Submission No 41

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

Organisation: NSW Bar Association

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NEW SOUTH WALES
BAR ASSOCIATION

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15 May 2025

The Hon Greg Donnelly, MLC
Chair, Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: Law@parliament.nsw.gov.au

Dear Chair,

Inquiry into proposed changes to liability and entitlements for psychological injury in New South Wales

1. The New South Wales Bar **Association** thanks the Standing Committee on Law and Justice for the opportunity to make a submission regarding **the inquiry** into proposed changes to liability and entitlements for psychological injury in New South Wales.

Background

2. On Friday 9 May 2025, the NSW Treasurer and the Ministers for Industrial Relations and Customer Service issued a joint media release, which included an "Exposure Draft" of the Workers Compensation Legislation Amendment Bill 2025 (**the draft Bill**). That media release advised that the draft Bill was referred to the Standing **Committee** on Law and Justice in the Legislative Council for further inquiry.

3. On Friday 9 May 2025, the Committee also advised the community that the Terms of Reference for this inquiry were:

   That the Committee inquire into and report on proposed changes to liability and entitlements for psychological injury in New South Wales, specifically:

   (a) the overall financial sustainability of the NSW workers' compensation system; and

   (b) the provisions of the Exposure Draft of the Workers Compensation Legislation Amendment Bill 2025 as provided by correspondence to the Committee.

4. On Monday 12 May 2025, the Committee invited stakeholders and the community to provide submissions to the inquiry by midday on Thursday 15 May 2025.

5. This is an unreasonable timeframe for stakeholders and the community to provide appropriate consideration of the draft Bill and formulate submissions that will be of assistance to the work of this Committee.

6. In the Treasurer's address to the Legislative Council on 18 March 2025, he noted that NSW's workplace health and safety laws and workers compensation scheme may directly impact as many as 4 million workers and 338,000 businesses. A genuine and considered consultation process with stakeholders and the wider community is critical for ensuring that any reforms of this potential scope and significance are fit-for-purpose and meet the needs of the NSW community. A rushed inquiry process, imposed by the NSW Government, is unsatisfactory for the community, for businesses and for the millions of workers who rely on the workers compensation scheme.

7. Despite the short period of time, the Association has prepared the following submission to assist the Committee and the Parliament to understand some of the practical problems with the workers

compensation scheme and the proposed approach set out in the draft Bill. An extension of time, for stakeholders to provide additional submissions, would be welcomed, so that the draft Bill can be appropriately considered.

8. Rushed legislation can produce unintended, harsh and embarrassing consequences. For example, the Workers Compensation Legislation Amendment Bill 2012 brought about the extraordinary situation that certain amputees were unable to obtain replacement prosthetic limbs. The Standing Committee subsequently had to devote a great deal of time to identifying and amending the provisions which had that effect.

The NSW Government's rationale for the proposed reforms

9. A media release from the Treasurer, dated 18 March 2025, and an address by the Premier to the Legislative Assembly on 19 March 2025 raised concerns about an increase in the projected deficit of the scheme as a result of payments being made for psychological injuries. The media release and the Premier's address contemplate a range of potential reforms to address the issue.

10. It is assumed that the increasing deficits referred to by the Premier and Treasurer were identified via actuarial advice. That advice, and its underlying assumptions, appear to have been kept confidential. This prevents stakeholders and the community from understanding the assumptions underlying that advice and the extent of the projected deficit. The quantum of the payments made for psychological injuries also appears to have been kept confidential.

11. This approach should be contrasted with what occurs in the field of motor accident insurance, where law reform proposals are routinely discussed in conjunction with released actuarial information.

12. The suggested changes referred to in the Premier's address can be summarised as:

    (a) Giving "*the Industrial Relations Commission a bullying and harassment jurisdiction, requiring those claims to be heard first before compensation is applied for and paid out.*"

    (b) "*Reform of workplaces*".

13. The Premier, in his address, also stated that in addition to these reforms, "*a proper jurisdiction in the Industrial Relations Commission will fix these problems root and branch, rather than paying people out and hoping the problem goes away.*"

14. The Treasurer's media release referred to the following reforms:

    (a) Defining "*psychological injury*" and "*reasonable management action*".

