Submission No 18

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

Organisation: Australian Lawyers Alliance (ALA) NSW

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Proposed changes to liability and entitlements for psychological injury in New South Wales: Exposure Draft - Workers Compensation Legislation Amendment Bill 2025

Submission to the Standing Committee on Law and Justice, Parliament of NSW

15 May 2025

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Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Standing Committee on Law and Justice ('Standing Committee') on the NSW Government's proposed changes to liability and entitlements for psychological injury, as detailed in the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW) ('Exposure Draft').

2. The media release accompanying the Exposure Draft asserts that there had been "[r]ounds of formal consultation" that began in March 2025. Insofar as the ALA is concerned, there has been no formal consultation in relation to any proposed changes to the workers compensation system in NSW. Any such consultation with the ALA could only have been said to have occurred through the media. The ALA understands that there has been very limited consultation with the legal profession.

3. ALA members, as legal practitioners who represent injured workers, are extremely concerned about the changes proposed in the Exposure Draft and the impact those changes will have on all injured workers in NSW. The ALA submits that the changes proposed in the Exposure Draft are significant and will impact all workers injured physically or psychologically in NSW. All injured workers will face increased and unnecessary obstacles in accessing the support those workers need to recover and return to work. ALA members are very concerned that a significant number of injured workers in NSW will have no entitlement to claim compensation and seek the support they need, if the changes in the Exposure Draft are enacted.

4. Instead of drastically stripping away rights from injured workers, the ALA contends that the NSW Government should instead be progressing measures which address prevention of injuries (both physical and psychological) in workplaces across NSW, as well as measures which support the rehabilitation and return to work for workers who are injured in NSW.

5. With regards to the Terms of Reference for this inquiry, the ALA's submission will address the following matters:

    a. The overall financial sustainability of the NSW workers compensation system; and

    b. The provisions of the Exposure Draft, specifically:

        i. General observations from ALA members;

ii. Definition of psychological injury;

iii. Sexual harassment, racial harassment and bullying;

iv. A Principal Assessment;

v. “Reasonably necessary” versus “reasonable and necessary”;

vi. WPI threshold, including the WPI threshold and common law entitlements;

vii. Further assessment;

viii. Commutations;

ix. Death benefits;

x. Increased disputation; and

xi. Legal costs.

The overall financial sustainability of the NSW workers' compensation system

6. At the outset the ALA acknowledges that psychological injuries have increased and continue to increase across the scheme. The ALA acknowledges that there is a need to bring these costs down but we have not been provided with sufficient information and data for us to meaningfully comment on the specific drivers of the increased costs and how the Exposure Draft addresses those drivers to improve the overall financial sustainability of the NSW workers compensation scheme.

7. The practical experience of ALA members is that psychological harm in workplaces is a serious and widespread issue arising from poor systems of work and management. Rather than eliminating compensation rights, the ALA contends that the workplace problems leading to injuries need to be addressed.

8. The observation that we can make is that the Exposure Draft does not seem to take a nuanced approach to solving the problem, as we would have hoped, but rather appears to

slash benefits and introduce barriers to accessing those entitlements across the board in a shotgun approach aimed at solving the problems.

9. If one were to take a more nuanced approach to the solution, the starting point would be to consider the evidence and findings of the 2023 Standing Committee Review of the Workers Compensation Scheme ('2023 Review'). As current members of this Standing Committee would be aware, the 2023 Review paid particular attention to the rise in psychological injuries. It was clear then, as it is clear now, that the increasing psychological claims are particularly pronounced for the Treasury Managed Fund (TMF) as compared to the Nominal Insurer, self-insurers or specialised insurers.

10. The ALA contends that nothing has changed.

11. If the increasing costs of the TMF is the true driver of the wide-ranging reforms in the Exposure Draft, then the ALA submits that the NSW Government, as an employer, should work to get its house in order before attacking the benefits of all workers. As the employer of the largest group, the NSW Government should be leading by example on providing safe workplaces, injury management and return to work options for their employees. Serious psychological injuries are not restricted to exempt workers. Workers all over the state and in many industries are affected by serious psychological injuries suffered in the workplace.

