

## FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

**Organisation:** Specialist PTSD and Injury Lawyers

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Partially  
Confidential

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25 September 2016

The Legislative Council of New South Wales  
Standing Committee on Law and Justice  
New South Wales Parliament House Sydney

Dear Chairperson and Committee Members,

**Re: Submissions in respect of the  
first review of the workers' compensation scheme**

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I thank the Committee for the opportunity of making submissions to it regarding my concerns in respect of the running of the New South Wales workers' compensation scheme. I have deliberately kept my submissions succinct in the hope that the Committee will allow me the opportunity of giving evidence at its hearings on 4 and 7 November 2016.

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  - b. Redacted Desktop Investigation Report of Lee Kelly Commercial Investigations dated 24 April 2015 (redacted for the privacy of the claimant);
  - c. NSW Government Model Litigant Policy for Civil Litigation.

## 1. **Personal Introduction**

By way of introduction, I am a lawyer with over 20 years' experience in acting solely for plaintiffs in personal injury matters. I have held specialist accreditation with the Law Society of New South Wales in personal injury since 2003. I am the principal of Specialist PTSD & Injury Lawyers.

I have represented hundreds of plaintiffs during my career. I have developed an expertise in acting for claimants with psychological injuries, the most common of which is Post-Traumatic Stress Disorder (**PTSD**). Specifically, the largest group of workers who suffer from this condition (and the majority of my clients) are first responders, a category of workers which includes police officers, and paramedics, and fire & rescue personnel.

## 2. **Abstract of submissions**

The role of the Committee is a broad one, as it is seeking to review the Workers' Compensation, Dust Diseases, Motor Accidents, and the Lifetime Care and Support regimes. This submission will not be addressing the effectiveness and operation of these schemes overall, as they are not areas of compensation that I frequently practice in.

My submission is directed specifically to the treatment of former New South Wales police officer claimants, suffering from psychological injuries, within the workers' compensation scheme.

Whilst this is a very narrow segment of workers' compensation claimants, the impact of the actions of the scheme insurer, Employers Mutual Limited (**EML**), is having a significant effect on these claimants, their health, their families and the efficient running of their compensation claims. In respect of the clients I represent, the matters that I raise within these submissions are extremely serious and there is at the very least anecdotal evidence that the actions of EML impact significantly on the claimants' health, and have led to suicides of officers pursuing claims.

## 3. **The effect of surveillance on claimants**

For the sake of brevity and on the assumption that the Committee is well aware of the legislative framework of the workers' compensation scheme, I will not go into great detail regarding it.

First responders in New South Wales, which includes members of the New South Wales Police Force, are exempt claimants under the workers' compensation scheme.<sup>1</sup>

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<sup>1</sup> See *Workers Compensation Act 1987* (NSW) sch 6 pt 19H cl 25.

What this means is that such claimants were not affected by previous reforms,<sup>2</sup> are more generously compensated than other workers,<sup>3</sup> and have an entitlement to have their legal costs paid by EML.

The recent Four Corners program, "*Insult to Injury*", which aired on 2 August 2016, highlighted some of the issues facing police officers pursuing workers' compensation in respect of the way that their claims are processed, and the effect of surveillance.

I believe that one of the most disturbing features of the way the current scheme is being run by EML and the New South Wales Police Force is the systemic approach taken to the processing of these claims. There seems to be a default position that a claim is a fraudulent one or otherwise lacks *bona fides*, unless the claimant is able to prove otherwise. I have come to this conclusion largely based on my experiences with EML and noting the way that EML routinely processes these matters. It is not unknown for insurers to engage private investigators to assess the merits of the claim and to investigate for fraud. The entitlement of an insurer to do so in the right circumstances is unarguable. Indeed, my clients, most of them being police officers and having been actively involved in criminal investigations during their careers, do not seek to argue the entitlement of an insurer to properly investigate such claims, including the use of surveillance where warranted. I assert, however, that an insurer is not entitled to undertake the type of intrusive and relentless surveillance that it does without having reasonable cause or some other grounds upon which to establish an entitlement to do so. However, in my everyday dealings I see surveillance used routinely as a normal processing step in almost all of these claims. This includes physical (video) surveillance and online desktop surveillance which I will discuss further below. In all of the police claims that I have been involved in, to the best of my recollection, I am yet to have been confronted with any surveillance that has led to a claim being declined upon the basis of a fraud or some other wrongdoing.

