Submission No 9

INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: The Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

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28 May 2020

The Hon Wes Fang MLC
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au

Dear Mr Fang,

2020 Review of the Workers Compensation Scheme

The Law Society of New South Wales welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice's (Standing Committee) review of the NSW workers compensation scheme, the third since the establishment of the State Insurance Regulatory Authority (SIRA) in 2015.

The Law Society is the state's peak legal representative body and our members represent workers, scheme agents, self-insurers and employers, all of whom are key stakeholders in the scheme.

In this submission, we discuss the following matters:

1. Scheme improvements since the 2016 review;
2. Issues with impairment determining access to benefits;
3. Dispute resolution and settlement;
4. Legislative drafting issues; and
5. Access to legal representation under the scheme.

Scheme improvements since the 2016 review

The Law Society acknowledges the improvements made to the workers compensation scheme since the Standing Committee's first review of the scheme in 2016.

We note the significant improvements to the dispute resolution system for workers compensation matters since December 2018, when the Workers Compensation Commission's jurisdiction was expanded to cover both work capacity and liability disputes. Based on advice from our practitioner members, the removal of a bifurcated workers compensation system has improved the efficiency and effectiveness of the dispute resolution process.

We also acknowledge some improvements to the dispute notification process, through creation of section 78 Notices under the *Work Injury Management and Workers Compensation*

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Act 1998 (WIM Act), which replace and combine the former notices to dispute a claim under section 54 of the *Workers Compensation Act 1987* (WC Act) and section 74 of the WIM Act into a single notice.

However, we suggest that the dispute notification process could be further simplified, including through development of a generic form for the mandatory elements of all notices. The Law Society would welcome an opportunity to engage with SIRA on the drafting of a standardised notice for use by all insurers to help remove inconsistencies and further simplify the notification process.

Finally, we acknowledge the work SIRA has undertaken to address issues associated with the complexities surrounding the calculation methodology used to determine a worker's pre-injury average weekly earnings (PIAWE). The Law Society was pleased to be involved on the working group considering reform mechanisms to address these issues. In our view, the reforms, which commenced in October 2019, address many of the complexities with the calculations we raised previously.

Although there have been some positive changes made to the scheme since the 2016 review, the Law Society considers there are elements of the scheme still requiring urgent attention and reform.

Impairment determining access to benefits

Reforms in 2015 under the *Workers Compensation Amendment Act 2015* increased the scope of medical and treatment expenses available under the scheme. Workers with 10% or less whole person impairment (WPI) can receive medical benefits for up to two years after weekly payments cease (or from the date of claim if no weekly payments are made). Workers with greater than 10% WPI and less than 21% WPI can receive medical benefits for up to five years, and workers with greater than 20% WPI can receive medical benefits indefinitely.

However, as raised in previous submissions, the Law Society considers that linking eligibility for medical benefits to the degree of WPI, in addition to the cessation of weekly payments, is problematic and results in many injured workers not being able to access the benefits they need to return to work or to recover.

The Law Society considers that a WPI assessment is not an appropriate threshold test for recovery of medical treatment expenses, noting that injured workers may sustain injuries that require ongoing medical attention regardless of their WPI assessment. As surgery very often increases the WPI assessment, there is also the risk of creating perverse incentives for workers to prematurely undergo recommended surgery.

In our view, restricting injured workers' access to medical benefits without considering the nature of their injury and recovery requirements is arbitrary and therefore unfair. We consider the thresholds introduced as part of the 2015 amendments also create additional friction points, resulting in increased disputation, delay and costs.

We note that one of the objectives of the NSW workers compensation scheme is 'to provide … payment for reasonable treatment and other related expenses' (subsection 3(c) of the WIM Act). To meet that objective, the Law Society considers the scheme should be simplified and revert to a straightforward system, in which reasonably necessary medical expenses are payable to all injured workers. This could be achieved including through amendments to section 59A of the WC Act.

The Law Society also suggests that the pre-approval requirements in subsection 60(2A) of the WC Act should be repealed, as they prevent the scheme from fulfilling its fundamental

functions of providing prompt, effective and proactive treatment of injuries. We are concerned that this provision may enable insurers to undermine medical recommendations by delaying or refusing approval.

