The Law Society OF NEW SOUTH WALES

Our ref: ICC:RMsb150526

15 May 2026

Ms Mandy Young
Chief Executive
State Insurance Regulatory Authority
Locked Bag 2906
LISAROW NSW 2252

By online form

Dear Ms Young,

NSW WORKERS COMPENSATION REFORM – REGULATIONS AND GUIDELINES FEEDBACK

The Law Society of New South Wales is grateful for the opportunity to provide feedback on the draft Workers Compensation Legislation Amendment Regulation 2026 (**Regulation**) and associated forms and guidelines. The Law Society's Injury Compensation Committee contributed to this submission.

The Law Society consistently raised concerns ahead of the passing of the *Workers Compensation Legislation Amendment Act 2025* (NSW) (**2025 Amendment Act**) and the Workers Compensation Legislation Amendment (Reform and Modernisation) Act 2026 (NSW) (*together,* **Amendment Acts**) that the wide-reaching reforms failed to promote the scheme objectives of providing injured persons with access to treatment, rehabilitation and appropriate compensation. We are now concerned that some aspects of the Regulation are also antithetical to this objective.

A lack of certainty around the commencement date of key reforms, coupled with the significant details delegated to the Regulation by the enabling Act, has meant that legal practitioners have been placed in the unenvious position of being unable to provide definitive legal advice to their clients on a range of matters. As outlined below, this uncertainty has been increased, given that the Regulation backdates certain amendments to cover workers injured before the commencement of key provisions of the Amendment Acts. From a rule of law as well as a regulatory perspective, we emphasise the importance of laws that are clear and unambiguous. We express our sincere regret that the lack of early consultation on the Amendment Acts, which have been described by the Government as the 'most significant reform to workers compensation in a generation'[1], has led to the current legal uncertainty. In our view, the Regulation does not dispel this uncertainty or provide further clarity.

The scale of the reforms contained in the Amendment Acts and the Regulation are wide-ranging. Before commencement, there will need to be significant changes to the internal processes of employers and insurers. In addition, it will be important to ensure that persons contemplating making a workers compensation claim are

[1] NSW Government, 'Workers compensation reforms pass parliament', media release by the Treasurer, Minister for Customer Service and Digital Government, Minister for Work Health and Safety, 5 February 2026.

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apprised of the new processes. We encourage the Government to ensure as smooth a transition as possible for scheme participants.

We make the following comments on the Regulation for your consideration:

Schedule 1 Amendment of Workers Compensation Regulation 2016

i. Clause 3A – meaning of "relevant event"

Clause 3A is intended to extend the definition of "relevant event" in s 8G of the 1987 Act, as inserted by the 2025 Amending Act, to include a "prescribed death," which is defined as the traumatic death of a person with whom a worker had a close, ongoing and pre-existing relationship, who at the time of their death was also under the immediate and primary care of the worker, at the worker's workplace. The provision also requires that there be a "real and direct connection between the person's death and the worker's employment."

We query the rationale behind limiting what constitutes a "prescribed death" to the current remit of the draft clause 3A, which would operate to exclude workers who suffer a psychological injury as a consequence of being exposed in a wider sense to the aftermath of traumatic incidents, who may not have a carer relationship with the deceased in connection with their employment.

We also note that the draft clause 3A may be affected by ambiguity in terms of what is meant by the concepts of "close," "ongoing" and "pre-existing."

Part 4A Treatment and services for injuries

i. Clause 8O – Definitions

Clause 8O defines "injured worker" as follows:

> ***injured worker*** includes the following—
>
> (a) an injured police officer
>
> (b) an injured paramedic
>
> (c) an injured firefighter
>
> (d) an injured coal miner
>
> (e) a person whose claim arises under the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*.

We query the inclusion of police officers, paramedics, injured firefighters and coal miners in this definition. The *Workers Compensation Legislation Amendment Act 2012* (NSW) (**2012 Amendment Act**) expressly excluded these groups of workers from ss 60(2A), 60(2B) and 60(2C) of the *Workers Compensation Act 1987* (NSW) (**1987 Act**).[2] Those sections introduced a pre-approval provision for an employer's liability for medical and related treatment and rehabilitation services to apply to workers covered by the 2012 reforms.

Given that cll 8P and 8Q under Part 4A of the Regulation concern the application of ss 60(2C) of the 1987 Act, it is unclear why the Regulation seeks to expand the definition to those categories of exempt workers identified in the 2012 Act. We suggest the definition in the Regulation could be beyond power and should be omitted.

[2] *Workers Compensation Act 1987* (NSW), Division 3 Miscellaneous, cll 25 and 26.

ii. Clause 8P – Rules for determining whether treatments and services are "reasonable and necessary"

The test for medical and related treatment has changed from "reasonably necessary" to "reasonable and necessary".[3] It is accepted that the new test is more stringent for the determination of compensable treatment and services.