    (b) Setting a different "*whole-person impairment threshold*" like that in South Australia and Queensland,

    (c) Adopting "*some of the anti-fraud measures recently adopted by the Commonwealth to protect the National Disability Insurance Scheme.*"

    (d) Implementing "*many of the recommendations Robert McDougall made in his independent review of Safe Work NSW. As well as recommendations the State Insurance Regulatory Authority and our own Law and Justice Committee have made too.*"

15. The Treasurer's media release described the intention behind the proposed change to be to:

    (a) "*curb the rising number of psychological injuries people are experiencing at work*"; and

    (b) "*treat those with psychological injuries quickly.*"

Comments about the causes of the problems and some potential solutions

16. The Treasurer's media release observed that the rise in psychological injury cases seemed to be "*coinciding with social and technological changes and growing awareness of mental health*". The Association agrees with these observations and notes that a practical consequence of technological change and increasing mechanisation in NSW is that fewer workers are engaged in strenuous physical activities and more are engaged in sedentary work of a clerical nature. The incidence of physical injuries is therefore decreasing, and psychological injuries represent a larger proportion of the claims being made.

17. It is also worth observing that a proportion of workplace psychological injuries results from what are essentially interpersonal conflicts that occur over a period of time. Another proportion of these injuries is the result of more dramatic events – such as devastating traumatic events witnessed by emergency service workers, or the traumatic incidents experienced by workers such as teachers, when they are assaulted in the workplace. Moreover, recently there has been significant media attention devoted to similar trauma suffered by workers in the hospitality and retail sector, arising from harassment and assault in workplaces involving customer service. This aspect underscores that the risk of psychological injury is not confined to any particular occupation and illustrates that changes to the workers compensation regime will have far-reaching consequences across all NSW workplaces.

18. The government's general comments and proposed legislation appear to be directed at matters involving interpersonal conflict. If this is the intention, care needs to be taken that unintended changes are not made to the entitlements of workers who are exposed to sudden and significant trauma.

19. The causes of such interpersonal conflict are numerous. In the Association's view, there is a range of different approaches to trying to reduce the incidence and severity of such conflicts, without resorting to the mechanisms proposed in the draft Bill.

20. The Premier's speech refers to "*Reform of workplaces*" and giving "*the Industrial Relations Commission a bullying and harassment jurisdiction*" as two approaches.

21. In referring to workplace reform, the Premier may be indicating a range of activities by government and other interest groups to try to reduce the incidence and degree of interpersonal conflicts in the workplace. Some activities which may assist, include:

    (a) Education campaigns (perhaps in conjunction with industry groups and unions) which better inform employees about the risks of causing psychological harm to their colleagues and how to reduce that risk.

    (b) Endeavouring to ensure organisations have sufficient human and other resources to perform their tasks, so as to avoid overwork and fatigue contributing to mental illness or conflict.

    (c) A sufficiently resourced NSW Ombudsman, and/or other Ombudsman type office, which can suitably enquire into organisations that generate complaints of conflict and overwork. The Association would welcome discussions about whether this could potentially be performed within the Industrial Relations Commission (**IRC**).

    (d) Aggrieved employees being able to approach the IRC for suitable relief. In providing for this, consideration needs to be given to how the required degree of professional assistance can be appropriately provided. Unions can play a very practical role with such matters, but of course many employees do not have union membership.

Reducing the costs of psychological claims

22. Members of the Association observe a range of matters which are inflating the costs of psychological injury claims. They include:

    (a) Workers delaying seeking treatment because of the stigma associated with mental health issues and making a complaint or a claim.

    (b) Actions by insurers and scheme agents which delay the provision of medical care and/or result in the inappropriate early withdrawal of medical care.

    (c) The practical reality that the health system (public and private) does not have the resources to supply the frequently required medical care and, in many regional areas, any care at all. This issue was explored in the recently-concluded Special Commission of Inquiry into Healthcare Funding, the report of which has not yet been released by government.

    (d) The reluctance of the colleagues and supervisors of injured workers to fairly describe what their actions have been.

    (e) Insurers and scheme agents wasting money on unnecessary consultants.

    (f) The inability of insurers and scheme agents to collate the required evidence to successfully defend claims by utilising the existing section 11A *Workers Compensation Act 1987* (**WCA**).

    (g) The practical difficulties associated with injured workers obtaining alternative employment.

23. In the Association's view, addressing these matters is likely to make a significant difference to the apparent cost of the scheme, while avoiding the far reaching consequences that this draft Bill will have on workers across NSW who suffer a psychological injury at work.