12. Over the years there have been many recommendations aimed at improving the return to work rates of the TMF, recommendations which have yet to be implemented. For example, in the 2023 Review, this Standing Committee recommended:

> Recommendation 6
> That the NSW Government:
> - investigate and look to implement opportunities to support injured public sector workers to return to work.
> - develop a whole of government return to work strategy for the public sector to facilitate the placement of staff who have sustained an injury, in particular a psychological injury, but cannot return to their usual workplace.

13. Far too little work has been made on these recommendations. We still have a nurse suffering from an injury in one public hospital unable to return to suitable duties in another public hospital, or an injured teacher unable to return to suitable duties at another public school.

14. It is unacceptable for the NSW Government to fail to manage its own workplaces, to the extent that it has, only for the NSW Government to come to the people of NSW, not to announce

how they are going to do better as an employer, but to strip away the rights of all injured workers. The people of NSW should be outraged that they will be picking the tab for this failure.

15. If the Exposure Draft is introduced and passed without amendment, the ALA anticipates that it could improve the financial position of the scheme but that would be at enormous costs to the injured worker. A cost, the entirety of which, should not need to be incurred.

The provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025

16. Unfortunately, one of the consequences of removing the peak legal bodies from the consultation process and then providing a short time frame to review and comment on an Exposure Draft that contains significant and complex changes to an already complex legislative framework, is that there is insufficient time for the ALA to consider the Exposure Draft as carefully as would be required to identify and advise on any unintended consequences.

17. Our general observation is that, taken as a whole, this package goes too far and brings a sledgehammer to solve a problem that may be solved with a hammer. The proposal does not place one hurdle in front of workers to obtain benefits – it actually places multiple hurdles. The combined effect of which is to make it so hard to obtain compensation that it would be simpler and less cruel if the NSW Government were to simply state that it intends for no one to claim compensation for a psychological injury.

18. The ALA appreciates the intent behind the amendments, but the pendulum will swing too far away from the system objectives of supporting injured workers. Our submission seeks to draw out a discussion on what we see as some of the key issues that should be considered by the Standing Committee. Failure to comment on any single provision should not be taken as an expression by the ALA that it supports or endorses it.

19. Hopefully, these submissions assist the Committee in understanding the perspective of our members and the injured workers of NSW. We encourage the Standing Committee to have the courage to make recommendations to the NSW Government that will result in a more nuanced solution being adopted. Or at the very least an incremental approach to solving the problem that does not decimate the rights of injured workers and their families.

Definition of psychological injury

20. The Exposure Draft proposes to introduce section 8A creating a definition of psychological injury. Given the significant impact of this proposed section, it is worth setting it out in full:

> *In this Act, **psychological injury** means an injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction.*

21. That is, a worker in NSW does not even have an injury unless and *until* they have a "mental or psychiatric disorder" that causes "**significant** behavioural, cognitive or psychological dysfunction" [emphasis added]. It is not medically possible for significant behavioural, cognitive or psychological dysfunction to be immediately obvious following a traumatic event. A worker will therefore have no "injury" to report or claim they can make until such time as their behavioural, cognitive or psychological dysfunction is 'significant'. In some cases, this could take weeks or months to appear and be present. When a claim is lodged it will make the insurer's investigation of the claim significantly more difficult as a result of the passage of time. Witnesses may no longer be available and where they are recollections may no longer be clear.

22. The term "significant" will ultimately be a matter for judicial interpretation but it is clear that inclusion of the term is intended to raise the bar and exclude minor behavioural, cognitive or psychological dysfunction. Defining "minor" will likely also create further obstacles for injured workers. One of the challenges with adopting this approach is that minor symptoms, without treatment, develop into significant symptoms.

23. Take, for example, a nurse who through significant work pressure and vicarious trauma of working in a challenging environment begins to develop minor symptoms. With a short time off work and treatment, the nurse would be able to return to work in a reasonable timeframe, whilst undergoing the treatment. With the new definition of psychological injury, that nurse will not have an 'injury' and will be prevented from accessing treatment and wage support, therefore most likely prolonging the symptoms and hindering any return to work.

