

**Submission  
No 7**

**INQUIRY INTO 2018 REVIEW OF THE WORKERS  
COMPENSATION SCHEME**

**Organisation:** Police Association of New South Wales

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# Police Association of NSW Submission

Legislative Council Standing Committee on Law and Justice

2018 review of the workers compensation scheme



*The Police Association of New South Wales (PANSW) represents the professional and industrial interests of approximately 16,500 members, covering all ranks of NSW Police Officers in New South Wales.*

*This submission is written on behalf of our members.*

The Police Association of New South Wales notes the Committee resolved to 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 *The First review of the workers compensation scheme*.

The Police Association appreciates Recommendation 16 was made with the intention to improve the experience for injured people involved in the workers compensation dispute resolution system (WC DRS) or the CTP dispute resolution system (CTP DRS).

The *First review of the workers compensation scheme* heard considerable evidence regarding the difficulty injured workers and even legal practitioners have navigating the excessively complicated system.

The Police Association's members were exempt from the 2012 changes and have therefore not experienced the same degree of complexity as that created by the 2012 changes.

This is due to a number of differences between the provisions that apply to exempt and non-exempt workers. In relation to the dispute resolution specifically, a key factor was exempt workers' continued access to the Workers' Compensation Commission for all disputes, compared to non-exempt workers' being subject to the bifurcated dispute resolution system.

Despite police officers accessing a dispute resolution system that is more satisfactory than other workers, accessing workers compensation and dealing with the insurer remains a complex and stressful period for injured police. Undergoing the claims process occurs at a time when they are already suffering from physical and/or psychological injury, increasing the difficulty of that process. For many officers, the rigours of the process exacerbate their injuries or cause further pressures on their health and wellbeing.

The Police Association would therefore support any proposal that would improve the experience of injured police officers, and injured workers in general.

We do not believe the proposal to consolidate the WC DRS and CTP DRS would improve the experience of injured police or injured workers in general.

Therefore, the Police Association does not support that proposal.

We do acknowledge that the CTP DRS and WC DRS could be improved, but believe separate reforms, tailored to the needs of injured persons within the two distinct legislative frameworks, would be of more benefit than consolidation.

## Reasons the PANSW Opposes Consolidation

Nothing as yet put to the Police Association demonstrates there is any inherent benefit in the two schemes being consolidated.

The only model as yet put forward was contained in the Discussion Paper – *Improving workers compensation dispute resolution in NSW* – released by the Department of Finance, Services and Innovation (*the Discussion Paper*). That model would have exacerbated difficulties faced by workers under the current system (both for workers affected by the 2012 changes, and exempt workers).

That model was opposed by the WIRO, unions, and the legal profession.

We have attached our response to that *Discussion Paper* for the Committee's convenience, and would also identify the response from Unions New South Wales as worthy of consideration by the Committee.

If a model for consolidation that differs from that contained in *the Discussion Paper* is put forward, we would not inherently oppose that, and would consider the merits of the model. However, it is not apparent why consolidation of the two systems would of itself improve the experience for injured workers.

The *First review of the workers compensation scheme* heard evidence regarding serious deficiencies in the WC DRS, and the provisions determining entitlements more broadly. Some of those deficiencies in the WC DRS will be improved by the reforms announced in May 2018.

The CTP DRS contains some key characteristics similar to those which were highly criticised in the *First review of the workers compensation scheme*. For example, the CTP DRS replicates the internal review/merit review model subject to significant criticism and ultimately reform in the WC DRS. The merit review is conducted by SIRA, which does not satisfy the COAT *Tribunal Excellence Framework* principal of independence. The Workers Compensation Commission is a more appropriate tribunal for resolving workers compensation disputes.

We also understand there are problematic limitations on legal assistance and legal costs within the CTP DRS that we would be highly concerned about if that were to apply in the WC DRS.

Given the CTP DRS was so recently reformed, the Police Association anticipates there could be some reluctance to change the system again so soon after that reform. The Police Association is therefore concerned that the proposal to consolidate the two systems will in practice amount to little more than the CTP DRS model being imposed on injured workers. Given the model proposed in *the Discussion Paper*, there is some justification for that concern.

