



NEW SOUTH WALES
BAR ASSOCIATION*



Our ref: InjuryComp:GUml1196360

9 September 2016

The Hon John Della Bosca and
Ms Nancy Milne
CTP Reform Reference Panel
C/O Christian Fanker
Director, CTP Reform
State Insurance Regulatory Authority
Level 25 580 George Street
Sydney NSW 2000

By email: christian.fanker@sira.nsw.gov.au

Dear Mr Della Bosca and Ms Milne,

NSW CTP Insurance Scheme Reform

We refer to the draft paper "CTP Reform Consultation Observations" that was provided to the legal profession on Friday 2 September 2016, for feedback on whether the views attributed to the legal profession are properly represented.

The legal profession again expresses its appreciation for the opportunity to discuss issues in depth with the Reference Panel and the apparent interest and engagement shown by the Panel in understanding all stakeholders' views put forward to meet the requirements of the Government's reform agenda for lower premiums, capped insurer profits and fairness in the compensation benefits for injured road users.

Unfortunately, the draft paper does not accurately or fully reflect the complex issues discussed at various meetings with the Reference Panel or the detailed feedback the legal profession has provided in its numerous submissions made throughout the consultation process.

Our respective organisations approve the immediate publication of our joint submissions dated 29 July 2016 and 23 August 2016 on the SIRA website together with all earlier submissions on behalf of our organisations. This will ensure that there is transparency in the legal profession's position, which can be tested against those matters that we consider have been inaccurately attributed to the legal profession.

There are particular inaccuracies in the draft paper as follows:

i) Endorsement of a new scheme (page 3)

The legal profession's participation in the reform process was not an endorsement of the new scheme being proposed. However, the legal profession from the outset acknowledged that there was scope for improvements and modifications to the scheme and have put forward various proposals to improve the efficiency, cost effectiveness and timeliness of the existing scheme which the legal profession continues to believe is fundamentally a sound one.

ii) Step-downs for weekly benefits (page 6, final paragraph)

The legal profession has at no stage throughout the reform process advocated for greater step-downs (or any step-downs) for weekly benefits. Fair compensation for an injured motorist who can't return to work places them in the same position they would have been in had the accident not occurred. A step-down in weekly benefits does not achieve this.

iii) Fairness test (page 8, paragraphs 2 and 5)

This is not an adequate or accurate summary of the legal profession's narrative test. We refer you to section 1.2 of our submission dated 23 August 2016.

The suggestion of a "fairness test" or narrative test was proposed to provide a second gateway to modified common law damages (not extended defined benefits) for those who do not exceed the proposed common law threshold but have continuing disabilities which will result in continuing economic losses.

The Government's express desire was to have a "fairness test" which will provide access to greater benefits in appropriate cases for those who are not otherwise entitled to common law damages. This will have to be sufficiently flexible to allow access to a range of individual circumstances which may include children, university students or parents who are on parental leave and those who are injured but cannot perform their pre-injury work, all of whom have suffered a permanent degree of impairment to their earning capacity. We regard the inclusion of a "fairness test" as an acknowledgement that the 2013 Motor Accident Bill was too extreme in abolishing the common law rights of all those innocent victims of motor accidents who did not achieve the greater than 10% whole person impairment threshold.

It is the legal profession's experience from representing the full range of injured persons that the only way to compensate an individual for a permanent loss of earning capacity over a working lifetime is by way of an aggregation of the weekly entitlement into a lump sum. Injured persons do not want to be drip fed their entitlements, and continue to be challenged by an insurer in relation to the benefits payable. This does not allow an injured person to get on with their life. In addition, the actual cost of claims will increase significantly if no settlement of the aggregated amount is allowed, further driving up premium cost in the new scheme and failing to meet one of the primary requirements of the reform agenda.

A second gateway to modified common law damages (rather than an extension of any defined benefits in the new scheme) will ensure fairness to the more seriously injured, compensating them for their permanent incapacity to work and meeting their ongoing need for treatment over their life expectancy. Properly understood, the legal

profession's proposal should be costed by SIRA's actuaries and all costings prepared to date, including any peer review of same, made available to stakeholders. This is a request by the legal profession that has so far been denied.

The separate pathways to access defined benefits and common law remedies must be clearly identified so that injured persons are aware of the alternative courses which are potentially available to them at all times.

We note that paragraph 5 on page 8 refers to estimated costs "to commute these claims after the 5 year defined benefits period" and references legal profession proposals in the footnote. This statement is confusing. The legal profession is opposed to a 5 year defined benefits period.

iv) Legal costs (page 12, final dot point)

This is not an adequate or accurate explanation of the legal profession's proposals with respect to legal costs. The legal profession did not suggest a \$100,000 threshold, later reduced to \$50,000. We refer you to our email dated 24 August 2016 to Mr Christian Fanker at SIRA explaining the proposal put forward by the legal profession. Indeed, to stem the flow of minor severity claims, immediate action was proposed by the legal profession in March 2016. The Government did not take the suggested remedial action to stem the "blow out" in minor severity claims that were putting pressure on the current scheme. Further analysis is required, including an actuarial assessment based on correct assumptions of our proposal.

