Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

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Mr Anthony Lean
Chief Executive
State Insurance Regulatory Authority

Ms Caroline Walsh
Executive Director, Workers Compensation Regulation
State Insurance Regulatory Authority

Email to: 2015benefitsreform@sira.nsw.gov.au
Cc: [redacted]

Dear Mr Lean and Ms Walsh

CONSULTATION ON THE REGULATION OF LEGAL COSTS FOR WORK CAPACITY DECISION REVIEWS

The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide a submission to the State Insurance Regulatory Authority ('SIRA') in its consultation on the regulation of legal costs for Work Capacity Decision Reviews.

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

The ALA has had the opportunity to read the submissions of the Law Society of NSW and the Bar Association of NSW and endorses the comments and recommendations made within and commends them to SIRA.

In particular, the ALA emphasises that:

1. In order to engage in any meaningful debate that could result in a sensible costs regime it would be prudent to consider rationalising the dispute resolution processes first.
2. The dispute resolution systems within the NSW Scheme must be rationalised and reduced to a single system to achieve the stated objectives of the scheme set out in section 3 of the 1998 Act.

3. It would be prudent to consider reducing the complexity and confusion inherent in the *work capacity assessment process* and the *work capacity decision review process* before the scope of the regulation is determined;

4. Injured workers in NSW should be able to access, and avail themselves of, legal advice and legal representation in relation to any dispute arising with respect to their workers compensation claim;

5. Legal practitioners should receive fair and reasonable remuneration for work done in relation to any dispute which arises in respect of a claim;

6. Simply enacting a regulation that provides for legal costs to be paid in respect of work capacity decision reviews will not in and of itself restore equity and fairness to the process by which a worker's capacity and weekly payments are determined;

The ALA makes the following further observations for consideration by SIRA:

1. The scope of reform

The ALA commends the Government for omitting section 44(6)[1] as recommended by the Standing Committee on Law and Justice[2].

The Committee recited at 5.41:

> *"The Statutory Review of the Workers Compensation Legislation Amendment Act 2012 observed that the restrictions on access to legal representation were an area where the reforms appear to have resulted in unintended consequences that 'are arguably counter to the spirit of the objectives of reform'. In particular, the review highlighted that '… the restrictions placed around legal representation in the merit review process do not exist in any other jurisdiction, where injured workers are typically afforded legal representation'."*

However, section 44BF whilst ostensibly 'lifting the restrictions around legal representation' does not actually afford workers or insurers legal representation. Rather, the section restores the prohibition[3] on payment of recovery of costs for legal services provided by a legal practitioner to a worker or insurer in respect of:

- reviews of a prescribed class

[1] *Workers Compensation Amendment Act 2015*, Schedule 2, clause [11], yet to be proclaimed

[2] Review of the exercise of the functions of the WorkCover Authority - Report 54 September 2014, Recommendation 10

[3] Section 44BF*(1) "A legal practitioner is* ***not entitled*** *to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review if…"*

- reviews where the regulations do not fix any maximum costs.

Effectively, the Government could regulate that all reviews are of a prescribed class or could not fix maximum costs in relation to all classes of review. To take that step would be contrary to the objectives of the system, the spirit of the amending Act and contrary to the recommendations of the Standing Committee.

It is against the background of a section that employs the language of prohibition that SIRA wishes to develop a regulation that will achieve a number of positive goals[4]. It is the ALA's submission that the relevant goals with respect to the fixing of legal costs are:

- providing fair, equitable and appropriate access to professional legal services
- promoting sound judgement and effective primary decision-making
- encouraging and support early agreement on work capacity.

The ALA submits that many of the goals of the regulation can only be achieved by detailed review and amendment of the Guidelines - the Work Capacity Guidelines and the Guidelines For Work Capacity Decision Internal Reviews By Insurers And Merit Reviews By The Authority - and the legislation with a view to:

- bringing focus, certainty and clarity to the process of ***assessment*** that may lead to the making of a work capacity decision or which leads to an insurer determining a worker's capacity (see section 38[5]) rather than the decision itself;
- development by the regulator of a 'robust and transparent decision making process'[6] which is not currently prescribed in the legislation or the Guidelines;
- restoring balance to the assessment and review processes thereby providing a level playing field by:
    - removing limb (b) from the definition of suitable employment in section 32A of the 1987 Act
    - removing the insurer's discretion in section 38(2) and (3);
- bringing the merit review and procedural review into the one process occurring at the one time or at the very least bring procedural review before merit review[7].

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[4] See page 4 of the discussion paper

[5] Section 38 employs the phrase "*A worker who is assessed by the insurer" … "as having no current work capacity" or "having current work capacity" or "as being, and is likely to continue indefinitely to be, incapable of …*

[6] *Work Capacity Guidelines* 4 October 2013, paragraph 5.1 'Making a work capacity decision' page 12.

[7] Refer to Davies J, in The Trustees of the *Sisters of Nazareth v Simpson [2015] NSWSC 1730* at paragraphs 23 – 25.

2. Regulatory controls

The ALA supports the view that there should be no prescribed classes of review for which a worker is prevented from accessing paid legal advice and assistance.

The ALA is concerned to ensure that the introduction of a legal costs regulation does not permit the insurer to effectively 'outsource' their claims management processes to a legal practitioner. In this regard, the ALA submits that to encourage better primary decision making and prevent outsourcing of claims management, an insurer should not have legal costs paid by the fund or any administrative scheme in respect of any or all of the following:

- The *assessment* process (whether 'on the papers' or undertaken in accordance with the 'Guidelines')
- The making of a work capacity decision, or
- The Internal Review.

