THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC/ELC:JBsb150525

15 May 2025

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

By e-mail: law@parliament.nsw.gov.au

Dear Mr Donnelly,

WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2025

Thank you for the opportunity to provide a submission to the Standing Committee on Law and Justice (**Standing Committee**) on the exposure draft of the Workers Compensation Legislation Amendment Bill 2025 (NSW) (**Draft Bill**). The Law Society's Injury Compensation and Employment Law Committees contributed to this submission.

The Draft Bill proposes significant changes to liability and the ability of claimants to commence claims for compensation for workplace psychological injury in New South Wales. Given this, the Law Society expresses concern about the lack of consultation and transparency in respect of the development of the Draft Bill. Broad consultation at earlier stages would have assisted in ensuring proposed changes to the workers compensation scheme were based on strong evidence and informed by a wide range of stakeholders, including the legal profession. In our view, the truncated timeline to provide a submission for this inquiry is also inadequate for changes of this scale which will impact many employers and workers across NSW.

Basis for changes to psychological liability and entitlements

Our members, who represent claimants, insurers and employers, understand that reform of the NSW workers' compensation scheme is overdue. We appreciate that it is important to ensure the long-term financial viability of the scheme in order that businesses, including small to medium sized businesses, can thrive, and contribute to productivity in NSW and Australia. Further, we support the principle that employees, if they are injured at work, should be supported through treatment, rehabilitation and appropriate compensation. For the reasons outlined below, however, we are concerned that the policy options for reform of the scheme as a whole are not appropriately tailored, and that the proposed reforms, rather than focusing on a shift towards prevention and early recovery at work[1], appear to be directed to limiting the ability of workers to make a claim on the basis of psychological injury.

[1] Explanatory Note, Workers Compensation Legislation Amendment Bill 2025, 1.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

We appreciate concerns have been raised by business and employer groups about the cost to the scheme due to a rise in the number of psychological claims made in NSW. We agree that it is important to establish a mechanism to limit unmeritorious psychological claims, which have consequences for the operating costs of businesses, and may affect the viability of small businesses. It is in the interests of transparency, accountability and sound law reform and policy-making, that the Government provide statistical data on psychological claims which may assist in providing a more nuanced understanding of the pressures facing the scheme.

Evidence provided to the Standing Committee in the context of the 2023 Review of the Workers Compensation Scheme, for example, showed that the 'growth in psychological claims as a proportion of active claims is more pronounced for some insurer types', including the Treasury Managed Fund, which represents the public sector in NSW.[2] We suggest that before the enactment of legislation designed to limit access to workers compensation, the Government should investigate and measure the impact of bespoke, systemic responses around psychological safety and supports for different workplaces, including the agencies in its remit.[3] We also suggest that the results of SIRA's 2024 audit into the claims management practices at iCare be made available to inform the reform process.

Use of delegated legislation

As a rule of law matter, we are concerned that the Draft Bill relies too heavily on delegated legislation to achieve its objectives. Examples include the definitions of 'reasonable management action' (s 8D of the *Workers Compensation Act* 1987 (NSW) (**Act**)), 'relevant event' (s 8E), and 'vicarious trauma' (s 8H), all of which can include 'any action prescribed by the regulations'. Further, s 8G proposes that the regulations may provide for matters relating to primary psychological injuries, including the type of matters or circumstances an insurer must take into account when determining whether an injury is a primary psychological injury, and the evidence a worker must provide for a claim in relation to a primary psychological injury. As discussed below, it is also left to the regulations to determine the classes of matters appropriate for commutations (s 87EA(2)).

The reliance on delegated legislation concerning significant matters of substance and policy is concerning in the context of a piece of legislation that directly impacts the legal rights, interests and livelihoods of injured people. It is preferable to promote and maintain Parliamentary oversight and public scrutiny over the legislative process, and we encourage the Standing Committee to consider this issue in its review of the Draft Bill.

Change to the Whole Person Impairment (WPI) threshold

The Draft Bill proposes that weekly payments cease after 130 weeks for primary psychological injuries unless the injury is at least 31 per cent WPI (s 39A); that the permanent impairment threshold is increased to 31 per

[2] Standing Committee on Law and Justice, *2023 Review of the Workers Compensation Scheme*, December 2023, 26: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2988/Report%20No%2084%20-%20Law%20and%20Justice%20-%202023%20Review%20of%20the%20workers%20compensation%20scheme%20-%205%20December%202023.pdf

[3] For example, this could include greater resourcing and powers for SafeWork NSW to conduct investigations around harassment, including sexual harassment in the workplace.

cent (s 65A(3)); and that damages for primary psychological injuries are unavailable unless they are greater than 31 per cent WPI (s 151H).

