



LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

# 2018 review of the Workers Compensation Scheme

Report 67

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Standing Committee on Law and Justice

# **2018 review of the Workers Compensation Scheme**

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## Terms of reference

1. 1. That, in accordance with section 27 of the *State Insurance and Care Governance Act 2015*, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers compensation and motor accidents legislation, which include the:
  - (a) Workers' Compensation Scheme
  - (b) Workers' Compensation (Dust Diseases) Scheme
  - (c) Motor Accidents Scheme
  - (d) Motor Accidents (Lifetime Care and Support) Scheme.
2. In exercising the supervisory function outlined in paragraph 1, the committee:
  - (a) does not have the authority to investigate a particular compensation claim, and
  - (b) must report to the House at least once every two years in relation to each scheme.

Please note that on 1 May 2018, the committee resolved that the 2018 review of the workers compensation scheme focus on:

- the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the committee's first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required
- recommending a preferred model to the NSW Government.

The terms of reference were referred to the committee by the Legislative Council on 19 November 2015.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 19 November 2015, p 623.

## Committee details

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### Committee members

<b>The Hon Natalie Ward MLC</b>	Liberal Party	<i>Chair</i>
<b>The Hon Lynda Voltz MLC</b>	Australian Labor Party	<i>Deputy Chair</i>
<b>The Hon David Clarke MLC</b>	Liberal Party	
<b>The Hon Trevor Khan MLC</b>	The Nationals	
<b>The Hon Daniel Mookhey MLC</b>	Australian Labor Party	
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## Chair's foreword

Following on from the committee's 2017 review of the workers compensation scheme, this review focused on the feasibility of establishing a consolidated personal injury tribunal for workers compensation and CTP disputes.

During this review, the committee received evidence about the similarities between the workers compensation and CTP systems, highlighting how a single jurisdiction may provide certainty, efficiency and better streamlining of decision making for claimants.

Some stakeholders sought reassurance that a consolidated approach would not dilute the expertise that is particular to each jurisdiction. There were also views about the need for the proposed tribunal to be independent, with a judicial head and an appeal mechanism, and the need for transparency of decisions and access to legal advice and representation for claimants. There was general consensus that the Workers Compensation Commission was an appropriate vehicle for this jurisdiction, and that it could successfully operate with two streams of expertise.

On this basis, the committee has recommended that the NSW Government consolidate the workers compensation scheme and CTP insurance schemes dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise.

The committee heard evidence of stakeholders' views about the need to preserve the role of the Workers Compensation Independent Review Office and the Independent Legal Assistance and Review service in the workers compensation scheme, and how these services might be expanded to claimants in CTP insurance scheme disputes.

On behalf of the committee, I thank all participants in this inquiry. The committee's regular oversight review is a valuable opportunity to engage and assess these important schemes, together with all participants respectively in them. Thank you to all committee colleagues for their considered contributions to this inquiry and the committee secretariat for their professional support, in particular Tina Higgins, Teresa McMichael, Samuel Griffith and Janina Moaga.

I commend the report to the Parliament.



The Hon Natalie Ward MLC  
**Committee Chair**

## Recommendations

### Recommendation 1

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That the NSW Government consolidate the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise.

### Recommendation 2

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That the NSW Government ensure that if a single personal injury tribunal is established, as outlined in recommendation 1, it:

- be independent and judicial
- have statutorily appointed presiding officers
- provide a judicial appeal mechanism
- publish its decisions
- allow claimants to have access to legal representation.

### Recommendation 3

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That the NSW Government preserve the Workers Compensation Independent Review Office and Independent Legal Assistance and Review Service in the workers compensation scheme, and expand its services to claimants in CTP insurance scheme disputes.

### Recommendation 4

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That the NSW Government assist injured workers who have lost, or will lose, their weekly entitlements under section 39 of the *Workers Compensation Act 1987* to transition quickly to the disability support pension, where eligible, and investigate other support mechanisms for those ineligible for these payments.

### Recommendation 5

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That the State Insurance Regulatory Authority give consideration to resolving legislative ambiguities including issues of back-pay following resumption of weekly payments, pre-existing psychological injury, assessment of permanent impairment and aggregating impairments, as part of the Workers Compensation Dispute Resolution Reform Steering Committee Review, and in ongoing consultation with the Workers Compensation Independent Review Office.

## Conduct of review

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 19 November 2015.

The committee received 21 submissions and held three public hearings at Parliament House in Sydney.

The committee held three public hearings at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.



# Chapter 1 Overview

This chapter provides a brief overview of the committee's ongoing oversight role of the workers compensation scheme and the key issues that arose from the committee's last review of the scheme in 2017. It outlines important developments that have occurred since the 2017 review, primarily involving reforms of the workers compensation dispute resolution system, before discussing what the focus of this review will be.

## Committee oversight role

- 1.1 In accordance with s 27 of the *State Insurance and Care Governance Act 2015*, the operations of the workers compensation scheme are required to be supervised by a committee of the Legislative Council.
- 1.2 The Standing Committee on Law and Justice has been designated as the committee to perform this oversight role. The resolution appointing the committee requires the committee to report to the Legislative Council in relation to the scheme at least once every two years. The same resolution also requires the committee to supervise the operation of other insurance and compensation schemes established under New South Wales' workers compensation and motor accidents legislation, including the Compulsory Third Party (CTP) insurance scheme, Workers' Compensation (Dust Diseases) scheme and the Motor Accidents (Lifetime Care and Support) scheme.<sup>2</sup>
- 1.3 The committee's last review of the workers compensation scheme was completed in March 2017 (hereafter referred to as the '2017 review'). Information about that review and other reviews conducted by the committee, including the reports, are available at: [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

## 2017 review

- 1.4 A major issue that arose during the 2017 review was the complexity of the two separate dispute resolution processes for resolving disputes regarding work capacity decisions and liability matters. Stakeholders described the bifurcated nature of the dispute resolution system as inefficient and dysfunctional, and expressed concerns that it caused delays, resulted in inconsistent decision-making and was difficult to navigate.<sup>3</sup> The committee supported suggestions by stakeholders to dismantle the current dispute resolution system and establish a single jurisdiction for determining all workers compensation disputes, and as such recommended that the NSW Government establish a 'one stop shop' forum for resolution of all workers compensation disputes which:
  - allows disputes to be triaged by appropriately trained personnel
  - allows claimants to access legal advice as currently regulated
  - encourages early conciliation or mediation

<sup>2</sup> *Minutes*, NSW Legislative Council, 19 November 2015, p 623.

<sup>3</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), p xi.

- uses properly qualified judicial officers where appropriate
- facilitates the prompt exchange of relevant information and documentation
- makes use of technology to support the settlement of small claims
- promotes procedural fairness.<sup>4</sup>

1.5 The committee also considered there could be merit in creating a specialised and well regarded personal injury jurisdiction, and therefore recommended that the government 'consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales'.<sup>5</sup>

1.6 In its subsequent response the government expressed in principle support for both recommendations, and advised that it had commenced a review of workers compensation dispute resolution arrangements (discussed below).<sup>6</sup>

## Developments since the 2017 review

1.7 This section outlines key developments since the committee's last review in 2017.

### NSW Government discussion paper

1.8 In December 2017 the Department of Finance, Services and Innovation published a discussion paper on potential reforms to the New South Wales workers compensation dispute resolution system.<sup>7</sup> The paper canvassed options for reform and presented the following four options to consolidate, simplify and modernise the dispute resolution system:

- **Option 1** - a one stop shop for workers compensation dispute resolution in the current Workers Compensation Commission, which provides a single online portal for claimants to access all scheme bodies and their dispute resolution-related functions.
- **Option 2** - the one stop shop and single online portal proposed in Option 1, with the addition of more claimant and legal support. Under this option the Workers Compensation Independent Review Office's (WIRO's) current insurer complaints handling would be expanded into a claimant support service, including proactive support for complex claims.

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<sup>4</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), Recommendation 14, p 86.

<sup>5</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), Recommendation 16, p 86.

<sup>6</sup> Correspondence from the Hon Victor Dominello MP, Minister for Finance, Services and Property, to the Clerk of the Parliaments, providing government response to the first review of the exercise of the functions of the WorkCover Authority, 27 September 2017, p 6.

<sup>7</sup> NSW Department of Finance, Services and Innovation, *Improving workers compensation dispute resolution in NSW: A discussion paper on potential reforms to the NSW workers compensation dispute resolution system*, 20 December 2017.

- **Option 3** – the one stop shop proposed in option 1 'with increased CTP consistency'. This option transfers all of WIRO's claimant and legal support services to the State Insurance Regulatory Authority (SIRA).
- **Option 4** – a consolidated personal injury dispute resolution model that integrates the workers compensation and CTP dispute resolution systems into a single system.<sup>8</sup>

1.9 The government received 34 submissions to the discussion paper.<sup>9</sup> The outcome of the review are discussed below.

### Reforms under the Workers Compensation Legislation Amendment Act 2018

1.10 Based on the outcomes of our 2017 review of the workers compensation scheme and research undertaken by the Department of Finance, Services and Innovation (discussed above), the Workers Compensation Legislation Amendment Act 2018 was recently passed by the NSW Parliament.

1.11 The reforms under this legislation were designed to simplify the dispute resolution process for injured workers who are navigating the workers compensation scheme. Some of the changes under the Act which are directly relevant to issues raised within this inquiry include:

- abolishment of internal review, merit review and procedural review for work capacity decisions, with the Workers Compensation Commission given jurisdiction to determine these matters instead
- changes with respect to the calculation of the pre-injury average weekly earnings of a worker for the purpose of determining the worker's entitlement to weekly payments of compensation
- enhanced information collection and sharing powers of SIRA and a scheme for mandatory notification of contraventions of the Workers Compensation Acts.

1.12 SIRA advised that it expected the proposed changes to take effect in early 2019, 'pending passage of legislation and appropriate consultation and updating of regulations and guidelines'.<sup>10</sup>

1.13 While the proposed reforms were welcomed by a number of review participants, many stakeholders remained cautious, noting that they were yet to see any of the detail.<sup>11</sup>

<sup>8</sup> NSW Department of Finance, Services and Innovation, *Improving workers compensation dispute resolution in NSW: A discussion paper on potential reforms to the NSW workers compensation dispute resolution system*, 20 December 2017, pp 35-40.

<sup>9</sup> NSW Department of Finance, Services and Innovation, Consultations, *Workers compensation dispute resolution*, <http://www.financeconsultations.nsw.gov.au/consultations/workers-compensation-dispute-resolution-process/consultation-submissions>.

<sup>10</sup> Submission 8, State Insurance Regulatory Authority, p 15.

<sup>11</sup> Submission 17, Australian Manufacturing Workers' Union NSW Branch, p 3; Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, p 5; Evidence, Ms Natasha Flores, Industrial Officer, Work Health and Safety, Workers Compensation, Unions NSW, 24 July 2018, p 17; Evidence, Mr David Henry, Work Health and Safety Officer, Australian Manufacturing Workers' Union, 24 July 2018, p 22; Evidence, Mr Peter Remfrey, Secretary, Police Association of New South Wales, 24 July 2018, p 34.

### New claims model

- 1.14** Another noteworthy development since the committee's last review is icare's new claims model, which is a new information technology platform for claims management. The partially implemented case platform went live on 1 January 2018, and was expected to be rolled out in November 2018.<sup>12</sup>
- 1.15** The model is centred around a new portal that enables quick and effective notification of an injury that leads to the triage of each claim and ensures that the appropriate level of case management and support is assigned.<sup>13</sup> The model aims to benefit injured workers by:
- Ensuring fairer entitlements and provision of better care for the seriously injured.
  - Getting people back to work for a faster, fuller recovery when they are able.
  - Improving outcomes and the quality of lifetime care.
  - Making sure the benefits of the reforms go back into the system, keeping premiums at the right level.<sup>14</sup>
- 1.16** Ms Elizabeth Uehling, Acting Group Executive – Workers Insurance, icare, informed the committee that the new model had already led to increased efficiencies, advising that in the first quarter of 2017 the average time between lodgment of a claim to receipt of the first service was approximately 20 days; however, by July 2018 it had been reduced to around 10 days.<sup>15</sup> icare advised that its Net Promoter Score, which it implemented to gauge client satisfaction, had increased from +11 in March 2017 to +22 as at April 2018.<sup>16</sup>
- 1.17** There was support for the new claims model during this review, with stakeholders welcoming the faster turnaround times.<sup>17</sup> The committee also heard that there have been fewer matters in relation to treatment disputes.<sup>18</sup>

### Committee comment

- 1.18** The committee acknowledges the important changes introduced under the Workers Compensation Legislation Amendment Act 2018. These reforms simplify the dispute resolution process for injured workers and address concerns which have been raised in previous reviews.
- 1.19** The committee acknowledges the steps the government has taken to address the unnecessary level of duplication and complexity in the workers compensation scheme and for introducing

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<sup>12</sup> Evidence, Mr John Nagle, Chief Executive Officer and Managing Director, icare, 25 July 2018, p 33.

<sup>13</sup> icare, *Notify us of an injury or make a claim*, <https://www.icare.nsw.gov.au/workers-insurance-claims/notify-us-of-an-injury-or-make-a-claim/>

<sup>14</sup> Submission 5, icare, Annexure A, p 1.

<sup>15</sup> Evidence, Ms Elizabeth Uehling, Acting Group Executive – Workers Insurance, icare, 25 July 2018, p 34.

<sup>16</sup> Submission 5, icare, Annexure A, p 3.