We also make the following additional observations:

- A scheme based on the New South Wales workers compensation model will involve as a part of its scheme design the shifting of the financial burden from the CTP insurance scheme to the Commonwealth social security scheme and therefore the taxpayer;
- The draft paper should record and take into account the community impact of the cost to individuals of uncompensated loss of income, financial distress and the burden which will be created on the social security system by the removal of common law rights and the substitution of limited defined benefits;
- A "return to health" approach is inconsistent with continued involvement in a defined benefits scheme;
- At page 7 (1st bullet point) the report asserts that lump sum payments in personal injury schemes lead to inflated scheme costs. We question the accuracy of this statement. For example, the report does not mention the findings of the 2010 US study titled, "*The US Experience with No-Fault Automobile, Insurance, A Retrospective*" (otherwise known as "*the Rand Report*") which was drawn to the Reference Panel's attention during the consultation process and was referenced in the Law Society's submission of 6 May 2016. This study concludes that no-fault/defined benefits schemes are more likely to lead to inflated scheme costs because of higher utilisation, cost and frequency of medical treatments.
- The workers compensation model has resulted in significant injustices for those who are moderately injured and have a permanent incapacity to work. It should not be adopted in a third party scheme.

- We reject the use of work capacity or functional capacity testing as the basis of any fairness test. The NSW workers compensation experience since 2012 has shown how unfair this type of testing can be when it is used to intimidate, and then terminate, the benefits of an unrepresented claimant. Further, the legal profession believes that such testing frequently lacks any common sense based on the practicalities of the claimant's background and injuries, and it also lacks procedural fairness.
- There is, contrary to the Government's stated position, a strong push for the removal of some of the compensatory damages which are presently available to the seriously injured. In particular:
 - Any suggestion that non-economic loss damages should be modified to provide a defined lump sum benefit should be categorically rejected.
 - Concerns regarding delays in the payment of compensation are not a logical basis for opposing the aggregation of weekly losses into a capital sum which can be redeemed or commuted. Lump sums provide ultimate certainty for both the injured person and insurers as opposed to defined statutory benefits which cannot be commuted, may be subject to frequent review and will ultimately be significantly diminished over time, even if still required.
 - The suggested increase in the whole person impairment threshold for psychological injury from 10% to 15% is contrary to the Government's stated objective of ensuring that benefits are paid to the seriously injured. There is no evidence to suggest other than that an increase in the whole person impairment threshold for psychological injury will result in under compensation of the seriously injured. Such a reform would run counter to the Government's objective that a greater proportion of funds be directed to the more seriously injured.
- Conflating defined benefits for at fault drivers with benefits for not at fault victims who have moderate and significant injuries (which do not achieve the greater than 10% whole person impairment threshold) will result in grossly undercompensating those innocent victims of motor accidents with moderate injuries. At fault drivers have the surety of the Commonwealth social security scheme against their own negligence and the innocent victims should not be deprived of proper compensation due to the expense of compensating those who fail to take adequate precautions for their own safety.
- The paper observes that the number of claimants with less than 10% whole person impairment and ongoing needs beyond the 5 year cut off for defined benefits as proposed by the Government is relatively small. This finding supports our contention that access to common law rights for that category of claimants is affordable on any view of things.

Finally, we express our disappointment at the lack of information we have received during this consultation, particularly as the legal profession has approached the reform process in an open and constructive fashion.

The Reference Panel will be aware that we sought information on 9 August 2016 which has yet to be received. Earlier requests of SIRA have also been made to no avail. The draft paper makes it apparent that other data and documents have not been provided to the legal profession. For example, the paper mentions:

- i) Targets set by NCOSS (page 2)

- ii) Numerous studies . . . highlight significant problems with lump sum payments in personal injury schemes (page 4 and page 7)
- iii) Independent research and analysis commissioned by SIRA and undertaken by the ADIIS Group (page 9)

Most importantly, the paper makes reference to costing estimates for various proposals. For example, at page 6, (dot point 6) and at page 7, where it is stated:

“if those claimants eligible to access common law after 18 months do so the impact on the scheme is expected to be an additional \$120 - \$200 on top of the proposed scheme cost”.

Again, the legal profession has not been provided with any of the data which supports such costings. We do not understand why there should be any resistance to the provision of this data.

We look forward to receiving the information requested on 9 August 2016, which included the insurers' submissions with respect to premium calculation, together with the additional information referred to in the draft paper and outlined above, as soon as possible.

Should you have any questions or require further information, please contact Leonora Wilson, Policy Lawyer at the Law Society of NSW on 9926 0323 or email leonora.wilson@lawsociety.com.au.

Yours sincerely,



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