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

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NSW GOVERNMENT
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Contents

1. Introduction

Workers compensation and motor accidents compulsory third party (CTP) insurance are the two largest injury insurance schemes in NSW. Collectively these schemes provide an essential social safety net for around 110,000 people injured at work or on the road each year.

At any one time, almost 220,000 people in NSW are supported through these schemes following an injury in a workplace or on the road. The schemes are funded by 320,000 employers and 5.7 million vehicle owners, who together pay $6.8 billion in premiums each year.

As the peak insurance regulator and system steward, SIRA focuses on ensuring that people have access to the benefits and support they need to recover, return to work or achieve the best possible quality-of-life outcome. SIRA also has a role in ensuring that policies are affordable and that the schemes remain financially sustainable.

This consultation paper is an opportunity for scheme customers, service providers and stakeholders to contribute to the next horizon of reform for NSW personal injury compensation schemes. SIRA is seeking input into:

- Reforms to thresholds and entitlements recommended in the Independent review of icare and the five-year statutory review of the State Insurance and Care Governance Act 2015 (McDougall Review)
- Reforms proposed in the 2020 Law and Justice Review of the workers compensation system on thresholds, entitlements and costs
- Options to mitigate the impact of COVID-19 on customers of the workers compensation and CTP schemes
- Preliminary ideas for modernising and aligning customer experience, outcomes and support within the workers compensation and CTP schemes.

The feedback received through this consultation process, combined with actuarial modelling, will inform SIRA's advice to Government.

2. Review and reform background

Over recent years the workers compensation and CTP schemes have undergone extensive review and reform, including those outlined below.

2015: The State Insurance and Care Governance Act 2015 split the functions of the former WorkCover Authority into three new organisations: The State Insurance Regulatory Authority (SIRA), icare, and SafeWork NSW. The key objective of the Act was to reform the governance and regulatory arrangements of the NSW insurance and compensation schemes by creating three structurally separate organisations to regulate the schemes, operate the schemes, and regulate workplace safety.

2017: Through the Motor Accidents Injuries Act 2017, the NSW Government overhauled the motor accidents scheme to enable a fairer and more affordable system. The reforms have reduced complexity, minimised delays in claim management, and increased the number of injured people entitled to benefits.

2019: SIRA commissioned an Independent Compliance and Performance Review of the Workers Compensation Nominal Insurer managed by icare due to concerns about deteriorating scheme performance. The report, handed down in December 2019, contained findings on the operation and sustainability of the Nominal and recommended significant steps for improvement.

2020: The Treasurer and Minister for Digital and Customer Service jointly commissioned the Hon. Robert McDougall QC to conduct the McDougall Review. The report, handed down the next year on 30 April 2021, offered an independent assessment of the issues and challenges facing icare and the workers compensation scheme.

2021: In March, the Personal Injury Commission was established as a new tribunal that combines dispute resolution services for people claiming against the workers compensation and CTP insurance schemes. The Commission delivers better customer service and improved dispute resolution in NSW. At the same time, the newly established Independent Review Office (formerly the Workers Compensation Independent Review Office) commenced, with an expanded role in the CTP scheme.

2021: In July, a Statutory Review of the Motor Accidents Injuries Act 2017 commenced reviewing all aspects of the 2017 CTP scheme. The final report is due by 1 December 2021.

3. McDougall Review

On 4 August 2020, in response to concerns about icare and the workers compensation scheme more broadly, the NSW Government commissioned the McDougall Review.

Independent Reviewer, the Hon Robert McDougall QC, provided a frank assessment of recent issues and challenges and recommended a series of changes to deliver a stronger and better workers compensation system.

Thirty-five recommendations that could be implemented operationally by SIRA and icare were immediately accepted after the review was handed down. The NSW Government has also accepted eight recommendations requiring legislation to strengthen governance, regulation, and clarify the roles of key agencies in the NSW workers compensation system.

This paper consults on a further four recommendations that deal with threshold tests and entitlements. If implemented, these recommendations could have flow-on effects to other parts of the system, including the CTP scheme, and it is therefore important that the public and stakeholders can provide their views on these matters.

