**Submission No 52**

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

**Organisation:** StateCover Mutual

**Date Received:** 15 May 2025

Thursday, 15 May 2025

The Hon. Greg Donnelly MLC
Committee Chair
NSW Legislative Council Standing Committee on Law and Justice

Dear Chair

**Re: Inquiry into proposed changes to liability and entitlements for psychological injury in NSW**

As the only specialised workers compensation insurer in New South Wales for local government, insuring 131 Member Local Government Organisations with coverage for more than 39,000 employees, StateCover Mutual is pleased to provide our submission to the inquiry and our feedback on the Exposure Draft Amendment to the Workers Compensation Act.

StateCover supports three fundamental principles in relation to a healthy workers compensation system for NSW:

1. Workers are protected with a focus on prevention
2. Early intervention should be the priority over compensation
3. A sustainable system is required to balance the needs of both workers and employers.

With these principles in mind, StateCover generally supports the amendments proposed in the Exposure Draft.

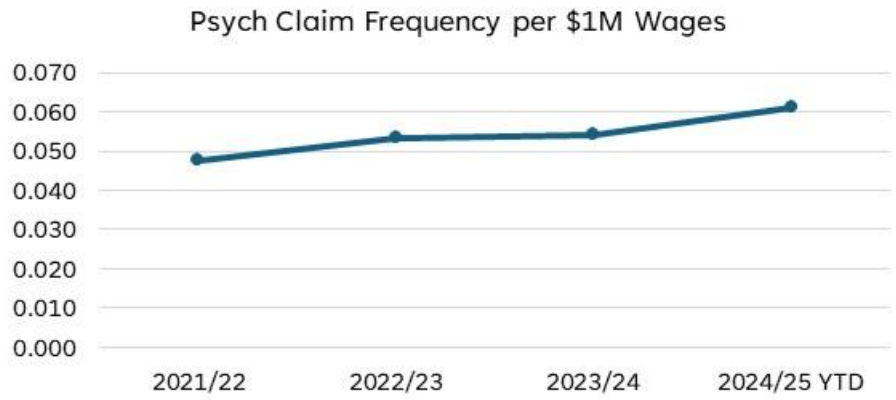
We note a critical element of the changes will be in relation to the dates of assent. Whilst a staggered approach can be useful from an operational perspective it creates a greater risk of a flurry of claims being reported in advance of the application date(s) that might not otherwise be reported. We therefore caution Parliament to consider the potential impact of any staggering of dates. There is a well-trodden path of insurance failures associated with spikes in reporting following announcement of changes that have led to insolvency.

Below we outline StateCover and its Members' experience with psychological injury claims, together with our feedback on the proposed amendments and other areas of reform announced by the Treasurer.

## Trends in psychological injury – the need for change

Claims for psychological injury have increased in prevalence in our sector in recent years. As the legislation and regulations currently stand, the *perception* of an injury is one of the most fundamental issues in the system. With the compensation element attached to a system fraught with high proportionate misdiagnosis and a no-fault liability basis, we have seen a rise in the proportion of our claims relating to alleged psychological injury and deteriorating return to work outcomes as workers and their advisors seek to reach whole person impairment thresholds that enable eligibility for lucrative work injury damages settlements.

In the 12 months from March 2024 to April 2025, StateCover received more than 250 claims for psychological injury, representing more than 10% of the claims reported in the period. In the last 3 years we have seen a 28.5% increase in psychological injury claims per $1M wages.




Return to work rates for StateCover psychological injuries are deteriorating and claims costs increasing.

- Return to work rates at 13 weeks are 47% for psychological injury versus 92% for physical injuries.
- The average cost of a psychological injury has increased from approximately 3.2 times that of a physical injury in 2021 to 4.2 times in 2025 (as at April 2025).

