

**Submission  
No 16**

**STATUTORY REVIEW OF THE STATE INSURANCE AND  
CARE GOVERNANCE ACT 2015**

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

**Date received:** 15 November 2017

---



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: Injury:PWj1413571

15 November 2017

The Hon. Shayne Mallard MLC  
Committee Chair  
Standing Committee on Law and Justice  
Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Mr Mallard,

**Review of the *State Insurance and Care Governance Act 2015***

The Law Society welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice ("Standing Committee") in relation to its statutory review of the *State Insurance and Care Governance Act 2015* ("the Act"). This submission has been prepared on the basis of input from the Injury Compensation Committee, whose members represent workers, scheme agents, self-insurers and employers - key stakeholders in the workers compensation scheme. The Law Society would be pleased to assist the Standing Committee by providing oral testimony to supplement this submission.

On 27 October 2017, you provided clarification by email to all stakeholders that this statutory review relates only to the Act itself and not the manner or effectiveness of the schemes and organisations established by it.

The Law Society is of the general view that the policy objectives of the Act remain valid, but that inherent deficiencies in the Act have resulted in or perpetuated inadequacies in relation to the workers compensation system in NSW.

It is the Law Society's position that issues of concern in the workers compensation system are inextricably intertwined with the terms of the Act, and that those issues fall

within the remit of the Standing Committee's statutory review. We have adopted this approach in our submission below.

### **Policy objectives of the Act**

The Law Society notes that the Act does not provide for any specific policy objectives, and it is the view of the Law Society that the Act would benefit from a clear statement of policy objectives. However, from the supporting material<sup>1</sup>, the Law Society considers the relevant 'policy objectives' of the Act include:

- a) Avoiding conflicts of interest in the organisations responsible for the workers compensation scheme;
- b) Creating clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services;
- c) Creating a structure which is transparent and accountable;
- d) Creating organisations which are customer-centric, streamlined and efficient; and
- e) Making insurance structures in NSW easier to understand.

### **Avoiding conflicts of interest in the organisations responsible for the workers compensation scheme**

It is the view of the Law Society that avoiding conflicts of interest in the organisations responsible for the workers compensation system and the delivery of the scheme of benefits, including the creation of defined structurally separated organisations, remain fundamental and integral policy objectives for the Act. As the Law Society has previously submitted (in its submission to the Review of the exercise of the functions of the WorkCover Authority of NSW dated 28 January 2014), creating appropriately separated organisations is integral to ensuring fairness, transparency and accountability in the workers compensation system.

In 2014, the Law Society strongly submitted that the functions of the Nominal Insurer should be separated from the other functions then performed by WorkCover to avoid conflicts of interest. The Act seeks to institute formal separation of those functions, establishing

---

<sup>1</sup>Policy objectives obtained from the Second Reading Speech for the Bill on 5 August 2015, by Mr Dominic Perrottet MP, then Minister for Finance:  
<https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLA/316/2R%20Workers%20Compensation%20and%20cognate.pdf>

- icare (ICNSW) to provide services for the Nominal Insurer and to other insurance and compensation schemes;
- the State Insurance Regulatory Agency (SIRA) as regulator of NSW government insurance schemes; and
- SafeWork NSW as work health and safety regulator.

We welcome the steps taken in the Act. However, there remain conflicts in the organisations responsible for administering the workers compensation system.

The Law Society is concerned that SIRA plays a continuing role as merit reviewer under the workers compensation system, as reformed in 2012. As the Law Society submitted to the First Review of Workers Compensation Scheme, *“reviews to a division of SIRA do not satisfy the necessary requirements of a fair and transparent dispute resolution model, namely impartiality, independence and integrity.”* When considered against the Council of Australian Tribunals’ International Framework for Tribunal Excellence, the merits review process rates low against nearly all the nominated independence measures – particularly in relation to independence of management, funding, and efficacy of power. The Law Society maintains its previous submission that the regulator should not be involved in any form of dispute resolution when its primary function is to regulate the insurance scheme.

The Law Society does however note that the Government has commenced a review of workers compensation dispute resolution arrangements which is considering a number of issues. The Law Society submits that this review should consider the conflict of interest issue identified above as part of the review. The results of that review should then inform relevant amendments to the Act and other relevant legislation.

### **Creating clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services**

The Law Society submits that operational separation between the provision of government insurance services and the regulation of those services remains an important policy objective for the Act.

Whilst the Act legislates a separation of the functions, the Law Society is of the view that this separation is not appropriately maintained in practice. As a result, the separation of functions is often unclear or not apparent. For example, it has been the case that (in the

absence of timely guidance from SIRA), icare has issued its own guidance on various aspects of the scheme for the use of insurers. The result of this is that, despite apparent structural separation, the roles of icare and SIRA become confused and service providers can be uncertain as to where to obtain definitive guidance on the scheme. This operational confusion undermines the statutory separation between these agencies.