Despite my acknowledgement of the right of insurers to investigate and conduct surveillance (in circumstances where they have valid reasons to do so), there is a strong school of thought as to whether physical (video) surveillance of a claimant with PTSD is likely to assist the insurer at all. It is the opinion of many psychiatric experts in this field (and I note the comments of Professor Alexander McFarlane in the recent Four Corners story) that physical surveillance of a person with a psychological injury does not show what is going on in their minds and as such is of absolutely no probative value in assessing a claim. Professor McFarlane is not the only doctor with this opinion, and I believe that it is an opinion that is gathering support even within insurers.<sup>4</sup>

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<sup>2</sup> See *Workers Compensation Legislation Amendment Act 2012* (NSW) and *Workers Compensation Amendment Act 2015* (NSW) for changes to the workers' compensation scheme.

<sup>3</sup> For example, exempt claimants are entitled to a payment for pain and suffering pursuant to Section 67 of the *Workers Compensation Act 1987* (NSW) whereas non-exempt claimants are not.

<sup>4</sup> Recently, MetLife Insurance Ltd, an insurer for Total and Permanent Disablement (TPD) claims announced on 1 August 2016 that it would no longer conduct surveillance on claimants with psychological claims. Although no reasons were given for this decision, I would suggest that the outcry over this insurer, its methods, and the effect that its surveillance had on claimants is the reason why.

Apart from this first proposition, I have concerns with the way such covert surveillance is undertaken and indeed some of the companies retained by EML. Unfortunately, the scope of these submissions does not allow me to go into more detail regarding this issue. I assert that this issue alone, the way private investigation firms operate, their links with various insurers and the people who are often employed in the private investigations could itself be the subject of its own inquiry. From my experience the main private investigation firms retained by EML are Lee Kelly Commercial Investigations and Brookside Investigations (Aust) Pty Ltd. Without further comment, I simply make the following observations regarding both companies:

My personal experience is that covert physical surveillance of ex police claimants with psychological illnesses often have a devastating effect. One of the most common symptoms of PTSD is that sufferers experience hypervigilance and paranoia. Most often the police clients I represent have worked in high-level criminal investigations which involved covert surveillance. I cannot overstate the trauma occasioned by these claimants suddenly finding themselves (without any reasonable cause) being extensively surveilled over long periods of time, all in the course of simply pursuing compensation benefits to which they are entitled. In addition to this, many of these claimants have been the subject of previous threats by criminals during their career. They suddenly find themselves under surveillance with no way of knowing who they are being surveilled by, criminal or insurer? My own observations are that this surveillance is extremely traumatic for these claimants. In addition, I have on numerous occasions obtained reports by my clients' treating psychiatrists who indicate that this type of surveillance has caused significant aggravation and exacerbation of their psychological symptoms.

Perhaps more significant is that despite the assurances from these investigators (both in their written reports as well as on their websites) that they act at all times within the law, this is clearly not the case. I have experiences of private investigators, in breach of the law, doing the following: attending schools; entering school grounds without consent; taking video footage of sporting events involving large groups of children; without consent entering the private properties of my clients in order to take video footage; and entering hospital grounds without consent for the same purpose. What is most curious of all (given their assurances as to the legality of their conduct and privacy considerations) is that this conduct is documented in their own reports which inevitably

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are sought to be relied upon by EML and the NSW Police Force in defending the claims. Again, for the sake of brevity, I will not go into further detail except to say it is my submission that investigators retained by EML often break the law and seem to have little consideration or understanding of the relevant law.

This disregard for the law is most starkly seen in the case of what is referred to by EML and its investigators as 'desktop investigations', an innocent sounding but Orwellian title. In discussing desktop investigations, I refer the Committee to the report of Lee Kelly Commercial Investigations which is attached. I began to see these desktop investigations 18 to 24 months ago. The desktop investigations are, in short, an investigation into a claimant's online history and social media activity. It is my experience that social media for many sufferers of PTSD, especially ex police officers, (who often feel cut off from their police colleagues once medically discharged) is one of the only social engagements they have. Even a cursory internet search will reveal many forums and websites ex police officers with PTSD become engaged with and obtain support from in respect of their current circumstances. One of the significant forums is the Forgotten 000's Facebook page, formerly known as the Forgotten 300.<sup>8</sup> While some may not necessarily agree with all the content on that page, I know that it is a very important resource for ex police and a valuable forum.<sup>9</sup> For many of my clients, social media sites such as Facebook are the only or the main tool by which they are able to engage with friends, family, and support services. Many are unable to engage socially outside of their homes and as a result spend a lot of time on Facebook. For some of them, Facebook is the only significant way that they engage with the outside world. Given their privacy concerns, most ex police officers deliberately use pseudonyms on social media and engage the highest security settings, especially in respect of Facebook.