<sup>17</sup> Answers to questions on notice, Police Association of New South Wales, 17 August 2018, p 1; Evidence, Ms Flores, 24 July 2018, p 19; Ms Sherri Hayward, Legal/Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), 24 July 2018, p 28.

<sup>18</sup> Evidence, Mr Shane Butcher, NSW State Committee Member, Australian Lawyers Alliance, 24 July 2018, p 6.

changes to address the calculation of pre-injury average weekly earnings, which will be discussed further in chapter 3.

- 1.20** The committee notes that icare states that its new claims model has already achieved efficiencies. We look forward to hearing more about the results of this initiative in due course, particularly once the platform has been fully implemented.

### **Focus of this review**

- 1.21** Given our comprehensive 2017 review of the workers compensation scheme, the committee resolved to focus this review on the establishment of a consolidated personal injury tribunal for CTP and workers compensation dispute resolution, as per recommendation 16 of the 2017 report (outlined above at paragraph 1.5).<sup>19</sup>
- 1.22** This review investigated the feasibility of such a tribunal, including the preferred model, where it should be located and what legislative changes would be required. Since the hearings for this review completed, however, the NSW Government introduced the Workers Compensation Legislation Amendment Act 2018. The impact of these amendments on some of the issues raised during the inquiry will be detailed throughout the report.
- 1.23** Several other issues pertaining to the workers compensation scheme also arose during the course of this review, primarily in relation to legislative and operational issues. These issues will also be discussed, in chapter 3 of this report.

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<sup>19</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), Recommendation 16, p 95.



## Chapter 2 A consolidated personal injury tribunal

This chapter begins with an overview of the current workers compensation dispute resolution system. It then sets out stakeholders' views regarding a consolidated personal injury tribunal, before considering the preferred model and location of such a jurisdiction. The chapter concludes with a discussion of the key principles suggested by stakeholders for the design and operation of a consolidated tribunal.

### Workers compensation scheme

- 2.1 As noted at the beginning of this report and in the committee's 2017 review, the dispute resolution system in the workers compensation scheme was, prior to the 2018 amendments, considered a bifurcated system, whereby disputes about work capacity decisions and liability decisions fell within different jurisdictions.
- 2.2 Disputes about work capacity decisions were subject to an administrative review and a judicial review by the Supreme Court of NSW. Administrative review of work capacity decisions comprised three potential steps: internal review by the insurer, merit review by SIRA and procedural review by WIRO. Disputes about liability decisions, on the other hand, fell within the jurisdiction of the Workers Compensation Commission.
- 2.3 Under the Workers Compensation Legislation Amendment Act 2018, however, the Workers Compensation Commission is established as the central dispute resolution body in the scheme for work capacity and liability decisions. The internal review process is now optional, rather than mandatory, and if workers are not satisfied with an insurer's decision in relation to work capacity, they can take their dispute directly to the Workers Compensation Commission.

### Stakeholders' views on a consolidated tribunal

- 2.4 In regard to whether the workers compensation scheme and CTP scheme dispute resolution processes should be consolidated into a single personal injury tribunal, there was consensus that one tribunal would provide certainty, efficiency and better streamlining of decision making for claimants. Many stakeholders supportive of this approach also sought reassurance around independence and judicially led decision making in any such model.
- 2.5 The NSW Business Chamber submitted that any consideration of a personal injury jurisdiction should be deferred until at least 12 months after implementation of the recent reforms to the workers compensation dispute resolution system.<sup>20</sup>
- 2.6 The following sections set out stakeholders' views in respect of a consolidated tribunal. It is important to note that inquiry participants provided their evidence prior to the amendments being introduced under the Workers Compensation Legislation Amendment Act 2018.
- 2.7 Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, supported the establishment of a single tribunal, describing it as 'a welcome reform which will provide greater

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<sup>20</sup> Submission 13, NSW Business Chamber, p 3.

certainty for injured workers as to their rights and entitlements'.<sup>21</sup> Mr Garling was of the view that an independent personal injury tribunal would provide 'certainty and confidence' for injured workers by dealing fairly, openly and properly with disputes.<sup>22</sup>

**2.8** Mr John Nagle, interim Chief Executive Officer and Managing Director, icare, expressed support for a consolidated tribunal, noting that the current system has 'multiple pathways and multiple contact points for an injured worker [which] are quite confusing'.<sup>23</sup> He submitted that a single tribunal would provide more consistent decision-making.<sup>24</sup>

**2.9** icare did raise some concerns about the differences in the two schemes and how that would affect the implementation and operation of such a combined jurisdiction and recommended that thought be given 'to ensuring that any benefits arising from a combined tribunal jurisdiction are real and consider the ongoing complexities of both schemes, as well as consistency in the interpretation and application of the law – not just shared administrative resources'.<sup>25</sup>

**2.10** The differences between the two schemes were also acknowledged by the Insurance Council of Australia, which also supported the move to consolidation. It suggested that such a tribunal would require 'a level of flexibility to accommodate the differences in the two schemes'.<sup>26</sup>

**2.11** Potential benefits of a consolidated tribunal identified by the Insurance Council of Australia were:

- improved efficiency through greater economies of scale
- better allocation of resources and triaging of disputes
- the ability to share scheme data 'to improve recovery, benefit coordination and reduce claim leakage, including fraud'.<sup>27</sup>

**2.12** Ms Elizabeth Medland, NSW Claims Managers Sub-committee Member, Insurance Council of Australia, commented that the current compensation schemes are:

...very difficult to navigate and anything that is more simple will obviously help the customer in dealing with this. Both the New South Wales CTP scheme and workers compensation scheme can be overwhelming for a claimant so one tribunal would be a more simple process and they would be less likely to be confused.<sup>28</sup>

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<sup>21</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 25 July 2018, p 2.

<sup>22</sup> Evidence, Mr Garling, 25 July 2018, p 12.

<sup>23</sup> Evidence, Mr John Nagle, Interim Chief Executive Officer and Managing Director, icare, 25 July 2018, p 34.

<sup>24</sup> Evidence, Mr Nagle, 25 July 2018, p 36.

<sup>25</sup> Submission 5, icare, p 1.

<sup>26</sup> Submission 15, Insurance Council of Australia, p 1.

<sup>27</sup> Submission 14, Insurance Council of Australia, p 11.

<sup>28</sup> Evidence, Ms Elizabeth Medland, NSW Claims Managers Sub-committee Member, Insurance Council of Australia, 24 July 2018, p 42.

- 2.13** The Australian Road Transport Industrial Organisation, NSW Branch, were also in favour of a single tribunal that provides a consistent decision-making process. It noted the broad similarities between the CTP and workers compensation schemes and stated:
- It follows that in a management and operational sense it should be possible to establish a 'one stop shop' which can administer insurance claims, make more consistent assessments, provide for improvements in corporate knowledge of case history while ensuring appropriate rights and obligations to parties to seek redress through dispute resolution are retained with the assistance and advice of suitably qualified professionals. Hopefully, system improvements achieved through a standardised process will also facilitate earlier resolution of disputes and reduced recourse to avenues of appeal.<sup>29</sup>
- 2.14** The Law Society of New South Wales considered a single tribunal to be a 'feasible concept', acknowledging that there may be 'valid economic and structural arguments' for combining the workers compensation and CTP dispute resolution systems.<sup>30</sup>
- 2.15** The Australian Lawyers Alliance told the committee that it was 'not opposed' to motor vehicle disputes being handled by an independent, judicial-led body, and that it was 'cautiously supportive' of a consolidated tribunal.<sup>31</sup> However, like some other stakeholders, both the Law Society and Australian Lawyers Alliance said they would only support the establishment of such a tribunal if it met certain design and operational principles (to be discussed later).
- 2.16** A number of stakeholders did not support the move to a single tribunal due to a variety of reasons. Some stakeholders asserted that it would be better to fix the existing issues rather than establish a new dispute resolution tribunal.
- 2.17** For example, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) submitted that prevention was better than cure, and that addressing the legislative issues with the workers compensation scheme would lead to less matters being disputed in the first place.<sup>32</sup>
- 2.18** Mr Angus Skinner, Research Manager, Police Association of New South Wales, agreed that '[m]ost of the issues that give rise to disputes arise much earlier in the process and as a result of the legislation rather than the source of the dispute resolution provider'.<sup>33</sup> The Association asserted that 'separate reforms, tailored to the needs of injured persons within the two distinct legislative frameworks, would be of more benefit than consolidation'.<sup>34</sup>
- 2.19** Similarly, the Australian Manufacturing Workers' Union declared 'it is essential that we fix the current system before there is any further consideration about a potential unification or merger of jurisdictions'.<sup>35</sup>

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<sup>29</sup> Submission 4, Australian Road Transport Industrial Organisation NSW Branch, p 2.

<sup>30</sup> Submission 19, Law Society of New South Wales, p 2.

<sup>31</sup> Submission 14, Australian Lawyers Alliance, p 11.

<sup>32</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, p 5.

<sup>33</sup> Evidence, Mr Angus Skinner, Research Manager, Police Association of New South Wales, 24 July 2018, p 35.

<sup>34</sup> Submission 7, Police Association of New South Wales, p 1.

<sup>35</sup> Evidence, Mr David Henry, Work Health and Safety Officer, Australian Manufacturing Workers' Union, 24 July 2018, p 22.

**2.20** The New South Wales Bar Association contended that 'it would be a better use of financial and human resources to consolidate workers compensation dispute resolution within the existing Workers Compensation Commission and to make some changes of detail to try to help it deal with those matters', and likewise to consolidate the CTP dispute resolution into CARS, than to create a new personal injury jurisdiction.<sup>36</sup> The committee notes that the Association's first suggestion is what the NSW Government has achieved under the Workers Compensation Legislation Amendment Act 2018.

**2.21** Concerns were also raised that merging the two dispute resolution systems would have a negative impact on the workers compensation system, to the detriment of injured workers. For example, Ms Natasha Flores, Industrial Officer, Work Health and Safety, Workers Compensation, Unions NSW, told the committee:

We fear that the merging of the two dispute resolution processes and the undertaking of what is a much larger reform process may result in injured workers being worse off as we are concerned that their issues may be lost in an increased bureaucracy which is unresponsive to their needs.<sup>37</sup>

**2.22** This concern was shared by the Australian Education Union, NSW Teachers Federation Branch<sup>38</sup> and Mr David Henry, Work Health and Safety Officer from the Australian Manufacturing Workers' Union.<sup>39</sup>

**2.23** Similarly, Mr Stuart Barnett, NSW State Practice Group Leader, Workers Compensation and National Manager for Union Services, Slater and Gordon, stated: 'What we do not want to see is a weakening of the workers compensation system in order to drag along a CTP system'.<sup>40</sup>

**2.24** While some stakeholders referred to the similarities in the two systems in support of merging them (see above), others underscored the differences to argue against the move. For instance, Ms Flores from Unions NSW highlighted the fundamental difference in relationships between injured parties in the two schemes:

... whilst the two systems deal with injuries, there are great differences in the nature of the relationships of the injured parties within both systems. Those involved in CTP do not have an ongoing employment relationship and they do not have any form of relationship other than as a result of a road accident. However, the workers compensation system involves quite complex relationships. Parties involved in workers compensation disputes have that employment relationship, which we believe needs to be managed with the utmost care in order to assist the recovery and return to work of the injured worker and to maintain the relationship between the employer and the employee and to ensure the injured worker's industrial and legal rights are maintained throughout the process.<sup>41</sup>

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<sup>36</sup> Evidence, Mr Ross Stanton, Common Law Committee Member, NSW Bar Association, 24 July 2018, pp 3-4.

<sup>37</sup> Evidence, Ms Natasha Flores, Industrial Officer, Work Health and Safety, Workers Compensation, Unions NSW, 24 July 2018, p 16.

<sup>38</sup> Submission 3, Australian Education Union NSW Teachers Federation Branch, pp 1-2.

<sup>39</sup> Evidence, Mr Henry, 24 July 2018, p 22.

<sup>40</sup> Evidence, Mr Barnett, 24 July 2018, p 53.

<sup>41</sup> Evidence, Ms Flores, 24 July 2018, p 16.

- 2.25** The difference between the relationships in each scheme was also emphasised by Ms Mallia from the CFMMEU, who noted that workers compensation is about the continuing relationship between employers and employees, whereas CTP has 'more of an arms-length, let us get the claim sorted, open the claim, deal with the issues, close the claim' mentality. Ms Mallia declared: 'We do not want that CTP sentiment to infiltrate workers compensation.'<sup>42</sup>
- 2.26** The Australian Education Union NSW, Teachers Federation Branch did not support a consolidated tribunal on the basis that the different objectives in the *Workplace Injury Management and Workers Compensation Act 1998* and *Motor Accidents Compensation Act 1999* would 'create a body with two different aims and objects.'<sup>43</sup> A similar point was raised by the Police Association which highlighted the 'different legislative frameworks, definitions, thresholds, liabilities and entitlements' to note that a consolidated tribunal would probably still require two streams, in which case:
- ... consolidation would amount to little more than a cosmetic relocation of functions that could be performed in separate schemes, and would not represent benefits other than possibly some minor cost efficiencies for the running and facilities of the joint tribunal.<sup>44</sup>

### Committee comment

- 2.27** The committee acknowledges that the support for a consolidated personal injury tribunal is varied amongst stakeholders. Some consider there to be enough similarities between the workers compensation and CTP schemes for consolidation to be beneficial, whereas others consider there are challenges which should inform any such entity.
- 2.28** Several stakeholders expressed support for a consolidated tribunal, provided certain design and operational elements are met in creating such a tribunal. These elements are considered in the remainder of this chapter.