The Standing Committee should consider what further steps could be taken to ensure that the statutory separation of these agencies is reflected in their operation.

### **Creating a structure which is transparent and accountable**

The Law Society is of the view that creating a workers compensation system that is transparent and accountable is fundamental to the efficient and effective operation of the scheme. However, the Act has been insufficient to ensure that this occurs in practice.

#### *Lack of transparency and accountability in the merits review and dispute resolution processes*

The Law Society is of the view that SIRA's operation has not been appropriately transparent or accountable in the conduct of its dispute resolution functions. This concern is demonstrated, by way of example, by the lack of information available in relation to outcomes from the merits review process. The Law Society notes that since September 2014 only 18 decisions have been published to the SIRA website<sup>2</sup>, even though SIRA has finalised approximately 700 merit review applications each calendar year since its inception<sup>3</sup>. This low number of published decisions stands at odds with the SIRA Dispute Resolution Services publication "A guide to Workers Compensation Merit Reviews", published in September 2017, which notes that that "The Authority is committed to the publication of merit reviews on the SIRA website..."<sup>4</sup>, and that "the publication of merit reviews is to enhance transparency, accountability and for education purposes..."<sup>5</sup>. The Law Society considers that the failure of SIRA to adhere to its own public commitments highlights the inadequacy of the Act in its current form to deliver accountability and transparency to the scheme.

---

<sup>2</sup> SIRA, "Merit Review Notable Decisions" - <https://www.sira.nsw.gov.au/disputes/workers-compensation-disputes/work-capacity-disputes-not-used/Examples-of-merit-review-decisions>

<sup>3</sup> SIRA Annual Report 2015/2016, at page 22

<sup>4</sup> SIRA Dispute Resolution Services – A Guide to Workers Compensation Merit Reviews (September 2017) at 8.20

<sup>5</sup> *ibid* at 8.21



### *Lack of transparency and accountability in consultations with stakeholders*

The Law Society is of the view that neither SIRA nor icare have been sufficiently accountable or transparent in their consultations with stakeholders, and that both organisations' engagements with stakeholders have been inadequate. The lack of transparency can be seen in the number of reviews identified in the Government's response to the First Review of the Workers Compensation Scheme<sup>6</sup>. That response identifies a number of reviews as currently being undertaken, which (as far as the Law Society is aware) have not been the subject of public consultation.

### **Creating organisations which are customer-centric, streamlined and efficient**

It is the Law Society's view that the characterisation of organisations being 'customer-centric' is not appropriate for a statutory scheme like workers compensation. The relationship that exists between claimants, insurers and employers and the relevant organisations they deal with is not one of a 'customer' seeking a service. Rather, in the case of SIRA and SafeWork, the organisation is a regulator dealing with a regulated organisation, or a claimant, under the regulated scheme. The characterisation of a claimant in particular as a 'customer' ignores the fact that a claimant cannot simply 'take their business elsewhere' if they are dissatisfied with the level of service provided to them. In the case of icare, the relationship between an insurer and the insured employer may be closer in character to a customer relationship, but this is modified by the role of icare as the sole scheme agent.

The Law Society submits that this is not 'social insurance' where compulsory contributions are made to enable state assistance for matters such as sickness and unemployment, but that rather it is an insurance scheme where employers pay premiums for the benefits of their employees. Management of the scheme is conducted by the public financial corporation icare, and regulated by SIRA. The system is adversarial by its very nature, and premiums have to be paid for the benefit of both employers and employees.

As such, using the language of 'customers' and 'consumers' for the delivery of business objectives of both SIRA and icare is misguided, and the interchangeable use of terms by these organisations creates confusion for both injured workers and employers.

---

<sup>6</sup> Minister for Finance, Services and Property, *Government Response to the Report of the Legislative Council Standing Committee on Law and Justice on the First Review of the Workers Compensation Scheme*, 27 September 2017, <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/6105/Government%20response%20-%20Review%20of%20Workers%20Compensation%20scheme.pdf>

## **Making insurance structures in NSW easier to understand**

The Law Society is of the view that this continues to be a valid objective for the Act, but that due to the issues highlighted above, the Act in its current form has not achieved this policy objective. In particular, by importing the terms of underlying legislation, the Act does not address the inherent and wide-ranging complexity of the workers compensation scheme. The establishment of separate agencies, without further consideration of the underlying complexity of the scheme, is not sufficient on its own to make those insurance structures easier to understand.

In general, the Law Society supports the policy objectives of the Act that have been identified (with the one exception noted above). However, in the experience of our members the structural changes brought about by the Act have been insufficient and require revision. Unless amendments are made to address the substantive issues above, the Act will remain ineffective in achieving these objectives.

The Law Society thanks you for the opportunity to provide a submission and looks forward to providing further assistance by way of oral evidence in due course.

Should you have any queries with regard to this submission, please contact Law Society Principal Policy Lawyer,

Yours sincerely,

Pauline Wright

**President**