My concerns regarding the desktop investigations are as follows:

1. Firstly, I assert that they are illegal.
2. Secondly, they are a significant breach of the claimant's privacy.
3. Thirdly, they significantly increase and exacerbate the trauma and often the psychological illness of the claimants.
4. Fourthly, whatever their legal status, the process involved is so excessive, heavy-handed and intrusive, that it is one that neither EML nor the New South Wales Police Force should be engaged in. I also refer to the *Model Litigant Policy for Civil Litigation* which I will discuss below.

My experience is that the main company retained for the purposes of these desktop investigations is Lee Kelly Commercial Investigations (**Lee Kelly**). With reference to

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<sup>8</sup> [www.facebook.com/TheForgotten000s](http://www.facebook.com/TheForgotten000s)

<sup>9</sup> As an aside, the conduct of the New South Wales Police Force in shutting down the original Forgotten 300 Facebook page was an outrageous action and one that caused a lot of distress among ex police.

the redacted report annexed to my submissions, the process involved is set out on page 3 of that report under the heading '*Methodology and Specialised Technology*'.

With respect, I would hope that the Committee carefully reviews this document. When doing so, please be aware that the police claimant had the highest Facebook security settings in place at the time of the desktop investigation. At paragraph 4 of the report (page 2), '*Volume of material identified, collected and preserved*,' the report indicates that "*our search identified and preserved about 13,427 items of electronically stored information (ESI) relating to the claimant.*" Further, "*we downloaded relevant Facebook and website data pertinent to this case. All items are now in an encrypted evidence container and preserved to commit entry standards.*" I would also specifically point out '*Our findings*' at page 5 of the report and the photographs taken from Facebook, pages 8 to 30. Perhaps of significance also is the annotation at attachment 1.2 on page 2 under the heading '*Web Snapshot*' which states that "*Collection is not disabled yet*". As a lay person, what I take this to mean is that the investigators are continuing to conduct surveillance and collect information in respect of this claimant's Facebook page.

My concerns regarding the legality of these reports involve the following statutory provisions:

**1. Section 308H of the Crimes Act 1900 (NSW)**

**308H Unauthorised access to or modification of restricted data held in computer (summary offence)**

(1) A person:

- (a) who causes any unauthorised access to or modification of restricted data held in a computer, and
- (b) who knows that the access or modification is unauthorised, and
- (c) who intends to cause that access or modification,

is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

(2) An offence against this section is a summary offence.

(3) In this section:

**"restricted data"** means data held in a computer, being data to which access is restricted by an access control system associated with a function of the computer.

**2. Section 8 of the Privacy and Personal Information Protection Act 1998 (NSW)**

**Collection of personal information for lawful purposes**

- (1) A public sector agency must not collect personal information unless:
- (a) the information is collected for a lawful purpose that is directly related to a function or activity of the agency, and
  - (b) the collection of the information is reasonably necessary for that purpose.
- (2) A public sector agency must not collect personal information by any unlawful means.

**3. Section 14 of the Surveillance Devices Act 2007 (NSW)**

**Communication and publication of information from the use of a data surveillance device**

- (1) A person must not publish, or communicate to any person, any information regarding the input of information into, or the output of information from, a computer obtained as a direct or indirect result of the use of a data surveillance device in contravention of this Part.

Maximum penalty: 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

- (2) Subsection (1) does not apply to the following:
- (a) to a communication or publication made:
    - (i) to the person having lawful possession or control of the computer, or
    - (ii) with the consent, express or implied, of the person having lawful possession or lawful control of the computer, or
    - (iii) for the purpose of investigating or prosecuting an offence against this section, or
    - (iv) in the course of proceedings for an offence against this Act or the regulations,
  - (b) if the communication or publication is no more than is reasonably necessary in connection with an imminent threat of:



- (i) serious violence to persons or substantial damage to property,  
or
  - (ii) the commission of a serious narcotics offence.
- (3) A person who obtains information in a manner that does not involve a contravention of this Part is not prevented from publishing or communicating the information so obtained even if the same information was also obtained in a manner that contravened this Part.

