THE LAW SOCIETY
OF NEW SOUTH WALES

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29 July 2022

The Hon Chris Rath 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 Rath,

2022 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 2022 Review of the NSW Workers Compensation Scheme. The Law Society's Injury Compensation Committee has contributed to this submission.

This submission addresses the following issues:

1. Psychological claims;
2. Review of the workers compensation scheme;
3. Settlement of claims;
4. Assessment of entitlement to weekly and medical benefits;
5. Pre-injury average weekly earnings (**PIAWE**);
6. Independent Legal Assistance and Review Service (**ILARS**); and
7. Fixed legal costs and indexation.

1. Psychological claims

The Law Society considers that it would be helpful for the Standing Committee on Law and Justice to outline the reasons why psychological claims were chosen as a focus of this review. SIRA's open data shows that in FY21-22, there were 6,110 mental diseases claims out of a total of 82,542 claims.[1] In FY20-21, there were 8,313 mental diseases claims out of a total of 99,398 claims.[2]

In our view, it is to be expected that COVID-19 and working-from-home arrangements may lead to a modest increase in this category of claims. Furthermore, as mental illness literacy

[1] SIRA Claims Data, FY21-22 & FY20-21 https://www.sira.nsw.gov.au/open-data/system-overview/claimsdata.
[2] Ibid.

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grows within the community, it may be a natural consequence that there is an increase in claims for psychological injuries. However, these factors are not, in our view, a reason to be concerned with the operation of the scheme in relation to psychological claims, as compared to other categories of claims.

'Injury' is defined in section 4 of the *Workers Compensation Act 1987* (NSW) (**WC Act**) to mean 'personal injury arising out of or in the course of employment'. The liability of an employer is limited by section 9A of the WC Act, which provides that no compensation is payable in respect of an injury unless the employment concerned was a substantial contributing factor to the injury. Where the injury is part of a 'disease injury' as defined by section 4 of the Act, the requirement is more stringent in that the worker's employment must be the main contributing factor to contracting the disease.

Section 11A(1) further limits the liability of employers in the case of psychological injuries and is set out in the following terms:

> No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.

The Law Society considers that these provisions strike an acceptable balance in the way in which they determine the liability of the employer for psychological injuries. Our main concern is around the management of psychological injury claims. We recognise the importance of effective case management to support injury recovery, particularly psychological injuries, and return to work. In the experience of our members, where a worker has suffered a significant psychological injury, unfortunately it sometimes takes upwards of one year for the worker to be referred to a specialist case manager. In our view, it is critical that significant investment be made in developing and educating specialist case managers to deal with these types of claims.

2. Review of the workers compensation scheme

The need for a comprehensive examination of the workers compensation scheme was recognised in the *icare and State Insurance and Care Governance Act 2015 Independent Review* (**McDougall Review**), which recommended a suitable agency or body conduct a review and reconciliation of the WC Act, the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), and the *State Insurance and Care Governance Act 2015* (NSW) into a single consolidated piece of legislation (**Recommendation 34**).[3]

The following comments were made in the context of that recommendation:

> 33 As those within the workers compensation system already know, the current legislative system is cumbersome, confusing and unwieldy. It consists of two key Acts, each containing hundreds of sections; a further Act dealing with regulatory and structural matters; and a suite of regulations, guidelines and policies issued by multiple agencies with overlapping functions. The benefits provided by, responsibilities under, and structures of the scheme have been amended repeatedly, sometimes at short intervals.
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> …
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> 36 The result is a scheme which has been subject to repeated review and piecemeal amendment, but has not been subject to a wholesale legislative rethink, in over 30 years.

[3] Report by the Hon Robert McDougall QC, Independent Reviewer, *icare and State Insurance and Care Governance Act 2015 Independent Review*, 30 April 2021 (**McDougall Review**), 21.

> 37 The current legislative provisions, Byzantine in their elaboration and labyrinthine in their detail, have resulted in a level of confusion, inconsistency and complexity that does nothing to assist the schemes to achieve their policy objectives. That must change.[4]

The McDougall Review also recognised that while the review announced in 2014, known as the *Parkes Project,* did not complete a report of its work, it made 'substantial progress towards formulating possible improvements to the legislative scheme'.[5]

The Law Society echoes the concerns expressed in the McDougall Review about the complexity of the legislative scheme. We strongly support a review that builds on the work of the *Parkes Project*, and looks at the scheme as a whole, rather than the current piecemeal approach to amendment.

In this context, we also wish to express our concern about the way in which major amendments to the scheme are occurring by regulation rather than primary legislation. An example can be seen in the introduction of the *State Insurance & Care Legislation Amendment Bill 2022* (NSW) earlier this year, which proposed major decisions around commutation arrangements be made via regulation rather than the principal legislation. While we note that, ultimately, an amendment moved by the Opposition to remove the commutation provision was not opposed by the Government, we emphasise that it is in the public interest that proposed amendments of this nature occur through changes to the principal legislation itself, rather than via a regulation.

3. Settlement of Claims

The Law Society has a long-standing view that there needs to be a proper mechanism by which claims can be resolved including, if necessary, on a final basis.

As raised in our 2020 submission to the Standing Committee on Law and Justice, we consider that the restrictions presently placed on a 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 so that all parties have the ability to agree to a settlement of statutory compensation entitlements on a final basis.