Dispute resolution and settlement

Dispute Resolution

The Law Society notes that during its last inquiry into the workers compensation scheme, the Standing Committee considered the viability and feasibility of establishing a new personal injury tribunal or commission with jurisdiction over both workers compensation and motor accident disputes. While the Law Society acknowledged that we would support, in principle, the amalgamation of the two disparate schemes into a single tribunal, we provided a range of issues we considered must be taken into account and addressed during the development of any new scheme. Primarily, we considered that any new structure must be capable of appropriately catering to the specific and discrete requirements of both the workers compensation and motor accidents dispute resolution schemes, and must ensure the retention of expertise within the separate schemes.

We understand the NSW Government is proposing to introduce legislation into the Parliament for the establishment of a Personal Injury Commission. The proposed new Commission will consolidate motor accident and workers compensation disputes 'into a single tribunal by expanding the Workers Compensation Commission' to cover both types of disputes.[1] We understand that 'two divisions will be created, with an independent judicial head, enabling the retention of subject matter expertise and personnel in the new body'.[2]

The Law Society would welcome the opportunity for a public consultation process before the legislation establishing the proposed Commission is introduced. We consider a public consultation process may assist the NSW Government understand the specific issues users of the systems currently face, and would help ensure the development of targeted solutions to those problems. The Law Society suggests that any new system must ensure the maintenance of subject matter expertise within the separate streams over time, and cautions strongly against any future dilution of scheme-specific expertise among relevant decision makers.

Settlement

As raised previously, the Law Society is of the view that the dispute resolution process should include the availability of a proper mechanism by which claims can be resolved including, if necessary, on a final basis. A key issue with the present dispute resolution process is that, while the legislation focuses on the resolution of disputes, the options available to resolve disputes are either extremely limited or simply unavailable.

For these reasons, we consider that the restrictions presently placed on the party's ability to commute liability for the payment of statutory compensation benefits as set out in section 87EA of the WC Act should be removed altogether so that all parties have the ability to agree to a settlement of statutory compensation entitlements, however described, on a final basis. In our view, the availability of settlement on this basis should be subject only to the requirement that a claimant first obtain legal advice concerning any such settlement and that in cases where a

[1] The Hon Victor Dominello MP, Minister for Customer Service, 'New personal injury commission proposed for injured road users and workers' (media release, 10 March 2020) <https://www.customerservice.nsw.gov.au/about-us/media-releases/ministerial-releases/new-personal-injury-commission-proposed-for-injured-road-users-and-workers>.
[2] Ibid.

person is operating under a disability (by reason of age or mental capacity) such a settlement has the oversight of a judicial officer within the dispute resolution system.

Legislative drafting issues

The Law Society has raised concerns previously over some legislative drafting issues following the 2012 legislative reforms to the WC Act and the WIM Act. Many of these issues have not been addressed, and we therefore request the Standing Committee's consideration and review of these ongoing issues during the current inquiry.

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

Fundamental to the return to work focus of the 2012 reforms was the notion of 'suitable employment' in section 32A of the WC Act. This is because the entitlement to weekly payments under sections 36, 37 or 38 of that Act now depends on whether a worker has any 'current work capacity' for the purposes of section 32A.

The definition of whether a worker has current work capacity is also contained in section 32A, which reads:

> ***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.

The 'suitable employment' definition includes any employment for which the worker is currently suited, regardless of whether such a job is available in the labour market and regardless of the worker's pre-injury employment and place of residence. The Law Society considers that if a workers compensation system is to have 'return to work' as a key objective, then it must adopt a realistic approach to what alternative employment is suitable in the labour market and reasonably accessible to the worker. Any system that enables suitable employment to be determined solely by an insurer and entitles an insurer to disregard factors such as the state of the employment market or the claimant's place of residence, is inherently unfair. It could allow insurers to adopt unrealistic approaches to return to work and to use the work capacity decision process as a means to terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.

Unfortunately, the cases dealing with the definition of 'suitable employment' have reinforced the very wide ambit of the suitable employment test. In our view, the inequity associated with the existing definition is reflected in the burgeoning area of vocational capacity assessments. There are numerous organisations performing these types of assessments to determine what work is said to be suitable for the worker. In our members' experience, these assessments tend to focus almost exclusively on the hypothetical availability of a job in the open labour market for which the claimant may (and often may not) be physically and psychologically suited. However, these organisations often avoid consideration of whether the type of job is realistically available to the claimant in the current labour market or whether it is realistically suitable to the claimant having regard to their education, training and work history and/or residence.

