**Submission No 133**

# INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

**Organisation**: The Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

18 May 2012

Joint Select Committee on the
NSW Workers Compensation Scheme
Parliament House
Macquarie St
Sydney NSW 2000

***Re: Inquiry on the NSW Workers Compensation Scheme***

Dear Mr Borsak,

The Law Society of New South Wales ('the Law Society') is the state's peak legal representative body. Our members represent key stakeholders in the Scheme including worker, insurer and self-insurer representatives.

The Law Society's Injury Compensation Committee ('the Committee') welcomes the opportunity to supplement these written submissions with oral testimony.

The Committee intended to provide submissions addressing the actuarial analysis of the Scheme and has requested copies of key documents appended to the actuarial report of PricewaterhouseCoopers Actuarial Pty Limited (PwC). The appendices have not been provided to date. The Committee believes it is impossible to provide a detailed analysis of the actuarial opinions in the absence of the material upon which the actuarial advice has been provided. On the basis of the publicly released material, the Committee believes the actuarial analysis of the Scheme is fundamentally flawed.

Since 2005 the Law Society has regularly met with WorkCover NSW and raised its concerns with the Scheme. Most recently in a letter to the Minister for Finance and Services dated 22 March 2012 (copy enclosed), the Committee made four recommendations for change to enhance the operation of the Scheme. It also noted that poor performance of the Scheme was driven by Scheme management issues. The Law Society has advocated for some years that the first of the recommendations in the enclosed letter (i.e. fix the Guidelines for Independent Medical Examinations) be adopted. The Committee notes that prior to the calling of this Inquiry, this recommendation has been implemented and changes gazetted.

The Committee recommends that the remaining three proposals be immediately implemented. The implementation of these three recommendations (repeated below) will result, both in the short and long term, in substantial improvements in the Scheme's financial position and improve the general effectiveness of the operation of the Scheme.

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The Committee rejects the need for any change to benefits or premiums. The current financial performance of the Scheme is not driven by claim numbers or by benefits. It is largely driven by poor claims management, over-regulation and the inability of the Scheme to allow claims to be finalised by settlement mechanisms. It has also clearly been effected by the loss of revenue (investment income) as a consequence of the global financial crisis.

The three remaining recommendations of the Law Society are as follows:

1. **Commutations**: The government should immediately re-implement the ability to resolves claims on a full and final basis by way of commutation with removal of the restrictions on commutations as they currently exist. The role of WorkCover NSW in the approval process should be removed as with the threshold requirements in section 87EA of the *Workers Compensation Act* (the 1987 Act). All claims then become capable of finalisation. This will enable Scheme agents to properly target settlement strategies around claims that they consider appropriate.

2. **Claims Estimate Guidelines:** The Claims Estimate Guidelines should be amended to enable an appropriate discount to be applied to any estimate of any claim where the claim is capable of commutation. The effect of the discount would be to substantially reduce the wages component of any claims estimate. This is important because wages comprise the largest liability of the Scheme. This proposal alone will have an immediate impact on the deficit irrespective of any changes to assumptions and discount factors applied by the Scheme actuary.

3. **Negotiation on lump sums**: The government should re-implement the ability of parties to negotiate an outcome.

In response to the request for submissions by this Inquiry the Committee has considered other initiatives. These should be considered in place of any reduction of benefits, limitation of entitlements or alteration to premiums. These are:

1. That Scheme agents be permitted to efficiently operate as claims agents without over-regulation.

   The Law Society, through the WorkCover & Law Society Regulatory and Process Working Group ("The Working Group") (established in 2005) has repeatedly called for this reform. The Law Society is aware from direct discussions and recent correspondence from WorkCover NSW that its recommendations are being implemented. The Law Society remains available to assist with this project.

2. That existing return to work initiatives be enhanced.

The Committee opposes further reforms of the Scheme which erode workers' rights and entitlements or place unnecessary impost on employers.

## ANALYSIS OF THE ACTUARIAL REPORTS

The Committee has analysed the available material. No response has been received to a request for the provision of the entire report. The Committee has concluded, from its analysis of the material provided, that the actuarial advice and recommendations are flawed. The methodologies adopted (whilst in accordance with accounting standards) contain inaccurate assumptions, apply artificially high discount

rates and base the recommendations on unsubstantiated opinion regarding such matters as claimant behaviour. There is no accounting, forensic, statistical or psychosocial survey, report, data or the like to support the opinion.

The Committee has concluded that the primary cause of the current situation is driven by financial conditions and, arguably, by the actuarial advice itself.

**Change in surplus/deficit**

The deficit comprises two parts, namely, the actual deficit and the projected deficit. Both are of concern.

Page 264 of the PwC report demonstrates the change in the surplus/deficit from underwriting operations on a six monthly basis. The most interesting feature from this summary is that over the last 2½ years, the Scheme results have changed by $1.6 billion purely driven by changes in '*inflation assumptions and discount rates*' that have been applied by PwC. This means 37.5% of the current total projected deficit relates only to changes in assumptions.

For example, in the six months ending December 2011, these assumptions resulted in the deficit increasing by $1 billion. The increase in the deficit for the last 6 months is a total of $1.7 billion. This demonstrates that 58.7% of the increase in deficit is due to changes in assumptions relating to inflation and discount rates.

