Submission No 42

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

Organisation: Slater and Gordon Lawyers

Date Received: 15 May 2025

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

Submitted by
Slater and Gordon Lawyers

15 May 2025

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

Dear Chair,

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

Slater and Gordon welcomes the opportunity to make this submission to the Legislative Council Standing Committee on Law and Justice's *Inquiry into Proposed Changes to Liability and Entitlements for Psychological Injury in New South Wales* (the Inquiry).

This inquiry was referred to the Committee by the Treasurer, the Hon Daniel Mookhey MLC, to examine and report on the proposed changes outlined in the Exposure Draft of the *Workers Compensation Legislation Amendment Bill 2025*. We understand the Committee may make recommendations as part of its final report, and we respectfully urge it to do so in a manner that protects access to justice for psychologically injured workers. We encourage the Committee to focus not only on safeguarding workers' rights, but also on addressing the underlying causes of psychological injury claims, to help ensure that any reforms contribute to a fair, sustainable workers compensation system; one that avoids creating further unintended harm for injured workers and the broader New South Wales community.

WHO WE ARE

Slater and Gordon is a leading Australian consumer law firm with a proud legacy of standing up for the rights of working people. Our mission is to deliver access to justice for all – ensuring that all Australians, regardless of income or background, can enforce their legal rights and obtain fair compensation.

For more than 90 years, we have advocated for injured workers and their families. We provide expert legal services in personal injury, workers compensation, superannuation and insurance, employment law, and class actions. Our clients come from all sectors of the economy, including healthcare, construction, education, transport, emergency services, and retail.

In New South Wales, Slater and Gordon has one of the largest specialist workers compensation teams in the state. We work closely with unions, treating practitioners, and community groups to support clients navigating the complex process of claiming entitlements. Each year, we assist thousands of injured workers – many of whom are dealing with life-altering psychological trauma.

We are values-driven, legally rigorous, and deeply committed to a fair and sustainable compensation system. We have a strong history of contributing to legal and policy reform through evidence-based submissions and constructive engagement with government. That includes active collaboration with the Australian Lawyers Alliance and other stakeholders who share our commitment to improving health and safety outcomes and ensuring justice for injured workers.

OUR POSITION

Slater and Gordon is deeply concerned by the pace at which these reforms have been introduced, particularly in the absence of meaningful consultation with the legal profession, injured worker advocates, or medical experts. To date, no data or actuarial modelling has been made publicly available to support the proposition that psychological injury claims including whole person impairment (WPI) claims are placing unsustainable pressure on the scheme. Without clear evidence that such claims are contributing to systemic pressures, the rationale for targeting them in the Exposure Draft is unclear. Greater transparency and broader consultation would support confidence in the reform process and help ensure that any changes strike the right balance between sustainability and fairness for injured workers.

We are also concerned that the proposed changes fail to address the root causes of psychological injury claims in New South Wales, including systemic issues within the public sector — such as poor return-to-work (RTW) support and management practices within NSW Government agencies and the Treasury Managed Fund (TMF). Instead, the reforms risk shifting the burden onto injured workers, limiting their entitlements and access to justice. By curtailing WPI claims, the legislation may reduce accountability for negligent employers, undermining both worker protections and broader public confidence in the system. These unintended consequences will have long-lasting effects not only on psychologically injured workers, but on the fairness and integrity of the workers compensation scheme as a whole.

Slater and Gordon supports the submission made by the Australian Lawyers Alliance and endorses its recommendations in their entirety. Our submission is intended to supplement that material by highlighting specific legal, practical and clinical concerns – particularly as they relate to the clients we represent and the scheme's frontline operation.

We are especially concerned about the proposed increase in the Whole Person Impairment (WPI) threshold for psychological injury to 31%, which would simultaneously affect access to extended weekly payments, work injury damages, and lump sum compensation. In practice, it would operate as a near-complete exclusion for workers with psychological injuries.

In addition to the WPI threshold, our submission identifies further provisions that would increase legal complexity, delay access to care, and shift discretion away from treating professionals and injured workers. We include three case studies to illustrate the real-world impact of these changes on workers whose lives have been permanently altered by psychological injury.

