

Inquiry into the Operation of Queensland's Workers' Compensation Scheme (edited for psychiatrists)

Report No. 28

Finance and Administration Committee

May 2013

Executive summary

On 7 June 2012 the Legislative Assembly agreed to a motion that the Finance and Administration Committee inquire into and report on the operation of Queensland's Workers' Compensation Scheme. The Committee was initially required to report to the Legislative Assembly by 28 February 2013. However, the Committee requested, and was granted, an extension to 23 May 2013 in order to enable the Committee to explore the information generated by the inquiry to the fullest extent possible.

In particular the Committee is required to consider a number of matters (some not relevant to psychiatrists and hence excluded):

Definition of injury

The Committee has considered the arguments about whether the definition of injury should be 'the' or 'a' major significant contributing factor and has concluded that the current definition is appropriate and should remain unchanged with the exception of psychological injuries.

Psychological injuries are considered separately in section 4.4 – 4.5 of this report. The majority of the arguments centred around reducing the cost of premiums to employers by limiting the definition and, by default, the number of claims. The Committee considers that there are other methods of mitigating premiums without unjustly excluding injured workers.

How the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions

Psychological injury claims

The Committee was concerned that **the area of psychological claims is the fastest growing category of claims** and may place increasing pressure on the workers' compensation fund in the future. The Committee acknowledges that the growth in numbers is also a reflection of greater awareness of mental health issues in the broader community.

The Committee recognises that the legislation as it currently stands already treats traumatic event psychological injuries which would not come under the 'reasonable management action' test differently. However, the Committee considers that this needs to be defined more clearly in the legislation.

The Committee recommends that the **legislation be amended to recognise the two types of psychological injury.**

The Committee acknowledges that there would be those who would argue that the existing definition recognises the former category, however, the Committee has heard evidence that the 'reasonable management action' has been used to disqualify legitimate claims.

Currently, psychological injuries are included in the definition of injury and the exceptions that apply to these types of injuries are included in section 32(5). The Committee considers that it would be better if psychological injuries were included under separate provisions within the legislation.

The Committee recommends that the current exclusions for reasonable management action be removed and include specific exceptions for normal work place practices.

In order to mitigate the effect of the removal of this exemption from the legislation, the Committee recommends the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for this type of claim.

The Committee also recognised that **work place bullying** is an issue in some Queensland workplaces. Incidents of work place bullying have the potential to impact on the Workers' Compensation Scheme through higher psychological claim rates. The *Work Health and Safety Act 2011* allow for fines and

imprisonment of work place bullies. The Committee considers that the Attorney-General should initiate a review of that Act with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Medical Assessment Tribunal (MAT)

The Committee is satisfied that the MAT is the most reasonable solution for independent medical assessment of injuries. The MAT is made up of experienced professionals who are in a position to provide their expertise.

The Committee notes that **a specialty panel for psychological or psychiatric injuries is not included** in the list of specialty medical assessment tribunals included under section 118A of the Regulation. Whilst the Committee recognises that psychologists and psychiatrists are included on the Tribunal when needed, **it considers it appropriate that a specialty Medical Assessment Tribunal be established to include psychiatric or psychological medical specialists when considering psychological injury claims.**

Recommendations

Recommendation 6 45

The Committee recommends that the current definition of injury be retained in its current form with the exception of psychological injuries which are addressed separately in section 4.4.

Recommendation 7 45

The Committee recommends that the definition of injury be considered at the next review subsequent to the roll out of 'DisabilityCare Australia' formerly known as the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS).

Recommendation 10 86

The Committee recommends that psychological injuries be included under separate provisions within the legislation.

Recommendation 11 86

The Committee recommends that the definition of psychological injuries be amended to include the two types of psychological injury identified as category A and B above in section 4.5.

Inquiry into Qld's Workers' Compensation Scheme Recommendations

Finance and Administration Committee xix

Recommendation 12 86

The Committee recommends that the current exclusions for reasonable management action be removed and be replaced with specific exceptions for normal work place practices such as:

- a) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;
- b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;
- c) action by the Authority or an insurer in connection with the worker's application for compensation.

AND the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for Category B type psychological injury claims.

Recommendation 13 86

The Committee recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

Recommendation 14 87

The Committee recommends that the Attorney-General should initiate a review of the *Work Health and Safety Act 2011* with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Recommendation 15 87

The Committee recommends that WorkCover review its psychological claims assessment processes, including a review of the reasons claims are set aside or varied upon review, with a view to reducing this ratio.

