

2022 Review of the Workers Compensation Scheme

Submission to the New South Wales Legislative Council
Standing Committee on Law and Justice

8 August 2022

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide a submission to the New South Wales Legislative Council Standing Committee on Law and Justice's ('the Committee') 2022 Review of the NSW Workers Compensation Scheme ('the Review').
2. The ALA's NSW members are some of the most engaged stakeholders in the workers compensation scheme. Our stated objective is to ensure a fair, sustainable and affordable workers compensation scheme that delivers fair outcomes and benefits for workers, by focusing on genuine return to work prospects and restoration of health without perversion by the arbitrary and capricious decisions of insurers.
3. Although there have been some positive changes made to the scheme since the 2020 review, the ALA considers there are a number of areas within the scheme requiring urgent attention and reform. This submission will look at the following issues:
 - 1) Matters arising from the 2020 Review of the Workers Compensation Scheme;
 - 2) Psychological injuries;
 - 3) Other legislative issues; and
 - 4) Review of the Scheme.

Matters arising from the 2020 Review of the Workers Compensation Scheme

4. The ALA submission to the 2020 Review of the Workers Compensation Scheme ('the 2020 Review') covered a number of issues that remain of concern and rather than repeat that submission here, we refer you to it.² A number of those points raised in our previous submission were picked up and endorsed in the recommendations made by the 2020 Committee.

² Australian Lawyers Alliance, Submission to New South Wales Legislative Council Standing Committee on Law and Justice, *2020 Review of the Workers Compensation Scheme* (29 May 2020) <<https://www.lawyersalliance.com.au/documents/item/1886>>.

5. Recommendation 9 from the 2020 Review included a recommendation that State Insurance Regulatory Authority ('SIRA') investigate:

- whether the use of the whole person impairment test in the workers compensation scheme is appropriate and whether the restriction in terms of having one assessment of impairment could be removed for certain injuries
- whether the definition of 'suitable employment' used prior to the 2012 reforms might be more appropriate than the current definition
- other options for injured workers and insurers to reach settlements and exit the scheme
- the feasibility and potential impacts associated with increasing legal costs under the Workers Compensation Regulation 2016.³

6. The NSW Government's response was to support the recommendation and commented that:

SIRA has commenced consultation on a range of factors related to workers compensation thresholds and entitlements as highlighted in recommendations 37,38,39 and 40 of the McDougall Review. The consultation also covers the matters raised in recommendation 9 of the Law and Justice Review.⁴

7. The reference to "the McDougall Review" is, of course, a reference to the *icare and State Insurance and Care Governance Act 2015 Independent Review* report, prepared by the Independent Reviewer, the Hon Robert McDougall QC dated 30 April 2021 ('the McDougall Review').⁵

8. The fourth part of Recommendation 9, in relation to legal costs, was not specifically looked at in the McDougall Review. However, on 23 October 2020 legal fees in Schedule 6 of the Workers Compensation Regulation 2016 were increased by 10 per cent. This was the first increase in many years. Legal costs remain essentially the only part of the scheme that is not indexed for inflation. Those increases in 2020 did not even cover inflation from prior years and have already been eroded, in real terms, by record inflation since then.

9. The ALA has long called for a wholesale review of legal costs of the scheme and advocated for the indexation of Schedule 6. A wholesale review of Schedule 6 is required and with record

³ Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *2020 review of the Workers Compensation Scheme* (Report 75, April 2021) xiii.

⁴ The Hon. Matt Kean MP and the Hon. Victor Dominello MP, *Government Response to the Government Response's 2020 Review of the Workers Compensation Scheme* (25 October 2021) 3.

⁵ Robert McDougall QC, *icare and State Insurance and Care Governance Act 2015 Independent Review* (Report, 30 April 2021) <<https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf>>.

inflation levels in the economy the need for this to occur is now urgent. Failure to act could result in access to justice issues if practitioners cease to undertake work in the field.