24. Workplace education activities would greatly assist with the issue described in [22(a)]. For example, if workers were made aware of the early symptoms of worsening anxiety and depressive type conditions, early confidential treatment through their GP might prevent the condition worsening. It can also prompt individuals, where possible, to remove themselves from situations that are damaging their health.

25. The Treasurer's media release, quoted at [15] above, observed that it is important to "*treat those with psychological injuries quickly*." The Association strongly agrees. According to the Association's members, the Scheme is often failing to achieve this. For many workers, early treatment will often support a quick return to work. If it is delayed, psychological injuries can drastically worsen, preventing or significantly delaying a return to work.

26. The Association suggests that this is an area worthy of particular attention. On its face, the existing legislation seems to facilitate this with provisional payments. However, the reality is often that many workers struggle to obtain early treatment. The reasons for this are numerous, and defy a simple answer. Availability and affordability of treatment are further important considerations.

27. However, one thing is clear - if a worker had to successfully take a bullying and harassment allegation to the IRC before any compensation could be "*applied for and paid out*" (as the Premier's address, quoted at 12(a) above, stated), there would be no practical possibility of the worker receiving quick treatment. It would instead be delayed by months, and perhaps longer. The existing problem of delay in accessing treatment will, without doubt, be exacerbated.

28. In the Association's view, this sort of approach, leading as it would to delay in the provision of medical treatment, would have the obvious potential to increase the overall cost of claims, and prevent the laudable aim of facilitating quick treatment so that injured workers might return to work. In a similar vein, the

provision of weekly compensation benefits should not be delayed, as a continuing income stream is essential to maintain health and to facilitate a quicker return to work.

29. As referred to in 22(c) above, the health system (public and private) is unable to provide the typical care required. That of course is a matter affected by general State and Commonwealth resourcing, and market forces, but it is worth observing that rational economic theory dictates the costs of treating injured workers should be borne by the activity that causes the damage. That is, the economic activities of employers. Imposing the cost on employers as a collective group has historically been done through requiring workers compensation insurance. Employers should not be excused from collectively paying for the needs their activities create.

30. The reluctance of fellow employees and supervisors to describe fairly what occurred (see 22(d) above) can be partially addressed through workplace education that encourages all employees to be fairer and more balanced in what they describe. This includes education that employees and supervisors will not and should not be penalised for simply being truthful.

31. Any practice of insurers and scheme agents wasting funds on unnecessary consultants is one that iCare and SIRA should address. From the observations of the Association's members, there is one practice which has questionable value. This is the use of so-called "Vocational Capacity Reports" by insurers and scheme agents. It is understood these reports can cost between $3,000 to $5,000 each. They are produced by what has become a small industry of consultants, who are paid the report fees by insurers and scheme agents. The report fees are then included in the claim costs for the worker in question.

32. The reports are written by various authors with varying qualifications. Many of them simply describe themselves as "Rehabilitation Consultants", and typically hold a Bachelor of Arts with a major in psychology. Some disclose no qualifications. A few are registered nurses, and a small number are occupational therapists or physiotherapists. Very occasionally a medical practitioner is described as being a joint author, although the extent of their contribution to the report is often unclear.

33. These reports assert that a worker has the ability to work in some kind of employment and to earn a certain weekly amount. Some of the authors self-describe that they do not have the expertise to provide an opinion on the degree of fitness of a worker, and they typically adopt an identified medical opinion, and then set out various salary and wage rates for certain jobs which they assert come within the expressed degree of fitness. Some of the authors advance their own purported opinion as to the degree of fitness, despite having no medical qualifications.

34. These types of report did not exist before the 1990s, but the vocational capacity report writing industry has been successful in purveying its services since that time. Claims managers are now used to seeing them and seem to think they are required for the purposes of normal claims management.

35. Before such reports existed, claims managers would note the sort of work medical practitioners were describing that an individual was fit to perform and then look at relevant job advertisements in local newspapers to form an administrative decision as to what the worker could earn in the open labour market. They would then adjust or end the workers weekly compensation accordingly (which the worker was at liberty to dispute in the then Workers Compensation Commission). There was no added cost to the scheme from this administrative process. In contrast, what happens now is that claims officers are spending up to $5,000 of iCare's money to engage an 'expert' to tell them something that they could find by simply looking at "Seek" on their desktop computer and keeping a copy of the online advertisement on the claim file.