Recommendation 16 87

The Committee recommends that WorkCover undertake a review of its psychological claims management to include the following:

- ✘ ensure that there is provision for flexibility for claimants to provide necessary information;
- ✘ inclusion of a specialist unit with suitably qualified assessors;
- ✘ incorporation of a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- ✘ incorporation of mental health and wellbeing into education and awareness processes; and
- ✘ incorporation of consideration and analysis of employer claims history into claims process.

4.4 Psychological injury claims

Psychological injury claims were also highlighted as an area of concern for some submitters.

Psychological or psychiatric injuries (PPI) may include work related stress, anxiety or depression. To be compensable, the injury must have occurred at work and resulted from a single event or over a period of time. Examples of causes may include exposure to a catastrophic event, workplace bullying, harassment, unfair action taken by management or an excessive workload.³⁰¹

4.4.1 How a typical psychological claim is assessed by WorkCover

The Committee asked the Department to provide details of how a typical psychological claim was assessed by WorkCover. They advised the following:

As soon as a psychological injury claim is lodged with WorkCover it is investigated by an experienced claims representative who is aligned to that employer and industry. Subject to the size of the employer, one claims representative will investigate all claims for that employer.

The injured worker is immediately contacted by telephone to explain WorkCover's investigation process. This process typically focuses on the events that caused the condition and whether it was 'reasonable management action' (section 32(5)). They will provide a written and/or verbal statement to WorkCover about what they allege caused their condition. This information is then shared with the employer who can also provide a written and/or verbal statement about their version of events. Both the employer and injured worker are also asked to provide details of any witnesses and WorkCover will obtain statements from these witnesses. Alternatively, the employer might obtain the witness statements. To meet 'natural justice' obligations, we must then provide a copy of the employer's information to the injured worker so they can respond.

Based on the above information, WorkCover will then review all the evidence and documentation and make a decision within the legislated 20 business days (section 134(2)). This decision is communicated verbally to both the injured worker and their employer and either party can request written reasons and apply for a review of the decision by Q-COMP. WorkCover does not typically obtain medical evidence (other than the treating doctor's medical certificate) prior to making the decision about the claim. This is because in the majority of decisions about psychological injury claims, whether the action was 'reasonable management action' is the key issue. Even if the injured worker had a history of mental illness, the claim must still be accepted if work aggravated the pre-existing condition (section 32(3)(b)). If an injury has been diagnosed and the factual investigation confirms it is due to unreasonable management action, or management action taken in a reasonable way, then the extent of the illness or aggravation is relevant for the duration of the claim, not whether the claim is accepted or not.

If the claim is accepted, WorkCover will obtain detailed medical information from the treating doctors and from independent specialists. This helps ensure that all treatment and rehabilitation required as a result of the work events is provided to the worker.³⁰²

4.4.2 Legislative definition

The definition of psychological injuries is included in section 32. The relevant components of this section are detailed as follows:

(1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

(5) Despite subsections (1) and (3), *injury* does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
- (b) the worker's expectation or perception of reasonable management action being taken against the worker;
- (c) action by the Authority or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment

The definition excludes psychological injuries from compensation where they are caused by reasonable management action taken in a reasonable way by the employer or management. The Department advised the Committee that this exclusion is an attempt to balance an employer's freedom to manage its business operations with an employee's protection from injury.³⁰³

The Department also confirmed that the onus of proof rests with the claimant to show evidence that, on the balance of probabilities, the injury was caused by their employment. In an application for compensation where management action is nominated as the stressor, there must be evidence that the management action was unreasonable for the claim to be accepted. When considering what is reasonable, WorkCover must have regard to relevant case law in previous rulings on the interpretation of the term. The Department advised that WorkCover takes a wide interpretation of the term 'reasonable management action taken in a reasonable way'.

The Department outlined that the following 'reasonable management action' tests must all be satisfied to activate section 32(5):

- ☒ Did the injury arise from management action?
- ☒ Was the management action reasonable?
- ☒ Was the management action taken in a reasonable way?³⁰⁵

The Department further outlined that:

'Q-COMP review officers consider the evidence on the insurer file plus any submissions received during the review process. Inevitably, the question of whether the management action is 'reasonable' or not, will form part of the review decision'.

