



Our ref: 22/74

22 July 2022

The Director
2022 Review of the Workers Compensation Scheme
Parliament House, Macquarie Street
SYDNEY NSW 2000

By email: law@parliament.nsw.gov.au

Dear Director,

2022 Review of the Workers Compensation Scheme

1. The New South Wales Bar Association (**the Association**) thanks the Standing Committee on Law and Justice (**the Committee**) for the invitation to comment on the 2022 Review of the Workers Compensation Scheme. The Association notes that the Committee has resolved to particularly focus on the increase in psychological claims in this Review.
2. Psychological injuries are compensable as an injury under s 9 of the *Workers Compensation Act 1987* (NSW) (**the 1987 Act**). A psychological injury may be compensated as an injury simpliciter or as a disease under s 4 of the 1987 Act.
3. For the sake of brevity, these submissions shall focus on the following matters:
 - a. the defence under s 11A of the 1987 Act and difficulties in its application;
 - b. proposed extension of the provisional payment of s 60 of the 1987 Act expenses (medical expenses) to treat workers and return them to employment; and
 - c. reduction of the threshold for compensation under s 66 of the 1987 Act for psychological injuries from 15% to 10% to accord with physical injury claims.

The defence under s 11A of the 1987 Act and difficulties in its application

4. The employer has a defence to psychological injuries available under s 11A of the 1987 Act which is as follows:

11A No compensation for psychological injury caused by reasonable actions of employer

(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.

(3) A *psychological injury* is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.

(4) This section does not affect any entitlement to compensation under this Act for an injury of a physical nature even if the injury is a physical symptom or effect of a psychological injury, so long as the injury is not merely a physiological effect on the nervous system.

(6) This section does not extend the definition of *injury* in section 4. In particular, this section does not affect the requirement in section 4 that a disease is not an injury unless it is contracted by the worker in the course of employment.

This section does not affect section 9A (No compensation payable unless employment substantial contributing factor to injury).

(7) In the case of a claim for weekly payments of compensation in respect of incapacity for work resulting from psychological injury, the medical certificate required to accompany the claim must (in addition to complying with the requirements of section 65 of the 1998 Act) use, for the purpose of describing the worker's condition, accepted medical terminology and not only terminology such as "stress" or "stress condition".

(8) If a claim is deficient because subsection (7) has not been complied with and the insurer or self-insurer concerned notifies the worker in writing of the deficiency (including details of what is required to comply with that subsection) as soon as practicable after receiving the deficient claim then (unless the insurer or self-insurer waives that requirement)—

- (a) the claim is not considered to have been duly made for the purposes of section 93 of the 1998 Act until subsection (7) is complied with, and
- (b) proceedings before the Commission cannot be commenced in respect of the claim until subsection (7) is complied with.

5. The onus is on the employer to prove the s 11A defence. The employer can only conduct the defence where a psychological injury is established or conceded. The section requires the employer to establish that the whole or predominant cause of the psychological injury was the reasonable action of the employer with respect to the specific matters in s 11A(1). This means that the employer must adduce evidence of the following:
 - a. that the actions of the employer with respect to the specific matters in s 11A(1) were reasonable. This will require full, comprehensive evidence of the actions of the employer, relevant internal policies and procedures dealing with the specific matters in sub-section (1), and statements of relevant persons who made decisions or participated in the specific matters in sub-section (1). These persons may be senior managers, human resources representatives and directors of corporate employers; and
 - b. that the psychological injury was wholly or predominantly caused by the reasonable action of the employer. This is usually a medical (psychiatric) opinion. In the absence of such evidence the defence will usually fail.
6. The onus on the employer to prove the matters in s 11A(1) is not discharged lightly. Counsel who appear for the employer (respondent) frequently find the presentation of this defence is hampered by a lack of medical (psychiatric) evidence as to causation and lack of evidence of reasonableness. This is due to the fact that many investigations into psychological injury are incomplete or rushed. It is not unusual for factual investigation reports to include unsigned witness statements and to not include evidence of the employer's internal policies and procedures.
7. The Association submits that to properly apply the defence s 11A(1) of the 1987 Act, it is necessary to extend the time for investigation of psychological claims and undertake a two-stage process as follows:
 - a. a comprehensive factual investigation be conducted of the worker's allegations of injury and the employer's conduct with respect to the specific matters in s 11A(1). This will require copies of the employer's internal policies and signed witness statements; and
 - b. a medical (psychiatric) examination of the worker then be conducted and the examiner be asked to comment on causation by reference to the factual investigation report and the worker's version of events.
8. A further difficulty in the application of s 11A(1) of the 1987 Act is the limited costs recoverable by the employer's legal representatives under Schedule 6 of the *Workers Compensation Regulation 2016* (NSW). Counsel appearing for a scheme agent of iCare currently receive between \$1,150 and \$1,200 plus GST for preparation, attendance and appearance at the Personal Injury Commission for any claim. This is even less than Legal Aid rates for appearance of junior counsel on contested hearings or trials. Moreover, counsel's fees

