



NSW GOVERNMENT RESPONSE

2023 Review of the Workers Compensation System

INTRODUCTION

The prevalence and impact of psychological injuries in the modern workplace is a cause of concern for the NSW Government. The Standing Committee on Law and Justice (SCLJ) has provided a valuable service to the community by highlighting the problems that are being experienced by workers in NSW and calling for action.

The NSW Government will undertake a targeted review of workers compensation claims management requirements focusing on claims management, processes and practices. The NSW Government will also examine specific claims management issues identified by the committee.

The Government notes the SCLJ recommended that the Government consider amending workers compensation legislation to address perceived issues relating to independent medical reviews, processes and thresholds used for assessing whole person impairment and to increase access to commutation settlements. The NSW Government will examine possible options, in consultation with key stakeholders for Government review and consideration.

The SCLJ has highlighted the high number of psychological injuries occurring in NSW government agencies and the impact that this is having on government workers. The Minister for Work Health and Safety has asked NSW Treasury and icare to work with agencies to prepare a whole of government return to work plan. The review by the SCLJ will provide a useful input into this work.

The NSW Government thanks the SCLJ for its detailed examination of the workers compensation scheme. Our response to the committee's specific recommendations are addressed in the following section.

RESPONSE TO RECOMMENDATIONS

Recommendation 1

That the State Insurance Regulatory Authority, Insurance and Care NSW and the NSW Government continue to work with stakeholders to implement the forty-nine recommendations of the Hon Robert McDougall QC in his report, *icare and State Insurance and Care Governance Act 2015: Independent Review* (30 April 2021).

Supported in principle

The NSW Government welcomes the contribution that the Hon Robert McDougall KC has made through his report on Insurance and Care NSW (icare) and the State Insurance and Care Governance Act 2015.

icare is addressing the recommendations directed to it through their ongoing Improvement Program and they are well progressed. SIRA has progressed the operational recommendations directed to it.

In 2023, the Government legislated to restructure the icare Board and to establish statutory objectives for icare. The Government is considering the outstanding recommendations including those relating to SIRA's functions and powers.

Mr McDougall also recommended in his 30 April 2021 Independent Review that the responsible Minister for SafeWork NSW commission a review of that agency's performance. Mr McDougall was commissioned by the NSW Government in October 2022 to carry out an independent review of SafeWork NSW. This report has now been released.

Recommendation 2

That the State Insurance Regulatory Authority and Insurance and Care NSW continue to enhance and expand work with stakeholders to implement measures to address declining return to work rates in the workers compensation scheme.

Supported

Return to work rates are declining nationally. This decline reflects, in part, the changing nature of work and increased prevalence of mental ill health in the community.

SIRA and icare are working in partnership with SafeWork NSW and scheme stakeholders including unions and business to address this decline. Measures to improve claims management practices are being implemented including an increased focus on professional standards for claims managers and building insurer capability.

icare through its Test and Learn Centre in Wollongong is also testing new ways of claims management in particular for psychological claims. icare is hoping to embed learnings from the Test and Learn Centre into broader operations of icare and its claim service providers as soon as it can.

This issue is also addressed in response to Recommendation 6 and in response to Recommendation 18.

Recommendation 3

That SafeWork NSW as the work health and safety regulator collaborates more closely with the State Insurance Regulatory Authority and Insurance and Care NSW to ensure safer workplaces reducing workers compensation claims.

Supported

The new Government has directed SafeWork NSW to increase its collaboration and engagement with SIRA and icare.

SafeWork NSW, SIRA and icare will continue to collaborate on initiatives including data sharing arrangements designed to improve health and safety in the workplace through an ongoing cross agency executive forum. This work builds on current initiatives such as the Mentally Healthy Workplaces Advisory Board which consists of representatives from SIRA, icare, SafeWork NSW, NSW Mental Health Commission, NSW Ministry of Health, NSW Small Business Commission and Department of Regional NSW.

SafeWork NSW will collaborate further with icare to build psychosocial risk management capability across NSW Government agencies through the Risk Education eXpress (REX) program and participate in Mental Health Forums.

SafeWork NSW inspectors are authorised to conduct workers compensation compliance checks on behalf of SIRA when visiting workplaces. SafeWork NSW should act to make sure these checks occur every time a workplace is visited. This collaboration between SafeWork NSW and SIRA ensures businesses meet their obligations and fosters an end to end approach to safety and injury management in the workplace.