### Preferred model and location

- 2.29** Regardless of whether or not they supported a consolidated personal injury tribunal, there was general consensus amongst stakeholders that if such a jurisdiction were to be created, the preferred option would be to vest it in the Workers Compensation Commission.<sup>45</sup> Review participants deemed this preferable to creating a new tribunal<sup>46</sup> or moving the functions to the NSW Civil and Administrative Tribunal (NCAT).<sup>47</sup>

<sup>42</sup> Evidence, Ms Rita Mallia, State President, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), 24 July 2018, p 23.

<sup>43</sup> Submission 3, Australian Education Union NSW Teachers Federation Branch, pp 1-2.

<sup>44</sup> Submission 7, Police Association of New South Wales, p 3.

<sup>45</sup> Submission 7, Police Association of New South Wales, p 2; Submission 18, p 12; Submission 19, The Law Society of New South Wales, p 3; Evidence, Ms Flores, 24 July 2018, p 16; Evidence, Mr Garling, 25 July 2018, p 3.

<sup>46</sup> Evidence, Mr Stanton, 24 July 2018, p 7.

<sup>47</sup> Submission 14, Australian Lawyers Alliance, p 10; Evidence, Mr Stanton, 24 July 2018, p 29.

- 2.30** There were some concerns about the impact on the Workers Compensation Commission if its jurisdiction were to be expanded. The Police Association of New South Wales considered the Workers Compensation Commission to be very effective in its dispute resolution function, and claimed: 'Grafting on an entirely separate scheme to the Commission could adversely affect the Commission's ability to provide effective and timely resolution'.<sup>48</sup> Mr Remfrey, Secretary, Police Association of New South Wales, added: '[T]he fear we have is that you would dilute the Workers Compensation Commission arrangements and put at risk what we consider to be a superior system'.<sup>49</sup>
- 2.31** The Law Society of New South Wales described the Workers Compensation Commission as a 'natural fit' for a single personal injury tribunal,<sup>50</sup> and Unions NSW and the CFMMEU agreed that should the merger eventuate, the Workers Compensation Commission would be the appropriate body given its resources and expertise.<sup>51</sup>
- 2.32** WIRO recommended that the tribunal be located in the Sydney CBD 'where the majority of the insurers and lawyers work.' It added that the tribunal should also be able to determine disputes in regional locations (as the Workers Compensation Commission currently does).<sup>52</sup>
- 2.33** The importance of services in rural and regional areas was also emphasised by the Law Society, who requested there be no retraction of services in those locations.<sup>53</sup> The CFMMEU likewise supported a greater geographical footprint of the tribunal's services.<sup>54</sup>

### Two streams of expertise

- 2.34** Numerous review participants also agreed that an expanded Workers Compensation Commission could, and probably should, operate with two streams of expertise for the workers compensation and CTP schemes.<sup>55</sup>
- 2.35** Mr Andrew Stone SC, NSW State President, Australian Lawyers Alliance, submitted that retaining subject matter experts, as opposed to dispute resolution experts, was essential due to the complexity of the two schemes and their legislation, stating: 'You want the people you are appointing to hear and determine disputes to know things backwards'.<sup>56</sup>

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<sup>48</sup> Submission 7, Police Association of New South Wales, p 2.

<sup>49</sup> Evidence, Mr Peter Remfrey, Secretary, Police Association of New South Wales, 24 July 2018, p 39.

<sup>50</sup> Submission 19, The Law Society of New South Wales, p 3.

<sup>51</sup> Evidence, Ms Flores, 24 July 2018, p 16; Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, p 12.

<sup>52</sup> Submission 21, Workers Compensation Independent Review Office (WIRO), p 25.

<sup>53</sup> Evidence, Mr David Potts, Partner, Kells Lawyers, Law Society of New South Wales, 24 July 2018, p 4.

<sup>54</sup> Evidence, Ms Mallia, 24 July 2018, p 24; Evidence, Ms Sherri Hayward, Legal/Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), 24 July 2018, p 24.

<sup>55</sup> Evidence, Mr Remfrey, 24 July 2018, p 35; Evidence, Mr Barnett, 24 July 2018, p 51; Evidence, Ms Flores, 24 July 2018, p 16; Evidence, Mr Andrew Stone SC, NSW State President, Australian Lawyers Alliance, 24 July 2018, p 8.

<sup>56</sup> Evidence, Mr Stone, 24 July 2018, p 8.

**2.36** Mr Stone illustrated some of the nuances between treatments in the two schemes in support of this argument:

... in workers compensation the treatment has to be reasonably necessary whilst under the motor accidents scheme it has to be reasonable and necessary. Apparently there is a difference between the two. More significantly, for example, nobody in workers compensation has to deal with concepts of contributory negligence and relative culpability because they are dealing with a straight statutory benefits scheme whereas in motor accidents where you are dealing with lump sums and damages they do have to be familiar with some, at times, quite complex concepts of relative culpability and apportionment between driver and passenger or pedestrian, and that is more complex.<sup>57</sup>

**2.37** The Australian Lawyers Alliance contended that not all experienced legal practitioners understand both systems, giving the example that: 'Not all current CARS assessors could do justice to a workers compensation dispute and not all Commission arbitrators could apply principles of contributory negligence in a motor vehicle accident (MVA) claim.'<sup>58</sup>

**2.38** The Police Association of New South Wales agreed that there should be 'two distinct arms' to ensure the specialist skills in each scheme are maintained and the systems are 'not put at risk'.<sup>59</sup> Similarly, the Shop, Distributive and Allied Employees' Association maintained that workers compensation matters 'must be heard by experts in workers compensation legislation ... [I]t is a more complex area of law and as such an expert decision-maker is necessary to make sure those matters are fairly and adequately heard.'<sup>60</sup>

**2.39** Slater and Gordon strongly advocated for separate streams due to the differences in the relationships and nature of the two schemes (as highlighted by other stakeholders earlier in this chapter). It believed specialised streams would provide 'consistency for workers and consistency for injured drivers'.<sup>61</sup>

**2.40** In response to questioning from the committee as to whether it was worth creating a single jurisdiction if there are going to be two streams, Mr Stone still supported the proposal on the basis that it would give the CTP dispute resolution system independence through a judicial head. In response to further questioning as to whether the CTP system could just be made independent without consolidating it with workers compensation, Mr Stone expressed the view that there is no need to have two judicial heads of two separate tribunals.<sup>62</sup>

**2.41** On the other hand, Mr Garling from WIRO did not share the view that there needed to be two separate streams of expertise, describing such views as 'over-protective'. He told the committee:

I do not think that a sensible judicial officer, whether it be an arbitrator, Deputy President or a President equivalent, would have any difficulty with determining disputes in either jurisdiction. They are essentially much the same. I do not think that is an issue

<sup>57</sup> Evidence, Mr Stone, 24 July 2018, p 8.

<sup>58</sup> Submission 14, Australian Lawyers Alliance, p 9.

<sup>59</sup> Evidence, Mr Remfrey, 24 July 2018, p 39.

<sup>60</sup> Evidence, Ms Monica Rose, Industrial Officer and Women's Officer, Shop, Distributive and Allied Employees' Association NSW, 24 July 2018, p 24.

<sup>61</sup> Evidence, Mr Barnett, 24 July 2018, p 51.

<sup>62</sup> Evidence, Mr Stone, 24 July 2018, p 8.

... [For example], District Court judges have multiple different functions every day and that seems to work fine.<sup>63</sup>

- 2.42** In Mr Garling's opinion, adding CTP dispute resolution to the Workers Compensation Commission 'should not affect the workers compensation jurisdiction at all'. However, he urged for there to be appropriate consultation with the Workers Compensation Commission and other stakeholders to determine the processes.<sup>64</sup>

### **WIRO and ILARS**

- 2.43** There has been, and continues to be, significant stakeholder support for WIRO during all of this committee's reviews of the workers compensation scheme. There was also strong support during this review for the Independent Legal Assistance and Review Service (ILARS), which is administered by WIRO and provides access to free, independent legal advice to workers, through the provision of a grant, where there is a disagreement with insurers regarding entitlements or where assistance is needed to make a claim.<sup>65</sup>
- 2.44** Stakeholders urged for WIRO and the ILARS to be preserved alongside any consolidated tribunal, with concern expressed that the consolidated tribunal model proposed in the government's discussion paper (outlined earlier in this report at 1.8) appeared to dismantle WIRO. The CFMMEU did not support that model as it removed 'one of the most effective agencies in the workers compensation system in WIRO',<sup>66</sup> and neither did other stakeholders, as noted by the Police Association: 'That model was opposed by the WIRO, unions, and the legal profession'.<sup>67</sup>
- 2.45** The Australian Association of Medico-Legal Providers was adamant that the establishment of a consolidated tribunal 'should not be implemented to the detriment of past reforms such as the development of WIRO/ILARS and the ongoing improvement of the medico legal assessments under this body'.<sup>68</sup>
- 2.46** Mr Remfrey from the Police Association asserted that if a single tribunal is created, 'WIRO should be responsible for handling complaints against insurers, resolving disputes and overseeing the compensation systems' and ILARS 'should be the chosen model for funding legal costs'.<sup>69</sup> Mr Stone from the Australian Lawyers Alliance noted that the CTP system does not have a WIRO equivalent, and felt that it would benefit from such a service.<sup>70</sup> The Lawyers Alliance supported expanding the office's remit, suggesting that 'a WIRO style organisation [is] needed to ensure accountability within the CTP scheme'.<sup>71</sup>

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<sup>63</sup> Evidence, Mr Garling, 25 July 2018, p 3.

<sup>64</sup> Evidence, Mr Garling, 25 July 2018, p 11.

<sup>65</sup> WIRO, *Get legal advice*, <https://wiro.nsw.gov.au/search/content/legal%20help>.

<sup>66</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, Annexure A, p 30.

<sup>67</sup> Submission 7, Police Association of New South Wales, p 1.

<sup>68</sup> Submission 10, Australian Association of Medico-Legal Providers, p 4.

<sup>69</sup> Evidence, Mr Remfrey, 24 July 2018, p 35.

<sup>70</sup> Evidence, Mr Stone, 24 July 2018, pp 13-14.

<sup>71</sup> Submission 14, Australian Lawyers Alliance, p 10.

- 2.47** Mr Garling, the Workers Compensation Independent Review Officer, believed that WIRO could take on motor accident complaints relatively easily, telling the committee:

It is viable. In the 2013 amendments that were proposed by the then Minister, which did not go any further, our office was to be the independent review office for the motor vehicle scheme. We actually drew up a structure at that stage anticipating that possibility. We would see that we could envisage doing that without a great deal of additional resources ... It may be two or three extra people on our claims team but it is not likely to be doubling our size.<sup>72</sup>

- 2.48** Mr Garling advised, however, that the issue would be whether there would be adequate funding to support an expanded ILARS.<sup>73</sup>
- 2.49** WIRO and ILARS will also be considered in chapter 3 in the context of resourcing and independence.

#### **Committee comment**

- 2.50** The committee notes that if a consolidated personal injury tribunal is to be created, there is general consensus amongst review participants for the jurisdiction to be vested in the Workers Compensation Commission, with separate streams for workers compensation disputes and CTP disputes in order to maintain subject matter expertise in those areas.
- 2.51** The committee also notes the requests from stakeholders that the tribunal's services be available in rural and regional areas, as the Workers Compensation Commission currently is, and agree that this should occur.
- 2.52** The committee notes the strong stakeholder support for the work of WIRO and the very broad support for WIRO's role to be expanded to encompass the CTP scheme.

### **Guiding principles**

- 2.53** As noted earlier in this chapter, stakeholders (regardless of whether or not they supported a single tribunal) urged for certain principles to be followed in relation to the design and operation of a consolidated tribunal, should one be created. This section discusses the predominant principles raised.

#### **Independent and judicial**

- 2.54** The most prominent principle espoused by review participants was the need for the tribunal to be independent. As illustrated below, stakeholders were emphatic that the regulator, SIRA, should have no role in the dispute resolution process:

<sup>72</sup> Evidence, Mr Garling, 25 July 2018, p 11.

<sup>73</sup> Evidence, Mr Garling, 25 July 2018, p 11.

- 'The scheme regulator should have no access to, and no influence over, the decision makers'.<sup>74</sup>
- 'Permitting SIRA to engage in dispute resolution would far exceed its legislative role and remit and is fundamentally inconsistent with its role as a regulator' and 'would be antithetical to the fundamental notion that such a forum should be structurally, functionally and institutionally independent from the scheme regulator'.<sup>75</sup>
- 'it is imperative that the regulator should play no part in the dispute decision-making process. We feel there is an inherent conflict of interest in this ... [T]he regulator must focus on the sole task of regulating the industry'.<sup>76</sup>
- 'SIRA should not be performing this [dispute resolution] function, as the conflict of interest between such a function and SIRA's other roles make that allocation entirely inappropriate'.<sup>77</sup>
- 'the regulator makes the rules, they are perhaps there to oversee breaches of those rules, set up the framework, but there should be an independent tribunal determining what could be one of the most important things in a person's life'.<sup>78</sup>
- 'Simply put, SIRA is a regulator. It should be confined to that important activity'.<sup>79</sup>

**2.55** Some stakeholders expressed concern about SIRA's role in the new CTP Dispute Resolution Service. The Australian Lawyers Alliance submitted that the Dispute Resolution Service and its predecessors, MAS and CARS, were 'too close' to and had 'no objective independence' from SIRA, given that the services reported through and were part of the SIRA structure.<sup>80</sup>

**2.56** In order to achieve such independence, the Australian Lawyers Alliance recommended that the consolidated tribunal have a judicial, rather than administrative, focus.<sup>81</sup> This was supported by other stakeholders, such as the CFMMEU which argued for an 'independent, judicial ... proper court-like tribunal like the [Workers Compensation] commission to make sure that there is fairness on all sides'.<sup>82</sup>

**2.57** According to the Law Society of New South Wales, 'the significance, complexity and volume of personal injury matters are such that it is essential that the forum for determining disputes be overseen by an independent judiciary'.<sup>83</sup>

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<sup>74</sup> Submission 14, Australian Lawyers Alliance, p 4.

