THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:JBsb020625

2 June 2025

The Hon. Damien Francis Tudehope
Leader of the Opposition in the Legislative Council
Parliament House
SYDNEY NSW 2000

By e-mail: damien.tudehope@parliament.nsw.gov.au

Dear Mr Tudehope,

WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2025

We refer to the recent introduction of the *Workers Compensation Legislation Amendment Bill 2025* (NSW) and, given the lack of genuine consultation on the Bill, take the unusual step of writing to the Opposition and Greens Members of the Legislative Council on this issue. Our submission is informed by the Law Society's Injury Compensation Committee.

The Law Society's position

Our members, who represent claimants, insurers and employers, understand that reform of the NSW workers compensation scheme is overdue. As a matter of integrity and prudence in law reform processes, we suggest that the consultation process that preceded this Bill has not been adequate. This is of particular concern noting that the Bill would significantly impact not only liability and entitlements in relation to psychological injuries but also the operation and processes of the wider workers compensation scheme. This has led to the introduction of a Bill which, in our view, is troubled by conceptual and drafting concerns, and is unlikely to achieve a fair and modernised scheme for workers compensation in this State.

As a key stakeholder, we regret that the only avenue offered to us to consider fundamental changes to the scheme was through the unusually truncated inquiry process of the Standing Committee on Law and Justice.[1]

The Law Society's position continues to be that the Bill should not pass in its current form, and the Government should return to the design stage, in a meaningful consultation informed by relevant and publicly accessible data and involving a diverse range of stakeholders, with adequate time for consultation. We are concerned, as outlined in our submission to the Standing Committee, that the proposed changes will effectively exclude the vast majority of persons with psychological injuries, including those who are severely disabled by contemporary community standards, from accessing the scheme.

[1] Law Society of NSW, Letter to Standing Committee on Law and Justice – Workers Compensation Legislation Amendment Bill 2025, 15 May 2025: https://www.lawsociety.com.au/sites/default/files/2025-05/Ltr%20to%20Standing%20Committee%20on%20Law%20and%20Justice%20-%20Workers%20Compensation%20Reforms%20-%2015.5.25.pdf.

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Should this Bill pass, we take this opportunity to highlight to the Legislative Council the following five critical areas of the Bill which, we suggest, require reconsideration and amendment.

1. WPI Threshold

The Law Society continues to oppose the increase in Whole Person Impairment (**WPI**) threshold to 31%. As set out in our submission to the Standing Committee, as a compromise position and if the transitional approach is to be adopted, we suggest that it would be appropriate to start at a threshold of 20 per cent or greater. This would conceivably achieve the aim of reducing the number of claims while ensuring at least some people recognised by community standards as being severely impacted by psychological workplace injuries would be able to make a claim, who would otherwise be excluded under the current proposal.

It is also unclear to the Law Society why the Government proposes that the increase in WPI threshold will occur in stages, rising from 25 per cent from October 2025 to greater than 30 per cent from 1 July 2026.[2] We are not aware of whether these percentages are based on rigorous data or analogous provisions in the existing legislation, and they do not take account of the evidence put forward as part of the inquiry. In our members' experience, the number of cases involving impairment at 25 per cent or greater are extremely rare.

2. Retrospective application of transitional provisions

We consider that the transitional provisions in Schedule 1.10 in relation to existing claims for primary psychological injuries require substantial revision. As currently drafted, the increases in the degree of WPI required to access work injury damages will apply to workers who have not yet served a pre-filing statement under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**1998 Act**).

The fact that a pre-filing statement cannot be served unless the injured worker has satisfied detailed legislative requirements means that, in practice, this typically may not occur until years after the injury was sustained.[3] We suggest the transitional provisions fail to recognise the lengthy timeframes and complexities involved in the mandatory claim process and will, accordingly, result in substantial unfairness to affected injured workers.

There may be many workers who have engaged legal representatives to act on a claim but are not yet in a position to file the pre-filing statement due to the timeframes imposed by the current legislation. These injured persons will have incurred costs, both financial and emotional, in relation to their claim, and, as a result of the provisions, will most likely be immediately disentitled to proceed, despite in many cases having undertaken the lengthy process to confirm their entitlement.

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[2] Changes to WPI are proposed for weekly payments - Schedule 1.1[6] (s 39A) and [7]; medical treatment - Schedule 1.1[8] (s 59A(b)(i)) and [9]; lump sum payments for permanent impairment - Schedule 1.1[13] (s 65A(3)) and [14]; and work injury damages - 1.1 [16] (151DA(i)(a)) and [17], [18] (s 151H(2)(b)) and [19].
[3] See relevant sections of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), including ss 280A-282 and ss 315-318.

While we do not agree with the proposed changes to WPI for work injury damages claims, if the legislature decides to proceed, we suggest, in the interests of fairness and transparency, that the WPI increases should only apply to workers who suffer an injury on or after the time at which the amendments take effect.