Increasingly, General Practitioners are providing initial certificates of capacity for new injuries which certify 4 weeks of total unfitness for work (no work capacity) with minimal diagnostic investigations undertaken and based solely on the worker's often contested version of the causative workplace events. Provisional liability supports up to 12 weeks of weekly compensation whilst investigations are undertaken to determine liability, with very limited ability to 'reasonably excuse' the commencement of weekly payments, even in the most contentious or unmeritorious claims which are ultimately disputed. Due to the extensive factual investigations typically required and a shortage of quality psychiatrists, coupled with a lower fee scale for independent medical examinations under NSW Workers Compensation, liability is not typically determined before the expiration of the 12 week provisional liability period.

The intended 'reasonable restrictions' on psychological injury claims in accordance with section 11A of the *Workers Compensation Act 1987* (as stated in the second reading speech in connection with the introduction of section 11A) have become increasingly difficult for employers to rely on, and even more difficult for employers to succeed on in the Personal Injury Commission (and its predecessor), which has seriously undermined employer confidence in the system.

A consequence of the inability to apply section 11A effectively is that employers have become increasingly reticent to address performance issues, fearing a spurious workers compensation claim and that, this in turn is having negative impacts upon others in the workplace, at times resulting in associated claims.

The lack of proper diagnostic investigations, coupled with observed delays in access to psychology and/or psychiatric treatment and reluctance of treating doctors to certify any capacity for work creates an immediate disconnection with the workplace. Yet studies show that working is one of the most significant positive impacts on our mental health. Amongst

the return-to-work tools developed by the State Insurance Regulatory Authority (SIRA) reference is made to the fact that we know:

- the longer a worker is away from work, the harder it can be to get back to work
- taking a long time off work is bad for you socially, emotionally and physically
- work helps you stay active and is an important part of your recovery

In StateCover's experience, having workers out of the workforce due to psychological injury allegations has a direct linkage to workforce shortages in local government, challenges delivering community services and a direct impact from rising insurance costs on the rate payers whose rates ultimately go towards funding their Council's insurance premiums.

### Commentary in response to the Draft Exposure Workers Compensation Amendment Bill

As noted, StateCover are broadly in support of the amendments. We have however identified some aspects that we consider require additional clarity to support decision making or that we believe may have unintended consequences and note these below.

## 1 Strengthen the definition of primary psychological injury and reasonable management actions

**Section 8D(1)**

**In the proposed new section 8D(1), 'reasonable management action' means management action –**

**(a) taken in a reasonable way, and**

**(b) that is reasonable in all the circumstances.**

StateCover foresee the phrase 'reasonable in all the circumstances' providing significant discretion to the decision-maker. Use of the word "**all**" when referring to "reasonable in <u>all</u> the circumstances" creates an unnecessary ambiguity, noting that an act or omission may be reasonable in a particular circumstance, and unreasonable in another.

Also, the use of the conjunctive 'and' rather than the disjunctive 'or' will probably make it more difficult for an employer to establish 'reasonable management action'.

For example, the Commission could find that the management action was 'taken in a reasonable way' but was **not** 'reasonable in **all** the circumstances' (leading to the defence failing) or that the management action was 'reasonable in all the circumstances' but was **not** 'taken in a reasonable way' (also leading to the defence failing).

These two expressions will probably be interpreted in different ways.

### Recommendation – clarify and amend wording

StateCover recommend that using the disjunctive 'or' would be preferable to using the conjunctive 'and' in section 8D(1)(a).

StateCover recommend that the word "all" be deleted from 8D(1)(b) and 8(2), so that the subclauses (after amendment) read "reasonable in the circumstances".

**Section 8D(2)**

Section 8D(2) provides a list of management actions that are considered reasonable, if taken in a reasonable way and reasonable in all the circumstances. We believe this expanded list of reasonable actions is a positive step and provides greater clarity to workers and employers. In StateCover's experience, an unreasonably high bar is applied by the Commission for the

employer to establish that its disciplinary or performance appraisal or other section 11A actions were reasonable. Examples include finding fault in the process adopted by the employer due to a small number of missteps in the disciplinary process (such as the timing of notice of a disciplinary meeting) which had no significant effect on the merits of the process or the appropriateness of the actual disciplinary action/outcome.

