Submission No 10

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

Organisation: NSW Workers Compensation Self Insurers Association

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The NSW Workers Compensation
Self Insurer's Association

15th May 2025

The Hon. Greg Donnelly MLC

Chair, Standing Committee on Law and Justice

Legislative Council

Parliament House

SYDNEY NSW 2000

Workers Compensation Legislation Amendment Bill 2025

This submission is made by the New South Wales Workers Compensation Self Insurers' Association Incorporated (NSW SIA) and encompasses the general views of its members, which include self-insured companies, specialised insurers, and companies seeking self-insurance.

The NSW SIA appreciates the opportunity to contribute to Proposed Legislative Amendments.

The NSW SIA is a non-profit association representing New South Wales employers who are licensed to manage their own risk for workers' compensation. Established in 1979, the association now includes 98 full member companies, 13 associate members, and 21 affiliate members. The members range from top ASX-listed companies to smaller, single-state entities across various industries, including banking, steelworks, local councils, and healthcare.

The need for reform

The Association accepts the urgent need for reform of the Workers Compensation system so far as it relates to psychiatric or psychological injuries and welcomes the opportunity to contribute to this process.

It is, however, regrettable that the opportunity for the Association to contribute to the reforms being considered and the time constraint within which submissions have been required are limited. For this reason, these submissions concentrate on the main areas in respect of which consideration should be given to alteration of the current proposal. The Association would welcome the opportunity to contribute in a more substantial way to these issues should the opportunity be available.

These submissions are directed to the clauses as they appear in the exposure draft.

Section 8D – Reasonable management action

The Association is of the view that the definition in paragraph 8D(1) is sufficient and does not require the qualification set out in subparagraph (2). If the subparagraph is to remain the Association's view is that it should be made clear that these are non-exhaustive examples only and in particular that all management action comes within the definition.

Section 8H[4]

The Association is of the view that the reference to "a significant cause of the psychological injury" is too stringent a test and is likely to give rise to disputation. The view of the Association is that subsection(1) of the section should make reference to "a psychological injury if a contribution to the psychological injury was – ' etc.

Section 8F

The Association welcomes reform to address claims for psychological injury where allegations of bullying are made. However, the proposed requirement to have a finding of bullying made by a tribunal, commission or court introduces a completely new process and the detail of how this will operate remains unclear. There are also concerns about time and costs implications for self insurers in defending claims in the Federal jurisdiction.

It is also unclear why the proposed amendments introduce a new definition of bullying when it is already defined and well understood in fair work legislation. Further, section 8F refers to sexual and racial harassment specifically but does not take into account other forms of harassment.

Section 32AC – Settlement of lump sum claims

The Association welcomes the introduction of a provision which will allow for settlement of death benefit claims where liability is in dispute but says that there is no need for or benefit in providing yet more guidelines in respect of the management of such claims (see subparagraph (8)).

Section 79A – Cessation of weekly payments after 130 weeks

The Association welcomes the cap on weekly compensation for psychological injury claims at 130 weeks but says that this of itself does not provide any specific encouragement or incentive for recovery at/return to work which is critical in the early stages of an injury to improve injury recovery prospects for the worker. The Association's view is that consideration should be given to reducing the rate at which weekly payments of compensation are paid for psychological injury to 80% of the pre-injury average weekly earnings for the first 13 weeks and 50% of the pre-injury average weekly earnings for the period between week 14 and week 130.

Section 78 – Commutations

Once again, the Association welcomes the provision at which, provides more reasonable access to commutation of workers compensation benefits in appropriate case but says that it is neither necessary, reasonable nor appropriate to include an allowance that would limit the class of claims to which the commutation provisions would apply by reference to regulation as is currently proposed in Section 87EA (2)(a). it is the view of the Association that the sub-section referred to should be deleted. In this regard, it should be noted that commutations would already be subject to the supervision of the Personal Injury Commission.

In the same way that the Association is of the view that there should be no requirement for regulations imposing a condition for the provision of financial advice as is proposed in Section 87F(2)A. This will do no more than add additional unnecessary costs to the commutation process. As indicated, the commutations will already be under the supervision of the Personal Injury Commission. If a member of the Commission is of the view that independent financial advice is required, they can refrain from approving the commutation until such financial advice is provided.

Section 148B

The Association does not support the introduction of special medical or related treatment expenses for "work pressure disorders". The section provides that the application for payment of this special compensation for payment is not a claim, yet the entitlement to this special compensation requires a self insurer to assess whether the requirements of the provision are met. To do this, medical evidence will be required regarding both diagnosis and causation which is a time and financial burden to self insurers. The Association foresees difficulties with interpretation of the word "instance" which may result in disputes.

Part 6 – Degree of Permanent Impairment Determination

The Association is very much opposed to the proposed limitations on the assessment of permanent impairment set out in Division 2 of Part 6. It is the view of the Association that it is imperative that a self-insurer retains the right to qualify its own independent specialist in claims involving permanent impairment compensation (as indeed with all compensation claims). In addition, there are practical considerations associated with the assessment of permanent impairment that make the use of a single joint or SIRA appointed assessor completely unworkable. This includes such consideration as to what material is provided to an assessor, the question of how unresolved factual disputes are dealt with, issues as to what qualifications are appropriate to the assessment and other technical and practical considerations.

Having separate independent opinions provides both parties the opportunity to scrutinise the assessments which is particularly important noting the complexity of the method of assessment having regard to both AMA5 and the SIRA Guidelines for the Evaluation of Permanent Impairment and the scope for the exercise of discretion in impairment assessments. It is also likely that the proposal for a single assessor for impairment will mitigate against settlement of claims and may also

constrain the settlement function required of the Personal Injury Commission in determining disputes.

It is the view of the Association that the current arrangements in place for determination of a permanent impairment should not be changed.

Other areas of reform supported by the Association

The Association understands that one of the objectives of the reforms under consideration is to improve return to work outcomes for injured workers. It is the Association's view that this objective could be achieved by improving the obligations on workers to return to work when it is or can be made available. At the present time workers are, quite appropriately, required to comply with obligations for return to work but the same obligations do not extend to a worker complying with the requirements of an injury management plan or with the injury management process generally. The experience of self-insurers is that this is a particular problem with psychological injuries and claims.

The Association's view is that consideration should be given to amending the provisions of Section 48 and Section 48A of the Workplace Injury Management and Workers Compensation Act, 1998 to make it clear that a worker also has obligations to co-operate in and comply with the requirements of an injury management plan and to make it clear that the failure has the same potential consequences as those relating to a failure to return to suitable employment.

The Association notes that schedules 6 and 7 of Workers Compensation Regulation 2016, which set out legal costs payable to lawyers representing self insurers, have not been amended since October 2020. There is significant disparity between the fees payable to lawyers acting for self insurers and lawyers acting for workers who are paid under the ILARS regime.

The Association and its members will continue to review the Workers Compensation Legislation Amendment Bill 2025 which is detailed and contains novel and complex provisions. We anticipate offering further commentary on the proposed amendments. Therefore, the views in this submission should not be interpreted as an exhaustive or complete response by the Association.

Once again, we wish to express the view that the Association welcomes any further opportunity to contribute to the considerations around the proposed amendments.

Kind Regards,

Rebecca Sekulovski

Chairperson

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