



Submissions summary

Regulation of legal costs for work capacity decision reviews

December 2015

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Introduction

In October 2015, the State Insurance Regulatory Authority (SIRA) called for stakeholder comment in response to its discussion paper titled *Regulation of Legal Costs for Work Capacity Decision Reviews*.

Twenty-four submissions, including seven confidential submissions, were received during the public consultation period. This paper provides a high level summary of the key themes articulated in those submissions. All non-confidential submissions are now also available on our website.

Prescribed classes of review

Submissions generally noted that the work capacity decision review process can be complex and that some workers may require assistance to effectively navigate it. However, submissions were divided as to whether that support should necessarily be through the provision of paid legal services, and whether or not that support should be for all or limited classes of review. Some submissions proposed that support could alternatively be provided to workers through an independent advisory or advocacy service that may or may not include access to professional legal services.

A key theme for those who opposed the introduction of paid legal services was the perceived risk of paid legal services increasing the complexity and time taken to deal with reviews without necessarily improving recovery and return to work outcomes.

An issue addressed in several submissions was the perception that insurers, despite being prohibited from paying for legal services in connection with work capacity decision reviews, have access to in-house legal support. Although this perception was broadly acknowledged in submissions, there was some suggestion by opponents to the introduction of paid legal services that published Workers Compensation Independent Review Officer (WIRO) decisions indicate such access, if availed, does not translate to any increased success for insurers over workers within the review process.

Submissions that proposed limiting paid legal services to certain classes of review generally proposed that such limits be linked to the complexity of the case, and/or limited to Merit Review Services and/or WIRO reviews only. Submissions generally did not support limiting paid legal services to reviews that result in a recommendation to change the original decision.

Maximum legal costs

A number of submissions included detailed pricing proposals, with several proposing elements of Schedule 6 in the Workers Compensation Regulation 2010 as a mechanism to provide maximum and fair ranges for legal costs. A common theme noted in submissions was the tension between providing sufficient funding to ensure adequate provision of legal services across a range of case types while also ensuring cost effective controls are in place to safeguard scheme sustainability and appropriate use of scheme funds. Although a range of cost structures and limits were proposed, most of those proposals suggested costs in the vicinity of \$1,000 to \$4,000, with most linking the maximum cost to aspects of case complexity.

Of the submissions that opposed the introduction of paid legal services, there was concern that should a maximum cost be established, an additional mechanism would also need to be put in place to ensure that it was indeed used as a maximum costs structure and not a fixed or flat-rate structure that is charged by services providers regardless of the services provided.

Legal costs of other party

Submissions were generally not supportive of implementing regulation that would provide for awarding of legal costs to the other party, particularly the worker, except in cases where an application is found to be fraudulent, vexatious, frivolous or without proper justification.

Compliance mechanisms

A number of submissions noted that SIRA will have a critical role in ensuring dissemination of information about legal costs structures and schedules, and that SIRA must develop and impose appropriate regulatory compliance obligations. The existing mechanisms to control unprofessional conduct by lawyers, including referral to the Legal Services Commissioner, were noted in several submissions.

Operational and administrative considerations

There was a strong theme within the submissions that any provision of paid legal services should be underpinned by transparency in cost calculation and billing, such as ensuring that all invoicing includes detailed itemisation of billed costs. Most submissions did not address administrative processes for billing; however, those that did comment generally proposed that billing occur directly between the provider and the insurer, as is done for other compensable costs under the legislation.

Another proposed approach is to ascertain the components of the legal costs framework and set fixed costs (with split fee payments) for different stages of the work capacity decision review process. The fixed costs would be based on a schedule reflecting the hours of effort involved in the case and the stage of review, with the intent being that the fixed costs would mitigate the risk of cost increases due to delays in timeframes.

Submissions included a wide range of views about the design of the regulation. The uncertainty about what may be optimum is reflected in the suggestion that it may be prudent to revisit the reforms two years after implementation to ensure any unintended consequences are addressed.

Innovation

Alternative concepts and proposals included:

- the establishment of a funded advocacy and advice service staffed by independent (non-lawyer) work capacity review experts
- funding of an independent legal services advice hotline
- mandatory conciliation as a precursor to, or an alternative to, the internal review processes
- greater promotion of translation and interpretation services provided by government to support workers with literacy or language issues
- timely publication of review decisions to increase awareness of common review matters and related decisions
- the establishment of incentives and/or disincentives to encourage timeliness of review decisions, and/or positive recovery and return to work outcomes
- the creation and/or review of existing advice and guidance material in consultation with stakeholders.

Other themes

Although somewhat out of the primary scope of this consultation, a strong and related theme raised in more than half of the submissions was a view that the work capacity decision review process should not be considered separately to other dispute resolution processes, and that any action to improve the work capacity decision review process should only be undertaken in consideration of efforts to improve the broader dispute resolution framework. In many cases, submissions articulated a view that the work capacity decision review process adds to the complexity of the broader dispute resolution framework and should be addressed as a broader issue.

A principal concern noted in those submissions that oppose the introduction of access to paid legal services is the perceived risk that it may increase scheme and regulatory costs without necessarily improving worker recovery and return to work outcomes.

Next steps

The information provided through this public consultation will be used to develop detailed regulatory options for consideration by government, with the view to finalising and implementing a new regulation by no later than June 2016.

SIRA will continue to consult and engage with stakeholders throughout the development and implementation phases.

Any questions or enquiries in relation to this *Submissions summary* or the proposed legal costs regulation for work capacity decision reviews should be emailed to 2015benefitsreform@sira.nsw.gov.au.

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