Independent Review Office

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1. About the Independent Review Office

1.1 The Office of the Independent Review Officer (IRO) is an independent statutory office and public service agency established under the *Personal Injury Act 2020* (NSW) (PIC Act) and *Government Sector Employment Act 2013* (NSW). The IRO commenced operation in its current form on 1 March 2021.

1.2 The statutory functions of the Independent Review Officer are set out in clause 6 of Schedule 5 to the PIC Act, and include, as relevant:

- dealing with complaints made to the Independent Review Officer under Schedule 5,
- inquiring into and reporting to the Minister for Customer Service and Digital Government on any matters arising in connection with the operation of the PIC Act or the enabling legislation[1] as the Independent Review Officer considers appropriate or as may be referred by the Minister, and
- managing and administering the Independent Legal Assistance and Review Service (ILARS).

1.3 The IRO welcomes the opportunity to provide a submission to the Legislative Council Standing Committee on Law and Justice (Standing Committee) biennial review into the NSW workers compensation scheme and supports the Standing Committee's decision to focus on psychological injury in its current review.

2. Overview of submission

2.1 Section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (WIM Act) provides that the NSW workers compensation system's central objectives include:

- to assist in securing the health, safety and welfare of workers,
- to provide prompt treatment, effective and proactive management of injuries, and necessary rehabilitation to assist injured workers and promote their return to work as soon as possible,
- to provide workers and their dependents with financial support in the form of income support, lump sums for permanent impairment or death, and meeting treatment costs, and
- to be affordable, financially viable, efficient and effective.

2.2 This submission reflects the IRO's observations on, and experiences with, a steadily growing number of psychological injury claims, offered with the system objectives in

[1] The enabling legislation is set out under section 5, PIC Act.

mind. It includes data to illustrate both the increased prevalence of this injury type in workers compensation claims, as well as the increased complexity, disputation and costs of these matters.

2.3 The persistent upward trend in psychological injury matters and the cost of their management and resolution suggest that:

- there may be more work to be done to avoid the incidence of such injuries, and
- the way in which such claims are assessed and managed by insurers may contribute to increased costs to the scheme; affect the scheme's efficiency, effectiveness, and financial viability; and cause delays in meeting system goals.

2.4 The IRO observes that elements of the existing system, many of which were originally established with physical injury and swift return to work as front of mind, may not be ideally suited to managing psychological injury. In some cases, features of the system have potential to exacerbate these injuries. We have set out information below regarding this concern.

2.5 At the conclusion of our submission, we have suggested a range of reforms and actions for consideration, with a focus on reducing disputes and complaints, improving insurer case management, and increasing fairness for and the experience of workers with psychological injuries.

3. Prevalence and impact of psychological injuries

3.1 Mental distress, mental illness and psychological injury are on the increase in the Australian community. The Australian Bureau of Statistics (ABS) National Study of Mental Health and Wellbeing (NSMHW) indicated that, in 2020/21, 15 per cent of Australians aged 16-85 years, and 20 per cent of Australians aged 16-34 years, experienced high or very high levels of psychological distress.[2] Data for the 2017/18 financial year (FY) shows that 19.1 per cent of people in NSW had a mental or behavioural condition (an increase from 17.8 per cent in FY2014/15), 12.3 per cent had an anxiety-related condition (static since FY2014/2-15) and 9.8 per cent had depression or feelings of depression (an increase from 8.4 per cent in FY2014/15).[3]

3.2 SafeWork Australia defines 'psychological injury' as:

> "*a range of cognitive, emotional and behavioural symptoms that interfere with a worker's life, which can significantly affect how they feel, think, behave and interact with others… [and may] include… disorders such as depression, anxiety or post-traumatic*

[2] Australian Bureau of Statistics, *First Insights from National Study of Mental Health and Well-being, 2020/21* (2021).
[3] Australian Bureau of Statistics, *Mental Health* (2018).

stress disorder."[4]

3.3 There is substantial evidence about the prevalence and impact of mental illness and psychological injury in the community and in workplaces, including the following:

- The Productivity Commission's 2020 *Mental Health* inquiry report found that:
  - mental ill-health affects all Australians either directly or indirectly,
  - almost half of all Australian adults have met the diagnostic criteria for a mental illness at some point in their lives, with almost one in five Australians experiencing mental illness in a given year,
  - mental illness, on a conservative basis, is costing Australia an estimated $200-$220 billion per year, and
  - nation-wide, mental health-related workers compensation claims are much more likely to be rejected than non-mental health claims; in the States and Territories, 24 to 60 per cent of mental health claims are rejected compared with only 6 to 10 per cent of non-mental health claims.[5]
- The Australian Human Rights Commission (AHRC) 2018 report, *Everyone's Business: Fourth National Inquiry into Sexual Harassment in Australian Workplace*, and its 2020 *Respect@Work: Sexual Assessment National Inquiry Report* have both highlighted the prevalence of sexual harassment in the workplace, and its strong correlation with psychological distress.
  - The 2018 survey found that, in the five preceding years, 39 per cent of women, and 26 percent of men had experienced sexual harassment in the workplace.[6]
  - The 2020 report found that sexual harassment exists in every industry, and causes considerable financial, social, emotional, physical and psychological harm.[7]
- KPMG's 2018 report, *Investing to Save – The Economic Benefits for Australia of Investment in Mental Health*, calculated that, each month, employers face a cost of $3,200 in absenteeism and presenteeism for each worker with a mental illness, and

[4] SafeWork Australia, *Fact Sheet - Workers' Compensation Legislation and Psychological Injury*.
[5] Productivity Commission, *Mental Health* (2020), Vol 1, pp2, 9, 20, 25, 310.
[6] Australian Human Rights Commission, *Everyone's Business: Fourth National Inquiry into Sexual Harassment in Australian Workplace* (2018), p8.
[7] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020), p13.

up to $5,600 for workers with severe mental illness.[8] In addition, the cost to NSW of mental ill-health at work is estimated at $2.8 billion per year.[9]

- SafeWork reported that the average duration of mental health conditions rose by 138 per cent since between 2000/01 and 2018/19, from 11.2 working weeks to 26.6 weeks.[10]
- The 2021 *icare and* State Insurance and Care Governance Act 2015 *Independent Review* (McDougall Review) observed that psychological injury claims were increasing, particularly within the Treasury Managed Fund (TMF) portfolio, and that an increasing proportion of such claims are reaching the 15 per cent whole person impairment (WPI) threshold, have a longer tail and see greater difficulty in achieving return to work.[11]

3.4 The number of matters where lawyers, approved under ILARS, request grants of funding to assist workers with psychological injuries is also growing rapidly.