To maintain a real focus on sustainable return to work and in keeping with considerations of fairness, the Law Society considers that paragraph 32A(1)(b) of the WC Act should be removed. We suggest that the definition of suitable employment included prior to the 2012 amendments should be reinstated. That definition afforded greater fairness to injured workers and delivered some support when challenging employers who would not provide suitable employment to their injured employees.

Section 39 of WC Act

Under section 39 of the WC Act, access to weekly compensation payments is cut off after 260 weeks (or five years) for all workers with a WPI of less than 20%. In line with our comments above in relation to the nature of the impairment test, the Law Society considers that the 260 week time limit imposed under section 39 has the capacity to create severe financial hardship for workers who have sustained significant ongoing injuries that prevent their return to work.

A WPI assessment does not take into account subjective pain factors which impact on the claimant's work capacity, nor the combined impact of both the physical and psychological injuries on the worker's overall functionality. Law Society members are aware of numerous cases where workers given WPI assessments of less than 20% have nevertheless been grossly inhibited on the open labour market.

The Law Society continues to submit that a fair system of compensation should not cut off permanently injured workers from receiving benefits at an arbitrary point in time. Instead, we consider there should not be any time cap on the entitlement to weekly benefits other than retirement age.

Section 66 of WC Act

Subsection 66(1A) of the WC Act states that only one claim can be made under the WC Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.

The Law Society considers that, at the very least, the section requires amendment to create an exception to the 'one lump sum only' rule where there is a significant deterioration in the worker's condition or the first lump sum claim does not result in receipt of any financial compensation.

Section 322A of WIM Act

Section 322A of the WIM Act provides that only one medical assessment can be made of the degree of impairment of an injured worker.

The Law Society considers it unfair and unreasonable to lock a claimant into a fixed assessment of impairment for life, particularly when an assessment of WPI is critical to the ability to access ongoing medical treatment. We consider the legislation should reflect the reality that medical conditions can, and often do, deteriorate with time.

To enhance access to justice for injured workers, the Law Society suggests reform of this section to permit a further medical assessment where circumstances have changed.

Section 318 of WIM Act

Paragraph 318(1)(c) of the WIM Act provides that a defendant is not entitled to file a defence that wholly or partly disputes liability for a claim if the defendant has failed to serve a pre-filing defence within 42 days.

Law Society members have expressed concerns with this provision and have noted various instances where, because of administrative or other error, employers have been unable to serve the pre-filing defence within the time required, to their detriment. Noting that a failure to serve a pre-filing defence in time allows a plaintiff to commence proceedings after 42 days, the Law Society considers this provision should be amended to offer other less punitive mechanisms to encourage compliance with the 42 day time period. For example, we consider

it may be appropriate to require a defendant to pay the plaintiff's costs if the pre-filing defence has been served outside of the 42 day time period, even in circumstances where the plaintiff is unsuccessful.

Access to legal representation under the scheme

Given the complexity of the issues and processes involved, the availability of expert legal advice to help all stakeholders under the workers compensation scheme is essential to creating a fair compensation scheme. It also ensures an outcome which achieves justice for all parties. The Law Society continues to hold strong concerns that the costs available to legal practitioners for services under the scheme are outdated, inadequate, and represent a significant underfunding of the work required of lawyers working in the system.

The Law Society urges that this Committee consider, as part of this Review, the growing issues arising from a prohibitive regulated costs framework, which may diminish the availability of expert legal advice.

Fixed legal costs and indexation

Generally, legal costs available to lawyers under the scheme are governed by Schedule 6 to the *Workers Compensation Regulation 2016* (the Regulation). The system is based primarily on payment of a fee to a solicitor for the resolution of a matter at various points in the dispute resolution process.

To highlight the discrepancies in the legal costs available to lawyers working under the workers compensation scheme, compared with other regulated fees under NSW Government policy, we draw your attention to the Attorney General's rates for legal representation (payable to legal representatives engaged by and on behalf of the Government). Under the Attorney General's rates, a solicitor is entitled to payment of $295 per hour, with a daily maximum of $2,950 plus GST.

We note that over the last 10 years, the rates payable to lawyers acting for the NSW Government have increased from $240 per hour to $295 per hour (an increase of 23% since 2010). In contrast, since 1 November 2006, there has been only one increase to the fees for lawyers under the workers compensation scheme, in 2012, which represented an increase of 15% on the rates originally prescribed in 2006. The regulated fees under Schedule 6 to the Regulation have not been reviewed or revised at all since October 2012, despite increases to the Consumer Price Index (CPI) of 14% from September 2012 to March 2020.[3] This represents a substantial reduction in costs able to be recovered in real terms.

