



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:DHjl 1440871

16 February 2018

Mr Tom Kearney
Director
Central Policy Office
Department of Finance, Services and Innovation
Level 2, 2-24 Rawson Place
Sydney NSW 2000

By e-mail: disputeresolution@finance.nsw.gov.au

Dear Mr Kearney,

Potential reforms to the NSW workers compensation dispute resolution system

The Law Society welcomes the opportunity to provide feedback to the Department of Finance, Services and Innovation ('the Department') in relation to its discussion paper on potential reforms to the NSW workers compensation dispute resolution system. This submission has been prepared on the basis of input from the Injury Compensation Committee, whose members represent workers, scheme agents and self insurers that are key stakeholders in the workers compensation scheme.

The Law Society is strongly of the view that the current iteration of the dispute resolution system is badly in need of reconsideration. As the Law Society has previously stated to the Legislative Council Standing Committee on Law and Justice ('Standing Committee') during the course of the First Review of the Workers Compensation Scheme, the current system is bifurcated, inefficient and unnecessarily complex to deal with.¹

We note that whilst the discussion paper ostensibly seeks to examine reform of the dispute resolution scheme – particularly focusing on the concept of the 'one stop shop' for workers compensation dispute resolution as considered by the Standing Committee – relatively little about the potential processes and forum(s) for dispute resolution is canvassed in any detail in the discussion paper. More emphasis appears to have been placed on broader issues such as claimant support, which is not the central issue in need of reform, nor the focus of the relevant recommendations of the Standing Committee.

¹Law Society of NSW, Submission to the Legislative Council Standing Committee on Law and Justice, *First Review of the Workers Compensation Scheme* (2 December 2016); Evidence to Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, Parliament House, Sydney, 4 November 2016 4–5 (Paul Macken, Tim Concannon).

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The Law Society submits that the complexity and severity of the current system has led to significant confusion, frustration and stress amongst claimants – as demonstrated in the findings of the Department’s Claimant Experience Study.² We accept that there has been an increased need for claimants to be provided with support throughout the current process, however in the Law Society’s view this has been caused by the complexity of the current process, the complete removal of lawyers from parts of the process, and the unsustainably low levels of legal costs payable in those matters where lawyers have not been completely excluded. The Law Society submits that any increased level of claimant support that is non-legal in nature would be a poor substitute for the advice of a fully insured and independent lawyer.

Further, the Law Society disagrees with the characterisation of ‘informal’ and ‘formal’ disputes in the discussion paper. The Law Society submits that the definition provided is unnecessarily complex, and is symptomatic of the over-complication of the system design. We submit that the qualifying terms ‘informal’ and ‘formal’ should not be used, and that the definition of ‘dispute’ should be considered as being “where there is disagreement between a claimant and an insurer about an insurer’s decision” – as per the State Insurance Regulatory Authority (‘SIRA’) website.³

As the Law Society has previously submitted, we support the proposal of a ‘one stop shop’ for workers compensation matters.⁴ However we do not consider the options provided by the Department in the discussion paper as being appropriate to address the issues that exist with the current system. The Law Society considers that any beneficial change to the dispute resolution scheme will require significant amendment to legislation and alteration of processes. We would counsel against incremental or minor modifications to dispute resolution in workers compensation.

The Law Society also re-iterates its position that SIRA, as the independent government regulator for the insurance industry,⁵ should have no role to play in dispute resolution.⁶ It is the Law Society’s view that any action to increase SIRA’s role in the dispute resolution process would be a further significant departure from the originally stated principal objectives of the organisation as listed in section 23 of the *State Insurance and Care Governance Act 2015*. The Law Society is of the view that dispute resolution processes should be dealt with by an appropriately independent body, and not one that is also responsible for the regulation of the system under which disputes occur.

The Law Society submits that any consideration of an appropriate dispute resolution forum should be preceded by a consideration of the fundamental flaws evident in the 2012 reforms. It is the view of the Law Society that if the particularly problematic features of the system were removed or nullified, the complexity of the system would be significantly reduced, and this would result in a corresponding reduction of the need for proactive claimant support models emphasised in the discussion paper.

In previous submissions to the Standing Committee, the Law Society has drawn attention to the following features of the 2012 legislative reforms to the *Workers Compensation Act 1987* (‘the WC Act’) and the *Workplace Injury Management and Workers Compensation Act 1998*

² Department of Finance, Services and Innovation (NSW), *Improving Workers Compensation Dispute Resolution in NSW: A Discussion Paper on Potential Reforms to the NSW Workers Compensation Dispute Resolution System* (2017) 18–19.

³ New South Wales Government, State Insurance Regulatory Authority, *Complaints about Insurers* <<https://www.sira.nsw.gov.au/disputes-and-complaints/complaints-about-insurers>>.

⁴ Law Society of NSW, Submission to the Legislative Council Standing Committee on Law and Justice, *First Review of the Workers Compensation Scheme* (11 October 2016).

⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 August 2015, 73 (Dominic Perrottet)

⁶ Law Society of NSW, above n 4.