- In 2015, the IRO's predecessor, the Workers Compensation Independent Review Office (WIRO), approved grants for lawyers to assist injured workers with psychological injury claims in just over 1,100 matters; this number had trebled to around 3,300 in both 2020 and 2021.
- Data from the State Insurance Regulatory Authority (SIRA) indicates that psychological injuries (assumed to be all those in the category of mental diseases) made up around 7.4 per cent of all workers compensation claims in the year to April 2022.[12] However, psychological injury is the primary issue in 19 per cent of ILARS grants. The proportion of psychological injuries as against all other injures represented in ILARS grants has almost doubled since 2015 (then 11 per cent).
- In monetary terms, the sum of professional fees and disbursements paid by WIRO/IRO in psychological injury matters has also tripled, from $4.56 million in 2015 to $15.3 million in 2021.

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[8] KPMG and Mental Health Australia, *Investing to Save - The Economic Benefits for Australia of Investment in Mental Health Reform*, (2018), p33.
[9] NSW Government, *NSW Mentally Healthy Workplaces Strategy to 2022* (2021), p21.
[10] SafeWork Australia, *Fact Sheet - Workers' Compensation Legislation and Psychological Injury*.
[11] The Hon Robert McDougall QC, *icare and* State Insurance and Care Governance Act 2015 *Independent Review* (2021), p302.
[12] State Insurance Regulatory Authority, *Workers compensation system dashboard* (2022). The dashboard shows a total of 6,035 claims for psychological injuries (nature of injury - mental diseases) out of 82,542 total reportable claims. Note that the dashboard states that 5.6 per cent of claims are for psychological injuries (as at April 2022, period unspecified), but this cannot be reconciled with other data on the dashboard.

3.5 Psychological injuries can be debilitating for workers, resulting in significant impacts on workers' families; disruptive for employers; and expensive for the NSW workers compensation system.[13] On a per claim basis, psychological injury claims involve longer absences from work, have poorer return to work outcomes, take longer to resolve, and cost more to resolve than those for physical injuries.[14]

4. Management of claims involving psychological injury

4.1 The Mental Health Council of Australia (MHCA) notes that workers who have mental illnesses:

> *"… face distinctive barriers with insurers in engaging with a complaints process, which can be complicated, drawn-out, often adversarial in nature, and daunting for consumers who may be worried about the symptoms of their illness worsening"*.[15]

4.2 This observation is reflected in the McKell Institute's 2022 report on the NSW workers compensation system, *It's Broken: Workers' Compensation in New South Wales Since 2012*. The report includes results from a survey of 106 injured workers, conducted by the NSW Injured Workers Support Group, about their experience in navigating the NSW workers compensation system. The survey found a significant number of respondents (almost 80 per cent) strongly agreed that their experience with the workers compensation system had negatively affected their mental health and well-being. Further, 73 per cent reported experiencing suicidal ideation as a result of their workers' compensation claim. Finally, 76 per cent of those surveyed strongly disagreed with the proposition that the system had helped them recover from injury.[16]

4.3 These sentiments about injured workers' experience with the workers compensation scheme are also reflected in a recent user experience survey of injured persons about their satisfaction with IRO's services. Results from that survey reflect the challenges for persons with psychological injury engaging with complaints processes; workers suffering a psychological injury were 50 per cent more likely to be dissatisfied with the process or outcome of their complaints when compared to workers with physical injuries. Verbatim comments from a number of these workers demonstrate considerable frustration and general dissatisfaction with the workers compensation system as a whole.

4.4 To reduce the risk of exacerbating psychological injury, SIRA's Standard of Practice

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[13] Comcare, *Working well - An organisational approach to preventing psychological injury* (2008), p6.
[14] Productivity Commission, *Mental Health* (2020), Vol 2, p3.
[15] Mental Health Council of Australia, *Mental health and insurance: Submission to the Australian Law Reform Commission issues paper on Equality, Capacity and Disability in Commonwealth Laws*, (2014), p3.
[16] McKell Institute, *It's Broken: Workers' Compensation in New South Wales Since 2012* (2022), pp9, 13.

(SOP) 33 *Managing psychological injury claims*, effective as of 1 March 2021, sets expectations of insurers when managing these claims, based on the overarching principle that:

> "*psychological injury claims are to be managed with empathy and a strong focus on early treatment, tailored communication, timely recovery and return to work, in a manner likely to minimise conflict and delay.*"[17]

4.5 SOP 33 sets a range of expectations, focused on matters such as early treatment and return to work, determining liability, communication and avoiding secondary psychological injury.

4.6 Complaints from injured workers received by the IRO evidence that some psychological injury claims have not been managed well at critical stages – from initial liability decisions, to investigation of the claim and claims management generally. We have set out below some of the concerns raised in these complaints, and suggestions to reduce the adverse impact of claims management on workers with psychological injuries.

4.1 Notification of injury and provisional liability

4.1.1 A worker who suffers an injury is generally required to notify their employer as soon as possible.[18] Section 267 of the WIM Act provides that, after receipt of a notification of injury, an insurer is to commence provisional weekly payments of compensation within seven days, unless the insurer has a 'reasonable excuse' for not commencing those weekly payments.[19] Payment of weekly payments on the basis of provisional acceptance of liability is for a period of up to 12 weeks.[20] An insurer can also accept liability for medical expenses on a provisional basis, and pay up to $10,000.[21]

4.1.2 Provisional liability provides a simple and quick way to ensure that injured workers can be financially supported to take the time they need to recover, seek necessary treatment, and return to work as soon as possible. For many workers, an injury will resolve within 12 weeks, and they will be able to return to unrestricted duties. In this case, it may never be necessary for that worker to submit a compensation claim form, and the insurer may not need to make a liability decision.

4.1.3 In FY2021/22, the IRO received 118 complaints where the primary issue was about initial notification of claims from injured workers – most commonly about the

[17] State Insurance Regulatory Authority, *New standards of practice for managing psychological claims* (2021).
[18] Section 254, WIM Act.
[19] Section 267, WIM Act.
[20] Section 294, WIM Act; State Insurance Regulatory Authority, *Understanding the claims journey - Provisional liability* (2021).
[21] Section 280 WIM Act; Part 2, Workers Compensation Guidelines.

application by the insurer of a reasonable excuse to avoid provisional liability payments. Where there was information about the nature of injury available, 45 per cent of these complaints were received from workers with psychological injuries.

4.1.4 One reasonable excuse for declining to accept provisional liability arising in these complaints was the misapplication of the reason of 'insufficient medical information'. Claims may be excused despite the injured worker having submitted a certificate of capacity (COC) with a valid diagnosis. This is contrary to SIRA Workers Compensation Guidelines Table 2.1, which sets out the reasons that support (and do not support) each ground of reasonable excuse.