24. The ALA would encourage this Standing Committee to call for expert evidence from a psychiatrist as to the expected impact on injured workers in not receiving the treatment that they need at an early stage, as well as in relation to how diagnoses are made and the usual timeframes required before diagnoses can be made. The experience of ALA members and their clients tells us that we should expect that the nurse will continue to push on until they

eventually reach breaking point at which time the system has turned an employee with minor impairment and symptoms into a worker who is likely to face significant challenges in returning to work and ultimately become a long tail claim for the scheme to have to finance.

25. Further, the ALA submits that the combined effect of proposed sections 8G and 8E is that there is no compensation payable for a primary psychological injury outside of the "relevant event(s)" identified by proposed section 8E. That means there would be no compensation payable for psychological injuries caused, for example, by:

    a. overwork (for example, doctors and nurses);

    b. a single event, regardless of how serious (short of violence or criminal conduct – see more below regarding the definition of bullying); or

    c. abuse from customers or clients of a business.

26. It is unclear to the ALA how the scheme actuaries can properly assess the financial risk to the scheme of workers who develop minor symptoms potentially developing into a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction. These will be workers who have not lodged a claim as they do not meet the definition of 'psychological injury' but may later lodge a claim once their symptoms are 'significant'. Because they haven't lodged a claim or made notification of injury there will be no record of how many workers of this type there are. Failure to properly assess that risk will result in the scheme being potentially over or under funded in years to come and result in further amendments needing to be made.

Sexual harassment, racial harassment and bullying

27. The effect of proposed sections 8E and 8G is that a worker who is subject to bullying, racial harassment or sexual harassment is required to prove that conduct in a tribunal, commission or court.

28. There has been too little information provided on exactly how this will work for the ALA to have specific comments on how the system will work. We understand from the Explanatory Note that there will be another bill to follow that will contain more detail and somehow puts

the jurisdiction in the Industrial Relations Commission of New South Wales (IRC). For now, we make the following observations:

a. We assume that the worker and the employer will both be unrepresented at the IRC.

b. It is unclear what incentive there would be for the employer to turn up and engage in the proceedings at the IRC.

c. Whilst the IRC is typically a no costs jurisdiction it is unclear if the either party will be entitled to representation and if the successful party will obtain a costs order.

d. If representation is anticipated, it is unclear whether any consideration has been given to the fact that these changes may result in a worker needing two separate lawyers – one for the IRC proceeding and one for the workers compensation claim.

e. Regardless of whether the worker and/or employer will be entitled to representation there will be an increase in costs on the employer. This will occur either through increased legal costs or loss of productivity with the employer representing themselves.

f. It is unclear if the decisions of the IRC will be appealable.

g. It is unclear if there will be estoppel issues that arise from decisions of the IRC and bind employer (and consequently the WC insurer later on).

h. It is unclear how evidence will be taken and if there will be a right of cross examination. Would this allow an employer to directly cross examine a worker who has accused them of sexual harassment, racial harassment or bullying.

i. It is likely to add trauma to an employee who has to engage in litigation directly with their employer.

j. If there is no legal representation at the IRC then the case management of large numbers of unsophisticated self-represented applicants with psychological symptoms will prove challenging.

k. It will effectively ensure that any employee who lodges an application will not return to work with their employer.

l. It is unclear why the Personal Injury Commission could not resolve disputes of this nature through an expedited application process with the employee and employer being represented by solicitors and the insurer maintaining some input into how the matter is, or is not, defended. The idea of having a "one stop shop" to resolve disputes involving workers compensation is nothing new and has been the subject of recommendations by the Standing Committee in the past.

A Principal Assessment

29. The Exposure Draft introduces the concept of 'Principal Assessment' into the workers compensation scheme. It appears that the idea for these amendments has its genesis in complaints made by icare that a settlement by way of complying agreement does not have the same force as those disputes resolved by way of assessment by the Personal Injury Commission. If that was the concern the problem can be solved by methods other than the adoption of 'principal assessments'

30. The initial, fundamental, problem with principal assessments is that SIRA should not, in any way, be actively involved in dispute resolution. This has been discussed at length in the 2015 Standing Committee Review of the Workers Compensation System ("2015 Review") and the ALA refers this Committee to the findings of that review. SIRA is the regulator and dispute resolution should be left to the parties or, failing that, the judiciary.