36. The sometimes limited and often non-existent medical expertise of the authors of these reports means that decision makers in disputed claims (i.e., judges or Personal Injury Commission members) essentially never

accept the expressed opinions on work fitness contained in these reports. In other words, they are a waste of iCare's funds.

37. Significant funds are also spent on rehabilitation consultants. The experience of the Association's members is that longer term recipients of weekly benefits often have persuasive stories about impractical rehabilitation efforts. The reasons surrounding such failures are varied and also escape simple analysis. The Association urges the Committee and the government to examine the reasons behind such expenditures, with a view to limiting the waste.

38. The current section 11A WCA provides a complete defence to a workers compensation claim if the worker's psychological injury is 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*."

39. The task of collating the evidence that can establish this defence is now left to the claims officers working for insurers and scheme agents. It is a concern that these officers are often not legally-qualified, and do not necessarily have the training to collate the required evidence in a persuasive admissible form, so as to mount an effective defence under section 11A. The current funding arrangements for scheme agent solicitors do not provide any fees for such external solicitors to be used for such purposes. Lawyers are therefore not used to perform the task. The claims officers are however allowed to retain loss assessors to prepare reports about such matters, and do that.

40. The loss assessors seem typically to charge around $3,000 to $5,000 for such reports. The sub-contracting investigators who undertake the work are likely to be paid around $1,000 to $2,000. This investigator will be a licensed enquiry agent, but would not typically be legally qualified. The quality of the evidence they collate is variable. They often fail to obtain statements from important witnesses, or the statements they do obtain are of poor quality, and the evidence carries little weight. As a result, defences which may otherwise have successfully relied on section 11A will fail, and the scheme will acquire a large liability it could otherwise have avoided.

41. In contrast, if the scheme has simply spent the same $3,000 to $5,000 on an external solicitor to interview the relevant individuals and obtain the required statements, the chances of completely defending the claim would be much improved.

42. One potential solution would be to enable iCare and scheme agents to pay external solicitors to do such work.

43. The difficulty of workers finding alternative employment is also worthy of consideration. In psychological injuries of any consequence, the individual is often unable to return to the workplace where they were injured, as it may provoke anxiety about events recurring. Large employers, like the Department of Education, can address this by posting returning teachers to alternative schools. However, smaller employers typically only have one place of employment. The only practical solution in such cases is to find work with another employer.

44. Although certain changes favourable to employers have been made with a view to containing premiums, many employers are still reluctant to take on new employees who have been away from employment for a period on workers compensation. This is because they still perceive they are at risk of their premiums increasing if they employ the individual, as they (rightly or wrongly) assume they are more likely to make a further claim than some other possible employee. Further educative steps could be undertaken to try to reduce this prejudice.

45. The Association would welcome the opportunity to discuss these potential mechanisms for reducing unnecessary costs.

The NSW Government should not reduce the cost of claims by reducing the level of benefits

46. The Association does not support the NSW Government reducing the costs of claims by reducing benefits to injured workers.

47. In particular, medical treatment expenses should not be reduced. They are fundamental to any fair and sensible workers compensation scheme. From 1926 to 2012, there were no time limits or threshold requirements with respect to medical expenses. It is noteworthy that the time limits and threshold requirements introduced in 2012 resulted in workers in NSW being entitled to less compensation for medical expenses than their forbears did 100 years ago. The current entitlements should not be eroded further. In the Association's view, they should be restored to what they were before 2012.

General comments about the Workers Compensation Acts[1]

48. Virtually all recent reviews of the Acts have found that legislation in this area has become unnecessarily complex. The Acts now contain numerous redundant provisions, and even provisions that conflict with each other. The Acts should be simplified and consolidated into a single Act. Doing this would improve the performance of the scheme. The government should not make the current, unsatisfactory situation worse by adding further unnecessary provisions.

49. Legislative changes to the Acts in recent decades have proceeded on the assumption that defining concepts in detail, and trying to codify required matters, will improve the scheme. There is a role for both approaches, but they have not, overall, improved matters. Especially when first introduced, detailed definitions and unnecessary codification tends to create uncertainty, which adds to delays, legal costs, appeals and the like.

50. The definition of some concepts, such as injury or reasonable conduct, is in the Association's opinion best kept concise and general.

51. The practice of setting out required functional detail in future supporting regulations, rather than in the body of the proposed Acts, is unfortunate. It prevents parliament and individuals or organisations understanding, and scrutinising, how a Bill will ultimately operate. It is preferable to include the details in the Bills.