Case study 1:

The injured worker contacted the IRO to complain that their insurer failed to accept provisional liability for their psychological injury, asserting a 'reasonable excuse' on the basis of insufficient medical information about diagnosis. The injured worker had provided the insurer with an appropriate COC with a valid diagnosis, together with other requested information.

The IRO contacted the insurer referencing Table 2.1, which relevantly provides: "If a certificate of capacity or other medical information is provided and includes a clear diagnosis, the claim cannot be reasonably excused using this reason."

In response, the insurer accepted provisional liability and made weekly and medical payments accordingly.

4.1.5 The IRO also receives complaints that provisional liability has been denied on the asserted reasonable excuse of having insufficient information, but where the insurer has made no effort to clarify the information received. This is contrary to SOP 33, which provides that an insurer should not delay commencement of provisional weekly payments due to insufficient information unless reasonable and appropriate attempts have been made to clarify the diagnosis.

Case study 2:

The injured worker contacted the IRO to complain that the insurer failed to accept provisional liability for their psychological injury. The notice issued by the insurer asserted a 'reasonable excuse' for denying provisional liability on the basis it needed 'more detailed information to establish the diagnosis'. The injured worker had provided the insurer with an appropriate COC with a valid diagnosis, together with other requested information.

The IRO sent a notice of complaint, drawing the insurer's attention to Table 2.1 of the Workers Compensation Guidelines which states that if a certificate of capacity includes a clear diagnosis, the claim cannot be reasonably excused using the reason that there is insufficient medical information. The insurer was asked to comment on whether it had made reasonable attempts to clarify the diagnosis with the nominated treating doctor (NTD), as required by the SOP 33.

The IRO also encouraged the injured worker to speak to their NTD and request further information be provided to the insurer.

After considering the IRO's concerns and additional information provided by the NTD, the insurer accepted provisional liability and made payments accordingly.

4.1.6 In addition, the IRO has received complaints from injured workers where provisional liability has been denied on the asserted reasonable excuse that the insurer *may* have a defence to the claim under section 11A of the *Workers Compensation Act 1987* (NSW) (WC Act). This provision is to the effect that no compensation is payable where a psychological injury was caused by reasonable action taken by an employer with respect to matters such as discipline. The Personal Injury Commission (Commission)[22] has since decided that this is not a reasonable excuse.

Case study 3:

The injured worker's lawyer contacted the IRO in June 2021 after receiving a notice from the insurer denying provisional liability on the basis of a 'reasonable excuse'. The excuse applied was that, as the psychological injury related to accusations of misconduct, it may not be work-related because the insurer may have a defence to the claim under section 11A(1) of the WC Act.

The IRO sent a notice of complaint to the insurer and in response, the insurer claimed that Table 2.1 of the Workers Compensation Guidelines, defining where an 'injury is not work related', allowed for a 'reasonable excuse' to be applied where section 11A(1) of the WC Act may apply. However, the injured worker's legal representative disputed this reasoning, and maintained there was no evidence to suggest that the injury may not be related to employment.

As the complaint could not be resolved, the worker sought a determination by the Commission. The worker's lawyer received a grant of legal funding under ILARS, administered by IRO, to assist the worker.

In October 2021, the Commission made a determination in favour of the injured worker, rejecting the insurer's argument that the potential existence of a section 11A(1) defence could be relied upon as a reasonable excuse to deny liability for provisional payments.

4.1.7 As reflected in SOP 3 *Initial liability decisions*, making initial liability decisions promptly, in consultation with key stakeholders and based on all available evidence, ensures that workers and employers can focus on recovery and return to work. Conversely, wrongly denying provisional liability can see workers feel unsupported, disbelieved, and pressured to return to work quickly, regardless of whether they are ready. It may also mean that injured workers do not have the financial support they need to take time to

[22] The Personal Injury Commission is the successor agency to the Workers Compensation Commission and commenced operation on 1 March 2021. A reference in this submission to 'Commission' includes a reference to both entities.

recover or to seek early medical assistance. The consequences for a worker already experiencing a psychological injury can be substantial, may impact on the worker's recovery, and may set an adversarial tenor to the relationship between the worker and the insurer from the outset.

4.2 Claims not being managed in a manner likely to minimise conflict

4.2.1 Under the current scheme, there must be evidence of a link between the injury and the worker's employment, for a worker to have an entitlement to compensation. Physical injury can often be established by citing a particular verifiable incident. However, this can be less common for psychological injury, which may result from persistent exposure to traumatic material, prolonged elevated stress levels, or workplace harassment over time.

4.2.2 Almost one in 10 injured worker complaints to the IRO concern the insurer disputing liability for the worker's compensation claim,[23] and many of these complaints are made by workers claiming a psychological injury. In FY2021/22, 627 complaints were received from workers about the insurer denying liability for their claim. Where there was information about the nature of injury available, 25 per cent of the complaints were received from workers with psychological injuries.

4.2.3 We also see that liability is more likely to be contested at an earlier stage - and that proportionally more workers with these injuries need legal assistance, and need it at an earlier stage of their claim - than those with physical injury. This is reflected in the data set out below:

- SIRA data indicates that psychological claims accounted for approximately 7.4 per cent of workers compensation claims lodged in the 12 months to April 2022.[24] ILARS data, however, shows that 20 per cent of ILARS grants between 1 July 2021 and 30 June 2022 (4,112 grants out of a total of 20,148) were made by lawyers seeking to assist workers claiming a psychological injury.
- For all ILARS grant applications received between January 2019 and May 2022:
    - 22 per cent of applications for workers with psychological injuries were made to the IRO within three months of the date of injury, compared to 14 per cent for industrial deafness and 10 per cent for other physical injuries.
    - 55 per cent of applications for workers with psychological injuries were made to the IRO within 12 months of the date of injury, compared to 33 per cent for physical injuries.

4.2.4 For all grants made within three months of injury, the reasons for which grants are

[23] Independent Review Office, *Annual Report 2020/2021* (2021), p42.
[24] State Insurance Regulatory Authority, *SIRA Stats: Reportable claims data.*

sought are also telling. The reasons point to substantially increased disputation about every element of a psychological injury claim – from denial of liability, to disputes about medical treatment and disputes about weekly payment – with these disputes almost twice as likely to arise in psychological injury matters.

Table 1 – Reason for ILARS grants within three months of injury

Reason for grant – ILARS grant applications within three months of injury	**Psychological injury (%)**	**Physical injury (%)**
Assistance to make a claim for compensation	54	51
Advice generally	39	22
Denial of liability	24	13
Medical treatment	10	5
Weekly payments	22	13

4.2.5 The extent that psychological injury claims are contested is also shown by the stage at which ILARS grants are completed:

- In around one third of all ILARS grants (32 per cent) finalised between January 2015 and May 2022, it was necessary for proceedings to be filed in the Commission before a resolution was reached. However, in around 41 per cent of psychological injury claim grants it was necessary for proceedings to be commenced.
- In about 30 per cent of all ILARS grants matters finalised between January 2015 and May 2022, parties were able to reach an earlier solution about the claim. However, this proportion was halved (15 per cent) for psychological injury claims only.