<sup>75</sup> Submission 19, The Law Society of New South Wales, p 2.

<sup>76</sup> Evidence, Ms Flores, 24 July 2018, p 16.

<sup>77</sup> Evidence, Mr Remfrey, 24 July 2018, p 34.

<sup>78</sup> Evidence, Mr Barnett, 24 July 2018, p 52.

<sup>79</sup> Submission 16, NSW Bar Association, p 4.

<sup>80</sup> Submission 14, Australian Lawyers Alliance, p 5.

<sup>81</sup> Submission 14, Australian Lawyers Alliance, p 5.

<sup>82</sup> Evidence, Ms Mallia, 24 July 2018, p 25.

<sup>83</sup> Submission 19, Law Society of New South Wales, p 2.

- 2.58** To further ensure this independence the Law Society recommended that the tribunal's presiding officers be statutorily appointed.<sup>84</sup> This was also supported by other stakeholders, such as the CFMMEU which asserted: 'Members of the decision making body must, where possible, have tenure or fixed terms and not subject to the political whims of the regulator or the government. The body must be truly independent to inspire confidence among the participants'.<sup>85</sup>
- 2.59** It was also suggested to the committee that the new system should include an appropriate judicial appeal mechanism.<sup>86</sup>

### **Fair, transparent and accountable**

- 2.60** Inextricably linked to the principle of independence is the perception of fairness, which was the Insurance Council of Australia's first recommended principle for a dispute resolution process. In its submission to the committee the ICA stated: 'Research highlights that people generally have a better recovery if they feel they have been treated fairly. A perception of fairness is promoted by having an open and transparent system which sits separately from the original decision makers or scheme stakeholders'.<sup>87</sup>
- 2.61** Witnesses during the review agreed that the perception of fairness should be a fundamental principle for any tribunal. Mr Stuart Barnett, NSW State Practice Group Leader, Workers Compensation and National Manager for Union Services, Slater and Gordon, added that perceived bias was as important as actual bias, stating:

My experience is that it is often about the journey. People like to feel they have had their say, they have had people listen and if they perceive that that decision or that listening has been done by someone who has already made their decision or wants it to go a certain way, then even if they have a reasonable result they come away a bit disgruntled because they have not been heard.<sup>88</sup>

- 2.62** The Insurance Council further recommended that the tribunal publish all of its decisions for transparency, which would improve the dispute resolution and decision-making process:

... publication would promote improved decision making by insurers which would likely lead to greater efficiency by reducing levels of disputation and a better claim experience for injured people.

The timely publication of decisions ensures that all parties involved are up-to-date on recent developments which can assist insurers to make faster decisions to the benefit of claimants.<sup>89</sup>

<sup>84</sup> Submission 19, Law Society of New South Wales, p 2.

<sup>85</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, Annexure A, p 30.

<sup>86</sup> Submission 19, Law Society of New South Wales, p 2.

<sup>87</sup> Submission 15, Insurance Council of Australia, p 11.

<sup>88</sup> Evidence, Mr Barnett, 24 July 2018, pp 51-52.

<sup>89</sup> Submission 15, Insurance Council of Australia, pp 11-12.

- 2.63** The Law Society supported the creation of transcripts for proceedings and the publishing of judgments.<sup>90</sup> WIRO commented that '[t]ransparency in decision making is essential to the community's acceptance of decisions made by Courts, Tribunals and Commissions'.<sup>91</sup>
- 2.64** It was also suggested to the committee that the consolidated tribunal adhere to best practice principles and guidelines, such as the Council of Australasian Tribunal Excellence Framework 2017, to ensure appropriate levels of independence, accountability and transparency.<sup>92</sup>

### **Internal merit review**

- 2.65** Some stakeholders requested that the new system contain no merit review, or only allow optional merit review.
- 2.66** Concerns were raised both in the committee's 2017 review<sup>93</sup> and this review<sup>94</sup> regarding the independence and transparency of the SIRA operated Merit Review Service in the workers compensation scheme. For example, in regard to transparency, the NSW Bar Association noted that SIRA's Merit Review Service does not carry out any publicly accessible hearings and, with the exception of less than 20 matters, has never published any of its decisions.<sup>95</sup>
- 2.67** As noted in chapter 1, the government's recent amendments under the Workers Compensation Legislation Amendment Act 2018 addressed this issue, with the abolition of mandatory internal merit review.
- 2.68** The Australian Lawyers Alliance opposed the inclusion of any internal merit review within a consolidated dispute resolution system.<sup>96</sup> The CFMMEU also advocated to remove the requirement for internal review for disputed decisions'.<sup>97</sup>
- 2.69** A slightly different view, proffered by the Police Association of New South Wales, was that internal review by insurers should be an option rather than mandatory.<sup>98</sup>

### **Access to justice and legal representation**

- 2.70** Another principle advocated by a number of review participants was access to justice and legal representation. For example, the Australian Association of Medico-Legal Providers argued:

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<sup>90</sup> Submission 19, Law Society of New South Wales, p 3.

<sup>91</sup> Submission 21, Workers Compensation Independent Review Office (WIRO), p 22.

<sup>92</sup> Submission 7, Police Association of New South Wales, p 3; Submission 19, Law Society of New South Wales, p 3.

<sup>93</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), pp 74-76.

<sup>94</sup> Submission 16, NSW Bar Association, pp 3-4; Evidence, Ms Hayward, 24 July 2018, p 22.

<sup>95</sup> Submission 16, NSW Bar Association, p 4.

<sup>96</sup> Submission 14, Australian Lawyers Alliance, p 11.

<sup>97</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, pp 13-14.

<sup>98</sup> Submission 7, Police Association of New South, pp 4-5.

'there must be legislated entitlement for individuals to have an opportunity to have appropriate legal advice and representation at all stage of the dispute process'.<sup>99</sup>

- 2.71** Similarly, WIRO submitted that '[t]he parties involved in a dispute must be entitled to legal representation by experienced practitioners'.<sup>100</sup> It further added that lawyers must be entitled to be paid a reasonable fee for the work they conduct on behalf of their clients.<sup>101</sup>
- 2.72** The CFMMEU stated that injured workers need a dispute resolution system that 'provides access to justice and access to appropriate legal representation'.<sup>102</sup> It pointed out that legal support is not available for work capacity reviews as it is for liability disputes and argued that this should be rectified.<sup>103</sup>

### **Committee comment**

- 2.73** The committee acknowledges the concerns raised regarding the differences between the workers compensation and CTP schemes, and how consolidation may impact on vulnerable people navigating each scheme.
- 2.74** It is clear however, that rectifying some of the legislative and operational issues with each scheme will lead to fewer disputes arising in the first place. In this regard, we note that changes under the Workers Compensation Legislation Amendment Act 2018 will simplify dispute resolution processes in relation to work capacity and liability issues for injured workers. It will also address other specific issues which injured workers and stakeholders have been faced with, such as the calculation of pre-injury average weekly earnings.
- 2.75** The committee considers that there are valid reasons for progressing towards consolidation of the two systems into a single personal injury tribunal. This will not only address some of the complexities raised within each system but will potentially generate efficiencies where similarities exist.
- 2.76** Even though some stakeholders expressed concerns about consolidation, many acknowledged that it may nevertheless occur, and expressed largely similar views as to where and how such a tribunal should operate. Numerous stakeholders agreed that it would be preferable for the Workers Compensation Commission to be given jurisdiction.
- 2.77** The committee also acknowledges that an expanded Workers Compensation Commission should ideally retain two separate streams of expertise for the two schemes. Concerns about consolidation having a negative impact on injured workers rights could be allayed by retaining the specialist expertise in each scheme.

<sup>99</sup> Submission 10, Australian Association of Medico-Legal Providers, p 5.

<sup>100</sup> Submission 21, Workers Compensation Independent Review Office (WIRO), p 23.

<sup>101</sup> Submission 21, Workers Compensation Independent Review Office (WIRO), p 23.

<sup>102</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, pp 7-9.

<sup>103</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, pp 7-9.

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### **Recommendation 1**

That the NSW Government consolidate the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise.

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- 2.78** Ideally, any such consolidated personal injury tribunal should be independent and judicial, with statutorily appointed presiding officers, a judicial appeal mechanism and access to justice and legal representation for claimants.
- 2.79** We also agree that the tribunal should be transparent, and support the publication of its decisions. The committee notes that the Workers Compensation Commission already satisfies many of these recommendations.
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### **Recommendation 2**

That the NSW Government ensure that if a single personal injury tribunal is established, as outlined in recommendation 1, it:

- be independent and judicial
  - have statutorily appointed presiding officers
  - provide a judicial appeal mechanism
  - publish its decisions
  - allow claimants to have access to legal representation.
- 

- 2.80** The committee acknowledges stakeholders views that there is a need to preserve and expand WIRO and ILARS. Retaining this statutory office and the free legal service it administers, ILARS, is essential for the workers compensation scheme, and would be equally valuable to claimants in CTP disputes.
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### **Recommendation 3**

That the NSW Government preserve the Workers Compensation Independent Review Office and Independent Legal Assistance and Review Service in the workers compensation scheme, and expand its services to claimants in CTP insurance scheme disputes.

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## Chapter 3 Legislative and operational issues

This chapter examines a number of legislative and operational issues raised by stakeholders in relation to the workers compensation scheme, including the calculation of pre-injury average weekly entitlements, cessation of weekly benefits after five years, WIRO's financial independence, and the regulation of insurer conduct and performance by SIRA.

While these issues are strictly outside the focus of this review on the consolidation of a personal injury tribunal, they are canvassed briefly to acknowledge stakeholder concerns.

### Calculation of pre-injury average weekly entitlements

- 3.1** During the committee's 2017 review concerns were raised about the calculation of Pre-Injury Average Weekly Entitlement (PIAWE), being the amount of weekly compensation payable to an injured worker unable to perform his or her pre-injury job or suitable alternative duties as a result of a work-related injury or illness.
- 3.2** As noted during that review, the methodology for calculating PIAWE was altered as part of the 2012 reforms to the workers compensation system. Many stakeholders contended during the 2017 review that the new definition was overly complicated and disadvantaged workers (see 4.73 - 4.94 of the 2017 review for a more detailed discussion of PIAWE).
- 3.3** In the 2017 review the committee acknowledged the complexity of the PIAWE calculation, which has the potential to cause delays in the processing of claims, and supported the call for a fairer, more transparent calculation method. The committee noted that SIRA had been consulting with stakeholders to develop a proposed regulation for the NSW Government to vary the calculation, and recommended that SIRA expedite this process as a matter of priority.<sup>104</sup>
- 3.4** The complexity of PIAWE calculation was again raised as an issue during this review. Stakeholders expressed frustration with the calculation.<sup>105</sup>
- 3.5** Mr John Nagle, Chief Executive Officer and Managing Director, icare, informed the committee that it can take four hours to calculate a PIAWE calculation for a single day off work.<sup>106</sup>
- 3.6** The CFMMEU asserted that the issue could be addressed by 'a simple legislative change' to the definition, which would in turn alleviate the pressure on the worker compensation dispute resolution system because less disputes would arise in the first place:

No matter the dispute resolution model chosen, injured workers will continue to have PIAWE disputes because no one agrees on the interpretation. However, a simple legislative change would remove the disputation around PIAWE thereby reducing costs

<sup>104</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 66.

<sup>105</sup> Evidence, Mr David Potts, Partner, Kells Lawyers, Law Society of New South Wales, 24 July 2018, p 15; Evidence, Ms Rita Mallia, State President, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), 24 July 2018, p 23; Evidence, Mr Shane Butcher, NSW State Committee Member, Australian Lawyers Alliance, 24 July 2018, p 15.

<sup>106</sup> Evidence, Mr John Nagle, Chief Executive Officer and Managing Director, icare, 25 July 2018, p 31.

to the injured worker and the system as a whole. A simplified PIAWE definition would almost eradicate PIAWE disputes.<sup>107</sup>

- 3.7 The CFMMEU expressed support for the pre-2012 definition,<sup>108</sup> as did other stakeholders including WIRO<sup>109</sup> and the Australian Lawyers Alliance, the latter of which stated that '[t]he pre 2012 methodology was capable of catering for many different workers and flexible to adapt with changing working arrangements'.<sup>110</sup>

### Sourdin report

- 3.8 During this review, the committee heard from SIRA and a number of other stakeholders about a report produced in March 2017 by Professor Tania Sourdin, Dean of the University of Newcastle Law School, focused on the calculation of pre-injury average weekly earnings. The Sourdin Report was an initiative of the NSW Government commenced after representations by the Corrective Services Union about the PIAWE calculation method not including member's overtime and allowances. In response Professor Sourdin was asked to review PIAWE calculations and provide a report to the NSW Government. Professor Sourdin had undertaken a targeted consultation process with stakeholders and recommended that the legislation be amended to simply the definition of PIAWE.<sup>111</sup>

- 3.9 Ultimately, Professor Sourdin identified potential options for legislative amendment, submitting that a simplified definition would lead to greater efficiencies and cost savings, as well as reduce disputes:

The replacement of the seven sections with a single and concise definition of PIAWE that is easy to understand and apply would likely result in a decreased administrative burden and cost for employers and insurer. A simple methodology also has the potential to lead to a reduction in disputes about what benefits should be included when calculating PIAWE, and could reduce delays with the processing of weekly payments.<sup>112</sup>

- 3.10 Despite this outcome, inquiry participants criticised the fact that the process took so long before instigating change, given the report was submitted to SIRA in March 2017 and not publicly released until November 2017.<sup>113</sup> The Chief Executive of SIRA, Ms Carmel Donnelly, told the committee that the delay in publishing the report was due to it being Cabinet-in-confidence,

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<sup>107</sup> Submission 18, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, p 5.

