**Submission No 121**

# INQUIRY INTO WORKERS COMPENSATION LEGISLATION AMENDMENT BILL 2025

**Organisation:** Australian Lawyers Alliance

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# Workers Compensation Legislation Amendment Bill 2025 (NSW)

## Submission to the Public Accountability and Works Committee, Parliament of NSW

**22 July 2025**

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*Protecting and promoting justice, freedom and the rights of the individual.*

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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 access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.[1]

[1] www.lawyersalliance.com.au.

# Introduction

1. The ALA welcomes the opportunity to have input to the Public Accountability and Works Committee ('PAW Committee') on the NSW Government's proposed changes to liability and entitlements for psychological injury, as detailed in the Workers Compensation Legislation Amendment Bill 2025 (NSW) ('the Bill').

2. The ALA previously provided a submission to and provided public hearing evidence before the Standing Committee on Law and Justice.[2] The following ALA submission is made on the assumption that our earlier evidence has been read.

3. We note that Terms of Reference for this inquiry refer the Bill to the PAW Committee "*for inquiry and report, including the examination of the impact of the bill on business and economic conditions in New South Wales*".

4. The Terms of Reference are important because both employers and injured workers have a vested interest in ensuring that the NSW workers compensation scheme ('the scheme') meets all of its key objectives, as laid out in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ('the WIM Act'). That is:

> *(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,*
> *(b) to provide—*
> - *prompt treatment of injuries, and*
> - *effective and proactive management of injuries, and*
> - *necessary medical and vocational rehabilitation following injuries,*
>
> *in order to assist injured workers and to promote their return to work as soon as possible,*
> *(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,*
> *(d) to be fair, affordable, and financially viable,*
> *(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,*
> *(f) to deliver the above objectives efficiently and effectively.*

[2] Australian Lawyers Alliance, *Proposed changes to liability and entitlements for psychological injury in New South Wales: Exposure Draft - Workers Compensation Legislation Amendment Bill 2025* (Submission: 15 May 2025; Public hearing appearance: 16 May 2025) <www.lawyersalliance.com.au/Web/Submissions-Content/2025/250515SubNSW.aspx>.

5. The current scheme in NSW is failing to adequately meet these objectives for workers and employers alike. The ALA accepts that the number of new psychological claims being lodged is increasing and this submission will outline steps that, we say, should be taken to address that.

6. However, the increase in psychological claims should not be the only, or even the primary, source of concern and inquiry. If there is a 'financial crisis' then the blame should lay squarely at the feet of both the State Insurance Regulatory Authority (SIRA) and icare for their inability to manage the scheme in accordance with principles already laid out in the legislative framework underpinning the scheme. The failure to ensure proper case management of claims in accordance with the framework established by the 2012 reforms has resulted in declining return to work rates and a burgeoning long tail scheme.

7. This submission will make the case that the solution should involve a two-pronged approach of:

    a. reducing the number of new psychological claims entering the scheme through a 'relevant event' test with appropriate definitions; and

    b. ensuring proper case management in accordance with the legislation.

8. We submit that these changes will be sufficient, with some amendments around dispute resolution, to ensure the long-term financial position of the scheme.

9. With regards to the Terms of Reference for this inquiry, the ALA's submission will address the following matters:

    a. The overall financial sustainability of the NSW workers compensation system;

    b. Claims management;

    c. The provisions of the Workers Compensation Legislation Amendment Bill 2025; and

    d. The ALA's key recommendations.

## The overall financial sustainability of the NSW workers compensation system

10. At the outset the ALA acknowledges that psychological injuries have increased and continue to increase across the scheme. The Government, SIRA and icare have been consistent in their messaging that the looming 'financial crisis' is due to an increase in psychological claims. Implicit in that is that if there was no increase in psychological claims then the financial position of the scheme would be stable.

11. The evidence from Mr Dai Liu (General Manager, Actuarial Services, Insurance and Care NSW) to the first public hearing before the PAW Committee was that the simple act of introducing the proposed 'relevant event' test would see a reduction in new claims by one third:[3] (transcript pages 18-19).

> **The Hon. MARK LATHAM:** Dai Liu, what assumptions have you got in your modelling for the number of new claims?
>
> **DAI LIU:** We had a look at claims that currently presented as bullying, harassment, stress and burnout—sadly, that's how they're categorised—and then looked at the proportional reductions that will occur with this bill. It's broadly a third of reduction in terms of psychological claims that the schemes will receive.

12. The numbers seem to vary depending on reporting periods, but on most accounts there is projected to be 11,373 psychological claims for the 2024/25 reporting year (ending 30 September) at an average projected costs of $288,542 per file. A one-third reduction in psychological claims will see a reduction of 3,791 claims per year. Without reducing benefits at all this should result in future savings of $1.1 billion per year (3,791 fewer claims x $288,542 costs saving per claim).

13. Whilst the numbers can never be precise, there is no doubt that this in an enormous saving to the scheme. Whilst the ALA has some concerns about the specific wording of items in the proposed 'relevant event' test and accompanying definitions, we nonetheless agree that it has the potential to act as a gateway to those entering the scheme. If the introduction of a 'relevant event' test meant that benefits for those on the scheme can be retained, then this should be the preferred course of action.