4.2.6 Despite this higher level of disputation, and disputation at an earlier stage of the claim, ILARS outcome data suggests that the *resolution* of psychological injury matters is as likely to benefit or favour the worker as other claims:

- Only 4 per cent of resolutions in ILARS grants for psychological injury claims finalised between January 2015 and May 2022 were clearly in favour of the employer/insurer.
- 53 per cent of the resolutions in these grants resulted in the injured worker improving their position.[25]

[25] The remaining 44 per cent of matters are those where the claim was not advanced, or there was no outcome. This includes grants of funding for advice only.

- ILARS grants for claims made by workers with primary psychological injuries have the same success rate for the injured worker as those grants for workers with primary physical injuries.

4.2.7 Higher levels of disputation result in higher costs for ILARS grants – to cover both increased professional fees for lawyers and the costs of medical reports, assessments and other investigations. In FY2021/22,[26] 21 per cent of total costs incurred by ILARS were directed to assisting workers with psychological injury claims. Over the past three years, the average cost of an ILARS grant where a psychological injury claim was resolved after an application was made to the Commission was $10,139 – more than twice the cost of matters resolved at an earlier stage ($5,026).

4.3 Claims not being managed in a manner likely to minimise delay

4.3.1 As reported in the IRO's June 2021 Inquiry Report, *Delay in determining liability*, complaints from injured workers about insurer delays in determining liability are consistently the most common complaints received by the IRO. As that Report notes, in FY2019/20, complaints relating to delay in determining liability accounted for 28 per cent of complaints received by the WIRO.[27]

4.3.2 In FY2021/22, again, 26 per cent of the complaints received by the IRO (or 1,839 of the total complaints received) related to delay in determining liability. Of those, 68 per cent concerned alleged failures by insurers to determine claims for weekly payments or medical expenses within the 21 days as required under sections 274 and 279 of the WIM Act. Where there was information available about the nature of injury, 19 per cent of the complaints about delay in determining liability were received from workers with psychological injuries.

4.3.3 The 'Delay in determining liability' section of the *IRO Issues Paper: Practical Issues Arising from the Operation of Section 59A* noted that:

> *"...delays in insurer decisions occur for a range of reasons, including where the information necessary to make a decision is not available to the insurer or there are administrative failings in dealing with requests for treatment. Sometimes, no reasons are provided.*
>
> *In these types of matters, through events most often beyond the control of the injured worker, an entitlement to treatment compensation may be lost or compromised, even though the claim is made in a timely manner..."*[28]

4.3.4 Delay in determining whether to accept or dispute liability can negatively affect the

[26] $16.3 million of $78.4 million in total payments.
[27] Independent Review Office, *IRO Inquiry report: Delay in determining liability* (2021), p2.
[28] Independent Review Office, *IRO Issues Paper: Practical Issues Arising from the Operation of Section 59A* Workers Compensation Act 1987 – *October 2021* (2021), p8.

worker's physical, psychological and financial wellbeing, defer access to dispute resolution and treatment, and impact the efficient operation of the workers compensation scheme.

Case study 4:

The injured worker contacted the IRO stating they had been referred for psychological treatment by their NTD but received no response to the request for approval for treatment in six weeks.

The IRO raised a complaint to the insurer. In its response, the insurer advised that it had overlooked the request. The insurer advised it had taken action to respond to the NTD to accept liability for the treatment and inform the injured worker of the outcome.

4.3.5 Delay in access to treatment has a clear correlation to delay in return to work, which, in itself, can result in secondary psychological injury.[29] The McDougall Review notes:

> "*The personal and economic benefits of return to work are universally recognised. Conversely, the personal and economic detriments of delayed return to work are obvious. The worker's overall recovery may be hindered; consequently, the duration and hence the cost of treatment may be extended; and there is a very real likelihood of secondary psychological injury arising.*"[30]

4.4 Excessive use of Independent Medical Examinations (IMEs)

4.4.1 In the course of a claim for compensation, injured workers will undergo medical examinations or assessments to determine the nature and extent of their injury. Most consultations will be performed by treating doctors or allied health practitioners (AHPs). However, workers may also be examined by medicolegal experts arranged by their own legal representatives, or at the request of an employer or insurer.[31] The latter are known as Independent Medical Examinations (IMEs).

4.4.2 In IMEs for physical injury a worker may be required to provide a brief history of how the injury occurred as well as any relevant medical history and current complaints; the primary focus is a physical examination for diagnosis, determination of treatment needs and assessment of capacity for employment.[32] These IMEs rarely result in any aggravation of the worker's injury.

4.4.3 However, workers with psychological injuries are commonly required to retell the details of how they came to be injured as part of explaining its nature and impact. The

[29] State Insurance Regulatory Authority, *Reversing the trend - improving return to work outcomes in NSW* (2020).
[30] The Hon Robert McDougall QC, *icare and* State Insurance and Care Governance Act 2015 *Independent Review* (2021), p46.
[31] Section 119, WIM Act.
[32] *Nominal Defendant v Clancy* [2007] NSWCA 349, at para 55.

focus of these examinations is necessarily the worker's emotional state, particularly those aspects which cause distress and disability.

4.4.4 The complaints received by the IRO indicate that this can be very distressing and may, in fact, exacerbate those injuries; workers report the process to be upsetting and re-traumatising. Added to this, some workers are concerned that, if they do not attend an IME at the request of an insurer or they obstruct the examination, the insurer may suspend their weekly compensation payments, or it may affect their right to recover compensation.[33]

4.4.5 The IRO's experience, as shown in the data outlined above, is that insurers tend to be less willing to accept liability for a psychological injury at an early stage, and more likely to contest these cases generally. This often results in the psychologically injured worker being required to undergo multiple IMEs, at any or all of the following stages:

- when initial liability is being considered by an insurer,
- when a work capacity decision is to be made,
- when an insurer is considering liability from time to time on the basis that a worker may have recovered from the injury,
- when a new form of treatment is requested,
- when the worker makes a claim for lump sum compensation - organised by their own legal representative and potentially again by the insurer in response, and
- at the Commission's direction, as part of its dispute resolution process.