31. A further problem arises from the complex nature of assessment of whole person impairment under the AMA V. The way the provisions are currently set out appears to contemplate that neither the worker nor the insurer will have the ability to obtain their own independent medical assessment for the purposes of trying to resolve the dispute. It is not always easy for a lawyer, let alone an unsophisticated injured worker, to fully appreciate what ratable impairment they may have without having obtained expert medical evidence. Without that independent expert evidence injured workers are likely to miss out on ratable impairments simply because they are not aware that they should be seeking agreement with the insurer to be referred for assessment.

32. The proposed section 153H(3) refers to items that 'must' be agreed between the parties before the principal assessment can occur but does not seem to provide any guidance on how a dispute will be resolved where one of the items cannot be agreed. Is it intended that SIRA

would resolve the dispute, or is it intended that an application will be made to the PIC? Disputes of this nature are currently resolved in the PIC by a member with the benefit of expert medical evidence being relied upon by the parties.

"Reasonably necessary" versus "reasonable and necessary"

33. The Exposure Draft replaces "reasonably necessary" with "reasonable and necessary" in sections 60 and 60AA for treatment and rehabilitation expenses as well as domestic assistance. This applies to all injured workers.

34. It appears that these amendments adopt the recommendations in the *icare and State Insurance and Care Governance Act 2015 Independent Review (McDougall Review)*, which suggests that the "reasonably necessary" test has led to poor outcomes and the funding of low value treatments. However, there does not appear to be any data to support this.

35. This amendment will make it more difficult for <u>all</u> injured workers to access treatment and therefore hinder their rehabilitation as well as their chances of returning to work. It sets a higher bar than the "reasonably necessary" test, without a clear benefit to injured workers.

36. It is submitted that if the "reasonable and necessary" test is adopted, that the entitlement to treatment and care should be extended, and not remain dependent on the receipt of weekly benefits or on a worker's degree of permanent impairment. It should be based on the injured worker's needs and the benefits to be gained from the treatment and care.

WPI threshold

37. The Exposure Draft limits weekly payments to 130 weeks for psychological injuries, unless the worker's degree of permanent impairment is at least 31% (sections 38, 39 and 39A).

38. The Exposure Draft also prevents workers with psychological injuries from making lump sum permanent impairment claims and from making work injury damages claims, unless their degree of permanent impairment is at least 31% (sections 65A and 151H).

39. In commenting on the effect of thresholds and the entitlement to one claim, the independent reviewer observed in his report that (at page 269, paragraph 111):

> *It is hardly surprising to learn that this encourages workers to put off the assessment for as long as possible.*

40. Putting off the assessment for as long as possible has the effect of creating uncertainty for participants in the scheme and uncertainty for the actuaries looking to set premiums. It is akin to the uncertainty that the scheme currently endures with respect to the unknown number of workers who may return for payments following a section 39 dispute. Continuing in his analysis the independent reviewer also observed (at page 269, paragraph 112):

> *It is also hardly surprising that the deferral of WPI assessment might lead to unnecessary medical interventions during the period when compensation is available. Workers with an injury that may or may not require further medical treatment in future years have an obvious and understandable incentive to seek that treatment during the period, rather than waiting to see if it is needed.*

41. The ALA anticipates that workers will delay their assessment until they can be confident they will have reasonable prospects of success in reaching the 31% threshold.

42. No doubt this Committee will hear a number of submissions from stakeholders about how few workers are currently assessed at 31% WPI or higher in the current system. That is, injured workers who are being provided the treatment and financial support they need are typically assessed lower than 31% WPI.

43. Moving forward we will not be operating in the current environment. We will be operating in an environment where workers who do not meet the 31% threshold will be cut off. They will be isolated, without treatment and without financial support from the workers compensation system. They will be left to fend for themselves.

44. The ALA encourages this Standing Committee to seek the expert opinion of psychiatrists on what they anticipate will be the impact on injured workers cut off from their benefits. The experience of our members tells us that those who are isolated and without treatment are at risk of rapid deterioration. As this Standing Committee would no doubt be aware there have been a number of reported suicides attributable to workers being cut off from benefits that flowed from the 2012 amendments. There is no reason to believe that the same risks will not surface here.

