Submission No 6

INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Lawyers Alliance

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Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

2020 Review of the Workers Compensation Scheme

Submission to New South Wales Legislative Council

Standing Committee on Law and Justice

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide a submission to the NSW Legislative Council Standing Committee on Law and Justice in response to the Review of the Workers Compensation Scheme.

2. The ALA's NSW members are some of the most engaged in the workers compensation scheme. Our stated objective is to ensure a fair, sustainable and affordable workers compensation scheme that delivers fair outcomes and benefits for workers, focusing on genuine return to work and restoration of health without perversion by the arbitrary and capricious decisions of insurers.

3. The ALA would like to acknowledge the improvements made to the workers compensation scheme since the Standing Committee's first and second review of the scheme in 2016 and 2018. There have been a number of changes that have all been for benefit of the workers of New South Wales. In particular we would like to make mention of the positive changes to dispute resolution and pre-injury average weekly earnings (PIAWE).

4. This committee would be well aware of the changes to the dispute resolution system that commenced in December 2018. The Workers Compensation Commission's jurisdiction was expanded to cover both work capacity and liability disputes, which has been widely accepted with almost universal support. The change has reduced confusion, provided fairer outcomes and improved the overall efficiency and effectiveness of the dispute resolution process.

5. With respect to the PIAWE amendments, this committee would again be well aware of the confusion that stakeholders had previously described surrounding the practical impacts of the previous definitions. The ALA was pleased to be a member of a PIAWE working group that was created by SIRA pulling in representatives from a wide range of stakeholders with the goal of coming to mutual agreement as to how the simplified PIAWE should look. The end result is a simplified PIAWE that, at this early stage, appears to be working much better than the previous iteration and one that stakeholders have been able to take ownership in.

6. Although there have been some positive changes made to the scheme since the 2016 review, the ALA considers there are a number of areas within the scheme requiring urgent attention and reform. This submission will look at the following issues:

a) Access to justice for injured workers under the scheme;

b) Dispute resolution and settlement; and

c) Legislative drafting issues.

Access to justice for injured workers under the scheme

7. A fundamental principle for the success of any compensation scheme must necessarily be access to justice for stakeholders of the scheme. There are two significant issues that are currently creating an impediment to access to justice. Firstly, the way the current system operates by placing the whole person impairment (WPI) at the center of rights and settlements is locking injured workers out of benefits for what are arbitrary and capricious reasons. This had led to the term 'impairment is king' to be coined by those that practice in the field. Secondly, legal costs remain a significant issue that continues to loom as an increasing barrier.

8. As the ALA consists of legal representatives of injured workers our submission will be largely focused from that perspective, but we acknowledge there are access to justice issues that plague 'both sides of the fence' particularly with respect to costs of legal representation.

9. The ALA is concerned if these issues are not addressed then access to the NSW workers compensation scheme will restrict to such an extent that obtaining fair compensation for the injuries sustained at work will become almost impossible.

Nature of impairment test – 'Impairment is king'

10. Since the 2012 reforms the NSW workers compensation legislation has created a scheme where access to treatment, care and weekly payments are determined with respect to your level of whole person impairment. More particularly the amount of time that that you can access these benefits is determined by the level of whole person impairment or lack thereof.

11. The ALA considers it inherently unfair that we can look at an injured worker and tell them that they can no longer receive medical treatment, or no longer receive weekly payments, not because these things are not necessary or because they are not needed, but because their particular injury does not rate high when applying the tests set out in a book. That book is the American Medical Association Guidelines to the Evaluation of Permanent Impairment 5th

edition (AMA V). At this point in time it is worth providing some quotes from that book from Chapter 1- Philosophy, Purpose and Appropriate Use of the Guides:

> *'The whole person impairment percentages listed in the guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work…. '*
>
> *The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Worker is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is a highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with other factors as the worker's age, education and prior work experience to determine the extent of work disability….. '*
>
> *'An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others……An individual who develops rheumatoid arthritis may be disabled from work as a tailor but may be able to work as a child care aide. A pilot to develops a visual impairment, correctable with glasses, may be able to perform all of his daily activities but is no longer able to fly a commercial plane. An individual with repeated hernias and repairs may no longer be able to lift more than 20kg (40lb) but could work in a factory where mechanical lifts are available. '*

12. Just as the authors of AMA V say that WPI is not a predictor for work capacity, the ALA submits that it should not be used as test for determining entitlements. Doing so not only creates an inherently unfair system but has the side effect of encouraging the perverting of the natural course of behaviour of both insurers and claimants.