4.4.6 The more examinations a worker has, the greater the potential for magnifying distress. As the Royal Australian and New Zealand College of Psychiatrists (RANZCP) has stated:

> *"[f]or people struggling to cope with mental health issues and fearful that their compensation will be terminated, it can be especially difficult to resist requests to visit IMEs. For claimants with PTSD [post-traumatic stress disorder], it can also be traumatic to repeatedly retell the events that gave rise to their condition, and clinical progress can be set back greatly as a result."*[34]

4.4.7 The RANZCP has also strongly recommended that, if an IME is genuinely required, the treating medical practitioner(s) is consulted to ensure that the worker is adequately prepared and supported.

4.4.8 As part of the Standing Committee's 2017 review of the workers compensation scheme (discussed in Report 60, *First Review of the workers compensation scheme*, released in

[33] Section 119(3), WIM Act.

[34] Royal Australian and New Zealand College of Psychiatrists, *Public insurance schemes: advocating for mental injury claimants Position Statement* (2017).

March 2017) (First Review), it received a number of submissions and heard evidence from several stakeholders on the issue of excessive use of IMEs – in some cases, more than 10 in the course of a single claim – and the psychological distress that this can cause.[35] At the time, both SIRA and icare provided information about steps being taken to limit IMEs. These steps are reflected, for example, in the current Workers Compensation Guidelines at Part 7 – *Independent Medical Examination and Reports*, which reflects a general position that:

> *"[r]eferral for an IME is appropriate when information from the treating medical practitioner(s) is inadequate, unavailable or inconsistent, and the referrer is unable to resolve the problem directly with the practitioners."*

4.4.9 The Workers Compensation Guidelines specify matters such as when a referral will be appropriate, the required notification to the worker, when subsequent IMEs are acceptable, when a different examiner is permitted, and how concerns by injured workers that a request is unreasonable are handled.

4.4.10 Despite these system improvements, concerns about the use of IMEs continue. For example, about 40 per cent of the 106 respondents to the survey conducted by the NSW Injured Workers Support Group survey referred to in the *It's Broken* report reported having attended six or more IMEs.[36]

4.4.11 In FY2021/22, the IRO received 215 complaints about IME appointments and examinations. Where there was information about the nature of injury available, 35 per cent (76 complaints) were received from workers with psychological injuries.

4.4.12 Issues raised in the complaints received by the IRO include insurers' requests for multiple IMEs or other assessments. Our experience is that many of these examinations and assessments are sought where the insurer says it has insufficient information to determine the claim. The complaints we receive also make clear the considerable distress appointments can cause, as the following case studies illustrate:

> ***Case study 5:***
>
> *The injured worker contacted IRO stating that they had been directed by the insurer to attend a psychiatrist IME and participate in psychometric testing conducted by a psychologist, or risk suspension of weekly payments. The injured worker, their general practitioner and their psychologist all cautioned that the worker may find attending additional testing 'incredibly traumatic'.*
>
> *The IRO raised a complaint to the insurer, concerned that the request to attend the psychologist was inconsistent with section 119 of the WIM Act. In its response, the*

[35] Legislative Council Standing Committee on Law and Justice, *First Review of the workers compensation scheme – Report 60* (2017), at paras 8.86-8.99.
[36] McKell Institute, *It's Broken: Workers' Compensation in New South Wales since 2012* (2022), p33.

insurer maintained the direction to the worker to attend the appointment, noting matters including that the results would be provided to the psychiatrist.

The worker did not attend the psychometric testing, and the insurer suspended the worker's weekly payments.

As the complaint could not be resolved, the worker sought a determination by the Commission. The worker's lawyer received a grant of legal funding under ILARS, administered by IRO, to assist the worker.

The Commission determined that the worker's failure to attend the psychometric testing was not a refusal to submit for examination by a medical practitioner, as a psychologist was not a medical practitioner for the purposes of section 119 of the WIM Act. The worker's entitlement to weekly payments was reinstated.

Case study 6:

The injured worker contacted the IRO, enquiring about whether they had to attend an IME arranged by the insurer with only seven days' notice, with a different specialist to the one whom the worker had previously seen and without having sought relevant information from the worker's treating doctor.

The IRO raised an urgent complaint with the insurer to assess compliance with Part 7 of the Workers Compensation Guidelines. The insurer acknowledged that it had not followed Guidelines, cancelled the appointment, and agreed to seek necessary information from treating health practitioners before attempting to arrange a further IME.

4.4.13 In the following case study, the insurer was ultimately co-operative in attempting to minimise the number of IMEs, but had not considered this issue before receiving a complaint.

Case study 7:

A complaint was referred to the IRO by a lawyer acting on behalf of the worker. A claim was made for lump sum compensation for permanent impairment one week before the insurer had already arranged for the worker to be examined by an IME to assess work capacity. Nevertheless, after discussion with their case manager the worker understood the IME would also assess their impairment.

The insurer's lawyer arranged another IME in response to the permanent impairment claim. The worker did not wish to attend what would have been a third medicolegal assessment within three months, as they were already significantly unwell and believed repeated appointments caused distress.

After the IRO's intervention, the insurer agreed to seek a supplementary report from the IME rather than requiring a further examination.

4.4.14 We have seen examples where it appears that an insurer has not turned its mind to the impact of multiple IMEs on vulnerable workers or considered whether the worker

needs additional assistance to safely participate in an assessment.

Case study 8:

The worker complained that the insurer had arranged for them to be examined by an IME and this was the fourth IME they would have to attend. The worker explained this made them feel that they did not wish to live anymore. Following the last IME, the worker said they felt like crashing their car on the way home.

The IRO raised this complaint with the insurer and asked whether it had contacted the worker's treating health practitioners to determine how the worker's condition could be accommodated at the appointment.

The insurer agreed the worker had attended a number of IMEs for other aspects of the claim but insisted that it reasonably required a further assessment in order to respond to a claim for permanent impairment compensation. In response to the concerns raised, the insurer arranged for the worker to participate in the IME by telehealth in the worker's treating psychologist's rooms. The injured worker advised they now felt comfortable to attend the appointment given it would take place at their psychologist's rooms and the purpose of the IME was clear.

4.4.15 The information above suggests that more needs to be done – at a system and case management level – to reduce the number of unnecessary IMEs injured workers are requested to attend, and to reduce any negative impact of IMEs that workers attend.

4.5 Lack of tailored communication and empathy

4.5.1 Concerns by injured workers about case management by insurers are the third most common cause of complaint to the IRO. In FY2021/22, IRO dealt with 1,881 general case management complaints and enquiries. Many of these are matters raised with the IRO by workers with psychological injuries who are concerned by what they see as case managers' inflexible, late, and unempathetic dealings with them.