52. The proposed changes are directed to psychological injures and not physical injuries. The expressed reasoning behind this is that psychological injuries are becoming more common and that therefore the benefits payable for them need to be reduced. This approach is predicated on the peculiar proposition that psychological injuries should be treated differently from physical injuries. It is informative to compare this with physical conditions that are increasing in frequency. For example, there is (appropriately in our view) no suggestion that the significantly increasing rates of silicosis caused by dust inhalation by construction workers requires a reduction in the benefits that are payable to them.

The draft bill

53. In the limited time available, the Association is unable to provide more than preliminary, and likely incomplete, comments as to specific provisions in the draft Bill. The Association's decision not to provide comments in response to certain provisions should not be understood as agreement or disagreement with those provisions.

54. Proposed subsection 8A attempts to define "*psychological injury*". This is not required. All parties rely on the medical profession in relation to such matters. They spend a great deal of time producing analytical

[1] Abbreviations used in the following sections of this submission: 'WCA' – *Workers Compensation Act 1987*; 'WIM' – *Workplace Injury Management and Workers Compensation Act 1998*; and 'The Acts' – the combined provisions of WCA and WIM.

texts which describe and provide diagnostic terms for various psychological conditions. The existing Acts refer to psychological injuries in general terms (with section 11A(3) containing a minor exception). This has been adequate for some time and remains appropriate.

55. Proposed subsection 8A also adds a requirement that to be a psychological injury the relevant dysfunction has to be "*significant*". This interposes a further threshold that a worker is required to prove, and hence a further area of potential preliminary factual dispute which will increase delays and costs. The Association defers to the expertise of medical professionals. However, it may reasonably be assumed that a particular condition would not be diagnosed unless it were significant in the first place. As such, the proposed provision does not serve a useful purpose.

56. Proposed subsections 8B and 8C attempt to define "*primary psychological injury*" and "*secondary psychological injury*". This is also unnecessary. The terms already exist in section 65A of the WCA, and in the Association's experience, there have not been problems with decision-makers distinguishing between primary and secondary psychological injuries.

57. Proposed subsection 8D attempts to define "*reasonable management action*", which is then reused in revised subsection 11A to provide that compensation is not payable for certain employment-related psychological injuries. Subsection 11A in the current Act has been in operation for a long time. It has a short general phrase in it which provides that compensation is not payable for psychological injury that is "*wholly or predominantly caused by reasonable actions taken with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*."

58. The meaning of subsection 11A, and its practical application, has been well-clarified by appellate decisions. It provides a complete defence to employers in these situations, if the employer can prove that its requirements are satisfied. As discussed above, in the experience of the Association's members, the main practical problem with the attempted use of the defence is the inadequate evidence that has been collated by the insurer or scheme agent – rather than the words of the subsection itself.

59. The proposed subsection 11A in the draft Bill will make it easier for employers to avoid paying compensation. This is largely because it reduces the causative requirement previously imposed. Instead of the employer's reasonable disciplinary or other actions having to be the whole or predominant cause of the injury, the various expanded set of reasonable actions only need to be a "*significant cause of the psychological injury*". This is an easier evidentiary requirement to discharge. Although as already noted, there is not any point in reducing the evidentiary requirement, unless the scheme provides for a system that can competently collate the required evidence to do this.

60. In other words, this statutory effort to reduce the amount of compensation that is payable will not work, unless the individuals with the required skills to collate the evidentiary statements and medical reports that are needed, are able to do so. This means the insurers and scheme agents need to be able to retain solicitors who are paid sufficient fees to permit this to occur.

61. Proposed subsection 8E in the draft Bill attempts to define what is a "*relevant event*". These are events such as being assaulted, witnessing gruesome scenes, sexual or racial harassment, or being bullied. There are then further provisions that attempt to define harassment and bullying.

62. The purpose in creating a new defined term of a "*relevant event*" is then found in proposed subsection 8F which provides that "*notification*" of a psychological injury caused by sexual or racial harassment or bullying is "*taken not to have been given*" unless the worker has provided a "*finding of harassment or bullying made by the tribunal, commission or court*". The identity of the tribunals, commissions or courts being referred to does not seem to be described in the draft Bill. Whatever the body is, it would need to have the jurisdiction to make such a finding. At the present time this would seem to be limited to the Personal Injury Commission and (for some workers, such as coal miners) the District Court of NSW.