Review officers do have regard to:

- ☒ *'reasonable' means reasonable in all the circumstances of the case and whether a reasonable observer of all the circumstances of the case would find the employer's actions reasonable in the same circumstances;*
- ☒ *be reasonable the management actions do not have to be perfect or ideal – the onus is on the claimant to prove the management actions justify characterisation as unreasonable rather than blemishes;*
- ☒ *the 'unreasonableness' must be the reality of the employer's conduct and not the employee's perception of it;*
- ☒ *was the action a significant departure from the established employer policies or procedures, and if so, in these circumstances was it reasonable'.*³⁰⁶

4.4.3 Reasonable management action

The provisions relating to work place stress were first introduced in 1994. The definition of injury was amended to state that:

'injury' does not include a personal injury, disease, or aggravation or acceleration of a disease, suffered by a worker because of—

- (a) reasonable disciplinary action taken against the worker in connection with the worker's employment; or*
- (b) failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment.*³⁰⁷

The explanatory notes identify that the clause sets out to amend the definition of injury to limit the grounds for compensation for a stress related condition resulting from certain work incidents.

The then Minister for Employment, Training and Industrial Relations, the Hon Matt Foley MP, stated that:

A marked increase in the number and cost of stress-related claims over the past three years has resulted in the need for a substantially enhanced response to the management of claims for stress-related conditions. This response requires not only the amendments contained within this Bill but also a much improved management response to a range of issues which are at the root cause of this problem. Accordingly, this Bill makes it clear that a

compensable injury must have employment as "a significant contributing factor" and does not include an injury, disease or aggravation or acceleration of a disease suffered by a worker because of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment.

The definition was further amended in 1995 to include the words 'taken in a reasonable way'. When introducing the amendments, the then Minister for Employment and Training and Minister Assisting the Premier on Public Service Matters, Hon Wendy Edmond MP, said:

The Bill also expands the current definition of "injury" in relation to stress. It will exclude cases where reasonable action has been taken in a reasonable way to transfer or redeploy a worker. In instances where such action is not reasonable, stress claims will still be accepted; for example, unreasonable action could be where an education administrator demands that a teacher who has taught in Brisbane for 20 years is moved to a regional centre the following week. The reform measures contained in these amendments will apply to injuries which occur on or after 1 January 1996.

The Kennedy review in 1996 also considered the issue of stress related conditions. The report noted that most jurisdictions had moved to legislate precise provisions to limit claims for stress related conditions in response to an increasing number of claims being lodged where remedial action regarding poor work performance, workload and other reasons were the stimulus for claims.³¹¹

The report recognised that Queensland had introduced new provisions in respect to stress from 1 January 1996, however, considered that, based on experience to date, further changes were needed to prevent some claims of this type. The inquiry found cases where employers were being held liable for stress claims where reasonable management action had been undertaken. The inquiry noted its concern that the term 'reasonable' in relation to management action was susceptible to interpretation in relation to individuals' particular circumstance.³¹²

The government supports this recommendation. The then Minister for Training and Industrial Relations, Hon Santo Santoro MP stated that:

The provisions relating to the definition of injury for psychiatric or psychological conditions have been strengthened in response to an increasing number of claims where reasonable management action, for example remedial action regarding a worker's poor work performance, has been the stimulus for the worker lodging a claim.³¹³

The Minister further stated that:

Amendments to the definition of "injury" were introduced in January 1996 in an attempt to control this trend. However, under these amendments, employers have still been held responsible for claims where reasonable management action had been taken. This is considered to be inappropriate, especially when a worker may have a pre-existing disposition to psychiatric or psychological disorder. It is intended that regard be had, when making a decision about the reasonableness of the management action, as to how a worker of ordinary susceptibility would have reacted. A "reasonable person test" has also been introduced so that consideration must be given to whether a reasonable person in the same situation would have been expected to sustain an injury.³¹⁴

The following definition was included in the Bill for the new Act when it was introduced in November 1996:

(4) 'Injury' does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
- (b) the worker's expectation or perception of reasonable management action being taken against the worker;
- (c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;
- (d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- *action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker*
- *a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.*

(5) For subsection (4), in deciding in a particular case whether management action was reasonable or whether management action was taken in a reasonable way—

- (a) regard must be had to what action or way of taking action would have been reasonable for a worker of

ordinary susceptibility to psychiatric or psychological disorder; and

(b) regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.

The provisions relating to stress related claims have largely remained the same since 1996 with the exception of section 34 (4)(d) and 34(5) above which were removed in the amendments made in 1999. The explanatory notes identify that:

*...the tests for a "reasonable person" and "ordinary susceptibility" in subsections 34(4)(d) and 34(5) have been removed, as these were difficult to interpret and apply. These tests related to psychological and psychiatric injury (stress claims).*³¹⁵

Under section 32 of the Act, an insurer has two key considerations when determining a nontraumatic psychological claim. Firstly, employment must be 'a significant contributing factor' to the injury, and then the claim can only be accepted if the injury arose out of or in the course of unreasonable management action.