(‘the WIM Act’), which we submit need to be addressed prior to any consideration of fundamental reform to the dispute resolution system:

Section 32A of WC Act – Definition of ‘suitable employment’

As the Law Society has previously stated,⁷ the current definition of ‘suitable employment’ is not appropriate given the key ‘return to work’ objective of the legislation, as it does not take into account factors such as whether a suitable job is actually available, where the employee was previously employed and where they reside. As such, it is our view that the definition should be amended to take these factors into consideration.

Section 59A of WC Act

This section states that compensation is not payable to an injured worker under the Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period. The Law Society submits that it is inappropriate that this section links the entitlement to these benefits with a Whole Person Impairment (‘WPI’) assessment.

Section 66(1A) of WC Act

This section 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 submits that this section should provide for an exception in circumstances where there is a substantial deterioration in the condition of a person making an initial claim after the introduction of the new regime in 2012.

Section 322A of WIM Act

This section provides that only one medical assessment can be made of the degree of impairment of an injured worker. The Law Society submits this section should be repealed, which would allow claimants to undertake an additional impairment assessment when seeking a benefit of a different type.

This remainder of this submission responds to the questions posed in the discussion paper.

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Do you support developing a single system for resolving personal injury disputes?

Single system for all personal injury disputes

The Law Society notes the significant recent reforms that have occurred in the compulsory third-party (‘CTP’) area resulting from the introduction of the *Motor Accident Injuries Act 2017*, including the introduction of new dispute resolution processes. We submit that given the short timeframe in which the new CTP scheme has been in operation, it would be premature to consider the merit of dealing with this process in a single system together with workers compensation disputes. The immediate focus of any reform should be to significantly improve workers compensation disputes.

Complication and duplication of workers compensation matters

The Law Society has on numerous occasions raised the important issues of unnecessary complication and duplication that currently exists in the workers compensation dispute resolution system.⁸ It remains the view of the Law Society that a single system ‘one stop shop’ approach for workers compensation matters is the only appropriate way in which the current issues in the dispute resolution system can be resolved, and we support Recommendation 14 of the Standing Committee report in relation to the attributes that this forum should have.

⁷ Law Society of NSW, above n 4.

⁸ See, eg, Law Society of NSW, above n 1; Law Society of NSW, above n 4.

As the Law Society has previously stated, the current bifurcated system is overly and unnecessarily complicated,⁹ and as illustrated in the matter of *Sabanayagam v St George Bank Ltd* [2016] NSWCC PD3, has resulted in an unclear and confusing system. Although the Department has acknowledged this throughout its discussion paper, the options provided in response do not appropriately consider all of the relevant issues, nor address the concerns and recommendations of the Standing Committee.

What do you think might be the benefits and/or costs of a single system?

The benefits of a single system for workers compensation disputes are indicated above. The Law Society submits that the involvement of lawyers in a process with appropriate incentives to parties for the early resolution of matters will serve to benefit the system in the long term.

Page 18:

Does the case for change outlined here reflect your experience of knowledge of the system?

The Law Society notes that in the discussion paper the Department has recognised the findings of the Standing Committee in relation to the complexity of the current scheme, and has acknowledged that the process as it currently stands is not an easy one for claimants to understand.

The Law Society disagrees with the emphasis in the discussion paper, and in the proposed models, on enhanced 'claimant support' at the expense of other areas of the dispute resolution process. Whilst the Law Society agrees that the current process can be stressful and difficult for claimants to navigate, it is our view that any claimant support services provided will need to be carefully and appropriately implemented to provide any value, and would at the very minimum require that those providing the support be experienced and independent of the regulator.

The Law Society also queries the utility of placing emphasis on the findings relating to 'claimant support' based substantially on the results of a 'Claimant Experience Study' that had a total sample size of only 32 claimants.¹⁰ The Law Society submits that given the volume of complainants that utilise the process, the incredibly small sample size cannot be considered as being adequately representative. Further, the Law Society notes that no similar engagement with insurers or employers was conducted as part of the consultation process.

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Should any of these options for preventing disputes be implemented? Which one/s and why?

Commutation, or lump sum exit from the scheme

The Law Society is of the view that every worker should have the ability to access every possible type of resolution, and that the current restrictions on parties' ability to commute or exit the scheme should be reviewed so that parties are given unrestricted opportunities to obtain a final, formal resolution. It is our submission that claimants should always have the ability to extricate themselves from the system by way of reasonable settlements, subject to having the benefit of legal advice, and that this should be considered as part of any dispute resolution model adopted.

Simplify insurers' notices to claimants

⁹ Law Society of NSW, above n 4.

¹⁰ Department of Finance, Services and Innovation, above n 2, 17, 19

The Law Society supports a simplification of insurers' notices to claimants. The Law Society has previously put forward this proposition,¹¹ and submits that it goes hand in hand with the simplification and clarification of the process, an argument that has been given support by the Standing Committee in its report. The Law Society agrees with the proposal that forms be re-drafted in 'plain English', and again re-iterates the importance of removing the current bifurcation of 'work capacity' and 'liability', which would allow for the drafting of one simplified form of dispute notification.