<sup>108</sup> Answers to questions on notice, Construction Forestry Mining and Energy Union (CFMMEU) Construction and General Division NSW Divisional Branch, 15 August 2018, p 1.

<sup>109</sup> Submission 21, Workers Compensation Independent Review Office, WIRO, p 28.

<sup>110</sup> Answers to questions on notice, Australian Lawyers Alliance, 17 August 2018, p 2.

<sup>111</sup> Evidence, Ms Carmel Donnelly, Chief Executive Officer, State Insurance Regulatory Authority, 25 July 2018, p 13 and 16.

<sup>112</sup> Professor Tania Sourdin, *NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)*, March 2017, pp 5-6.

<sup>113</sup> See for example, Evidence, Ms Sherri Hayward, Legal/Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch), 25 July 2018, p 24; Evidence, Ms Mallia, 24 July 2018, p 25.

and that she released the report in November 2017 after being satisfied that it no longer needed to be classified as such.<sup>114</sup>

- 3.11** SIRA also explained that it had continued to progress the issues through its PIAWE roundtable stakeholder meetings, where consultations took place on the drafting of proposed legislative amendments.<sup>115</sup>
- 3.12** The Sourdin report also recommended that an online system be developed to assist with the calculation of PIAWE and ensure consistency in PIAWE calculations. Further to this, it recommended that time and money should only be spent on developing the system after the PIAWE definition had been simplified.<sup>116</sup>
- 3.13** The committee was informed that icare has in fact developed a PIAWE calculator as part of its new information technology system being launched later this year, and that an app will be built in due course. Ms Elizabeth Uehling, Acting Group Executive – Workers Insurance, icare, told the committee that it was still a complex and time consuming process as information needs to be manually collected to enter into the calculator, and that as it hasn't been implemented yet it is not clear whether or to what extent it will reduce the calculation time.<sup>117</sup>
- 3.14** The calculator was built on the basis of the legislative definition of PIAWE pre the late 2018 amendments. In response to questioning from the committee as to what will happen if the definition is changed, Ms Uehling advised that it has been built outside icare's IT system, and was therefore 'not hard wired so we can make changes to it reasonably quickly.'<sup>118</sup>

### Recent amendments

- 3.15** After stakeholders gave evidence in this review, reforms to the calculation of pre-injury average weekly earnings were introduced under the Workers Compensation Legislation Amendment Act 2018. The PIAWE definition was amended to align more closely to the Motor Accident Injuries Act 2017 by including all earnings of workers in their capacity, such as overtime, allowances and loading.
- 3.16** In addition, the amendments provide for a simple and clear method of determining PIAWE, with provision to make changes to this calculation in the future by regulation.
- 3.17** The committee was advised by SIRA that there is no set date as yet for commencement of these specific changes, with the amendments commencing on proclamation. The working group convened by SIRA will help to inform the development of supporting regulation and guidelines in preparation for the implementation of the new PIAWE provisions. SIRA is also seeking

<sup>114</sup> Evidence, Ms Donnelly, 25 July 2018, p 16.

<sup>115</sup> Answers to questions on notice, State Insurance Regulatory Authority, 23 August 2018, p 5.

<sup>116</sup> Professor Tania Sourdin, *NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)*, March 2017, p 17.

<sup>117</sup> Evidence, Ms Elizabeth Uehling, Acting Group Executive – Workers Insurance, icare, 25 July 2018, p 32.

<sup>118</sup> Evidence, Ms Uehling, 25 July 2018, p 32.

advice from the working group about the soonest practicable time to commence the new pre-injury average weekly earning provisions.<sup>119</sup>

### Cessation of weekly benefits after five years

- 3.18** During the committee's 2017 review concerns were raised about section 39 of the *Workers Compensation Act*, which terminates weekly benefits after 260 weeks (five years) for injured workers with a Whole Person Impairment (WPI) of 20 per cent or less. The section was introduced as part of the 2012 reforms to the workers compensation scheme, and stakeholders were apprehensive about the then impending transition of workers from those entitlements (see paragraphs 6.65 – 6.95 of the 2017 review for more detail).
- 3.19** In 2018 during this review, in answer to questions on notice, SIRA informed the committee that 3,543 workers affected by section 39 ceased weekly payments between September 2017 and June 2018. 1,882 of these workers will cease entitlement to medical expenses between September 2019 and June 2020.<sup>120</sup>
- 3.20** Stakeholders continued to express concerns about section 39. Unions NSW criticised the 20 per cent WPI test, asserting: 'This threshold is a huge source of disputation. The current model is arbitrary and is exceedingly high'.<sup>121</sup>
- 3.21** The committee heard that many injured workers who had lost their weekly benefits under s 39 were finding it difficult to access the disability pension. For example, Unions NSW expressed concern that injured workers affected by s 39 who have applied for the disability pension 'have a limited understanding of the requirements that need to be met to qualify for this pension, and do not appear to be receiving the necessary information or help required to assist them to better understand the process from Centrelink'.<sup>122</sup>
- 3.22** The committee was also informed that many injured workers who had lost their s 39 benefits failed to qualify for the disability pension, either due to income earned by their spouse or other reasons.<sup>123</sup> Mr Garling said that of the approximately 2,000 people who sought legal advice funded through ILARS regarding the provision, around 55 per cent failed the threshold test and did not qualify for social security either, leaving them without any income support from the workers compensation scheme or Centrelink.<sup>124</sup>
- 3.23** WIRO remarked that the difficulties faced by injured workers transitioning onto Centrelink benefits 'demonstrates that the workers compensation and welfare schemes are not interchangeable and that great hardship can result from a failure to recognise this'.<sup>125</sup>

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<sup>119</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 15.

<sup>120</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 13.

<sup>121</sup> Submission 11, Unions NSW, p 23.

<sup>122</sup> Answers to questions on notice, Unions NSW, 17 August 2018, p 1.

<sup>123</sup> Submission 21, Workers Compensation Independent Review Office, WIRO, p 30..

<sup>124</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 25 July 2018, pp 9-10.

<sup>125</sup> Submission 21, Workers Compensation Independent Review Office, WIRO, p 30.

- 3.24** Unions NSW commented that it 'remains deeply concerned about the welfare of these injured workers who remain injured and unable to work and are now forced to endure a life of ongoing pain and poverty'.<sup>126</sup>

#### **Committee comment**

- 3.25** In its 2017 review this committee acknowledged that the impending transition of injured workers off weekly payments would cause considerable upheaval, and stated that it was of utmost importance that SIRA and icare appropriately oversee the transition and assist the affected individuals.
- 3.26** It would appear to be an ongoing concern that sufficient information and support be provided to assist individuals who are transitioning off weekly entitlements and are eligible for the disability pension to access those benefits as quickly and seamlessly as possible.

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#### **Recommendation 4**

That the NSW Government assist injured workers who have lost, or will lose, their weekly entitlements under section 39 of the *Workers Compensation Act 1987* to transition quickly to the disability support pension, where eligible, and investigate other support mechanisms for those ineligible for these payments.

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#### **Other legislative issues**

- 3.27** This section provides a brief outline of some other legislative issues that were raised by the Workers Compensation Independent Review Office (WIRO).

#### **Back pay following resumption of weekly payments**

- 3.28** In its submission the WIRO drew attention to the issue of whether an injured worker who has lost their entitlement to weekly payments under s 39 of the *Workers Compensation Act*, but subsequently became re-eligible to receive such payments, is entitled to be back paid to the date of the cessation of the 260 weeks.<sup>127</sup>
- 3.29** SIRA advised that this situation may arise in limited circumstances, such as where a worker's degree of WPI is subsequently assessed at more than 20 per cent for the first time, or by way of a subsequent assessment for an 'existing recipient'.<sup>128</sup>
- 3.30** WIRO informed the committee that the issue is currently being considered in the Workers Compensation Commission and may have a potentially significant financial impact on the scheme if the commission finds that such benefits should be back paid. He submitted that that

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<sup>126</sup> Answers to questions on notice, Unions NSW, 17 August 2018, p 1.

<sup>127</sup> Evidence, Mr Garling, 25 July 2018, p 2.

<sup>128</sup> Answers to questions on notice, State Insurance Regulatory Authority, 23 August 2018, p 18.

the ambiguity might be resolved 'by some minor legislative amendment to make the Government's intention clear'.<sup>129</sup>

- 3.31** The Workers Compensation Commission does not have the power to order back payments. Mr Garling explained that this was due to the definition of a work capacity decision and whether the commission should vary such a decision.<sup>130</sup> WIRO suggested that the relevant legislation be amended to empower the tribunal to determine an injured worker's entitlements to compensation during this period.<sup>131</sup>

### **Pre-existing psychological injury**

- 3.32** WIRO raised concerns about an emerging cohort of injured workers who suffered a severe psychological injury between 1 July 1987 and 31 December 2001. Under the current legislation there is no provision for an assessment of the degree of WPI resulting from psychological injuries suffered during this period for the purposes of satisfying the s 39 threshold in the *Workers Compensation Act*.
- 3.33** As a result, even if these workers meet the WPI threshold, their weekly benefits will be cut off after 260 weeks as the legislation excludes them from an assessment to measure their degree of impairment.

### **Assessment of permanent impairment**

- 3.34** WIRO advised that under s 322A of the *Workplace Injury Management and Workers Compensation Act 1998*, injured workers are only permitted one assessment of their degree of permanent impairment.<sup>132</sup>
- 3.35** Mr Garling considered the provision to be 'unduly prejudicial in its operation', noting that there are both advantages and disadvantages of seeking the assessment early or late:

The challenge is this: You only get one assessment of your impairment in your whole life. The question is when do you seek that decision, which is binding. Do you do it now, or do you wait? If you do not do it now, you lose your entitlement to current income support. However, delaying it may be beneficial, in one sense ... it is really difficult for a medical consultant or independent medical officer to determine whether you will deteriorate or at what level it will happen in your life.<sup>133</sup>

- 3.36** Mr Garling noted that for certain types of injuries, medical evidence suggests it is better to prolong surgery. In addition: 'Not all injured workers are old. You can have someone who may be in their early twenties who will face a long life of having further surgery but does not get the benefit of having that paid for by the insurer'.<sup>134</sup>

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<sup>129</sup> Evidence, Mr Garling, 25 July 2018, p 2.

<sup>130</sup> Evidence, Mr Garling, 25 July 2018, p 6.

<sup>131</sup> Submission 21, Workers Compensation Independent Review Office, WIRO, p 30.

<sup>132</sup> Submission 21, Workers Compensation Independent Review Office, WIRO, p 28.

<sup>133</sup> Evidence, Mr Garling, 25 July 2018, pp 10-11.

<sup>134</sup> Evidence, Mr Garling, 25 July 2018, p 11.

- 3.37** A further issue is, that to be compensated for the procedure, s 59A of the *Workers Compensation Act* requires an injured worker to have the surgery within a certain period. Mr Garling told the committee:

That is a guillotine period. If you do not have it, you have a problem. We had the difficulty that there were a number of people towards the end of the period who could not get the surgery because the surgeons were not available and, therefore, missed out on their compensation for the surgery. There are a number of issues in there which are related to the drafting of the legislation.<sup>135</sup>

### **Aggregating impairments**

- 3.38** Another legislative ambiguity is whether multiple impairments can be aggregated for the purposes of meeting the s 39 impairment threshold in the *Workers Compensation Act*.
- 3.39** Mr Garling advised that currently, separate injuries cannot be aggregated for this purpose, with the result being '[y]ou might have someone who is quite severely disabled but does not pass the test on a single view'. He informed the committee that this issue has also been the subject of challenge being considered by the Workers Compensation Commission.<sup>136</sup>

### **SIRA's response to issues raised by WIRO**

- 3.40** In response to questioning from the committee regarding the ability of WIRO to bring legislative and other issues to SIRA's attention to be addressed, Mr Garling responded: 'There seems to be, over the nearly six years, a reluctance to embrace reform'.<sup>137</sup>
- 3.41** Mr Garling noted that WIRO is uniquely placed to identify early warning signals within the workers compensation system, however he was of the view that there was not a great deal of interest from SIRA to find out more about these issues:

... we have this early warning information and do actually have a depth of knowledge. I have more than 20 lawyers who are experts in workers compensation; they do workers compensation cases all day. As I said, they read everything. We know what the arguments are and what the early warnings are and we have, if you look at my annual reports, flagged them for some years. But there has not been any excitement about foraging further for information.<sup>138</sup>

### **Committee comment**

- 3.42** The committee notes the various issues raised by WIRO regarding ambiguities within the state's workers compensation legislation. The committee acknowledges that some of these, if not all, could potentially be resolved by legislative amendment. The committee has not, however,

<sup>135</sup> Evidence, Mr Garling, 25 July 2018, p 11.

<sup>136</sup> Evidence, Mr Garling, 25 July 2018, p 10.

<sup>137</sup> Evidence, Mr Garling, 25 July 2018, p 5.