Assuming that concern is not well-founded, and that the consolidation was implemented by the creation of a tribunal that replicated the Workers Compensation Commission, rather than the CTP DRS, we are still unconvinced that consolidation represents a preferable course of action compared to making standalone, tailored improvements to each system separately.

The Committee, in its *Report - First review of the workers compensation scheme*, acknowledged at para 5.89 the two systems have significant differences. The feedback from solicitors who represent our members indicates these differences are incompatible with any perceived efficiencies in consolidation.

They do not share committee's hope that common issues provide an opportunity for an effective consolidated system.

The Workers Compensation Commission is a very effective tribunal. Of course, the claims process and dispute resolution process within the workers compensation scheme creates considerable challenges for injured workers, but this is due to the legislative framework, in particular the changes made in 2012. For its part, the Workers Compensation Commission is very effective and the preferred source of conciliation and arbitration for injured workers. It is perceived as fair and independent, and facilitates a far more timely resolution than would occur without its involvement.

Grafting on an entirely separate scheme to the Commission could adversely affect the Commission's ability to provide effective and timely resolution.

The two schemes have different legislative frameworks, definitions, thresholds, liabilities and entitlements. Consolidating the two schemes into one tribunal would likely require separate divisions within the tribunal, 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.

The Police Association believes it is a preferable approach to identify any further improvements to each scheme, and make those amendments specifically designed for each, without consolidation.

Any further improvements to the WC DRS scheme not completed by the reforms announced May 2018, should be made promptly to workers compensation legislation, without the added difficulty and implementation-delay necessary in consolidation.

As identified by many stakeholders including unions, WIRO, and the legal profession, the greatest opportunity to improve the operation of the workers compensation scheme is reform of the restrictive and complex means of determining liability and calculating entitlements, such as:

- The expiration of compensation for treatment, services or assistance,
- The definition of suitable employment,
- PIAWE calculations,
- The restriction to one claim for permanent impairment compensation, and
- The restriction to one medical assessment.

This may be beyond the scope of this Review, but many stakeholders consider these reforms would be far more beneficial than consolidation with the CTP DRS.

## Key features of an effective, user-friendly workers compensation dispute resolution system

Maintaining our opposition to consolidation, if this Committee does recommend progressing with the consolidation proposal, there are key components of the WC DRS that must be maintained to minimise the risk the system will become less effective and more difficult for injured workers.

### Access to the Workers Compensation Commission

It is crucial that the decision maker for all disputes is an independent tribunal that meets the standards set out in the COAT Tribunal Excellence Framework.

The Workers Compensation Commission (WCC) is the most appropriate tribunal to fill this role in the WC DRS, and this must be maintained in any consolidation process.

Exempt workers retained access to the WCC as the final arbiter for all disputes. That is a far more satisfactory resolution process than the one imposed on workers seeking review of a work capacity decision, and is far more desirable than the current CTP DRS processes.

The reforms announced in May 2018 re-established access to the WCC to resolve all disputes for workers affected by the 2012 changes.

The WCC should be maintained as the independent body responsible for all dispute resolution.

SIRA should not be performing this function, as the conflict of interest between such a function and SIRA's other roles make that allocation entirely inappropriate.

### Complaints about insurers and claimant support continue to be WIRO function

WIRO does not provide services to workers exempt from the 2012 changes. Police Association members therefore cannot access WIRO services, and the Police Association does not have direct experience of the benefit of those services.

However, based on the feedback from other worker representatives, it appears WIRO has been very effective in supporting workers through the process, handling complaints about insurers, and resolving disputes before they escalate to more time/resource consuming forms of dispute resolution.

WIRO's Solutions Group is repeatedly identified as the driver for early resolution.

This was demonstrated in the responses to *the Discussion Paper*, and the subsequent reforms announced by the Department of Finance, Services and Innovation in May 2018.