Another recommendation was for a review of workers compensation legislation to examine opportunities to consolidate and simplify the existing legislation. A preliminary review of the workers compensation legislation to scope out the issues, implications and benefits of legislative amalgamation will be undertaken. This work may involve the appointment of an independent expert to lead the work. The preliminary review will commence in late 2021.

4. Standing Committee on Law and Justice

Under the State Insurance and Care Governance Act 2015, a committee of the Legislative Council is designated to supervise the operation of workers compensation in NSW.

Following the Committee's 2020 Review of Workers Compensation, nine recommendations were made for the scheme, many of which overlap with recommendations of the McDougall Review. This consultation paper seeks input into the recommendations for SIRA to investigate the use of whole person impairment, examine the definition of suitable employment, explore options for settlements and increasing legal costs.

5. The COVID-19 pandemic

COVID-19 has created unprecedented community, workplace, and economic impacts and challenges. Among the impacts are a new group of workers compensation claims, for people who catch the virus or sustain a vaccine-related injury through work. These claims may

impact insurers' claims management services and result in additional costs to employers that fund the scheme.

To date, SIRA has overseen the implementation of numerous measures to address the ongoing impact of COVID-19 in its personal injury schemes. Some of these measures include:

- Workers in prescribed employment who contract COVID-19 are presumed to have contracted the disease in the course of their employment and are entitled to workers compensation, under section 19B of the Workers Compensation Act 1987.
- Telehealth services are available without insurer pre-approval for nominated treating doctors, medical specialists (within 3 months from the date of injury), and some allied health services.
- Treating physiotherapists and psychologists can issue the second and subsequent certificate of capacity for injuries or illnesses within their area of expertise. The first certificate of capacity must be issued by the nominated treating doctor.
- SIRA programs are available offering financial incentives to support recovery at work.
- Free mental health resources can be accessed through the SIRA COVID-19 hub by injured people and employers.

However, as the pandemic evolves and other risks become apparent, more measures may be needed to manage the impacts of COVID-19 on the scheme and outcomes for customers.

6. Changing context for personal injury schemes

Laws establishing compulsory injury insurance arrangements began to be enacted in NSW in the 1920s. The intent at that time was to protect injured people from having to sue for damages to cover their healthcare costs and protect those at fault from being sued and going bankrupt.

In the nearly one hundred years since, there have been many social, economic, and healthcare changes. There are new and changed injury and disease risks, such as silicosis from engineered stone, psychological injury, and most recently COVID-19 acquired in the workplace.

The changing nature of work has created gaps in the coverage of traditional workers compensation arrangements. For example, the recent experience of people providing gig economy services has highlighted a situation where there are gaps in mandatory insurance coverage.

There have been changes in road use and technologies implemented in motor vehicles, and new injury prevention initiatives such as seatbelts, child restraints and drink driving laws.

Similarly, there have also been substantial developments in medicine, surgery, rehabilitation, and allied health services.

These developments mean that it is important to regularly review the design of personal injury schemes to ensure it is still delivering the best possible outcomes for the people of NSW.

7. Reform options for consideration

The context around both the McDougall and Law and Justice recommendations, the flow-on effects, and discussion questions are set out below.

7.1. Replacement threshold test

McDougall review recommendation 37: That consideration be given to a replacement threshold test for entitlement to weekly and medical benefits that more accurately reflects the need for compensation.

Law and Justice recommendation 9: That SIRA investigate whether the use of the whole person impairment test in the workers compensation scheme is appropriate.

The threshold test for entitlement to ongoing weekly and medical payments involves an assessment of a worker's degree of permanent impairment, which is expressed as a percentage of Whole Person Impairment (WPI). A permanent impairment assessment (WPI assessment) measures the degree of permanent impairment arising from work-related injuries and diseases in accordance with the NSW workers compensation guidelines for the evaluation of permanent impairment.

WPI assessment is used as a threshold for ongoing payments of compensation. For workers to receive ongoing weekly payments beyond 260 weeks, WPI thresholds of more than 30% or 20% (in conjunction with work capacity conditions) must be met.