### Recommendation – clarify reasonable management action further

In StateCover's experience, a reasonable proportion of claims result from reasonable management actions relating to organisational matters such as restructure and implementation of policies and procedures. We recommend that an additional reasonable management action **"Workplace change, including restructure or implementation of policies and procedures"** be included in section 8D(2) so that the definition of reasonable management action includes workplace change that is taken in a reasonable way and that is reasonable in the circumstances.

We also propose an amendment to this section, or through the regulations, defining certain circumstances whereby there is a 'presumption' that the management actions of the employer were reasonable where the circumstances occurred during one of the reasonable management actions in 8D(2). The following list may not be exclusive but in our experience are actions where historically, the Commission has mostly refused to uphold section 11A defences raised by employers in response to psychological injury claims.

a. The worker was not advised of the employers employee assistance program in circumstances where they were already aware of the availability of the employers assistance program.

b. The worker was not invited to bring a support person or other representative to a meeting - unless the meeting was a disciplinary or dismissal meeting where substantive responses to allegations of misconduct, poor performance and/or breaches of codes of conduct or policies were being sought from the worker or substantive disciplinary, punitive or dismissal actions were being proposed to be taken against the worker.

c. The worker was not invited to bring a support person to a discussion or meeting concerning the suspension of the worker or standdown of the worker pending a subsequent disciplinary investigation (where no substantive responses to allegations of misconduct, poor performance and/or breaches of codes of conduct or policies were being sought from the worker at the time of the suspension or standdown of the worker).

d. The worker was not invited to bring a support person to a discussion or meeting involving the proposed introduction of a performance improvement plan.

e. The worker was not invited to bring a support person to a periodic performance appraisal/performance review or performance improvement plan discussion or meeting.

f. The worker was given more than 24 hours' notice of a disciplinary or performance appraisal or show cause meeting.

g. The employer issued the worker with a communication about a defined management action while the worker was on leave in circumstances where the worker had not responded to a previous communication about the same management action that was issued by the employer to the worker prior to them commencing leave.

h. The employer issued a disciplinary or dismissal outcome communication to the worker by email or letter in circumstances where the worker refused or failed to attend a disciplinary or show cause close out meeting notified by the employer to the worker and refused or failed, without reasonable cause or reasonable explanation, to agree to a

proposed rescheduling of the meeting within 5 business days of the proposed rescheduling of the meeting being communicated to them.

i. The employer directing the worker to keep the details of a disciplinary investigation confidential.

This proposed change seeks to provide further clarity to the Personal Injury Commission in interpreting what constitutes 'reasonableness' in relation to 'reasonable management actions' - in circumstances where the onus will still rest on the employer to establish reasonableness. It is submitted that the above proposed 'presumption' provision should result in a more balanced and fairer approach to the determination of the 'reasonableness' issue in the context of the statutory defence to psychological injury claims and assist in achieving the objective of the Amendment Bill.

**Section 8E**

In this section, a 'relevant event' includes being subjected to conduct that a tribunal, commission or court has found is 'sexual harassment' or 'racial harassment' or 'bullying'.

The definitions of 'racial harassment' and 'sexual harassment' in section 8E(2) are uncontroversial.

StateCover considers the definition of 'bullying' in section 8E(2) to be somewhat problematic.

The definition is as follows:

> **'Bullying', in relation to a worker, means an individual or a group of individuals repeatedly behaving unreasonably towards the worker or group of workers of which the worker is a member.**

The definition of bullying in section 8E(2) is inconsistent with the definition of bullying at section 789FD of the *Fair Work Act 2009* ("FW Act"). The definition of bullying under the FW Act is as follows:

> "(1) A worker is *bullied at work* if:
> (a) while the worker is at work in a constitutionally - covered business:
> (i) an individual; or
> (ii) a group of individuals;
> repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
> (b) that behaviour creates a risk to health and safety.
> (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner."