The rules set out at cl 8P qualify and arguably narrow the definition of "reasonable and necessary". In our view, it may be more appropriate for the Government to observe, in the first instance, whether the higher threshold contained in the Act has the desired effect of reducing or eliminating treatments without clinical justification or which can only be provided at unreasonable expense. If these observations support the contention that unreasonable and unnecessary treatments are being provided, consideration could then be given to inserting this clause in the Regulation.

We are concerned that the rule requiring that 'there are no other accessible treatment or service options that can provide similar benefits to the worker at lower cost' may result in some instances where an injured person is offered a cheaper form of treatment as opposed to the treatment which will assist their prompt recovery and return to work in line with the objectives of the scheme.

Further, we suggest that the rules may result in unintended consequences for the scheme. These could include delays in treatment decisions, leading to an exacerbation of symptoms which, in turn, will prevent timely return-to-work. The rules also require the insurer to conduct a prospective assessment of factors which may only be able to be properly assessed retrospectively. Further, the rules may lead to increased disputes about treatment in the Personal Injury Commission, particularly given the insurer only has 21 days to consider whether the treatment is reasonable and necessary.[4] In our view, this is contrary to the efficient and effective operation of the workers compensation scheme.

From a legislative drafting perspective, we note that s 60(2C) of the 1987 Act provides for the making of Guidelines. From our perspective, it is unclear why the 'rules' are contained in the Regulation, which serves only to complicate a scheme that must be navigated by injured persons.

iii. Clause 8Q- Treatment and service costs for which employers are not liable

Clause 8Q sets out the treatment and service costs for injuries for which employers are not liable.

While some of the examples of alternative health care treatments listed appear to lack a scientific evidentiary basis, we are concerned that the approach in cl 8Q, which excludes certain classes of treatment in their entirety, has the effect of limiting the discretion of the qualified health practitioner engaged to provide tailored treatment advice to the injured worker. Medical research is ongoing with respect to the effectiveness of certain alternative health care offerings (e.g., acupuncture), and other excluded treatments such as cannabinoid medication and GLP-1 medication are now widely prescribed in clinical settings. We suggest that it is inappropriate for the Regulation to operate in an inflexible manner, noting that it is possible that the list may be rendered out-of-date in light of new research and/or subsidisation of certain treatments. Government may instead consider leaving the recommendation of appropriate treatment in the hands of qualified health practitioners, who are more likely to be appraised of the most current research and available treatments for a given injury, rather than drafting the Regulation in such a way as to necessitate a process of legislative amendment each time new research suggested or established the utility of parts or all of the excluded categories of treatment.

[3] See amendments to ss 60, 60AA, 61 and 63A of the *Workers Compensation Act 1987* (NSW) contained in the *Workers Compensation Legislation Amendment Act 2025* (NSW).
[4] *Workplace Injury Management and Workers Compensation Act 1998*, s 279.

Part 8A Primary psychological injuries

i. Clause 42E: Making a claim for compensation or damages

Clause 42E of the Regulation sets out the evidence that a worker must give when making a claim in relation to a primary psychological injury. Clause 42F requires evidence for a claim caused by 'relevant conduct', including details on the following:

- the specific nature of each instance of the conduct.
- the date, time and location of each instance of the conduct.
- the persons involved in the conduct.
- the names of witnesses to the conduct.

These detailed requirements are reflected in the Worker's Injury Claim Form at 3A. While the Regulation states that these details must be provided 'as far as reasonably practicable', Form 3A states that the worker 'must' provide this information.[5]

We note that the vast majority of claimants completing the form will not have the benefit of legal advice. The level of detail required, which is akin to that typically found in a statement of claim or pleading, presupposes that a claimant has kept a detailed log of every instance of bullying/sexual or racial harassment/excessive work demands that they will set out on the form. While this may be desirable, we suggest that it is unrealistic to expect claimants to provide this level of detail to commence a claim.

The barrier imposed by this requirement could be exacerbated in cases of claimants with limited literacy and/or English language skills or for claimants who have experienced 'relevant conduct' which may be of a traumatic nature, such as sexual harassment. Further, many claimants will be unaware of the consequences of failing to provide the details set out in cl 42F, including the denial of s 280AD payments under the 1998 Act.[6] This, in turn, may undermine the objectives of the Act with respect to prompt treatment and the promotion of return to work.

