

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

Name: Kim Garling

Date Received: 15 May 2025

Submission to the Law & Justice Committee of the NSW Legislative Council

Reference on the workers Compensation Legislation Amendment Bill 2025 – Exposure Draft

Hearing – 16 May 2025

It is important to confirm that the government may at any time make amendments to legislation that governs the workers compensation scheme. There have been many amendments since the last major reform in 2012.

The result is complex legislation which is not easily understood even by specialist lawyers.

This submission refers to the draft Exposure Bill but also where relevant may contain comment on prior media articles.

While there are 43 pages of proposed amendments I propose to confine my submission to the financial sustainability of the Scheme and the proposed amendments to compensation for psychological injuries.

Background

In the Explanatory Memorandum issued by the Treasurer with an Exposure Draft of a proposed Bill on or about 8 May 2025 it stated:

“This is to address the fact that the NSW workplace health and safety and workers compensation laws are failing to prevent psychological injuries and failing to treat those with psychological injuries quickly”

And further:

“stronger definition of compensable psychological injuries so that workers and employers can better navigate the workers compensation system”

There was a shopping list of other changes to the system including modernising benefits and compensation thresholds to better reflect the cost of living and community expectations.

From the public comments by various members of the government and including the opinion piece from Mr Hunter for Business NSW it appears that the major issue is said to be the current and future cost of psychological claims across the whole system.

That reflects one of the reasons for this enquiry and that is to address the financial stale sustainability of the system.

Without specifically addressing every media article which allegedly contain comments¹ by various ministers it may be appropriate to concentrate on comments to the effect that the scheme is not sustainable without these changes for a further two years. Thus these changes are urgent.

The CEO of Business NSW recently set out his opinion in an article in the Daily Telegraph in which he stated:

“However, we have a workers’ compensation scheme in NSW that is out of control.

The workers comp deficit has hit \$3.6 billion, growing by \$1.8 billion last year alone, or nearly \$5 million a day. Injury claims and the associated costs, particularly for psychological claims, are driving the cost of premiums to unacceptable levels.

The workers compensation scheme has become an all-to-common entry point for workplace disputes between managers and staff.

We have heard dozens of cases recently where the scheme has been used as a defence against low level workplace disputes and underperformance.

In one case a worker – already doing only half the workload of other team members – was being performance managed due to poor performance. They logged off after a performance discussion and notified the leader that they had developed a psychological injury.

¹ I am not suggesting that the comments were actually made.

The claim was denied but the worker won on appeal at the Personal Injury Commission, based on her “perception of being overworked”.

Three years later, the claimant is still not fit to work more than 16 hours per week. The business has been forced to pay a significantly higher insurance premium, spent countless hours dealing with the issue and can’t replace the worker.

It is no wonder psychological injury claims have skyrocketed, creating a system where businesses with no previous claims at all are facing insurance premium hikes of 36% over the next three years if we do nothing. For a business that has experienced some previous compensation claims the increase will be more like 50 – 100%.

Psychological injury claims have increased by 65% between 2021-22 and 2023-24, according to the State Insurance Regulatory Authority (SIRA).

In 2023-24 alone, there were 11,464 psychological injury claims, with each claim taking longer to process and being more complex than physical injuries.”

In order to understand how the workers compensation scheme operates and to appreciate the correct context for the above explanatory note and media comment,

There are in fact at least four separate groups of the scheme which provide funding for workers injured at work. Each of these four separate groups operates differently and have different pressures and reasons as to why workers injured in their employ.

It is not simply one scheme with common factors across the board.

The biggest in the group is the Workers Compensation Insurance Fund which is owned by the Employers and Workers and is held on trust by and managed by Icare.

This is best known as the Nominal Insurer and protects about 350,000 employers against claims against them and through those employers there are over 3.5 million workers.

There are three other groups of employers who are classified as self insurers because they manage their own funds from which their obligations to compensate injured workers under the legislation are met.

The largest of these self insurer funds is that which provides protection to government agencies and departments in their capacity as employers and is known as the Treasury Managed Fund. That fund is managed by Treasury on behalf of the Government and has an arrangement with iCare for external claims managers to manage the claims but under the control of the various agencies and departments.

The other two groups of self insurers have been licensed by the State Insurance Regulatory Authority and whether they operate successfully is a matter for themselves.