KEY CONCERNS

While Slater and Gordon acknowledges the NSW Government's objective of improving the financial sustainability and preventative focus of the workers compensation system, we hold serious concerns about the impact of the Exposure Draft on injured workers – particularly those suffering psychological harm. We highlight three principal issues for the Committee's consideration.

1. Narrowing the Definition of Psychological Injury

We are particularly concerned about the proposed amendment to the definition of "psychological injury" under section 8A of the Act, which would redefine psychological injury as a "mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction".

This change introduces a fundamentally different and more restrictive threshold than the current scheme and represents a marked departure from long-established common law principles that have underpinned the legal understanding and assessment of psychological injuries. Rather than focusing on clinical diagnosis and functional impairment assessed by medical professionals, the proposed definition imposes a legally ambiguous and clinically undefined threshold that dysfunction must be "significant" before a psychological injury will be recognised at all.

There is a lack of clinical clarity and practical implications: The inclusion of the term *"significant"* is undefined in the legislation and lacks clinical grounding. It creates ambiguity as to what symptoms or impairments qualify, opening the door for inconsistent interpretation by insurers and courts. Psychiatric conditions often present in varying degrees and evolve over time; symptoms may begin as "minor" but can escalate rapidly without early intervention. The revised definition ignores this clinical reality and risks delaying access to treatment and support until the condition deteriorates substantially – effectively requiring workers to become more unwell before they can seek help.

In practice, this may prevent workers from making claims in the early stages of psychological distress; (for example, exposure to vicarious trauma or cumulative work-related stress), even when prompt support would enable recovery and return to work. For example, a nurse experiencing early signs of burnout, anxiety, or trauma might currently be eligible for temporary treatment and time off. Under the proposed definition, that same nurse would not be able to lodge a claim until their symptoms had

escalated to a “significant” dysfunction at which point recovery becomes far more complex, and the costs to the system increase dramatically.

There is increased administrative burden and judicial uncertainty: This ambiguous threshold will inevitably increase administrative complexity and legal disputes. Courts and tribunals will be tasked with determining what constitutes “significant” dysfunction an inherently subjective assessment that will vary between cases, judges, and jurisdictions. These disputes will add unnecessary cost and delay to the system, strain the judiciary, and prolong workers’ suffering.

Furthermore, insurers will likely challenge claims more frequently on the basis that a worker’s symptoms are not “significant” enough to meet the threshold. This will result in higher volumes of rejected claims, internal reviews, medical disputes, and appeals. The costs associated with this increased contestation for insurers, the system, and most importantly, the injured worker are difficult to quantify but will be substantial.

There is a risk to system sustainability and financial modelling: There is also a fundamental lack of transparency about the financial or actuarial modelling that underpins this definitional change. As the ALA submission notes, one of the significant risks is that the scheme may fail to account for “latent” claims workers who initially develop minor symptoms but delay lodging a claim until their condition deteriorates and meets the new definition. Since these workers may not report their injury early (because they don’t yet meet the “significant dysfunction” threshold), there will be no accurate data on their numbers or their trajectory, making it harder for actuaries to properly model future liabilities.

This creates a paradox: while the change appears aimed at cost-containment, it may actually increase long-term costs by encouraging delayed claims, worsening injuries, and generating more complex and expensive claims over time. These so-called “long-tail” claims are more difficult to manage and costlier for the scheme.

The proposed definition also risks arbitrarily excluding workers who have sustained legitimate psychological injuries that do not manifest in traditionally defined “significant” dysfunction. These could include injuries caused by:

- chronic overwork (such as in hospitals or emergency services);
- high-stress environments leading to gradual psychological breakdown; and/or
- customer abuse or repeated low-level workplace stressors.

Under the current framework, these scenarios can give rise to compensable injuries if supported by medical evidence. Under the new definition, they may be excluded entirely, not because they aren’t real injuries, but because they don’t meet a subjective threshold imposed by law rather than medicine.