#### 4. **New South Wales Police Force involvement in claims process**

For the purposes of the submissions, I will not go into detail regarding the above sections and what I believe to be the breaches by both EML and the Police Force concerning their conduct in commissioning, relying upon the information obtained, copying and then storing the information for an unspecified period of time. I would hope that I will be given the opportunity to advance these arguments during the hearings of the inquiry.

Over the past 18 months, I have expressed my objection to these reports both in writing and in person, whilst various of my clients' claims were the subject of mediation in the New South Wales Workers Compensation Commission. On at least 10 of those occasions, the Police Force itself was represented by \_\_\_\_\_ who, I understood at the time, to be the workers' compensation manager of the New South Wales Police Force. Also in attendance on these occasions were representatives of EML and its lawyers. On those occasions I specifically raised my objections in respect of the desktop investigations and clearly asserted that not only were they illegal, but that they were in breach of the *Model Litigant Policy* and that these were outrageous breaches of my clients' rights to privacy. In response I was informed on several occasions, words to the effect of "*EML and the Police Force are quite aware of your assertions regarding these reports. We have however obtained legal advice and do not share your concerns.*" What is clear is that the New South Wales Police Force, through its employees, is entirely aware of this practice.

If I am wrong in respect of my assertions that the desktop investigations are illegal, I would assert that this still does not absolve the conduct of EML and the Police Force. Do we, as a community, want a compensation system that tolerates such intrusion upon a segment of claimants, who I would suggest, that deserve better given the sacrifices they often made for the citizens of this state? Whether illegal or not, this process is completely unsatisfactory and should be immediately stopped.

## 5. Model Litigant Policy for Civil Litigation

Annexed to my submissions is the *Model Litigant Policy for Civil Litigation*. In the words of the State Government, “*This Memorandum sets out the Model Litigant Policy for Civil Litigation (the Model Litigant Policy), which provides principles for maintaining proper standards in litigation and the provision of legal services in NSW*”.<sup>10</sup> The concept of the Crown as a model litigant arose from an early recognised dictum that the Executive must “*maintain the highest standards of probity and fair dealing because of the Crown’s position as the source and fountain of justice*.”<sup>11</sup> The origins of the policy seek to ensure fair play in respect of litigation between the Crown and its citizens, given the obvious power and resource inequities between both parties.

Recently in New South Wales, arising from the Royal Commission into Institutionalised Responses to Child Sex Abuse, the results of such breaches of this Policy were exposed, but unfortunately gained little public attention.<sup>12 13</sup>

It is my assertion, as an experienced litigator in workers’ compensation, that this Policy is routinely breached by both the Crown and its associated entities such as EML (who incidentally are bound by the Policy), to the extent that the Policy is of little or no protection, and therefore of no value. I would be happy to provide the inquiry with details and examples of routine but serious breaches of clause 3.2 (a), (b), (c), (d), (e), (f), (g), (i) and (k) by the Crown.

## 6. Summation

Given the public nature of the submission process and the very broad scope of the Committee, I have tried my best to restrict these submissions. I believe that the allegations I have raised are significant and affect many hundreds of police officers and their families. Anecdotally, there is at least one suicide of a former police officer which appears to have occurred (at least in part) as a result of the frustration of that officer in respect of his dealings with the workers’ compensation system and the insurer EML. I know some of the Committee will be aware of whom I speak, however for the sake of his family I choose not to mention his name.

I appreciate very greatly the opportunity to advocate on behalf of my police officer clients, and the broader general community of former NSW Police men and women. In order to extrapolate upon these submissions, I would respectfully request the opportunity of providing evidence at the upcoming hearings. Prior to that time, if the

<sup>10</sup> <http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>

<sup>11</sup> *Sebel Products v Commissioner of Customs and Excise* (1949) CH 409.

<sup>12</sup> See [www.abc.net.au/pm/content/2014/s4118285.htm](http://www.abc.net.au/pm/content/2014/s4118285.htm)

<sup>13</sup> <https://www.childabuseroyalcommission.gov.au/getattachment/e5c0b90a-fdc4-41ab-97fc-10804fb73043/17-Model-litigant-approaches>

Committee seeks clarification, or if I can be of further assistance please not hesitate to contact me.

Yours faithfully  
**Specialist PTSD & Injury Lawyers**

**John Cox**  
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Accredited Specialist in Personal Injury Law