There is no data available to illustrate the number of claims to date which involve a WPI threshold of greater than 31 per cent in the context of a psychological injury. We suggest that it is in the interests of transparency that such data is published to illustrate the extent of the impact that the proposed changes will have to psychological claims in the scheme.

In our members' experience, the number of cases involving impairment at 31 per cent or greater would be so rare that this threshold effectively abolishes the right of workers in NSW to pursue work injury damages claims against a potentially negligent employer even after they have successfully navigated the additional hurdles introduced by the other amendments. We have been provided with anonymised case studies of members' clients who are experiencing ongoing, persistent and severely disabling symptoms associated with various recognized psychological disorders, but have been assessed at between 17 and 22 per cent, including clients who have required significant periods of in-patient treatment in hospital settings.

Given that each area of function described in the Psychiatric Impairment Rating Scale (**PIRS**) is given an impairment rating which ranges from Class 1 to 5, with the median then calculated by averaging the two middle scores, we suggest that it is probable most claimants will be excluded from making a claim for damages or weekly benefits beyond 130 weeks, as they will fail to be assessed at a median class 4 for any indicators, and therefore fail to reach impairment of greater than 31 per cent. Severe impairment (Class 4) includes indicators such as:

- Needs supervised residential care. If unsupervised, may accidentally or purposefully hurt self.
- Never leaves place of residence. Tolerates the company of family member or close friend, but will go to a different room or garden when others come to visit family or flat mate.
- Finds it extremely uncomfortable to leave own residence even with trusted person.
- Unable to form or sustain long term relationships. Pre-existing relationships ended (eg lost partner, close friends). Unable to care for dependants (eg own children, elderly parent).
- Can only read a few lines before losing concentration. Difficulties following simple instructions. Concentration deficits obvious even during brief conversation. Unable to live alone, or needs regular assistance from relatives or community services
- Cannot work more than one or two days at a time, less than 20 hours per fortnight. Pace is reduced, attendance is erratic.[4]

As the level of impairment demanded by the PIRS to reach 31 per cent will conceivably exclude nearly all workers with psychological injury from making a claim, we suggest the Government consider whether a change to 21 per cent or greater would be more appropriate. This would ensure that some workers generally recognised by community standards as being severely impacted by mental ill-health would be able to make a claim, who would otherwise be excluded under the current proposal.

While we understand the Government is seeking to emulate impairment thresholds in the workers compensation systems of other States such as South Australia and Queensland, significantly different

[4] SIRA, Psychiatric and psychological disorders (Website): https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment/11.-psychiatric-and-psychological-disorders

assessment criteria are used and applied by practising psychiatrists in these jurisdictions.[5] We suggest that it is inadvisable to simply transplant the percentage figure into a very different scheme.

Definition of 'relevant event'

We are concerned that the proposed definition of 'relevant event' is drawn too narrowly, which may lead to frontline workers (e.g., nurses, teachers, train drivers, call centre operators) who develop a mental health condition as a consequence of confrontations and experiences in the workplace being prevented from making a claim. We suggest that further consultation is required to ensure that other types of traumatic events experienced in the course of their work are appropriately captured by the legislation.

Assessment Process

Proposed s 153G sets out that a principal assessment must be made by an assessor included on SIRA's register of permanent impairment assessors, who is either agreed by the insurer and worker or otherwise appointed by SIRA. The Law Society does not support this change, and suggests that providing workers and insurers with the flexibility to choose an independent medical examiner is preferable. In the experience of our members, if two disparate views are reached by the medical examiners, this can often encourage settlement, which benefits both parties. This is particularly the case given the complexity of the method of assessment, which demands consideration of AMA5 and the SIRA Guidelines for the Evaluation of Permanent Impairment, as well as the scope for the exercise of the examiner's discretion. We suggest the change will substantially increase the risk of capricious outcomes.

There is typically a significant amount of work and advice required to be given to a worker or employer prior to the formal assessment process and there is no acknowledgement of this in the legislation. It is unclear from the Draft Bill whether letters of instruction will be permitted to be tailored to individual circumstances by each party, or will need to be agreed between the parties before the assessment. Further, there is no guidance on supplementary reports and/or amendments to the original assessment.

We are concerned that the provision on the unexpected and material deterioration in the worker's condition (s 153N) will operate in an obtuse manner by preventing workers with physical injuries who are likely to have surgery in the future from having a further assessment, given the deterioration in their condition may be held to be foreseeable. We note that the word "unexpected" can carry a variety of connotations and suggest that it would be appropriate to define the term to remove this element of subjectivity. Further, there should be an avenue for the Personal Injury Commission to review whether a deterioration is unexpected and material.