Recommendations:

We strongly urge the Committee to reject the proposed redefinition of psychological injury under section 8A. The current, clinically grounded approach allows treating professionals to assess psychological harm in a nuanced and case-sensitive manner. Introducing the term “significant dysfunction” without clear clinical criteria, legal precedent, or actuarial backing will only serve to delay treatment, increase disputes, elevate system costs, and harm workers.

In our submission, if any changes are to be made to the definition of psychological injury, they must:

- *be based on robust clinical evidence and actuarial analysis;*
- *preserve access to early treatment and return-to-work pathways;*
- *avoid imposing arbitrary thresholds that exclude legitimate injuries; and*
- *minimise the administrative and judicial burden by offering clear, objective criteria.*

We also support the ALA's call for expert psychiatric evidence to be presented to the Committee regarding how psychological injuries are diagnosed, how symptoms progress, and the consequences of delaying treatment.

2. Excessive WPI Threshold for Psychological Injuries and the Impact on Common Law Rights

The proposed increase of the Whole Person Impairment (WPI) threshold for psychological injuries to **31%** represents a fundamental and unjustified restriction on access to key workers compensation entitlements. This change would significantly limit access to:

- weekly payments beyond 130 weeks (s 39A);
- medical and treatment expenses beyond one year from claim or weekly payment cessation (s 59A);
- lump sum compensation for permanent impairment (s 65A and s 66); and
- work injury damages (WID) claims for employer negligence (s 151H).

We do not support the 31% WPI threshold for the following reasons:

(a) 31% WPI is functionally unattainable and exclusionary

Under the *Psychiatric Impairment Rating Scale* (PIRS), only the most extreme cases of psychiatric injury typically involving near-total incapacity, residential care, or complete social withdrawal reach or exceed 31%. Workers suffering from major depressive disorder, PTSD, or anxiety disorders even when permanently disabling rarely meet this threshold. The current 15% standard is already stringent and ensures only seriously injured workers are eligible for compensation.

Raising the threshold would exclude the vast majority of workers with legitimate psychological injuries from accessing the support and remedies they need.

(b) No evidence or data supports this change

There is no clear data or evidence in the Exposure Draft or supporting materials to demonstrate that common law claims are driving cost pressures in the NSW workers compensation scheme. To the contrary, publicly available information and stakeholder experience strongly suggest that the financial strain stems primarily from the no-fault statutory scheme, particularly the growing volume of long-tail psychological injury claims and declining return-to-work rates, especially within the Treasury Managed Fund (TMF), which covers government employees.

In the absence of detailed financial modelling or actuarial analysis disaggregating the cost impacts of statutory versus common law claims, it is premature and unjustified to increase the WPI threshold for accessing common law remedies.

(c) Raising the threshold will increase costs, not reduce them

Counterintuitively, this proposal could increase the long-term cost burden on the scheme by keeping psychologically injured workers trapped in the statutory system for longer periods without closure. In contrast, common law claims often resolve disputes earlier, enabling workers to exit the scheme entirely and move forward. This can:

- Reduce long-tail liabilities;
- Lower the overall cost of medical and income support;
- Improve psychological outcomes for workers;
- Provide greater certainty for employers and insurers in premium setting.

(d) This reform would erode the deterrent effect of common law and reduce employer accountability

Access to common law damages serves a broader public purpose and holds negligent employers accountable and incentivises safer workplace practices. Raising the threshold to 31% WPI would severely undermine this deterrent, removing any real consequence for employer negligence in the majority of psychological injury cases. The long-term implications for workplace psychological safety and public sector risk exposure are significant.

(e) The Government's attempt to align with other jurisdictions is flawed

Impairment thresholds across jurisdictions are not directly comparable. Other states use different impairment assessment tools, legal frameworks, and medical standards. Transplanting a 31% threshold into NSW without accounting for these differences will only deepen systemic inequities and create further confusion.