The Department advised that the process of assessing psychological claims is no different to that for any other type of claim. The injured worker is contacted by telephone to explain the investigation process which typically focusses on the events that cause the condition and whether it was 'reasonable management action' (section 32(5)).

The Committee heard from a number of witnesses who had had their claims rejected on the basis of 'reasonable management action'. These submissions and testimony were considered in-camera by the Committee.

The Committee asked the Department whether employer claims history is considered in deciding whether management action is reasonable. The Department advised that whilst they may recognise patterns they do not consider it is their place to decide whether there is or is not workplace bullying.³²⁴ They further advised that they only consider whether there is reasonable management action and in particular whether the manager is aware of the problem and what action is taken.³²⁵

The Department advised that:

... Several years ago we set up a psychological unit to deal with these sorts of claims. If we did pick up a pattern with a particular employer, then we would go in and talk to people and make an assessment with our psychosocial people about what might be happening in that workplace. The other thing is how you deal with bullying, we have developed a diagnostic tool, People At Work, to try to assist employers in this area. What we are trying to do is to get people to take a much more proactive approach to the management of the managers within their organisation and employees. That is why we have had a number of inquiries into workplace bullying.

The Committee sought further clarification on the reasoning for the use of 'reasonable management action' in the case of psychological injuries. The Department advised that:

...the exclusion of 'psychiatric and psychological injuries in certain circumstances from the definition of 'injury' was in response to an increasing number of claims where remedial action regarding a workers' poor performance (one example of reasonable management action) was the stimulus for the claim. It was considered that some claims were beyond the control of the employer or impacted by an individual's personality or psychological make-up. They acknowledged that 'an employer could implement world's best practice performance management systems and still have its business impacted by a psychiatric or psychological claim for example, conflict between co-workers.

The Department further explained that:

The term 'management action' has been given a broad interpretation but essentially covers such instances as interactions with supervisors, workload, procedural and strategic decisions, transfers, promotions and disciplinary processes, amongst other actions. The Courts have also interpreted that management action need not be perfect or without blemish when considering the application of s.32(5).

The PMSA supported that current provisions advising that:

*...the current scheme and the current act in terms of workers compensation is very good in the provision that the scheme can actually remove claims under the act that have occurred as a result of reasonable management action taken in a reasonable way in relation to a person's employment.*³³⁴

4.4.4 Other issues raised regarding psychological injury claims

In addition to the 'reasonable management' action issues raised during the inquiry, there were a

number of other areas of interest. Arguments included:

- ✧ exclusion of a proportion of these types of claims;
- ✧ inclusion of these types of claims on a 'no-fault' basis, like other types of injury;³³⁶
- ✧ amending the definition to make it fairer to workers; and
- ✧ strengthening the definition to consider the pre-dispositions of claimants.³³⁸

Other issues identified included the relationship to the workplace, what is appropriate compensation³³⁹, medical diagnosis, cost, WorkCover staff training, time frames and secondary claims.

The Queensland Hotels Association (QHA) recommended *'that for stress and psychological claims to be successful, the workplace must be the significant contributing factor causing injury'*.³⁴⁰

However, it can be argued that a psychological injury would not have resulted if the worker had not been employed by the particular employer.

CPM Engineering Queensland suggested that 'stress leave' claims should be further investigated.³⁴²

The Local Government Association advised that:

Our view is that there are certainly some psychological claims that do not belong in the system, because the major cause or originating factor of the problem is not work related. What we are saying is that there are some circumstances where the non-work related issues are the predominant.

The PMSA (Presbyterian and Methodist Schools Association) advised that they have identified that even though the legislation specifically identifies examples of what is reasonable management action they have found 'stress' scenarios being used in relation to performance management issues. They advised that:

We are seeing an increasing tendency that an employee is going off on sick leave and obtaining a doctor's certificate that makes it work-related stress before we even get to the first performance management formal interview, . That puts the whole performance management issue into a very difficult position, because it has occurred before the performance management formally takes place.