Recommendation 4

That the NSW Government review the State Insurance and Regulation Authority 'significant matter' policy and the application of that policy in practice, to ensure the policy is functioning and ensuring that major mistakes or errors by insurers including Insurance and Care NSW are notified to the State Insurance and Regulation Authority in an efficient manner.

In recognition of the oversight functions of this committee, in instances where an issue is found to be a significant matter:

- Insurance and Care NSW must in writing inform this committee of such issues as soon as practicable. Such information should be in the form of a highlight summary of no more than one page
- the State Insurance Regulatory Authority must notify this committee as soon as practicable of the way in which they have overseen the effective redress of the significant matter. Again, such information should be in the form of a highlight summary of no more than one page.

Supported in principle

Since the committee hearing, SIRA has updated its significant matter policy and issued sector wide reporting requirements to workers compensation, home building and compulsory third party motor accident (CTP) insurers. SIRA engaged with insurers to revise the policy

and drew from reporting requirements applied by the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investment Commission (ASIC).

The policy plays an important role in identifying wide ranging issues that may have a broad scheme impact, as well as insurer actions that may cause harm to individual customers. Scheme impacts can include a potentially broad range of different matters such as the insurer being a party to a decision by a Court that sets a new precedent or may lead to changes in how entitlements are calculated. It may also include an insurer becoming aware of serious or systemic fraud against the scheme.

The SCLJ has requested that icare and SIRA provide summary information to the SCLJ about each matter reported by icare under the significant matter policy. All insurers (including icare) must submit reports under the policy for a broad range of matters to SIRA. These matters are not limited to errors by insurers.

SIRA will investigate all reports made under the policy and, where appropriate, publish a summary of the matter and the outcome in its regulatory updates. Further, SIRA will provide an annual summary to the Committee for its consideration. This approach is intended to strike a practical balance between workability, transparency and accountability.

Recommendation 5

That the NSW Government engage with the State Insurance Regulatory Authority and Insurance and Care NSW to establish a specific timetable to implement a robust and reliable method of data collection that ensures information on secondary psychological injuries is collected by insurers and is maintained on an ongoing basis.

Supported

SIRA has commenced work to better define 'secondary psychological injury' to ensure correct liability decisions are made and to refine claim data requirements to ensure data collection methods are reliable and robust.

SIRA and icare are working together with other insurers to develop a timetable for making system improvements to better capture data on secondary psychological injuries. Implementation will consider all insurers (including self-insurers) and the transitional impacts including operational and business system changes, such as the time necessary to make system changes.

SIRA will work with icare and other insurers to explore possible interim measures that may be available.

SIRA and icare will provide an update to the Committee if requested to do so in six months from the publishing of this response.

Recommendation 6

That the NSW Government:

- investigate and look to implement opportunities to support injured public sector workers to return to work
- develop a whole of government return to work strategy for the public sector to facilitate the placement of staff who have sustained an injury, in particular a psychological injury, but cannot return to their usual workplace

Supported

The current NSW Government acted early after coming to government and directed icare and NSW Treasury to prepare a whole of government return to work plan. A cross-agency steering committee has now been established to oversee development of a whole-of-government strategy to improve return-to-work outcomes in the Treasury Managed Fund. The Steering Committee is chaired by NSW Treasury and includes senior representatives from The Cabinet Office, State Insurance Regulatory Authority, icare, Industrial Relations and the Public Service Commission.

The strategy will focus on addressing structural, cultural and capability barriers and incentives intended to improve return-to-work outcomes across the NSW government sector. Consultation is planned across NSW Government agencies, the Chief People Officer Leadership Group, unions, independent experts, key subject matter experts, and other stakeholders as identified by the Committee. The strategy is scheduled to be finalised mid-2024.

Recommendation 7

That the State Insurance Regulatory Authority, Insurance and Care NSW, and SafeWork NSW:

- continue to investigate and examine in detail the factors influencing the large number of psychological claims from injured workers employed in the Stronger Communities, Education and Health clusters within the public sector
- prioritise the implementation of any changes revealed as necessary by the integrated compliance audit and performance review of the Treasury Managed Fund.

Supported in principle

As duty holders under the *Work Health and Safety Act 2011* (WHS Act), all NSW Government agencies have a legal obligation to ensure as far as reasonably practicable the health and safety of their workers while they are at work. They must also ensure that suitable and adequate information, training, instruction or supervision is provided to workers.

