THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:JWsb091121

9 November 2021

State Insurance Regulatory Authority
Level 13 West, 2-24 Rawson Place
Haymarket NSW 2000

By email: Policy&Design@sira.nsw.gov.au

Dear Sir / Madam,

Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury schemes

The Law Society of NSW appreciates the opportunity to provide a submission to the State Insurance Regulatory Authority's ('**SIRA**') *Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury schemes*. The Law Society's Injury Compensation Committee has contributed to this submission.

The Law Society's comments in response to the questions posed in this consultation are **attached**, adopting the headings and numbering provided by SIRA.

Our response also incorporates a discussion of the issues raises in the *IRO Issues Paper: Practical Issues Arising from the Operation of Section 59A Workers Compensation Act 1987*.

Should you have any questions in relation to this submission, please contact Sophie Bathurst, Policy Lawyer, on (02) 9926 0187 or email Sophie.Bathurst@lawsociety.com.au.

Yours faithfully,

Juliana Warner
President

Encl.

7.1 Replacement threshold test

1. What do you consider would be a suitable replacement threshold test for entitlement to ongoing weekly and/or medical payments?

The Law Society considers that the current threshold test for entitlement to ongoing weekly and/or medical payments is problematic. The Whole Person Impairment ('**WPI**') assessment was not designed to determine impairment in relation to work disability or functional incapacity. Its use for this purpose leads to arbitrary, counterintuitive, and unfair outcomes for claimants in circumstances where workers may sustain injuries that require ongoing payments of compensation, regardless of their WPI assessment. In particular, this can arise in cases where injured workers do not meet the WPI threshold but whose injuries make them permanently unfit for their previous occupation.

The Law Society has previously expressed the view that a fair system of compensation should not prevent permanently injured workers from receiving ongoing payments of compensation beyond an arbitrary point in time. Our view is that the scheme objective of providing 'payment for reasonable treatment and other related expenses' would be better served by providing payment for all medical expenses reasonably necessary because of the injury. It was noted in the McDougall Report that such an approach is similar to what occurs at the Commonwealth level, under the Comcare scheme.[1]

If a threshold system is to be maintained, the Law Society proposes that an independent medical assessor be given the discretion to determine that workers who do not meet the required degree of permanent impairment using the current methodology should nevertheless be entitled to weekly and medical benefits on account of their work disability or functional incapacity.

Affording such a discretion to a medical assessor would overcome some of the problems arising from the universal application of the current threshold test. Further, it would assist in preventing the exclusion of those claimants whose injury may not lead to an assessable degree of permanent impairment and who therefore are prevented from meeting the required threshold. It would move closer to the objective, as pointed out in the McDougall Report, of a test that assesses the severity of an injury by reference to the treatment and support necessary to manage its consequences, as well as its impact on the worker's capacity for work.[2]

7.2 Further assessment of degree or permanent impairment

The Law Society considers that it is unreasonable to limit a claimant to one fixed assessment of the degree of permanent impairment, particularly given an assessment of WPI is critical to the ability to access ongoing weekly and/or medical payments. Of particular concern is the disadvantage experienced by a worker with a deteriorating condition, who may have made a claim at an early stage in the process.

In its 2012 report on the NSW Workers Compensation Scheme, the Joint Select Committee also noted the possibility of injustice arising from the single assessment, observing as follows:

> The Committee accepts there are benefits in limiting the number of assessments which a worker may obtain…The Committee however believes that in some isolated

[1] Report by the Hon Robert McDougall QC, Independent Reviewer, *icare and State Insurance and Care Governance Act 2015 Independent Review* (30 April 2021), p 267.
[2] Ibid.

> cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition.[3]

Section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) is unduly restrictive on a worker's ability to assert entitlement to a range of benefits not restricted to lump sum compensation. The operation of s 322A as a second gateway to entitlement adds significantly to the cost of the scheme by requiring necessary formal proceedings to assert rights.

