

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Walker Law Group

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LAW GROUP

To whom it may concern,

We write in relation to the 2022 Review of the Workers Compensation scheme and acknowledge the opportunity provided to interested parties to contribute a submission.

We further note the Standing Committee on Law and Justice's mention in the terms of reference of a particular interest in psychological injury claims. We welcome this focus area, agreeing that it is a matter deserving of focus and we provide the following comments on the issue.

It is known that psychological injuries have been increasing in recent years.

It is equally well known that our society has expectations that people with a mental illness be treated with dignity, empathy and compassion.

Our motivation for contributing a submission, is that we believe that both the data and our experience indicates that there can be improvements in the experience of workers compensation insurance for injured workers with a psychological injury.

IRO data

We are grateful for the role of the IRO in the workers compensation scheme. Broadly speaking there are two critical areas that the IRO oversee that our firm interacts with. Firstly, IRO, through their Solutions team, perform a complaints function addressing complaints raised by or on behalf of injured workers. We will touch further on this later. Secondly, the IRO through their ILARS function, administer legal funding.

By virtue of this latter function, the IRO has access to significant data indicating vital trends in the workers compensation industry in NSW.

In the IRO's recent periodic performance review, covering the period of 1 July 2021 to March 2022¹, data around the funding provided to applicant law firms is covered extensively. At page 20 of this valuable publication, the IRO report on grants of funding for the period by 'injury location.' In this period there were 14393 grants of funding overall. Of these, 3009, were grants of funding to do with the 'psychological system' as the 'injury location.'

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This means that nearly 21% of the funding granted by IRO for the period of 1 July 2021 to March 2022 has been for psychological systems as the injury location. This is the highest 'injury location' recorded on this page of IRO's report. Just over one in five grants of funding by IRO/ilars in the 2022 financial year reported to date then are to do with the psychological system.

The next highest 'injury location' is for the back at 2425 (nearly 17%) and then ears 2114 (nearly 15%).

This high volume of psychological system funding is not a new development.

In the WIRO/IRO PERIODIC PERFORMANCE REVIEW 1 JULY 2020 TO 30 June 2021,ⁱⁱ data concerning the funding based on 'injury location' is found on page 20. For the 2021 financial year there were 20413 grants of funding. Of these 20413 grants, 3883 or 19% were for the 'injury location' of 'psychological systems.'

The 'injury location' of 'ear' was next highest funded at 3843 (nearly 19%) and then 'back' at 2996 (nearly 15%).

The WIRO PERIODIC PERFORMANCE REVIEW for 1 JULY 2019 TO 30 JUNE 2020ⁱⁱⁱ contains similar trends. The 'injury location' part of the report is found at page 17. There were 16795 grants of funding for the 2020 financial year. There were 3168 grants of funding (nearly 19%) for the 'psychological system' 'injury location.'

The back was next highest funded with 2810 grants of funding (nearly 17%) and ear 2280 grants of funding (nearly 14%).

Whilst the abovementioned reports indicate the 'injury location' most funded to be the psychological system, if you review IRO/WIRO's annual reports prior to that, none of them have the psychological system as the highest funded. Ordinarily it is ears, then the back and then the psychological system.

IRO's ilars data bears out that the trend in funding has seen that when it comes to injury location, it is the 'psychological system' that are the most funded injury location in the scheme since the records in the 2020 financial year. This is a trend that the current data from IRO shows is not changing and if anything, the current three-quarter year report, indicates is increasing.

Some caveats need to be mentioned. It is not apparent from the data, the reason for the grant of funding.

IRO/ILARS provided different stages of funding. Stage one funding is for the provision of initial advice. Sometimes an injured worker will need initial advice only. This grant of funding occurs when so a lawyer can 'determine whether they can provide assistance to pursue any rights and entitlements of their client under the workers compensation legislation^{iv}.' There will be instances where 'a Lawyer determines that no further action or assistance is proposed to be taken or provided for a period of no less than twelve (12) months the grant of funding may be finalised.'^v

We note then that some of the funding referred to above could be stage one in nature only.

A further caveat is to note that the funding data does not identify that if litigation follows, what the nature of it might be? IRO/ilars grants cover a wide range of matters/disputes including, but not limited to, assessing whole person impairment^{vi}, work capacity decisions^{vii}, non-compliance decision^{viii}, insurer liability decisions concerning whether an injury having resolved^{ix}, and of course initial liability decisions^x, for which we will discuss more under the PIC data discussed next.