SafeWork NSW, as regulator under the WHS Act will continue to provide advice and information on work health and safety to duty holders under the WHS Act, including government agencies. SafeWork will also continue to monitor and enforce compliance with the WHS Act. SafeWork NSW recognises that more inspectors should be trained to handle psychological issues in the workplace.

SIRA, as regulator of the workers compensation scheme, will continue to take forward its Review of the Treasury Managed Fund. SIRA will work with icare and relevant agencies to implement review findings as appropriate.

Recommendation 8

That Insurance and Care NSW, the State Insurance Regulatory Authority, SafeWork NSW and the Department of Education work in partnership to conduct a forensic investigation into the underlying drivers of stress-related psychological claims in the Education sector.

Supported in principle

This recommendation is addressed in the response to Recommendation 7.

Recommendation 9

That the State Insurance Regulatory Authority investigate and undertake further research and modelling into potential options to deal with psychological claims in the workers compensation scheme, including whether such claims should be dealt with as a separate stream within the existing framework or whether they should be managed entirely separately.

Supported in principle

The NSW Government with the support of SIRA will investigate options for improving the management of psychological injury claims supported by modelling and analysis. SIRA will consult with key stakeholders including worker representatives, employer representatives, insurer, legal representatives and people with lived experience.

Recommendation 10

That SafeWork NSW, in consultation with industry and union stakeholders:

- develop, implement, evaluate and publicly report on all programs that manage and reduce psychosocial risk
- undertake a project to build the capacity and number of health and safety representatives who have received training in identifying, managing and responding to psychosocial hazards in the workplace
- undertake an enforcement campaign targeting workplaces that have high incidents of psychological injury to ensure they have in place a psychosocial hazard risk assessment. The efficacy of this campaign should be subject to an independent external evaluation.

Supported in principle

SafeWork NSW is finalising a Psychological Health and Safety Strategy 2024-26 which builds on lessons learnt from the previous strategy, in consultation with stakeholders. This includes implementing learnings from the external valuation of the 2018-2022 Mentally Healthy Workplaces Strategy. The evaluation report is publicly available.

SafeWork is currently reviewing and improving its approach to health and safety representatives (HSRs) and aims to build the capacity and number of HSRs. SafeWork recognises that HSRs play a central role in workplace health and safety and require better support.

SafeWork NSW is funding programs that assist NSW businesses to reduce psychological risk and will continue enforcement campaigns which focus on psychological hazards, such as recent enforcement campaigns announced in social and disability services. The new

Psychological Health and Safety Strategy will be more compliance focused than the previous strategy.

SafeWork undertakes a wide range of programs, of various sizes, that aim to manage and reduce psychosocial risk. SafeWork has and will continue to develop, implement, evaluate and report on its psychological health and safety strategy.

Recommendation 11

That the research functions of SafeWork NSW, the State Insurance Regulatory Authority and Insurance and Care NSW work more closely and collaboratively together and the responsible Ministers consider unifying those functions to ensure the best use of these resources.

Supported

SafeWork NSW, SIRA and icare have different but complementary statutory functions which can be leveraged to establish a more integrated and efficient approach to planning and realising research outcomes.

The three agencies are committed to working together to ensure that their research programs are coordinated and focussed on high priority needs and that no duplication occurs. This commitment builds on existing initiatives such as the SIRA partnership with icare to jointly fund successful research by the John Walsh Centre for Rehabilitation and Research.

Recommendation 12

That the State Insurance Regulatory Authority and Insurance and Care NSW, in consultation with key stakeholders and injured workers, identify and implement measures to minimise the impacts caused by case manager turnover, in order to avoid further distress and/or trauma to injured workers if they have to re-tell their story.

Supported

icare continues to work collaboratively with its claim service providers (CSPs) and other stakeholders, including injured workers, to identify and implement measures to minimise the impact caused by case manager turnover.

icare has developed an enhanced claims model to improve the way claims are managed, and the structure of CSPs delivering services. The new claims model endeavours to create a more competitive marketplace and to promote choice, innovation, and continuous improvement for both injured workers and businesses. By introducing competition between claim service providers that emphasises outcomes for claims management, the NSW Government hopes this will also improve outcomes for both injured workers and business.

icare has established the Professional Standards Framework which prioritises attracting and retaining highly experienced case managers, monitors turnover within CSPs and publishes CSP caseload data each quarter.