2. What limitations and controls should be placed upon a further assessment of impairment?

The Law Society considers that a further assessment of impairment should be available to those claimants who are able to show a significant deterioration in their condition. Further, workers whose impairment increases as an unintended consequence of medical or other types of intervention should be able to apply for a further assessment of impairment.

A review into significant deterioration should be available in circumstances regardless of whether there has been previous agreement under a medical assessment or a complying agreement pursuant to s 66A of the *Workers Compensation Act 1987* (NSW). The recent case of *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236 illustrates the importance of consistency in the way in which claimants are treated in the case of further assessments of impairment.

3. How could a 'significant deterioration in injury' be measured?

Whether there has been 'significant deterioration in injury' is a medical question and should be capable of being measured in the same way that the extent of the original injury is measured.

4. Should a further assessment of impairment be limited to certain injuries - for example, those prone to deterioration over time?

The Law Society does not consider that there should be a closed list of conditions or injuries to be considered for further assessment of impairment. Such a system may have the unintended consequence of unfairly excluding workers who experience significant deterioration in circumstances where such deterioration is not anticipated as part of the prognosis of their condition.

7.3 <u>'Reasonably necessary' test</u>

5. What are the advantages and disadvantages of replacing the words 'reasonably necessary' in section 60 of the Workers Compensation Act 1987 with the words 'reasonable and necessary'?

Section 60(1) of the *Workers Compensation Act 1987* (NSW) sets out that treatment or services must be 'reasonably necessary'. There is a long line of case law that has analysed this definition in some depth. Deputy President Roche (in the Workers Compensation Commission) made the following comments in relation to the phrase:

> …reasonably necessary does not mean "absolutely necessary"… If something is necessary, in the sense of indispensable it will be "reasonably necessary". That is

[3] Joint Select Committee on the NSW Workers Compensation Scheme, *New South Wales Workers Compensation Scheme* (Report 1, June 2012), 79.

> because reasonably necessary is a lesser requirement than "necessary". Depending on the circumstances, a range of different treatments may qualify as "reasonably necessary" and a worker only has to establish that the treatment claimed is one of those treatments. A worker does not have to establish that the proposed treatment is the "optimal treatment" before it can be held to be reasonably necessary.[4]

The requirement for treatment to be both 'reasonable and necessary' as opposed to 'reasonably necessary' imposes a higher bar for medical payments and represents a more demanding test. The Law Society submits that there are already significant barriers to accessing medical treatment such as s 59A of the *Workers Compensation Act 1987* (NSW). There is no justification to impose another hurdle.

6. Are there alternative tests that align more closely with the principles of value-based healthcare or evidence-based medicine?

As noted by Burke J in *Rose v Health Commission* (NSW) (1986) 2 NSWCCR 32, in determining what is "reasonably necessary", 'the Court, amongst other factors, will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition'.

The 'Rose Test' was embraced in amendments to the 1998 Act with the introduction of the Commission's ability to make Interim Payment Decisions in 2001.[5] The test embraces sound values and evidence-based principles.

It follows that a determination that treatment or services are "reasonably necessary" will inevitably involve a consideration of value-based healthcare and evidence-based medicine.

7.4 <u>Commutation and Settlement</u>

7. Given historical experience, what controls are appropriate in expanding access to commutation?

The Law Society considers that caution should be exercised in equating the liberalisation of commutations with a 'lump sum culture'. In its 2012 report, the Joint Select Committee commented that it was not convinced by the notion that expanding access to commutation would lead to a 'lump-sum culture'. The Committee commented:

> Any 'culture' is more likely to stem from the size and scope of the underlying benefits, rather than from an ability to commute them. Commutations have the potential to reduce ongoing administrative costs. If they release an injured worker from the 'system', he or she has a greater incentive to return to work than if kept on a 'drip feed'. The Committee considers that commutations should be much more freely available. They should be generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation.[6]

As noted above, appropriate controls in expanding access to commutation include requiring the injured worker to have access to legal and financial advice, given that commutation inevitably entails a relinquishment of rights to ongoing benefits.