Workers with 10% or less WPI can receive medical payments for up to two years after weekly payments cease or after the date of injury if no weekly payments have been paid or are payable. Workers with more than 10% WPI, but not more than 20% WPI, can receive medical payments for up to five years, and workers with more than 20% WPI can receive medical payments indefinitely. This reflects the policy intent that workers with the greatest needs should receive the most benefits.

The table below provides an overview of current WPI thresholds and related entitlements in the scheme.

Degree of WPI	Entitlement related to WPI threshold
More than 10%	• Entitlement to medical expenses after cessation of weekly payments or after the date of injury (2- 5 years) • Lump sum compensation for permanent impairment (excluding psychological injury)
15% or greater	As above plus: • receive lump sum compensation for a primary psychological injury • seek a commutation • receive ongoing domestic assistance where applicable • work injury damages claim threshold
More than 20%	As above plus: • Ongoing entitlement to weekly payments after 260 weeks • Ongoing entitlement to medical expenses

The WPI assessment method is widely used throughout Australian workers compensation schemes to measure impairment and determine access to payments, with some variation in the application between schemes. Most states and territories use WPI assessment, or similar, to determine access to various levels of weekly payments. Some, including NSW, also use the system as a threshold test for cessation of weekly payments.

While some jurisdictions use WPI assessment as a threshold test for cessation of medical and treatment payments, others use monetary caps or time limits or combine the use of

these caps or time limits with 'narrative tests' (defined in glossary) as a determinant for access to medical payments.

Use of a measure such as WPI, which has a methodological assessment process for threshold purposes, may help reduce the potential erosion of thresholds over time. This compares to the risks that accompany narrative tests, as they may involve a greater degree of subjective interpretation.

However, some of the issues highlighted in reviews include that WPI assessment was not designed to determine impairment in relation to work disability or functional incapacity, and that its use as a threshold test may not reflect the policy objective of ensuring that certain workers should receive ongoing support. A further issue raised is that workers may be left uncompensated for a real and severe loss, especially for conditions that may result from an injury that does not lead to an assessable degree of permanent impairment using the current methodology.

Discussion question

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

7.2. Further assessment of degree of permanent impairment

The McDougall Review and the Law and Justice Committee examined how permanent impairment is assessed in workers compensation, recommending:

> **McDougall Review recommendation 38:** That the legislature give consideration to amending the Workplace Injury Management and Workers Compensation Act 1998 to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.
>
> **Law and Justice recommendation 9:** That SIRA investigate whether the restriction in terms of having one assessment of impairment could be removed for certain injuries.

Section 322A of the Workplace Injury Management and Workers Compensation Act 1998 provides for only one assessment of the degree of permanent impairment of an injured worker. However, a party to a medical dispute may appeal the medical assessment of a Medical Assessor, on grounds that there has been a deterioration of their condition that increases the degree of permanent impairment.

Recent reviews suggest that the provision in section 322A may cause injustice for a worker whose medical condition deteriorates after the assessment. It may drive certain behaviours, including the worker delaying the assessment of the degree of permanent impairment, resulting in financial hardship due to an unwillingness to commit to a 'once and for all' single assessment where there is a risk of the injury deteriorating. It may also lead to unnecessary or premature medical interventions during the period when access to compensation is available.

Permitting a further assessment of the degree of permanent impairment may allow an approach that more accurately compensates for a worker's medical needs, incapacity for work, and entitlement to permanent impairment compensation. However, permitting a further assessment may also create uncertainty in the scheme, prolonged claims management complexity and costs, increased financial and behavioural risks concerning lump sum compensation, and impacts to other scheme liabilities such as work injury damages. It may also create the potential for increased disputation.

Discussion questions

2. What limitations and controls should be placed upon a further assessment of impairment?
3. How could a 'significant deterioration in injury' be measured?
4. Should a further assessment of impairment be limited to certain injuries - for example, those prone to deterioration over time?

