ALA TALKING POINTS

LEGAL SUPPORT IN THE 2017 CTP SCHEME

1. DATA

The ALA repeats previous comments that this enquiry should be data driven and that not all relevant data has been made available. Some relevant data is not collected.

(i) No data is available on what insurers spend on their fulltime internal legal units so no "*apples for apples*" comparison of legal expenditure can be made between claimants and insurers.

(ii) Expenditure on legal costs compared to actuarial predictions for the 2017 scheme remains "*material to be provided*" by SIRA. Apparently, the prediction was $69 per policy [EY letter 13.06.17 Appendix A Table 11]. To date, what is the legal costs expenditure on year 1 per policy? [Acknowledging that the vast majority of year 1 damages claims remain unresolved. On the other hand, the vast majority of year 1 statutory benefits disputes have been run and resolved. Is there a breakdown of the $69 as between statutory benefits and damages? Are there year 1 expenditure figures available broken down between statutory benefits and damages?]

(iii) The calculation by SIRA of 106 exceptional circumstances costs orders is based on a flawed data collection process. Despite asking SIRA to review their methodology, they refuse to do so. Determinations about the costs of exceptional costs bases should not be based on fundamentally flawed data.

2. LEGAL REPRESENTATION MAKES A DIFFERENCE

Data provided by SIRA demonstrates that legal representation does make a difference. It seemingly makes a difference both as to a claimant's willingness/capacity to challenge a decision and the prospects of success with that challenge.

Less than 30% of statutory benefits recipients (as the ALA understands) are legally represented. Yet, there have been 4690 disputes generated by the legally represented and only 508 disputes generated by those not legally represented.

The consultants should be concerned that those who are not legally represented abandon their entitlements too readily.

Further, the overturn rate of insurer decisions is 31% for those who are not represented and 42% for those who are represented. Legal representation improves the prospects of overturning a decision by one-third.

There are multiple reasons why legal representation might make a difference, including:

- Legal representation means a better-quality application with better prospects of success.

- Legal representation acts as a filter where less meritorious disputes are not pursued. This saves the system money on avoiding unnecessary disputes.

3. COSTS IN STATUTORY BENEFITS

It is crazy that there is a separate dispute to recover the costs of a medical assessment rather than the costs just flowing from the event. Simplicity should be encouraged. At present, there is no evidence of claimants' legal representatives generating unnecessary disputes. If there were such evidence, then protective measures could be taken against it.

To streamline the regime, the following is suggested:

(i) Recovery of costs in a statutory benefits medical dispute should be generated by lodging of the application rather than upon determination of the dispute. Why should a claimant miss out on recovering the costs of preparing the application if, after the application is lodged, the insurer finally concedes the point?

(ii) Costs should be payable by the insurer within 14 days of resolution of the dispute unless the insurer generates a costs dispute challenging the entitlement to costs. The onus should then be on the insurer to show why costs should not be paid, with the insurer paying the claimant's full costs of this costs dispute if the insurer's application is unsuccessful. [In other words, put the onus on the insurer to show why costs should not be paid and punish the insurer with a full costs order if they are unsuccessful.]

(iii) The maximum regulated fee should also be the minimum fee. Remove argument in an individual dispute about whether recovery of the full regulated fee of $1660 is warranted. In the vast majority of cases, the costs are more. In the few cases where costs are less, then apply swings and roundabouts.

(iv) Clarity is required around the operation of s.8.10(4)(a). [See ALA letter of 18 August 2020 and the unsatisfactory SIRA response of 27 November 2020.]

(v) Leave exceptional costs orders under s.8.10(4)(b) alone. It is a valuable and necessary safety valve.

(vi) The duplication of liability disputes between statutory benefits and damages claims is unfortunate, but a lesser evil than the alternatives.

(vii) The regulated costs for claimants in liability disputes do not reflect the amount of work involved. The randomness of some assessors allowing two or three regulated fees is an imprecise salve. The regulated fee for this dispute category should be substantially increased.

(viii) Do not allow insurers unrestricted costs on statutory benefits disputes. The insurers already have unlimited medical resources, unlimited expenditure on accident reconstruction experts, unlimited expenditure on investigators and unlimited expenditure on internal legal units. They do not need greater expenditure on external legal representation.

4. A WIRO IS SUPPORTED FOR STATUTORY BENEFITS DISPUTES

(i) Independent consideration as to what are reasonable legal costs.

(ii) Funding and indemnity for test cases.

(iii) Greater flexibility in application of regulated costs provisions.

(iv) Not necessary to extend to any such damages regime where current system works well.

5. MONITORING INSURER COSTS EXPENDITURE

Is SIRA doing anything? [See ALA letters of 14 February and 27 February 2019.]

6. LEGAL SUPPORT FOR DAMAGES CLAIMS

(i) Is SIRA interested in claimants recovering the damages to which they are entitled? Example: Twelve months loss of work, then full return to work. No NEL. No FEL. Is this claimant being assisted to return to recover twelve months of wages top-up and lost past superannuation benefits? Or is this claimant abandoning their entitlements when forced to wait 20 months and then pursue these entitlements unassisted?

(ii) DRS Assessors approving settlements for unrepresented litigants is a sensible safety net, provided the skill level of those conducting the assessments is maintained. Where is the SIRA oversight of insurer conduct where DRS assessors refer for medical assessment (on the basis there might be NEL) or where the offer is increased after the DRS Assessor initially refuses to approve? SIRA is not monitoring or collecting data or seemingly exercising any oversight and the situation will worsen with the change to DRS.