In considering the reasons for questioning the sustainability of the whole workers compensation scheme it is important to observe that in the article I refer to there is a statement that in 2023-24 there were 11,464 psychological injury claims. That number is correct however there were 113,874 claims of all types across all employers which gives the context..

That represents just 10% of all claims in the system.

Obviously, that means there are 90% of claims which arise from physical injuries.

When considering in further detail of the areas where these injuries arise it is necessary to observe that in the largest scheme being that of the Nominal Insurer there was only 7% of claims that arose from psychological injuries which of course means that 93% arose from physical injuries.

That part of the scheme being the Treasury managed fund which covers government employers had a significantly different result. Of the 21,776 claims lodged 4,572 were as a result of psychological injuries which represents 21% of the claims against that fund.

It is not entirely clear as to how many of those claims arise from those made by first responders who are exempt from the reforms in 2012 and are not affected by the current proposals. Those claims will continue.

In considering the numbers of claims that are quoted there is no data indicating how many of those claims have actually been accepted and have resulted in payments of weekly income support or medical treatment expenses.

The financial statements for the nominal insurer fund indicate that the fund received more premiums than it paid out in claims for the 2023-24 year.

It is important to address the other allegations set out in the opinion piece

The author of that opinion piece also claimed that it was no wonder that psychological injury claims have skyrocketed. That claim flies in the face of the data available from the iCare annual reports which indicates that four years ago psychological injury claims represented 6% of all claims in the nominal insurer scheme and in the two years following reduced to 5% of all claims.

If that is a skyrocket then it exploded spectacularly somewhere else.

The author of that opinion piece also suggests that there are dozens of claims which arose from low level workplace disputes between employer and worker. As is well known for a worker who claims to be injured then he or she has to attend upon a general practitioner and obtain a certificate of capacity whereby the general practitioner sets out the details of the injury and provides an opinion as to how long the worker will need to recover capacity.

It occurs to me that if there are a substantial number of instances where it may be suggested that a medical practitioner has given a certificate as to the capacity of the worker and the circumstances of the injury which is incorrect then that must occur on the basis of information from the worker which is apparently incorrect or result from an opinion which is wrong.

That can only arise in instances of negligence by the medical practitioner or if there is fraud occurring somewhere in the system.

Given the number of claims that will have been the subject of a certificate of capacity from a medical practitioner it seems unlikely that many of them will have been given by a single practitioner and therefore I would suggest that these cases should immediately be referred to the claims managers in the first instance for further consideration to determine whether the allegations could be justified.

Of course, may be that the concerns raised by the employers are not correct and they have been responsible for the psychological injuries.

The allegations cannot stand as justified without proper investigation of the individual cases.

Financial Sustainability

The Government has already announced that there are significant financial deficiencies with the current funding of the obligations to compensate injured workers and in particular that the scheme is unsustainable in its current form.

The Workers Compensation Scheme in New South Wales currently has a range of individual funding mechanisms which can broadly be categorised as the Nominal Insurer; the Treasury Managed Fund which is a Self Insurer; and other private insurers.

For the purposes of this submission I propose to concentrate on only two:

[A] The Nominal Insurer (NI)

[B] Treasury Managed Fund (TMF)

The Nominal Insurer manages the Workers Compensation Insurance Fund which provides the funding for private businesses and protects about 350,000 private businesses in the State. These businesses employ about 3.5 million workers.

The Treasury Managed Fund is owned and managed by the government through the Treasury. It protects Government Departments and Agencies which employ about 400,000 workers.

The two Funds are completely separate, funded differently, and claims are managed differently even though claims for both are managed by external Claims Managers.

It is completely misleading to try and conflict the management of these two funds or their individual financial position.

The Nominal Insurer

According to the annual report of iCare for the year ended 30 June 2024 being the last audited accounts available.

It reports that in that year there were 72,321 new claims arising from a work injury².

It also reports that the volume of psychological injuries in the year ended 30 June 2021 was only 6% of the total claims reported. In the following two years the percentage of overall claims had been reduced to 5%. In the recent year it had increased to 7%.

This is a very minor percentage correction given that 93% remain for other injuries.

There does not appear to be any report of the number of claims admitted or the number denied. I have been unable to determine of the claims denied how many were subsequently admitted. There does not appear to be any data about the outcome of matters denied but which are subsequently agreed to in the Personal Injury Commission.

There does not appear to be any report about the types of injuries and the estimate at the time of notification as to the seriousness all the reasons for the claim. There does not appear to be in the reporting of data concerning return to work rates that measures what the return to work should have been based on the medical information available.