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[4] *Diab v NRMA Ltd* [2014] NSWWCCPD 72 at [86].
[5] See *Workplace Injury Management and Workers Compensation Act 1998*, s 296(4).
[6] Joint Select Committee on the NSW Workers Compensation Scheme, *New South Wales Workers Compensation Scheme* (Report 1, June 2012), 79.

It should not be necessary to place arbitrary limits on a worker's entitlement to commutation as final resolution can be in the interests of both parties, especially in cases where there is little prospect of return to work. The Law Society submits that the existing preconditions to commutations as set out in section 87EA of the *Workers Compensation Act 1987* (NSW) are unnecessarily restrictive.

8. What classes of claims, if any, lend themselves to commutation?

The Law Society submits that there should not be restrictions on the types of claims that are able to be commuted.

The Law Society considers that any restrictions should not be based on the type of claim but rather whether it is in the best interests of the injured worker to commute their compensation payments.

7.5 Compromised settlement of the lump sum death benefit

9. Should compromised settlement of death benefits be permitted? Why or why not?

The Law Society supports recommendation 40 of the McDougall Review that the legislature should consider expanding the powers of settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.[7]

A mechanism that allows the parties to compromise where there is a genuine dispute would no doubt be preferable to requiring distressed family members to litigate in the Personal Injury Commission or the Court.

10. What oversights are needed to protect the parties?

Oversight by the Personal Injury Commission of unrepresented litigants would be appropriate to prevent injustices from arising.

7.6 Definition of suitable employment

11. Is the definition of suitable employment used prior to the 2012 reforms more appropriate than the current definition? What risks would you see with re-instating the previous definition?

The current definition of "suitable employment" as defined in s 32A of the *Workers Compensation Act 1987* (NSW) 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

[7] Report by the Hon Robert McDougall QC, Independent Reviewer, *icare and State Insurance and Care Governance Act 2015 Independent Review* (30 April 2021), p 277.

terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.

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.

The definition of 'suitable employment' as it was defined in s 43A before the 2012 amendments took account of a range of factors that are necessary in achieving a realistic return to work including the worker's age, education, skills and work experience; the worker's place of residence; and any suitable employment for which the worker has received rehabilitation training.

12. What might be an alternative solution or definition and why?

The Law Society submits that the definition of suitable employment used prior to the 2012 reforms should be restored.

7.7 <u>Legal Costs under the Workers Compensation Regulation 2016</u>

13. What are the benefits and impacts associated with increasing legal costs under the Workers Compensation Regulation 2016?

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.

Fixed legal costs and indexation

The system under Schedule 6 to the *Workers Compensation Regulation 2016* ('**Regulation**') 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.

Schedule 6 was devised as an events-based regulation where the events are either no longer reflected in practice either in informal or formal dispute resolution processes, or the appropriate events are not identified. The Law Society therefore submits that Schedule 6 is not fit for purpose.

We consider it is fundamental for the Regulation to ensure it reflects the reality of costs incurred. We understand that some legal practitioners regularly are 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.

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. At the least, we suggest that indexation of fees under the Schedule be introduced to bring the approach into line with other scheme expenses and that an allowance for counsel's fees in arbitration hearings be included as a regular disbursement.

14. How can a sustainable approach to legal costs regulation be set in the workers compensation scheme?

A sustainable approach to legal costs regulation involves balancing two competing considerations. First, it is important that the cost structure adequately remunerates lawyers for providing services in this area. If it fails to do so, then lawyers will be deterred from providing these services, which will result in a lack of access to justice for injured workers. However, the cost structure must not place an unsustainable burden on insurers or lead to overservicing and exorbitant legal costs.