14. Unfortunately, the Bill goes further than simply implementing a 'relevant event' test. It introduces many other restrictions to benefits. The largest savings are said to come from reducing the weekly payments from 260 weeks to 130 weeks and raising the Whole Person

[3] Evidence to the Public Accountability and Works Committee, Parliament of NSW, Tuesday 17 June 2025, 18.

Impairment (WPI) threshold for various types of claims. Whilst we maintain that it is not necessary to cut benefits, it should be pointed out that there would be 130 weeks before any of these changes would impact workers. This means that there should be broad agreement that the amendments that cut benefits are unnecessary at this point in time as they can be considered at again at a later stage if the introduction of a 'relevant event' test failed to provide sufficient improvement in the scheme's financial performance.

15. Once you introduce the gateway, two and half years of scheme operation should be sufficient time to evaluate the impact of the change and adjust course if necessary.

## Claims management

16. At the same time as introducing a 'relevant event' test with accompanying definitions to provide savings through a reduction of claims entering the scheme, there should also be a focus on the claims management and the costs of managing the claims.

17. SIRA and icare, as custodians of the scheme, have failed to adequately manage their responsibilities and obligations assigned to them through the legislation to ensure that claims are appropriately managed to achieve the objectives of that legislation. Their failure has ultimately led to what is now being described as a 'financial crisis'.

18. On 2 April 2024, the NSW Auditor-General's report *Workers compensation claims management* ("Auditor-General's Report") was published.[4] The ALA would suggest that this report is mandatory reading for anyone undertaking a review of the scheme. Some of the key findings include:

    - icare did not assess its existing claims management model or conduct a comprehensive options analysis assessing alternative approaches before commencing reforms to the Nominal Insurer (NI).

    - icare's focus for reforming the Treasury Managed Fund (TMF) is not based on addressing key strategic challenges for the scheme.

[4] See: Auditor General, Audit Office of New South Wales, *Workers compensation claims management* (2 April 2024) <www.audit.nsw.gov.au/our-work/reports/workers-compensation-claims-management>.

- icare has commenced a procurement process for the TMF without comprehensively assessing its claims management model.

- icare's accountability for achieving the key objectives of the scheme – improving return to work outcomes and financial sustainability – is not clear enough.

- icare has committed significant resources to internal organisational improvement programs which have contributed to increases in icare's corporate expenses.

- SIRA increased its regulatory activities for the NI from 2019 but only began actively focusing on the TMF in 2023. Prior to 2019, SIRA was mostly focused on developing regulatory guidelines and frameworks.

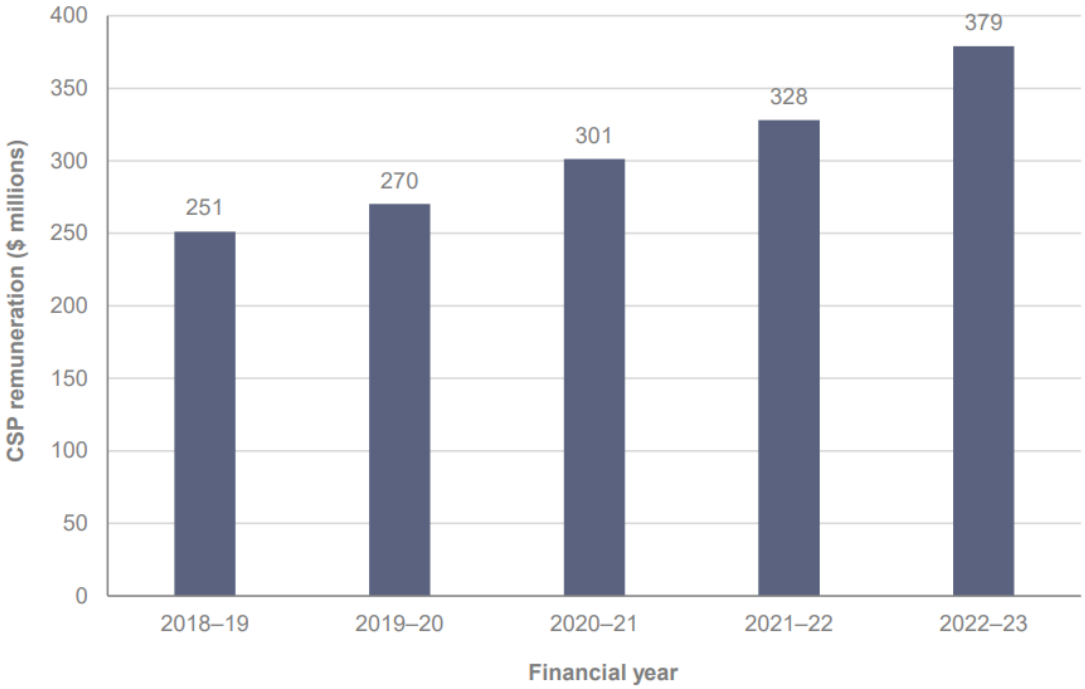
- SIRA began focusing on improving compliance of employers with workers compensation obligations from 2020, but did not have a strategy or active program prior to this.

19. Having been entrusted with the management of the scheme and armed with the findings of the Auditor-General's Report, SIRA and icare have made inadequate progress on improvement – preferring instead to place their bets on the passing of the Bill to slash workers' rights.