At page 260, the deficit increases by a total of $555.2 million (a further 32.2% of the deficit). This figure is derived from combining the six month reduction in discounting (which total $319.3 million) and '*change in actuarial assumptions*' (which totals $235.9 million).

Accordingly, over $1.5 billion of the total increase of $1.7 billion in the deficit is due to changes in calculation methodology and assumptions.

**Future economic assumptions**

The PwC report at page 248 sets out the projected assumptions regarding inflation and return. The effect of the table is that the projected net rate of investment return is less than the rate of inflation for 4 years. This has an extremely important effect on the projections. It is a pessimistic and overly conservative outlook and requires complete review by an independent actuary.

The major changes to the liability of the Scheme relate to changes in actuarial assumptions.

**External peer review**

The Committee has considered the external peer review of the outstanding claims liabilities by Ernst & Young dated 22 March 2012.

The report does not support the actuarial analysis of PwC. It confirms that the method of calculation accords with accepted standards but otherwise does not accept the assumptions.Because the views of the actuaries are not aligned, the Committee believes the actuarial opinions need to be approached with caution.

## FURTHER ISSUES

Apart from the actuarial issues, the Committee now addresses two further issues before dealing with the individual matters raised in the Issues Paper. Those issues are:

1. The notion that a 'lump sum culture' and/or a 'compensation mentality' exists and rejecting that notion; and

2. A specific discussion regarding over-regulation of the Scheme and the failing of the 2000 - 2002 reform program.

### 1. Lump sum culture and commutations

Much is made in numerous documents, including the actuarial reports, which advocate, rather than provide evidence of, the existence of a lump sum culture. The Committee does not accept that such a culture exists. There is no data, study, or material at all to support the existence of such a psychosocial culture.

Whilst the documents are replete with references to a "*lump sum culture*" the concept is not defined, nor is a clear argument articulated as to why payment of lump sum benefits is problematic.

The payment of lump sum benefits is a principle that has underpinned the common law for centuries. There is nothing new or novel about such payments, either in the context of personal injury claims or other claims for damages.

Access to lump sum benefits is consistent with Article 3(a) of the *Convention on the Rights of Persons with Disabilities* (the Convention), to which Australia is a signatory. The Convention mandates respect for individual autonomy, freedom to make one's own choices and the independence of persons with disabilities.

Commutations are one way to deliver outcomes consistent with the obligations under the Convention. They are an expression of an injured worker's autonomy especially in circumstances where that autonomy has already been eroded by virtue of their injury and incapacity.

Mr Richard Grellman, the then Chair of the Motor Accidents Authority, in his evidence to the Inquiry into the *Review and Monitoring of the New South Wales Workers Compensation Scheme* on 21 November 2001, acknowledged that commutations can work well for the recipient and the entity paying the money. He agreed they bring closure and finality to a situation that might otherwise be debilitating and allows the recipient to get on with their life.

One of the underlying assumptions in the PwC report is that the increased level of continuance rates for weekly benefits and medical expenses is reflective of the existence of a lump sum culture, i.e. worker's choose to bring claims or make deliberate decisions to remain dependent on the system in order to access lump sum compensation. The Committee rejects this theory for two reasons, namely:

a. There is no verifiable evidence to support the existence of a lump sum culture and to the extent to which PwC (and others) proffer an opinion that it exists, they opine well outside their areas of expertise and should table evidence to support their opinions.

b. The lump sum entitlements that do exist are insufficient to motivate anyone.

One of the primary reasons given to justify the changes made to the Scheme in 2001 was that a lump sum culture existed. The justification for that reform has now proven to be illusory.

## 2. Over-regulation of the scheme & the failings of the 2000 - 2002 reforms

The role of agents in the Scheme was provided for in the 2000 - 2002 reforms. It was thought that the introduction of agency arrangements would be more efficient. There is no doubt considerable data is available that demonstrates that the agents are effectively managing the claims allocated to them in accordance with their contractual arrangements with WorkCover. The Committee makes this assumption on the basis that the agents continue to have their contractual arrangements renewed, are paid for their individual performance and are paid bonuses of various descriptions.

The facts are that the cost of managing the Scheme has significantly grown in recent years.

In this regard:

- The PwC Report records a $209m increase in claims handling expense allowance to $1,132m as at 31 December 2011, an increase of over 20% in the six month period;[1]
- Payments to insurance companies between 2001 and 2009 have increased from $134m to $476m;
- The administrative cost of running WorkCover has increased from $70m in 1999 to more than $600m recently, a nearly 10 fold increase;[2]
- The Scheme cost per dispute has risen 16 fold between 1999 and 2009;[3]

and yet

- The number of major injuries to workers has halved since 1996 (62,000 to 30,000);
- The number of disputed claims before the Workers Compensation Commission is currently one third of the 1996 rate[4];
- Total payments by the Scheme fell by almost 20% from 2002 to 2010.[5]

The Committee accepts that private insurers are probably the best source of claims management services. The Committee takes no issue in relation to the performance

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1 PwC Report, p.5

2 These figures are extracted from WorkCover Annual Report 1997/1998 to 2009/2010, the Workers Compensation Commission Annual Review 2002 to 2009, the NSW Department of Industrial Relations Annual Report 1997 to 2002 and the NSW Attorney General's Department Annual Report 2002 (Appendix 6)

3 Ibid.

4 Ibid.

5 Table 7.1 Payments 1997/98 to 2010/11

of individual Scheme agents. It is beyond the scope of this submission and the scope of this Inquiry. There must exist doubt however, as to WorkCover's effectiveness as contract administrator for the Scheme agents given that there has been no change to agents appointed to the Scheme and the cost trends identified by the Committee.