13. This can be illustrated this way. Following an injury an injured worker may return to work but still require treatment to continue to be able to fulfil their inherent task in their employment. This may be in the form of accessional physiotherapy, medication, gym programs, hydrotherapy etc. When that reimbursement of these expenses stops due to an arbitrary statutory cap on entitlements workers can find themselves in a difficult situation. If they can't afford to pay the treatment themselves their condition can deteriorate and they eventually end up stopping work. This in turn leads to the worker going back on weekly payments as their impairment increases, higher lump sum claims and potentially common law claims that otherwise would have been avoided if they could just continue to receive their treatment.

14. There is another more concerning side effect of the arbitrary cut of periods. The fear of entitlements being cut off can lead doctors and injured workers to try to bring forward treatment that might otherwise have been delayed. Some might see it is as better to have treatment at a less optimal time then to not have it all because it can't be afforded if workers compensation entitlements are removed at some time in the future. This can mean exposing injured workers to greater risks than necessary in surgery, increased impairments, increased lump sum claims and increased common law claims.

15. The converse is also true, a worker's entitlement to treatment can be extinguished either deliberately or inadvertently by decisions made by insurers. For example, as a worker reaches the end of their entitlement to treatment, an insurer's decision to decline treatment on the basis that it is not reasonably necessary can leave little to no time to challenge that decision and have the treatment. An example where these issues played out is *Air Electrical Pty Ltd t/as DJ Staniforth & Co v Mortimer* [2015] NSWWCCPD 18.

16. The ALA submits that the linking of medical treatment and weekly payments to impairment should be removed. A worker who is injured at work should be entitled to have the costs of their medical expenses covered so long as it is reasonably necessary. They should also be entitled to their weekly payments so long as the incapacity remains. We accept that this tends to create a tail in the system but you will find that later in the submission we touch upon the inability to 'settle' a claim and how changes to this aspect would remove that problem.

Access to legal representation under the scheme

17. The ALA has had the benefit of seeing the draft submission of the Law Society and echoes the comments made with respects to access to legal representation. The ALA supports the Law Society in its call to review Schedule 6 to the Regulation in its entirety, and to the indexation of fees under the Schedule 6 as an interim measure.

18. The brevity of the submission on costs should not be confused with lack of priority or support but should be looked at as a credit to the Law Society on their submission on this point.

19. The only other thing that we would add is that rural NSW is particularly vulnerable to being deprived of adequate or any legal representation if the legal fees are not kept up to pace. The NSW workers compensation scheme is incredibly complex and requires a lot of specialisation. As the system becomes more complex and less profitable the practitioners that tend to drop

out of the market are those that operate general practices. Larger firms that are specialised and can achieve economies of scale on their knowledge and work can afford to absorb the losses more readily. The large firms are based in Sydney and perhaps Newcastle and Wollongong. The rest of the state is serviced by local practitioners doing generalist work for the community. As these people struggle to keep up with the complexity of the work they are the first to drop out to spend their time doing more profitable work.

Dispute resolution and settlement

Settlement

20. There is an absence in the current scheme of a working system or mechanism by which a worker can exit the scheme securing his or her entitlements for the future or resolving a dispute with finality by way of 'settlement'. It is the ALA's opinion that workers and insurers should be able to avail themselves of a mechanism by which they may resolve a dispute or ongoing 'liability' for benefits under the scheme which brings finality to the claim.

21. The continuing and overwhelming frustration of the current dispute resolution system is that there are extremely limited means by which a dispute may be finalised once and for all between the parties.

22. The only mechanisms available to workers in the scheme are to enter into a commutation arrangement under section 87EA of the *Workers Compensation Act 1987* (the 1987 Act) or pursue a work injury damages claim. Both have a threshold of 15%WPI.

23. The ALA is strongly of the view that the prerequisites in section 87EA are overly onerous and inaccessible to most workers. Schedule 8 of the 2012 *Amending Act* sought to provide a means whereby 'the Authority' could 'open' commutations in certain terms. Schedule 8 remains unproclaimed. The ALA submits that proclaiming Schedule 8 would not remedy the absence of a proper finalisation mechanism.

24. The ALA believes that section 87EA should be repealed in full to facilitate resolution of disputes and claims on terms agreeable to both parties on a full and final basis. Any settlement of rights or liabilities should permit workers to avail themselves of paid legal representation and advice and there should be an appropriate approval process presided over by a judicial officer in the event that a worker is operating under a disability.

Legislative drafting issues

25. In previous submissions to the Standing Committee, the Law Society has raised concerns over some legislative drafting issues following the 2012 legislative reforms to the WC Act and the *Workplace Injury Management and Workers Compensation Act 1998* (the WIM Act), which we consider still need to be considered and addressed.

Section 32A of WC Act – Definition of 'suitable employment'

26. The definition of 'current work capacity' in section 32A of the 1987 Act is:

> ***Current work capacity*** *in relation to a worker means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in* ***suitable employment****.*

27. The definition of 'suitable employment' contains the very harsh limb (b) which permits an insurer to consider employment as suitable regardless of whether the work is available, is of a type or nature that is generally available in the employment market, is in the nature of the worker's preinjury employment and regardless of the worker's place of residence.