Despite the caveats, it is significant that the IRO data indicates that the 'psychological system' injury type have become the number one funded 'injury location' in the industry for approaching the third straight financial year. Furthermore, as noted earlier, the experience this financial year is that the percentage of funding for the 'psychological system' is at its highest ever since IRO/WIRO came into being and that the gap between 'psychological system' and the next highest funded area is stretching.

The final obvious point to note is that this data reflects injured workers with psychological injuries increasingly seeking assistance from lawyers concerning their workers compensation claim. We believe this tends to suggest an overall adversarial approach to workers with psychological injuries.

Personal Injury Commission (PIC) data

The Personal Injury Commission (PIC) came into being on 1st March 2021.

The PIC has a policy of pro-publication of its Member's decisions. We note the PIC allows for application in exceptional circumstances for non publication^{xi}. When a decision is not published it is unclear on the nature of the dispute. Despite this, it is apparent from the PIC website that the overwhelming majority of Member decisions are published.

It is our view that the publication policy of the PIC is extremely valuable. The PIC is in many ways the heartbeat of the industry. For those that keep track of decisions in the PIC or summaries provided by IRO or private sector law firms, all sorts of important trends are uncovered. The published decisions are a valuable resource for practitioners and industry stakeholders and serve as important guides on how to approach liability considerations on all sorts of topics and issues.

Of the published Member decisions since the PIC's inception, we are aware of at least 43 that are to do with psychological injuries where the issue involved section 11A of the Workers Compensation Act NSW 1987.

Section 11A of the Workers Compensation Act NSW 1987 acts as a defence for an insurer in the context of a workers compensation claim for a psychological injury. S11A(1) provides:

(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.

Of these 43 decisions where the insurer relied on the section 11A defence, 5 resulted in decisions in favour of the insurer decision with the vast majority (38/88%) being findings in favour of the injured worker^{xii}.

Of course, there have been more than 43 matters in the PIC concerning psychological injury cases involving section 11A since the PIC's inception. The 43 we have reviewed are matters that proceeded all the way through the PIC process and proceeded to requiring a determination of a PIC Member. It would be reasonable to say that these are 43 cases where the insurer felt they had a strong case and so did the injured worker.

This data indicates that when a dispute cannot be resolved through the conciliation process at the PIC and a determination is required by a PIC Member, the very vast majority of cases are found in favour of the injured worker.

Combining this data with that of IRO indicates that injured workers are seeking legal representation more and more if their injury is psychological in nature. And, that when a case has to be determined at the PIC, usually the decision is found to be in favour of the injured worker.

Our experience

In the above comments, we have touched on publicly available data that is either published in full (IRO) or able to be discerned through review of decisions (PIC). We would like to now comment on what our firm's experience is for our clients for psychological injuries.

Reasonable excuse

Some clients we represent have lodged a new claim for a psychological injury at work and have had their first liability decision be a 'reasonable excuse' to not commence payments of weekly compensation. This is particularly the case where the insurer seems to consider that section 11A of the Workers Compensation Act NSW 1987 may apply.

We have seen examples where the insurer has applied the 'reasonable excuse' to not meet weekly compensation on the basis of the injury 'not being work related.' This is despite the recent valuable finding of the PIC in **Ly v HealthShare NSW [2021] NSW PIC 400**.^{xiii} This decision points out that 'a section 11A defence does not constitute a reasonable excuse for the injury not being work related as it is a separate causal matter after a relevant injury is established as being work related.'

A 'reasonable excuse' is a kick in the guts for an injured worker lodging a claim for a psychological injury. Despite the good work in our society to de-stigmatise mental illness, it still is a big step for an injured worker to lodge a psychological injury claim.

No matter how well a case manager communicates such a decision, this is a set back for an injured worker who has lodged a psychological injury claim at a point where they are already vulnerable and at a low point in their life.

Our experience is that unless an injured worker fills in a claim form before the insurer completes their first liability decision on day 7 after notification, there is a strong likelihood of a 'reasonable excuse' being applied if their claim is for a psychological injury and section 11A may apply.

We assist our clients to ensure a claim form is completed as soon as possible to assist them with their claims experience. Completing a claim form makes a claim duly made and creates a 21 day time frame for determining liability.

We see client's claims usually receive payments of weekly compensation on a without admission of liability basis, under provisional liability, if a claim form is completed.

Whilst we are of course absolutely willing to assist our clients in this regard, we take the view that this is a pity that a claim form must be completed to secure provisional payments. Many injured workers without legal representation may not understand the importance of the completion of a claim form. The tendency to apply a 'reasonable excuse' in the absence of a claim form is one that we believe is inconsistent with the scheme objectives^{xiv} that include 'to provide injured workers and their dependants with income support during incapacity...'

