

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

Organisation: Australasian Association of Medico-Legal Providers

Date Received: 17 June 2018



AAMLPLP Advocacy Committee

Submission to the NSW Legislative Council Standing Committee on Law and Justice

“2018 review of the workers compensation scheme”

Submission Date: 17th June, 2018

The Australasian Association of Medico Legal Providers (AAMLPLP) welcomes to opportunity to provide a submission to the NSW Standing Committee on Law and Justice in its review of the NSW Workers Compensation scheme. As the representative voice of the medico-legal services provider industry nationally, the AAMLPLP has a strong record of working constructively with all stakeholders to set industry standards through the review, development and promotion of appropriate industry guidelines and protocols.

The AAMLPLP understands the committee is calling for submissions on the feasibility of a consolidated personal injury tribunal for both Workers Compensation and Compulsory Third Party dispute resolutions and in particular, a preferred model.ⁱ

By way of background

The Australasian Association of Medico Legal Providers (AAMLPLP) is the peak body for medical, health and business professionals who provide expert opinion to Insurer groups, the Legal industry, Government departments and regulators / scheme administrators.ⁱⁱ

The AAMLPLP members as Medico Legal Providers (MLP's), provide administrative management and professional support to specialists who are required to be 'witness box ready' while also maintaining strict privacy and data control standards in an environment of continually changing regulatory and procedural conditions. One should not underestimate how complex, time consuming and onerous these requirements can appear to those with little or no expertise in this area. Therefore, the services that MLPs provide includes maintaining strict privacy and data control standards for health professionals undertaking medico legal assessments, which are crucial in supporting the provision of medico legal consultation examinations and reports to the scale and complexity of assessments required, and is a significant factor in supporting a Specialist doctor to undertake medico legal practice IMEs or not.

The range of end-client services provided by AAMLPLP members is typically classified as a “medico legal assessment”, conducted by a registered Independent Medical Examiner, which in broad term covers a range of second opinion or expert witness reporting services associated with a medically related insurance

claim or a related investigation of the facts in a medico-legal claim. The key outcome for a medico legal assessment is to provide expert medical opinion as may be relevant regarding: ⁱⁱⁱ

- the nature / history of the incident/accident;
- the diagnosis of the nature and extent of the condition or injury;
- the relationship of any such condition or injury to the incident/accident (evidence that indicates liability);
- the therapeutic or other treatment provided and required;
- the prognosis for recovery from the condition or injury (evidence of fitness for work or work capacity);
- the effect (in both short and long term) of the condition or injury on the client/patient in relation to employment and/or enjoyment of life (evidence of Whole Person Impairment: WPI), and
- in relation to a claim of alleged medical negligence, an opinion in relation to whether the treatment and/or advice given departed from proper professional standards having regard to relevant definitions and terms of legislation and other matters of law as explained by the referring legal practitioner.

Over the past 30 years, Independent Medical Examiners and their medico-legal providers (AAMLPLP members) have continued to develop a crucial role in the adversarial at-fault and no-fault insurance systems for Workers Compensation, Motor Vehicle Accidents, Medical Negligence, Public Liability and Life Insurance in respect to protecting the integrity of each scheme and system by providing expert witness impartiality and independence.

Specialist medical practitioners, engaged as Independent Medical Examiners (IMEs), are the only medical practitioners qualified to provide expert opinion as to a claimant's injury in what can be a complex and sensitive process. The range of opinion can include objective analysis of a claimant's work capacity through to impairment assessment which is integral to the viability and confidence of every personal injury insurance and compensation scheme, including the NSW workers compensation and compulsory third party motor accident schemes as amended.

Current situation

Recommendation 16 of the Standing Committee on Law and Justice report (March 2017) calls on the NSW Government to consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in NSW.

While the AAMLPLP's position on the establishment of such a jurisdiction is neutral, it is firmly of the opinion that careful consideration is given to the central and critical role that Independent Medical Examiners can and must have to ensure the integrity of a consolidated personal injury tribunal.

