



## NSW Bar Association response to question on notice from the Standing Committee on Law and Justice's Inquiry into "proposed changes to liability and entitlements for psychological injury in New South Wales"

### Question from the Hon. Stephen Lawrence MLC:

*"Mr Toomey, we heard some evidence from the Treasurer this morning to the effect that the workers compensation system was designed for physical injuries and is obviously now being used for psychological injuries. In summary, he said that there are quite complex questions in terms of assessing psychological injuries, particularly when assessing their connection to work, as opposed to contributions by virtue of the person's inherent make-up or other problems that they might have outside of the workforce. I think it could be said that the bill—particularly section 8E and the meaning of "relevant event"—is an attempt to engage with that by excluding certain people from the scheme. Do you have any thoughts about alternatives? Accepting the premise that there is a certain type of crisis in the scheme and accepting the premise that some form of limitation might be needed to address that, is there a way to address the issue that is more fair than the exposure draft? For example, are there issues with the standard of proof? Is that something that could be looked at? Is there a case to limit payments overall in psychological cases, as opposed to other cases? Is there some other way, apart from the wholesale exclusion of access to the scheme?"*

### Answer:

1. The NSW Bar Association thanks the Hon. Stephen Lawrence MLC for his question regarding potential alternative approaches to the exposure draft of the Workers Compensation Legislation Amendment Bill (**draft Bill**) to address the "crisis in the scheme" that was identified in the evidence provided by the NSW Treasurer. The response below should be considered alongside the Association's written submission, the opening remarks from the Senior Vice-President, Dominic Toomey SC, and the answers provided to the Standing Committee on Law and Justice at the Inquiry hearing held on 16 May 2025.
2. At the outset, the Association reiterates the significant challenge of addressing these identified issues without the most recent financial modelling and without an understanding of the proposed Industrial Relations Amendment Bill and the yet unreleased delegated authority or regulation that supports the draft Bill. With those qualifications acknowledged, the Association suggests that the Standing Committee should address the following matters to produce a fairer outcome than that proposed by the draft Bill:
  - (a) During the Inquiry, the Standing Committee received evidence that, based on iCare's modelling, only 27 employees impaired by workplace psychological injury per year would be eligible to claim long term benefits under the new threshold of 31% Whole Person Impairment (WPI).<sup>1</sup>
  - (b) The Association notes that the definitions of the required "relevant event" in proposed subsection 8E for sexual harassment, racial harassment or bullying will require a finding from a Tribunal, Commission or Court (presumably the Industrial Relations Commission). The introduction of a preliminary litigated step in the claim process for psychological injury within these categories will dissuade bona fide injured workers and militate against the stated intention of producing a more efficient, quick and fair process.

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<sup>1</sup> Evidence provided to the Standing Committee by Mr Dai Liu, General Manager, Actuarial Services, icare on page 41 of the uncorrected transcript.

3. In response to the concerns set out above, the Standing Committee and the NSW Government should consider the following matters to reduce costs for the workers compensation scheme, while also producing fairer outcomes than those currently sought to be achieved by the proposed draft Bill:
- (a) Take the steps suggested in the Association's written submission to reduce the incidence of psychological injury.
  - (b) Reduce the funds wasted by iCare, as set out in the Association's written submission and the subject of previous public and parliamentary comments.
  - (c) Take practical steps to improve the rate of successful defences under section 11A of the *Workers Compensation Act 1987* through facilitating and encouraging employers to marshal proper evidence to make out the defence. It is the Association's view that the expansion of categories of conduct by the employer which would afford it a defence in the proposed new section 11A is unnecessary. The better approach is to ensure that employers are in a position to engage the provision in its current form so that it has the effect intended by its enactment. The more significant concern in respect of the amendment to section 11A, however, is the dilution of the causative standard from "wholly or predominantly" to "significantly". On one view, that change could result in a worker who suffers a psychological injury by reason of a "relevant event" within the meaning of that term in the proposed section 8E (for example, an assault by a fellow worker in the workplace) failing to recover compensation for their injury because the gravity of the injury was then "significantly" contributed to by the employer's actions (in the given example, in investigating who of the two workers was guilty of misconduct.) If section 11A is to be amended, the potential for such unintended consequences would need to be recognised and appropriate "carve outs" incorporated.
  - (d) Reduce the scope for protracted and expensive treatment disputes in the workers compensation scheme overall.
  - (e) While acknowledging that there is not a sound jurisprudential basis for treating psychological matters differently from physical injury, a reduction of benefits payable could be considered, but only where appropriate medical treatment is maintained, and benefits are proportionate to independently assessed severity of injury, including through gradation of benefits according to injury (see (f) below).
  - (f) The Association is strongly of the view there should be no changes to the thresholds for physical injury. One avenue could be to introduce tiered or graduated claims pathways for psychological injury, however, with a low threshold early support tier for mild cases, and graduated increased support and benefits for more serious cases. The Standing Committee could examine gradations of benefits depending on the level of psychological impairment identified on assessment noting entitlements, for example, for workers determined to be suffering an 11% to 15% WPI and then lesser entitlements for less serious conditions, being those determined to attract an assessment below 11% WPI.
  - (g) The Association is concerned that the Work, Health and Safety (WHS) matters have not received due attention in the NSW Government's proposed reforms, noting that psychological risk assessment and management is a key feature of providing safe workplaces. WHS has a key role to play in creating psychologically safe workplaces and needs emphasis in this proposal. To that end, resources should be deployed to expand access to early intervention and in-house support, including fast-tracked access to psychological support for employees showing early signs of distress—before a claim is made. Other initiatives could include:

encouraging insurers and employers to embed psychologists and counsellors in high-risk workplaces, such as emergency services, and supporting “recovery at work” programs, where workers can stay engaged part-time while receiving treatment and create Industry-Specific Mental Health Standards.

- (h) Require all employers (public and private) to regularly assess psychosocial hazards under SafeWork NSW regulations and enforce compliance through audits and penalties for high-risk employers who fail to act. That could include mandating mental health first aid and leadership training as part of WHS compliance and offer incentives (e.g., insurance premium reductions) to businesses that implement mental health leadership frameworks and reduction measures.
  - (i) Raise awareness through public mental health education campaigns, with particular focus on the workplace. The NSW Government should consider partnering with recognised not-for-profit organisations, with expertise in the area of mental health, which was foreshadowed by the Government in its media releases regarding the proposed reforms.
4. If the Standing Committee were attracted to tightening the definition of “bullying”, to enhance the distinction between legitimate actions for the purpose of section 11A and those that sound in compensation, this could be achieved by requiring that “bullying” be conduct “intended to cause harm or distress”. The Association notes, however, that this is a departure from the no-fault quality of workers compensation.
5. The Association thanks the Committee for receiving this response on notice. 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,