There are several alternatives to achieving a sustainable approach to legal costs regulation in the workers compensation scheme. The first is to simply index the existing entitlement to payment in Schedule 6. Simply indexing, however, would not take into account the failure over many years to adjust fees by reference to the cost of living and the consequent increase in payments to workers or the changes in the events leading to outcomes not being reflected in Schedule 6. There also should be provision for application to be made for additional costs in matters of higher levels of complexity.

The Law Society considers that counsel's fees should be allowed as a separate disbursement item in addition to the allowances for professional costs. The expectation that the allowances for counsel's fees be absorbed within the general allowances for professional costs is not financially sustainable for legal practices. There can still be a discretion to disallow counsel's fees as a disbursement item in matters where it is determined not to have been appropriate to brief counsel in straightforward claims.

8.1. <u>Addressing the impacts of COVID-19 in a sustainable way</u>

15. How can the needs and interests of scheme participants be balanced during COVID-19 so that there are optimal outcomes for injured people and scheme sustainability for policyholders?

16. Should there be a statutory review of, or limits (such as time limits), placed on measures taken in response to the COVID 19 pandemic like the workers compensation COVID-19 presumption?

17. What alternative measures may be appropriate?

There is currently no empirical or anecdotal evidence to suggest that special arrangements need to be made for COVID-19 other than the presumption which presently exists that workers in prescribed employment who contract COVID-19, are automatically presumed to have contracted it in the course of their employment (unless the contrary is established). The

question of when the presumption should be reviewed would have to be carried out by reference to the continuing effect of the pandemic and evidence that it was having a material impact on the scheme or its participants.

8.2. Access to services and treatment in the workers compensation scheme

18. What measures might be appropriate for workers where they may not be able to access treatment in their compensation period as a result of COVID-19 impacts or other delays beyond their control?

We note that possible solutions to address this problem are detailed in the IRO Issues Paper. The Law Society does not advocate for any particular solution other than a straightforward system where reasonably necessary medical treatment continues to be available regardless of arbitrary time limits.

19. Is the existing framework in section 59A providing revival of treatment compensation adequate and appropriate? What are the opportunities to improve the framework?

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 *Workplace Injury Management and Workers Compensation Act 1998* (NSW)). 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 through amendments to section 59A of the 1987 Act.

9.1. Aligning support for people injured on the road or at work

20. Are there opportunities for alignment across schemes that would improve outcomes for injured people, premium affordability and scheme sustainability?

21. How could thresholds and entitlements be modernised to meet best practice and be closer aligned to value-based care?

22. How can there be greater alignment of the workers compensation and CTP schemes so that people with the same type of injury receive the same type of treatment and outcomes

In our view, it is not desirable for injured people to be subjected to different compensation regimes depending on whether they are injured at work or in a motor vehicle accident. However, alignment of the schemes should not be a simple merging of the schemes, but should be approached with the goal of promoting greater fairness, accessibility and efficiency.

For example, the need for compulsory internal reviews for motor accidents should be revised so that, in line with the workers compensation scheme, such reviews are optional. As the Law Society previously has submitted, an internal review process for motor accidents is inefficient and ineffective for its intended purpose, as insurers have strong financial interests in the outcomes of a review.

While internal reviews for workers compensation are optional, it is the experience of Law Society members that these often are rendered essentially mandatory by the fact that most ILARS Principal Lawyers require proof of an internal review being requested before funding to commence PIC proceedings is approved. While internal reviews may be desirable in

some cases, it seems that in other circumstances they can simply delay finalisation of the claim with no corresponding benefit. Thus, internal reviews in both schemes should be made genuinely optional.

A further area of alignment is to simplify and align the tests used to determine a worker's pre-injury average weekly earnings (PIAWE) under the workers compensation scheme and pre-accident weekly earnings (PAWE) under the motor accidents scheme. A uniform test would be a sensible opportunity for alignment in circumstances where both PIAWE and PAWE are directed to compensation for economic loss. We acknowledge that some modest differences in the tests will need to be retained given that the schemes deal with different categories of earners. For example, the PAWE test in the motor accidents scheme deals with students, self-employed owners of businesses and claimants injured prior to the scheduled date of commencement of work whereas the workers compensation scheme does not.

