly compensation, medical treatment (including counselling).

How does this work in practice:

For workers who suffered a psychological injury as a result of being subjected to or witnessing an act of violence or a threat of violence or being subjected to indictable criminal conduct then that worker having received the opinion or assessment as to the disorder arising from that relevant event would be then entitled to notify the claims manager (insurer) of that injury and then be subject to the scrutiny by the claims manager of the circumstances of the relevant event (which may now be months ago) and a further assessment where appropriate of the justification for the assessment as a psychological injury.

I am sure it is not essential in this submission for me to set out the different possibilities particularly for first responders and nurses.

For workers who suffer a psychological injury as a result of being subjected to conduct that a Tribunal Commission or Court has found is sexual harassment or racial harassment or bullying then the situation is quite different.

Although these workers would be immediately off work as a result of the consequences of that relevant event then a dilemma arises.

Firstly for those workers who are subject to the current jurisdiction of the Industrial Relations Commission they would be required to lodge application in that Commission to have a finding that they had been subjected to such conduct or

alternatively they would await the outcome of an action in the court system which at present may take some years.

For those workers who are not subject to the current jurisdiction of the Industrial Relations Commission than they would be required to seek to have a prosecution of the offender in the court system and would not have the opportunity of the matter being referred to the industrial commission.

Of course that is not clear from the current draft package that has been released.

Having endured the pathway for an injured worker to receive a determination by a psychiatrist that they suffered a psychological injury and depending upon the category as set out above then endured the court system the worker then faces the next hurdle which is to overcome the presumption that if it arose out of circumstances surrounding reasonable employment that they overcome requirements in that section.

I am unable to comment further until the details of this new IRC Jurisdiction is available.

I have restricted my submission to the above matters rather than canvassing the whole of the proposed amendments and I'm sure my colleague Roshana May will have covered those in her submission.

As I indicated earlier there are always competing views with reference to competing interpretations of data. I have set out my view but I recognise that there will be other views which may have more merit than mine.

I do hope that the Committee may be assisted by this submission.

Kim Garling

15 May 2025

Submission No 19

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

Organisation: Australians for Mental Health

Date Received: 15 May 2025

15 May 2025

Standing Committee on Law & Justice
Legislative Council
Parliament House,
Sydney NSW 2000

Dear Committee,

Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

Thank you for the invitation to make a submission to your important inquiry.

We are deeply concerned about the Government's proposed legislation. It will cut the support available to workers experiencing mental ill-health whilst doing little to address the underlying causes of the growing prevalence of psychosocial injury.

Work Should Not Make You Sick

We agree that workplace mental health – like mental health across all areas of Australian life – is currently in crisis. We agree that urgent action is required. We agree with the Treasurer when he says that the current worker's compensation system is not fit for purpose for ensuring the mental wellbeing of workers in NSW.

But we disagree that the solution to the crisis is cutting support for workers experiencing mental ill-health, which is what these proposed reforms will do.

It is hard to imagine another policy area where, when confronted by the rapidly rising prevalence of a social problem, Parliament chooses to reduce the supports available for that problem rather than addressing the causes directly. It is analogous to dealing with an increase in crime by reducing the number of offenses in the Crimes Act.

We welcome the government's proposals to improve compliance with existing psychosocial safety laws. More could be done to ensure workplaces are psychologically safe, including:

- Placing a stronger obligation on employers to proactively monitor for mental distress that arises both from the inherent nature of the work as well as the culture and norms of the workplace;
- Encouraging a collaborative approach to job design that centres mental well-being;
- Proactively addressing relationship breakdowns between employers and employees and encouraging early resolution of interpersonal conflicts;
- Centrally identifying those occupations and workplaces that are experiencing the highest level of psychosocial injury and directly intervening in those to reduce the causal factors.

Better mental health across all workplaces would simultaneously reduce the projected financial demands on the system, improve workplace productivity and reduce needless human misery.

Workers Need Support & Solutions

Reducing access to mental health supports for workers will make a system that is already in crisis far worse. It is already too hard to access care through the public health system. Workers with few other options will simply add to the already overburdened system.

Or worse, some workers will not seek out help at all. We know that early intervention in mental health issues is the best way to reduce the severity of mental ill-health, but the greater the hurdles to accessing support, the less likely this becomes.

Under these proposals, workers would need to win a legal case before being able to even access some of the most basic mental health supports through the compensation system.

It can take months to even get a first appointment with a mental health practitioner, and yet under these proposals a worker could not access paid time away from the workplace while waiting for that most minimal of supports.