Whilst the difference between the definitions may appear subtle, the current Bill appears to be deficient in that it fails relate to unreasonable behaviours that "**creates a risk to health and safety**". Having different definitions of "bullying" under NSW and Federal legislation is likely to lead to confusion for employers and employees.

### Recommendation – revise the definition of bullying

It is submitted that the FW Act definition of bullying be adopted for Section 82E as it requires the worker to establish that they or a group of workers they are a member of have been 'targeted' by repeated unreasonable behaviour and requires that the behaviour must create a risk to health and safety.

## 2 Increase the threshold for eligibility for whole person impairment, ongoing weekly payments past 130 weeks and work injury damages to 31%

Our experience that the current impairment threshold results in an unhealthy 'lump sum' mentality among claimants and their advisors, unnecessarily prolonging efforts to recover and return to work and driving or encouraging an excessive or disproportionate frequency of long-term disability and unemployment.

Increasing the threshold for access to ongoing weekly payments and work injury damages would mean that workers with genuine **permanent** impairment that seriously impacts their ability to function in society and work are able to benefit from long term benefits and compensation for damages (where applicable).

We believe this amendment will significantly improve prospects for earlier recovery and return to work for those with less serious injuries, optimising participation in the workforce for this group of injured workers. A direct additional benefit of this would be a reduction in litigation and in the costs and resources associated with this.

We have some concerns with provisions and procedures related to whole person impairment assessment which we have addressed in our recommendations.

### Recommendation – address deductions for previous injuries or pre-existing conditions (all injuries)

Section 323 of the 1998 Act deals with the deduction for any proportion of impairment that is due to any previous injury or pre-existing condition or abnormality. Section 323(2) says: 'If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is '**at odds with the available evidence**.'

It is submitted that too often the default 'one tenth deduction' (Section 323 of the 1998 Act) is applied in circumstances where it has been 'at odds with the available evidence'. This is particularly prevalent with psychological injuries, where despite circumstances where claimants had significant and longstanding pre-existing or co-existing psychological conditions and abnormalities, the default one tenth deduction is routinely applied to assessments. This is inconsistent with the general prevalence of mental health conditions that impact social and vocational function in the community.

It is submitted that an alternative to section 323(2) ought to be considered in a future bill so that a better approach to determining the actual deductible proportion is applied. It is noted that section 323(2) of the 1998 Act is essentially replicated in the new 153C(2) of the1987 Act in the proposed Bill that does not appear to address this issue. In addition, consideration could be given to increasing the default deduction for pre-existing conditions (where the actual deduction will be difficult or costly to determine) to 25% for psychological injuries.

### Recommendation – address flaws in the Psychiatric Impairment Rating Scale (PIRS) and its interpretations

We recommend that consideration be given to a more objective, clinically based assessment, including psychometric testing conducted by trained clinical psychologists. Recent decisions such as *ComfortDelGro Corporation Australia Pty Ltd v Elmi- Anvari* [2024] NSWPICPD 34 have made it very difficult for insurers to compel workers to attend assessments with clinical psychologists for psychometric testing and symptom validity assessment purposes (even where the insurer's IME psychiatrist has recommended such an assessment).

StateCover is of the view, regardless of the threshold adopted, that the PIRS scale for determining the whole person impairment rating for psychiatric impairment is flawed, relying on subjective, self-reported self-care and personal hygiene, social and recreational, travel, occupational, concentration and other prescribed PIRS categories of functioning - which is very difficult to objectively verify.