The 31% threshold is not just an actuarial decision, it is a policy shift that will have lasting consequences for vulnerable workers, psychological safety standards, and the sustainability of the compensation scheme itself. We urge the Committee to approach this issue with caution, and to prioritise fairness, evidence, and public accountability in its recommendations.

Client Case Studies: The Human Impact of a 31% WPI Threshold

The following case studies illustrate the profound consequences of raising the WPI threshold for psychological injuries. Each worker below has been assessed at under 20% WPI, yet suffers from severe, permanent psychiatric injuries that have left them unable to work or function in daily life. Under the proposed 31% threshold, all of these individuals would be excluded from accessing the very benefits intended to support them.

'Dylan' (Sales Manager), WPI: 17%

Dylan sustained a psychological injury due to prolonged workplace bullying, including verbal abuse, threats, and exclusion. He was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood, requiring ongoing psychiatric treatment and multiple hospital admissions. He is now severely incapacitated, reliant on his wife for daily care, and socially withdrawn. Despite the enduring nature of his condition, Dylan would be excluded from common law damages under the proposed 31% WPI threshold, illustrating the harsh impact on workers with serious but sub-threshold impairments.

'John' (Retail Manager), WPI: 19%
John developed Post-Traumatic Stress Disorder after witnessing a fatal workplace accident in which a colleague was crushed by machinery. He had worked in the industry for nearly 30 years and had recently undertaken training to expand his skills. Following the incident, he experienced severe psychological symptoms including flashbacks, suicidal ideation, and anxiety, leading to hospitalisation. John has not returned to work and remains reliant on his partner for day-to-day care. His case shows that, under the proposed changes, a worker exposed to an extreme and traumatic workplace event – with enduring consequences – would not meet the threshold for ongoing compensation or support.

'Sarah' (Primary School Teacher), WPI: 20%
Sarah was employed at a NSW government primary school when she sustained multiple psychological injuries, including Major Depressive Disorder with psychotic and paranoid features, resulting from prolonged workplace bullying and unfounded allegations. In 2018, she attempted suicide and underwent an eight-week inpatient stay. Since that time, she has been unable to care for her children independently or leave her home without assistance and remains dependent on her husband for daily living support. Her case illustrates that, under the proposed reforms, a worker with severe, permanent psychological impairment would not be eligible for ongoing entitlements or work injury damages.

Recommendations:

We urge the Committee to:

1. *Reject the proposed 31% WPI threshold for psychological injuries. It is functionally unattainable for the vast majority of affected workers, clinically inappropriate, and unsupported by evidence.*
2. *Maintain and preserve the current 15% WPI threshold, which already filters out less serious claims and ensures only workers with substantial, lasting impairments can access lump sum compensation and common law remedies.*
3. *If the Committee considers reform necessary, the Government should:*

a) *Release comprehensive modelling and disaggregated data on the cost drivers of scheme instability — specifically distinguishing between statutory and common law claims.*
b) *Consider a lower threshold (e.g. 21% WPI) as a compromise, although we maintain this is still too high and may continue to exclude many genuinely injured workers.*
c) *Explore a tiered system that reflects both the severity and permanency of injury, rather than relying on a blunt numerical cut-off.*
d) *Preserve access to common law for those injured due to employer negligence, a foundational principle of our civil justice system that promotes both fairness and deterrence.*

3. Lack of Transitional Provisions and Uncertainty Around Retrospectivity

The Exposure Draft does not contain any transitional provisions, nor does it make clear whether the proposed reforms will apply prospectively to new claims only, or retrospectively to existing claims and entitlements. This omission creates substantial legal and practical uncertainty for thousands of workers who are currently receiving weekly payments, treatment, or pursuing claims for compensation based on the current legislative framework.

There is no clarity around whether:

- the new 130-week limit on weekly payments for psychological injuries (s 39A) will apply to current recipients;
- the proposed 31% WPI threshold will apply only to newly injured workers or also to those already in the system;
- current “exempt” workers, such as emergency service personnel, will continue to retain existing protections or be brought under the new regime.