The CCF (Civil Contractors Federation) considered that *'most jobs contain some elements that can cause stress to some people at some time'*. They argued that stress is a normal human emotion that everyone feels at some time and should not be a compensable illness under the workers' compensation legislation. However, where work is the major contributing factor in illnesses such as depression or posttraumatic stress disorder then individuals should be provided with support and compensation to maximise their chances of returning to work'.³⁴⁹ They further recommended *'that compensable psychological or psychiatric illnesses be restricted to those with a clear DSM IV diagnosed condition from a psychiatrist or psychologist, not a vague diagnosis of stress'*.

The cost of psychological claims was another factor identified. One of the submitters identified that there are further implications arising from this section in that there are indirect costs such as resource cost (such as engaging specialist injury lawyers) for both injured worker and employer.

Other costs for unsuccessful applicants for compensation include:

- ✧ *Cost of social welfare payments.*
- ✧ *Cost of income insurance payments.*
- ✧ *Direct cost associated with the injury (e.g. Medicare, medication etc.).*
- ✧ *Indirect cost associated with the injury e.g. lost productivity for both worker and employer (allocation of resources for replacement or recruitment).*
- ✧ *Increased demand on professional services.*³⁵⁴

The Local Government Association Queensland (LGAQ) recommended that *'a significant proportion of psychological claims be excluded from the system'* as they are currently resulting in negative outcomes for both workers and employers. LGAQ noted that psychological claims generally involved significant investigation as they are complex and as such can be costly. They further stated:

The reality of the process involved in making a decision on a psychiatric/psychological claim and then management of an accepted claim through the workers' compensation medical model will typically create an injury management environment that is the direct opposite of an optimal return to work model.

Their submission included a comment regarding psychological claims by an experienced HR professional with sound return to work outcomes for physical injuries, which states:

The current process seems to be used in circumstances where professional and external mediation would be a far more appropriate response. I am struggling to recall any successful reintegration back into the workforce once a claim is lodged.

The Bar Association advised the Committee that as a consequence of the high rejection rate many claims progress through the Q-COMP administrative review and appeal processes which often require substantial resources in terms of document disclosure, witness conferences, hearing days and preparation time.³⁵⁷

A number of witnesses identified secondary psychological claims as a growing issue. This includes identification of psychological injury subsequent to a physical injury. The Act does not refer to secondary psychological claims and they are treated the same as any other injury.

The Bar Association of Queensland also identified that section 32(5)(a) applies only in relation to reasonable management action taken in a reasonable way by a worker's employer. With the increasing prevalence of labour hire arrangements, this provision will not apply if management action in relation to a worker is taken by an entity other than the employer (e.g. a host employer or contractor). There would seem to be no reason in principle why an injury should be excluded from the Workers' Compensation Scheme based simply upon the status of the entity on whose behalf reasonable management action is taken.

4.4.5 Fault based injury

One submission emphasised that *'section 32(5) is adversarial and requires the injured worker to engage in a process whereby the worker has to prove the employer has been unreasonable'*.³⁶⁶ As such, there is significant potential for a psychological injury to be exacerbated as the worker is required to:

- ✧ *Engage in an adversarial process at a time of substantially diminished psychological capacity;*
- ✧ *Respond to adversarial statements made by the employer;*
- ✧ *Argue a case for 'unreasonable' behaviour by the employer without any criteria for what constitutes 'unreasonableness' under the Act.*

Q-COMP's statistics show that *'rejections and claims for psychiatric and psychological injuries take longer to decide'* and *'claims for psychological and psychiatric injuries have a higher chance of rejection'*. The average decision time for psychological and psychiatric injuries is 26.9 days (2011/12) compared to 6.1 days for back strains and sprains. Q-COMP statistics also show that females account for over 58 per cent of psychological and psychiatric injury claims. As the statistics above indicate, the rejection rate for psychological claims is considerably higher.

Psychological and psychiatric injury cases are also more likely than physical injury cases to proceed to a Medical Assessment Tribunal (MAT) for determination of ongoing incapacity. Psychological and psychiatric claims are also the most expensive despite accounting for only 2.7 per cent of all claims finalised. They currently have an average finalised time lost claim cost of \$36,640 which is over three times the average time lost claim cost of physical injuries (\$11,764 for 11/12).

Given that psychological injury claims are also more costly, it was suggested that repealing section 32(5) would save substantial resources as there would no longer be a need to address the issue of management action, whether it was reasonable or not. Similarly, costs associated with taking a matter to the QIRC would also be substantially reduced given the number of matters currently brought to them for review.

Psychological and psychiatric injury claims also represented 8.3 per cent of all common law claim lodgements in 2011/12.

