THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:InjuryComp:RHap1981780

29 October 2020

The Review
Office of the Secretary
Department of Customer Service
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: independentreviews@customerservice.nsw.gov.au

Dear Judge McDougall,

**Review of icare and the *State Insurance and Care Governance Act 2015***

The Law Society of New South Wales welcomes the opportunity to provide a submission to the Independent review of icare and the *State Insurance and Care Governance Act 2015* (SICG Act). This submission deals with suggestions in relation to the operation of the SICG Act, and then with comments in relation to the Workers Compensation Nominal Insurer (Nominal Insurer) managed by Insurance and Care NSW (icare).

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.

**Improvements to the SICG Act since the last statutory review**

The Law Society acknowledges the improvements made to the SICG Act, and ultimately, the workers compensation scheme, since the Standing Committee on Law and Justice conducted the first statutory review into the SICG Act in 2017.

In our submission to that review in November 2017, we advocated strongly for a system that avoids, so far as possible, conflicts of interest in the organisations responsible for the workers compensation system and the delivery of the scheme benefits. We noted our concerns with the State Insurance Regulatory Authority (SIRA) continuing its role as merit reviewer under the workers compensation system and submitted that the scheme regulator should not be involved in any form of dispute resolution when its primary function is to regulate the insurance scheme.

We acknowledge that since our submission, the Workers Compensation Commission's jurisdiction has been expanded to cover all workers compensation disputes. We consider this to be a very positive outcome. We note that from 1 March 2021, the new Personal Injury Commission will perform these functions.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

**Scope for additional improvements to the SICG Act**

As raised previously, the Law Society notes the SICG Act does not provide for any specific policy objectives. We consider that the Act would benefit from a clear statement of policy objectives. From the relevant supporting material,[1] the Law Society considers that the SICG Act has various 'policy objectives', outlined below, which we consider should be incorporated into the Act.

Creating clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services

The Law Society submits that operational separation between the provision of government insurance services and the regulation of those services should be an important policy objective for the SICG Act.

While the SICG Act legislates a separation of the functions, the Law Society is of the view that this separation is not appropriately maintained in practice. As a result, the separation of functions is often unclear or not apparent. For example, it has been the case that (in the absence of guidance from SIRA), icare has issued its own guidance on various aspects of the scheme for the use of insurers. The result of this is that, despite apparent structural separation, the roles of icare and SIRA may be confused and service providers can be uncertain about where to obtain definitive guidance on the scheme. This operational confusion undermines the statutory separation between these agencies.

The objectives and functions previously contained in sections 22 and 23 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIMA), which under WIMA were the responsibilities of WorkCover (now SIRA), were repealed and 'split' between the three entities: SIRA, iCare and Safework under the SICG Act. However, some of the functions remain in sections 22 and 23 of the WIMA and therefore provide grey areas where both the nominal insurer and the regulator now share functions, adding to the confusion of separation of functions in the SICG Act.

The Law Society suggests that the review focus on what additional steps could be taken to ensure that the statutory separation of these agencies is reflected in their operation.

Making insurance structures in NSW easier to understand

The Law Society considers that making insurance structures in NSW easier to understand and navigate continues to be a valid objective of the SICG Act, but that the Act, in its current form, has not achieved this objective. In particular, by importing the terms of underlying workers compensation legislation, the Act does not address the inherent and wide-ranging complexities of the workers compensation scheme. The establishment of separate agencies, without further consideration of the underlying complexity of the scheme, is not sufficient on its own to make those insurance structures easier to understand.

**The Nominal Insurer – organisational issues**

The Law Society notes that the Nominal Insurer is not a private corporate insurer. Rather its scope, functions and objectives are dictated by statute. The Nominal Insurer has been in existence for four years and in that short time, has been required to create a new operating structure and introduce a new claims management model. Since its establishment, there have

[1]Policy objectives obtained from the Second Reading Speech for the Bill on 5 August 2015, by Mr Dominic Perrottet MP, then Minister for Finance: https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLA/316/2R%20Workers%20Compensation%20and%20cognate.pdf.

also been a number of significant changes to the legislative framework and system within which the Nominal Insurer operates.

Notwithstanding this, the Law Society considers that there are a range of organisational issues within icare which should be addressed to ensure that it remains financially viable and provides certainty to both employers and workers.