While the form specifies that the details must be provided 'as far as is reasonably practicable', it is unclear whether the claimant will be permitted to provide further details around the 'relevant conduct' that they failed to particularise on the Injury Claim Form, for example, if they subsequently obtain legal advice. There is the possibility that the Industrial Relations Commission (**IRC**) or Personal Injury Commission may refuse to allow such additional evidence to be led outside what is contained in the Form.[7]

We suggest the Regulation adopts a more balanced approach that does not unduly prejudice access to justice for those workers who struggle to particularise the details of their claim. Consideration may be given, for example, to encouraging as much detail as possible without requiring specific evidence as to each instance of the relevant conduct. This would be particularly appropriate where the relevant conduct forms part of a broader pattern of behaviour, such as, bullying. We note that this approach is taken in the Fair Work Commission with respect to Form F72, which requires 'at least 2 examples of when the bullying behaviour happened' (emphasis added). Further, consideration could be given to including an obligation on the employer to provide a claimant access to work records that would assist them in ensuring their claim form is not incomplete.

Clause 42F provides that additional evidence required for a claim caused by relevant conduct includes whether or not the relevant conduct has been the subject of proceedings in the IRC, which we understand flows from the

[5] See Form 3A, p 6.
[6] Workers Compensation Legislation Amendment Regulation 2026, cl 42G(2)(d).
[7] See commentary on where additional evidence is sought to be led outside the case pleaded and particularised in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287.

intention to provide for claimants to elect to have the IRC determine whether or not conduct is, in fact, relevant conduct, should an insurer still, after internal review, dispute a claim for a relevant injury. We suggest that this regulation should allow for evidence from any other court/tribunal (state or federal), including the Personal Injury Commission and the Fair Work Commission. This will ensure that claimants who have already had the issue determined by another court/tribunal will not unnecessarily seek to relitigate the issue in the IRC. It will also be necessary to make this change if the new jurisdiction for the IRC, following the amendments within Schedule 2 of the 2025 Amendment Act, has not yet commenced.

Part 9B Commutation of compensation

We note that the 2025 Amendment Act created a regulation-making power to provide for claims to be commuted in certain circumstances prescribed by the Regulations without meeting the existing pre-conditions in s 87EA of the 1987 Act.

The Law Society has a long-standing position of advocating for the liberalisation of commutations for the purpose of settlement options of disputes and for exiting the scheme. Such voluntary arrangements can benefit individual workers, who will be offered a further alternative to leaving the scheme other than through a work injury damages settlement.

The Regulation requires workers to lodge an Expression of Interest within 12 months of commencement of the Regulation. Further, a commutation agreement under section 87EA(2) of the 1987 Act must not be approved unless the injured worker has applied for the approval within 24 months after the commencement day. It is unclear why the availability to access commutations has been time-limited in this way. In particular, the time limits may in practice be unworkable, given the significant number of workers who will need to be informed of the changes, obtain legal and financial advice and explore their options in a truncated time period. In addition, it is unclear to us why workers injured on or after 1 January 2023 are not afforded the option to commute.

The Law Society supports the requirement that an injured person obtain independent financial and legal advice with respect to entering into a commutation agreement. We do not consider, however, the change to the maximum legal fee available for a commutation ($3,500) to be set at an appropriate level, considering that the legal work involved in advising a client and making arrangements for a commutation through the two -stage process prescribed by the Regulation may be extensive.

Consequential and transitional provisions

i. Period in which claim must be made for assessment conducted before commencement day

The drafting of cl 5 of the consequential and transitional provisions raises a number of difficulties of statutory interpretation. In particular, it is unclear what constitutes an assessment of a worker's degree of permanent impairment (**WPI**) for the purpose of cl 5. For example, it is unclear whether it would include an assessment obtained by the worker which has not been served and could properly be the subject of a claim for legal professional privilege. It is also unclear if it would include an assessment obtained by the insurer which has not been served on the worker. If it is the intention of the Regulation to deal with assessments of WPI which have been served, this should be made clear in the Regulation.

We suggest that cl 5 is also undesirable due to the way in which it imposes a time limit for making a claim for compensation, notwithstanding the absence from the enabling Acts of a special limitation on the right to make a claim for compensation under s 66 of the 1987 Act. As drafted, cl 5 appears to operate as an extinguishment, on and from 1 July 2028, of worker's existing rights to make a s 66 claim. We suggest that the clause will unfairly impact workers who may not have access to legal advice and therefore lose the entitlements owing to them.

ii. Determination on and from commencement day

Clause 6 is set out as follows:

> ***6 Determination on and from commencement day***
>
> (1) Part 6 applies to all injuries, whether incurred before or after the commencement day, subject to this clause.
>
> (2) An injured worker with an existing claim under the 1987 Act, Part 3, who before the commencement day has received 1 or more assessments of the worker's degree of permanent impairment
>
> (a) is not entitled to a principal assessment of the existing claim, and
>
> (b) is not entitled to a further principal assessment of the existing claim except in accordance with the 1987 Act, section 153Q.
>
> (3) For an injured worker with an existing claim who on the commencement day has an assessment of the worker's degree of permanent impairment underway—
>
> (a) the assessment is taken to be a principal assessment, and
>
> (b) the injured worker is not entitled to a further principal assessment except in accordance with the 1987 Act, section 153Q.