WorkCover's program of reform of the claims processes and *Claims Guidelines* should be allowed to unfold and proceed. The effectiveness of that program must be monitored and reviewed in twelve months' time. The negative costs trends of the Scheme should be brought into alignment with the positive injury and dispute trends.

## THE ISSUES PAPER

The Committee firstly notes the language used in the Issues Paper describing the system as '*broken*' or other such terms. The system is not broken. It is inefficient.

### The need to reform the NSW Workers Compensation Scheme

Commencing on page 4 of the Issues Paper is a broad-ranging discussion stating the reasons why reform of the Scheme is thought to be necessary. However the Committee is unable to accept many of the statements made because they either lack an evidentiary basis or are incorrect:

- Premiums in NSW are not easily compared to premiums paid by employers in other States. The operational risks and the like between employers in different States are entirely different. The wages structures are not identical in many situations and the commercial practices of companies are not the same. Moreover, the law varies from State to State. Comparing one employer in one State with one employer in another is an interesting but not useful exercise.

- There is no doubt the system is difficult to navigate and is over-regulated.

- The Committee agrees that payments to injured workers are inadequate. It strikes us as odd that in recognition of payments being inadequate one of the proposals is the cutting of benefits.

- The Committee agrees that return to work initiatives are not properly implemented in NSW. The Committee does not agree that there is ineffective work capacity testing as such. The mechanism for it exists. Whether or not Scheme agents or WorkCover NSW are applying available avenues of enquiry is simply not known based upon the data that has been supplied, however, our members are of the view that return to work initiatives are wholly underutilised and the delay in the provision of return to work initiatives results in many workers remaining off work far longer than they should otherwise be off work.

- The Committee does not agree that WorkCover should have any power to discourage payment of treatment services as asserted in the Issues Paper. Treatment is either reasonably necessary or appropriate within the meaning of section 60 of the 1987 Act or it is not. If it is, then an entitlement to the recovery of those payments should be provided for by the Scheme. If it is not, then the payment is not payable by operation of law.

- Statements such as *"it costs far more to get a claimant back to work in NSW than it does in Queensland or Victoria"* are unhelpful and arguably misleading.

Such statements are not backed by any verifiable data and in any event are based upon an analysis of three entirely different Schemes, that operate entirely differently, achieve different outcomes, afford different benefits, etc. The analogy is a very poor example and the analysis is weak in this regard.

However there are two points worth noting:

- Firstly, the Committee agrees that the costs of the Scheme are increasing at an unsustainable rate. The cause of that escalation is neither related to claimants' behaviour nor, we suspect, employer behaviour. The costs problem is being driven by the management of the Scheme and possibly inefficient return to work/rehabilitation practices which are expensive;

- Secondly, despite the unacceptable delay in many claims of the provision of suitable rehabilitation or return to work support and the notable decline in the Scheme's performance in return to work measures since approximately 2008, the return to work outcomes of the NSW Scheme are remarkably similar to the outcomes in other jurisdictions.[6]

**Guiding Principles**

The system, objectives and purpose of workers compensation law in NSW are in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIM Act) and not the incorrect version in the Issues Paper.

Any attempt to reform the system for reasons not related to the matters in section 3 of the WIM Act would be unlawful.

**Financial background**

The Committee's comment on the financial background and analysis of the Scheme is set out earlier in this submission.

**Premium levels**

The Committee's comment on premium levels is set out earlier in this submission.

**Key differences compared to Schemes in other jurisdictions**

- **Scheme Premium Jurisdictional Comparisons**

  The Committee's view in relation to this issue is set out above.

- **Injured Worker Benefit Jurisdictional Comparisons**

  For reasons set out above, comparison by jurisdiction is not a very helpful exercise.

  The benefit levels in NSW are conceded to be poor and need to be increased not reduced.

[6] E-Brief 10/2012 Workers Compensation: an Update, NSW Parliamentary Research Service, page 13 of 20.

The commentary in the Issues Paper on work injury damages shows a lack of understanding of the interrelationship between workers compensation law and the common law. Aligning the *Workers Compensation Act* with the *Civil Liability Act* is presumably intended to make work injury damages claims easier to defend or discourage them be made.

The introduction of concepts such as obvious risk and the exclusion of liability by risk warnings for example, run directly counter to the concept of non-delegable duty which underpins the special relationship between employee and employer. It does so for good reasons because of the inequality of bargaining power and the level of control exercised over an employee.

## OPTIONS FOR CHANGE

All the options on pages 22 to 28 of the Issues Paper have been considered and the Committee has already had discussions with the Government and WorkCover in relation to many of these issues.

Indeed, the Law Society representatives on the Working Group have made many suggestions of this nature to WorkCover NSW over the past seven years. On some occasions legislation was in fact drafted for consideration although none of the suggestions by the Law Society representatives in relation to better operation of the Scheme have ever been enacted by the WorkCover Authority.