The PIRS can result in a wide variance in WPI assessments, resulting in increased disputation. It is clear in a significant number of cases that claimants have read the PIRS prior to their assessments with IME psychiatrists or Commission appointed Medical Assessors. There is persuasive anecdotal information and evidence that some claimants appear to have been 'coached' in relation to the PIRS and have tailored, and in some cases misrepresented, their histories of symptoms and impaired functioning to IME psychiatrists and Commission appointed Medical Assessors to artificially inflate their WPI assessment rating. We commonly see psychological injury claimants giving subjective histories to impairment assessors about only showering and changing their clothes once or twice a week, with prompting, and of not being able to concentrate on newspaper articles for more than 5 minutes (which are actual examples given in the PIRS scales in the SIRA Impairment Guides for class 3 for self-care and personal hygiene and class 3 for concentration, persistence and pace – see pages 56 and 57 of the SIRA Impairment Guides). This has mostly been occurring in circumstances where these histories were not reported previously to any treating or medico-legal doctors. Anecdotal feedback from IME psychiatrists is that these types of reported dysfunction (particularly in relation to showering only once or twice a week, with prompting) are significantly more prevalent in workers compensation claimants compared to the histories they obtain from patients with similar psychological conditions seen in their private practices.

StateCover and our Members have experienced claimants who have been assessed with significant whole person impairment ratings (above 20%) and are later (post claim settlement), identified to have returned to higher levels of work and social functioning than the assessment indicated.

This casts significant doubt on the PIRS assessment methodology being a reliable and objective measure of actual 'permanent impairment'.

## 3 Amendment proposing one Principal Assessment for the determination of permanent impairment.

Section 153G proposes a principal assessment of permanent impairment conducted by a SIRA registered assessor. It gives the parties the opportunity to agree on a SIRA registered Medical Assessor upfront, failing which SIRA, rather than the Commission, will appoint the Medical Assessor for the purposes of the principal assessment. It seems a claimant's solicitor will make an application for a principal assessment of permanent impairment to SIRA under section 153H of the 1998 Act after reaching agreement with the insurer on the body systems or disorders to be assessed and all the medical and allied health information and the results of clinical investigations relevant to the assessment of the injury and other matters specified in the Guidelines [not yet known] that are to be referred to the Medical Assessor. It is not clear what the process is if the worker's solicitor and insurer do not agree on these matters or on what material is to be forwarded to the Medical Assessor for the principal assessment.

### Recommendation – Clarify

Clarity should be provided to the worker and insurer on what process is to be followed if they cannot agree on a principal assessor.

## 4 Amendments to restrict the employer attendance at medical appointments

The proposed Section 231A amendment prohibiting the employer from attending medical treatment or a medical examination unless the worker requests the attendance is too restrictive.

While we support the right of a worker to have a private examination or treatment consultation, retaining the ability for the employer or their representative to work collaboratively with the injured worker and their treatment team including their nominated treating doctor is critical to promoting recovery and return to work. General Practitioners often have a limited understanding of the workers compensation system, and a case conference is a valuable mechanism to reach a shared understanding of how the employer and/or insurer can support the worker's recovery and return to work, including the availability of suitable duties.

SIRA's Standard of Practice 16 outlines the principles and expectations for case conferences. While it is noted that case conferences should generally be arranged for a separate consultation outside the worker's scheduled medical review, the Standard notes that there may be circumstances where this is not possible due to availability of appointments. In these cases, SIRA considers it appropriate to attend the worker's scheduled consultation, with agreement from the worker.

In practice, StateCover services a wide range of Councils in regional and remote communities, where access to General Practitioners is very limited. In many cases it simply isn't feasible to have additional and separate consultations with these GPs to facilitate case conferences, due to the availability of appointments. In fact, this would put more pressure on the local community access to medical treatment.

### Recommendation – amendment to allow with agreement from the worker

We submit that this proposed amendment should be changed to indicate that the employer or their representative can attend a worker's scheduled medical consultation with agreement from the worker, to participate in a case conference regarding the workers employment and return to work.

## 5 Addition of a special medical expenses entitlement for work pressure (Part 4A, 148B)

Work pressure disorder is not a recognised clinical diagnosis, potentially leading to confusion about what diagnostic criteria are required to be met to satisfy eligibility for the special entitlement.