63. The Premier's address, referred to previously, seems to indicate that the IRC would be given the role of making these findings. It is therefore assumed that some other Bill is being prepared which gives it the required jurisdiction.

64. In considering these proposed sections it must be appreciated that section 254(1) of the WIM provides that compensation is not recoverable by an injured worker unless "*notice of the injury is given*". Hence, what the proposed subsection 8F does is to prevent a worker, who has been injured by bullying or sexual or racial harassment, from receiving any workers compensation, including medical expenses or weekly benefits, until that worker has obtained a finding from a tribunal, commission or court confirming that the person has been subject to bullying or such harassment.

65. There are several serious difficulties with this proposal.

66. The first has been referred to in the preliminary commentary to these submissions. As noted by the Treasurer in his speech to the Legislative Council, it is desirable for psychologically injured workers to receive prompt medical treatment. This has the obvious potential to promote a quick recovery and return to paid employment. This proposed section will prevent that laudable aim being achieved. A worker may never have the resources to bring the required proceedings in the tribunal, commission or court. Even if the worker does, they will be delayed by the many months that are required for the relevant body to come to its decision. This also prevents quick treatment being provided and prevents the worker from receiving any income in the form of weekly compensation.

67. It is appreciated that the proposed new subsection 148B seems to be an attempt to ameliorate this situation by creating a new concept of a "*work pressure disorder*" and "*a special work pressure payment*" for medical expenses for a limited period of 8 weeks. The significant problem is that it assumes the worker can obtain a finding from a tribunal, commission or court within 8 weeks. That is entirely unrealistic.

68. It is also not clear whether the "*work pressure disorder*" payment will in fact cover injuries alleged to have been caused by sexual harassment, racial harassment and bullying and harassment as it is specifically defined to mean *"a mental or psychiatric disorder caused by or arising from the pressures placed on a worker in the course of the worker's employment but only if the employment was the main contributing factor to the worker experiencing the disorder"*. This definition appears to be targeting overwork/excessive workloads, rather than harassment, unless harassment here includes unreasonable workloads.

69. Another problem concerns matters where the insurer or scheme agents quickly determine that a worker has been psychologically injured by bullying or sexual or racial harassment. There is often no preliminary factual dispute about this. In these situations, the proposed provisions would have the perverse effect of preventing the insurer from paying the compensation it has administratively decided it should be paying. That is because the proposed subsection 8F does not provide for any alternative - it mandates that notice has not been given until the finding has been obtained. This will result in pointless proceedings that will involve unnecessary costs.

70. Proposed subsection 8H attempts to define a new term "*vicarious trauma*". Under the proposed subsection, this essentially involves a worker becoming aware that a closely connected individual (such as a work colleague) has been injured or killed in a workplace accident. The preceding proposed subsection 8G then provides that no compensation is payable for a psychological injury caused by such "vicarious trauma". These provisions are not required, because the law, as described by the Court of Appeal, already produces that result: *Zinc Corporation Ltd & Anor v Scarce* (1995) 12 NSWCCR 566.

71. Proposed subsection 39A provides that workers who have suffered a "*primary psychiatric injury*" cannot receive weekly benefits for more than a combined period (which is usually cumulative) of 130 weeks. This limit does not apply if the worker is assessed as having a degree of permanent impairment (**WPI**) of 31% or more.

72. Virtually no workers are ever assessed as having a psychological injury that produces an impairment of 31% or more. This is an extremely harsh provision that significantly changes the benefits payable. In short, this provision will effectively end workers compensation for psychological injury in NSW.

73. The current situation is that any injured worker, including those with primary or secondary psychological injuries, can receive benefits for up to 260 weeks, as long as they are totally unfit for all work or, if they have residual work capacity, are working for at least 15 hours a week. In addition, any worker who has a WPI of 21% or more, can potentially access weekly benefits to 68 years of age.

74. Workers, who have been devastated by a workplace injury, would be required to rely on Centrelink benefits to live after only 130 weeks, despite being unfit for any work as a result of conditions such as post-traumatic stress disorder. This will include police officers, fire brigade members, nurses, doctors, security guards, teachers, care workers and so on. In the Association's view, this is an unacceptable outcome and will fail to meet community expectations.