20. The finding that SIRA did not begin focusing regulatory activities of the TMF until 2023 is perplexing in light of the that fact that all evidence points to the fact that the increase in psychological claims and costs sits primarily with the TMF. Throughout this inquiry and the Standing Committee on Law and Justice's inquiry in May, SIRA has failed to explain why it did not have a focus on the TMF until 2023 and what it has done since. The only conclusion the PAW Committee could possibly reach is that there has been no work done by SIRA to adequately address the problems in the TMF.

21. Claim service provider remuneration has increased from around $251 million in 2018–19 to almost $379 million in 2022–23, an increase of more than 50%. Remuneration has increased in each financial year during this period. The following graph is provided in the Auditor-General's Report:[5]

[5] Auditor General, Audit Office of New South Wales, *Workers compensation claims management* (2 April 2024) 22.




22. In discussing new payment structures for the NI, the Auditor-General's Report points out the following:[6]

    - "*For at least the first year of the new model, icare has committed to paying a proportion of the performance-based outcome fees to CSPs even if they do not achieve their targets*"; and
    - "*The return to work rate targets for CSPs were lower in 2023 compared to 2022*".

23. So while the number of new claims has increased by single digit numbers and the return-to-work rates have deteriorated, the payments to service providers have somehow managed to increase by over 50%. The injured workers of NSW deserve better and we submit that the PAW Committee should hold icare accountable.

24. Equally appalling is the increase in the average costs of a claim. The following data is taken from the document entitled "*3c. Historical claims into category*" provided by NSW Treasury to this Committee:

[6] Auditor General, Audit Office of New South Wales, *Workers compensation claims management* (2 April 2024) 4.

| WORKFORCE % | WORKFORCE % | | | |
|---|---|---|---|---|
| Report year ending 30 Sep | Average cost - psych claims | Average cost - physical claims | Total cost - psych claims | Total cost - physical claims |
| 2015 | - | - | - | - |
| 2016 | - | - | - | - |
| 2017 | - | - | - | - |
| 2018 | - | - | - | - |
| 2019 | - | - | - | - |
| 2020 | $145,786 | $29,061 | $721m | $1,961m |
| 2021 | $163,741 | $31,243 | $904m | $2,066m |
| 2022 | $184,237 | $33,108 | $973m | $2,142m |
| 2023 | $216,021 | $40,655 | $1,521m | $2,920m |
| 2024 | $255,626 | $45,651 | $2,324m | $3,361m |
| **FY24/25 Projection** | **$288,542** | **$57,616** | | |

25. An increase in costs on a per claim basis from $145,786.00 to a projected $288,542.00 has nothing to do with an increase in the number of claims. The stark reality that must be accepted is that the significant increases in costs on a per claim basis is clearly a result of failing to properly manage claims and improve return to work rates so avoid a long tail.

26. The 2012 amendments to the scheme laid the foundation for a insurers to take greater control of weekly payments. With proper case management insurers should be able to keep control of these costs.

27. One powerful example of where this case management has gone wrong is around the insurer's current application of section 38 of the *Workers Compensation Act 1987* (NSW) ('the Act'). The current version of section 38 was introduced as part of the 2012 reforms and provides:

> ***38 Weekly payments after second entitlement period (after week 130)***
>
> *(1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.*
>
> *(2) A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.*
>
> *(3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if—*
>
> *(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*
>
> *(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt*

*of current weekly earnings (or current weekly earnings together with a deductible amount) of at least $155 per week, and*

*(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*

28. That is, the insurer must have assessed the current work capacity AND must have formed the view the workers current capacity is likely to continue indefinitely.

29. At this point it is worth reflecting on the intent of the 2012 reforms. In the second reading speech on the introduction of the Workers Compensation Legislation Amendment Bill 2012 (NSW), the Hon Mike Baird, Treasurer, said:[7]

> *The Workers Compensation Legislation Amendment Bill represents a fundamental shift towards properly meeting the needs of the most seriously injured workers in the scheme while strongly incentivising return to work for those workers who have the capacity to return to work. The Government is committed to ensuring that the income, support and treatment needs of seriously injured workers are met, and the bill will increase the weekly benefits paid to the most seriously injured workers while ensuring such workers have benefits until retirement if they cannot return to work.*
>
> *…*
>
> *If a worker who has work capacity is not working at least 15 hours per week by the end of the 130-week period, entitlement to weekly benefits will cease. However, workers who have no work capacity will continue to receive benefits of up to 80 per cent of their pre-injury average weekly earnings. This new benefit structure will support workers while they are recovering from workplace injury or illness and provide incentive to workers who have work capacity to return to work.*

30. The introduction of section 38 was heavily criticised as being too harsh and effectively making impossible to obtain weekly payments beyond 130 weeks except for the very seriously injured. From its commencement the insurer was entitled to assess the capacity of injured workers and even if they felt their current work capacity was accurate, the insurer could still deny payments on the basis that they did not think it was likely to continue indefinitely.

31. Following the 2012 amendments, insurers were making regular work capacity assessments and decisions. Workers could first seek a merit review with SIRA followed by a procedural review with the Independent Review Office (IRO). There were few, if any, details published around the success rates of workers versus insurers in merit review proceedings. The experience of our members and their clients is that the success rates have remined largely the same as what we see now.

[7] NSW, *Parliamentary Debates*, Legislative Assembly, 19 June 2012, 13015.