Currently, diagnoses of 'stress' or 'work pressure' would not meet the evidentiary requirements for eligibility for compensation. StateCover sees many early and provisional diagnoses of adjustment disorder, where a worker is suffering from work pressure and has developed clinically significant symptoms in response to an identifiable work stressor or stressors. Adjustment disorder is a recognised diagnosis in line with the DMS 5 and would typically meet the requirements to allow commencement of provisional weekly payments.

### Recommendation – define a list of acceptable recognised clinical diagnoses and consider alternate forms of assistance programs in place

While the amendment allows for the Workers Compensation Guidelines to provide for the requirements for evidence, StateCover proposes that a list of acceptable recognised clinical diagnoses for eligibility are defined.

Many employers have Employee Assistance Programs in place that arguably are better placed to respond quickly to employees who require some support and treatment to deal with workers experiencing the symptoms that this special entitlement is designed to address (regardless of whether it arises from work or not). Consideration should be given to how to encourage employers to remain pro-active in providing this support to workers, if it is decided to proceed with this special entitlement.

### Recommendation – provide guidance to insurers and self-insurers on anticipated financial impact

Utilisation and scope of this proposed entitlement is unknown and should be subject to quantitative actuarial analysis on the likely financial impact of it being introduced, including considering changes in stakeholder behaviour that may arise as a result, i.e. unintended consequences.

## 6 Feedback on other proposed reforms

**New bullying & harassment jurisdiction -** *The NSW Industrial Relations Commission will now have jurisdiction over workplace bullying and harassment matters before they can proceed as workers' compensation claims.*

### Recommendation – establish safeguards for workers

When establishing the forum within the Industrial Relations Commission to deal with allegations of bullying and racial and sexual harassment, we recommend the Government establish safeguards to minimise harm to individuals and to fast-track resolution.

Establishment of supporting processes should consider:

- early assessment and triage frameworks
- panel of experts to assess the circumstances and merits of a matter
- mechanisms to establish early mediation as a first step in resolving a grievance or complaint.

The current Federal Fair Work Commission process to resolve workplace bullying grievances aims to resolve cases in 16 weeks. There is a conciliation/mediation step in the process within the first few weeks that allows a Member to help parties to resolve matters before proceeding to a formal conference or hearing. StateCover believe that a conciliation process conducted by a skilled mediator will assist in reducing the volume of matters that need to move to formal proceedings. In the long term, this would also reduce the impact of future workers compensation claims, as more workers will return to work and be less financially motivated to pursue other forms of compensation.

StateCover presumes that the proposed ‘special entitlement’ to medical and rehabilitation expenses for work pressure will support access to treatment including counselling and professional mediation services while the worker’s case is being determined. This will directly reduce the risk of long-term harm that would emerge if delays were experienced in determining an alleged bullying or harassment incident through the IR commission and then any psychological injury arising is determined under workers compensation.

**Anti-fraud safeguards -** *Elements of the federal government's anti-fraud framework for the National Disability Insurance Scheme (NDIS) will be incorporated into NSW's workers' compensation system.*

StateCover supports strengthening of anti-fraud measures. In our experience, SIRA has limited resourcing to investigate alleged fraud and in most cases relating to claimant and provider fraud they have simply passed on information to the Insurer for further investigation. We note that SIRA has in more recent times strengthened their approach to service provider accreditation and bans on certain providers operating in the system have been increased. We support these initiatives in the interest of achieving value-based outcomes for the NSW Scheme.

The NDIS approach of sharing and analysing data with other agencies to identify suspicious patterns that may indicate fraudulent behaviour would be particularly beneficial. Even within the NSW workers compensation system, there are many insurers and claims providers, and increased matching of claimant or provider behaviour to investigate potential fraud, for example, claimants claiming entitlements from multiple insurers or providers at the same time, is an area that could be strengthened.

In summary, StateCover shares the view that the legislation as currently constructed and applied is not sustainable. It is not assisting workers to achieve the intended outcomes of return to work, particularly with respect to psychological injury and as a result is not sustainable in the long term for employers, rate payers and the taxpayers of NSW.

Yours sincerely

Samantha Fuller
Chief Executive Officer