4.5.2 Simple measures to tailor engagement to an injured worker's specific needs, or to show empathy to their circumstances, are sometimes overlooked, which can cause considerable distress. By way of example, during the COVID-19 pandemic, the IRO received complaints about insurers' inflexibility, including:

- refusing to allow IMEs to be conducted via audio visual link (telehealth appointments) rather than face-to-face,
- requiring IMEs to be face-to-face in circumstances where the worker requested an audio-visual consultation (including instances where the worker was unvaccinated and could not attend a face-to-face appointment),
- changing face-to-face appointments to telehealth appointments without notice,
- refusing to allow injured workers to have a support person present during an

appointment, and

- scheduling appointments considerable distances from the injured worker's residence despite closer options being available.

4.5.3 The following case study provides an example of the potential consequences of an insurer's reliance on the legislative and policy framework without engaging with the individual needs of the injured worker. It also demonstrates, where matters are escalated by the IRO, fast responses can be provided that address urgent needs.

Case study 9:

The injured worker contacted the IRO, complaining that their treating psychiatrist had sought an urgent response to a request for approval for inpatient treatment due to the worker's deteriorating condition and suicidal ideation. The insurer advised the worker that it had 21 days to determine liability.

The IRO raised the complaint with the insurer. While acknowledging that the insurer has a 21-day time frame to make a decision, the IRO requested early attention to the matter in view of the worker's circumstances. The insurer agreed to expedite the decision, and accepted liability for the treatment within three business days.

4.5.4 Refusing to accommodate an injured worker's stated needs and including incorrect statements in standard letters may cause recipients distress, as the following case studies demonstrate:

Case study 10:

The injured worker contacted the IRO stating their insurer had previously communicated with their NTD as the main point of contact, but a new case manager refused to deal with the NTD. The injured worker stated that they were currently unwell and about to start a new course of treatment, that they found the insurer quite demanding, and they did not want to deal with the insurer directly. If the insurer would not deal with the NTD, the injured worker suggested email only contact, so that they could deal with the insurer when they were rested and not suffering the effects of medication.

The IRO raised a complaint with the insurer. In response, the insurer agreed that it would deal with the NTD for all medical related communication, and otherwise only email the injured worker for administrative matters (such as payments, travel and appointments) unless the injured worker asked that they call them. The injured worker thanked the IRO for dealing with the complaint, stating: "I feel a little pressure has been taken off me during this difficult phase where I'm not coping very well".

Case study 11:

The injured worker contacted the IRO stating the insurer emailed, without 10 clear business days' notice, advising they were required to attend an IME. IRO reviewed the letter, which also did not state why information from the worker's treating practitioners was insufficient, did not have the IME's qualifications or contact details, and included a

statement that failure to attend the appointment would result in a cancellation fee payable by the worker, and may result in suspension of weekly benefits.

The IRO raised a complaint with the insurer. In response, the insurer conceded that less than 10 business days' notice had been given, and that no cancellation fee could be charged to the worker if they were unable to make the appointment. A new IME appointment was forwarded to the worker that complied with notice and other requirements. The insurer also confirmed that it would remove the reference to workers being charged cancellation fees from their template letters.

4.5.5 In relation to communication in particular, the IRO has seen examples ranging from inaccurate or threatening statements in template letters, to an instance where a case manager inadvertently sent a psychologically injured worker an email in which the injured worker was described as 'cray cray' [crazy].

4.5.6 The negative impact of such communications on workers is both understandable, and in our view entirely avoidable.

4.6 Other examples of poor claims management

4.6.1 The IRO also receives complaints from injured workers relating to the way in which insurers manage day-to-day issues arising in claims. One common cause of complaint is frequent changes of case managers or failure to allocate a dedicated case manager. This can result in inconsistent or slow communication, delays in payments, and leave injured workers confused as to whom they should direct their concerns to.

Case study 12:

The injured worker with a psychological injury contacted the IRO to complain that, several times over the preceding months, their weekly payments (usually paid fortnightly) had not been processed and paid by the insurer until the worker contacted the insurer to discover the reason for delay. The worker told IRO they had been informed by the insurer this might be because they did not have a single case manager appointed to the claim. The repeated delays were causing the injured worker anxiety and distress.

The IRO raised the complaint with the insurer. The insurer responded by admitting that payments were made a day late on several occasions due to authorisation taking place late in the day it was due. The insurer informed IRO it had now appointed a dedicated case manager to ensure the issue did not reoccur. The worker was happy to accept this outcome but noted that at least one payment had been a week (and not a day) late.

4.6.2 Insurers' failure to pay invoices in a timely manner is another common cause of complaint. This can deprive injured workers of treatment, aggravate injury, and may damage the worker's relationship with their treatment provider and the insurer.

Case study 13:

An injured worker with a psychological injury was attending a specialist regularly as part of a course of treatment approved by their insurer. The treating specialist advised the worker that

the insurer had declined an invoice for a visit, and they would be required to pay for the treatment if the insurer did not. The worker was concerned about attending the next scheduled appointment, and felt their psychological injury was 'triggered' by what had occurred.

The IRO raised the complaint with the insurer. The insurer acknowledged that it made a mistake when it informed the treating specialist that liability was not accepted for the treatment and refused to pay for three invoices. The insurer apologised to the specialist and the worker and attended to payment of the outstanding invoices.

This was one of four complaints submitted to IRO by the injured worker over several years about delays in approving treatment, reimbursing treatment costs and making weekly payments.

4.6.3 These types of case management concerns are, in our view, generally able to be avoided. Expert case managers who have the capability and are allowed the time to establish effective and empathetic relationships with injured workers are key, as are thorough reviews when things go wrong, to identify and respond to any root causes of concern for the injured worker.

5. Claims resolution and return to work

5.1 Section 3(b) of the WIM Act provides that one of the primary objectives of the workers compensation system is return to work as soon as possible. Under section 49 of the WIM Act, employers have an obligation to provide suitable employment to injured workers, and, under section 48, injured workers have an obligation to make reasonable efforts to return to work in suitable employment.

5.2 Promoting timely return to work is recognised as beneficial to an injured worker's recovery, and delay can in fact lead to secondary psychological injury. However, return to work for workers with psychological injuries presents unique challenges. These two potentially competing issues are discussed below.

5.1 Promoting swift return to work – WIM disputes

5.1.1 The IRO considers that the expedited assessment of work injury management (WIM) disputes under the WIM Act[37] potentially represents an underutilised tool to facilitate timely and durable return to work. WIM disputes are dealt with by the Commission where there is a dispute between a worker and an employer about an injury management plan or the worker's return to work.[38] The employer is required to directly participate in the dispute resolution process, which offers the injured worker the option of having an external body intervene where return to work is not being adequately assisted by an employer.

[37] Division 3, Part 5, Chapter 7, WIM Act.
[38] Disputes arising from Chapter 3 of the WIM Act.