10. The first three points of Recommendation 9 were examined closely in the McDougall Review and were the subject of recommendations. In the report, the Hon Robert McDougall QC made recommendation 37, 38, and 40 which provide:⁶

37	That consideration be given to a replacement threshold test for entitlement to weekly and medical benefits that more accurately reflects the need for compensation.
38	That the legislature give consideration to amending the <i>Workplace Injury Management and Workers Compensation Act 1998</i> to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.
40	That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.

11. Despite the recommendations of both the Standing Committee and Independent Reviewer, the ALA is not aware of any attempt or effort to examine, or to take action, in relation to Recommendations 37 and 38.
12. The ALA submits that the issues raised previously, which culminated with these recommendations, are just as relevant in 2022 as they ever were. The ALA recommends that this Committee examine what, if anything, has occurred to advance these recommendations since being made following the 2020 Review and by the Independent Reviewer.
13. With respect to Recommendation 40, the ALA notes that provisions of the State Insurance and Care Legislation Amendment Bill 2022 contained provisions that dealt with commutations. However, those provisions did not ultimately pass.
14. The ALA continues to support the need for greater access to commutations, but not in the manner that was put forward in the State Insurance and Care Legislation Bill 2022.
15. Specifically, the ALA supports the removal of all the restrictions in section 87EA of the *Workers Compensation Act 1987*, so that the parties have the ability to resolve statutory compensation entitlements on a final basis. In the ALA's view, the only restrictions that should be imposed

⁶ Ibid 21–22.

is the requirement that a claimant obtain legal advice on any such settlement and, in any case, where the claimant does not have capacity to provide instructions, that such settlement be the subject of approval from the Personal Injury Commission.

Psychological injuries

16. The ALA notes the Terms of Reference for this Inquiry set out that the Committee has resolved to focus this Review on the increase in psychological claims. It is concerning to the ALA that the available data does not make the scale of increase in psychological claims, if any, transparent.
17. This part of the submission attempts to examine the data, as well as making some general observations as to the ways that we can improve the manner in which psychological claims are managed within the scheme.

Psychological injuries: the data

18. It is unclear to the ALA exactly which data is being used to establish that there has been an increase in psychological claims or that such an increase should be of concern.
19. We acknowledge that there has been a spate of publicity on this topic in recent months and that this publicity appears to have been pushed by icare. For example, the following was published on 27 June 2022 by *The Daily Telegraph* in an article entitled ‘Psychological injuries double every four years, employers to brace for mental health storm’:

Government insurer icare boss Richard Harding said mental health was set to become the “single greatest workplace issue” over the coming years, with mental health claims growing by 13 to 17 per cent per year.⁷

20. Richard Harding also appeared on *7News*, where he said:

⁷ Angira Bharadwaj, ‘Psychological injuries double every four years, employers to brace for mental health storm’, *The Daily Telegraph* (online, 27 June 2022) <<https://www.dailytelegraph.com.au/news/nsw/psychological-injuries-double-every-four-years-employers-to-brace-for-mental-health-storm/news-story/4cb5889229be8634bfa105030f4536c6>>.

We are seeing it almost a doubling every four or five years of the number of mental health claims.... It's not good at all and its really probably one of the biggest threats to sustainability of the workers compensation system.⁸