45. It is submitted that these amendments are likely to eliminate most claims for psychological injuries. In the experience of our members, workers with psychological injuries are rarely assessed as having a degree of permanent impairment that is at least 31%. Reaching a degree

of permanent impairment of at least 31% for a psychological injury is near impossible. That is not because psychological injuries do not cause significant disabilities and incapacities. The rarity is more of a reflection of the restrictions imposed by the Psychiatric Impairment Rating Scale (PIRS) used to assess whole person impairment arising from psychological injuries. Indeed, there are many examples of workers with an agreed or assessed degree of permanent impairment of 15% or less that are suffering from permanent incapacity due to their injuries and have not been able to return to any form of work.

46. Comparing the threshold adopted in one state versus another is problematic as not all states adopt the same assessment criteria. 31% in one state can mean a very different experience compared to 31% in another state.

47. Our members routinely represent injured workers who are unable to return to work at all or in any capacity resembling their pre-injury capacity, due to the far reaching and permanent impact of their psychological injuries. To restrict their ability to continue to receive weekly payments beyond 130 weeks and to make claims for lump sum permanent impairment compensation, will result in significant disadvantage to these workers.

48. Moreover, many psychological injuries arise from the negligence of employers in failing to implement safe systems of work and failing to address bullying and harassment. To prevent workers with psychological injuries from making work injury damages claims unless their degree of permanent impairment is at least 31% will likely result in a decline in work health and safety measures, rather than improvement.

49. It is submitted that if amendments are made to the above mentioned sections, the threshold of at least 21% permanent impairment should be considered. While the threshold of at least 21% is also difficult to meet, it would not have the far reaching disadvantageous consequences of the proposed “at least 31%”.

The WPI threshold and common law entitlements

50. The proposed amendments to section 151H(2) provides for an increase in the threshold required to make a common law damages claim to 31% WPI.

51. As pointed out above, increasing the threshold for (including for work injury damages)creates uncertainty and unintended consequences. The solution to the uncertainty and lack of

support is to maintain the threshold for work injury damages of at least 15% WPI. There is no reason why the threshold for common law damages needs to be increased.

52. It is the long tail nature of the scheme and the falling return to work rates for injured workers with psychological injuries that has increased year on year and is putting the financial pressure on the scheme. The ALA has not seen a single submission by any stakeholder that it is the number of common law claims causing the financial pressure. Allowing workers to bring a common law claim:

    a. reduces the psychological impact on injured workers by giving them closure, removing them from the scheme, and thereby allowing them to move on and reduce the burden on the public.

    b. closes the loop on the claim thereby reducing uncertainty in premium setting by knowing workers will not comeback many years later to assert they have reached the 31% threshold.

Further assessment

53. Restriction to one assessment and one claim was first introduced in the 2012 amending legislation. Even before its introduction there was concern that restricting workers to one assessment would cause problems. The Joint Select Committee in its 2012 Report stated:

> *[t]he Committee however believes that in some isolated cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition.*

54. The Joint Select Committee recommended as follows:

> *That the NSW Government ensure that, under the Workers Compensation Scheme, after the determination of a claim for whole person impairment, only [sic] up to two further claims be permitted and in each case only if there has been a deterioration of whole person impairment of at least 5 per cent since the last determination.*

55. Over the years that followed many submissions have been made and considered. Once such review that considered the issue was the Independent Review of the icare and *State Insurance and Care Governance Act 2015* by the Hon Robert McDougall QC. In his report, following careful consideration made the following recommendation:

> *That the legislature give consideration to amending the Workplace Injury Management and Workers Compensation Act 1998 to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.*

56. The issue was once again the focus of consideration during the 2023 Review in which the following recommendation was made:

> *That the NSW Government considers amending the workers compensation legislation to:*
> - *enable a further assessment of whole person impairment where there has been a significant deterioration in relation to an injury.*
> - *ensure there is a consistent threshold for whole person impairment regardless of whether the injury is physical or psychological in nature.*

57. The ALA supports this recommendation, and we note that the NSW Government's response was to support it in principle.

58. The point of contention is how you define "significant deterioration". The Exposure Draft seeks to do this by adopting the language "unexpected and material deterioration" and limits defining it to only occur if