3. Medical Treatment

Proposed new s 39A of the *Workers Compensation Act 1987* (NSW) (**Act**) provides for the cessation of weekly compensation after 130 weeks, subject to the worker's degree of permanent impairment. We suggest that this provision is a retrograde step, which fails to recognise that recovery from certain psychological disorders extends beyond 2.5 years, and that recovery may not be a linear process for all injured persons. We suggest that this provision is inconsistent with contemporary community standards around recognition of the nature of psychiatric illness.

We also consider that the change in threshold to access treatment from "reasonably necessary" to "reasonable and necessary" (see, for example, Schedule 1.9, s 60 of the Act) adds an additional level of difficulty for injured workers and does not accord with the objective of the workers compensation scheme, which includes giving workers access to medical support in order to rehabilitate and encourage return to work as quickly as possible. The Law Society is unable to support this change.

4. Joint principal assessment process

The Law Society is unable to support the proposal that SIRA administer a joint principal assessment process.[4] As described in our submission to the Standing Committee on Law and Justice, providing workers and insurers with the flexibility to choose an independent medical examiner is preferable.[5] 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. Further, variance in medical opinions is not unusual and, in our view, all parties should be given the opportunity to consider and test those opinions in the interests of justice.

The joint single assessment process will apply to both physical and psychological injuries. In the experience of our members, independent medical assessments are often relied upon by lawyers to determine, for example, what body system or structure should form part of a claim as well as the precise nature of the diagnoses. Requiring the injured workers and the insurer to agree on what body parts are referred for assessment will conceivably create further disputes in the Personal Injury Commission, leading to further delays and costs.

We also note that the legislation is currently unclear about the costs regime associated with this process. For example, it is typical for lawyers to obtain an independent medical assessment for their client as part of their investigations to establish whether a client actually has a claim in the first place. While this appears to still be contemplated by the proposed new section in Schedule 5, cl 9A(1)(b)(i) of the *Personal Injury Commission Act 2020* (NSW) (**PIC Act**), it is unclear how this will work in conjunction with the joint single assessment process.

[4] See Schedule 1.3, including proposed s 153K.
[5] See above n 1.

5. Role of Legal Representatives in the Scheme

The Law Society is concerned that Schedule 3 of the Bill may have the effect of decreasing access to legal assistance provided to injured workers in respect of both physical and psychological injuries.

We note that there has been no discussion ahead of the introduction of these provisions about the role and performance of the Independent Legal Assistance and Review Service (**ILARS**) scheme. In our view, the establishment of the ILARS in 2012 represented a landmark development for personal injury law in NSW, which assists injured workers in gaining independent advice to have their claims investigated and professionally represented.

The Bill, through amendments to Schedule 5 of the PIC Act changes the purpose of the ILARS scheme to the following:

> The purpose of ILARS is to provide funding for legal and associated costs for workers under the Workers Compensation Acts seeking advice, representation or assistance regarding decisions of insurers or disputes that, if not addressed through legal representation or assistance, would result in a disadvantage to injured workers in relation to the workers' rights or entitlements to benefits under Workers Compensation Acts.[6]

It is unclear how the IRO will objectively determine, at the outset of a claim, whether or not legal representation or assistance would result in a disadvantage to injured workers in relation to their rights or entitlements. The Law Society, which has members representing both injured workers and insurers, suggests it is widely agreed, that when a worker is represented, they are assisted in navigating a fundamentally complex scheme in a professional manner and better outcomes are achieved for both parties.

Similarly, proposed new Schedule 5, cl 9A of the PIC Act lacks sufficient clarity. It is unclear how the IRO will determine, at the outset of a claim, that a person has reasonable prospects of success in relation to the matter to which the proposed funding relates: see cl 9A(1)(b). Under this proposal, an Approved Lawyer will be required to undertake these preliminary investigations of workers compensation claims and make a case around "reasonable prospects of success" in essentially a pro bono capacity before they can receive a grant of ILARS funding. The Law Society has concerns that this will affect the sustainability of this area of practice, and this will have flow on impacts on access to justice. Persons injured at work with meritorious claims should be able to access high quality advice, particularly when it is likely that all insurers will have in-house or external legal representation.

Proposed new Schedule 5, cl 9A(1)(c) is similarly unclear. It is a matter of concern to the Law Society if the effect of this provision is that ILARS funding is only available to lawyers acting for clients who have been means-tested. It is possible that this will result in a significant "missing middle"[7] of injured workers, who will not be able to access treatment or entitlements under the scheme.

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[6] See Schedule 3.3 of the Bill, which amends Schedule 5, cl 9(2) of the *Personal Injury Commission Act 2020* (NSW).
[7] "The group of individuals who do not meet eligibility criteria for publicly funded legal services yet lack the resources to afford a private lawyer's assistance for all or part of their legal matter, make up the 'missing middle'." Law Council of Australia, *Addressing the legal needs of the missing middle*, Position Paper, November 2021, 3: https://lawcouncil.au/publicassets/d8ff81b4-7558-ec11-9444-005056be13b5/2021%2011%2030%20-%20PP%20-%20Addressing%20the%20legal%20needs%20of%20the%20missing%20middle.pdf

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Thank you for your consideration of these issues. The Law Society reiterates its position that the Bill as currently drafted should not be passed, and returned to a design stage where thorough consultation should be undertaken with all affected stakeholders.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President