21. The problem with that data, and the conclusions advanced, is that it appears to be inconsistent with data that is published by SIRA on its website as part of its open data. For example, between 2021-2021 financial year, SIRA data discloses that there was a decrease in overall claims from 99,398 to 82,542 and the number of mental disease claims decreased from 8,313 to 6,110 over the same time. At face value, that would suggest a decrease of the percentage of psychological claims from 8.3 per cent of all claims to 7.4 per cent of all claims.
22. All the messaging and publicity that has quoted icare on the issue seem to imply that the alleged increase in psychological claims is having a material impact on return to work rates and; therefore, impact the overall costs of the scheme. It is the ALA's view that any suggestion that an increase in psychological claims has caused the decrease in return to work rates should be rejected unless further information is provided to support such a conclusion. Return to work rates have been declining for some time now and to suggest in 2022 that the increase in psychological claims is a key driver would be disingenuous. It would ignore the past as well as ignore the key issues that were examined in the McDougall Review.
23. With that in mind, it is difficult to understand why the information coming from icare and SIRA are so different. It makes it hard for stakeholders to provide a significant contribution to this inquiry if the data provided by the regulator seems to be at complete odds with the nominal insurer. This Committee should be extremely concerned about how it can be expected to do its job properly if it cannot be confident in the data presented to it. How can the Committee accurately make recommendations to the NSW Government if inaccurate data presents a blurry or false picture of reality? This can only lead to poor outcomes for those injured in NSW, who deserve better.
24. The Committee should also be extremely concerned about the root cause of the difference in data. One would assume that both agencies would have been careful in ensuring the data was accurate, given the focus of this review. Each agency would have been aware that their information would be highly scrutinised.

⁸ icare NSW, 'Richard Harding on Mental Health at 7NEWS' (YouTube, 14 July 2022) <<https://m.youtube.com/watch?v=EGxznWWT100>>.

25. If the data from icare is correct, then one must wonder how SIRA (as the regulator) could be so wrong. It begs the question, what insight (or lack of) do they have on the scheme and are they providing appropriate oversight to the scheme? If SIRA are operating on inaccurate data, we must then question whether they are asleep at the wheel or whether inaccurate data is being provided to them.
26. If the SIRA data is accurate then that should raise questions as to how icare can go to the public and create this false narrative as well as raise questions as to what SIRA has done to try and correct that false narrative.
27. Whatever the situation, the ALA urges this Committee to investigate and report on the reality of any purported increase in psychological claims and the manner in which the data is being collected and presented to stakeholders in a more transparent way.

Psychological Injuries: general observations

28. Whilst the current state of psychological claims in NSW may be obfuscated by the lack of clarity in the data, there are some general observations that can be made about the current trends in both the propensity to claim and the management of claims.
29. With respect to observations around the propensity to claim, the ALA makes the following two points.
30. First, there can be no doubt that the stigma surrounding psychological claims has eroded over time. Society has become more accepting of people speaking up about their mental health and about seeking treatment. Furthermore, society as a whole is now more willing to hold people accountable for the impacts they cause on others mental health. Employers are no exception to this. The experience of the ALA's members is that injured workers are now more willing to lodge a workers compensation claim for psychological claim than they may have been in the past. They are more willing to get treatment and they are more willing to talk openly about it. Whilst this change in the stigma may lead to an increase in claims, it will also need to be balanced against the fact that many employers are now more cognisant of their employees mental health, which should lead to a change in behaviours and a reduction in the number of claims.

31. Secondly, both employers and employees are currently emerging from one of the most difficult times in recent memory. Many employers and industries have responded well to these challenges. Many working environments have changed significantly and probably permanently. There are all new challenges that need to be faced and grappled with by employers and employees alike. Some of the solutions will lead to improvements in mental health while others, if left unchecked, could lead to a deterioration. For example, in many industries, flexible working appears to be here to stay and will improve work life balance for many. This needs to be contrasted with potentially increased isolation that some workers might face, or the invasion of work into the home.
32. It is probably too early in a pandemic or post-pandemic world to know whether the trends will continue, revert back to the pre-pandemic ways or continue to evolve. This uncertainty, taken together with the uncertainty around the current data, makes it almost impossible to provide recommendations as to anything that Parliament should do at this stage.
33. With respect to the trends in management of claims, it is the view of the ALA that the current system is failing injured workers. Managing a claim for psychological injury on behalf of an insurer requires an entirely different set of skills, processes and systems. The two types of claims are not comparable. An injured worker who breaks his or her leg is not required to have to constantly prove their injury, yet anyone who makes a claim for psychological injury is constantly having to face barriers. The experience of our members is that liability is more routinely declined. The worker is constantly having to retell their story to case officers, investigators, specialists, lawyers and IME's. Whilst ALA members are not doctors, our experience tells us that this does not assist with recovery, in fact, it has the effect of hampering it.
34. In the IRO annual report for 2020-2021, it is reported that 19 per cent of ILARS grants are for psychological claims,⁹ while the SIRA open data for the same period suggest that psychological claims only account for 8.3 per cent of all claims. Clearly, a worker with a psychological claim is much more likely to need the assistance of a lawyer than someone with a physical injury.
35. If the Committee wishes to have a better understanding of the impact that this combative style of case management has on injured workers, the ALA recommends that the Committee