The absence of transitional provisions raises serious concerns about the fairness and legality of retrospective application. Applying these reforms to current claims would result in the sudden removal of entitlements from workers who have relied on the existing system, potentially cutting off income and medical treatment overnight. This would not only be unjust but could give rise to legal and constitutional challenges, particularly where workers’ rights have vested under existing law.

Retrospective laws that strip individuals of existing legal entitlements without proper notice or justification are inherently unfair. Workers who are already psychologically injured – often as a result of employer negligence – should not have the rules changed mid-way through their recovery or claim process.

Recommendation:

We urge the Committee to recommend the inclusion of clear and robust transitional provisions that protect the rights of current workers and ensure that no part of the proposed reforms apply retrospectively or to the exempted category of workers. The legislation should apply only to new claims made after the commencement date, and transitional arrangements should be explicitly set out to avoid legal uncertainty, unnecessary disputes, and further harm to injured workers.

4. Definition of "Relevant Event" and Jurisdictional Concerns with the IRC

The Exposure Draft introduces a new requirement that, in order for a psychological injury caused by bullying, sexual harassment, or racial harassment to be compensable, a tribunal, commission or court must make a factual finding that the worker was subjected to a "relevant event" as defined in proposed section 8E. Specifically, conduct such as bullying, racial harassment, or sexual harassment will only be considered a relevant event if a tribunal, commission or court has made a prior determination affirming that such conduct occurred.

This change represents a fundamental shift in how psychological injuries linked to workplace harassment are treated under the workers compensation scheme. It requires workers to first litigate the facts of their injury mechanism, often in a separate jurisdiction, before they can access even basic entitlements like weekly payments or treatment.

From the Explanatory Note, it appears that these factual determinations will fall to the Industrial Relations Commission (IRC). However, the IRC is not traditionally equipped either procedurally or culturally to manage highly sensitive, trauma-informed matters involving sexual harassment, racial harassment, or bullying. These matters frequently involve vulnerable witnesses, complex psychological evidence, and power imbalances, and are more appropriately handled by bodies with specialist jurisdiction, such as the NSW Civil and Administrative Tribunal (NCAT) or the Federal Circuit and Family Court of Australia.

There are serious procedural, legal and practical concerns about this approach:

- The legislation provides no detail on how IRC proceedings will operate: whether workers or employers will be entitled to legal representation; whether costs orders will be available; whether evidence can be tested or cross-examined; and whether decisions will be binding or appealable.
- The proposed model may require injured workers to engage multiple legal representatives one to run the IRC matter and another to pursue the workers compensation claim creating confusion and increasing costs for both parties.
- If workers are self-represented, as is likely in the IRC, the process may cause additional psychological harm, particularly where workers must directly face or be cross-examined by their alleged harasser.
- The prospect of needing a tribunal finding before a claim is accepted will result in delays, during which no compensation is payable. For a psychologically injured worker, this gap in support is not only medically counterproductive but may risk further deterioration or harm.
- The risk of issue estoppel and evidentiary consequences for future common law claims is high and workers may inadvertently prejudice their civil claims by participating in proceedings with different procedural rules or evidentiary standards.
- There is no explanation has been provided for why only sexual harassment, racial harassment, and bullying are included often ignoring other forms of discrimination or psychological harm, such as that based on age, disability, gender identity, or religion.
- This system is not only procedurally confusing and duplicative, but it runs contrary to the principles of trauma-informed justice. It adds complexity and delay to an already difficult process for vulnerable workers and risks significantly undercutting access to compensation for survivors of workplace harassment.

We also adopt and support the concerns raised by the ALA, which have similarly emphasised the procedural gaps, lack of jurisdictional clarity, and potential for re-traumatisation embedded in this proposed model. The ALA has further pointed out that it is unclear why these claims could not be dealt with within the existing Personal Injury Commission (PIC) jurisdiction, through an expedited process with proper representation and oversight. This would provide a more coherent, efficient, and fairer model for handling such claims.