The *Discussion Paper* canvassed options which would have drastically reduced the functions of WIRO.

This was met with widespread opposition from workers representatives.

The subsequent announcement of reforms identified WIRO as the most appropriate provider of claimant support by establishing that all enquiries/complaints from injured workers will go to WIRO.

The reforms identified WIRO as the most appropriate provider of claimant support. The changes will ensure WIRO will be the sole provider of claimant support, and will continue to administer the Independent Legal Aid and Review Service (ILARS).

If any consolidation proposal progresses, WIRO should remain responsible for claimant support, for all dispute categories within the expanded personal injury jurisdiction, and all categories of workers or motor vehicle accident victims.

In taking on this additional coverage, WIRO should be provided with the additional funding necessary to cover any increase in case load.

### System oversight by WIRO

WIRO's functions includes the following:

- (c) to inquire into and report to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister,

In handling complaints about insurers, providing claimant support and resolving disputes, WIRO has an important perspective of the workers compensation system which the Regulator does not have.

WIRO's important oversight function must be maintained in any reformed scheme.

### Internal review should not be mandatory

Internal review by the insurer may result in resolution of disputes without the need for proceedings to commence.

It should therefore be an option available for dispute resolution.

However, it should not be a mandatory step. The additional step inevitably results in a delay when an internal review is unlikely to resolve the dispute.

### Ensure there is no bifurcation in the system

The most immediate reform available to improve the WC DRS was to ensure workers did not have to categorise the type of decision being made in order to identify the steps they needed to take to challenge it or resolve a dispute about it.

Workers subject to the 2012 changes had significant difficulty due to the differing pathways to review a liability decision or work capacity decision, coupled with restrictions on accessing legal services.

Changes announced in May 2018 will ensure access to the Workers Compensation Commission for review of all types of decision.

Any changes recommended by this Committee regarding consolidation should ensure there is no differentiation between categories of decisions (within the same scheme) and how the decision type determines DRS pathways.

All decisions should be subject to review by the Workers Compensation Commission.

### Claimants' Legal Costs

Workers compensations entitlements are complex, and the outcomes of disputes are highly difficult to predict, even for highly qualified legal practitioners.

Without legal representation, it is extremely difficult for many workers to determine and pursue their entitlements. All injured workers should be able to obtain independent legal representation to determine their rights and pursue their entitlements.

An injured worker is likely to require legal representation at the same time their financial security is under significant stress, due to their injury, medical needs, and time away from paid employment.

Workers should not be left in any state of uncertainty regarding the funding of legal representation, and the costs they may have to bear. To limit legal assistance access would only discourage workers from pursuing their entitlements. If workers were to bear the costs themselves, they may have no choice but to simply give up on their entitlements, out of fear they would be unsuccessful, thereby being denied compensation and be left with the cost of their legal representation.

Related costs, such as obtaining medical reports and incidental expenses, must also be covered.

Access to legal costs, paid for via the Insurance Fund, must be provided for in any consolidated scheme.

Workers subject to the 2012 changes and exempt workers have access to legal costs/assistance paid from the Insurance Fund, albeit via different procedures.

### Pre-2012 legal funding

Exempt workers' legal costs are met according to the pre-2012 model. If the exempt worker challenges the insurer's decision successfully, they are awarded legal costs that are paid from the Insurance Fund.

If the exempt worker is unsuccessful, they are protected from having to pay costs (unless the proceedings were determined to be frivolous or vexatious, fraudulent or made without proper justification), but their legal representative is not paid for their services.

### 2012 legal funding

For workers subject to the 2012 changes, legal costs may be met by the Independent Legal Assistance and Review Service (ILARS). Lawyers that are approved by WIRO may apply for grants of funding to provide legal advice and assistance to injured workers pursuing workers compensation entitlements. The grant of assistance will cover the cost of medical reports and clinical notes, as well as providing funding, in appropriate cases, for the lawyer to obtain further reports consistent with the proper conduct and preparation of the claim. ILARS funding is only granted for filing applications in the WCC where ILARS is satisfied the worker has an arguable case.