⁹ Office of the Independent Review Officer, *Annual Report 2020/2021* (Report, 1 November 2021) <<https://iro.nsw.gov.au/iro-annual-report-2020-21-now-available-1>>.

seek evidence from expert medical practitioners in relation to impact that it may have on injured workers and their return to work.

36. To assist the Committee to have a greater understanding of how entrenched the combative style of case management for psychological claims is, the ALA recommends that the Committee seek the following data from SIRA:

- The percentage of claims for psychological injury that have a specialist trained in managing psychological claims allocated to the file within eight weeks of the claim being lodged;
- The percentage of claims for psychological injury that are “reasonably excused” compared to physical injuries;
- The percentage of claims where liability under sections 4, 9A or 11A are issued for psychological injuries versus physical injuries;
- The percentage of claims for psychological injury where a factual investigator is engaged by the insurer compared to physical injuries;
- The percentage of claims where an IME is arranged before liability is accepted compared to claims for physical injuries; and
- The view of SIRA as to whether they are satisfied with the outcomes of these questions and, if they are not, what steps they have taken to investigate the reasons for this performance.

Other legislative issues

Death benefits: funds management

37. The ALA was pleased to see that the passage of section 2.2[1] of Schedule 2 of the Motor Accidents and Workers Compensation Legislation Amendment Bill 2022 allowing for funds management fees in claims that involved payments made to NSW Trustee for the benefit of a dependant. This is an improvement that has long been advocated by the ALA and, whilst it has taken a number of years to get to this point, we acknowledge that we have had the support of SIRA on this point.

38. The Motor Accidents and Workers Compensation Legislation Amendment Bill 2022 was assented to on 16 June 2022 and the whole Bill commenced on assent *except for* that provision which was said to commence on a day to be appointed by proclamation.
39. Unfortunately, the new section 25(1A) has not been proclaimed. This is a valuable provision that ensures the most vulnerable of our community do not see their compensation eroded by fees. The section should be proclaimed and commenced as soon as possible.
40. The ALA understands that there is currently consultation being conducted by SIRA in relation to the logistics of the operation of the new section. That is, exactly what role the PIC would have in making the orders, would the payment be made as a lump sum or on an ongoing basis etc. The ALA's view is that this should be resolved by establishing a system where the PIC makes a simple order that funds management be paid and the NSW Trustee inform the insurer of the fees at the relevant intervals and requiring payment from the insurer. Any attempt to reverse engineer a lump sum payment to the NSW Trustee is likely to result in underpayment of the benefit and, because the insurers will still be paying ongoing weekly payments for the dependent child, there will always be an active file to allow the payment to be processed.

Death benefits – dispute resolution

41. The State Insurance and Care Legislation Amendment Bill 2022 is currently before the NSW Parliament. It contains provisions that would enable the parties to a death benefit dispute to resolve it by way of compromise. Additionally, this Bill sets out the legal structure as to how that would occur.
42. The ALA supports all these provisions, with one exception. Subject to that exception, they should be passed and commenced as soon as possible.
43. The one exception that we do take issue with is found in clause 11 of Schedule 2 of the State Insurance and Care Legislation Amendment Bill 2022. That is, the transitional provisions would establish that the amendments would not apply to a death occurring before the amendment commences. There seems to be no logical basis for restricting the commencement of these dispute resolution mechanisms in that way. The provisions do not create an entitlement and hence, could not possibly cause any increase in costs to the scheme. On the contrary, many of these claims can take years to resolve and costs many thousands of dollars in legal costs.