### 1. Severely injured workers

Severely injured workers need particular care. It is not appropriate that new categories of benefit levels be created. All victims of workplace injury should be treated equally, save that, the type of services and the level of services required for severely injured persons should be commensurate with their injuries.

30% whole person impairment as a threshold would exclude countless, arguably the majority of, seriously and severely injured persons from the Scheme.

Moreover, the belief that an impairment level is good evidence of treatment needs, level of economic incapacity or other support needs is misguided.

### 2. Removal of coverage for journey claims

The Committee opposes the abolition of journey claims and particularly so for the reasons advanced in the Issues Paper.

These claims are not premium impacting. Further, there is no evidence that benefits paid as result of journey claims are driving the deficit.

The retention of journey claims is fair and justified. A worker injured on their way to or from work is injured in the furtherance of the employer's activity and not their own. Moreover, the legislation is designed to promote return to work as soon as possible. The relatively limited number of journey claimants each year will be left without return to work support and this is contrary to the legislation's intention. Lastly, a significant number of these claims result in a recovery to the Fund by other forms of insurance such as CTP.

## 3. Prevention of nervous shock claims, etc

The Select Committee's attention is drawn to section 3(c) of the WIM Act which provides that one of the purposes of the legislation is to "*provide dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses*".

It is presumably argued that the payment of damages is not anticipated by the legislation. The Committee disagrees. The legislation clearly provides for the payment of compensation and other damages to be paid to this class of claimant.

If it is the will of government to remove a lawful benefit that has otherwise been granted to victims of workplace injuries (including their families and survivors) then that is a matter for government to determine but not for the reasons proffered in the Issues Paper. Such decision would be unmeritorious and would treat these claimants as less entitled than ordinary citizens who would otherwise qualify under the general law.

The savings achieved by the abolition of this form of benefits will be minimal anyway. A very small number of claims are involved. In consideration of the harm caused to the claimant, the savings achieved by the proposed reform does not justify the imposition of further hardship.

## 4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

The Committee notes that the definition ascribed to pre-injury earnings within the Issues Paper is incorrect. In principle the Committee supports simplification of the definition of 'pre-injury earnings' and 'current weekly wage rate' contained within the 1987 Act and WIM Act. However, simplification of the legislation should not used as a vehicle for reducing benefits.

## 5. Incapacity payments - total incapacity

The purpose of the legislation is to provide injured workers with income support during incapacity (section 3(c) WIM Act). Therefore, termination of benefits while a worker is incapacitated is contrary to the intent of the legislation.

Benefits are not currently driving the deficit and any attempt to cut benefits through the reform program under consideration would be a removal of existing rights in circumstances that is not justified. What is needed is better scrutiny by scheme agents of the evidence of incapacity.

The Issues Paper notably recognises that NSW workers are not paid enough in weekly compensation. There is no justification to align NSW with any other State. To do so assumes the arrangements in the other States are in the interests of NSW workers and the Committee does not believe this to be the case.

## 6. Incapacity payments - partial incapacity

The purpose of the legislation is to provide injured workers with income support during incapacity (section 3(c) WIM Act). As with the discussion concerning total incapacity, termination of benefits while a worker is incapacitated is contrary to the intent of the legislation.

As noted above. benefits are not currently driving the deficit and any attempt to cut benefits through the reform program under consideration would be a removal of existing rights in circumstances that is not justified. What is needed is better scrutiny by scheme agents of the evidence of incapacity.

To provide 'financial disincentives' as suggested by the Issues Paper is against the purpose of the legislation if the worker remains incapacitated. Furthermore, the Victorian provision of a 'financial disincentive' does not provide Victoria with markedly better return to work outcomes compared to New South Wales. [7]

An example of the need for retaining entitlements for genuinely incapacitated workers is illustrated by the common facts of most claims. Most workers who suffer injury and incapacity usually make a graduated return to work. After a relatively short period of total incapacity, a return to work plan is commenced and the worker is certified fit for duties of some type. Often they return to work with some loss of economic capacity. In these cases they are compensated for these losses of earnings. The make-up pay benefits are an important safety net. Many workers genuinely require the compensation to meet ordinary living expenses they otherwise could meet before they were injured. Limits on the level of benefits are already an incentive to continue to upgrade hours to pre-injury levels of employment.

The primary vehicles for determining entitlements are sections 38 and 40 of the 1987 Act and section 49 of the WIM Act. Consideration should be given to strengthening the mutual obligations of workers and employers with respect to seeking suitable duties and the provision of them. Avoiding the requirement to provide suitable duties is a practice that should be further discouraged. This could be achieved by a variety of financial and non-financial incentives via premium modelling or improved reinstatement powers reposed in the Workers Compensation Commission and better utilisation of provisions within the legislation dealing with job seeking and the like.

It is difficult to provide a more meaningful analysis in the absence of data and in circumstances which are already suggestive of a claims management environment that is not operating efficiently.

## 7. Work capacity testing

Avenues for testing work capacity already exist within the legislation (section 40A of the 1987 Act). Severe penalties are imposed for non-compliance.

The situation is not that there are inappropriate mechanisms available; rather, it is their under-utilisation or misapplication. This is a matter highlighting the need for Scheme agent training by WorkCover NSW. The system does not need reform, it needs proper application.