75. Proposed subsection 39A(4) is also an entirely unreasonable provision, as its clear intention is to cut costs at the worker's expense. Currently, if a person is assessed at greater than 20% WPI, they are entitled to ongoing weekly benefits beyond 260 weeks, as if there were no cessation of weekly benefits. This new provision states that when the assessment of 31% or more occurs, weekly benefits will start again, but only from the date of the assessment. If a worker's weekly compensation had ceased because 130 weeks expired, and the assessment is not for another year, the worker could be left without compensation for a year. Centrelink ought not to be required to pay to support a worker in circumstances where the employer is liable to pay.

76. The proposed change to subsection 59A is also very harsh to workers who suffer a primary psychiatric injury. Under the current Act, which as noted above is already inferior to the Acts that applied between 1926 and 2012, such workers can have their medical expenses paid for 2 years after they cease to be entitled to weekly benefits. Hence most workers have cover for 130 weeks plus 2 years – which is a total of 4 ½ years. This is extended to 7 ½ years if they have a WPI between 11% and 20%, and lifetime cover if they are 21% or more.

77. The proposed new subsection 59A is very different. It would create a situation where workers with a primary psychiatric injury are only entitled to 3 ½ years of cover for medical expenses. This applies regardless of their eventual WPI. After that, they would have to privately fund their medical care, or more likely, seek treatment from an already overloaded public health system. This too is unacceptable. The Association does not accept that the scheme is unable to fund the medical expenses of such workers.

78. Furthermore, there is no legitimate or logical reason why workers with a primary psychological injury should be treated differently from workers with physical injuries and secondary psychological injuries.

79. The proposed revision to subsection 65A also significantly changes the potential entitlement to lump sum compensation for primary psychiatric injury under section 66. The current threshold, before any lump sum compensation is payable, is a 15% WPI. The proposed revision will impose a threshold of 31%. As a practical matter, this will essentially abolish lump sum compensation for such injuries, as virtually no one is ever assessed as having an impairment that high for a primary psychiatric injury.

80. By virtue of a proposed revision to subsection 151H, this new 31% threshold will also apply to any damages claim. For similar reasons, this will have the practical effect of abolishing damages claims for such injuries.

Provisions in the Bill which apply generally to all injuries and which are not directed to psychological injuries

81. As noted previously, the Treasurer's address referred to implementing certain recommendations made in the "McDougall review". The Bill does that in a number of ways, as discussed below.

82. Proposed subsections 32AA, 32AB and 32AC provide a method of entering into a compromise settlement relating to certain death benefit claims. This is a useful addition to the Act.

83. Certain other provisions (such as a revision to section 25) also amend the Act to change the amount of certain benefit levels. It is useful for a reader of the Bill to appreciate that these amendments do not actually increase the amount of any benefits. This is because the higher figures already apply, by virtue of the routine indexing of the Act's benefits that reside in various statutory instruments. The purpose of them is to bring the substantive text of the WCA temporarily up to date with those changes.

84. Subsections 87EA to 87I contain provisions which reintroduce generally available overall lump sum commutation settlements. This is a promising development. The main problem with the provision in the draft Bill is that the circumstances where a liability can be commuted are to be "*prescribed by the regulations*". It would be preferable for these to be set out in the body of the draft Bill, as without that detail, it is impossible to know the practical effects of these proposed amendments. In recent years, a near identical provision did not pass the Legislative Council for this reason.

85. Another problem is that the sensible safeguard of requiring independent approval is a task to be performed by the President of the Personal Injury Commission. In reality, this task would be given by the President to their delegates. With some exceptions, these tend to be less experienced decision-makers in that jurisdiction. It is suggested the approval process should lie with the Personal Injury Commission, rather than the President. That way the approval process would be performed by the Members of the Commission, who tend to be far more experienced and hence would be better able to consider the wide range of matters referred to in proposed subsection 87EA(2A).

Conclusion

86. As noted, the limited time available has not permitted the Association to consider the other proposed changes to the Acts and the scheme. Genuine consultation and community consideration is required on reforms of this significance and scope, rather than a rushed and unsatisfactory inquiry process, which has been imposed by the NSW Government.

87. The Association thanks the Committee for considering this correspondence and for the opportunity to appear before the inquiry on 16 May 2025. If you wish to discuss, or if the Association may be of further assistance, please do not hesitate to contact Sean Robertson, Director, Policy and Law Reform, at

Yours sincerely

Dr Ruth Higgins SC
President