It is difficult to appreciate from that information how it can be suggested that the nominal insurer fund is somehow not sustainable into the future.

I quote from the annual report:

“psychological injuries have **increased year on year**.”

² I use work injury as a broad description of the wider definition.

The chart set out below that comment records the number of new claims received in each year as follows:

Y/e 30 June 2021	3687	6%
Y/e 30 June 2022	3166	5%
Y/e 30 June 2023	3760	5%
Y/e 30 June 2024	5344	7%

That statement is simply incorrect as the number of claims declined in 2021/22 and remained at the same percentage of claims.

The report then sets records that for the NI, 70% of the psychological claims reported are caused by harassment and work pressure. These would be relatively minor and straightforward claims however without more detailed statistics it is difficult to comment.

The annual financial statements for the Nominal Insurer fund record that in the year ended 30 June 2024 the fund received \$4.482bn in premiums and paid out \$3.889bn in claims leaving a cash positive result and compared to the previous year it received \$3.793bn in premiums and paid out \$3,273bn in claims. Again another positive result

In fact if one considers the financial position of the fund for the year ended 30 June 2020 it demonstrates that the fund held assets of around \$19bn against future claims of a similar amount which were estimated to be paid over more than five years.

The financial position of the fund remains much the same. That is it holds sufficient assets to meet its future liabilities over time not all on the one date being the end of the financial year.

This is particularly the case that the fund is held on trust for employers and workers and to the extent that there is any significant shortfall then a levy can be made on employers or a reduction in benefits to accommodate the then financial position.

That is obviously not on the horizon at the present time.

According to the published results the average premium paid by an employer for each worker is under \$1500 pa.

When considered in relation to the other operating expenses of a business one has to take into account that in addition to any wage a worker receives the Employer contributes additional monies by way of superannuation, leave provisions and payroll tax.

TMF

According to the annual report of iCare for the year ended 30 June 2024 being the last audited accounts available.

It reports that in that year there were 21,776 new claims arising from a work injury³.

It also reports that the volume of psychological injuries in the year ended 30 June 2021 was 20% of the total claims reported. In the following two years the percentage of overall claims had been reduced to 18%. In the recent year it had increased to 21%.

Again this data does not reflect an increase in each year.

In order to understand the relevance of these claims the Annual Report also states:

“While for the TMF, these injuries are increasingly driven by exposure to trauma, occupational violence and assaults. As an example, the emergency services sector, particularly in its claims related to Post Traumatic Stress Disorder (PTSD) is being impacted by these challenges, as many employees with PTSD cannot return to their pre-injury jobs”

It would appear that these figures relate to such high risk occupations such as first responders and nurses and teachers.

There can be no comparison of the causes to those injuries arising in the Nominal Insurer Fund.

³ I use work injury as a broad description of the wider definition.

How the Government determines the collection of funds from departments and agencies is entirely a matter for Treasury and themselves and how the Government determines what reserves are necessary within this fund is entirely a matter for them.

It is important to appreciate that in the annual report from iCare for 2020/2021 concerning the Treasury Managed Fund it was reported:

There is ongoing pressure driven by psychological claims with an increase in the number of psychological injuries reaching higher whole person impairment thresholds.

The TMF has experienced a substantial increase in psychological injury claims across Government workers. These claims have a higher average cost compared to physical injury claims, and if the trend continues, the TMF funding ratio will deteriorate further. There is ongoing pressure driven by psychological claims with an increase in the number of psychological injuries reaching higher whole person impairment thresholds

This has been well known for at least five years and I would expect that the Public Service Commission and the departmental heads of those agencies and departments which have the higher number of claims would have been hard at work to overcome any such increase.

Sustainability of this fund is entirely different to the sustainability of the Nominal Insurer Fund and there can be no comparison.

Draft Legislation regarding psychological claims

Psychological injury is now defined to mean an

“injury that is a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction”⁴.

This amendment of the injury definition impacts over 4 million workers across the whole system but does not include exempt workers which include first responders but does include nurses and teachers.

This definition has caused great concern among medical professionals.

In the relatively short time since the exposure draft was released, I have been informed by a number of consultant psychiatrists, that it would be extremely unlikely that a general practitioner would have the experience or skills to make such a diagnosis.