3. Innovation

3.1 Funding of certain classes of work capacity decision

Until such time as the dispute resolution system is rationalised, the ALA encourages SIRA to consider the following:

a. Funding of legal costs for workers regardless of outcome for reviews of work capacity decisions:
   - Where the worker is or could be a 'seriously injured worker' or a 'worker with high needs'.
   - Where the decision involves an exercise of the insurer discretion in sections 38(2) and (3).

b. In judicial review matters, where an insurer has made the application, the legal costs of the worker should be paid regardless of the outcome to ensure there is a contradictor. Likewise the worker should be protected by the Fund against an adverse costs order.

c. If the insurer is not a scheme agent and they are successful on a judicial review application their costs should be met by the scheme.

d. Either on or other of the insurers' legal representatives and workers' legal representatives to receive payment of legal costs upon success on a procedural review, with WIRO to determine who was successful. This ensures only one party receives payment of legal costs and would encourage both sides to advise realistically on the prospects of success.

3.2 Remove Pre injury average weekly earnings from the definition of work capacity decision

Many clients who experience the WorkCover scheme are traumatised by the lack of transparency and inclusiveness they encounter, including an often adversarial approach to claims management of some 'insurers' when the worker does not meet the insurer's expectations.

The relationship between worker, employer and insurer is paramount to ensuring that the objectives of the scheme are met – specifically that workers receive income support while injured, are encouraged favourably to return to work as soon as they have some work capacity and that they receive necessary medical and treatment supports to return to full work capacity.

When a worker is effectively in dispute with their claims officer/manager from the outset because, for example, the calculation of pre injury average weekly earnings is incorrect, the very fact that the worker is steered down a dispute resolution pathway (the section 44 review process) even though the dispute is relatively 'minor', creates hostility from the get-go and can cause a souring of the relationship which is so important to the worker's claim being managed smoothly.

The ALA is of the opinion that section 43(1)(d) should be amended to remove reference to "pre-injury average weekly earnings" from the definition of Work Capacity Decision. Whilst not suggesting that a worker does not require assistance with such a dispute, the introduction of a non- adversarial or rather, inquisitorial, approach to disputes over PIAWE would in part lead to preservation of the worker/employer/insurer relationship and thereby retain focus on the objectives of the scheme.

3.3 Access to information

Early agreement on work capacity requires the insurer and worker to engage at the time the worker has capacity for some work, and not at some artificial point many weeks later. This requires early exchange of information with the worker, particularly of information that may assist the worker understanding their changing capacity, in order to encourage agreement on capacity and engagement in return to work programs.

There remains an absence of mechanisms within the legislation to encourage workers to enjoin in the 'claims process' with the aim of achieving early and sustainable return to work and restoration of health at work.

Open and transparent access by workers to medical records, rehabilitation reports and other claims management reports such as functional and/or vocational test results (excluding

medico-legal reports) early in the management of the claim would, we submit, contribute to better return to work outcomes.

The ALA encourages SIRA to consider amending the *Workers Compensation Regulation 2010* to permit access by workers to information on their claim file so as to avoid workers being 'taken by surprise' with a work capacity decision and avoid disputation.

3.4 Aggregation of impairments

With the proclamation of the remainder of the *Workers Compensation Amendment Act* 2015 workers with a greater than 20% impairment will have to meet a relaxed test to receive weekly payments beyond the second entitlement period, workers who have multiple impairments from multiple injuries and injurious events should be able to aggregate their impairments to meet the test for 'workers with high needs' or 'workers with highest needs'. These workers currently form a small minority of claimants in the scheme. By permitting aggregation of impairments to meet the high or highest needs threshold would advantage more of the most seriously injured workers in the scheme whose prospects of returning to work are significantly compromised by the inability to consider them 'as a whole'.

3.5 Return To Work Agency

The ALA considers that as a fundamental principle lawyers should not be involved in claims management. Lawyers do however provide a service to claimants and insurers and employers in advising them in relation to the scope of their obligations under the legislation, managing disputes and setting expectations.

The Return to Work process is one which appears to be now managed through work capacity decisions. The work capacity decision review process is essentially adversarial as it is currently framed.

The responsibility for assisting injured workers with some work capacity to return to work should be separated from the claims management responsibilities of an insurer.

Consideration should be given to the establishment of an agency or service responsible solely for transitioning workers back to work as soon as they have some work capacity. This service would assume management of the return to work particularly where the employer is either unable, unwilling or refuses to provide the worker with suitable work within a defined timeframe. Such an agency or service could engage with workers in a positive way, providing necessary supports and encouragements to a worker, together with guidance and advice and be responsible for removal of barriers to returning to work.

This responsibility should sensibly be removed from insurers. The agency would be supported by skilled experts funded by the scheme and fall under the regulator (SIRA) and would assume the responsibility for return to work from insurers whose primary aim is to minimise the cost of a claim on the scheme and to an employer.

In Conclusion

The ALA, whilst critical of the current legislation and dispute resolution framework, recognises the complexity of the issues raised in the Discussion Paper and the desire to make a regulation that fulfils a number of critical objectives.

The resolution of the issues raised will, with respect, require thoughtful deliberation by SIRA. The ALA is willing to contribute to any further consultative or collaborative process that may emanate from the Discussion Paper and to elaborate on matters raised in this submission.

We thank you for the opportunity to contribute to this discussion and trust we can be of assistance as consultation progresses.

Yours faithfully

Roshana May
NSW Branch President
Australian Lawyers Alliance