The more likely outcome is workers give up and injuries become more severe. Families, communities and even the workplace itself pay the price of untreated mental ill-health.

Solutions Are Better than Litigation

The draft legislation favours legal processes over relationship building, restoration and meaningful solutions to very human experiences.

We believe this is the wrong approach. Legal processes are unable, by their very nature, to re-establish trust and relationships when they have broken down. They are inherently antagonistic at exactly the time when relationships are already extremely strained.

Moreover, by requiring workers to prove their injury the law would be perversely incentivising greater acuity and disincentivise early treatment and return to work.

We agree that finding better ways to get workers back to work is a worthwhile ambition.

But a better way would be for employers and workers to work collaboratively and constructively on addressing the issues that caused the injury – even if the root cause is a relationship breakdown triggered by a “reasonable management action”.

Early assistance from a practitioner skilled in navigating complex emotional issues between people could either help identify and implement an agreed path forward or recognise that the relationship is too broken to be restored. In both cases, next steps would be more fit for purpose and would reduce the amount of time both workers and employers need to wait around for resolution.

Such an approach would be cheaper, quicker and less distressing for all parties involved.

Politicians, Accountants & Lawyers v Mental Health Experts

In attempting to limit the scope for compensation claims, the draft legislation makes the parliament and the legal system the arbiters of the nature of mental illness, and leaves little room for a nuanced understanding of a highly complex field.

For example, Clause 8H defines vicarious trauma. In the current drafting, it would be lawyers and the legal system who would judge if a paramedic who attended a crime scene where a child had died had experienced a vicarious trauma in the workplace, rather than mental health practitioners. This is plainly absurd.

That the Treasurer and the Treasury have carriage of this legislation is instructive. Whilst the financial sustainability of the system is an important issue, it is not the basis on which reform of the workplace mental health system should be designed.

A better approach would be to design an effective system – that is financially stable – based on the health advice of experts, with the input of workers & employers.

Punching Down On Vulnerable People

It is hard not to infer that the underlying assumption in this draft legislation is that the cause of the financial strain on the worker's compensation system is a rise in bogus claims or "rorts".

We are yet to see evidence that this is true.

The framing of the draft legislation would embed mental health stigma into the workers compensation system forever.

People who experience mental ill-health are extremely vulnerable. They already endure extreme stigma and even internal shame. The draft legislation creates hurdles for having their injuries recognised, their stories understood and their employers held accountable. It places the onus on them to prove that they are not lying.

The idea that the rapid growth in mental health claims is attributable to a surge in rorting, is to enlist an obnoxious culture war into what is essentially a cost-cutting measure.

And we're seen it all before. The history of the workers compensation system is littered with reactionary assumptions that people who are injured at work are rorters or workshy.

These views are lazy at best. Is a firefighter who experiences PTSD after long term exposure to major tragedies trying to get out work? Or a nurse? Or any other front line worker?

The construction industry across Australia loses one person to suicide every second day. Construction makes up 9% of the workforce and 21% of the suicide deaths. Does work offer no explanation for these tragedies?

Or is the concern some abstraction of a soft-handed "woke" young person whose experiences of sexual harassment, racism, bullying, or other discrimination – some might say – should be viewed with contempt and judgement rather than curiosity and care?

A better approach would be to understand the root causes of mental ill-health and to design solutions that draw on the expertise of mental health experts, workplace culture experts, as well as employers, workers and their representatives.

An even better approach would be to send a strong message to the people of NSW that the government wants to make work safe. Starting with its own workplaces.

A Better Approach: whole system reform

A process of genuine reform that is designed collaboratively by experts in mental health, employers, workers, unions and insurers could have the goal of reducing workplace psychological injuries as the best way to bring down costs in the compensation system.

A whole of system approach would aim to ensure:

- Jobs are better designed to meet the wellbeing needs of all workers, including those with pre-existing mental health challenges;
- Employers are accountable at a workplace level for maintaining safe systems of work in relation to mental health and wellbeing;
- Relationship issues that arise in the employment context are dealt with quickly, simply and with a focus on rebuilding rather than litigating;
- Adequate interim arrangements are in place to ensure distressed workers are supported to focus on getting better;
- Workers who are in need of long term care are able to access it;
- Diagnoses of psychological injuries are made by clinicians and not lawyers or politicians.

Commitment to a process of this kind could well reduce costs in the compensation system far more than those anticipated by the proposed legislation, and reduce the needless suffering of thousands of Australians and their families.