5.1.2 The Commission aims to conduct a teleconference in such disputes within 14 days of proceedings being filed, and can:

a. conduct conciliation – with parties reaching a consent position,

b. direct that an injury management consultant (or similar) conduct a workplace assessment,

c. refer the dispute to SIRA, and

d. make a recommendation, including that a party to the dispute take certain actions or complies with an obligation imposed by an injury management plan;[39] parties must comply with recommendations within 14 days or request referral to the Commission for determination.

5.1.3 There are consequences for both parties in circumstances where a recommendation is not complied with and a referral is not requested. However, outcomes of WIM disputes are currently not otherwise enforceable, which can potentially undermine their utility in achieving safe, durable and early return to work options and deter their use.

5.1.4 The Personal Injury Commission's *2020/2021 Annual Review* recorded that, over the Commission's first four months of operation, only six of 2,683 applications filed with the Commission were WIM disputes. This compares to 1,762 Form 2 Applications to Resolve a Dispute and 81 other Applications for Expedited Assessment.[40]

5.1.5 Given the potential impact of this tool in quickly resolving WIM disputes, and the current low uptake of this resolution path, there is value in reviewing why this tool is not more frequently used. If a reason is that the range of orders is limited, then consideration should be given to expanding the powers of the Commission and consequences for non-compliance to more closely mirror those available for other expedited assessment matters.

5.2 Recognition of return to work risks in the case of psychological injury

5.2.1 Return to work for a person with a primary psychological injury presents unique challenges and has the potential to be detrimental if it is not managed well. A focus on return to work as soon as possible, as provided under section 3 of the WIM Act, may see some psychologically injured workers encouraged or feel pressured to return to work before they are ready, which may not be conducive to the recovery and longer-term health of the worker. This may warrant a reconsideration of whether the WIM Act's objective in this regard is appropriate for workers with psychological injuries.

[39] Sections 306-307, WIM Act.

[40] Personal Injury Commission, *2020-2021 Annual Review* (2021), p43.

Case study 14:

The injured worker suffered a psychological injury arising from a grievance with a colleague. The worker was provided with alternative duties for a short period but, once these were no longer available, consulted their employer about taking leave due to anxiety about returning to pre-injury duties. The employer did not inform the worker about what they could do to receive weekly payments of compensation and the worker went on unpaid leave.

The worker later became aware of their right to compensation, notifying both the employer and insurer. The worker provided the insurer with supporting documents including COCs, but no determination on liability was made for three months, despite the worker making enquiries with the insurer.

The IRO raised the complaint with the insurer. The insurer admitted to and apologised for the delays and determined that over $23,000 in payments were owing. The employer also reviewed and re-credited the injured worker's leave entitlements.

5.2.2 The complex and often cumulative nature of psychological injury can make adopting steps to promote return to work by removing or minimising the source of an injury very difficult or resource intensive (for example, fundamentally changing the content of the work, removing a second staff member against whom a grievance allegation has not been sustained, or hiring additional staff to reduce workload). SIRA data indicates that only 32 per cent of workers with a psychological claim are offered suitable work once certified as having some restricted capacity for work.[41]

5.2.3 The IRO considers that there may be value in employers thinking more laterally and flexibly about return to work options. While it may not always be possible to offer an injured worker a role outside the business unit they were previously based, or working on different subject matter, in larger organisations, and the public sector in particular, this appears to be a possibility that would warrant further exploration.

5.2.4 The TMF portfolio within icare (for public sector workers) appears to have a disproportionately high number of psychological injury claims.[42] In the 12 months to April 2022, SIRA's claims dashboard reports there were 2,753 reportable claims for psychological injuries (mental disease) in the TMF portfolio, out of a total of 6,110 reportable claims for that category of injury, representing 45 per cent of all reportable claims for this type of injury. Such claims accounted for 18 per cent of all claims reported by Government self-insurers (TMF).

5.2.5 For other insurers, the proportion of psychological injury (mental disease) claims is lower. Of total claims reported, psychological injuries represented 5 per cent for the

[41] State Insurance Regulatory Authority, *Reversing the trend - improving return to work outcomes in NSW* (2020).
[42] State Insurance Regulatory Authority, *Claims data - System overview*.

Nominal Insurer, 4.4 per cent for self-insurers and 5 per cent for specialised insurers.

5.2.6 This is likely to be at least, in part, a product of the subject matter of many public sector roles, which can involve exposure to traumatic events and material (for example, child protection agencies, prosecutors, or emergency services agencies).

5.2.7 However, as the largest employer in the State, and with various measures having been adopted in recent years to promote consistent recruitment processes and workforce mobility across agencies (for example, sector wide talent pools, and standardised eligibility criteria across grades), there may be options for more lateral transfers between agencies, to offer new environments, work forces and duties for workers to perform whilst unfit for their pre-injury duties.

5.3 Act of grace payments

5.3.1 The IRO has found that poor claims management, even where a matter is ultimately resolved in an injured worker's favour, can have detrimental effects on the worker. However, even in cases where there has been particularly serious mismanagement or maladministration, the injured worker is unlikely to have a right to compensation from the insurer.

5.3.2 In the IRO's experience, some insurers (although not icare, as explained below) or employers will occasionally make act of grace (or ex gratia) payments where there has been some significant mismanagement of a claim.

5.3.3 Under the now-repealed section 143 of the WC Act, the former State Compensation Board could make ex gratia payments to certain persons eligible under section 140 of the WCA (Uninsured Liability and Indemnity Scheme).[43] Under current arrangements, government agency insurers do not appear to be empowered to make such payments.

5.3.4 Pursuant to section 5.7(1) of the *Government Sector Finance Act 2018* (GSF Act), a Minister may, if satisfied that there are special circumstances or circumstances of a kind prescribed by regulation (noting that none are presently prescribed), authorise an act of grace payment even though the payment is not authorised by or under law, or required to meet an obligation.

5.3.5 In response to the IRO inquiries about icare's capacity to make act of grace payments, we have been advised that:

- the Nominal Insurer's powers to allocate funds[44] do not provide the ability to make act of grace payments, and

[43] Sections 140, 143, WC Act.
[44] Section 154E(2), WIM Act.

- the Nominal Insurer is not included in the definition of GSF Agency,[45] and therefore not subject to the GSF Act – hence the provisions relating to act of grace payments do not apply.

5.3.6 Without an express power, icare has advised that it will not make act of grace payments. Legislative reform to allow icare to make act of grace payments in exceptional cases may provide an additional option to remediate seriously mismanaged claims that have adversely impacted a worker.

6. Recommendations and conclusions

6.1 There is substantial evidence to indicate that the current workers compensation system does not serve individuals who suffer a psychological injury at work well in their recovery (from both a treatment and financial perspective) and return to work.