Special provisions for primary psychological injuries caused by sexual or racial harassment or bullying

We acknowledge the desire to ensure that compensation is provided only in support of injuries incurred as a result of substantiated harassment or bullying. However, we suggest that the special provisions for primary psychological injuries caused by sexual or racial harassment or bullying are not the most effective way to do

[5] McGowan, M., 'Experts say mental health payouts may become impossible', The Sydney Morning Herald, 28 April 2025, https://www.smh.com.au/politics/nsw/experts-say-mental-health-payouts-may-become-impossible-20250427-p5luhn.html

so. In our view, they also do not promote psychological safety in the workplace, nor "return to work" objectives of the reform package. Section 280AAB restricts the recovery of compensation unless a claim for the compensation has been made within six months after a finding by a Tribunal, Commission or Court that the relevant injury was caused by conduct that is sexual harassment, racial harassment or bullying. In the experience of our members, favourable applicant outcomes are rare in the Federal bullying jurisdiction. The inherent difficulties and legal complexities associated with prosecuting/bringing a claim for applicants in sexual harassment complaints, both at the State and federal levels, will in practice prevent the vast majority of workers compensation claims for psychological harm stemming from this form of assessment, particularly for those experiencing greater than 31 per cent WPI.

First, it is unclear why these provisions are restricted to injuries caused by sexual or racial harassment or bullying, but do not take into account discrimination/harassment on the basis of other personal characteristics, such as age and disability.

Second, the proposed definitions of "sexual harassment", "racial harassment" and "bullying" are not fully aligned to the current definitions contained in the *Anti-Discrimination Act 1977* (NSW) or under Federal laws. The definition of "bullying" is potentially broader than that contained in the *Fair Work Act 2009* (Cth), with no reference being made to the requirement for a continuing risk to health and safety. The term "racial harassment" is also not one which is used in other legislation.

Third, the Law Society is concerned that this will cause unacceptable delays for persons experiencing psychological injuries caused by bullying and harassment. We are aware of the long timeframes in both the NSW and Commonwealth jurisdictions for harassment and bullying matters to be considered or heard, and suggest that this requirement will also present a significant financial and psychological impost on people who may have existing vulnerabilities. This is particularly the case given there is no provision for payment of any type while a worker pursues proceedings in a Tribunal, Commission or Court to establish the mechanism of injury. In addition, those delays may result in further unintended consequences for employers, including the need to manage persons who are required to take increased personal leave during those periods, require the employer to manage the ill/injured employee directly (and outside of the workers compensation regime), and in some circumstances the cost of having an alleged victim and an alleged perpetrator continuing to work together in the same workplace prior to any determination.

Fourth, it is also unclear how the relevant Tribunal, Commission or Court will be resourced to deal with a potential influx of claims caused by workers needing to access these jurisdictions. In the Australian Human Rights Commission, for example, it may take 6-18 months to deal with a complaint of sexual harassment, and it could easily take up to 24 months from the date of making the initial application to get a determination by a Court.

Fifth, the practical impact of relying on a relevant event in the form of a bullying or sexual harassment decision or "finding" also has the flow-on effect of preventing a worker making a compensation claim, if the matter settles in a Tribunal, Commission or Court so that no finding is in fact made. It is likely that claims that would otherwise settle will now run to determination so that claimants have an opportunity to bring a workers

compensation claim. This in turn will place considerable stress on the limited resources of the Courts, Tribunals and the Commissions.

Sixth, there may also be negative consequences for employers, including the cost and time of defending the claims workers will be forced to commence to secure a determination, in what is largely a no-cost jurisdiction; and the cost to settle these claims without mitigation through the worker's compensation regime. This cost will be in addition to any costs which have been incurred by the employer already, including in funding internal investigations into complaints, as well as arising from the individual's absence from the workplace.

There appears to be no mechanism for an injured person to apply for an exemption from the 6-month timeframe, for example if their failure to comply was occasioned by ignorance, mistake, absence from the State or other reasonable cause. We suggest this needs to be clearly set out for the avoidance of friction in the scheme and unnecessary disputes.

The Law Society is concerned that the significant barriers currently associated with harassment or bullying claims will result in many psychologically-injured workers opting not to lodge claims. This may mean they are denied the required treatment and placed at increased risk of self-harm or long-term absence from the labour market. Ultimately, for a class of injured workers, this will result in compensation costs shifting to other sectors, including longer term health care, and social security.

39A Cessation of weekly payments after 130 weeks – primary psychological injuries

Proposed s 39A(4) has presumably been inserted in response to the findings of the NSW Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW* [2020] NSWCA 113, where it was held that liability for permanent impairment dates from the time of the employment injury, regardless of when the degree of permanent impairment is ascertained.