7.3. 'Reasonably necessary' test

A threshold test that attracts strong stakeholder views is the 'reasonably necessary' test. The McDougall Review proposed:

> **McDougall Review recommendation 39:** That the legislature give consideration to amending section 60 of the Workers Compensation Act 1987 to replace the words 'reasonably necessary' with the words 'reasonable and necessary'.

Under section 60 of the Workers Compensation Act 1987, medical, hospital, ambulance, or workplace rehabilitation services must be required as a result of the injury and be 'reasonably necessary'.

The NSW workers compensation scheme differs from tests in some other schemes, which require treatment to be both 'reasonable *and* necessary'. The NSW CTP scheme requires that treatment and care be "reasonable and necessary in the circumstances".

The McDougall Review highlighted a number of difficulties with the 'reasonably necessary' test, including that the test is unlikely to be 'straightforward'. The Hon. Robert McDougall QC observed that the test of 'reasonable and necessary' is readily comprehensible, has been judicially considered, and appears to be well understood and applied in practice in other schemes.

In the review, some stakeholder feedback indicated a change would introduce a more restrictive test that would 'raise the bar' for medical payments. A higher threshold test would make it harder for injured people to access healthcare, thereby reducing workers compensation healthcare costs in the short term, but potentially lead to poorer health outcomes in the long term.

There has also been a suggestion that the current 'reasonably necessary' test explains the rising healthcare costs in the workers compensation system. However, this test has been applied in workers compensation since 1987. It is only since 2016 that there has been a rapid increase in workers compensation healthcare costs.

Other stakeholder feedback to the McDougall Review indicated that the current definition allows for 'low value' or potentially 'harmful' treatments to be approved; has led to the deemed pre-approval of a wide range of services and incidental expenses; and is inconsistent with the use of a 'reasonable and necessary' test in similar personal injury schemes in NSW and Commonwealth schemes such as the National Disability Insurance Scheme.

Changing the current 'reasonably necessary' test requires further consideration of the issues raised by the McDougall Review and stakeholders, to ensure that the test adopted delivers the best possible outcomes for injured people.

Discussion questions

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'?

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

7.4. Commutation and settlement

The McDougall Review and the Law and Justice Committee considered the expansion of commutation and settlement in the workers compensation system:

> **McDougall Review recommendation 40:** That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.
>
> **Law and Justice recommendation 9:** That SIRA investigate other options for injured workers and insurers to reach settlements and exit the scheme.

A commutation is a voluntary agreement between a worker and employer (insurer) for a 'buy-out' or redemption of any future liabilities to pay weekly compensation and medical expenses by paying a lump sum to the worker.

Commutation numbers in the NSW workers compensation scheme have been low in recent years. The main barriers and disincentives to commutation include the legislated pre-conditions in section 87EA of the Workers Compensation Act 1987, especially the 15% WPI threshold and the requirement to have exhausted all opportunities for injury management and return to work.

Providing workers with a pathway out of the scheme may assist in reducing ongoing claims management costs, 'long tail' liabilities for employers/insurers, and overall levels of disputation. There is also evidence that prolonging the time people spend in compensation schemes can lead to worse health outcomes.

However, historical experience demonstrates that unrestricted access to commutations can drive changes in behaviour resulting in a 'lump sum culture', poorer return to work outcomes and high scheme costs. Other risks include that settlement amounts may not represent overall 'value' for the scheme - thus adding to overall liabilities - and a risk of inadequate protections for workers who may not understand the impact of commuting their future statutory entitlements.

Discussion questions

7. Given historical experience, what controls are appropriate in expanding access to commutation?
8. What classes of claims, if any, lend themselves to commutation?

7.5. Compromised settlement of the lump sum death benefit

The McDougall Review also recommended considering settlement of lump sum death benefits:

> **McDougall Review recommendation 40:** That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.

Section 25 of the Workers Compensation Act 1987 provides a lump sum death benefit where death results from a compensable injury. At 1 October 2021, the lump sum amount is $849,300. The entire sum is payable to the dependant/s of the deceased worker, regardless of whether a person is wholly or partially dependent upon the deceased worker at the time of death. The lump sum death is apportioned by the Personal Injury Commission where there

are multiple dependants. If there are no dependants, the sum is payable to the deceased worker's legal personal representative.