We consider it is fundamental for the Regulation to ensure it reflects the reality of costs incurred. We understand that some legal practitioners are, on occasion, having to personally bear costs incurred outside of those provided for in Schedule 6 to the Regulation. This is not a sustainable model for practice.

We are particularly concerned that without resolution of this issue, the availability of competent legal practitioners to assist stakeholders under the scheme may diminish as the administrative and other costs associated with professional legal services continue to make the provision of those services under this scheme untenable for many practitioners. This will inevitably have an adverse impact on the capacity of decision-makers to resolve disputes in a timely, just and cost-effective manner.

[3] Based on the Australian Bureau of Statistics' Consumer Price Index Inflation Calculator: https://www.abs.gov.au/websitedbs/d3310114.nsf/home/consumer+price+index+inflation+calculator.

To exacerbate issues with the already restrictive costs framework, we note the Regulation makes no provision for the annual indexation of legal costs, which would appropriately acknowledge the regular increases to the professional and administrative costs of providing advice over time. In contrast, most benefits under the scheme, including those for injured workers, treatment expenses and fees for medico-legal reports, are indexed (by means of annually gazetted fee orders). Similarly, under the new compulsory third party scheme for motor accidents in NSW, legal fees are indexed at CPI.

The Law Society suggests that Schedule 6 to the Regulation be reviewed in its entirety. If this Committee does not agree with this approach, then as an interim measure and at the least, we suggest that indexation of fees under the Schedule be introduced to bring the approach into line with other scheme expenses.

Disparity in costs available to applicants and respondents

Lawyers representing injured workers are usually paid by the Workers Compensation Independent Review Office (WIRO) under the Independent Legal Assistance and Review Service (ILARS) scheme, and lawyers representing insurers are paid by their clients pursuant to Schedule 6 to the Regulation. Issues with claimant lawyers' legal costs have, to a large extent, been ameliorated by the willingness of the WIRO to pay those acting for workers at rates which are based on a WIRO Funding Policy, which has, in part, diverged from Schedule 6. The Law Society wholly supports the WIRO's divergence from the Schedule and considers that any divergence has been beneficial for those paid under the ILARS scheme.

One example of this divergence is the way the costs for counsel are treated. The ILARS scheme allows legal practitioners to make an application for the use of counsel in certain prescribed circumstances. When that application is successful, WIRO reimburses the law firm for the costs of counsel as a disbursement.

This can be contrasted with solicitors who represent insurers. If these solicitors are instructed by their insurer client to brief counsel, they are required to absorb the costs of counsel themselves. There are a number of reasons counsel may be briefed, including because many matters have a degree of complexity and difficulty which require experienced advocacy. In a complex matter, or a matter that is heard over multiple days, this can result in solicitors not being paid at all, as any fees generated are absorbed by counsel.

To facilitate equal access to counsel for both sides of a dispute, Law Society members acting for both workers and insurers support costs of counsel being similarly treated as a claimable disbursement (subject to appropriate capping) for both worker and insurer representatives.

Complex work capacity disputes

The Law Society recognises the significant benefits of the expansion of the Workers Compensation Commission's jurisdiction to deal with work capacity disputes. In practice, these disputes are primarily dealt with by way of expedited assessment unless the Commission is convinced that the dispute should be considered by an arbitrator.

If a matter is dealt with by expedited assessment, the maximum amount chargeable by a respondent's solicitor (ILARS has adopted a different billing model for claimant solicitors) is $1,610.00. Some of these matters, however, may involve reviewing a large file (over 1000 pages), providing written advice to a client, and then participating in a hearing before a delegate where either settlement is reached or a direction is issued. This process is followed by the usual post-settlement or determination steps.

We understand the costs provisions were established to regulate the costs of disputes concerning whether a reasonable excuse existed or not at the early stage of a claim, rather than disputes involving significant compensation issues arising from a work capacity decision. The Law Society considers the allowances under Schedule 6 for these more complex types of matters are wholly unreasonable. Instead of the allowance for expedited assessment, the Law Society considers the usual amounts for matters resolved at teleconference should apply.

Thank you again for the opportunity to contribute to this consultation. Should you require any further information, please contact Adi Prigan, policy lawyer

Yours sincerely,

Richard Harvey
President