32. On the procedural review front, IRO was much more open and transparent about the decisions it made. In the 2014-15 IRO Annual Report it was reported that 61.6% of applications for procedural reviews by workers were successful. That is, some three years after the implementation of the 2012 reforms insurers, were still unable to get the procedures correct.

33. The only change in the legislative framework worth noting is that the process of reviewing an insurer's decision has changed from a merit review with SIRA and procedural review with IRO to reviews with the Personal Injury Commission (PIC) as part of the move to a 'one stop shop'. Having said that, section 38 remains the same and there has not been a significant expansion of the provisions through interpretation of the PIC.

34. It is our observation that, over time, the insurers have become unwilling to undertake the proper assessments and make the appropriate decisions that the scheme empowers them to make. The effect of this is a gradual decline in quality and quantity of insurer decision-making. Insurers are now choosing the path of least resistance, and they often compromise where compromises are not needed or expected.

35. The insurers reduced appetite for work capacity assessment and decisions is a large, but not the only example, of poor case management. The provisions and intent of the 2012 amendments are no longer being observed by insurers and a correction of the operations would have significant savings for the scheme.

36. **The ALA submits that the PAW Committee should conduct or order a full and comprehensive review into the claims management processes which examines the insurer conduct and behaviour in the way in which claims are managed.**

37. A full and thorough review will reveal that the failure of insurers to manage claims and undertake proposer assessments is what has led to the burgeoning long tail nature of the claims and the significant increase in average costs of a claim.

38. It will also reveal that if the 2012 amendments were properly implemented and enforced, as well as the introduction of an appropriate 'relevant event' test, then no further changes to the benefit structure would be needed.

39. The PAW Committee and the Parliament of NSW can take comfort in the fact that most of the proposed provisions and savings were not planned to take effect for 130 weeks after commencement. This means that there is time for the review to occur and for any course

correction needed. Failing all of that there would still be time for any further reforms to be implemented before participants reach the 130 week mark.

40. The comprehensive review we have recommended should also be coupled with more circumscribed amendments that:

    a. tighten access to the scheme with the introduction of the 'relevant event' test and appropriate definitions;

    b. permits full and open commutation; and

    c. offer transitional provisions for death benefit amendments that apply to all deaths from 5 August 2025.

41. Whilst this is our preferred path forward, we nevertheless wish to comment in the remainder of our submission on some provisions of the Bill for consideration.

## The provisions of the Workers Compensation Legislation Amendment Bill 2025

42. The ALA's general observation is that, taken as a whole, this package goes too far and brings a sledgehammer to solve a problem that may be solved with a hammer.

43. The Bill does not place one hurdle in front of workers to obtain benefits – it actually places multiple hurdles. The combined effect of this is to make it so hard for injured workers to obtain compensation that it would be simpler and less cruel if the NSW Government were to simply state that it intends for no one to claim compensation for a psychological injury in NSW.

### Definitions

44. Since the ALA's submission on the Exposure Draft dated 15 May 2025, the proposed definitions have been revised and there is some improvement. As we have submitted above, the ALA believe that the introduction of a 'relevant event' test with appropriate definitions creates an opportunity to obtain significant savings without the need to resort to cutting of benefits for those that meet the new test.

45. However, the ALA is still concerned that aspects of the proposed definitions are vague, ill-defined and will result in many injured workers in NSW being precluded from accessing compensation.

46. The inadequacies of the proposed definitions are indicative of the broader issue that the ALA has highlighted previously – that is, that the proposed reforms are hasty and ill-considered. Considerably more consultation is required to ensure that the definitions reflect the realities of the injuries that workers in NSW are suffering before those definitions can be introduced.

47. The Bill's proposed definitions predominantly affect workers with psychological injuries. It is noted that the Bill introduces new definitions mainly at sections 8A to 8K. The following submissions address the definitions that the ALA believes should be removed or clarified, as part of a broader and wholistic consultation process.

## Section 8A: Meaning of "bullying"

48. The ALA is concerned that the inclusion of the word "repeatedly" in this proposed definition is vague but also unnecessarily restrictive.

49. "Repeatedly" is not defined, however it suggests that a worker may only make a claim arising from bullying if the bullying has taken place over an extended period of time and numerous incidences of bullying have occurred.

50. The ALA's members, as practitioners in this area, have firsthand experience of workers who suffer significant injuries arising from bullying in the workplace, bullying that has not necessarily taken place over an extended period of time and not repeatedly.

51. There are examples of workers who suffer significant injuries as a result of one or a few significant incidences of bullying – not repeated incidences (see examples below). Based on the proposed definition in the current iteration of the Bill, such injured workers will be precluded from claiming compensation.

52. **The ALA seeks the deletion of the word "repeatedly" and further refining of this definition, as part of a more comprehensive consultation process, to better reflect the realities of bullying in the workplace**.

Section 8G: Meaning of "relevant event" and Section 8J: Meaning of "traumatic incident"

53. **The ALA continues to be concerned by the current proposed definitions of "relevant event" and "traumatic incident", which will result in many workers diagnosed with psychological injuries being excluded from the scheme**.

54. In addition, there are ambiguities which are likely to result in increased disputation – resulting in increased delays and costs for the scheme.