6.2 The IRO's view, informed by sources such as injured workers' complaints, and applications for and outcomes of ILARS grants to approved lawyers to assist workers, is that there are challenges for workers with psychological injuries at every step:

- There is a steady increase in the number of workers making claims for psychological injuries.
- Psychological injury claims are more likely than physical injuries to be disputed by the insurer, more likely to be disputed early, and more likely to result in protracted dispute resolution, even though overall outcomes in favour of workers with psychological injuries who are assisted through ILARS grants are comparable to those for workers with physical injuries.
- Workers with psychological injuries who complain to the IRO report delayed decisions by insurers, excessive requests for IMEs and other assessments, distress resulting from attendance at IMEs and assessments, and case management that fails to meet acceptable standards of consistency, empathy, flexibility and courtesy.
- There are many examples of matters where relevant laws and guidelines appear to be poorly understood or not adhered to and, as a result, unreasonable actions are taken by insurers to the detriment of injured workers.
- The cost of these claims – including the costs caused by time off work and the costs of their management – as against other workers compensation claims – is proportionately greater.
- The outcome, for some workers, is that the manner in which their claim is managed exacerbates their psychological injury. They report feeling distressed and (re)traumatised, and that case management issues adversely affect their recovery.

[45] Section 2.4(4), GSF Act.

6.3 There are a number of positive steps being taken to remediate this. SIRA's recent adoption of SOP 33 – focusing on the management of psychological injury claims – is one example. Steps being taken by icare and its agents to improve case management of claims – such as to increase the number of dedicated case managers and improve training and retention of case managers in response to recommendations from a number of reviews – is another.

6.4 Additional research into the challenges faced by workers with psychological injuries – such as SIRA's Partnership with the Black Dog Institute[46] – continues to build the evidence base to better enable the workers compensation system to respond to the challenge of psychological injuries. In our view, this is to be encouraged, and further opportunities to address any information gaps in understanding the experience of workers with psychological injuries in the compensation system should be explored. Such a data set can also be used to benchmark current experience and measure impact of interventions or reforms.

6.5 Our view is that there is value in considering fundamental reforms to the workers compensation system to better address the needs of workers with psychological injuries. Examples of the types of reforms that might be considered include the suggestions summarised below.

- Adopting the recommendation of the Productivity Commission in its 2020 *Mental Health* inquiry report that workers compensation legislation be amended so that:

  > *"any worker with a mental health condition can have funded treatment for a period of six months, without proving the condition is work-related."*[47]

  Such an approach may shift focus from establishing liability for an injury to treatment as the central priority, an approach that is directly centred on the worker's recovery and that places the injured worker's health at the centre of the equation.

- Adopting the recommendations of the WIRO's Parkes Project, that consideration be given to implementing a system whereby the worker is referred to one IME for a joint assessment, which will be accepted unless there are good reasons for referring to an Approved Medical Specialist.

6.6 We have briefly outlined some of the issues that arise for workers with psychological injuries returning to work. Often, the causes of the injury may still be present, resulting in the worker being unwilling or unable to return to their original role or place of work. While the IRO is not often directly involved in these types of disputes, potential

[46] State Insurance Regulatory Authority, *SIRA partners with the Black Dog Institute to support people with psychological injuries returning to work*, (2022).
[47] Productivity Commission, *Mental Health* (2020), Vol 1, p355.

solutions that might be explored include:

- reviewing the Commission's role in expedited assessment of WIM disputes, to better understand any reasons for the limited use of the process, and assess matters such as whether the current range of orders available should be expanded and include binding decisions, potentially increasing the value of the Commission's dispute resolution role in these matters, and
- considering, for the NSW Government and its agencies, whether additional steps can be undertaken to promote return to work options for injured employees across the whole of the sector, and, in particular, beyond the agency or Cluster where the work injury occurred.

6.7 In addition, our view is that reforms and improvements to case management should be prioritised for workers with psychological injuries. For these workers, poor case management potentially has greater consequences. Conversely, good case management is more likely to allow the worker to focus on their recovery.

6.8 There is a strong case to suggest that the most skilled and experienced case managers should be assigned to psychological injury matters, or have close oversight of them. This is aligned to, but goes beyond, the principles and requirements of SOP 33, which calls for case managers with the capabilities and skills relevant to the worker's needs. Given that workers with psychological injuries may require case management support beyond that required in other matters, it may also be appropriate to continually monitor, and where appropriate reduce, caseloads for case managers with a substantial proportion of these matters. Some of the areas of case management that we think warrant particular focus include:

- decisions to reasonably excuse the payment of provisional weekly payments or medical treatment expenses,
- decisions to refuse liability for weekly payments or treatment expenses,
- decisions to request a worker undergo an IME, and
- ensuring decisions are prompt and properly informed, and in line with timeliness and other requirements in workers compensation legislation, the Workers Compensation Guidelines, SOPs and relevant Commission precedents.

These are areas that may also be appropriate for additional and prioritised regulatory scrutiny, to provide further incentives for the highest standards of case management in claims made by workers with psychological injuries.

6.9 In addition, where injured workers with psychological injuries make complaints, there may be value, in addition to addressing the particular concern, to holistically and independently reviewing case management, considering matters such as continuity of

case management, timeliness of payments and reimbursements, and quality of communications with the injured person. This may provide an opportunity to address issues which, if left unresolved, have potential to escalate and adversely affect the injured worker.

6.10 The IRO further considers that there are opportunities to consider improvements to the existing Guidance and SOPs. For example, consideration could be given to:

- amending the Workers Compensation Guidelines and/or SOP 33 to require that, where an insurer requests an IME, the injured worker's NTD is consulted to ensure that the injured worker is adequately prepared and supported when attending the IME, and
- updating the Workers Compensation Guidelines to make clear that section 11A of the WC Act cannot be relied upon to reasonably excuse the making of provisional weekly payments to an injured worker.

6.11 Each of the above suggestions are made in addition to recommendations we have previously made in our *Delay in Determining Liability* inquiry report[48] to consider reforms to the SOPs to:

- improve the timeliness of communications acknowledging requests for treatment,
- keep workers updated on the progress of requests, and
- set benchmarks for insurers when they dispute liability in circumstances where further information is required from the injured worker.

6.12 Finally, our view is that, where the manner in which an insurer manages an injured worker's claim results in the worker being seriously adversely affected, it is only fair that, in appropriate circumstances, act of grace payments or some other restitution action be considered. There is no clear rationale for excluding injured workers from access to these payments where otherwise warranted; we therefore recommend that consideration be given to amending the relevant legislation to permit such payments.

[48] Independent Review Office, *IRO Inquiry report: Delay in determining liability - June 2021* (2021), Rec 3, p21.