Submission No 16

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Rehab Options Injury Management

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The Chair
NSW State Parliament Legislative Council
Standing Committee on Law and Justice
NSW Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Re: 2022 Review of the NSW Workers Compensation Scheme

We refer to the 2022 Review of the NSW Workers Compensation Scheme.

Rehab Options Injury Management ('Rehab Options') is an Australian owned company, established in 1989. Rehab Options specialises in return-to-work coordination, injury management, OHSE and risk management, HR/IR issues, claim reviews and case management. Rehab Options is recognised as an industry leader in terms of its results in achieving early return to work outcomes and minimizing claims costs.

Rehab Options provides this submission on behalf of its clients, comprised of NSW employers of various sizes across various industries.

We note the terms of reference for the current review include a specific focus on the increase in psychological claims.

We would like to bring the following matters to the attention of the Committee.

Legislative Provisions and Related Issues

1. Section 4(b)(ii) of the Workers Compensation Act 1987 (WCA) defines injury to include the "aggravation, acceleration, exacerbation or deterioration" of a disease condition, if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration.

2. The effect of section 4(b)(ii) is that many workers with pre-existing conditions who allege that an aggravation, acceleration, exacerbation or deterioration of that condition has occurred at or because of work are entitled to compensation.

3. While admirable in its intent, the practical impact is that the NSW workers compensation scheme pays compensation for claims that relate to longstanding conditions which may have been only slightly and only temporarily aggravated (etc.) by a claimant's employment.

4. The relatively generous changes to the NSW scheme in 2012 meant there is now a significant degree of wage support for such claimants, so long as they are certified as being unfit for work.

5. This (certification of being unfit for work) is an issue we will return to in further detail below.

6. Section 11A of the WCA provides a complete defence to psychological injury claims in circumstances where the injury was 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.

7. Section 11A defences typically require detailed investigation of the circumstances of the injury. Use of the section does not dispute the validity of the claimant's experience or condition.

8. However, section 11A defences are widely regarded within the workers compensation industry as difficult to successfully pursue. This discourages the detailed investigation by scheme agents of psychological injury claims, despite it being proper to do so. It also discourages the step of a scheme agent formally disputing a psychological injury as being compensable, because of the perceived risks of an unsuccessful defence (including the delay in treatment of workers who may later successfully challenge a decision to decline the claim).

9. An analysis of section 11A decisions issued by the Personal Injury Commission (PIC) between May 2020 and June 2021 showed that section 11A defences were successfully maintained by the employer and scheme agent in less than 15% of matters decided (details of those cases are available as Attachment A to this submission).

10. Presumably, the decision to allow those matters to proceed to determination before the PIC were taken by scheme agents on legal advice in the expectation that there were reasonable prospects of success in running the matter.

11. The fact that less than 15% of section 11A defences were successful indicates to us that one or more of the following are occurring:

    a. Matters are being defended by scheme agents inappropriately;
    b. Matters are being prepared by scheme agents and their lawyers inadequately;
    c. The standards being applied by PIC Members (who decide liability disputes) as to what constitutes "reasonable action" on the part of employers are too strict.

12. We do not consider 11(a) above is occurring. To the contrary, our experience is that scheme agents are most reluctant to allow matters to proceed to hearing before the PIC if there is doubt as to whether the section 11A defence has reasonable prospects of success.

13. We do consider 11(b) above is a factor. The preparation of section 11A defences can be time consuming and requires considerable legal expertise. There is no (or very limited) scope for icare's legal panel firms to be paid to prepare and review such evidence, because of the structure of the costs regulations in Schedule 6 to the 2016 Regulation. In addition, there is no, or limited, responsibility or expertise within scheme agents to ensure that evidence is gathered in a fashion which maximizes the prospects of a successful defence if a matter is litigated in the future.

14. Given the costs of psychological injury claims to the NSW scheme, it is a false economy to limit the involvement of legal panels in the investigation of psychological injury claims and the preparation of dispute notices issued under section 78 of the Workplace Injury Management and Workers Compensation Act 1998 (WIMA) (the document issued to contest liability for workers compensation claims).

15. We also consider 11(c) above is a factor. However, we acknowledge that the effects of precedent / case law in the PIC (and its predecessors) are such that, to a great extent, the expectations of what constitutes "reasonable action" by an employer are already established benchmarks.