About Australians for Mental Health

Australians for Mental Health is a national citizen-led social campaign group dedicated to creating an Australia where every person – regardless of their circumstance – has their mental health needs recognised and met, in every aspect of how we live, work and play. Australians for Mental Health was founded by 2010 Australian of the Year Patrick McGorry

Best wishes,

Chris Gambian
Executive Director

Australians for Mental Health.

Submission No 37

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

Organisation: NSW Council of Social Service (NCOSS)

Date Received: 15 May 2025

NCOSS
NSW Council of Social Service

Submission to the Inquiry on

Proposed changes to liability and entitlement for psychological injury in New South Wales

15 May 2025
Final Submission

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Executive Summary

NCOSS acknowledges that the existing workers compensation system requires reform and welcomes the NSW Government's commitment to modernising the scheme to ensure its long-term sustainability. In particular, the government's focus on strengthening preventative measures to protect workers is critical.

Any reform must be balanced and clear, ensuring that the new system is sustainable, fair, and effectively supports people with claims related to psychological injury. Acknowledging the need for quick action, greater clarity is required on elements of the reform to avoid unintended consequences. Finally, the community services sector will require support to transition to the new system, and the Government must address the underlying environmental issues that risk psychological injury to this essential workforce.

Summary of Recommendations

1. The Government must reform the workers compensation scheme, ensuring that the right balance is struck between effectively supporting the psychological welfare of workers, supporting employers, and managing scheme sustainability.
2. The Government must provide greater clarity on key elements of the reform to ensure that their implications are fully understood, and that the design sufficiently incorporates stakeholder perspectives, including those with lived experience.
3. Reforms should be introduced in stages to ensure that community service organisations have sufficient time to understand the new system and respond effectively.
4. The Government should fund the transition for the community services sector to support its successful implementation of changes to the system.
5. The Government must continue its implementation of the Secure Jobs and Funding Certainty Roadmap to ensure that program and organisational funding meets community need and to improve the psychological safety of workers in the sector.
6. The Government should extend the proposed Public Sector Wellbeing Hubs to support the community services sector, or replicate them to provide tailored support to essential community workers.

Detailed Commentary

NCOSS thanks the Standing Committee on Law and Justice for the opportunity to provide our views on this matter. This is an overview that reflects our policy analysis and a snapshot of a sample of social service organisations.

A. Balanced reform is required.

NCOSS supports the need for balanced reform. The Government must ensure that the new system prioritises prevention, effectively supports people with claims related to psychological injury, and addresses the unsustainable increases of insurance premiums experienced by community service organisations. It is critical that NSW has a sustainable system that prevents injury and provides workers with access to the care and support they require, and, where possible, to quickly and safely return to work.

Financial Pressures on Community Service Organisations

Essential, front-line community services are significantly stretched with rising delivery costs and growing demand. These essential services are provided on behalf of the NSW Government and include homelessness; domestic, sexual and family violence; mental health; disability; and child and family supports.

Rising insurance premiums, including for workers compensation, is a key issue that has been raised by our members. To illustrate the unsustainable financial pressures, we share the following three examples from our members:

- A small regional neighbourhood centre in saw workers compensation insurance premiums increase by 24% in 2023-2024.
- A medium youth support service saw workers compensation insurance premiums increase by 61% in 2023-2024
- A large, state-wide multi-service provider saw workers compensation insurance premiums increase by over 60% in 2023-2024.

These cost increases are unsustainable, particularly when the Government contracts do not provide for organisations to seek additional funds to meet these additional costs. Unfunded financial costs force organisations to cut critical workforce investments (e.g. professional supervision; learning and development), draw on reserves, or reduce service delivery. This underscores the urgent need to reform the system to bring insurance premiums under control.

Recommendation 1

The Government must reform the workers compensation scheme, ensuring that the right balance is struck between effectively supporting the psychological welfare of workers, supporting employers, and managing scheme sustainability

B. This is a complex system and a complex set of reforms. Greater clarity is required to avoid unintended consequences.

Greater clarity is required on key elements of the reform to ensure that the new system is fit-for-purpose and supports the safety of essential workers, community service organisations, and the community more broadly. It is possible that this clarity could be provided through regulations or more detailed guidance, or may require more substantive changes to the proposed reforms.