4.4.6 Suggested changes to the legislation

A jurisdictional analysis of workers' compensation claims for psychological injuries in 2006 indicated *'that there are not major differences between the Australian jurisdictions in regard to the provision of compensation for psychological injuries suffered by an employee'*.³⁷⁸ The study concluded that *'the solution to increasing psychological injury claims is unlikely to be found in the amendment of legislation'*.³⁷⁹

4.4.7 Statistical comparisons between psychological and physical injury claims

Rejection rates for psychological claims are in excess of 50 per cent compared to physical injuries which have a rejection rate of 5 per cent. Q-COMP confirmed the high rejection rate advising the Committee that:

*With psychological claims, unlike physical claims in the statutory scheme, there is a fault based system. There are a couple of tests that the claim has to go through. Firstly, has the person suffered a psychological injury that can be identified through actions at work? There is a defence to the claim, and that is if there has been reasonable management action taken then that would defeat a claim. A person may have a psychological illness, but if there has been reasonable management action then that would defeat the claim. In order to determine all of those factors, it takes time and, because the doctor does certify them as having a psychological illness, they put their claim in and they are not really aware of this second step of reasonable management action. It does take time and there is a high rate of rejection and it takes a lot of the whole scheme time, because we also provide the dispute resolution mechanism, and a large number of our disputes relate to psychological claims.*³⁸¹

The Committee obtained statistical information from the Department. Q-COMP advised that psychological or psychiatric claims as a primary injury represent 4.3 per cent of all intimations (4,522 lodgements in 2011/12). The number of psychological or psychiatric claims has increased over the past five years from 2969 claims in 2007/08 (i.e. 2.9 per cent of all statutory lodgements) to 4522 (4.3 per cent of all statutory lodgements) in 2011/12. This growth is predominantly driven by non-government organisations, which has seen an increase of psychological claims from 1.7 per cent (in 2007/08) to 2.8 per cent (in 2011/12) of all statutory claims.

Q-COMP also indicated that psychological/psychiatric are one of the most expensive injury types at \$33,155 for time lost claims for 2011/12. In 2011/12 psychological/psychiatric claims represented just over 7 per cent of total statutory payments (\$52.5 million for 2011/12).

In 2011-12, 86 per cent of all appeals finalised occurred before reaching court, with most of these withdrawn by the appellant.

The difficulty in assessing these claims is highlighted by the fact that a higher proportion of decisions on psychological claims i.e. over 15 per cent are reviewed when compared with physical injury claims two per cent in 2011-12. In addition, of those rejected and reviewed, six per cent of lodgements are appealed for psychological claims compared to 2.9 per cent for physical injury claims (for 2011-12). The comparison of the number of review decisions for psychological and physical claims also highlights that a greater majority of psychological review decisions are upheld compared to that of physical injury reviews. For example, in 2011-12 69 per cent (486 from a total of 699) of psychological review decisions are confirmed meaning the insurers' decision is confirmed by the Review Unit, whilst 47 per cent (744 from a total of 1594) of physical injury review decisions are confirmed. The number of insurer decisions set aside/varied by the Review Unit and a new decision substituted or varied for psychological claims total 140 (20 per cent) compare to 410 (25.7 per cent) for physical injury claims for 2011-12 (Tables 7 and 8).

4.4.8 Other jurisdictions

The most recent comparative analysis of the exclusionary provisions for psychological injuries was undertaken by Safe Work Australia and published in April 2012. That report identified that statutory threshold requirement for psychological injuries vary significantly from physical injuries and there are significant differences in the way in which each jurisdiction assesses psychological impairment.³⁸⁷ Appendix H contains a copy of the jurisdictional comparative data of exclusionary provisions for psychological injuries.

The Department advised that in 2006 the Office of Australian Safety and Compensation Council commissioned Professor Dennis Pearce to conduct an analysis of arrangements in Australia of the management of workers' compensation claims for psychological injuries.

The study identified the causal connection test, which is the description used in the various jurisdictions for the required level of contribution that has to be shown for an injury to qualify for compensation, was as follows:

- ☞ "material" - Commonwealth, Northern Territory
- ☞ "substantial" - ACT, New South Wales, South Australia
- ☞ "significant" - Queensland, Victoria, Western Australia
- ☞ "major or most significant" - Tasmania.³⁸⁸

The study concluded that

All jurisdictions apply similar statutory provisions for assessing eligibility for compensation of psychological injuries suffered by employees. There are some exceptions, but generally one

employee in one jurisdiction can expect a similar outcome on eligibility for compensation to a different employee working in another jurisdiction.