## 8. Capped weekly payment duration

The purpose of the legislation is to provide injured workers with income support during incapacity (section 3(c) WIM Act).

To provide 'financial disincentives' as suggested by the Issues Paper is against the purpose of the legislation. The Scheme is responsible for improving the earning capacity of injured workers. The Scheme should be providing and promoting effective

[7] Ibid at 13 of 20

return to work initiatives and not arbitrarily disentitling incapacitated victims of workplace injury from income and other support.

## 9. Remove pain and suffering compensation

Entitlements pursuant to section 67 of the 1987 Act are not causing any component of the deficit on any analysis of the data and there is no reasonable justification for the removal of this entitlement.

Section 67 is the *only* way to subjectively measure and compensate for pain and suffering in the Scheme. It is disregarded under the impairment assessment guidelines as a measure of impairment.

Further, the benefits payable under section 67 have not been increased for 25 years.

The further eroding of existing entitlements is unmeritorious. There is justification to retain this benefit and index the amount payable for it.

## 10. One claim for whole person impairment

The current assessment guidelines provide more than adequate protection to the Scheme to ensure only meritorious impairment claims can be brought and succeed.

Fraud is not a feature of the Scheme justifying this reform. In 2011, of the over 80,000 claimants in the Scheme, only nine were successfully prosecuted for fraud (0.011%). Enclosed is an extract on fraud from the WorkCover NSW Annual Report 10/11.

The term "rorting" is used to define those claimants obtaining benefits improperly but not otherwise criminally culpable. There is no evidentiary basis to conclude this actually occurs. If it exists, evidence supporting the existence of such practices and outcomes should be tabled. Moreover, if the Scheme meets such claims it does so by failing to properly assess and determine those claims. Again, this is an issue about claims management failings and not levels or types of entitlements.

Specifically as regards multiple claims for permanent impairment, it is important to recognise that the guidelines and the legislation permit it to occur. It does so because there are situations where a condition will deteriorate. The failure by the Scheme to foresee and properly account for legitimate claims for increased impairment is a failing of the claims management of the Scheme, not the legislation or the objectives that underpin it.

In any event, lump sum entitlements under section 66 are not causing any problematic component of the deficit on any analysis of the data and there does not appear to be any reasonable justification to restrict benefits of this type.

## 11. One assessment of impairment for statutory lump sum, commutations and Work Injury Damages

Limits on the number of reports that can be obtained in any claim already exist. The Issues Paper does not concede this fundamental point. However, what is really complained of is the practice of obtaining multiple reports from different medical specialists each of whom separately assess the impairment relating to their speciality.

This practice is necessary because many injuries involve multiple body systems and the guides for the evaluation of impairment require separate assessments.

There is no justification to conclude on any analysis of the available material that workers negatively focus on their injuries if they require multiple assessments. There is no evidence that the need to attend different specialists for assessment distracts workers from focussing on their recovery.

The imposition of a single assessment requires the assessor to undertake assessments outside their speciality and deprives the worker and the Scheme of the opportunity to rigorously test and review the evidence. When coupled with the existing limited rights of appeal from Approved Medical Specialists, this becomes an important issue if the checks and balances of competing expert reports are removed from the Scheme.

## 12. Strengthen work injury damages

This submission has already discussed the issue of liability in work injury damages claims. The Issues Paper lacks an understanding of the common law and the interrelationship with the concept of non-delegable duty of care.

The Committee appreciates that concerns have been raised about the impact of work injury damages claims on the Scheme. While the Issues Paper avoids this issue directly, it cannot be ignored as the PwC report recommends changes to work injury damages provisions based on these concerns. In response to these concerns the Committee notes:

- Of the approximately 30,000 major injuries in the Scheme each year, work injury damages claims have not exceeded 1207 compulsory mediations. This represents 4% of major injuries. When compared to the total number of claims annually (approximately 80,000) the figure is only 1.5% of all claims made.
- There has been no increase in work injury damages claims. In fact, despite statements that work injury damages claims are increasing in number, PwC confirms that intimated claims per accident half year have declined since December 2006 (see page 174 of the PwC report).
- The PwC report models additional intimated claims. This is not a measure of actual claims in the Scheme. It is a forecast only. Unusually and without explanation, the report assumes a sixfold increase in work injury damages claims is occurring. PwC estimates that for the full year 2010 there have been or will be 6,148 work injury damages claims (see page 174 of the PwC report). However, the Workers Compensation Commission annual review 2011 at page 32 (enclosed) confirms that only 1207 compulsory mediations actually occurred. This figure is remarkably similar to the historical intimated numbers of claims before the PwC remodelling.

### 13. Cap medical coverage duration

The Committee understands why WorkCover would wish to seek to limit medical costs. They are a potential driver of the deficit. Better claims handling is likely to result in better outcomes in terms of the payments for medical expenses. Properly testing medical evidence to determine what treatment is reasonable, necessary and appropriate should result in better outcomes in terms of disputes relating to medical expenses.

### 14. Strengthen regulatory framework for health providers

The regulatory framework for this already exists. It is simply not enforced properly.

### 15. Targeted commutation

The Committee has already indicated that it supports commutations for the reasons and in the manner set out above.