<sup>138</sup> Evidence, Mr Garling, 25 July 2018, p 7.

received sufficient evidence from stakeholders (other than WIRO) to recommend that legislative reform of these provisions occur.

- 3.43** The committee recommends that SIRA consider these issues as part of the Workers Compensation Dispute Resolution Reform Steering Committee Review and in ongoing consultation with the Workers Compensation Independent Review Office.
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### **Recommendation 5**

That the State Insurance Regulatory Authority give consideration to resolving legislative ambiguities including issues of back-pay following resumption of weekly payments, pre-existing psychological injury, assessment of permanent impairment and aggregating impairments, as part of the Workers Compensation Dispute Resolution Reform Steering Committee Review, and in ongoing consultation with the Workers Compensation Independent Review Office.

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- 3.44** The committee is troubled by SIRA's inaction in response to some issues raised by stakeholders in the last review. This is contributing to broader stakeholder dissatisfaction with the performance of the regulator, which the committee notes, was a common sentiment expressed by review participants.
- 3.45** It is important that SIRA genuinely listens to and takes on board the feedback and suggestions from stakeholders, who have valuable insights into improving the workers compensation scheme. The committee acknowledges that WIRO can and does meet and communicate issues directly to the Minister for Finance, Services and Property and his office. In addition, the committee encourages SIRA to consult and pro-actively engage with other key stakeholders in a similar manner.

## **Financial independence of WIRO**

- 3.46** This section considers the financial independence of WIRO. Concerns about the need for such independence were raised during this review, and in previous reviews of the workers compensation scheme.
- 3.47** In the 2014 review, the committee noted that despite being established as an independent body, WIRO did not have financial independence, and that it had to seek approval from the then WorkCover for all of its expenditure. The committee recommended that the relevant legislation be amended to designate WIRO as a separate agency, and that it receive funding for its operations accordingly.<sup>139</sup>
- 3.48** The committee's recommendation was not implemented, and WIRO's funding became subject to approval by SIRA and the Department of Finance, Services and Innovation. The impact of this was illustrated by WIRO in the 2017 review with an example that it was unable to complete two important inquiries it had initiated – the Parkes Review project and the Effeny Review of

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<sup>139</sup> Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p xii.

Hearing Loss – as funding was withdrawn by the department.<sup>140</sup> The committee recommended that the government consider the need for WIRO to complete the Parkes Review.<sup>141</sup>

- 3.49** The committee's 2017 recommendation was not implemented, and WIRO's financial independence was raised during this review. Mr Garling reiterated the value of completing the Parkes Review, which contained recommendations for legislative amendments to improve the operation of the workers compensation scheme, and the Effeney Review, which developed an innovative and more efficient method of determining injured workers' entitlement to hearing aids or lump sum damages for permanent impairment. WIRO informed the committee that it expected the cost savings for the scheme from the Effeney Review innovation to be more than \$15m per annum.<sup>142</sup>
- 3.50** Unions NSW commented on WIRO's inability to complete the Parkes and Effeney reviews due to funding withdrawals, pointing out that 'projects such as these would provide valuable research and data potentially leading to improvements in efficiencies and outcomes throughout the system'.<sup>143</sup>
- 3.51** Mr Garling informed the committee that staff, salary levels and promotional opportunities within WIRO are all subject to requirements of the Department of Finance, Services and Innovation, which are often incompatible with the special skills required of his office's employees.<sup>144</sup>
- 3.52** He further noted that the department and SIRA have control over proposed projects by WIRO, even where they fall within the office's delegated authority and budget. Mr Garling said '[t]his direct control is a fetter on my independence,<sup>145</sup> and highlighted the impact of this with the following example regarding the Effeney Review:

The classic example is the Hearing Loss project which was stymied because a Deputy-Secretary at DFSI refused to fund less than \$30,000 for the final software product required to enable the model to be operational. No explanation was provided [and] [t]he project was terminated.<sup>146</sup>

## Regulation of insurer conduct and performance

- 3.53** The committee also considered how SIRA is performing as the regulator, and how it is monitoring and responding to complaints about insurer conduct and performance.

<sup>140</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), p 7.

<sup>141</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the exercise of the functions of the WorkCover Authority* (2017), p 32.

<sup>142</sup> Submission 21, Workers Compensation Independent Review Officer, WIRO, pp 9-10.

<sup>143</sup> Submission 11, Unions NSW, p 16.

<sup>144</sup> Answers to questions on notice, Workers Compensation Independent Review Office, 20 August 2018, p 3.

<sup>145</sup> Answers to questions on notice, Workers Compensation Independent Review Office, 20 August 2018, p 3.

<sup>146</sup> Answers to questions on notice, Workers Compensation Independent Review Office, 20 August 2018, p 4.

- 3.54** The committee was advised by SIRA that, as at 2 October 2018, there had been 490 level 2 complaints made about insurers. These were complaints received through SIRA's advisory service which were not subsequently resolved by the insurer or service provider, or were considered to require immediate escalation.<sup>147</sup> Of these 490 complaints, the bulk (243) related to delays in payments. Interestingly, zero related to surveillance (discussed in the next section).<sup>148</sup>
- 3.55** SIRA imposed a short term licence with special conditions on one self insurer (Arrium), from April 2016 until September 2017, while the company was under administration. Four other self-insurers were issued with one year licences (less than the maximum licence term of 8 years) following identification by SIRA of risks related to performance.<sup>149</sup>
- 3.56** In terms of its monitoring of insurers, SIRA provided the committee with a 'scorecard' listing the number of claims, complaints and return to work rates by insurer. Based on this information, the committee questioned SIRA about the performance of self-insurers, including Westpac and the Northern Co-operative Meat Company.
- 3.57** The committee questioned the return to work rates for Westpac, but SIRA explained that being a self-insurer, it generally has a smaller cohort of claims than icare and specialised insurers. From 30 December 2016 to 30 June 2018 Westpac had 5 claims in the 4 week cohort and 7 claims in the 13 and 26 week cohorts. SIRA said that 'small cohort size may be associated with fluctuations' in return to work rates. It added that it has 'required data validation by Westpac and will work with Westpac to identify areas for improvement or action as appropriate'.<sup>150</sup>
- 3.58** In terms of 85.7 per cent of injury notifications being actioned within 7 days by Westpac, SIRA explained that based on the number of claims (14), this figure only represented two claims in the quarter as being non-compliant. From 1 July 2017 to 31 March 2018 Westpac achieved 100 per cent compliance in this area.<sup>151</sup>
- 3.59** Turning to the Northern Co-operative Meat Company, which had only 63.64 per cent of notifications actioned within seven days, SIRA advised that it 'became aware of potential performance issues' in July 2018 through complaints it received and through discussions with WIRO. In response, SIRA engaged with the company's Workers Compensation Insurance Manager and arranged a performance meeting in August 2018 to discuss allegations of poor performance.<sup>152</sup>
- 3.60** Ms Donnelly explained that there is a more structured system in place for regulation and monitoring of performance than in the past, where insurers are classified according to tiers – with four levels - from top tier (where an insurer meets required performance levels) to mid-tier and low tier, and the bottom level being where an insurer has their licence cancelled.<sup>153</sup> Under

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<sup>147</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 7.

<sup>148</sup> Evidence, Ms Donnelly, 2 October 2018, p 11.

<sup>149</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 7.

<sup>150</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 7.

<sup>151</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 9.

<sup>152</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 9.

<sup>153</sup> Evidence, Ms Donnelly, 2 October 2018, p 14.

this structure, Northern Co-operative Meat Company is recognised as being mid-tier, which means they are meeting expectations.<sup>154</sup>

**3.61** Given this rating, and the fact that Northern Co-operative Meat Company has been identified as having performance issues, Mr Parker reflected:

In light of this information that we have received in July and August, that has turned our mind to whether in fact that licence tiering assessment needs to be reviewed. What we are doing as a first step is to gather the evidence and the data, present that to the insurer, validate whether the concerns are genuine or a data error. Once we have that we then ask for the insurer to provide us with an improvement plan and we make an assessment at that point as to whether that tiering at mid-tier should remain or be changed.<sup>155</sup>

**3.62** Self-insurers rated as being 'low tier' included the Council of the City of Wollongong, McDonald's Australia Holdings Limited, Northern Beaches Council, Pacific National (NSW) Pty Ltd and Toll Holdings Limited. A number of other self-insurers were also not yet assessed or under review.<sup>156</sup>

**3.63** Across all insurers, SIRA told the committee that they engage actively to ensure there are clear expectations in terms of performance. Broadly, SIRA said that 'issues presented to insurers and rectified include late liability decisions, slow management of complaints and poor submission of data'. It noted, however, that no insurer has been prosecuted and that it is only considering formal regulatory actions against three self-insurers and one licenced insurer for different performance issues.<sup>157</sup>

**3.64** Additionally, SIRA noted that it has issued four penalty notices against the Nominal Insurer for non-compliance with legislative timeframes, including breaches of section 74 and 281 of the workers compensation legislation. It also advised that it undertakes proactive audits of insurer claims management, employer compliance and workplace rehabilitation providers.<sup>158</sup> SIRA also advised that there were 518 referrals between August 2017 to August 2018 relating to fraud, non-insurance and other issues within the scheme.<sup>159</sup>

**3.65** In light of the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry about insurer misconduct, Ms Donnelly also told the committee that she has put on all insurers on notice that she will require disclosure of any matters that do not meet either regulatory requirements or community expectations.<sup>160</sup>

**3.66** Ms Donnelly noted that she will be monitoring a number of issues related to insurer claims handling practices, including:

<sup>154</sup> Evidence, Mr Darren Parker, Acting Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority, 2 October 2018, p 15.

<sup>155</sup> Evidence, Mr Parker, 2 October 2018, pp 15-16.

<sup>156</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 10.

<sup>157</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 11.

<sup>158</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 11.

<sup>159</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 11.

<sup>160</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 11.

- the use of surveillance and other measures to justify denial of liability
- the setting of productivity targets for staff which means staff feel they cannot spend time properly managing claims
- non-compliance with regulator standards and failure to notify of breaches when required
- alleged misleading and deceptive statements by insurers who are trying 'to protect the bottom line'.<sup>161</sup>

**3.67** The committee also noted that the recent amendments to the workers compensation legislation introduced stronger requirements for insurers to notify the regulator of breaches. Ms Donnelly said that there will be an onus on insurers in relation to notifying of breaches.<sup>162</sup>

## Surveillance

**3.68** In the committee's last review of the workers compensation scheme, concerns were raised about the inappropriate use of surveillance of injured workers. The committee recommended that icare and SIRA expedite work on a mandatory surveillance guideline for scheme agents which would set out the objective standards for when surveillance should be used.

**3.69** According to Ms Donnelly, icare released the *Surveillance and Desktop Investigation Guidelines for icare Agents* in August 2017. These guidelines provide that prior to undertaking surveillance, agents must make an application outlining the duration, scope and method of surveillance to either the Nominal Insurer or icare Self Insurance Corporation for approval.<sup>163</sup>

**3.70** Between 31 October 2017 to 30 September 2018, 137 applications were made to scheme agents to undertake surveillance. Allianz had the highest proportion (68), followed by GIO (32), EML (30) and ULIS (7).<sup>164</sup>

**3.71** In Ms Donnelly's view, icare have taken action to reduce the amount of surveillance activities.<sup>165</sup> In response to a question on notice about this, SIRA said that information from icare indicates that practices have changed as a result of icare's surveillance guidelines and this can be supported by trend analysis which confirms investigation costs across the scheme have decreased by 50 per cent from June 2016 to June 2018.<sup>166</sup>

**3.72** SIRA has the power to impose conditions on the licence of self-insurers, or even revoke or cancel their licences. While Ms Donnelly stressed that this was a measure SIRA could take to enforce compliance with standards of practice in relation to surveillance, Mr Darren Parker,

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<sup>161</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, Attachment 1.

<sup>162</sup> See *Workers Compensation Amendment Act 2018*, sch 4; Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 2 October 2018, p 11.

<sup>163</sup> Answers to questions on notice, State Insurance Regulatory Authority, 23 August 2018, p 8.

<sup>164</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 4.

<sup>165</sup> Evidence, Ms Donnelly, 2 October 2018, p 4.

<sup>166</sup> Answers to questions on notice, State Insurance Regulatory Authority, 23 August 2018, p 8.

Acting Executive Director, Workers and Home Building Compensation Regulation, advised that SIRA has not, to date, issued any licence conditions relating to surveillance.<sup>167</sup>

3.73 In response to why SIRA has not imposed specific conditions around surveillance, Ms Donnelly stated 'to my knowledge it has not become something that is a source of serious complaints in the self-insurer space'.<sup>168</sup>

3.74 Beyond self-insurers, Ms Donnelly explained that the claims administration manual currently being finalised will set out detailed standards of practice in relation to surveillance, and 'will be enforceable'.<sup>169</sup> Ms Donnelly emphasised that the manual will be a 'superior tool than imposing requirements only on a small subset of the system'. She added:

Given that the nominal insurer and Treasury Managed Fund together cover something like 85 per cent to 88 per cent of claimants we felt that our energy was better dedicated to developing a claims administration manual that would be enforceable under the law.<sup>170</sup>

3.75 SIRA was seeking feedback on the draft Claims Administration Manual as at the time this report was being drafted.<sup>171</sup>

3.76 In terms of complaints about surveillance, the committee was informed that during 2018 SIRA only received three reports from workers about the behavior of private inquiry agents. SIRA contacted the relevant insurers in relation to these matters to obtain further information and assessed whether any regulatory action is appropriate. For all three cases, SIRA reported that the 'complaints were not assessed as requiring a regulatory response in the form of written communication to specific insurers'.<sup>172</sup>

### **Committee comment**

3.77 The committee is pleased that the work on the claims administration manual will soon be finalised, and that this will help to enforce practice standards for insurers, not limited to surveillance. We look forward to receiving feedback on the implementation of this manual in the future.