To demonstrate this, we highlight a number of proposed changes in the Exposure Draft that may lead to unintended consequences:

1. **Sections 8E and 8G** redefine "relevant events" and "primary psychological injuries". Stronger definitions are important, as this will allow workers and employers to better navigate the scheme. However, further detail is required and it is unclear whether these new definitions will excessively prevent legitimate psychological injury from being claimed.
2. **Section 65A(3)** (increase in the degree of permanent impairment from 15% to 31% for psychological injury) and **Section 39A** (cessation of weekly payments after 130 weeks—primary psychological injuries): Greater clarity is required to ensure that these changes will not prevent people from accessing the psychological support they require to live healthy, dignified lives (and ideally return to work). This would be a poor outcome for individuals and may push them towards community service organisations that already cannot keep up with community need.
3. **Section 106(9)** (relating to the payment of the prescribed excess amounts): depending on how this is implemented, it could put a significant financial burden on community service organisations.
4. **Section 8F** (Primary psychological injuries—sexual harassment, racial harassment and bullying) introduces a requirement that workers must undertake legal proceedings at the NSW Industrial Relations Commission (IRC) or Fair Work Commission for sexual harassment, racial harassment or bullying claims. It is unclear what implications this would have on employers and employees while the Tribunal process is underway and whether it would

introduce additional costs to community service organisations. Further, it risks genuine claims not proceeding due to workers fearing stigma, being too unwell to engage in a Tribunal process, or not having the resources to engage. This could leave vulnerable people without the support they need and potentially prolong or worsen the injury.

Recommendation 2

The Government must provide greater clarity on key elements of the reform to ensure that their implications are fully understood and that the design sufficiently incorporates stakeholder perspectives, including those with lived experience.

C. The community services sector will need support to transition to the new system

Whatever shape the final reforms take, there is minimal time between when legislation might be passed and the intended effective date of 1 July 2025. The community services sector is already under immense pressure with increased community demand, recommissioning processes, and the launch of the new Portable Long Service Leave Scheme (also from 1 July 2025). There is a significant risk that the sector will not understand the reforms, nor have the systems and processes in place to support their employees and meet their obligations.

Recommendation 3

Reforms should be introduced in stages to ensure that community service organisations have sufficient time to understand the new system and respond effectively.

Recommendation 4

The Government should fund the transition for the community services sector to support its successful implementation of changes to the system.

D. The underlying environment of the community services sector risks psychological injury and also requires reform.

NCOSS also notes that our members report the significant mental health impact of working in the sector.

While the work is deeply rewarding, it can be highly stressful, complex, and emotionally demanding. Workers in the sector regularly face the strain of supporting people affected by poverty, violence, and trauma, while contending with surging service demand and inadequate funding. Escalating demand and a lack of funding have led to burnout, staff turnover, higher workloads and job insecurity, compounded by the cost-of-living crisis.

The reform's emphasis on prevention reinforces the need for the Government to change its approach to funding, commissioning and contract management to prioritise stability and robust resourcing. This approach would significantly reduce stress and psychological health issues in the sector and allow organisations to sufficiently invest in their workforce and systems to foster a safe and stable work environment to prevent psychological injury.

The NSW Government's Secure Jobs and Funding Certainty (SJFC) initiative acknowledged the value of the essential work delivered by the community services sector by committing to increasing job security and funding certainty for the sector. We look forward to working with the Government to implement it.

Further, we note the Government's announcement of new public sector wellbeing hubs to support NSW Government health services, police service, education service and public service. The community services sector is an essential workforce, providing highly demanding services on behalf of the government, and requires similar support structures.

Recommendation 5

The Government must continue its implementation of the Secure Jobs and Funding Certainty Roadmap to ensure that program and organisational funding meets community need and to improve the psychological safety of workers in the sector.

Recommendation 6

The Government should extend the proposed Public Sector Wellbeing Hubs to support the community services sector, or replicate them to provide tailored support to essential community workers.

NSW Council of Social Service (NCOSS) is the peak body for non-government organisations in the health and community services sector in NSW. NCOSS works to progress social justice and shape positive change toward a NSW free from inequality and disadvantage. We are an independent voice advocating for the wellbeing of NSW communities. At NCOSS, we believe that a diverse, well-resourced and knowledgeable social service sector is fundamental to reducing economic and social inequality.

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Acknowledgement of Country

NCOSS respectfully acknowledges the sovereign Custodians of Gadigal Country and pay our respects to Elders, past, present and emerging. We acknowledge the rich cultures, customs and continued survival of First Nations peoples on Gadigal Country, and on the many diverse First Nations lands and waters across NSW.

We acknowledge the spirit of the Uluru Statement from the Heart and accept the invitation to walk with First Nations peoples in a movement of the Australian people for a better future.

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