Allowing them to resolve for a figure less than the current entitlement could only serve to save the scheme money, reduce the burden on the PIC and allow families to move on. It seems absurd to have a dual system of dispute resolution where some claims can compromise, and some cannot for no apparent reason.

44. By their nature, claims for death benefits can be quite emotionally charged for the family and because of the value of the claim they can be deeply contested between parties. Allowing the parties to resolve them by way of settlement will result in reduced cost for the scheme and reduced trauma for the families. There is no reason why these provisions could not apply to all claims
45. The ALA suggests that an appropriate amendment to the State Insurance and Care Legislation Amendment Bill 2022 would be to allow the provision to apply to all deaths occurring before 5 August 2015 being the date that the death benefit was significantly increased by the government. Allowing any dispute from that date onward will essentially open it up to any long-standing dispute to resolve and clear the system without going back so far as to be meaningless.

Section 60AA

46. Section 60AA imposes a restriction on injured workers, who would otherwise qualify, from obtaining paid domestic assistance for domestic activities that they did, personally, prior to their accident. It is best demonstrated by looking at two hypothetical examples:
 - A young person living at home with his or her parents who has a serious injury is forever precluded from receiving domestic assistance if he or she were not doing any domestic chores at the time of their injury.
 - An injured female worker, whose husband dies or leaves her after her accident, is forever precluded from receiving domestic assistance for work that she was not doing prior to her injury, even though that work now needs to be done by someone other than her.
47. It would be analogous to an insurer saying to an injured worker that they cannot have an MRI scan because they did not exist at the time of injury.

48. The ALA submits that it is grossly unfair that the legislation does not cater for a change in the worker's circumstances, post injury. The domestic assistance should be paid by the insurer if it is reasonably necessary, in line with other treatment expenses.

Review of the Scheme

49. The complexity of the scheme has been a source of complaint by all stakeholders for many years. Almost all submissions made by peak legal bodies since the Parkes Project was cancelled have called for its resumption. The ALA does not propose to repeat those submissions here. The submissions were picked up and examined closely in the McDougall Review, where he went on and made Recommendation 34, which provided:

The government should give consideration to appointing a suitable agency or body to conduct a review and reconciliation of the Workers Compensation Act 1987, Workplace Injury Management and Workers Compensation Act 1998 and State Insurance and Care Governance Act 2015 into a single consolidated piece of legislation.

That review should consider, among other things, the appropriate legislative response to the changing nature of work and the growth of the gig economy, and the extent to which, and ways in which, gig workers should have the benefits provided by the workers compensation scheme.

The reviewing body should be instructed to consider the further recommendations made herein this report, and should not otherwise consider, review, or amend workers compensation benefits.¹⁰

50. Since the publication of the McDougall Review, the ALA is not aware of any work that has been done, or is currently being done, to advance these recommendations. It remains a blight on the scheme that a recommendation so universally supported, by seemingly all stakeholders, has not gained any further traction since 2015.

51. The ALA agrees with the following words used in the McDougall Review:

The current legislative provisions, Byzantine in their elaboration and labyrinthine in their detail, have resulted in a level of confusion, inconsistency and complexity that does nothing to assist the schemes to achieve their policy objectives. That must change.¹¹

¹⁰ Recommendation, p.21: <https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf>

¹¹ p.256: <https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf>

Conclusion

52. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the NSW Legislative Council Standing Committee on Law and Justice's 2022 Review of the NSW Workers Compensation Scheme.

53. The ALA welcomes the opportunity to provide oral testimony in relation to any of the matters raised by this submission or matters of interest to the Committee.



Joshua Dale

NSW President

Australian Lawyers Alliance