Provide simpler, clearer public information about dispute resolution options and processes

The Law Society agrees with the concept of providing a greater amount of public information about the dispute resolution process, however considers that the need for this would be heavily mitigated in a simplified and unified workers compensation dispute resolution system.

Can you suggest any other ways to prevent disputes?

The Law Society submits that simplifying the system would not only prevent disputes but also reduce the escalation of disputes through early intervention. As stated throughout this submission, creating greater flexibility throughout the process will appropriately incentivise parties to resolve matters.

Page 40:

Which option do you prefer and why?

The Law Society is of the view that none of the four options presented by the Department are suitable for a workers compensation dispute resolution system. We are of the view that any options considered must be based on principles of access to justice, access to appropriate legal representation, and independent decision-making in disputes, as set out below.

Are there other options for a one stop shop you would prefer? If yes, what are they and why?

The Law Society supports a single, simplified system of dispute resolution in workers compensation matters that allows for matters to be dealt with in an independent forum with greater flexibility for parties to appropriately commute or settle matters outside of the formal process. It is the position of the Law Society that claimant support matters could be dealt with by the Workers Compensation Independent Review Office ('WIRO'), and that SIRA should be completely extricated from the dispute resolution process.

Forum for disputes

We submit that the appropriate forum for dispute resolution should be determined not by reference to existing frameworks, but rather after a thorough analysis of the system requirements. Although the Workers Compensation Commission would be the 'natural fit' for workers compensation dispute resolution matters, it is the view of the Law Society that utilisation of this forum would necessitate significant structural and procedural reform in order for it to be fit for purpose.

'One stop shop'

The Law Society is of the view that the forum for dispute resolution should be able to deal with all workers compensation matters and should be given the ability to suitably categorise matters and deal with them accordingly – such as through the creation of expedited processes for simple disputes, and the management of complex disputes by providing early opportunities to engage in conciliation.

¹¹ Law Society of NSW, above n 4.

We submit that the remit of the dispute resolution forum should extend to pre-injury average weekly earnings ('PIAWE') disputes – an area that has been identified as being in need of simplification and reform,¹² and a process that could be significantly expedited under such a unified forum.

Conciliation and arbitration functions

We submit that the appropriate forum for dispute resolution should have separate conciliation and arbitration functions, with judicial officers or arbitrators engaged in a conciliation process being excluded from participating in an arbitration. Further, we submit that parties should be given the option of participating in conciliation and arbitration processes on separate days, which will give parties more options in relation to the potential settling of matters prior to the arbitration occurring.

Page 42:

What digital solutions could help improve the dispute resolution system?

The Law Society is of the view that if all disputes are to be dealt with by a single tribunal or forum, simple disputes could be predominantly dealt with through online document submission. We submit that significant efficiencies could be made where online document submission is adopted in addition to the removal of the requirement for full documentation before conciliation, as noted below.

Do you think insurers should be required to conduct internal reviews of all disputed decisions as the first step in the formal dispute resolution process? Please explain why or why not

As the Law Society has previously stated, we submit that mandating internal reviews for disputed decisions is not appropriate.¹³ This is because the internal review process does not satisfy the requirements of an appropriate dispute resolution model that is fair and transparent, and unnecessarily increases the timeframe for claims progressing through the system for little to no benefit in the vast majority of matters.

Further, the Law Society submits that the figure of 40% of insurer internal reviews of work capacity decisions resulting in a different decision is not an accurate reflection of the intrinsic value of the internal review system.¹⁴ The Law Society is of the view that a large part of this high figure should instead be attributed to the significant number of cases that have involved miscalculations of PIAWE.

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Do you think removing the requirement for full documentation before conciliation would be beneficial? Please explain why or why not.

The Law Society supports this proposal as well as the incorporation of early conciliation into the management of complex disputes. It is the view of the Law Society that early conciliation without full documentation will reduce delay in the dispute resolution process, and that full documentation should only be required in circumstances where the dispute proceeds to arbitration and it becomes necessary to define the parameters of the dispute. The Law Society submits that this could occur by way of appropriate directions to provide full documentation

¹² Tania Sourdin, University of Newcastle, *Report on NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)* (2017).

¹³ Law Society of NSW, above n 4.

¹⁴ Department of Finance, Services and Innovation, above n 2, 42.

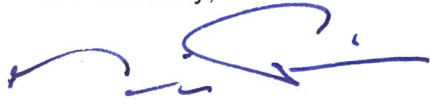
being made after conciliations, in circumstances where the conciliation process was unsuccessful.

Should any of these proposals for process improvements be implemented? Which one/s and why?

The Law Society supports the use of 'fast track' assessments and also supports the repeal of section 65(3) and related sections of the WC Act. Both of these proposals align with the Law Society's position that the dispute resolution process should be more efficient and cost effective.

The Committee thanks you for the opportunity to provide a submission. At present, the Law Society reserves its position as to how costs should be regulated in any reformed system. We intend to make a supplementary submission on this issue shortly. Should you have any queries with regard to this submission, please contact the Committee's Policy Lawyer, Jonas Lipsius at jonas.lipsius@lawsociety.com.au or on (02) 9926 0218.

Yours sincerely,



Doug Humphreys OAM
President