We understand there are some restrictions on the ability of legal practitioners to be paid for services relating to some disputes (merit reviews of work capacity decisions) under the 2012 changes. Regulatory changes in 2016 somewhat alleviated these restrictions, although legal assistance remains unavailable for the first internal review step.

All such restrictions should be removed, and if any consolidated proposal is progressed, these restrictions should not be replicated in the consolidated scheme.

### CTP legal funding

The CTP model for legal funding raises significant access to justice concerns. The *Discussion Paper* proposed some legal assistance models which, although scarce in detail, appeared to be based on the CTP funding model, and/or significantly reduce access to legal assistance. One example in the *Discussion Paper* is the proposal of “a more targeted ILARS”, administered by SIRA rather than WIRO.

Those proposals attracted considerable opposition from WIRO, the legal profession, and unions.

We do not recommend imposing the CTP costs scheme on injured workers if any consolidation progresses, other than one specific exception described below.

### Recommended costs scheme for a consolidated DRS

As ILARS is not available to our members, the Police Association does not have direct knowledge of ILARS, but based on feedback from other unions and solicitors who represent our members and other workers, we understand ILARS is a preferable model to the pre-2012 costs model.

The pre-2012 model can result in legal representatives not being paid for their services. Given the unpredictability of workers compensation decisions, in particular assessments of whole person impairment, legal representatives may be reluctant to provide legal services to injured workers, or may be placed in a position where they are cognisant of their own financial interests, not just the interests of their client.

The ILARS model ensures injured workers can obtain independent legal advice from legal practitioners who are being paid for their services.

In any consolidated system, we recommend the ILARS model be replicated over the pre-2012 model.

We did receive feedback regarding a specific issue with the ILARS model applying to motor accident injury claims in a consolidated scheme. We understand the ability to contract out of the costs provisions for motor accident claims over \$75 000, as is currently provided for by the *Motor Accident Injuries Act 2017*, will need to be retained if a consolidated scheme adopts an ILARS funding model. Claims in which settlements/awards reach this amount may require more extensive work by legal practitioners, the costs of which would not be sufficiently met by ILARS funding.



We therefore request, if consolidation does progress, the Committee consider recommending an ILARS funding model, with the retention of the provisions of the *Motor Accident Injuries Act 2017* identified above.

### Insurers' Legal Costs

Workers' who seek to pursue their entitlements should not be subject to the risk of having to pay the insurer's legal costs.

Workers' compensations entitlements are complex, and the outcomes of disputes are highly difficult to predict, even for highly qualified legal practitioners.

Even when an outcome is not easily predicted, it is still appropriate for an injured worker to pursue their entitlements (unless their claim is frivolous vexatious, fraudulent or made without proper justification).

Therefore, if a costs order against the claimant is available, the risk in such an unpredictable scheme effectively prevents injured workers from taking appropriate steps to pursue their entitlements.

If any model for consolidation is further considered, there should be no availability of an order the claimant pay the insurer's costs.

This is currently the case in the WC DRS.

### Insurers' notices

Insurers' notices should:

- Be clear, simple, and understandable for injured workers,
- Provide the reasons for the decision in simple form,
- Inform the claimant of all DRS pathways they can utilise if they wish to dispute the decision, including the Workers Compensation Commission, and
- Inform the claimant of all support services they can access, such as WIRO, and legal assistance.

### Access to insurer documents

Injured workers should be provided with the medical reports held by the insurer.

This would save time and expense in disputes, and also inform legal advice regarding the merits of claims.

## Conclusion

The Police Association does not support the proposal to consolidate the WC DRS and the CTP DRS.

We do not believe such a consolidation would represent any substantive benefit to injured workers.

Improvements to the WC DRS and CTP DRS would be better made through reforms to those specific systems, tailored to meet the needs of injured persons within those distinct legislative frameworks.

If the consolidation is progressed, any resulting personal injury DRS and tribunal must have the key features identified in this submission.

We thank you for the opportunity to make a submission, and are happy to provide any further information.