16. Suffice to say, our view is that the expectations placed on employers are such that even exemplary conduct throughout a process of carrying out reasonable management action can be undone by a single instance of less than ideal conduct, which we regard as an unreasonable standard to be applied to determining what constitutes reasonable action on the part of an employer.

17. Finally, there is seemingly a willful neglect of mechanisms in the legislation which may promote a swift return to work when it is objectively warranted.

18. For example, there may be clear, objective evidence that a worker has psychological capacity for work, yet a treating doctor may continue to certify the worker as totally unfit for work. Such situations are seemingly allowed to persist until a decision may finally be taken to dispute liability for the claim.

19. However, in practice, there are other mechanisms available to promote the early return to work (which indeed are available in relation to all claims, but the need for intervention is often most obvious in psychological injury claims).

20. Scheme agents are seemingly reluctant to apply the available statutory provisions, perhaps due to uncertainty on the part of their claims management staff as to both the existence of these provisions and their proper use.

21. We refer to sections 47, 48 and 48A of the WIMA, section 44B of the WCA, and sections 305 – 310 of the WIMA.

22. We suggest the Committee could approach the PIC for data as to the number of applications filed by scheme agents since the formation of the PIC seeking resolution of injury management disputes. We suspect that number would be extremely low compared to the number of active claims within the NSW scheme.

Claims Handling, Management and Investigation

23. SIRA's Standard of Practice 33 for the management of psychological injury claims[1] is replete with references to tailoring the management of psychological injury claims to the worker's experience by engaging with the worker with empathy and minimising conflict and delay.

24. These are noble goals, but in some respects they not only 'put the cart before the horse' (by assuming there has indeed been a compensable injury) but also enable the claimant in their view that they have been unfairly treated, leading to them feeling upset, hurt or disrespected.

25. Of course, this approach to managing claimants is well entrenched by the current claims management model and always occurs before any formal consideration has been given to whether there may be a valid section 11A defence, given that a psychological condition caused by reasonable action taken by an employer is, at law, not compensable.

26. If workers believe (from whatever source) that they are entitled to claim compensation if they have been unfairly treated, leading to them feeling upset, hurt or disrespected, that is a notion of which they should be disabused.

[1] See https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/other-instruments/standards-of-practice/s33.-managing-psychological-injury-claims

27. Sadly, in its stewardship of the NSW compensation scheme, icare's 'social heart' has overtaken its 'commercial mind'.

28. This imbalance of priorities is exemplified by notions such as the obsession with positive feedback for icare via a 'Net Promoter Score' metric, at the expense of prudent financial management of the scheme and its claims.

29. We need not point out to the Committee the known issues with the NSW scheme's appalling return to work statistics under the current claims management model.

30. There needs to be a return to 'old-fashioned' claims management where an appropriate degree of scrutiny is applied to claims. This is not incompatible with a provisional liability approach. Indeed, it is arguable that a period of provisional liability actually assists the proper decision making process, but only if the scheme agent managing a claim takes the proper steps to investigate a claim within the available legislative timeframes.

31. All too often in our experience (perhaps due to workload issues for claims staff or perhaps it is not regarded as a priority), formal liability decisions are being made by scheme agents (or icare):

    a. In haste, because remaining statutory timeframes are due to expire;
    b. In the absence of key evidence, due to delays in factual and medical investigations being arranged and then actually taking place;
    c. In the absence of proper legal advice, where appropriate;
    d. In the absence of engagement or consultation with employers.

32. The net result is that all too often this is experienced as a lack of care from an employer's perspective, as they feel their opinions and evidence are not valued or adequately taken into account in the liability determination process.

33. This situation is unsatisfactory, given employers are a key stakeholder in the operation of, and the outcomes sought by, the scheme.

The Role of the Medical Profession in Assessing Psychological Injury

34. In the almost 20 year period between 2000 and 2019, Safe Work Australia's (SWA) national workers compensation statistics[2] recorded a reduction in the incidence of every category of compensable disease condition, with one notable exception – mental health conditions – which increased by 28%.