### 16. Exclusions of strokes/heart attack unless work is a significant factor

Section 9A of the 1987 Act already provides the protection that the Issues Paper suggests does not exist.

The targeting of two specific types of injury is unnecessary.

## WHY CHANGE IS NEEDED?

The inaccuracies in the Issues Paper have been addressed within this submission.

The Scheme objectives are legislatively mandated by section 3 of the WIM Act. Other interpretations of the Scheme objectives are incorrect. Reform for reasons offending section 3 of the WIM Act would be unlawful.

The stated reform goal in the Issues Paper is only justified in an environment where the goal identified is not in existence, or not being achieved, or not part of the current system objectives if this is consistent with the legislation.

However, this submission demonstrates that components nominated for adoption by the Scheme already exist as a feature of the current system and are not a cause of the current problems in the Scheme. The current failings of the system have nothing to do with the matters raised in the last paragraph of the Issues Paper.

The Issues Paper and the PwC recommendations avoid analysis of key contributors to the current financial state of the Scheme and seek to shift the responsibility for it onto other elements and then adopt that displaced responsibility as a justification for wholesale reform.

In conclusion, the Committee opposes any reforms for the reasons proffered by the Issues Paper and the PwC report and recommendations. The Committee supports existing initiatives which have commenced and believes those initiatives should be given an opportunity to develop and the outcomes measured in due course. The Committee has suggested further initiatives and targeted reforms to assist the Scheme streamline and enhance its operating effectiveness and is committed to assisting the government in the event these initiatives are adopted.

Finally, the Committee thanks you for the opportunity to participate in this inquiry and looks forwards to providing oral evidence at the Public Hearing.

Should the Parliamentary Secretariat wish to contact the Law Society regarding this submission, the policy lawyer with responsibility for this matter is Patrick McCarthy who may be contacted on [redacted]

Yours sincerely,

Justin Dowd
President

THE LAW SOCIETY
OF NEW SOUTH WALES

22 March 2012

The Hon. Greg Pearce, MLC
Minister for Finance and Services
Governor Macquarie Tower
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SYDNEY NSW 2000

**BY EMAIL:**office@pearce.minister.nsw.gov.au

Dear Minister,

***Proposed changes to the NSW Workers Compensation System***

The Law Society appreciates the opportunity to meet with you to discuss proposed changes to the NSW workers compensation system. The Law Society's Injury Compensation Committee (the Committee) is aware of recent public discussion about changes to the system and is concerned about the proposals for reform which are emerging.

The need for reform of the WorkCover scheme is complex and the Committee believes that many of the factors driving the existing deficit as well as the projected deficit may be incapable of correction in the short term. While some of the more systemic problems with the scheme require broad legislative reform, the potential impacts have not been fully analysed or debated. Much of the debate has been focused on the financial performance of the scheme and whilst this is understandable the Committee notes that the scheme exists for the benefits of persons injured at work. In this regard, any cut to benefits would have a devastating effect on these already significantly disadvantaged members of our society. It is also noteworthy that levels of benefits do not appear to be a key driving factor in the current deficit nor the projected deficit.

The keys factors driving the deficits are, in the Committee's view, the poor performance of the scheme's fund managers and a claims management model and set of guidelines that encourage the growth of a tail of claims that is not sustainable. It is said that work injury damages claims are also a key factor, however, the Committee queries whether that argument is sustainable given the actual number of work injury damages claims compared to the projected deficit. For example, last year there were approximately 800 work injury damages claims of which only 88 proceeded to the District Court of NSW (and an even smaller number to judgment). This is about 400 more than the 400 or so work injury damages claims that ordinarily existed in the system before the apparent 'spike' in claims. The average cost of a work injury damages claim is reported to be $350,000.00. It follows then, that for the additional 400 work injury damages claims, the increased actual cost to the system is under approximately $140,000,000.00 per annum. Claims estimating and premium modelling should more than comfortably accommodate fluctuations of this nature.

Other proposals apparently under consideration include aspects of various state schemes, notably the Victorian scheme, by which it is proposed benefits in NSW should be terminated after two years. The Committee is concerned about this proposal given that ordinary and statutory benefits claims costs are not driving the deficits and even in Victoria, while statutory benefits are limited, common law entitlements are not.

Some additional statistics the Committee would like to bring to your attention are as follows:

1. The number of litigated major injuries has halved since 1996;
2. The number of disputes by scheme agents is one-third the 1996 rate;
3. Payments to scheme agents have risen from approximately $70,000,000 per annum in 1999 to over $630,000,000 per annum in 2010; and
4. The total cost to the scheme of managing a dispute has risen sixteen-fold in the past decade (1999-2009).

These statistics are openly available from an analysis of the annual reports of your department, the former NSW Department of Industrial Relations, the WorkCover Authority, the Compensation Court of NSW and the NSW Workers Compensation Commission. They support the Committee's view that the issues driving scheme performance have little to do with benefits, or culture, or the behaviour of lawyers – all of which have been proffered as grounds for change in the past.

The scheme clearly is in need of a review and the Committee is keen to play a significant role in any analysis of the scheme. The Committee recognises that there are some immediate concerns for the Government. The projected deficit needs to be swiftly brought under control. The existing deficit requires a considered response.