Safe Work Australia publishes a yearly report across all workers compensation jurisdictions in Australia. The most recent report 2015-16 outlines: ^{iv}

- Page 2: there were 104,770 complex claims made. This figure is a 'year on year' figure which provides an indication of the complexity of the personal injury sector

- Page 19: outlines the nature of the injuries and diseases, which add further to the requirement for experts who have specialist qualifications and experience with these specialties;
 - Traumatic joint/ligament & muscle/tendon injury
 - Wounds, lacerations, amputations & internal organ damage
 - Musculoskeletal & connective tissue diseases
 - Fractures
 - Burns
 - Intracranial injuries
 - Injury to nerves and spinal cord
 - Mental disorders
 - Digestive system diseases
 - Skin and subcutaneous tissue diseases
 - Nervous system and sense organ diseases
 - Respiratory system diseases
 - Circulatory system diseases
 - Infectious and parasitic diseases Neoplasms (cancer)
 - Other diseases

Additionally, Safe Work Australia is working to develop standards for Whole Person Impairment (WPI). It is well established by credible authorities working in the medico legal area that many areas of dispute relate to the degree of WPI.

- Permanent impairment (<https://www.safeworkaustralia.gov.au/workers-compensation>)
 - When someone sustains an injury it may result in a permanent impairment.
 - A prerequisite to determining the level of permanent impairment is the understanding that it shouldn't be decided until the claimant has improved as much as is possible; that is when their impairment has become stable or isn't likely to improve despite medical treatment; the industry term is Maximum Medical Improvement or MMI
 - In addition to the assessment principles laid out in the AMA (American Medical Association Guides to the Evaluation of Permanent Impairment), scheme legislation also provides substantial guidance on how to determine whether or not impairment is permanent.

Compensation and recompense is unlikely to be either fair or objective where an independent specialist doctor's opinion as to mental or physical capacity is not sought. Indeed, one can argue that the integrity of any compensation scheme relies as much on perception as it does reality and, therefore, independence and objectivity should be absolutely paramount.

Within current schemes, there is an increasing focus on cost reduction, overall scheme performance and resultant premium reduction. The AAMLPLP welcomes such initiatives to the extent where the overall scheme delivers to the injured or ill person an improved experience and outcome. However, there is also a growing argument that in fact many schemes are engaging in 'scheme shifting' rather than true outcomes, where due to time lines (2 to 5 years) or complexity of disputes, injured or ill people are 'shifted' across to other schemes, mostly publicly funded such as Medicare, Centrelink and NDIS.

There have been substantial changes to entitlements, the claims process and claims dispute process which in turn impact on the matters that are now dealt with by the Workers Compensation Commission. The 2012 Act established an independent external complaints resolution mechanism through the appointment of an independent statutory office, the WorkCover Independent Review Office (WIRO) one of whose responsibilities is the administration of the new Independent Legal Assistance and Review Service. ^v

While the proposal of a 'one stop shop' for dispute resolution is within the Committees brief this should not be implemented to the detriment of past reforms such as the development of WIRO/ILARS and the ongoing improvement of the medico legal assessments under this body. The AAMLPLP membership records here its acknowledgement of the valued service provided by WIRO office bearers and the private sector lawyers who undertake the ILARS referrals, expressing our support for continuation of this role and expansion of its role independently of that of the Workers Compensation Commission.

Additionally, there seems to be a rise in the growth of schemes bureaucracies who believe they can make effective dispute decisions by what AAMLPLP can state as the 'dumbing down' of expert decision making, through the use of less skilled claims administrators or health practitioners in the dispute resolution process who, while they may be generalists, do not have the required expertise to provide expert assessment and advice on the specific nature of the injury, its management and impact on return-to-work or other employment.

It is unsurprising that a scheme that increasingly operates without any independent and impartial third party medical expertise will inevitably lead to disillusion and mistrust of the scheme. As such, it could be argued that the stated aim of the iCare *"to deliver world-class insurance and care services to the businesses, people and communities of NSW"* is not being met, at least as it relates to injured workers and their families.

The NSW worker's compensation scheme has come under increasing pressure with the argument the balance has gone too far, even from within the current NSW Liberal Party. The Labour Party is on record to promote if they win the next state election, they will make significant changes due to their quoted 'unfairness within the current system'. The recent changes to the worker's compensation scheme announced last month will allow all injured workers who dispute the amount of money they receive while off work to seek legal assistance. These changes to the workers compensation system are a result of injured workers complaining and struggling with a complicated and confusing system that clearly created a power imbalance whereby insurers unilaterally determine the payout for workplace injuries, with the claimant having little or no ability to challenge.

There can be no confidence that the injured worker's best interests are being served if there is no agreement on the fundamental elements of the claim i.e., the nature and extent of the injury, and the myriad of complex issues around the timing and ability of that claimant to return to work. Only with the intervention of an IME can ALL interested parties have confidence that the scheme is meeting its aspirations to *"create the best possible outcome for every person and organisation we serve, delivered through a fair, respectful and empathetic experience that is focused on the person not the process"*.