55. Examples of workers who would have no entitlement to make a claim, based on the definition of "relevant event", are as follows:

    a. A worker on a building site who does not witness an accident that results in the death of a colleague yet is exposed to the loss of a colleague and the subsequent investigation into workplace safety. The initial grief and safety fears evolve into psychological injury.

    b. Retail and client services workers who are subjected to the inappropriate conduct of customers and clients that is not violent or criminal conduct but is nonetheless serious and results in psychological injury.

    c. A warehouse worker who suffers a psychological injury as a result of being the victim of a prank at the hands of his colleagues – where they led him to believe there was an armed hold up and his life was in danger. The conduct does not constitute "repeated" bullying as it is a one-off event. There was no violence or criminal conduct involved, as it was a prank. However, as a result of the colleagues' conduct, the worker suffers a psychological injury.

    d. A teacher who is exposed to difficult behaviours of special needs students – where the behaviour is not violent or criminal, and where the work demands are not excessive because they are part of the teacher's role, but nonetheless the exposure to difficult behaviours leads to a psychological injury.

42. The ALA is also concerned that the definitions in these provisions of the Bill do not provide any indication or clarity on what precisely is considered to be violence or a threat of violence.

43. Questions arise regarding these terms – who will determine what is "violence or a threat of violence" and what is "indictable criminal conduct"? How will they be determined? How is such a determination obtained? How long will it take to obtain such a determination? This is

indicative of the proposed definitions adding unnecessary complexity to an already complex scheme.

44. Similarly, it is not clear what kinds of events or incidents the regulations may prescribe. The uncertainty as to the regulations also raises concerns that the proposed amendments will lead to an increase in disputes, complexity and uncertainty, leading to delays and higher costs for the scheme.

Section 8K: Meaning of "vicarious trauma"

45. The ALA is similarly concerned about the proposed definition of "vicarious trauma". The proposed definition includes the term "repeated exposure".

46. Again, ALA members as practitioners in this area have represented workers who have suffered significant psychological injuries resulting from exposure to the traumatic experiences of others but not necessarily repeatedly.

47. For example, a counsellor who suffers a psychological injury as a result of a session with a client who has suffered extreme abuse and violence. In addition, there are examples of other kinds of healthcare workers who treat traumatised patients and suffer injuries resulting from vicarious trauma due to one off or a few significant exposures, not due to repeated exposure.

48. **The ALA contends that the term "repeated" is too vague and does not consider the realities of vicarious trauma**.

## A Principal Assessment

49. The Bill introduces the concept of 'Principal Assessment' into the scheme. The ALA has previously provided submissions that speak to:

    - the fact that SIRA, as regulator, should not be involved in dispute resolution;
    - the complex nature of assessments and how an injured workers and their representatives are unlikely to be able to easily navigate the guidelines to ensure assessments are complete; and

- the challenges around reaching agreement with the insurer as to what is to be assessed and how will disputes be resolved without adding costs and delay.

50. These concerns remain and we refer the PAW Committee to our earlier submission.

51. Since writing that submission in May 2025, another significant problem with the principal assessment process has been identified. The problem arises because there seems to be a misunderstanding that an assessment of WPI occurs on its own, in a vacuum, away from anything else that is occurring in the claim. This can be true in some cases but it not true is many.

52. A worker's solicitor is required, for good reason, to bring all disputes to the PIC together. If an insurer denies liability and an assessment is required, the doctor will usually be asked to comment on a number things including:

    a. liability;

    b. causation;

    c. reasonableness of treatment received in the past;

    d. the ongoing need for medical treatment;

    e. capacity for work in the past;

    f. capacity to work in the future;

    g. the need for domestic assistance; and/or

    h. WPI.

53. The provisions in the Bill that deal with Principal Assessments contemplate that the assessment will be for WPI only. One must ask what will happen when a claim involves multiple disputes and multiple needs for assessment.

54. The entire purpose of saving costs will be undone if the worker and insurer must get their own assessment for any issues other than WPI.

55. The end result will be the disputes will have three assessments (one for each party and one principal assessment) instead of the two that would originally have occurred. **This, the ALA**

**submits, will add to the costs of the assessments and make dispute resolution within the scheme even more complicated.**

## "Reasonably necessary" versus "reasonable and necessary"

56. The ALA has previously made submissions on this point that need not be repeated.

57. It is, however, worth commenting on how a new test of "reasonable and necessary" would operate in the Dust Diseases space.

58. The amendment to section 60 made by Schedule 1.9[6] apply to claims under the *Workers' Compensation (Dust Diseases) Act 1942* (NSW). The application of a "reasonable and necessary" test in the dust diseases space is particularly worrisome given the nature of the claims and treatment provided.

59. Often treatment will be approved that may be designed to ease comfort in an end-of-life situation. That treatment can often be experimental in nature and designed to give hope to extend life for even the shortest of time. There are many circumstances where treatment provided to asbestos victims would not necessarily meet the "reasonable and necessary" test but that everyone would agree is treatment that should be provided.

60. It is inappropriate to add additional burdens on ill and dying claimants. The scheme relies on new and innovative therapies which are extremely expensive if paid privately. It would be impossible for a dust diseases claimant to prove the necessity of the treatment and provide the 'evidence base' potentially required by the change in the test.

61. **The ALA maintains that there is no reason the "reasonably necessary" test needs to change at all and especially for dust disease claims**.

