
From: Neha Chopra
Sent: Thursday, 6 October 2022 12:45 PM
To: Law
Cc: Simon Cohen; Marilyn Cassidy
Subject: RE: 2022 review of the workers compensation scheme - transcript corrections
Attachments: Transcript - 2022 Review of the Workers Compensation scheme - 8 September 2022 - Panel 5 - Simon Cohen (proposed corrections to transcript).pdf

Dear Talina

Please find attached proposed corrections to the transcript.

We will also shortly be sending through our responses to the supplementary questions.

Kind regards
Neha

Neha Chopra
Policy Officer



Independent
Review Office

October 2012 to October 2022: 10 years of helping injured persons
and insurers find fair solutions to complaints and claims.

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Mr SIMON COHEN, Independent Review Officer, Independent Review Office, affirmed and examined

The CHAIR: I welcome our next witness. Do you have an opening statement you would like to share with us?

SIMON COHEN: I do, Chair. Firstly, thank you for inviting me to appear before you today. Earlier this year when deciding the theme of our annual Independent Review Officer seminar, we assessed the mega trends in the New South Wales workers compensation scheme. A clear standout was psychological injury claims. We knew that there were increased incidents of mental ill health across the community and increased psychological injury claims in New South Wales, and that, for many of these claims, they were more serious, with injured people having more time off work and with more workers with significant and permanent impairments.

The Independent Review Office's work falls into two primary areas: solving complaints where injured workers cannot sort out their concern with the insurer; and providing funding through the Independent Legal Assistance and Review Service for expert lawyers to advise and act for injured workers. Each of these areas is impacted by an increase in psychological injuries. More applications for ILARS funding as a result of psychological injuries have been seen—trebling in the last five years—with a consequent tripling in the expenditure required so that these workers can obtain appropriate legal assistance, and more hard-to-solve complaints which are often ongoing for extended periods and where the outcomes are less likely to be satisfactory from the worker's perspective.

Our submission focuses on the issues we have seen in our roles and seeks to bring forward the voice of injured workers and their experiences. The workers we deal with are the ones where the claim has not proceeded smoothly; where liability, including provisional liability, is disputed from the outset and the matter is contested at each step; and where there are issues in the handling of the claim itself, including delayed decisions, multiple medical examinations and inflexible case management. The consequences for workers where their psychological injury claim is not well managed can include that treatment may be delayed, that they suffer financial hardship and an exacerbation of their injury occurs, impacting upon their return to work and, importantly, their overall wellbeing.

Across the workers compensation system, there are responses to the challenges these claims present, including clearer regulatory guidance, better case management and more research, which are some examples in the submissions before the Committee. Our view, though, is that more could be considered to reduce the disputes and the impact of claims on workers, and enhance their recovery. Areas we've highlighted in our submission that may warrant consideration include funding treatment for workers' mental health conditions without the need to establish liability, reducing the number of medical assessments for workers, improving return-to-work opportunities, ensuring the most skilled case managers deal with workers with psychological injuries and increasing the monitoring of decision-making in these cases. Our view is that there is an urgency to improving how the workers compensation system responds to psychological injuries. I welcome the opportunity to discuss these matters with you today.

The CHAIR: Wonderful, thank you. I'll start with a couple of questions and then I'll hand over to my colleagues. We have this almost unique set of circumstances where psychological claims are increasing at quite a significant rate year on year, but we've also heard evidence of injured workers feeling like their claims have been unnecessarily delayed or denied. You wouldn't normally have those two things happening simultaneously. You'd think that if a lot of claims were being delayed or denied, you probably wouldn't have psychological claims increasing at such an exponential rate. Do you have any views on why those two things might be coinciding at the same time or what has led to that position?