> *(a) At the time the original principal assessment there was no reasonable cause to believe the worker's condition would deteriorate, and*
>
> *(b) The deterioration results in an increase in the worker's degree of permanent impairment of at least a further 20 percentage points.*

59. The first issue arises in subsection (a) around whether 'there was no reasonable cause to believe the worker's condition would deteriorate'. In many cases this will effectively rule out access to a further assessment on the basis that most deteriorations can be reasonably foreseen. For example, a worker who has had a left knee replacement and is advised that in due course he is likely to sustain damage to the right knee due to overuse will, if that comes to pass, be unable to establish that there was 'no reasonable cause to believe' their condition would deteriorate.

60. The ALA anticipated that these provisions will result in increased disputation around what the question whether there was or was not reasonable cause to believe. Presumably these disputes would need to occur before the further principal assessment occurs.

61. The second issue arises in respect to the requirement to establish a further 20% WPI. With the threshold to make a lump sum claim under section 66 for a physical injury currently sitting at 11% WPI the requirement to establish a further 20% WPI before a further principal

assessment is made is so unreasonably high to effectively be meaningless and near impossible. With a proposed threshold of 31% in psychological claims a further 20% would be so high as to effectively make it impossible. In either case this change would only open further assessments up to workers with highest needs.

62. As stated above, from as far back as 2012 consideration had been given to opening up of a claim for deterioration of at least 5% WPI. No sound policy reason has been given as to why 20% has been adopted in this bill and we can only assume it has been put there to create the illusion of an entitlement of a right to a further deterioration. The ALA submits that the 20% threshold is so high as to be capricious and does not meet the spirit of the recommendations previously made by this Committee and the independent reviewer.

63. Leaving aside the threshold itself, the drafting of the clauses creates some potential issues that may have the unintended consequence of creating a circular barrier to accessing the further principal assessment. That circular barrier arises because you can only get a further principal assessment if the worker and insurer agree there has been a deterioration of at least 20% WPI but in forming their view neither can get an assessment to determine if the worker has reached that threshold.

64. Presumably the worker could not be in a position to ask the insurer to concede the point with the benefit of their own assessment and the insurer could only agree to the point if they have seen or obtained a report to support the claim. If all that occurs, it then begs the question, if the worker and the insurer do happen to agree that the worker has incurred a greater than 20% WPI deterioration and that there was no reasonable cause to believe would eventuate then why should we force the parties to the costs of attending a further principal assessment.

65. The ALA recommends that the requirement to establish that there was reasonable cause to believe the worker's condition would deteriorate be removed and the threshold be amended to 5%.

Commutations

66. The Exposure Draft makes several amendments to Division 9 Part 3 of the Act which deals with commutation of compensation. The ALA supports the intention to modify the process of commutation payments under the scheme.

67. The benefit of a commutation payment is that they provide greater clarity as to the overall cost of a claim to the scheme as the payment of a commutation benefit ends once and for all, all entitlements to compensation as a consequence of a workplace injury and prevents future claims for compensation benefits.

68. The ALA submits that the pre-conditions for consideration of a commutation payment be removed so as to allow all potential claims to be the subject of a commutation payment.

69. The ALA submits that provided that an injured worker is legally represented and understands the nature and effect of a commutation payment, then with the additional safeguard of the payment being approved by the President, there is sufficient protection to ensure that the payment is in the best interests of the worker.

70. The Exposure Draft continues the current requirement that the ability for a commutation payment to be made continues to be subject to a 15% WPI threshold. The ALA submits that no threshold should apply to prevent a commutation payment being made; however, if a threshold should apply, then the threshold should be reduced to 11% which is the equivalent percentage for what is required for a Section 66 permanent impairment payment for physical injuries.

71. The Exposure Draft at clause 87EA(2) seeks to extend the ability to commute benefits for cases which will be prescribed by regulation as a "case is of a class prescribed by the regulations to which this subsection applies,…". The ALA submits that the proposed amendment not be made as the prescribing of a class of cases is only likely to create legal argument as to what is or is not a case that is prescribed.