The issues in death claims may be factually, medically, and legally complex. However, under current arrangements, the legislation does not provide a mechanism that allows the parties to compromise where there is a genuine dispute. Examples of dispute issues in death claims include issues around whether the deceased was a worker, and issues around causation. The lump sum death benefit is either payable in full, or not payable at all, depending on the outcome of proceedings in the Personal Injury Commission or Court. This can cause distress to the families of deceased workers and prolong litigation. Allowing resolution between the parties on a compromised basis, with appropriate protection and oversight by the Commission, may assist in resolving disputes in a timely manner and to the satisfaction of the parties.

Discussion questions

9. Should compromised settlement of death benefits be permitted? Why or why not?
10. What oversights are needed to protect the parties?

7.6. Definition of suitable employment

How to define suitable employment was considered by the Law and Justice Committee:

> **Law and Justice recommendation 9:** That SIRA investigate whether the definition of 'suitable employment' used prior to the 2012 reforms might be more appropriate than the current definition.

Section 32A of the Workers Compensation Act 1987 defines 'current work capacity' with respect to suitable employment. 'Suitable employment' is defined in section 32A. This definition permits the insurer to consider the worker's suitability for employment regardless of whether the employment is available, the nature of the worker's pre-injury employment, the worker's place of residence, and considerations involving the general state of the employment market.

Issues raised in the review include that the current approach is not based on a realistic assessment of the worker's ability to return to suitable employment, and that this may result in the identification of employment for which the worker may not be physically and psychologically suited. It has been argued by some stakeholders that any system that entitles an insurer to disregard factors such as the state of the employment market or the worker's place of residence is inherently unfair.

'Suitable employment' was formerly defined in section 43A of the Workers Compensation Act 1987. This involved consideration of matters that included the worker's place of residence, the nature of the worker's pre-injury employment, the length of time the worker has been seeking suitable employment, and the availability of suitable employment in a labour market reasonably accessible to the worker. This was qualified by the former section 52A, which required consideration of circumstances to support a policy intent that the workers compensation scheme did not become a de facto unemployment benefit.

There are multiple uses of the definition of 'suitable employment' in the legislation. Part 2 of Chapter 3 (Workplace injury management) of the Workplace Injury Management and Workers Compensation Act 1998 contains section 49, which requires that employers must provide suitable employment as defined in section 32A. Any change to the definition of suitable employment must also consider any impact to these workplace injury management obligations.

Discussion questions

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

7.7. Legal costs under the Workers Compensation Regulation 2016

The regulation of legal costs in the workers compensation system was examined by the Law and Justice Committee, which recommended:

> **Law and Justice recommendation 9:** That SIRA investigate the feasibility and potential impacts associated with increasing legal costs under the Workers Compensation Regulation 2016.

Various pieces of legislation deal with workers compensation legal costs in NSW, including:

- Part 8 of the Workplace Injury Management and Workers Compensation Act 1998 deals with legal costs and fees
- Section 337 of the 1998 Act provides that the regulations may make provision to determine maximum costs in connection with any workers compensation matter or work injury damages matter
- Part 17 of the Workers Compensation Regulation 2016 relates to costs for legal services
- Schedule 6 to the Regulation provides the maximum costs in compensation matters
- Schedule 7 to the Regulation provides the maximum costs for legal services in work injury damages matters.

Legal costs in workers compensation are not indexed annually. In 2012, there was a 15% increase applied to the Schedule 6 costs (originally calculated in 2006) and a further 10% increase was applied in October 2020.

Independent Legal Assistance and Review Service

Part 5 of Schedule 5 to the Personal Injury Commission Act 2020 establishes the Independent Legal Assistance and Review Service (ILARS). The purpose of ILARS is to provide funding for legal and associated costs for workers seeking advice on decisions of insurers under the workers compensation Acts and to provide assistance in finding solutions for disputes between workers and insurers. ILARS does not extend to claims for damages and is not available to exempt workers.