for the employer are not a separate disbursement and as such are deducted from solicitors' costs. Further, counsel for the employer cannot be retained to advise or interview witnesses as there is no allowance for such work in Schedule 6. The Association maintains that this is parsimonious and unfair when it is considered that personal injury claims in workers compensation can be legally and factually complex, especially psychological injury claims.

9. The Association submits that for there to be proper remuneration, counsel for the employer should be charged as a separate disbursement as is the case with counsel for the worker. Further, the costs of obtaining any necessary advice from counsel for the employer or conferences between the counsel for the employer and any witnesses should be a separate disbursement.

Proposed extension of the provisional payment of s 60 of the 1987 Act expenses (medical expenses) to treat workers and return them to employment

10. The current SIRA Guidelines provide pursuant to s 280 of the *Workplace Injury Management and Workers Compensation Act 1998* provisional payment of s 60 of the 1987 Act of up to \$10,000. The Association proposes that for psychological injury claims, this amount should be increased to \$15,000 to increase the prospects of a worker having with suitable and appropriate treatment, to enable a successful return to employment.

Reduction of the threshold for compensation under s 66 of the 1987 Act for psychological injuries from 15% to 10% to accord with physical injury claims

11. Section 65A(3) of the 1987 Act currently imposes a 15% permanent impairment threshold for recovery of permanent impairment compensation for primary psychological injury. Section 65A of the 1987 Act relevantly provides:

65A Special provisions for psychological and psychiatric injury

(1) No compensation is payable under this Division in respect of permanent impairment that results from a secondary psychological injury.

(2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury.

(3) No compensation is payable under this Division in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%.

...

(5) In this section—

primary psychological injury means a psychological injury that is not a secondary psychological injury.

psychological injury includes psychiatric injury.

secondary psychological injury means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.

12. This is in contrast to s 66(1) of the 1987 Act, which imposes a threshold of at least 10% for recovery of permanent impairment compensation for a physical injury. It is notable that 15% is also the threshold for Part 5 modified damages claims under s 151H of the 1987 Act. These are the so-called “work injury damages claims”.
13. The Association submits that to bring fairness and equity to workers, the 15% permanent impairment threshold under s 65A(3) of the 1987 Act should be removed. Instead, the threshold should be at least 10% permanent impairment to accord with s 66(1) of the 1987 Act.
14. At present, as the threshold of at least 15% permanent impairment matches the threshold for work injury damages, it is usually the case that a worker who establishes an entitlement to permanent impairment compensation under s 65A(3) will bring a claim for work injury damages.
15. The Association submits that if the threshold for psychological injury is lowered to at least 10% permanent impairment, workers may recover permanent impairment compensation but not be entitled to also claim work injury damages unless they achieve the higher common law threshold of 15%. There is no principled basis for imposing a different threshold for lump sum compensation in psychological injuries compared with physical injuries.

Conclusion

16. The Association thanks you in advance for considering this submission. Should you wish to discuss or may we be of further assistance, please do not hesitate to contact Policy Lawyer, Lucy-Ann Kelley

Yours sincerely,

Gabrielle Bashir SC

President