Considering the vulnerability of the persons most in need of the protection of the scheme, care must be taken not to over-react to the current situation by taking the focus off the real issues driving scheme performance and shifting it entirely to matters of a financial nature. In this regard, the Committee recognises that the projected deficit could have a significant impact on the state budget. The Committee understands the financial imperatives and the political consequences. However, the Committee believes that the immediate implementation of some short term reforms (coupled with ongoing consultation) will preserve the state's budgetary position and ensure that the scheme returns to a satisfactory position.

The Committee recommends the following proposals for immediate implementation:

1. Amend the regulations and claims guidelines to allow scheme agents to obtain independent medical examination reports at any stage of the life of the claim. The importance of getting an early independent medical examination report is that it states the boundaries of the dispute at a very early point in time. Is it important that this proposal be accompanied by the proposals below. The other advantage of an early independent medical examination report is that the existence of such an opinion at an early point in time will more often than not help curtail or resolve work injury damages claims. It is noteworthy that when independent medical examination reports could be obtained without restriction, the number of work injury damages claims was significantly less and the tail of claim less cumbersome. The correlation between the two cannot be ignored.

2. Re-introduce commutations across the board and without restriction. It is imperative that a large section of the tail of claims that exists in the scheme is extinguished and the most obvious way of doing this is by way of commutation. The Committee would propose amendments to the legislation to enable commutations to take place on all claims. The process for approval should comprise the completion of a simple standardised form by which certification from a legal practitioner is provided followed by registration of that document in the Workers Compensation Commission. There is no need for WorkCover to be involved in this process and cutting out this unnecessary involvement will improve efficiency. The immediate re-introduction of commutations will result in the resolution of potentially thousands of disputes and non-disputed claims. This will inevitably include a very large number of claims that are making up the projected deficit both as statutory claims or work injury damages claims.

3. Amend the claims estimate guidelines to apply a 50% discount to any estimate for any claim that is considered to be capable of a commutation. If the restrictions on commutations are removed, a significant discount could be applied to all claims in the scheme which would therefore, artificially perhaps, have an immediate impact on the projected deficit because the total estimates on all claims would reduce. It is important however that a wholesale settlement program be undertaken to ensure those savings are realised. The advantages are lower estimates, thereby curtailing premium and reducing the deficit.

4. Amend the current claims guidelines and reverse the direction against settlements to scheme agents enabling parties to negotiate between positions. The Committee sees no merit in the current process where scheme agents are prohibited from settling matters in between the applicant and respondent evidence and claims are required to proceed to determination where one or either of those assessments is not accepted.

In the Committee's view the above proposals could be implemented without any significant legislative reform and are likely to receive support from the legal profession, worker's groups including unions and employer groups. Employers should not object to the proposals as they help maintain the financial viability of the scheme.

There may be opponents to the above proposals who might argue that such proposals encourage compensation behaviour. Those arguments need to be analysed within the broader context of the scheme and the Committee is willing to participate in any formalised review which properly analyses those arguments. In any event, the current financial position of the scheme suggests that such arguments ought to be given little to no weight and moreover, if claims are properly considered then the correct value for those claims will be applied. The fear mongering that is generated by those who argue that a compensation mentality can grow suggests that the scheme agents for whom WorkCover pay over $600,000,000.00 per annum are incapable of undertaking their contracted roles correctly. The Committee does not have such little faith in professionally skilled organisations, although whether they are currently performing to the standard they should be is a matter which requires detailed analysis.

The longer term reforms of the scheme could take various forms. The Committee is in favour of a broad-ranging independent inquiry conducted in relation to the scheme's performance since 2001. It is not appropriate in this correspondence to

detail what the Committee believes some of those longer term reforms could be. In summary, management of and by scheme agents, estimating and claims management issues and the curtailment and proper control of rehabilitation services and costs are, in the Committee's opinion, the critical factors. Ideally, the Committee advocates for an independent judicial inquiry to be conducted, to not only identify how the scheme has come to be in the current state, but more importantly, to give to you a balanced and independent suite of recommendations.

Given the importance of this matter, the Law Society appreciates the opportunity to meet with you at short notice. The Committee would also like to offer to make itself available to you to assist in the urgent development of any amendments to legislation, regulations and guidelines. Many of the Committee's members have provided services through a range of scheme designs and are expert advisers in the current scheme, as well as members of expert industry groups including the reference group with WorkCover NSW. The Committee is therefore well-placed to assist with the current situation.

Please do not hesitate to contact me or the Chief Executive Officer, Michael Tidball, if you would like to discuss any of the issues raised in this letter. Should your officials require further detail, the policy lawyer with responsibility for this matter, Patrick McCarthy, can be contacted on [redacted].