28. The insurer makes the decision as to the whether the worker can work, whether the worker is undertaking sufficient work to the satisfaction of the insurer, what work the worker could undertake (regardless of whether that work actually exists), what the worker could earn in that notional employment and how much in weekly payments the worker will receive. The arbitrariness, subjectivity, inherent inequity and unfairness of these decisions does not need further amplification.

29. The ALA echoes the concerns of the legal profession expressed in the submissions of the Law Society of NSW. The ALA has called for abolition of limb (b) of the definition of suitable employment since the 2012 reforms and maintains the call for a test of actual, and not theoretical.

Subsection 66(1A) of WC Act

30. Naturally, an impairment evaluation has to be conducted in order to access a permanent impairment lump sum. However, the 2012 amendments have now been clarified by the New South Wales Court of Appeal and by a subsequent regulation such that an injured worker may

only make one claim for permanent impairment lump sum compensation (by which we mean may only receive one payment for permanent impairment lump sum compensation) after 19 June 2012. This is by virtue of the interpretation of section 66(1A) of the 1987 Act.

31. The single, once and only permanent impairment lump sum compensation payment prohibits workers who suffer a significant deterioration of their condition as a consequence of perhaps the passage of time or surgery to be properly compensated for their impairment. The ALA seeks a recommendation that workers be permitted to seek additional permanent impairment lump sum compensation if they can demonstrate significant deterioration of their condition.

Section 322A of WIM Act

32. In a vast number of cases, permanent impairment will be determined by an Approved Medical Specialist (AMS) on referral to medical assessment under section 65 of the 1987 Act and section 322 of the WIM Act ('the 1998 Act'). There are now occasions that allow an arbitrator will determine impairment but the effect determination by an arbitrator is the essentially the same as if determined by an AMS.

33. At the conclusion of an assessment under section 322 of the 1998 Act, a medical assessment certificate will issue which certifies as to the AMS's assessment of the matters referred for assessment including impairment evaluation if so asked.

34. Section 322A of the 1998 Act was introduced as part of the 2012 legislative reform. At the time it was clear that the section was primarily intended to supplement and fortify the one claim provision set out in section 66(1A). Section 322A permits only one *assessment* of the degree of permanent impairment of an injured worker. In addition, it permits only one *medical assessment certificate* in connection with that assessment.

35. Section 322A now acts as a complete barrier to assessments to determine threshold issues concerning access to weekly benefits, whether a worker is a worker with high needs or with highest needs, access to domestic care payments, access to medical treatment expenses including artificial aids and prostheses, and access to work injury damages.

36. The ALA argues that s322A is a superfluous and unnecessary section and should be repealed from the 1998 Act as soon as possible to permit workers to access the level of benefits to which they are legitimately entitled.

Section 60AA

37. 60AA imposes a restriction on injured workers, who would otherwise qualify, from obtaining paid domestic assistance for domestic activities that they did, personally, prior to their accident. It is best demonstrated by looking at two hypothetical examples:

    - A young person living at home with his or her parents who has a serious injury is forever precluded from receiving domestic assistance if he or she were not doing any domestic chores at the time of their injury.

    - An injured female worker, whose husband dies or leaves her after her accident, is forever precluded from receiving domestic assistance for work that she was not doing prior to her injury, even though that work now needs to be done by someone other than her.

38. It would be analogous to an insurer saying to an injured worker that they cannot have an MRI scan because they did not exist at the time of injury.

39. The ALA submits that it is grossly unfair that the legislation does not cater for a change in the worker's circumstances, post injury. The domestic assistance should be paid by the insurer if it is reasonably necessary, in line with other treatment expenses.

Funds managements

40. There is another provision in the legislation that provides great unfairness to some of the most vulnerable people in society. There are cases that involve large payments to people under a disability. The most common example is when there is a distribution of a death benefit to children. These payments can often be quite large and are usually sent to the NSW Trustee and Guardian (TAG) for management of the fund.

41. Unfortunately there are fees associated with having the funds managed and these fees are not claimable. Because the sums of money can be quite large the associated fees can be quite large. Under the current legislation there is no mechanism to allow a claim for the costs associated with funds management, with the end result being that the person under the disability (in this example the child) is out of pocket.

42. The ALA submits that in an example such as this the child should not be out of pocket to have the funds managed and that the costs of funds management should be paid as part of the overall distribution.

Conclusion

43. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Standing Committee on Law and Justice Committee review of the workers compensation scheme. The ALA welcomes the opportunity to provide oral testimony in relation to any of the matters raised by this submission or matters of interest to the Committee.

Andrew Stone SC

NSW President
Australian Lawyers Alliance