<sup>167</sup> Evidence, Mr Parker, 2 October 2018, p 6.

<sup>168</sup> Evidence, Ms Donnelly, 2 October 2018, p 6.

<sup>169</sup> Evidence, Ms Donnelly, 2 October 2018, p 5.

<sup>170</sup> Evidence, Ms Donnelly, 2 October 2018, p 6.

<sup>171</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 5.

<sup>172</sup> Answers to questions on notice, State Insurance Regulatory Authority, 6 November 2018, p 5.



## Appendix 1 Submissions

No.	Author
1	Workers Compensation Commission
2	Confidential
3	Australian Education Union New South Wales Teachers Federation Branch
4	Australian Road Transport Industrial Organisation NSW Branch
5	icare
6	Shop Distributive and Allied Employees Association NSW
7	Police Association of New South Wales
8	State Insurance Regulatory Authority
9	Ms Amanda Thake
10	Australasian Association of Medico-Legal Providers
11	Unions NSW
12	National Insurance Brokers Association of Australia
13	NSW Business Chamber
14	Australian Lawyers Alliance
15	Insurance Council of Australia
16	NSW Bar Association
17	AMWU NSW Branch
18	Construction Forestry Mining and Energy Union (CFMEU) Construction and General Division NSW Divisional Branch
19	The Law Society of New South Wales
20	Ms Jennifer Lynch
21	Workers Compensation Independent Review Office (WIRO)

## Appendix 2 Witnesses at hearings

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Tuesday 24 July 2018 Jubilee Room, Parliament House, Sydney</b>	Mr David Potts	Partner, Kells the Lawyers, Law Society of NSW
	Mr Ross Stanton	Common Law Committee Member, NSW Bar Association
	Mr Shane Bucher	NSW State Committee Member, Australian Lawyers Alliance
	Mr Andrew Stone SC	NSW State President, Australian Lawyers Alliance
	Ms Natasha Flores	Industrial Officer, WHS/WC, Unions NSW
	Mr David Henry	WH&S Officer, Australian Manufacturing Workers Union
	Mr Alan Mansfield	Workers Compensation Officer, Australian Manufacturing Workers Union
	Ms Rita Mallia	State President, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch)
	Ms Sherri Hayward	Legal/Industrial Officer, Construction, Forestry, Maritime, Mining and Energy Union (NSW Branch)
	Mr Robert Tonkli	Assistant Secretary, Shop Distributive and Allied Employees Association NSW
	Ms Monica Rose	Industrial Officer and Women's Officer, Shop Distributive and Allied Employees Association NSW
	Mr Peter Remfrey	Secretary, Police Association of NSW
	Ms Kirsty Membreno	Industrial Manager, Police Association of NSW
	Mr Angus Skinner	Research Manager, Police Association of NSW
	Ms Elizabeth Medland	NSW Claims Managers' Sub- Committee member, Insurance Council of Australia
Ms Fiona Cameron	General Manager Policy – Consumer Outcomes, Insurance Council of Australia	

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr Dallas Booth	Chief Executive Officer, National Insurance Brokers Association
	Mr Tim Wedlock	President, National Insurance Brokers Association
	Ms Vivienne Toll	National Head of Workplace Risk Australia, Gallagher Insurance Brokers
	Mr Stuart Barnett	NSW State Practice Group Leader, Workers Compensation and National Manager for Union Services, Slater and Gordon
	Ms Jasmina Mackovic	Practice Group Leader, NSW Workers Compensation, Slater and Gordon
<b>Wednesday 25 July 2018 Preston-Stanley Room, Parliament House, Sydney</b>	Mr Kim Garling	Workers Compensation Independent Review Officer, Workers Compensation Independence Review Office (WIRO)
	Ms Carmel Donnelly	Chief Executive, State Insurance Regulatory Authority (SIRA)
	Mr John Nagle	Intermin CEO and Managing Director, icare
	Ms Elizabeth Uehling	Acting Group Executive – Workers Insurance, icare
	Mr Tim Plant	Group Executive – Insurance for NSW, icare
	Mr Nick Allsop	Chief Actuary, icare
<b>Tuesday 2 October 2018 Jubilee Room, Parliament House, Sydney</b>	Ms Carmel Donnelly	Chief Executive, State Insurance Regulatory Authority (SIRA)
	Dr Rhys Bollen	Executive Director, Disputer Resolution Services, SIRA
	Mr Darren Parker	Acting Executive Director, Workers and Home Building Compensation Regulation, SIRA

## Appendix 3 Minutes

### Minutes no. 25

1 May 2018

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney, 2.02 pm

#### 1. Members present

Ms Ward, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan

Mr Mookhey

Mr Shoebridge

#### 2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 24 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### **Received:**

- 23 March 2018 – Letter from Dr Arthur Chesterfield-Evans to Chair, regarding the statutory review of the *State Insurance and Care Governance Act 2015*
- 18 April 2018 – Letter from the Hon Mark Speakman SC MP, Attorney General, to Chair, requesting that the committee inquire into and report on additional matters relating to adoptive relationships as part of the inquiry into special care offences.

##### **Sent:**

- 19 February 2018 – Letter from Chair to the Hon Mark Speakman SC MP, Attorney General, forwarding correspondence from Mr Timothy Nicholls, Senior Lawyer, Dowson Turco Lawyers to Chair, regarding changes to the *Relationships Register Act 2010* and the *Relationships Register Regulation 2010* to recognise de facto same-sex relationships registered overseas.

#### 4. Inquiry into the adequacy and scope of special care offences

##### 4.1 Amendment to terms of reference

Resolved, on the motion of Mr Shoebridge: That, as previously agreed via email, the committee adopt the amendment to the terms of reference to include examination of:

- whether the special care offence in section 73 of the Crimes Act 1900 should be expanded to include adoptive parents and adopted children as a special care relationship
- whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships.

#### 5. Timeline for next round of scheme reviews

Resolved, on the motion of Ms Voltz: That the committee adopt the following timetable for the next round of scheme reviews:

- workers compensation and Compulsory Third Party insurance schemes:
  - call for submissions 1 May 2018
  - report November 2018
- Dust Diseases and Lifetime Care and Support schemes:
  - call for submissions October 2018

- report February 2019.

## 6. 2018 review of the workers compensation scheme

### 6.1 Approach to the review

Resolved, on the motion of Mr Clarke: That the 2018 review of the workers compensation scheme focus on:

- the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the committee's first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required
- recommending a preferred model to the NSW Government.

### 6.1 Call for submissions and closing date

Resolved, on the motion of Mr Shoebridge: That the call for submissions be made on 1 May 2018 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of 17 June 2018.

### 6.2 Stakeholder list

Resolved, on the motion of Mr Shoebridge: That members have until 5.00 pm on Thursday 3 May 2018 to nominate additional stakeholders to the stakeholder list.

### 6.3 Hearing dates

Resolved, on the motion of Mr Shoebridge: That the committee set aside one hearing day in July/August, with the date to be determined by the Chair after consultation with members regarding their availability.

## 7. 2018 review of the Compulsory Third Party insurance scheme

### 7.1 Approach to the review

Resolved, on the motion of Ms Voltz: That the 2018 review of the Compulsory Third Party insurance scheme focus on the following aspects of the new scheme:

- whether it is achieving the NSW Government's stated objectives of:
  - increasing the proportion of benefits provided to the most seriously injured road users
  - reducing the time it takes to resolve a claim
  - reducing opportunities for claims fraud and exaggeration
  - reducing the cost of green slip premiums
- whether there has been a reduction in claims frequency since 1 December 2017 and if so, the projected impact on premiums
- the impact of the new profit normalisation and risk equalisation mechanisms in controlling insurer profits
- the effectiveness of the new CTP Assist and Dispute Resolution Services for statutory benefits claims
- the impact of the new minor injury definition, including on reducing fraudulent and exaggerated claims
- the impact of the changes on minor physical and psychological injuries
- the return to work and recovery outcomes of the new statutory benefits scheme
- the impact of the new reporting obligations on insurers which require them to report all new claims in real time to SIRA.

### 7.2 Call for submissions and closing date

Resolved, on the motion of Ms Voltz: That the call for submissions be made on 1 May 2018 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of 17 June 2018.

### 7.3 Stakeholder list

Resolved, on the motion of Mr Clarke: That members have until 5.00 pm on Thursday 3 May 2018 to nominate additional stakeholders to the stakeholder list.

#### 7.4 Hearing dates

Resolved, on the motion of Mr Khan: That the committee set aside one to two hearing dates in July/August, with the dates to be determined by the Chair after consultation with members regarding their availability.

#### 8. Adjournment

The committee adjourned at 2.17 pm, until Wednesday 27 June 2018, Jubilee Room, Parliament House (public hearing for inquiry into the adequacy and scope of special care offences).

Sharon Ohnesorge  
Clerk to the Committee

#### Minutes no. 27

24 July 2018

Standing Committee on Law and Justice

Jubilee Room, Parliament House, Sydney, 9.22 am

#### 1. Members present

Ms Ward, *Chair*

Ms Voltz, *Deputy Chair*

Mr Khan

Mr Martin (*substituting for Mr Clarke*)

Mr Mookhey

Mr Shoebridge

#### 2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 26 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 17 July 2018 – Email from the Hon Natasha Maclaren-Jones MLC, to secretariat, advising that the Hon Taylor Martin MLC will substitute the Hon David Clarke MLC for the hearing on 24 July 2018
- 17 July 2018 – Email from the Hon Natasha Maclaren-Jones MLC, to secretariat, advising that the Mr Scot Macdonald MLC will substitute the Hon David Clarke MLC for the hearing on 25 July 2018
- \*\*\*
- \*\*\*
- 10 July 2018 – Email from Ms Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS and Regulation, NSW Business Chamber to secretariat, advising that the NSW Business Chamber will not be attending the public hearing on 24 July 2018, preferring to rely on the written submission provided
- 26 June 2018 – Email and letter from Mr Carl Veugen to the committee, requesting a meeting to discuss workers compensation issues.

#### 4. 2018 review of the workers compensation scheme

##### 4.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1 and 3-21.

Mr Shoebridge moved: That submission no. 2 be published as partially confidential with name suppressed.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge and Ms Voltz

Noes: Mr Khan, Mr Martin and Ms Ward.

Question resolved in the negative on the casting vote of the Chair. Therefore, submission no.2 is confidential.

### **Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr David Potts, Partner, Kells The Lawyers, Law Society of NSW
- Mr Ross Stanton, Common Law Committee Member, NSW Bar Association
- Mr Shane Butcher, Australian Lawyers Alliance
- Ms Andrew Stone SC, Australian Lawyers Alliance.

Mr Stone SC tendered the following document:

- Dispute Resolution Service – Report of First Teleconference.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Natasha Flores, Industrial Officer – WHS/WC, Unions NSW.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr David Henry, WH&S Officer, AMWU
- Mr Alan Mansfield, Workers Compensation Officer, AMWU
- Ms Rita Mallia, State President, CFMMEU (NSW Branch)
- Ms Sherri Hayward, Legal/Industrial Officer, CFMMEU (NSW Branch)
- Mr Robert Tonkli, Assistant Secretary, Shop Distributive and Allied Employees Association NSW
- Ms Monica Rose, Industrial Officer and Women’s Officer, Shop Distributive and Allied Employees Association NSW.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Peter Remfrey, Secretary, Police Association of NSW
- Ms Kirsty Membreno, Industrial Manager, Police Association of NSW
- Mr Angus Skinner, Research Manager, Police Association of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Elizabeth Medland, NSW Claims Managers’ Sub-Committee member, Insurance Council of Australia
- Ms Fiona Cameron, General Manager Policy - Consumer Outcomes, Insurance Council of Australia
- Mr Dallas Booth, Chief Executive Officer, National Insurance Brokers Association
- Mr Tim Wedlock, President, National Insurance Brokers Association

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Stuart Barnett, NSW State Practice Group Leader, Workers Compensation and National Manager for Union Services, Slater and Gordon
- Ms Jasmina Mackovic, Practice Group Leader NSW Workers Compensation, Slater and Gordon.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

#### 4.2 Tended documents

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish the following document/s tendered during the public hearing, with the redaction of any sensitive/identifying information:

- ‘Dispute Resolution Service – Report of First Teleconference’, tendered by Mr Andrew Stone SC on 24 July 2018.

#### 5. Adjournment

The committee adjourned at 3.30 pm, until 10:15 am, Wednesday 25 July 2018, Preston-Stanley Room, Parliament House (second public hearing for the 2018 review of the workers compensation scheme).

Tina Higgins

**Clerk to the Committee**

#### Minutes no. 28

25 July 2018

Standing Committee on Law and Justice

Preston-Stanley Room, Parliament House, Sydney, 10.15 am

#### 1. Members present

Ms Ward, Chair

Ms Voltz, Deputy Chair

Mr Khan

Mr MacDonald (*substituting for Mr Clarke*) (from 11.59 am)

Mr Mookhey

Mr Shoebridge

#### 2. 2018 review of the workers compensation scheme

##### 2.1 Public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr Kim Garling, Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office.

Mr Garling tendered the following document:

- Report by Professor Tania Sourdin, University of Newcastle, entitled ‘NSW Workers Compensation arrangements in relation to pre-injury average weekly earnings (PIAWE)’, dated March 2017.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority.