Yours sincerely,

Justin Dowd
**President**

**Table 7.1 Payments**
**Type of payments made from 1997/98 to 2010/11 - ($'000)**

| Type of Payments | 1997/98 | 1998/99 | 1999/00 | 2000/01 | 2001/02 | 2002/03 | 2003/04 | 2004/05 | 2005/06 | 2006/07 | 2007/08 | 2008/09 | 2009/10 | 2010/11 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **COMPENSATION PAYMENTS** | **1,551,316** | **1,772,244** | **1,893,362** | **1,970,775** | **2,231,884** | **1,701,629** | **1,880,195** | **1,760,340** | **1,749,910** | **1,724,319** | **1,802,104** | **1,999,882** | **2,192,505** | **2,260,559** |
| Ambulance services | 10,086 | 7,641 | 7,812 | 7,165 | 8,395 | 9,756 | 10,917 | 12,319 | 12,038 | 6,273 | 3,885 | 3,994 | 7,728 | 2,977 |
| Medical treatment | 173,776 | 198,490 | 221,132 | 232,692 | 277,053 | 284,572 | 345,278 | 340,984 | 344,717 | 362,635 | 392,760 | 435,893 | 456,364 | 450,898 |
| Hospital treatment | 61,042 | 58,856 | 60,573 | 60,989 | 60,619 | 59,058 | 73,767 | 74,377 | 73,622 | 75,539 | 79,142 | 91,745 | 98,354 | 104,987 |
| Rehabilitation treatment | 54,262 | 57,600 | 58,099 | 74,258 | 88,096 | 111,258 | 122,615 | 120,448 | 107,148 | 94,076 | 96,260 | 109,743 | 129,613 | 123,070 |
| Physiotherapy and chiropractic treatment | 67,794 | 60,466 | 63,092 | 63,069 | 66,188 | 61,386 | 68,780 | 66,667 | 60,993 | 60,461 | 64,016 | 71,235 | 76,084 | 80,926 |
| Damage to artificial limbs and clothing | 2,902 | 2,275 | 2,317 | 3,327 | 3,635 | 4,388 | 5,574 | 6,431 | 7,928 | 8,700 | 9,996 | 11,322 | 12,960 | 14,107 |
| Death payments | 21,059 | 21,927 | 21,121 | 22,963 | 20,643 | 25,743 | 25,371 | 25,345 | 22,747 | 23,563 | 21,898 | 50,255 | 45,353 | 53,743 |
| Permanent injury | 277,821 | 182,318 | 145,122 | 136,377 | 156,632 | 265,827 | 261,694 | 187,240 | 192,680 | 165,321 | 151,565 | 170,234 | 205,666 | 201,385 |
| Pain and suffering | 110,749 | 67,008 | 55,583 | 50,620 | 57,493 | 113,347 | 111,437 | 72,377 | 70,717 | 60,363 | 56,744 | 62,081 | 75,569 | 76,693 |
| Redemptions | 130,673 | 462,667 | 615,182 | 665,565 | 812,501 | 26,770 | 28,886 | 17,697 | 19,324 | 18,253 | 24,542 | 31,729 | 46,459 | 31,415 |
| Section 38 (Weekly benefit) | 74,124 | 81,767 | 80,994 | 91,012 | 105,598 | 120,503 | 138,143 | 125,535 | 111,312 | 102,998 | 105,986 | 119,886 | 141,432 | 139,866 |
| Total incapacity (Weekly benefit) | 438,446 | 440,630 | 428,642 | 416,987 | 423,582 | 433,428 | 459,876 | 448,060 | 428,268 | 432,661 | 456,857 | 476,945 | 506,432 | 559,414 |
| Partial incapacity (Weekly benefit) | 128,583 | 130,593 | 133,688 | 145,745 | 151,443 | 185,587 | 227,851 | 262,854 | 298,411 | 313,470 | 338,449 | 364,814 | 390,485 | 421,072 |
| **NON-COMPENSATION PAYMENTS** | **530,246** | **712,774** | **789,413** | **975,334** | **1,304,203** | **1,548,358** | **925,504** | **494,582** | **455,638** | **489,005** | **473,760** | **525,508** | **523,445** | **567,807** |
| Transport and maintenance | 11,173 | 14,448 | 13,950 | 15,312 | 15,802 | 14,966 | 15,895 | 13,243 | 16,126 | 23,469 | 27,879 | 29,792 | 26,944 | 32,945 |
| Damages and common law | 179,092 | 311,448 | 329,211 | 460,307 | 704,657 | 1,013,829 | 431,830 | 209,205 | 189,536 | 225,925 | 226,361 | 269,317 | 265,113 | 295,690 |
| Investigation expenses | 96,629 | 107,269 | 127,781 | 150,152 | 173,111 | 137,986 | 117,561 | 107,110 | 110,423 | 101,422 | 90,079 | 92,977 | 97,680 | 105,523 |
| Interpreter services | 811 | 981 | 1,187 | 1,624 | 2,233 | 2,276 | 2,419 | 2,468 | 2,537 | 2,309 | 2,213 | 2,621 | 2,618 | 2,850 |
| Legal costs | 242,541 | 278,625 | 317,282 | 347,937 | 408,398 | 379,299 | 357,798 | 162,554 | 137,013 | 135,879 | 127,225 | 130,799 | 131,087 | 130,798 |
| Total | **2,081,561** | **2,485,018** | **2,682,776** | **2,946,109** | **3,536,087** | **3,249,988** | **2,805,700** | **2,254,923** | **2,205,548** | **2,213,325** | **2,275,865** | **2,525,390** | **2,715,951** | **2,828,366** |

*Note: Payments data in this table have not been adjusted for inflation / deflation.*
*Care should be taken when interpreting unadjusted data.*
*To enable time series comparisons, a method of indexation is recommended.*