We believe a more positive approach to the utilisation of provisional liability by insurers is consistent with the scheme objectives and could lead to better return to work outcomes.

IME

We also mention that for many clients, the interactions they have with their case manager are all about the case manager telling them they must attend an IME as part of the claims management process. This discussion can be as soon as the initial contact stage on the third day after the injury was notified but is usually no later than the initial liability decision on day 7 after notification.

We see examples where the client is provided with the IME appointment or the three choices of an IME at the initial liability decision stage.

SIRA's workers compensation guideline requires that an insurer make attempts to seek information from the treating practitioners before arranging an IME^{xv}.

We have raised concerns with insurers in these circumstances. We have pointed out to the insurer that it is impossible for compliance with SIRA's workers compensation guideline for them to be arranging an IME for our client at such an early stage in the life of a claim. Even if information has been requested soon after initial notification of an injury, it is not reasonable to have expected the treating doctor to have responded by the time of the initial liability decision.

In addition, SIRA's Standard of Practice 32.10, highlights again the importance of liaising with the treating team concerning a psychological injury claim during the COVID-19 pandemic^{xvi}. It specifically encourages insurers to:

- consider the need for the examination including whether further information can be obtained from the nominated treating doctor or specialist in the first instance, and /or whether the examination can be postponed until a later date^{xvii}

We have benefitted from the valuable assistance of the IRO Solutions group in situations where we have pointed out the above SIRA requirements and either not have had a response or agreement has not been able to be reached.

Our experience is that for an injured worker, being told from the outset they must attend an IME can be quite confronting. Whether the case manager means it or not, it can come across as though the insurer doesn't believe the injured person that they have a mental illness. As noted above, despite the good work in our culture about de-stigmatising mental illness, there are many who are nervous to speak up. When taking the step of lodging a claim for a psychological injury and then to be given the impression 'we aren't sure you really are sick so we are getting an IME as soon as possible;' this undermines the confidence of the injured worker in the case manager rhetoric on other topics.

We believe that SIRA's workers compensation guideline is a valuable document and coupled with SIRA's standards of practice, should be something that case managers are educated in and understand.

We believe that IME's should be considered consistent with SIRA's workers compensation guideline; something to be arranged only after reasonable attempts are made to seek the required information from the treating team. Given SIRA's expectations, there is no place for the discussion of an IME at the initial contact stage and even at the initial liability stage. Doing so only telegraphs doubt to an injured worker at a time when they need the insurer to bend all their efforts and resources towards securing a return to work outcome for a vulnerable person in need of help.

We again thank you for the opportunity to provide the above submission. We follow the 2022 review with interest.

Yours faithfully
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<https://iro.nsw.gov.au/sites/default/files/IRO%20Performance%20Report%20July%202021%20to%20March%202022.pdf>

ii <https://iro.nsw.gov.au/sites/default/files/IRO%20Performance%20Report%20July%202020%20to%20June%202021.pdf>

iii <https://iro.nsw.gov.au/sites/default/files/WIRO%20Performance%20Report%20July19-June%202020.pdf>

iv <https://iro.nsw.gov.au/sites/default/files/ILARS%20Funding%20Guidelines.pdf>

v <https://iro.nsw.gov.au/sites/default/files/ILARS%20Funding%20Guidelines.pdf>

vi http://www5.austlii.edu.au/au/legis/nsw/consol_act/wca1987255/s66.html

vii http://www5.austlii.edu.au/au/legis/nsw/consol_act/wca1987255/s43.html

viii http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/wimawca1998540/s48a.html

ix http://www5.austlii.edu.au/au/legis/nsw/consol_act/wca1987255/s33.html

x http://www5.austlii.edu.au/au/legis/nsw/consol_act/wca1987255/s11a.html

xi “The Commission operates under a presumption in favour of publication of decisions. In exceptional circumstances a decision may be withheld from publication. Decision are not published for 7 days to allow a party time to apply to withhold publication.” <https://pi.nsw.gov.au/decisions/find-a-decision>

xii The data mentioned is gathered through individual review of decisions to identify the issues for determination

xiii <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWPIC/2021/400.html>

xiv http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/wimawca1998540/s3.html

xv **Par 7.1** <https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/guidelines/workers-compensation-guidelines#part-7>

xvi <https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/other-instruments/standards-of-practice/s32.-managing-claims-during-the-covid-19-pandemic>

xvii <https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/other-instruments/standards-of-practice/s32.-managing-claims-during-the-covid-19-pandemic>