We are concerned by the way in which cl 6 applies to all injuries, whether incurred before or after the commencement day. In this way, it may unacceptably curtail the pre-existing rights of injured workers with existing claims, which may date back many years. In particular, we note cl 6(2)(b) requires any further principal assessment to be undertaken in accordance with s 153Q of the 1987 Act. Section 153Q now requires a worker to demonstrate an unexpected and material deterioration of at least a further 10 percentage points. We suggest that higher threshold should not apply retrospectively, given workers with pre-existing injuries would have obtained legal advice on the basis of s 153Q before the introduction of the 2025 Amendment Act.

iii. Interim Assessments

In our view, it would be preferable to continue existing arrangements for permanent impairment assessments until the commencement of Part 6, Divisions 2 and 3 of the new 1987 Act. In particular, cl 11(2) requires a party electing to have the disagreement dealt with as a medical dispute must, when making the election, present medical evidence supporting the party's position. Given there can only be one assessment, it is difficult to understand how this additional medical evidence will be obtained.

iv. Pre- reform assessments

We are concerned that the pre-reform assessment (as defined in cl7(3)) captures any worker injured at any time who may seek further compensation due to deterioration under the new "material and unexpected deterioration" test, whereby 10% WPI is required in addition to the deterioration being unexpected. We again oppose the retrospective operation of these provisions which curtail the rights of persons with existing injuries and claims.

Independent Legal Assistance and Review Service (ILARS) – Maximum lawyer and agent costs

Amendments to section 337 of the 1998 Act allow for a maximum scale of legal fees payable under ILARS to be set out in the Regulations. Clause 133A provides that the costs scale will be set at the level specified in the ILARS Funding Guidelines that are in force immediately before commencement.

The Law Society expresses its concern that there is no provision for annual indexation of legal costs and no process for review or revision of the cost scale once the Regulation enters into force. This will result in a schedule which is not commensurate with consumer prices in the legal sector and the broader economy.

The 2024 Indexation Review (**Indexation Review**) of the ILARS recommended that the Producer Price Index Australia Legal Services (PPI Legal Services) is the most appropriate choice for the purpose of making indexation adjustments to the ILARS fee schedule for professional legal services and counsel fees. It recommended annual adjustments except in the following circumstances:

- changes have been made to the ILARS fee schedule for approved legal fees and counsel fees as a result of a review of those fees
- the indexation calculation results in a negative number
- there is an external crisis (eg public health) that is relevant to workers compensation.[8]

We agree with the position reached in the Indexation Review that the ILARS fee scale should:

- reflect the value of the work done by qualified, efficient and experienced legal practitioners
- provide for 'normal' market return to efficiently operated and capable suppliers of the ILARS legal service
- be adequate to attract and retain sufficient qualified, efficient and experienced legal practitioners to meet ILARS ongoing needs (i.e. reasonable and fair to the system).[9]

In our view, a failure to provide for annual indexation in the Regulation will fail to achieve the above and, in the long term, will be of detriment to the scheme and the injured workers required to navigate it.

Changes to the Personal Injury Commission Act 2020 (NSW)

Schedule 2 of the Regulation deals with the changes to Schedule 5, clause 9A of the *Personal Injury Commission Act 2020* (NSW), which introduced the new funding requirements for ILARS grants. The Regulation provides that Schedule 5, clause 9A applies to an application for additional funding, which is defined as "top-up funding" and "funding for a stage of a matter if funding for the stage has not previously been approved".

In our view, this section is not tailored to the ILARS funding structure. It is based on Schedule 6 of the Workers Compensation Regulation 2016 in the sense that the lawyer's professional fees and disbursements are paid at the time of the resolution, or final determination of the claim or dispute the subject of the grant of funding. Therefore, we are unclear of what the reference to an application for additional funding, including top-up funding, is intended to cover.

Thank you for the opportunity to comment. Questions at first instance may be directed to Monika Matesa, Head of Commercial and Advisory Law Reform, at (02) 9926 0109 or monika.matesa@lawsociety.com.au.

Yours sincerely,

Ronan McSweeney
President

[8] Matthew Butlin AM, 'Indexation Review: Independent Legal Assistance Review Service (ILARS)', March 2024 Recommendation1.
[9] Ibid., Executive Summary, 3.