Robust claims management systems

We note recent reports which suggest that the workers compensation scheme is facing an annual loss of at least $850m.[2] Based on the most recent data available to us, produced by icare on the scheme's performance during 2019, the costs of the scheme and claims liabilities are increasing.[3] While the cost of medical payments has increased dramatically, legal payments have decreased and rehabilitation payments have reduced.

The Law Society strongly supports all efforts to ensure injured workers receive the necessary treatment and compensation they require as a result of workplace injuries. We consider it imperative, however, that all claims decisions are well-considered, accurate and objective, and that claims managers conduct necessary due diligence in managing claims.

We remain concerned that if the scheme continues to be managed as it currently is, it will soon be in a difficult financial position. The Law Society is deeply concerned that the ultimate 'losers' will be small businesses whose insurance premiums become untenable, and injured workers, who may not be able to access the benefits they are entitled to.

Personal claims management

Members of the Law Society have noted issues with scheme agents' claims management system, in particular that claims are often assessed and managed via an automated system or by multiple assessors. We understand issues with claims manager turnover have been exacerbated by the various changes to service provider arrangements over the last few years. The Workers Compensation scheme deals with personal injury matters, and we consider assessment and management of personal injuries necessarily requires human consideration.

We note that a high turnover of claims managers can create problems for both claimants and employers, including uncertainty, unnecessary delay and inefficiency. This can be particularly problematic for seriously injured workers who, as a result, may be unable to get the treatment they require.

The Law Society strongly supports a requirement for a single claims manager to deal with a complaint throughout its life (so far as is reasonably practicable), and who should communicate with, and be contactable by, both employers and claimants.

Restricted number of scheme agents

We note that on 1 January 2018, EML became the sole agent for all new claims. While this has since been expanded to Allianz, GIO and QBE, the Law Society queries the approach of limiting the number of scheme agents. In our view, a restricted number of scheme agents,

[2] Alexandra Smith, 'State's workers' compensation scheme faces $850m loss', *The Sydney Morning Herald,* 3 August 2020 https://www.smh.com.au/politics/nsw/state-s-workers-compensation-scheme-faces-850m-loss-20200802-p55hp0.html.
[3] Icare, *Nominal Insurer Liability Valuation as at 31 December 2019,* (22 May 2020) https://www.icare.nsw.gov.au/about-us/annual-reports#gref.

rather than an open market, may lead to a reduced capacity of qualified assessors and contribute to issues in relation to timely and robust claims assessments.

We also consider that an open market encourages competition and innovation. We consider that for the scheme to continue to operate as intended, consideration should be given to expanding the scheme to additional providers.

We also suggest that consideration be given to whether the Nominal Insurer role is the most conducive to a fair, efficient and robust workers compensation system (as opposed to a privatised scheme regulated, for example, by the Australian Prudential Regulation Authority).

Use of appropriate language

As a general observation, the Law Society considers that the characterisation of organisations being 'customer-centric' (as SIRA-regulated schemes are) is not appropriate for a statutory scheme like the workers compensation scheme. The relationship that exists between claimants, insurers and employers and the relevant organisations they deal with is not one of a 'customer' seeking a service. Rather, in the case of SIRA and SafeWork, the organisation is a regulator dealing with a regulated organisation, or a claimant, under the regulated scheme. The characterisation of a claimant, in particular, as a 'customer' ignores the fact that a claimant cannot simply 'take their business elsewhere' if they are dissatisfied with the level of service provided to them. In the case of icare, the relationship between an insurer and the insured employer may be closer in character to a customer relationship, but this is modified by the role of icare as the sole scheme agent.

The Law Society submits that this is an insurance scheme where employers pay premiums for the benefits of their employees. Management of the scheme is conducted by the public financial corporation icare, and regulated by SIRA.

Therefore, using the language of 'customers' and 'consumers' for the delivery of business objectives of both SIRA and icare is, in our view, inaccurate, and the interchangeable use of terms by these organisations creates confusion for both injured workers and employers.

Thank you again for the opportunity to contribute a written submission to the independent review of icare and the SICG Act. Should you have any further queries in relation to this submission, please contact Adi Prigan, policy lawyer, on (02) 9926 0285 or at Adi.Prigan@lawsociety.com.au.

Yours sincerely,

Richard Harvey
**President**