## WPI threshold

62. As part of our earlier submission to the Standing Committee on Law and Justice, the ALA wrote extensively on the issue of WPI thresholds. As with other items, we will not repeat them here but wish to make some additional observations.

63. First, during the 17 June 2025 public hearing the Treasurer gave the following evidence to the PAW Committee:[8]

> **The Hon. DANIEL MOOKHEY:** Chair, equally, the point is, under the PIRS scale, a person with no work capacity is defined as at 31 per cent. In the event that a person is assumed to have no work capacity—that is, they are totally impaired and cannot work—I expect them to stay on the scheme.
>
> **The Hon. DAMIEN TUDEHOPE:** Even if they are under 31 per cent?
>
> **The Hon. DANIEL MOOKHEY:** I think you're asking me what some would describe as a tautology, Mr Tudehope, which is that, if they are under 30 per cent, by definition they have capacity to work.
>
> **The Hon. DAMIEN TUDEHOPE:** That is now your interpretation of the PIRS scale—that anyone under 31 per cent has capacity to return to work, which is contrary to what we have heard today.

64. With respect, the Treasurer is incorrect in his understanding of the PIRS scale and we submit that the evidence of Associate Professor Michael Robertson and Dr Michael Epstein should be preferred. Employability is but one factor that makes up the PIRS rating. The experience of ALA members aligns with the evidence that Associate Professor Robertson gave in the following exchange:[9]

> **The Hon. DAMIEN TUDEHOPE:** In the 21 per cent to 31 per cent cohort, using the imperfect PIR scale, what's your assessment of the capacity of that cohort?
>
> **MICHAEL ROBERTSON:** The north of 22 per cent?
>
> **The Hon. DAMIEN TUDEHOPE:** The north of 22 per cent.
>
> **MICHAEL ROBERTSON:** I think the majority would not be capable of more than one or two days per week of sustained economic participation over the long term. There will be those who, through their own efforts or resilience, might find some place at a slightly higher level of participation. But that is a very damaged group, who have often had a very long pathway into their psychological injury, and it's more a challenge of care rather than cure. Where I think the opportunity exists is that group where these are otherwise resilient, well put together people with fairly normative life journeys who encounter some misfortune in the workplace, where inappropriate medicalisation and litigation makes a bad situation much worse. That's where I think—

65. Secondly, there has been a suggestion that the threshold had to be set so high (31%) because of what has sometimes been referred to as "bracket creep". The suggestion being that every time you set a new threshold the assessments will change to meet that threshold.

66. In order to understand the phenomenon it is probably better to think of it in economic terms like the way we think of price discovery. In that regard it is not so much "bracket creep" that occurs but more akin to "bracket discovery".

67. What happens is that when you have just one threshold (say, 15% like we had in pre-2012) the system gets very efficient in understanding the difference between 14% and 15%. This happens through the learnings that doctors and lawyers obtain through running cases. In

[8] Evidence to the Public Accountability and Works Committee, Parliament of NSW, Tuesday 17 June 2025, 80.

[9] Evidence to the Public Accountability and Works Committee, Parliament of NSW, Tuesday 17 June 2025, 65.

this ‘market’ there is no real incentive to discover the actual difference between say 19% and 20%, or 24% and 25%, etc. An injured worker who got 19% just accepted it and moved on. There was no incentive because the outcome for the worker was no different.

68. The 2012 amendments introduced a new threshold of 21%. All of a sudden, there was a cohort of workers who got 15-20% WPI who would have previously been happy but now want to appeal and expend effort in the case to reach the new threshold. That effort consisted of gathering of more evidence, challenging the findings of doctors and engaging in the appellate process. Over the next few years through the legal process, the ‘market’ learns what is the actual difference between say 20 and 21%. The process takes years to play out because not all workers who get 15-20% are unhappy as many are just happy to do their Work Injury Damages (WID) claim.

69. The effect of what the PAW Committee heard in the recent public hearing about what the ‘market’ discovered is that there is a clear demarcation between those under 20% and those above. Those people over 20% are significantly injured – much more than then 15-20% range.

70. The market then reaches an equilibrium. It does not always tend upwards if you don’t introduce new thresholds. No amount of understanding the system and judicial interpretation is going to turn an 12% into a 21%. But it might turn some 19% cases into a 21% case.

71. Currently, the market has no incentives to discover the difference between say 24% and 25% or 30% and 31%. Adding new and important thresholds will force a new action of price discovery by the ‘market’ and potentially result in the creep. A significant change in the stakes at current threshold will impact decision making of claimants, however, new thresholds will always have a bigger impact than changing the stakes at current thresholds.

72. The past experience of increasing WPI thresholds should be viewed as a natural cumulative reaction of the market that had to play out. There was no avoiding it. The NSW Government should take advantage of that and recognise it as another reason why it should work within the existing thresholds.

## Commutations

73. The Bill proposes several amendments to Division 9 Part 3 of the Act which deals with commutation of compensation.

74. **The ALA has long supported the opening of commutations in the workers compensation scheme. Any pre-conditions for consideration of a commutation payment should be removed so as to allow all potential claims to be the subject of a commutation payment**.