Another area where consistency could be achieved relatively simply would be by aligning the medico-legal report fees in each scheme. The Law Society's view, as expressed in previous submissions, is that the fees chargeable by medical practitioners under the current cost structures in both the motor accident and workers compensation schemes are inadequate for proper analysis and examination of claimants who have extensive medical histories or suffered complex injuries.

Questions from IRO Issues Paper: Practical Issues Arising from the Operation of Section 59A *Workers Compensation Act 1987* – October 2021

Section 59A generally excludes compensation in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker. The compensation periods run from one of two dates:

- either 2 or 5 years (depending on an assessment of the worker's permanent impairment, if any) commencing on the day on which the claim for compensation was first made if weekly payments have not been paid to the injured worker; or
- either 2 or 5 years (depending on an assessment of the worker's permanent impairment, if any) commencing on the day on which weekly payments of compensation cease to be payable to the worker, in circumstances where weekly payments have been made.

The issues paper raises concerns around two issues as follows:

Issue 1 – Treatment Claimed but Not Received

What is the preferable framing of section 59A of the 1987 Act to ensure workers have fair and equitable access to treatment before the expiry of the relevant compensation period?

a) **Would a framing to the effect that 'compensation is not payable in respect of any treatment requested after the expiry of the compensation period' strike a better balance?**
b) **What would be the risks (if any) of such a framing? How could these risks be mitigated?**
c) **What are the other options available, and what are the benefits and risks of these options?**

The Law Society submits that the only preferred framing of s 59A is to remove the time limitations imposed on access to medical treatment based on the claimant's impairment level

as this has no relationship to the need for treatment. However, we acknowledge that option (a) above would be better than the current wording of section 59A.

The risks associated with this option are that many workers will still miss out on the treatment they reasonably require purely on the basis of an arbitrary time limit. This would include workers for whom the need for the treatment does not become apparent until after the time limits in section 59A have expired.

A benefit of this change would be that workers are still able to access treatment which has been deprived to them because of delayed decision making by the insurer or because of lengthy waiting lists for mandated treatments.

The Law Society acknowledges the (former) WIRO Parkes Project Statement of Principles and Recommendations in relation to the restrictions on access to medical treatment. Apart from the introduction of longer time frames, the principles remain sound. The words "given or provided" should be replaced by a phrase that removes the ability of an insurer to obfuscate and avoid approval of treatment.

Issue 2 – Revival of Treatment Compensation

What is the preferable approach, in circumstances where reasonably necessary treatment may result in a revival of treatment compensation, for such a request to be decided?

a) **Is the existing framework provided for in section 59A for revival of treatment compensation adequate and appropriate? Please explain your view.**
b) **What are the opportunities to improve the framework?**
c) **A specific example may be to enable a worker whose compensation period for treatment compensation has expired, to make a request to an insurer:**
    - **to determine whether the requested treatment is reasonably necessary, and**
    - **if so, to determine whether the treatment will revive the worker's entitlement to treatment compensation, and to permit these decisions to be reviewable by the Commission.**
d) **What would be the risks (if any) of such a framing? How could these risks be mitigated?**
   What are the other options available, and what are the benefits and risks of these options?

The section is neither adequate nor appropriate. By linking the revived right to compensation only to the period in which weekly payments are made means a worker who is able to work with the assistance of treatment will not receive compensation for the treatment unless he or she ceases to work and claims weekly compensation. That is inconsistent with the 'return to work' object of the legislation. The appropriate solution is that a worker receives payment for treatment properly and necessarily incurred as a result of his or her injury.

The right to compensation should not depend on the discretion on the insurer. If the insurer has the discretion, there should be a time limitation within which the discretion is to be exercised. If the discretion is not exercised in the time, it should be a deemed refusal which gives an immediate right to review by the Commission.