72. The ability for workers to receive a commutation payment to enable them to exit the workers compensation system has been the subject of several submissions by previous persons/organisations to this Standing Committee and has also been suggested when reform of the scheme has been previously discussed. The ALA supports amendments to the Act so as to make the process of approval and receipt of commutation payments simpler and less bureaucratic for injured workers to access an approval for a payment than is currently the case and what is proposed by the Exposure Draft.

Death benefits

73. The introduction of sections 32AA, 32AB and 32AC into the 1987 Act are welcome by the ALA. The ability to navigate a resolution in a death benefit claim is long overdue and reflects previous submissions that have been made by the ALA.

74. The one comment that the ALA wished to make on the point is in relation to what will ultimately be contained in the savings and transitional provisions. That is, in our view, there is no good policy reason as to why these provisions could not be applied to all claims no matter when the death occurred and at least from 5 August 2015.

75. Any suggestion that this will open up the "floodgates" is misguided. These provisions will only be applicable where a worker has died and the death benefit claim has not yet been resolved. The claims that have not yet been resolved are the very ones that have complex factual and causation issues that are being litigated and are the very claims that these provisions are aimed at. The ability to compromise claims will ensure that grieving families can look at the commercial reality of long protected litigation on a very difficult subject and make a decision to resolve that dispute or not.

76. To the extent that there is any concern that a family who would otherwise not have pursued a hopeless claim will now pursue one in the hope of achieving a compromised settlement then this concern should be dismissed. The provisions do not create a right to make a claim. They merely create a mechanism to resolve the dispute. If an insurer is faced with a claim with no merits it is not forced to make an offer of settlement they can, and should, run their defence if the situation merits it.

77. The ALA submits that should the provisions on compromising death benefits be introduced in the same terms as set out in the Exposure Draft then they should apply to all deaths occurring on or after 5 August 2015.

Increased disputation

78. Many of the proposed provisions in the Exposure Draft, if enacted, will necessarily increase disputation between workers and employers/insurers and, hence, the flow-on effect will be reduced return to work rates, delays in treatment, delays in the restoration of health, and significantly increased costs of the system.

79. The ALA submits that increased disputation must be resisted in a system that already encourages disputes and is adversarial by its nature.

Legal costs

80. The Exposure Draft moves the setting of maximum costs for legal costs provided by the ILARS scheme from IRO to being determined by the regulations. This decision undermines the functions and independence of the IRO. Administering the ILARS scheme is a large part of the IRO's functions. Removing the ability to administer it as it sees fit effectively makes the IRO a caretaker with no responsibility for the success or failure of the system it runs.

81. There has been no suggestion by anyone that the ILARS guidelines and rates of pay represent a failure that need rectifying. Quite the contrary, the vast majority of submissions from all stakeholders go to the unsuitability of schedule 6 and point to the ILARS guidelines as representing an improvement on the current schedule.

82. The only criticism that has ever been made has been in relation to the increase costs of the scheme. But this is not surprising given the increasing number of claims- this is hardly the fault of the IRO.

83. Clause Part 5, Schedule 5 of the *Personal Injury Commission Act 2020* (NSW) and the requirement that ILARS guidelines are to be tabled before both houses of NSW Parliament already provide sufficient protection and oversight as to the guidelines.

84. Accordingly, the ALA submits that this Standing Committee should recommend that the proposed changes to section 337 be removed.

Conclusion

85. The Australian Lawyers Alliance (ALA) acknowledges that reform is required to the scheme; however, it is respectfully submitted that the Exposure Draft is not the solution to the problems which are being considered by the Standing Committee.

86. If legislation is enacted in accordance with the Exposure Draft, it will more likely than not result in significant impact on the rights of not only psychologically injured workers but all

injured workers. In addition it will result in increased complexity in navigating the scheme for all stakeholders, including many employers and insurers.

87. The ALA submits that the Exposure Draft appears to be a hastily prepared response to the problems facing the scheme, and the better approach would be for there to be extensive consultation with all stakeholders to explore scheme reform which will result in the desired outcomes.

88. The ALA welcomes the opportunity to have input to the Standing Committee on Law and Justice on the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW).

89. The ALA is available to provide further assistance to the Standing Committee, including by giving evidence at a public hearing, on the issues raised in this submission.

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