One response was in the following terms:

“The three conditions listed would need a consultant psychiatrist diagnosis. The evidence shows that some GP’s struggle to differentiate bipolar depression from recurrent depression or PTSD from adjustment.”

As best as I can tell from the enquiries I have made there is considerable doubt as to whether a diagnosis can be made in less than a month after the incident in question and often may take a year or more.

Obviously, there will be differing views, however it seems probable that a worker who suffers an emotional response to a workplace incident and who is off work and who has no capacity for work will not be able to be assessed immediately.

This worker although maybe satisfying the definition will be off work without any income and will have to wait for at least a month or more to commence being considered by the Claims Manager for eligibility for benefits.

Of course, a worker who may not meet that initial diagnosis will be off work and unsure of whether she or he is ever to be eligible for compensation for their lost income or medical costs (including the fee to the psychiatrist for the assessment).

⁴ Section 8A

Whether a worker is diagnosed as satisfying the definition or not they are excluded from receiving any assistance from the Independent Review Officer either by way of general assistance or funding for legal advice to understand their rights and entitlements in a very complex environment.

Where a worker successfully is diagnosed as having satisfied the first gateway and suffers from a psychiatric injury then that worker is not eligible to receive compensation until the following barriers are overcome:

The second stage which has to be considered by the consultant psychiatrist is whether the requirements of Section 8E are satisfied. That refers to the requirement that the psychiatric injury to arise from an event or relevant events:

A relevant event is defined:

- [A](1) A worker being subjected to an act of violence or a threat of violence or being subjected to indictable criminal conduct, or
- [A](2) witnessing an act of violence, a motor accident, a natural disaster, a fire or another accident which results in death or serious injury or the threat of either; or
- [B] experiencing vicarious trauma within the meaning of section 8H,
- [C] A worker being subjected to conduct that a tribunal, commission or court has found is sexual harassment, or racial harassment, or bullying

The Psychiatrist undertaking the assessment would then have to determine on the facts as told to her or him by the worker that the psychiatric injury arose from one of the following:

- [a] An actual act of violence which may also have evidence of a physical injury;
- [b] A threat of violence which may be difficult to determine as it would arise from the worker's point of view and may result from a sensitivity that worker has which may not be otherwise considered as an actual threat. There are also issues about what amounts to a threat of violence.

- [c] A worker being subjected to an indictable criminal offence but not an alleged offence.

A short version of an “indictable criminal offence” is an offence that may be prosecuted on indictment in either the Supreme Court or the District Court and include assault; stealing; fraud; murder; robbery, serious sexual offence and some types of burglary.

This simple version is complicated because there are a number of indictable offences which may be dealt with summarily and may therefore not ever be the subject of indictment.

- [d] witnessing an act of violence a motor accident a natural disaster or fire or another accident which results in death or serious injury or the threat of death or serious injury.

Having achieved a successful assessment at this second stage the worker is then subject to further assessment by the psychiatrist to whether:

“There is a real and substantial connection between the relevant event or series of relevant events and the worker’s employment”

And then a determination by the psychiatrist that employment is the “main contributing factor to the psychological injury.”

Having achieved success with that assessment and the Claims manager agreeing and accepting that assessment then the worker is entitled to weekly benefits for 130 weeks and medical benefits for only a further 52 weeks.

There are exemptions for workers assessed as having a certified degree of whole person impairment over 31%. I do not propose to dwell on injured workers with such a degree of permanent impairment because the substantial agreement amongst psychiatrists is such a degree is almost unheard of as arising from a psychological injury.

Returning to the requirements of section 8E and moving to

[B] experiencing vicarious trauma within the meaning of section 8H,

Section 8H provides:

Vicarious trauma (1) (2) 8I A worker experiences vicarious trauma if the worker becomes aware of any of the following acts or incidents that resulted in the injury to, or death of, a person (the victim) with whom the worker has a close work connection— (a) (b) (c) (d) an act of violence, indictable criminal conduct, a motor accident, a natural disaster, a fire or another accident, an act or incident prescribed by the regulations. The worker has a close work connection with the victim only if— (a) there is a real and substantial connection between the worker and the victim, and (b) the connection arose because of the worker's employment

[C] categories of psychiatric injury requiring additional findings

A worker who has suffered a psychiatric injury is defined in circumstances where it arose from sexual harassment racial harassment or bullying the injured worker then has to ensure the further step of having that conduct which is caused that injury being subject of a decision of a tribunal, a commission or a court.