SIMON COHEN: I suppose my view, really informed by our role and place in the system, is that the increase that we're seeing in psychological injury claims—the SIRA data I think increases in the last five years by around 3,000, from around 5,000 to 8,000—is being reflected and perhaps even amplified, in particular in terms of when workers need to seek legal assistance in those matters from expert lawyers. We fund those lawyers to provide that assistance. When we receive applications for funding from lawyers on behalf of those workers, we see that the applications are coming at an earlier point—much more frequently within three months or within 12 months of the injury—than for other injuries and that the nature of the disputes goes to issues around liability but also treatment and weekly benefits. So it seems that the areas of dispute fall across all of the key areas of claims management.

One of the things that I know many witnesses have reflected on, both in submissions and today, is there is something fundamentally different about a psychological injury from a physical injury. That includes the mechanism of injury itself. It includes the questions around whether the workplace is responsible for that injury. It also includes the response of the workplace to an injured worker, both in terms of being able to return the worker

to the workplace but also in terms of how the workplace can actually make adjustments itself—if the cause is stress caused by overwork or the like, how quickly workplaces can respond to that, as against a trip hazard or something along those lines. Our view is that what we see in these matters, I suppose, reflects the unique nature of them and does lead to the question, firstly, how fit for purpose is the current system to deal with some of those issues and what are the types of reforms that might be considered; but, secondly, if we're working within the existing rubric, what are the opportunities to improve, in particular, the way those cases are managed so as to reduce some of the friction that exists in them at the moment.

The CHAIR: I know you said you deal with the more difficult disputes that arise. Do you often deal with disputes between whether it was a psychological injury at work compared to whether it's at home in their personal life? Does that often come up as grounds for dispute that you have to deal with?

SIMON COHEN: Our role isn't to decide disputes. We have two particular roles if somebody's got a complaint. Usually, when a claim is already on foot, we will deal with that matter. Then, once a worker is in need of legal assistance, we provide funding for those matters. I suppose where we see disputation in those matters, it often goes to the question of whether work was the cause of it or something happening outside of the workplace—so, as you say, whether it was something that happened at home—but also, if in fact it did occur in the workplace, whether there's a defence to that—in particular, whether the injury was the result of some reasonable management action taken by the employer. That's an area of frequent disputation, and it's an area where there are a number of matters that we see funded and go through to the Personal Injury Commission.

The CHAIR: What about the whole person impairment—the WPI—at 15 per cent? Is that something that you think is problematic? I would just assume that a WPI at 14 per cent versus a WPI at 15 per cent is probably very difficult to—you've got to draw the line somewhere, but it would be quite difficult determining that and could be grounds for creating disputes between workers and insurers, for instance.

SIMON COHEN: I suppose our view about whole person impairment really goes to the use of it as a method to determine whether somebody should or shouldn't be entitled to weekly benefits or treatment. It perhaps doesn't go so much to the percentage, whether it's 14 or 15 or whatever, but whether a score that has been designed to assess impairment for the purpose of a monetary compensation is the appropriate tool to actually make a decision about whether someone is unable to work and therefore should receive weekly benefits or continues to suffer from the effects of the injury and therefore continues to need treatment. From our perspective, the recommendations from the McDougall review, reflected in our own views about that, is that that's something that does need to be looked at closely. It clearly drives disputation because it's such a critical element, particularly at the point in time where a worker may have their benefits cease, to be able to establish whether in fact they do or don't meet those thresholds. But I think the question that comes before that is whether they're the appropriate mechanism to throttle access to benefits.

The CHAIR: You're comfortable with the McDougall review and happy to see them being implemented?

SIMON COHEN: I think in terms of the need to review the whole of the legislation, we absolutely agree with that. We think there is a need to have a look at the question around whether whole person impairment is the right test to determine whether people have access to weekly benefits and treatment. We've been a strong advocate for increased access to commutations. Indeed, if there was that increased access, appropriately framed through access to appropriate legal advice and oversight, for example, by the Personal Injury Commission—subject to those matters, it would give people an avenue out of the workers compensation system that they don't have at the moment, and we think that's something that is worthy of progressing.