Recommendation 13

That the State Insurance Regulatory Authority investigate the extent to which delays in medical support and treatment are occurring and potential compliance measures.

Supported in principle

SIRA will work with the Independent Review Officer and insurers to investigate and analyse the complaints highlighted in the report of the Standing Committee on Law and Justice. This will inform further actions by SIRA to reduce delays in accessing health care providers and the approval and delivery of treatment.

SIRA will survey health providers to better understand their experiences, including barriers to greater participation and possible issues that may impact timely treatment and care.

SIRA is auditing self and specialised insurers to identify the causes for delays in determining requests for medical treatment and ensure remediation activities are in place.

Recommendation 14

That the NSW Government consider amendments to the workers compensation legislation that would ensure injured workers are only required to have a single independent medical examination from a specialist agreed upon by all parties, where relevant.

Supported in principle

Independent medical examinations are an important protection for injured workers. Injuries suffered by workers can change over time and there are circumstances where further medical assessments may be appropriate. Any proposed limitations on these assessments should be appropriate for the circumstances.

The NSW Government will consider amendments to the workers compensation legislation. The NSW Government with support from SIRA and icare and in consultation with other key stakeholders will assess the impact and potential benefits of introducing single independent medical examinations and provide options for Government to consider, including non-regulatory measures. Key stakeholders to be consulted include the Personal Injury Commission and the Independent Review Officer, medical and allied health service providers, worker representatives, employer representatives, insurers, legal representatives and people with lived experience.

Recommendation 15

That the NSW Government considers amending the workers compensation legislation to increase access to commutation settlements, provided that appropriate safeguards are included, such as the requirement for independent legal advice and the approval of the Personal Injury Commission where appropriate.

Supported in principle

The NSW Government will consider amendments to the workers compensation legislation. The NSW Government with support from SIRA will examine the role of, and access to,

commutations within the workers compensation system supported by modelling and analysis, including the role and efficacy of possible safeguards for injured workers. The NSW Government will consult with key stakeholders including worker representatives, employer representatives, insurer, legal representatives, people with lived experience, the Personal Injury Commission and the Independent Review Officer.

This work will consider the role of commutations in improving outcomes for injured workers alongside potential impacts on Scheme financial sustainability.

Recommendation 16

That the NSW Government considers amending the workers compensation legislation to:

- enable a further assessment of whole person impairment where there has been a significant deterioration in relation to an injury
- ensure there is a consistent threshold for whole person impairment regardless of whether the injury is physical or psychological in nature.

Supported in principle

This recommendation should be considered alongside recommendation 14 intended to ensure that the use of independent medical examinations are used in ways that is consistent with and upholds the integrity of the workers compensation system and its intended purpose to protect and support injured workers.

The degree of permanent impairment is used as a threshold for worker entitlements, including ongoing weekly and medical benefits and access to lump sum compensation from common law and commutations.

Any legislative change needs to be carefully assessed to ensure that they are needed and do not give rise to unintended consequences for injured workers or risk scheme financial viability.

SIRA will examine possible options in consultation with key stakeholders and provide advice to government.

Recommendation 17

That the State Insurance Regulatory Authority review the use of the Psychiatric Impairment Rating Scale within the workers compensation scheme, to assess whether it is the most effective tool for calculating whole person impairment in relation to psychological injuries.

Supported

SIRA has commenced work to identify and analyse tools available for the assessment of psychological injury in other jurisdictions. SIRA will continue to review the use of Psychiatric Impairment Rating Scale and consider alternative tools.

Recommendation 18

That the NSW Government prioritise a targeted review, engaging with key stakeholders, of the entire workers compensation scheme, to ensure claims management and the claims management process meet the needs of injured workers and better reflects the

nature of injuries occurring in modern workplaces. This review should include a consideration of whether there is an appropriate level of external oversight of quality assurance programs concerning claims service providers.

Supported

The NSW Government will undertake a review of claims management with a view to identifying opportunities to:

- improve return to work rates,
- ensure claims management can be shaped to meet specific needs of injured workers and their employers, including needs specific to psychological injuries,
- facilitate innovation in claims management and ensure it is able to meet the changing nature of work and work related injuries,
- minimise unnecessary administration, process prescription and reporting,
- empower injured workers in managing their recovery and return to work, and
- striking a better balance between principle, prescription and risk-based regulation.

Key stakeholders will be consulted.