35. In 2021, British author and academic Dr Lucy Foulkes posed the question of where to draw the line between psychiatric disorder and the inherent stresses and challenges of human experience in her book *'Losing Our Minds: What Mental Illness Really Is And What It Isn't'*.[3]

36. Earlier this year, the World Health Organization's ICD-11 came into effect as the global standard for the classification of health conditions. The ICD-11 now contains 21 separate psychiatric disorder groupings, compared with 11 in the ICD-10.[4]

[2] See https://www.safeworkaustralia.gov.au/sites/default/files/2021-01/Australian%20Workers%20%20Compensation%20Statistics%202018-19p%20FINAL_2.pdf
[3] See https://www.penguin.co.uk/books/112/1120086/losing-our-minds/9781847926388.html
[4] See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7365296/

37. What thread, if any, ties the above three paragraphs together? We consider it is the concept of medicalisation of emotion, which has certainly contributed to the inexorable rise in workers compensation claims for psychological injury.

38. Looking at the SWA data in the Australian context, how can the dramatic increase be explained? Does it suggest that the way in which employees are treated in workplaces is worse now than was the case twenty years ago? Or is it maybe that the strains and stresses of living in today's society are leaving workers more susceptible to psychological injury in comparison to the equivalent effects of living in Australian society at the turn of the millennium?

39. One of the changes between 2000 and 2019 in the context of the SWA data which might have played a role is the change in definitions of psychological conditions over the period. Broader or more extensive definitions of what constitutes a psychological condition would likely increase the opportunities for a psychological injury diagnosis to be made.

40. Is that change of itself enough to explain a 28% increase? In our view, that is unlikely.

41. Another explanation for the data might be the idea that increased awareness via public information campaigns (such as 'RUOK day', etc.) has led to a reduction in the stigma attached to making a claim for workers compensation for psychological injury, which in turn has increased the willingness of workers to make claims for psychological injury.

42. If that is the case, then perhaps it follows that an increase in the awareness of psychological conditions (and in turn the increase in the incidence of psychological injury claims) is not such a bad thing – indeed it may be something to be welcomed or even encouraged.

43. However, at least one eminent Australian academic and psychiatrist (Professor Samuel Harvey of the Black Dog Institute at UNSW) disagrees, saying:[5]

    "… there is some evidence that mental health awareness campaigns might do harm. A series of studies conducted in Sheffield in the UK showed that when you give people more information about mental health problems they may be at risk of, you actually increased the frequency of those at-risk symptoms. Well-meaning interventions can have harmful effects and it is possible that mental health awareness interventions may lead to reduced resilience and sensitization to psychological hazards."

44. Setting aside the adverse fiscal impacts of psychological injury claims on the viability of the NSW compensation scheme, one thing that seems clear from injured workers' subjective experiences of the operation of the various compensation schemes in Australia is that making a workers compensation claim is not a simple step on the path to recovery of psychological functioning.

45. If making a claim doesn't result in you 'getting better' as an injured worker, then why has there been such an increase in claims over time?

46. We do not intend to explore the influence of friends, family, personal injury lawyers or personal injury advertising on the increase in psychological injury claims in these submissions. We suggest that they are likely potential contributors which each warrant

[5] See https://www.blackdoginstitute.org.au/news/do-mental-health-awareness-campaigns-work-lets-look-at-the-evidence/

their own detailed, separate examinations by an appropriately funded and staffed enquiry.

47. A further possible explanation for the increasing prevalence of psychological injury claims may be the (apparently increasing) difficulty in distinguishing between mental distress and mental illness. One would hope that such a difficulty would not arise for medical professionals.

48. However, from a lay perspective, how does one decide whether feelings of anxiety or low mood rise to the status of a diagnosable condition? When does emotion become pathology? For the worker, or indeed the scheme agent tasked with making a liability decision, what is the difference between 'feeling depressed' and 'being depressed'?

49. We suggest that all too often properly contestable psychological claims are not given adequate scrutiny as to whether they are appropriately accepted under the WCA as being compensable.

50. It is obvious that heightened emotions and feelings can be difficult to deal with, especially in the context of potential threats to a worker's employment, their income and their financial security.

51. However, it is well-established from a legal perspective that something more than a 'standard emotional response' to a worker's circumstances is required for a compensable injury to occur.

52. In *Bhatia v State Rail Authority (NSW)* [1997] NSWCC 25, Burke J observed:[6]

    "Emotion is a fact of day-to-day life. If your daughter is ill, you can tend to be anxious; if she dies, you can tend to be depressed. Neither reaction is a physiological abnormality both being emotional reactions, or impulses, appropriate to the stimulus. This type of emotional impulse is the normal reaction of a human person or organism to a particular event. If that reaction becomes excessive in degree or duration, or is inappropriate to the stimulus, then there can be a physiological problem."