The CHAIR: Just a final one from me—liability. You spoke about before that it's a significant problem determining liability. But we heard from Business NSW and the Australian Industry Group just before that if you didn't have to determine liability—so, basically, everyone was covered—then who would have to bear the cost? Obviously if you're a small business, you'd prefer not to have to pick up that additional cost in premiums, which is a fair point. I don't know if you wanted to comment on that? But also, if you remove the need to determine liability then there's also a lot less transactional cost arrangements or disputes between insurer and worker. I assume that's a large degree of how acrimonious the system might be. A large part of it would come down to that.

SIMON COHEN: I suppose one of the key elements that a range of research that I understand is before the Committee points to is the importance of access to early treatment. One of our observations would be that workers who feel strongly and well supported are less likely to need to access our services, because they're not going to have disputes. When you have a look at some of the recommendations and some of the legislative changes that have happened in other jurisdictions, they've really focused on that front end about whether you need to make a liability decision at all during the first 13 weeks. I think that's the Victorian model. The Productivity Commission

is particularly focused on treatment in the first six months and whether you need to establish liability or not in order to be able to access that treatment. I think that would be my first reflection. It might not be an "if" but a "when" question of when liability may or may not need to be determined. My second reflection would be then, depending on what the policy setting was that was preferred, you would look at what's the appropriate way in which that would be funded. That's not a matter that I've given any thought to and I guess would be something that would be developed up if those sorts of policy options were put forward.

The Hon. ANTHONY D'ADAM: We got a pretty lukewarm response from the employers representatives earlier on that proposition. They clearly don't want to fund it through the existing system of premiums.

SIMON COHEN: I guess I would just reflect that that would be one of the policy issues that would need to be worked through if there was a decision made to remove the question of liability at an early stage of the claim.

The Hon. ANTHONY D'ADAM: I wanted to clarify in terms of the driver of disputes on liability. Can you explain to me the relationship of the employer in terms of the liability decision versus the insurer?

SIMON COHEN: Our understanding is that that decision is the insurer's decision. I understand they consult with the employer in relation to at least aspects of those decisions. Our role specifically focuses on the relationship between the worker and the insurer, both in our complaints handling function and in relation to the work that we've done through the ILARS scheme.

The Hon. ANTHONY D'ADAM: When you say "the insurer", are you talking about the claims manager, not the Nominal Insurer? It's not made by icare. It's made by EML or whoever is—

SIMON COHEN: Depending on the nature of the claim, if it's a self or specialised insurer, they would be made by those insurers directly. In some matters it's the claims manager. In some circumstances icare has an ability to make those decisions directly itself, depending on the nature and the level at which those decisions are made.

The Hon. ANTHONY D'ADAM: Do you have any visibility of where those decisions are being made, or is that something that's on the public record? I'm not sure.

SIMON COHEN: I could take that on notice. Certainly on a case-by-case basis in complaints, we see who makes those decisions. It may be a question that's better put to icare than to us, though.

The Hon. ANTHONY D'ADAM: What incentivises—say, in the case of the Nominal Insurer—either the claims manager or the Nominal Insurer itself to dispute liability? Is there something that you understand in terms of the incentive structure that operates between the Nominal Insurer and the claims manager that might incentivise a more aggressive approach in terms of disputing liability?

SIMON COHEN: That's not a question I could answer. I've got no visibility about those matters.

The Hon. ANTHONY D'ADAM: There was a proposition put in an earlier session—perhaps not on the public record; I think we had an earlier closed session with an number of injured workers—that, in terms of independent medical examinations, medical practitioners should be appointed by the PIC as opposed to a nominee of the insurers or claims managers. What's your view about that?


SIMON COHEN: I would firstly reflect that a common cause of complaint to us is the number of medical examinations that injured workers need to attend. Of the IME complaints that we receive, around a third of those are from injured workers, it's a much higher proportion than the general claims numbers. What we know, both through what injured workers tell us and also a range of other research, is that attending those IME appointments can be quite distressing. They have to retell their story on a number of occasions about what has happened to them, the impact it has had on them and the like. Our view is that exploring if there are opportunities to reduce the number of IMEs that an injured worker needs to undertake is something that would contribute to reducing the distress and the impact of the claims process on the injured worker.