Professor Pearce's assessment was that *'most cases are dealt with based on their unique circumstances and by and large any difference in relevant legislation in each jurisdiction was unlikely to impact on the outcome'*. He found that it was unlikely that the solution to the increasing psychological injury claims would be found in the amendment of legislation. He also noted *'that the approach in each jurisdiction was generally consistent and the law in each jurisdiction was also generally applied consistently by relevant courts and tribunals'*.³⁸⁹

4.5 Committee comments – psychological claims

In considering this issue the Committee needed to balance its compassion for those suffering from psychological injuries with the need to maintain a financially viable system of universal workers' compensation.

The Committee was concerned that the area of psychological claims is the fastest growing category of claims and may place increasing pressure on the workers' compensation fund in the future. The Committee acknowledges that the growth in numbers is also a reflection of greater awareness of mental health issues in the broader community.

Significant discussion relating to this classification centred around the current increase and expected future increase in claims relating to psychological injury and the obvious difficulty for the Workers' Compensation system and for medical experts. The Committee recognises that the same level of trauma or offense will produce markedly different responses in different people.

The Committee considers that psychological injuries can be defined as two types:

A. Where a psychological injury is attested to by medical evidence and it results from an event or series of events that deliver such significant trauma that it would reasonably be expected it would impact adversely in the short, medium and long term on a significant proportion or the majority of the population were they exposed to such significant events.

Examples of such events would include serious work related assault occasioning bodily harm and in particular residual physical disability. Other events, that if supported by medical evidence of ongoing psychological injury, may include people exposed to severe physical threat such as hold-up, work place invasion such as robberies or where workers are exposed to victims of road and rail incidents in the course of their employment.

B. All claims other than those identified above. This would include claims such as workplace harassment and those types of claims where it is anticipated it would only produce a lasting psychological injury to people whose pre-existing psyche is vulnerable. This type of claim is more difficult to assess because the events around them are likely to be influenced by non-work psychological stresses, pre-existing psychological issues such as substance abuse, pre-existing depression, personality disorder, bipolar disorder etc.

The Committee considers that the level of proof required for acceptance of a claim under the second type of claim should be quite high.

The Committee recognises that the legislation as it currently stands already treats traumatic event psychological injuries which would not come under the 'reasonable management action' test differently. However, the Committee considers that this needs to be defined more clearly in the legislation.

The Committee recommends that the legislation be amended to recognise the two types of psychological injury as defined above.

The Committee acknowledges that there would be those who would argue that the existing definition recognises the former category, however, the Committee has heard evidence that the 'reasonable management action' has been used to disqualify legitimate claims that could clearly have been categorised as Group A.

It became clearer to the Committee during the course of the inquiry that psychological claims are fraught with emotive issues and have not been well managed by the Department. The Committee considers that the words used in the legislation have contributed to this. Further, the high numbers of rejected claims would indicate that workers are unclear on their rights with regard to these types of claims.

It was also clear to the Committee that the use of the 'reasonable management action' exemption

may have precluded legitimate psychological injuries from the scheme where the work place was the major significant factor contributing to the injury. The Committee considers that employers who allow situations to develop in their work places which injure their workers, whether physically or psychologically, should not be allowed an unreasonable exemption.

The Committee recommends that the current exclusions for reasonable management action be removed and include specific exceptions for normal work place practices such as:

- a) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;*
- b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;*
- c) action by the Authority or an insurer in connection with the worker's application for compensation.*

In order to mitigate the effect of the removal of this exemption from the legislation, the Committee recommends the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for this type of claim.

A suggested alternative for the new definition might be:

An accepted psychological injury is a psychiatric or psychological disorder arising out of, or in the course of, employment if the employment is the significant contributing factor to the injury.

A psychological injury is not accepted in any of the following circumstances—

- d) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;*
- e) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;*
- f) action by the Authority or an insurer in connection with the worker's application for compensation.*

The Committee agrees that what should be compensable is a properly diagnosed psychological injury or disorder, not a short-lived disappointment or resentment.

The Committee also seeks to include provisions that identify that even if a claimant has a history of prior psychological issues, this does not automatically preclude them from workers' compensation if the work place is the major significant factor in causing the psychological injury.

The Committee recognises that claimants with psychological injuries are in the most vulnerable position when it comes to dealing with the requirements of making a claim and managing the consequences of having a claim rejected. The Committee considers that clear, concise, accurate and timely communication with claimants is a key to ensuring satisfactory outcomes.