Recommendation:

We recommend that the Committee:

1. *Urge the Government to reconsider the requirement for prior factual findings by a tribunal, commission or court before allowing a psychological injury claim based on workplace harassment.*

2. *If such a requirement is retained, the Government must ensure that:*

a) *A dedicated, properly resourced, trauma-informed jurisdiction is established or designated (e.g. a specialised harassment division within the PIC);*
b) *Legal representation is guaranteed for workers and employers;*
c) *Procedural fairness and protections (e.g. from direct cross-examination) are built into any hearing process;*
d) *Interim benefits (such as treatment and provisional payments) are made available prior to the final finding;*
e) *A flexible limitation period is provided, with scope for extension in appropriate circumstances.*

Without these safeguards, the proposed "relevant event" requirement risks delaying justice, denying access to entitlements, and compounding the trauma experienced by psychologically injured workers.

5. Definition of "Reasonable and Necessary" Medical Treatment (s60 and s60AA)

The Exposure Draft replaces the long-established "reasonably necessary" test for medical expenses with a new requirement that treatment be "reasonable and necessary". Although similar on the surface, this shift in language may enable insurers to impose stricter standards for treatment approval.

The dual qualifier invites semantic arguments (e.g., that treatment is reasonable but not necessary), which may increase disputes, particularly in cases involving psychological care, domestic assistance or longer-term therapies.

Recommendation:
That the Committee recommend either retaining the existing "reasonably necessary" standard or requiring the Government to provide detailed justification – grounded in case law or cost-benefit evidence – for the new test, including assurance that it will not be interpreted more restrictively in practice.

CONCLUSION

Slater and Gordon supports the goal of a more sustainable, effective, and accessible workers compensation scheme in New South Wales. However, the proposed reforms raise serious concerns – both in substance and process – that risk undermining the rights and recovery of psychologically injured workers.

These sweeping changes have been introduced without meaningful consultation, engagement with legal or medical stakeholders, or transparency around the data and modelling said to justify them. In the absence of this evidence, it remains unclear whether the reforms are a targeted response to cost drivers or a blunt policy shift likely to result in inequitable and harmful outcomes.

The proposed increase in the WPI threshold for psychological injuries to 31% is particularly troubling. It is functionally unattainable for most workers, regardless of severity, and would exclude them from four key entitlements – including income support, medical treatment, lump sum compensation, and access to common law damages. No comparable threshold exists for physical injuries, making this a discriminatory and regressive measure without a clear evidentiary basis.

Additional changes in the Exposure Draft risk legal uncertainty, delayed intervention, and poorer outcomes for injured workers. These include a narrower definition of psychological injury, jurisdictional

shifts to unsuitable forums, capped benefits irrespective of need, vague legal tests, and increased thresholds without clinical or financial justification.

This package represents a significant move away from a therapeutic, evidence-based approach. Far from addressing the root causes of scheme pressure – such as poor injury management and return-to-work rates in the public sector – it may exacerbate harm to some of the most vulnerable members of the NSW workforce.

We therefore urge the Committee to recommend the publication of all data, modelling, and impact assessments underpinning these reforms. If that evidence does not exist, the reforms should not proceed.

Overall Recommendations

Slater and Gordon respectfully recommends that the Committee:

1. *Reject the proposed 31% WPI threshold and retain the current 15% standard—particularly for common law claims;*
2. *Remove or substantially amend provisions that restrict access to benefits without evidentiary support or clinical rationale;*
3. *Treat psychological injuries with parity to physical injuries across all entitlements and legal pathways;*
4. *Publish all relevant modelling, data, and financial assumptions used to support the proposed reforms; and*
5. *Ensure adequate transitional provisions to protect existing workers and prevent retrospective harm.*

Every day, people leave their homes and families to contribute their labour for the benefit of their employers including the NSW Government. To now propose that these same individuals be denied basic rights when they suffer a psychiatric injury in the course of their work is not only unjust, but fundamentally out of step with contemporary medical understanding and the expectations of a fair and decent society.

We thank the Committee for the opportunity to contribute to this Inquiry and stand ready to assist further including through anonymised case examples, expert clinical evidence, and detailed commentary on scheme design and function.

Yours faithfully,

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