My predecessor, Kim Garling, led a parks project that looked at a range of issues in the workers compensation system. One of the recommendations arising out of that was to look at whether a single IME might be able to be undertaken with the agreement of both the worker and the insurer. From our perspective, there's value in looking at and deciding on the best mechanism to achieve that, but there's certainly value in terms of what we see is the impact on injured workers from continued requirements to attend those appointments.

The Hon. ANTHONY D'ADAM: Just clarify for me—the IMEs can be used for determining liability but also in terms of suitability of treatment. Do you have an understanding of what the breakdown is in terms of

Summary of Comments on Microsoft Outlook - Memo Style

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 Number: 1 Author: cohens Subject: Sticky Note Date: 26/09/2022 6:42:27 PM +10'00'
add 'with psychological injuries' after 'from injured workers'

 Number: 2 Author: cohens Subject: Highlight Date: 26/09/2022 6:43:14 PM +10'00'
replace with 'the Parkes Project'

what proportion of independent medical assessments are done for liability purposes versus questions around appropriateness of treatment?

SIMON COHEN: Yes, if I can perhaps reflect. IMEs can occur at the request of the—the injured worker's lawyer may request an IME, so on their behalf, at the request of the insurer, and then medical assessments can occur before the Personal Injury Commission, which then results in a medical assessment certificate that is binding on the parties, subject to whether it is appealed or not. They can be used at many and varied points in the claim, whether it is from the decision around initial liability through to the appropriate treatment that the worker may receive and, critically, in the context of thresholds for access to ongoing benefits and work injury damage claims, whether the worker actually has a percentage impairment that enables them to meet those thresholds. They are the most common areas where we see those medical examinations made.

I don't have a sense of the proportion at each step of those. I guess what I would reflect is that injured workers often report that they are required to undergo multiple medical examinations for each of those steps, and that is part of what causes the distress for them. One of our case studies points to an example where a worker had an independent medical examination for a claims and treatment purpose, made a whole person impairment claim and then was requested to go and undertake a further assessment in relation to that. We were able to solve that complaint through our complaints process, but I think it is a really good example of the potential impact of those and the potential requirement to undergo multiple examinations.

Ms SUE HIGGINSON: One of your case studies says that that was the cause of someone feeling like they didn't want to live anymore—it is that severe. Sorry, Mr D'Adam.

SIMON COHEN: That was what the worker reported to us, and that they had been requested to undergo repeated medical examinations and that had been the impact. It did point, in our view, to an opportunity to improve the existing system in the context of consulting with the nominated treating doctor before requiring a worker to undergo an IME to see what special arrangements might be put in place to support them, which we think is something that could be done within the existing system.

The CHAIR: The interesting thing, which I don't think we would be able to get access to, would be what the cost of the secondary psychological injuries would be as a result of dealing with the scheme, but I think it would be very hard to get any figures on the numbers of workers, or the dollar cost would be very hard, I assume. You would not have that?

SIMON COHEN: I guess what I would reflect is that SIRA has done some work around proxies for that in terms of workers with physical injuries who then require psychological appointments. I am happy to take that on notice and see what we might be able to find about—

The CHAIR: That would be great.

SIMON COHEN: —secondary psych injuries. But I will be up-front: I'm not sure whether there is a lot more light I will be able to put on it.

The CHAIR: We will ask SIRA and icare as well when they appear.

SIMON COHEN: Of course.

The CHAIR: The other thing to ask was, on workplace rehabilitation providers, if a workplace rehabilitation provider was appointed earlier on in the process—so within the first eight weeks—instead of leaving it all to the case managers in that early time period, do you think that that would be beneficial in terms of taking some of the heat out of the system, getting people back to work more quickly?