It is not clear whether that involves the worker in making an application to a tribunal a commission or a court for a finding that the conduct that caused the psychiatric injury is actually sexual harassment racial harassment or bullying within the terms of this legislation.

It is not clear whether where a colleague who has subjected the worker to sexual harassment and may be prosecuted for that conduct and found to be guilty is sufficient for the purposes of this section. It is not clear whether it has to be a particular application with a particular finding that the conduct was as alleged.

It is possible that there may be evidence about sexual harassment in other jurisdictions but is not clear whether in that jurisdiction the determination of the tribunal has to be to the effect that the conduct not only amounted to sexual harassment but was a cause of the psychological injury specifically.

Similarly racial harassment can be dealt with by other jurisdictions and a similar comment applies.

However there is no current jurisdiction for a finding to be made about bullying unless it involves some physical injury and could be the subject of a prosecution in the local Court.

It has been suggested by the Treasurer in a media release that there is to be a new jurisdiction in the Industrial Commission however that legislation has yet to be the subject of any draft legislation.

There has been no public comment about the funding necessary for applications to the Commission or the infrastructure necessary to manage applications.

At the present time that would only apply to public servants subject to that jurisdiction and on the current figures that may be as high as 2000 applications annually which would be 40 each week and may spread across the whole state.

There has not been any public announcement or suggestion as to how workers who claimed to be injured as a result of sexual harassment racial harassment or bullying should meet the cost of those applications and no suggestion as to how the alleged perpetrator would also be represented for the purpose of any such application.

Having achieved a pass in the first two stages of the journey to be eligible for compensation the worker who is off work because of a suspected injury still has to satisfy other tests.

Assuming that the suggestion which I have just referred to is only partially correct and there is evidence to show that such a diagnosis can be easily made and also be made by a general practitioner then the following situation may apply.

The assessment by the medical practitioner in this scenario having concluded that the injury meets the definition of psychiatric injury then the medical practitioner would also have to consider whether the cause of the injury had a real and substantial connection between the relevant event or series of relevant events and the worker's employment.

If the psychiatrist determines that an injured workers condition satisfies the test in the definition then the following provisions apply but only if the injured worker meets that test.

The next fundamental requirement is that a relevant event or series of relevant events must have caused the primary psychological injury

Notifying the employer of any psychological injury arising from [C] is not a notification for the purposes of commencing a claim for weekly compensation, medical treatment (including counselling).

How does this work in practice:

For workers who suffered a psychological injury as a result of being subjected to or witnessing an act of violence or a threat of violence or being subjected to indictable criminal conduct then that worker having received the opinion or assessment as to the disorder arising from that relevant event would be then entitled to notify the claims manager (insurer) of that injury and then be subject to the scrutiny by the claims manager of the circumstances of the relevant event (which may now be months ago) and a further assessment where appropriate of the justification for the assessment as a psychological injury.

I am sure it is not essential in this submission for me to set out the different possibilities particularly for first responders and nurses.

For workers who suffer a psychological injury as a result of being subjected to conduct that a Tribunal Commission or Court has found is sexual harassment or racial harassment or bullying then the situation is quite different.

Although these workers would be immediately off work as a result of the consequences of that relevant event then a dilemma arises.

Firstly for those workers who are subject to the current jurisdiction of the Industrial Relations Commission they would be required to lodge application in that Commission to have a finding that they had been subjected to such conduct or

alternatively they would await the outcome of an action in the court system which at present may take some years.

For those workers who are not subject to the current jurisdiction of the Industrial Relations Commission than they would be required to seek to have a prosecution of the offender in the court system and would not have the opportunity of the matter being referred to the industrial commission.

Of course that is not clear from the current draft package that has been released.

Having endured the pathway for an injured worker to receive a determination by a psychiatrist that they suffered a psychological injury and depending upon the category as set out above then endured the court system the worker then faces the next hurdle which is to overcome the presumption that if it arose out of circumstances surrounding reasonable employment that they overcome requirements in that section.

I am unable to comment further until the details of this new IRC Jurisdiction is available.

I have restricted my submission to the above matters rather than canvassing the whole of the proposed amendments and I'm sure my colleague Roshana May will have covered those in her submission.

As I indicated earlier there are always competing views with reference to competing interpretations of data. I have set out my view but I recognise that there will be other views which may have more merit than mine.

I do hope that the Committee may be assisted by this submission.

Kim Garling

15 May 2025