75. The document entitled *Expanding access to commutations* (document 1b of the Treasury-released material) is worth commenting on because it demonstrates a complete lack of understanding of the scheme by those who drafted it. The paper significantly underestimates the savings that could potentially be achieved through commutations, and yet somehow simultaneously overestimates the benefits of the proposed changes in their current form. In terms of underestimating the savings available through the expansion of commutation this can be seen from the following quote within the document itself:

> *On balance, avoided costs resulting from avoided liabilities to the NI and TMF are expected to be modest – in large part because a commutation should approximate the net present value of future claims costs.*

76. The above paragraph demonstrates a misunderstanding of the practical realities of what occurs in a commutation. Injured workers will almost always be prepared to accept a significant discount on the net present day value of the future claims entitlement to simply exit the scheme. This is because they view the system as so painful to be a part of that they would rather take a significant discount than face the prospects of dealing with an insurer for many years, or even decades, to come.

77. There appears to be no real analysis of the savings that can realistically be expected. This misunderstanding is so fundamental to the calculation of savings that can be achieved through the opening of commutation that it renders the current estimates useless.

78. The paper also overestimates the savings that the current proposals in the Bill will make by assuming that workers will even have something left worth commuting.

79. To understand why this is you have to understand that the WPI process takes significant time with many workers who are likely to reach a 15% WPI threshold not likely to reach maximum medical improvement for several years. That is several years in receipt of payments and

medical expenses. As the paper points out, it there is also an approximately nine month process to process a commutation. In many cases there will simply be little to nothing left to commute and idea of commuting medical expenses only is not as an attractive proposition as the drafters seem to assume.

80. In order to ensure the sustainability of the scheme any amendments should be working towards reducing the long tail claims as much as possible. Commutations should be open to anyone without restriction creating an adequate incentive to allow injured workers to exit the scheme on terms that are mutually agreeable with the insurers at any time.

81. Against this proposition, the paper warns against creating a lump sum culture. The PAW Committee should see through this warning. A lump sum culture around commutation cannot develop because of changing behaviours by injured workers. A commutation is a mutual agreement between insurer and worker. There is no "right" to a commutation to be enforced or pursued by a worker and, accordingly, any commutation can only be with the consent and blessing of the insurer. If any warning is to be given it should be levied against lazy case officers who may approve a payment that the worker is not entitled to rather than engage in proper case management and assessment before agreement. If a worker is not entitled to compensation, then the claim should be denied and it should certainly not be subject to a commutation.

82. The ability for workers to receive a commutation payment to enable them to exit the scheme has been the subject of several submissions by previous persons and organisations to both the Standing Committee on Law and Justice and to the PAW Committee when reform of the scheme has been discussed.

83. **The ALA supports amendments to the Act so as to make the process of approval and receipt of commutation payments simpler and less bureaucratic for injured workers than what is currently the case and what is proposed by the Bill**.

## Death benefits

84. The Bill proposes including new sections 32AA, 32AB and 32AC into the Act. The ALA previously made submissions to the Standing Committee on Law and Justice regarding these proposed amendments.

85. **The ALA welcomes the proposed amendments in relation to death benefits**. The proposed amendments permit a party to a death claim to either reach an agreement with the insurer or receive a decision from the PIC to a compromised resolution of the death claim.

86. Currently, section 25 of the Act provides for a lump sum of $955,950.00 to the dependents or beneficiaries of a deceased worker. There is currently no mechanism to compromise a death claim; it is an all or nothing provision. **The proposed amendments will allow for a compromise of a death claim and are, therefore, welcomed by the ALA.**

87. There is one point that the ALA wishes to make regarding the timing of the new provisions. There are no savings and transitional provisions with the proposed amended legislation. Previously, the savings and transitional provisions gave the amended sections application from the date of ascent to the Bill. If that applied to these provisions, it would rule out a small number of death claims where the claim arose before the date of the ascent of the Bill. **The ALA, therefore, submits that the proposed amendments should apply to all death claims, no matter when the death occurred.**

88. There are a small number of Death Claims in NSW each year, around 120. The vast majority of these claims are straight forward and are accepted by the insurer. The proposed amendments only affect a small number of claims that have complex factual or causation issues that need to be litigated. These are the very claims where the mechanism to compromise the claim could be utilised.

89. There should be no concern that parties will now pursue hopeless death claims. If an insurer is faced with a claim that has no merit, the amendments would have no effect. The insurer would run their defence in the normal way.

90. **In terms of timing of the proposed amendments, the ALA submits that the proposed amendments for death claims should commence from 5 August 2015, which was the date on which the Death Benefit lump sums were substantially amended. Any death claim arising from events occurring after 5 August 2015 should be able to utilise the proposed amendments and be capable of a compromised resolution.**

## ILARS and Legal costs

91. Prior to the 2012 amendments, workers did not pay their own costs, nor could they be charged costs, nor could they be asked to contribute towards costs. Costs were paid in full by the employer/insurer.

92. Costs for a party in the scheme were fully regulated and determined in accordance with Schedule 6 of the *Workers Compensation Regulation 2016*.

93. Costs included professional fees (legal fees) and the cost of investigations associated with claims and disputes about claims including medical report fees, Medico-Legal report fees, clinical notes, and interpreters fees. Barristers' fees were not recognised as a 'disbursement' and had to be paid out of the professional fees paid to a lawyer.