While the Law Society supports the liberalisation of the availability of commutations, two pre-conditions which should remain are the need for the injured worker to first obtain legal advice and approval for the settlement from a Member of the Personal Injury Commission, given that a commutation inevitably entails a relinquishment of rights to ongoing benefits.

In the context of psychological injuries, we consider that it is often in the best interests of the injured worker to commute the claim so they are no longer in ongoing contact with the scheme. As noted in the McDougall Review:

> There are also significant psychosocial benefits in allowing workers and their families to settle claims, avoid the ongoing stress and difficulty that pursuit of a claim can create, and get on with their lives.[6]

This was a view that was also expressed in the 2012 report of the Joint Select Committee that commented it was not convinced by the notion that expanding access to commutation would lead to a lump-sum culture:

> 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

[4] Ibid., 256.
[5] Ibid., 258, para 48.
[6] Ibid., 277, para 167.

> generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation.[7]

The Law Society welcomes the proposed expansion of the availability of compromises in death benefit claims,[8] but submits that there should be no restrictions on the types of claims that are able to be commuted. We consider 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.

4. Assessment of entitlement to weekly and medical benefits

In previous submissions to this Committee, the Law Society has expressed the view that linking eligibility for medical benefits to the degree of whole person impairment (**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.

We note that in this context, the McDougall Review found as follows:

> WPI assessments may well be suitable for their original purpose – assessing lump sum compensation for the non-economic loss caused by the injury. I received no submission to the contrary. But those assessments measure neither the capacity to work nor the necessity of medical treatment. The use of a WPI assessment for those purposes creates a significant risk that workers may be left uncompensated for a real and severe loss of capacity to work, or substantial medical expense, arising from a workplace injury.[9]

The Law Society considers that there should be further consultation as soon as possible to develop a replacement threshold test for entitlement to weekly and medical benefits that more accurately considers the need for compensation. This position reflects Recommendation 37 of the McDougall Review.[10]

5. PIAWE

The Law Society is of the view that, generally, the 2019 reforms have provided a simpler and clearer method of determining PIAWE.

However, we are also of the view that a further legislative change would be beneficial, specifically, to amend section 43 of the WC Act to remove sub-section 43(1)(d), namely 'a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings' from the definition of 'work capacity decision'.

We note that a legislative amendment to ensure that a PIAWE decision should not be regarded as a 'work capacity decision', has been recommended by numerous stakeholders, including the Law Society, over many years. Calls for this legislative change were recognised in Professor Tania Sourdin's *Report on NSW Workers compensation arrangements in relation to pre-injury average weekly earnings*, where the following was noted:

[7] Joint Select Committee on the NSW Workers Compensation Scheme, New South Wales Workers Compensation Scheme (Report 1, June 2012), 87, para 3.221.
[8] See State Insurance and Care Legislation Amendment Bill 2022 (First Print).
[9] McDougall Review, 267, para 97.
[10] Ibid., 21.

> Numerous stakeholders expressed dissatisfaction with the work capacity process which was seen as resulting in long delays for the processing of payments for injured workers.[11]

Further, the need for legislative change was highlighted in stakeholder responses to SIRA's 2016 PIAWE discussion paper.[12]

The Law Society considers this legislative amendment should be made as soon as possible for a number of reasons. Firstly, in our view, calculation of PIAWE is not a work capacity decision. The calculation is completely unaffected by a worker's capacity for work. Secondly, PIAWE is calculated from historic wages material. It is a static monetary figure, the calculation of which forms the basis for the determination of an injured worker's weekly payments. Thirdly, disputes and disagreements about PIAWE are typically resolved prior to a formal dispute resolution process at the Personal Injury Commission. The Solutions Group of the Independent Review Office resolves a significant number of disputes about the quantum of PIAWE. In addition, section 42 of the WC Act provides an alternative process of dispute resolution.

6. ILARS

The Law Society continues to support the operation of the ILARS scheme. The establishment of the ILARS in 2012 represented a landmark development for personal injury law in NSW. The ILARS has assisted injured workers in gaining independent advice to have their claims investigated and professionally represented.

Please refer to our recent submission to the Independent Review Officer on the ILARS Review here, which sets out the Law Society's perspectives on the operation of the scheme.

7. Fixed legal costs and indexation

In the absence of a grant of funding by the ILARS, costs available to lawyers under the scheme are governed by Schedules 6 and 7 to the *Workers Compensation Regulation 2016* (**the Regulation**). In particular, these Schedules apply to those lawyers acting for scheme agents/insurers, or for workers who are exempted from the 2012 amendments. The system of costs assessment under the Schedules 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.

The regulated fees under Schedule 6 to the Regulation have not been reviewed or revised since October 2012. We consider it is fundamental for the Regulation to reflect the commercial reality of costs incurred. We submit that, as a minimum, Schedule 6 and 7 should provide for indexation in accordance with the Consumer Price Index (CPI) as occurs in the motor accidents scheme.

Thank you again for the opportunity to contribute to this consultation. Should you require any further information, please contact Sophie Bathurst, policy lawyer on 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

[11] Professor Tania Sourdin (University of Newcastle), *Report on NSW Workers Compensation Arrangements in relation to pre-injury average weekly earnings (PIAWE)* (Report, March 2017) (**Sourdin Report)**, 10.
[12] State Insurance Regulatory Authority, *Regulation of pre-injury average weekly earnings (PIAWE)*, Discussion paper, February 2016 and Submission Summary, May 2016 as referenced in Sourdin Report, 4.