53. On the issue of an emotional reaction which is 'excessive in degree or duration', we ask: how many compensation claims are made arising from alleged 'bullying or harassment' which relate to a single incident where a worker has been made to feel upset, hurt or disrespected? Or indeed, how many compensation claims are made arising from alleged 'bullying or harassment' which relate to a worker's adverse reaction to their performance being placed under scrutiny or even their ongoing employment being questioned?

54. In those cases, in issuing a workers compensation certificate of capacity to support a claim, how many doctors consider whether a worker's reaction amounts to a physiological abnormality, in that the emotional reaction has become excessive in degree or duration?

55. We consider that these are the kinds of questions which should be being asked in the context of the rise and rise of psychological injury claims, but no-one seems to be interested in exploring such matters.

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[6] See http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCC/1997/25.html?context=1;query=1997%20NSWCC%2025%20or%20NSWCC%201997%2025;mask_path

56. To illustrate further by way of a common example, we note the ICD-11 definition of an adjustment disorder relates to two categories of symptoms:[7]

    "(1) preoccupation, defined as excessive worry, distressing thoughts and rumination related to the current stressor, and (2) failure to adapt, defined as a significant impairment in important areas of life (social, family or occupational)".

57. The role of the medical professional then, in diagnosing an adjustment disorder in the circumstances, seems to be to decide 'how much worry is too much worry' and 'how much impairment is significant impairment'.

58. We simply ask: How much worry is too much worry if your job is at risk, perhaps because of performance issues? How much worry is too much worry, if your financial security and income suddenly appear to be in jeopardy? Where is the line to be drawn?

59. The legal view is, as Burke J put it, a *"normal reaction of a human person or organism to a particular event"* is not compensable.

60. However, how much, if any, notice is taken of the legal view when a claim for psychological injury is made based on the supporting opinion of a medical professional? We suggest the answer is 'little to none'.

61. From the treating doctor's perspective, they should be in a position to say to a worker, when appropriate, "your reaction (anger, upset, stress, etc.) is medically normal and a compensation claim is not the answer".

62. Indeed, in our experience, many doctors do exactly that, with benefits to their patients in having them focus on their future path, rather than remaining anchored to and by the (perceived) insults or slights of the past.

63. Regrettably, however, there is a proportion of doctors who encourage the medicalisation of emotion. Whether that is because of the constraints of the treatment model (with only a short time to take history and recommend action or treatment) or a desire not to further upset an emotionally affected patient or because of still other factors is open to question.

64. The simple fact is that treating doctors too often certify a worker as having no work capacity when it is plainly not the case.

65. But the bottom line from the NSW scheme's perspective, as with all compensation claims, comes down to fundamental questions: is there an injury and, if so, how was it caused? And, in the context of psychological injuries, if the injury was caused by or at work, was it due to the employer's reasonable action under section 11A?

66. The fact that those basic questions are seemingly not the first, foundational questions asked in a scheme agent's assessment of a psychological injury claim is a matter of great concern to us and in our view one of the key reasons why the NSW scheme has lost its way in this area.

67. In short, workers compensation claims should be for injuries and not just stressful life events.

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[7] See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6968697/#:~:text=The%20symptom%20profile%20of%20adjustment,of%20life%20(social%2C%20family%20or

68. In turn, injuries should be properly identified (diagnosed) before (or very shortly after) a claim is made.

69. Finally, compensation should only be paid when injuries are assessed as being properly compensable.

70. Recent departures from these fundamental precepts have created detriment to the NSW scheme and its financial position.

71. Simultaneously, the ultimate benefit for workers who are upset, hurt or disrespected, but not truly injured, and who then make a compensation claim must be questionable, given they (and their claim) become part of a system which medicalises their emotional state and requires them to both focus on past events and continually revisit (and indeed justify) their negative feelings in order to try to secure ongoing compensation benefits.

72. That is not a healthy state for the NSW scheme nor is it a healthy state for its most important stakeholders, workers and their employers.

We trust the above views are of assistance to the Committee. Please contact us should there be any queries.

Kind regards

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22 July 2022