SIMON COHEN: It is an indirect answer to the question, if you would excuse me, because I am not an expert on knowing—

The CHAIR: No, sure.

SIMON COHEN: —the contribution that they might make, but I guess I would have two reflections about that. One is that where the relationship between the rehabilitation provider and the worker isn't working effectively, that does impact upon their recovery. Often we will receive complaints from injured workers where an issue arises around the rehab provider and we inform the worker of their right to actually choose their own rehab provider, which is something that they can then take steps in relation to. I think the second is the focus upon understanding how the evidence establishes the effectiveness of each of the proposed interventions, including rehab providers, is really the critical question. So if that evidence established the value of that, then you would think it would be something that would be closely examined. I think that is much of the intention that sits behind SIRA's Standard of Practice 33. That really encourages employers to have a look at workers who may be at risk of not returning to work and looking at evidence-based solutions, including rehabilitation providers.

The Hon. ANTHONY D'ADAM: Can I just ask about the standard of practice? Is that actually in operation? I couldn't find a final version, only a draft consultation version.

SIMON COHEN: It is in operation and, if it assists the Committee, I am happy for us to make available a link to the Committee to that after today, if that is of some assistance.

The Hon. ANTHONY D'ADAM: That would be useful. I have one further question. In our first session with some injured workers, one of the issues that was raised was the inability of the Independent Review Office to make binding determinations. Do you have any comment about that?

SIMON COHEN: I suppose my view about that is that at the moment that is not our role. What we are charged with doing is seeing if we can resolve complaints. We bring to that an expertise and also strong relationships with insurers so that we are able to, often, put before them persuasive information which demonstrates that they might not have acted fairly and reasonably and which causes them to change those decisions really quickly and properly. I think there is a real value to those systems and processes. Where we are unable to resolve those complaints, one of the things that I think works well in our overarching approach is that we can then connect that injured worker to an expert independent lawyer who can give them advice and assistance, investigate their claim and either reach a solution with the insurer or, in appropriate circumstances, take the matter to the Personal Injury Commission.

We do have a number of threshold tests that we have around whether we would provide funding, which ensures that cases that don't have a prospect of success don't proceed, but it equally ensures that those that do are properly dealt with by the commission. I think there is value in having role clarity in these types of systems. If lots of people are doing the same thing, I think it can become quite confusing. I think a lot of work based on the recommendations of this Committee previously around being clear around who does what in our single dispute resolution tribunal, a single complaints handling body, a provider of legal services and a single regulator in this space—I think there is value in having that role clarity through the system. If there are particular types of matters where people think we might have an increased role, we are certainly happy to look at those and give a view.




We think, for example, that there is more that we can do with some matters that might otherwise land at the Personal Injury Commission where we might be able to use our solutions approach to see if we can get a quick outcome. We do that quite frequently at the moment, for example, where an insurer hasn't responded to a claim and, as a result, the work is entitled to take the matter to the Personal Injury Commission. When the funding application comes to us, we make quick contact with the insurer and say, "Where is the response?" Often that response will actually be "We actually agree with that claim; we just haven't got the answer to them," or "We are just in the process of sending it to them." That saves time, reduces disputes, reduces cost and the impact on the worker, and we think there is value in exploring whether there are more opportunities to do that.

The Hon. ANTHONY D'ADAM: Do your recommendations have any standing with the Personal Injury Commission? Do they take them into account in terms of their determinations, or do they just start to know the—

SIMON COHEN: We don't make submissions, or our recommendations don't come before the commission. What we do have is an ability to investigate complaints, and we have recently refined our investigative approach so that where we don't think a response is fair and reasonable, we undertake a much more forensic investigation of it, and we have indicated to insurers that if, at the end of an investigation, we still don't think they have put a fair response on the table, we would make public our view and their response in relation to that. I think that has got a really strong effect in terms of insurers closely looking at their views and giving them an opportunity, importantly, to remediate the matter where they can. What I'm pleased to say is that, through that process, we have actually seen insurers look really closely at decisions and that they have actually come to solutions that I think are more creative than you might reach through a litigated process and that have been to the benefit of the injured worker. I think that's really positive.