Proposed situation

It is accepted that under any compensation scheme, disputes of fact, law and interpretation may arise. AAMLPLP proposes that it will only be through the use of independent expert medical advice within a fair and transparent dispute resolution process that the solution for appropriately managing disputes is found.

Work Safe Australia clearly advocates for a consistent use of the AMA guidelines. It is only medical specialists, who have undergone training and accreditation in the use of the AMA guidelines, that can deliver truly independent and expert medical assessments for such disputes. AAMLPLP contends that Independent Medical Examiners, who have attained appropriate accreditation in the AMA guidelines, play a significant role in the dispute resolution process of any new dispute resolution system due to their expert, independent and transparent role which will bring a stronger level of engagement and fairness to such disputes. Therefore the AAMLPLP proposes that reform of the IME System include:

- each party should have a right to choose its own independent medical examiner.
- any revised guidelines provide sufficient details on the use of independent medical examiners, and recognise on a National basis the accreditation of such expertise and the reporting requirements for Whole Person Impairment (WPI) assessments.
- reform to ensure full disclosure of all medical information by both parties to a dispute, to reduce delays and facilitate early resolution of matters where possible.

Additionally, since there is a potential imbalance of power for an injured or ill person seeking dispute resolution against a financially powerful insurer, there must be legislated entitlement for individuals to have opportunity to have appropriate legal advice and representation at all stages of the dispute process.

We support the development of a single system for resolving personal injury disputes that is consistent with other jurisdictions in Australia and draw the Committees attention to the details recently summarised by Safe Work Australia (2017) identifying by each State/Territory their Dispute Resolution process (Table 2.9).^{vi}

The AAMLPLP would welcome the opportunity to work with all stakeholders in developing a new model for dispute resolution for both Workers Compensation and CTP.

Recommendations

- We support the development of a single system for resolving personal injury disputes that is consistent with other jurisdictions in Australia, particularly in regard to the use of expert medical witnesses.
- Any revised guidelines provide sufficient details on the use of independent medical examiners and recognise on a National basis the accreditation of such expertise and the reporting requirements for Whole Person Impairment (WPI) assessments.
- Reform should include legal requirement of full disclosure of all medical information by both parties to a dispute.
- That individuals making a claim for compensation under the workers compensation and/or motor vehicle accident scheme (as amended) have the capacity to be legally represented in any such disputes, including access to the ILARS scheme and WIRO under relevant amended legislation.

References

ⁱ MEDIA RELEASE 1 May 2018 - REVIEW OF THE WORKERS COMPENSATION SCHEME, NSW Legislative Council Standing Committee on Law and Justice QUOTE: "This review will investigate the feasibility of a consolidated tribunal, including where it should be located and what legislative changes are required, and recommend a preferred model to government." <https://www.parliament.nsw.gov.au/lcdocs/other/11307/Media%20release%20-%20announcing%20review%20-%202018%20review%20of%20the%20workers%20compensation%20scheme%20-%201%20May%202018.pdf>

ⁱⁱ The Australasian Association of Medico Legal Providers (AAMLPL) home page <http://www.aamlp.org.au/>

ⁱⁱⁱ MEDICO-LEGAL RELATIONS A RESTATEMENT THE LAW SOCIETY OF NEW SOUTH WALES AND AUSTRALIAN MEDICAL ASSOCIATION (NSW) LIMITED 1 March 2010
<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/065485.pdf>

^{iv} Comparison of workers' compensation arrangements in Australia and New Zealand (2016).
https://www.safeworkaustralia.gov.au/system/files/documents/1801/awcs_2015-16_report-20171023_v3_0.pdf

^v The Law Society of New South Wales. Fact Sheet: Workers Compensation
<https://www.lawsociety.com.au/sites/default/files/2018-04/792989.pdf> (accessed 14 June 2018)

^{vi} Comparison of workers' compensation arrangements in Australia and New Zealand (2017). Safe Work Australia 2017. NOTE: Refer Table 2.9: Dispute resolution process.
https://www.safeworkaustralia.gov.au/system/files/documents/1801/comparison-of-workers-compensation-arrangements-australia-new-zealand-2017_0_1.pdf

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New South Wales Law Reform Commission Consultation (Paper 16) Dispute resolution: frameworks in New South Wales. Published April 2014 <http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/ADR/Consulation-paper/cp16.pdf>