ILARS is managed and administered by the Independent Review Officer (IRO). The IRO issues ILARS Funding Guidelines. The Funding Guidelines state that the IRO is not bound by Schedule 6 to the Workers Compensation Regulations 2016. Broadly, the Funding Guidelines cover both a wider range of 'services' through the four funding stages and generally pay higher professional fees than Schedule 6.

ILARS only applies to lawyers representing workers. Lawyers undertaking employer/insurer work are paid under Schedule 6.

In the CTP scheme, a recent review of legal supports put forward eight options for potential reform, ranging from no change to existing legal services arrangements to introducing a modified ILARS to people injured on the road. SIRA will consider the findings of this review in combination with the recommendations from the Statutory review, which are due in December 2021.

Discussion questions

13. What are the benefits and impacts associated with increasing legal costs under the Workers Compensation Regulation 2016?
14. How can a sustainable approach to legal costs regulation be set in the workers compensation scheme?

8. Impact of COVID-19 on personal injury schemes

Early measures adopted in response to COVID-19 have reduced some impacts across the workers compensation and CTP schemes. However, new concerns arise in the context of evolving community, workplace, and economic circumstances.

8.1. Addressing the impacts of COVID-19 in a sustainable way

The impact of claims arising from COVID-19 and business interruption is increasingly being felt by insurers and employers in different ways. Some insurers and employers will be exposed to a higher proportion of COVID-19 claims either due to their industry or the effect of the presumptive legislation in section 19B of the Workers Compensation Act 1987.

Meanwhile, other insurers in the workers compensation and CTP schemes, and employers, will have significantly reduced operations due to lockdowns or other COVID-19 impacts. These impacts could flow through to premiums through increased claims costs, reduced ability to provide return to work and alternative duties, and reduced wages.

Issues are also arising for some insurers and employers from workers having adverse reactions to vaccinations, mandated vaccinations, or as a result of some workers being vaccinated and others not. These issues will impact claims costs and have a flow through effect to employer premiums.

Meanwhile, lockdowns and other COVID-19 impacts have affected the availability of and access to services to help injured people in the workers compensation and CTP schemes. One such example is the availability of and access to medical treatment and other types of health care. In workers compensation particularly, this hinders the ability of injured people to return to work and adds costs to the scheme, resulting in higher premiums for employers.

Discussion questions

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?

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

The impact of COVID 19 has highlighted some practical issues arising from the operation of section 59A of the Workers Compensation Act 1987, which concerns limits on medical and treatment compensation.

Under section 59A, compensation is only payable for treatment given or provided to a worker within a legislated ‘compensation period’ tied to the last date of weekly payments. It is not

enough that the treatment has been claimed by a worker or pre-approved by an insurer to alter this legislative requirement.

The Independent Review Office has published an issues paper that includes a number of case studies demonstrating difficulties facing workers from the application of section 59A in some circumstances.

Some insurers have been able to take steps to mitigate the impact of the compensation period imposed by section 59A, however actions and outcomes have differed from insurer to insurer. This section considers two impacts of section 59A and how outcomes have been impacted by COVID-19.

COVID-19 has contributed to delays in some insurer activities and access to some healthcare services and as a result, some workers may be unable to access treatments before the compensation period ends. A direct impact of COVID-19 is that some non-urgent medical treatments have been unavailable or delayed for prolonged periods. As a result, some workers may lose their access to treatment that they may otherwise have been entitled to if not for the delay.

Also, there may be circumstances where a compensation period has not yet expired, and the worker is receiving treatment, but there is a need for additional treatment consequential to treatment already approved and provided. An example of this additional treatment could be post-surgical physiotherapy. In these cases, the insurer may not be able to approve the additional treatment as the worker will no longer be in the 'compensation period' when this additional treatment can be provided.

Discussion questions

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

9. Future opportunities for on personal injury schemes

The workers compensation legislation is underpinned by various acts, regulations, guidelines, and policies with overlapping and inconsistent rules. The arrangement was described by the McDougall Review as having "resulted in a level of confusion, inconsistency and complexity that does nothing to assist the schemes to achieve their policy objectives."