94. In 2012 IRO was established with functions to:

    a. deal with complaints about insurers;

    b. review work capacity decisions of insurers;

    c. enquire into and report on matters arising in connection with the operation of the legislation underpinning the scheme as IRO considered appropriate; and

    d. encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the scheme's legislation.

95. IRO was akin to a workers compensation ombudsman.

96. After the 2012 amendments were made, it became apparent that workers would have to pay their own costs for the first time in the life of the NSW scheme.

97. This was not the situation for employers, whose costs would continue to be met by insurers and paid out of the Insurance Fund.

98. The NSW Government established the Independent Legal Assistance and Review Service (ILARS) as an administrative function of IRO in late September 2012 to assist workers with their claims and disputes by providing access to independent lawyers to provide advice and legal assistance.

99. Were it not for ILARS, injured workers could not obtain advice about their rights and entitlements or challenge decisions by insurers about their claims.

100. The Bill proposes to amend section 337 of the WIM Act, providing that the NSW Government can direct:

    a. the funding for ILARS (which is administered and maintained by the IRO); and

    b. the fixing of a scale of maximum costs including that no costs are to be payable for certain matters or in certain circumstances.

101. The difficulty in these changes is that workers' rights to independent legal advice paid by the scheme are at risk because the NSW Government can direct which claims are to be funded. Theoretically, the Government could direct the IRO as to how it should fund workers with claims against the Government. That is of itself an inherent conflict.

102. The Bill proposes to substantial amendments to Schedule 5, Part 5 of the *Personal Injury Commission Act 2020* (NSW) which severely constrain a workers' costs by:

    a. restricting workers to independent legal advice, assistance and representation to only where if no such advice, assistance, or representation was provided there would be a disadvantage to the worker's rights and entitlements; and

    b. imposing on IRO the requirement to justify expenditure; and

    c. imposing on workers a reasonable prospects test;

    d. imposing on workers a means test; and

    e. permitting the NSW Government to direct by regulation whether funding is to be provided.

103. The amendments contained in the Bill, the ALA submits, are problematic because they mean that a worker's right to independent legal advice paid by the scheme is at risk. It is unacceptable that the independence of IRO is fettered. It is inappropriate that the NSW Government be provided the means to control management of claims against itself by imposing constraints on funding of workers' costs.

104. **The ALA rejects these amendments as unjustified and wrong**.

## Transitional provisions

105. There is a potential issue with what has been described by others as the 'Alex Greenwich amendments' and in particular what would not be 1.10 of Schedule 1 of the Bill under the headings "Lump sum compensation for psychological injuries" (page 40 at line 41) and "Existing claims in relation to primary psychological injuries" (page 41 at line 21).

106. First, the language is not clear if (a), (b)and (c) in each amendment are meant to be alternate requirements or are meant to be cumulative requirements.

107. Secondly, the pre-filing statement is something that only applies to WID claims. There is no pre-filing statement required for a lump sum claim or any other dispute about whole person impairment. Having reference to them potentially leaves it open for the insurers to argue that the amendments do apply to a lump sum claim because the workers has lodged a pre-filing statement – when one is not needed.

108. Finally, pre-fling statements are not "lodged". Section 315 of the WIM Act only requires lawyers to "serve" them.

109. There are a few ways it could be rewritten to make more sense, and different dates you could pick for (b) but in our view the following probably reflects the intention better:

> **Lump sum compensation for psychological injuries**
>
> *(1) The whole person impairment amendments do not apply to a worker who has done the following—*
>
> *(a) notified an injury before the date of assent to the amendment Act, and*
>
> *(b) made a claim for lump sum compensation before 1 July 2026,*
>
> *~~(c) lodged a pre-filing statement before 1 July 2026.~~*
>
> **Existing claims in relation to primary psychological injuries**
>
> *(1) Section 151H, as substituted by the amendment Act, does not apply to a worker who has done the following—*
>
> *(a) notified an injury before the date of assent to the amendment Act, and*
>
> *(b) made a claim for lump sum compensation before 1 July 2026, and*
>
> *(c) ~~lodged~~ served a pre-filing statement before 1 July 2026.*

## Conclusion and key recommendations

110. The Australian Lawyers Alliance (ALA) acknowledges that reform is required to the scheme; however, it is respectfully submitted that the Bill is not the solution to the problems which are being considered by the PAW Committee.

111. **The ALA recommends the following:**

    a. **That a full and comprehensive review into case management be undertaken.**

    b. **In the meantime, whilst that review is being undertaken, a smaller circumscribed package of reforms should be passed that are aimed at limiting the new entrants to the scheme, as well as targeting dispute resolution. Such a revised Bill should:**

        i. **tighten the access to the scheme with the introduction of a 'relevant event' with appropriate definitions;**

        ii. **permit full and open commutation; and**

        iii. **allow compromise of death benefit claims with transitional provisions that apply to all deaths from 5 August 2025.**

    c. **That otherwise, all benefits under the scheme should be left as they currently are.**

112. The ALA welcomes the opportunity to have input to the Public Accountability and Works Committee on the Workers Compensation Legislation Amendment Bill 2025 and our members are grateful for the invitation to provide further assistance on the issues raised in this submission at the PAW Committee's public hearing on Tuesday, 29 July 2025.

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**Australian Lawyers Alliance**

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**Chair, NSW Workers Compensation Subcommittee**
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