It is unclear why the Government, in the case of primary psychological injury, intends to legislate against the well-established principle, enunciated in other sections of the Act (e.g. ss 9(1) and 39), that 'injury and impairment are not necessarily concurrent' and 'entitlements to compensation…vest upon the occurrence of the injury, even though those entitlements may not be immediately ascertainable': see Brereton JA at [52].

Work Pressure provisions

Section 148B introduces a special entitlement for medical or related treatment for the concept of 'work pressure' which is limited to 8 weeks. As a 'work pressure' disorder is not a claim for compensation, it only requires the employer to pay for medical and other related treatment. We are concerned that this provision represents a band-aid solution which fails to address issues of psycho-social safety in the workplace. It is also unclear why a person who is ostensibly injured in the workplace due to "work pressure" is denied weekly payments by their employer and is treated differently from other claimants.

We can also foresee difficulties associated with workers accessing these payments if the employer (not the insurer) is small or otherwise unaware of these obligations. It is also possible that this provision may increase

costs to businesses, given that a 'work pressure' payment would be required to be made, in addition to the making of workers compensation premiums.

Other provisions affecting the broader workers compensation scheme

We note that some of the changes in the Draft Bill affect all injury types and not just psychological injuries. In addition to our comments on the "assessment process" above, we make the following brief comments on several issues of concern below.

'Reasonably necessary' versus 'reasonable and necessary'

We note that the Draft Bill at ss 60 and 60AA of the Act reflects the recommendation of the Independent Review of icare and State Insurance and Care Governance Act 2015 Review (**McDougall Review**) to replace the words 'reasonably necessary' with the words 'reasonable and necessary'.[6]

The Law Society opposes this change. We consider that the requirement for treatment to be both 'reasonable and necessary' as opposed to 'reasonably necessary' imposes a higher bar for medical payments and represents a more demanding test. We suggest that evidence has not been made out, in the McDougall Review or otherwise, that the "reasonably necessary" test results in harmful outcomes and funding of low value treatments.

Allied Health Consultants

New s 45B of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**WIMA**) allows SIRA to register and regulate allied health consultants. It is possible that the formalised use of allied health professionals in claim management is likely to lead to greater levels of disputation between treating doctor opinions or treating allied health practitioner opinions. It would be helpful to obtain more clarity on how these disputes will be resolved without leading to further delays in the scheme.

Timing of Lump sum compensation claims

Section 280AAD of the WIMA requires all claims for permanent impairment compensation for a relevant injury to be made at the same time. Subsection 2 states that a legal practitioner or agent who acts for a worker when a claim is made is not entitled to recover costs from the worker or the employer in relation to a claim made later, including a claim made by later amendment of proceedings, unless there is a good reason for the claim being made later.

We suggest the phrase 'good reason' is subjective and may result in friction. The phrase should be defined with examples, while leaving discretion to the Personal Injury Commission or Court to make its own decision outside of those definitions.

[6] The Hon Robert McDougall QC, *Independent Review of icare and State Insurance and Care Governance Act 2015 Review* (30 April 2021), Recommendation 39: https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf.

Permanent Impairment Agreements

Proposed s 153P of the Act introduces the concept of a permanent impairment agreement, which allows for the insurer and injured worker to accept or reject the principal assessment. If rejected, there is provision for the dispute to proceed to the Personal Injury Commission.

We are concerned that this provision may encourage tactical denials which will impact on the workload of the Personal Injury Commission.

Amendments to death benefits and commutations

The Law Society supports amendments that enable parties to a dispute about liability for death benefit compensation to settle the dispute if it has been referred to the Personal Injury Commission.[7]

Similarly, we support the provisions on commutations but continue to oppose ascribing classes of claims by regulation, an approach which lacks transparency and may create unfairness. If only certain classes and cohorts are permitted to commute, this may result in many workers for whom commutation would be beneficial being denied this opportunity. A further consideration is that by naming certain classes of claim, some workers may feel pressured to enter a commutation. This is contrary to the notion that a commutation relies on the voluntary participation of the parties.

Pre-injury average weekly earnings (PIAWE)

The Law Society supports the proposal to remove PIAWE from the definition of work capacity.

Thank you for the opportunity to contribute. In light of the significant concerns existing about the current proposed model for reform, the Law Society suggests that this process return to a design stage for further consultation to ensure that an appropriately balanced approach is reached.

Should you have any further queries in relation to this submission, please contact Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President

[7] See, however, comments in Law Society, 2022 Review of the Workers Compensation Scheme – Supplementary Submission, 13 September 2023: https://www.lawsociety.com.au/sites/default/files/2023-09/Letter%20to%20Standing%20Committee%20on%20Law%20and%20Justice%20-%202022%20Review%20of%20the%20Workers%20Compensation%20Scheme%20%E2%80%93%20Supplementary%20Submission%20%E2%80%93%2013%20September%202023.pdf