Reviewing and reconciling the workers compensation legislation into one Act will be the first time in over 30 years that the system has been subject to a wholesale legislative rethink. In developing the future workers compensation system there is an opportunity to ensure that NSW leads the way and takes advantage of emerging opportunities and innovations.

In 2017, the NSW Government implemented legislation that has resulted in a new and fairer CTP scheme. There is reduced complexity and delays in claims management, an increased number of injured people are entitled to benefits, and the system is more affordable. A similar opportunity now exists for the workers compensation scheme, and there may be further opportunities to build on this reform in CTP.

A unique opportunity for NSW exists through having the workers compensation system placed alongside the CTP insurance system. This placement allows advancements to be better leveraged to support any person who receives an injury, regardless of whether it happens at work or on the road.

This consultation paper seeks input on those future opportunities to improve workers compensation and CTP insurance.

9.1. Shaping the future compensation system

There have been significant social, economic, and healthcare changes in the nearly one hundred years since mandatory injury insurance arrangements were put in place in NSW. These changes mean that we must regularly take stock of how the system is operating and performing.

Advancements and innovations create opportunities for beneficial change across schemes, particularly where elements of scheme design require modernising to reflect best practice and how we live and work.

Under NSW laws, each injury insurance system operates and has been reviewed mostly in isolation. Whether a person is injured at work, in a motor vehicle accident, volunteering in emergency services, playing sport, through exposure to hazardous materials, or through injuries covered by civil liabilities legislation, the treatment, income replacement and support a person receives may differ - even when they suffer the same injury or illness.

A recent independent study commissioned by SIRA found that workers compensation and CTP can deliver vastly different customer experience and outcomes. On top of that, there is a strong body of research that suggests that making a claim in an injury insurance scheme leads to poorer health outcomes. People with comparable injuries treated outside of compensation schemes experience a better recovery.

With any change or reform, there are opportunities to consider how to improve outcomes for injured people. Looking to the best features of other personal injury or compensation schemes, or developments in personal injury research, may provide alternative options to shape the design of the future system to improve the experience and outcomes for injured people.

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

The NSW Government established SIRA in 2015 as a single insurance regulator to oversee workers compensation and CTP insurance. Bringing these insurance schemes together was designed to improve outcomes for people with an injury and policyholders, as expertise and functions could be leveraged across the State's insurance systems.

Building on this, the NSW Government established the Personal Injury Commission on 1 March 2021 as a consolidated personal injury tribunal, bringing together the dispute resolution functions of the NSW workers compensation and CTP systems. By having one joined-up dispute resolution system, NSW delivers a better customer experience by ensuring that disputes are dealt with justly, quickly, cost-effectively, and with as little formality as possible.

The Independent Review Office was also established on 1 March 2021 to deal with complaints by injured persons about both workers compensation and CTP insurers. This reform promotes fast, fair and consistent complaint solutions while informing shared learnings across both schemes.

While the workers compensation and CTP systems have their differences, there are also many other areas of overlap relating to claims management, healthcare, thresholds, entitlements, and dispute processes. Both are mandatory injury insurance schemes seeking to produce optimal outcomes for injured people while remaining affordable and sustainable for policyholders.

These areas of overlap present opportunities for alignment of the schemes where best-practice can be achieved and outcomes improved for injured people and policyholders. Advances in treatment and service delivery that exist in one scheme can be applied to the other, and other newer innovations that would improve health and social outcomes can be applied across both schemes.

One opportunity for alignment is healthcare, where existing legislative provisions may no longer be considered best-practice and could be modernised. Closer alignment of healthcare to value-based care could improve the quality of treatment, recovery of injured people, and the affordability of the system for policyholders. The range of healthcare providers that treat people in the schemes could also be subject to the same approval requirements, be held to the same standards, and be prevented from treating injured people in the compensation systems if rules are repeatedly breached.