The Hon. ROD ROBERTS: Thanks, first of all, for your attendance this afternoon and, secondly, for your detailed submission—which I'd like to say I enjoyed reading, but "enjoyment" is not the word. I was perplexed when I finished it. That relates to the 14 case studies you put in there. I congratulate you and your office on the practical, fair and commonsense solutions you found to these issues that have happened to workers, which leads me to two parts. You say you investigated and you've come up with these solutions to what appear to me to be very simple and easily fixed problems. Do you need a bigger stick in terms of enforcement? How do we stop these very simple issues from happening again? Because these issues that have been detailed and outlined here are causing further aggravation to the injured worker. How do we stop that from happening, going forward?

SIMON COHEN: It's a very good question. I suppose my first reflection would be that many of those matters that we've highlighted go to pretty basic case management issues, and so there is an urgent need to improve

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	Number: 2 Author: cohens Add 'a <u>single</u> funder of legal services'	Subject: Sticky Note	Date: 26/09/2022 6:46:55 PM +10'00'
	Number: 3 Author: cohens Replace text with 'worker'	Subject: Highlight	Date: 26/09/2022 6:47:49 PM +10'00'

the quality of case management for injured workers. I think that's been acknowledged. It's been acknowledged by icare; it's been identified by a range of reviews. Our view is that that's certainly the case. Our submission suggests that where those improvements come on track, prioritising them for workers with psychological injury, we think, could be of considerable value. I think the second is that the need to make sure that the system is responding in a joined-up way is really critical. One of the things that we've really been working on since we've become an independent agency has been to better exchange information with SIRA, as the regulator, and also with icare, as the major insurer.

Firstly, where we're seeing systemic issues, to be highlighting those and seeing whether we can find solutions to them, but also to be providing much more comprehensive data and flagging significant matters with SIRA so that they can use their extensive range of regulatory powers to have a look at those matters closely. In that context of having role clarity, where we see things that are going wrong, I think we've got a real obligation to call them out, you know—to blow the whistle, as it were. And then to really hand it over to the insurers and the regulator to actually look at the fixes or the solutions to those matters. My view is that we've gotten better at that, but there's continued improvements that we can make. I think the prospect that we can make public things that we see where we don't think responses are appropriate is a significant tool that we have at our disposal. It's one that, I think, does lead to good solutions in certain matters.

The Hon. ROD ROBERTS: Further to that then, can you see any utility or merit in the insurers having specialist case managers that specialise in psychological injuries because, as we know, they're unique compared to a broken leg? Much more empathy is needed, different people skills, et cetera—communication skills, such as the letters we've seen sent out that are false and/or threatening and intimidating. Do you think there is a merit in having specialised case managers for these types of injuries?

SIMON COHEN: I think our view is that expert case managers who are experienced in dealing with these matters is critical. I think, in addition to that, the systems and processes that are in place to oversight the key decisions that are made in matters is also critical. Whether provisional liability is disputed, whether liability is accepted, whether there's a treatment dispute that's on foot, whether weekly payments are going to cease, whether there's a concern about the impairment which may impact upon benefits—they're all the critical areas where we see, in complaints that we receive, heightened distress from workers because they may no longer be able to access the psychological treatment that they've been relying on, or they may find themselves at risk of financial distress, and, as a consequence, that can exacerbate their psychological injury. I think expert case managers, but also a system that identifies those key points and then really drills in to make sure the best decisions are being made.

The CHAIR: Thank you so much for coming and presenting your evidence to the Committee. Committee members may have additional questions for you after the hearing. The Committee has resolved that the answers to these, along with the questions that you took on notice, be returned within 21 days, and the secretariat will contact you in relation to these questions.

(The witness withdrew.)

The Committee adjourned at 16:22.