The Committee also acknowledges that psychological injuries are a complex area with a high level of uncertainty surrounding diagnosis. The Committee was conscious of not putting in place structural impediments for legitimately injured workers, however, there also needs to be recognition that for workers' compensation to apply, the work place must be the cause of the injury rather than other factors. The Committee considers that the proposed changes will make it both simpler for those workers who are injured because of specific events in the work place and clearer to those who are not eligible before they are caused more stress by 'fighting the system'.

However, in making the above recommendations, the Committee remains concerned that it may inadvertently preclude legitimate claimants. It therefore recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

The Committee also recognised that work place bullying is an issue in some Queensland workplaces. Incidents of work place bullying have the potential to impact on the Workers' Compensation Scheme through higher psychological claim rates. The *Work Health and Safety Act 2011* allow for fines and imprisonment of work place bullies. The Committee considers that the Attorney-General should initiate a review of that Act with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers'

Compensation Scheme.

The Committee also has concerns regarding the disproportionate number of rejected claims, the number asking for a review and the number of reviews where the decision is either set aside or varied. The Committee considers that the number of set aside or varied claims reflects on WorkCover's assessment processes. If a significant number of rejected claims are later either set aside or varied upon review, then the conclusion is that the initial assessment was flawed.

The Committee was also concerned, given the nature of psychological claims, that a significant number of lodgements not reviewed may be genuine cases where claimants are unable to "manage" pursuing the claim further. The Committee recommends that WorkCover review its assessment processes, including a review of why claims are set aside or varied upon review, with a view to reducing this ratio.

The Committee was not satisfied with the response from the Department regarding consideration of employer history. The Committee questions how management action can be considered to be reasonable if a particular employer has several similar claims made against them. The Committee considers that employer history needs to be considered as part of the process even if it is found at the end of that process that their actions were reasonable. It should be noted that employer history involves both proven and unproven claims.

The Committee has a number of recommendations relating to the way psychological claims are managed by WorkCover including:

- ✧ examining the process of reviewing psychological claims and to ensure that there is provision for flexibility for claimants to provide necessary information;
- ✧ improving their claims process in dealing with psychological claims, including a specialist unit with suitably qualified assessors;
- ✧ incorporating a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- ✧ incorporating mental health and wellbeing into education and awareness processes;
- ✧ incorporating consideration and analysis of employer claims history into claims process.

Recommendation 10

The Committee recommends that psychological injuries be included under separate provisions within the legislation.

Recommendation 11

The Committee recommends that the definition of psychological injuries be amended to include the two types of psychological injury identified as category A and B above in section 4.5.

Recommendation 12

The Committee recommends that the current exclusions for reasonable management action be removed and be replaced with specific exceptions for normal work place practices such as:

- a) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;
- b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;
- c) action by the Authority or an insurer in connection with the worker's application for compensation.

AND the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for Category B type psychological injury claims.

Recommendation 13

The Committee recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

Inquiry into Qld's Workers' Compensation Scheme

Recommendation 14

The Committee recommends that the Attorney-General should initiate a review of the *Work Health and Safety Act 2011* with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Recommendation 15

The Committee recommends that WorkCover review its psychological claims assessment processes, including a review of the reasons claims are set aside or varied upon review, with a view to reducing this ratio.

Recommendation 16

The Committee recommends that WorkCover undertake a review of its psychological claims management to include the following:

- ☞ ensure that there is provision for flexibility for claimants to provide necessary information;
- ☞ inclusion of a specialist unit with suitably qualified assessors;
- ☞ incorporation of a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- ☞ incorporation of mental health and wellbeing into education and awareness processes; and
- ☞ incorporation of consideration and analysis of employer claims history into claims process.

5.8 Committee comments – Medical Assessment Tribunal (MAT)

The Committee is satisfied that the MAT is the most reasonable solution for independent medical assessment of injuries. The MAT is made up of experienced professionals who are in a position to provide their expertise.

The Committee notes that a specialty panel for psychological or psychiatric injuries is not included in the list of specialty medical assessment tribunals included under section 118A of the Regulation. Whilst the Committee recognises that psychologists and psychiatrists are included on the Tribunal when needed, it considers it appropriate that a specialty Medical Assessment Tribunal be established to include psychiatric or psychological medical specialists when considering psychological injury claims.

Recommendation 23

The Committee recommends that a psychological specialty medical assessment tribunal be included on the list of specialty medical assessment tribunals under section 118A of *Workers' Compensation and Rehabilitation Regulation 2003*.