Ms Donnelly tendered the following documents:

- Report by Professor Tania Sourdin, University of Newcastle, entitled ‘NSW Workers Compensation arrangements in relation to pre-injury average weekly earnings (PIAWE)’, dated March 2017.
- SIRA Dispute Resolution Services, Financial year 2017/18 snapshot.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr John Nagle, Interim CEO and Managing Director, icare
- Ms Elizabeth Uehling, Acting Group Executive – Workers Insurance, icare
- Mr Nick Allsop, Chief Actuary, icare.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

The hearing concluded at 1.15 pm.

## 2.2 Tendered documents

Resolved, on the motion of Ms Voltz: That the committee accept and publish the following document/s tendered during the public hearing:

- ‘NSW Workers Compensation arrangements in relation to pre-injury average weekly earnings (PIAWE)’, dated March 2017, tendered by Mr Kim Garling
- ‘SIRA Dispute Resolution Services, Financial year 2017/18 snapshot’, tendered by Ms Carmel Donnelly.

## 2.3 Future hearings

Resolved, on the motion of Mr Khan: That the following witnesses be recalled to give evidence at a future hearing:

- State Insurance Regulatory Authority
- Mr Kim Garling, Workers Compensation Independent Review Office (*in camera*).

Resolved, on the motion of Ms Voltz: That Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, be provided with the following documents:

- Bret Walker's 2015 advice in relation to the Operation Prospect inquiry, along with the Clerk's advice
- an extract from Spigelman CJ's judgment in *Egan vs Chadwick*.

## 3. Adjournment

The committee adjourned at 3.30 pm, until 10:15 am, Wednesday 25 July 2018, Preston-Stanley Room, Parliament House (second public hearing for the 2018 review of the workers compensation scheme).

Tina Higgins  
Clerk to the Committee

**Minutes no. 33**

Tuesday 2 October 2018

Standing Committee on Law and Justice

Jubilee Room, Parliament House, Sydney, 9.20 am

**1. Members present**Mrs Ward, *Chair*Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan

Mr Mookhey

Mr Shoebridge

**2. Draft minutes**

Resolved, on the motion of Mr Khan: That draft minutes no. 29 be confirmed.

**3. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 26 September 2018 – Email from Witness A to secretariat, re-confirming he would like to appear in camera on the 2 October hearing
- 28 August 2018 – Email from Witness A, to secretariat, confirming he would like to appear in camera and via skype
- 22 August 2018 – Email from Peter McCarthy to secretariat, raising concerns about the Compulsory Third Party scheme.

**4. Answers to questions on notice****4.1 2018 review of the workers compensation scheme**

The following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from the Shop Distributive and Allied Employees Association, received on 20 August 2018
- answers to questions on notice from icare, received on 20 August 2018, including two attachments
- answers to questions on notice from the Workers Independent Review Office, received on 20 August 2018
- answers to questions on notice from Unions NSW, received 17 August 2018
- answers to questions on notice from the Police Association of NSW, received 17 August 2018
- answers to questions on notice from the Construction, Forestry, Maritime, Mining and Energy Union, received 15 August 2018
- answers to questions on notice from the Australian Lawyers Alliance, received 17 August 2018
- answers to questions on notice from SIRA, received 23 August 2018
- answers to questions on notice from the Insurance Council of Australia, received 23 August 2018.

**4.2 2018 review of the Compulsory Third Party scheme**

The following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice and supplementary questions from Slater and Gordon, received on 24 September 2018
- answers to questions on notice from the Insurance Council of Australia, received on 24 September 2018

- answers to questions on notice from Suncorp, received on 24 September 2018 (including supplementary information)
- answers to questions on notice from the NSW Bar Association, received on 19 September 2018
- answers to questions on notice from SIRA, received on 24 September 2018 (including several attachments).

## 5. 2018 review of the workers compensation scheme

### 5.1 In camera hearing

The committee previously resolved to take *in camera* evidence from an individual submission author.

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Ms Madeleine Foley, Ms Sonya Kim, Ms Angeline Chung and Hansard Reporters.

The following witness was sworn and examined:

- Witness A.

The evidence concluded and the witness withdrew.

Resolved, on the motion of Mr Shoebridge: That the evidence be kept confidential and to not publish the transcript of the *in camera* hearing.

### 5.2 Public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair also reminded Ms Carmel Donnelly, SIRA Chief Executive, that she did not need to be sworn, as she had been sworn at an earlier hearing for 2018 review of the workers compensation scheme.

The following witnesses were sworn and examined:

- Dr Rhys Bollen, Executive Director, Dispute Resolution Services, State Insurance Regulatory Authority
- Mr Darren Parker, Acting Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority

Ms Donnelly tendered the following document:

- Insurer performance – Workers compensation

The evidence concluded and the witnesses withdrew.

### 5.3 Tended documents

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish the following documents tendered during the public hearing:

- Insurer performance – Workers compensation, tendered by Ms Donnelly.

### 5.4 Briefing

The committee noted that SIRA offered to provide informal briefings on the claims administration manual and potentially other matters.

## 6. 2018 review of the Compulsory Third Party insurance scheme

### 6.1 Public hearing

Witnesses, the public and media were admitted.

The chair reminded Ms Carmel Donnelly and Ms Mary Maini, SIRA Executive Director, that they did not need to be sworn, as they had been sworn at an earlier hearing for 2018 review of the Compulsory Third party insurance scheme.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 1.08 pm.

The public and media withdrew.

## **6.2 Answers to pre-hearing questions**

The committee received answers to pre-hearing questions and additional material from the State Insurance Regulatory Authority (SIRA) on 26 September 2018.

The following material was published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to pre-hearing questions, including attachments
- additional material – CTP Legal Advisory Service fact sheet
- additional material – August scheme at a glance.

Resolved, on the motion of Mr Shoebridge: That the following documents be kept confidential, pending further advice from SIRA on the review by the Department of Finance Services and Innovation Chief Information Security Officer, and further consideration by the committee at the next deliberative:

- Claims Data Coding Manual and Data Validation rules
- Coding Manual Universal Claims Data – UCD Coding Specification.

SIRA provided the template letters from insurers at 5pm on Friday 28 August. These letters will be distributed to members after the hearing.

SIRA has also provided an updated dashboard for June. A copy was distributed to members.

## **9. Adjournment**

The committee adjourned at 1.20 pm.

Madeleine Foley

**Committee Clerk**

### **Draft minutes no. 39**

Wednesday 6 February 2019

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 1.35 pm

#### **1. Members present**

Mrs Ward, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan

Mr Mookhey

#### **2. Apologies**

Mr Shoebridge

#### **3. Previous minutes**

Resolved, on the motion of Mr Clarke: That the draft minutes no. 38 be confirmed.

#### 4. **Correspondence**

The committee noted the following items of correspondence:

##### ***Received***

- 31 January 2019 – Email and document from confidential submission author no. 2 regarding the review of the dust diseases scheme
- 5 February 2019 – Email and proposed amendments to the Chair's draft report for the 2018 review of the Workers compensation scheme, as provided to the secretariat by Mr Shoebridge.

##### ***Sent***

- 30 January 2019 – Letter from the Director to confidential submission author no. 2 regarding the review of the dust diseases scheme.

Resolved, on the motion of Mr Clarke: That the committee keep the following items of correspondence confidential:

- 31 January 2019 – Email and document from confidential submission author no. 2 regarding the review of the dust diseases scheme
- 30 January 2019 – Letter from the Director to confidential submission author no. 2 regarding the review of the dust diseases scheme.

Resolved, on the motion of Mr Mookhey: That the secretariat, on behalf of the committee, write to confidential submission author no. 2 concerning their correspondence.

#### 5. **Legacy Report**

The committee noted that the secretariat is preparing a Legacy Report for the committee to consider and adopt at its next meeting.

#### 6. **2018 review of the workers compensation scheme**

##### **6.1 Consideration of Chair's draft report**

The chair tabled her draft report, entitled 2018 review of the Workers Compensation Scheme, which having been previously circulated, was taken as being read.

Mr Mookhey moved: That paragraph 1.18 be amended by omitting 'These reforms simplify' and inserting instead 'The government saying that these reforms simplify'.

Question put.

Amendment negatived.

Mr Mookhey moved: That the second sentence in paragraph 1.18 be omitted as follows 'These reforms simplify the dispute resolution process for injured workers and address concerns which have been raised in previous reviews'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That paragraph 1.19 be amended by omitting 'commends the government for taking steps' and inserting instead 'acknowledges the steps the government has taken'.

Resolved, on the motion of Mr Mookhey: That paragraph 1.20 be amended by omitting 'The committee also commends icare for its new claims model, which – even in its infancy – has already achieved efficiencies'

and insert instead 'The committee notes that icare states that its new claims model has already achieved efficiencies'.

Resolved, on the motion of Ms Voltz: That paragraph 2.52 be amended by inserting at the end: 'The committee notes the strong stakeholder support for the work of WIRO and the very broad support for WIRO's role to be expanded to encompass the CTP scheme'.

Mr Mookhey moved: That recommendation 1 be amended by omitting 'consolidate' and insert instead 'consider consolidating'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That recommendation 2 be amended by inserting the following dot point at the end:

- 'leave no worker in a worse legal position'

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That recommendation 4 be amended by omitting all words and inserting instead 'That the NSW Government repeal section 39 of the Workers Compensation Act 1987'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That recommendation 4 as follows be omitted: 'That the NSW Government assist injured workers who have lost, or will lose, their weekly entitlements under section 39 of the Workers Compensation Act 1987 to transition quickly to the disability support pension, where eligible, and investigate other support mechanisms for those ineligible for these payments'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That the following new paragraph be inserted after paragraph 3.26:

'It is clear that the amendments to s 39 have caused widespread and unnecessary hardship and suffering. There is capacity in the scheme to meet the ongoing needs of workers who have been injured and continue to require income and medical support more than five years after their injury and the scheme should provide this.'

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That recommendation 5 be amended by omitting 'give consideration to legislative ambiguities including back-pay' and insert instead 'give consideration to resolving legislative ambiguities including issues of back-pay'.

Resolved, on the motion of Mr Mookhey: That paragraph 3.44 be amended by omitting 'The committee is troubled by SIRA's perceived inaction in response to systemic issues raised by stakeholders' and insert instead 'The committee is troubled by SIRA's inaction in response to some issues raised by stakeholders in the last review'.

Mr Mookhey moved: That paragraph 3.78 be amended by omitting all words and inserting instead 'The committee rejects SIRA's evidence about the reasons for delayed action on practice standards for insurers, including on surveillance'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That paragraph 3.78 be omitted as follows: 'The committee is pleased that the work on the claims administration manual will soon be finalised, and that this will help to enforce practice standards for insurers, not limited to surveillance. We look forward to receiving feedback on the implementation of this manual in the future'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The report be tabled on 12 February 2019.

## 7. 2018 review of the CTP insurance scheme

### 7.1 Consideration of Chair's draft report

The Chair tabled her draft report entitled 2018 review of the Compulsory Third Party insurance scheme, which, having been previously circulated, was taken as being read.

Mr Mookhey moved: That paragraphs 2.72 to 2.74 be omitted.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 2.73 be amended by omitting 'although we note' and inserting instead 'noting the'.

Mr Mookhey moved: That paragraph 2.74 be amended by omitting all words and inserting instead: 'SIRA could have taken more steps to ensure all New South Wales road users received the green slip funds they were entitled to'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That paragraph 2.90 be amended by omitting all words and inserting instead: 'The purported cost of living relief would be maximised by a cashback scheme on the M4'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Mr Mookhey moved: That paragraph 2.90 be amended by omitting 'The 2017 scheme' and inserting instead 'SIRA states that the 2017 scheme'.

Question put and negated.

Resolved, on the motion of Mr Khan: That paragraph 2.108 be amended by omitting 'operated by SIRA. However, the low number of referrals to this service raises questions as to why it has not been utilised to a greater degree. It is therefore recommended that' and inserting instead: 'operated by SIRA, however, the low number of referrals to this service raises questions as to why this service has not been utilised to a greater degree. It is recommended that'.

Mr Mookhey moved: That paragraph 2.175 and recommendation 5 be amended to insert 'and profit' after 'measure insurer performance'.

Question put.

The committee divided.

Ayes: Mr Mookhey, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mrs Ward.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That paragraph 3.25 be amended to insert 'in the CTP scheme' after 'associated with surveillance'.

Resolved, on the motion of Mr Khan: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- That the report be tabled on 12 February 2019.

## **8. Next meeting**

- 8.1** The committee adjourned at 2.16 pm, until Thursday 21 February 2019 (report deliberative for Lifetime Care and Dust Diseases reviews).

Tina Higgins  
**Clerk to the Committee**

## Appendix 4 Dissenting statement

**The Hon Daniel Mookhey MLC, Australian Labor Party**

Thousands of injured workers have lost, or will lose, access to income and healthcare arbitrarily after five years because of the pig-headed stubbornness of the current NSW Government, and the majority on this committee, who refused to support my amendment to repeal s39 of the Act.

The sop the majority throws to injured workers and their families is welfare. The majority goes so far to recommend NSW Government agencies help injured workers transfer onto the Commonwealth's welfare programme.

I've never heard of any Government, of any political persuasion, at any level of the Commonwealth, deliberately favouring welfare over work until now.

It says to employers that you're free of your obligation to rehabilitate workers injured under your care and supervision; and says to taxpayers that you now must pay a back door subsidy to big business and pick up the tab for caring for the injured workers

It's a disgrace.