Another consideration is fairness. Currently, people with similar injuries and needs may not receive equitable entitlements and support. For people with comparable injuries, the outcome they get can be based on which scheme they fall under. This detracts from the core objective of providing care and rehabilitation for injured people. There could be opportunities to align care and support to improve health and social outcomes, which could result in even more coverage for injured people without impacting affordability for policyholders.

The claims and injury management process presents another opportunity for greater alignment of schemes. There could be more consistent approaches to how claims are lodged and handled to provide a better customer experience. SIRA's research into customer experience in the workers compensation and CTP systems shows that the experience people have interacting with a scheme impacts their recovery. Reducing some of the complexity in the claims process – at a time when injured people simply need the right support – could help injured people along the path to recovery.

Discussion questions

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?

10. Have your say

This consultation paper sets out questions for consultation to shape the reform of workers compensation thresholds and entitlements following the McDougall Review and identify future opportunities for workers compensation and CTP insurance.

The consultation will be open from 7 October 2021 to 4 November 2021. You can provide your views by:

- visiting the SIRA website www.sira.nsw.gov.au
- visiting the NSW Government Have Your Say website www.nsw.gov.au/have-your-say
- emailing Policy&Design@sira.nsw.gov.au

SIRA may publish submissions on its website unless accompanied by a request for confidentiality.

Glossary of key terms

Term	Explanation
Exempt worker	The 2012 amendments do not apply to police officers, paramedics and firefighters.
Independent Legal Assistance and Review Service (ILARS)	ILARS provides access to free, independent legal advice for injured workers in circumstances where there is a disagreement with insurers regarding entitlements under the Acts. ILARS is managed by the Independent Review Office (IRO).
Independent Review Office (IRO)	The independent statutory office that manages complaints from workers compensation and motor accident claimants about any act or omission of an insurer that affects their entitlements, rights or obligations under the Acts. IRO also manages the Independent Legal Assistance and Review Service (ILARS).
Medical assessor	A medical assessor is a decision-maker appointed by the President of the Personal Injury Commission under the Personal Injury Commission Act 2020.
Motor Accidents Act	Refers to the Motor Accidents Injuries Act 2017.
Narrative test	A narrative test enables a decision maker to recognise that injuries have different consequences for individuals. Depending on the test used, this can be a way of enabling a decision maker to acknowledge that the impact of injury on an injured person will vary depending on the injured person's employment, environment, personal support, resilience, ability to adapt and pre-existing health and disability. Examples of these types of tests include • the administrative discretion to extend access to treatment and care contained in section 232(5) of Victoria's Workplace Injury Rehabilitation and Compensation Act 2013 • a monetary cap on additional medical expenses where a worker meets an exceptional medical circumstances test and has a certain degree of WPI such as under Western Australian workers compensation legislation.

The 1987 Act	Refers to the Workers Compensation Act 1987.
The 1998 Act	Refers to the Workplace Injury Management and Workers Compensation Act 1998.
The Commission	Refers to the Personal Injury Commission (PIC) which is a single, independent tribunal for injured people claiming against the workers compensation and compulsory third party (CTP) insurance schemes. The PIC replaced the former Workers Compensation Commission (WCC) from 1 March 2021.
The Regulation	Refers to the Workers Compensation Regulation 2016.
Pre-Injury Average Weekly Earnings (PIAWE)	PIAWE means the weekly average of the gross earnings received by the worker for work in any employment in which the worker was engaged at the time of the injury. Where a worker is entitled to receive weekly compensation payments, these payments are calculated by the insurer applying a formula to the worker's pre-injury average weekly earnings (PIAWE).
Reasonably necessary	Established under the 1987 Act, this term is used to assess the worker's eligibility to access medical treatment, hospital care and rehabilitation services.
Return to work	A timely, safe and durable return to work for which the worker is suited, having particular regard to their capacity, pre-injury employment, age, education, skills and work experience.
Return to work rate	The proportion of workers who have returned to work after a given period of time. For example, a 26 week RTW rate of 85% means that 85% of workers have returned to work by the time 26 weeks have elapsed from the time of their claim.
Significant injury	Defined in the *1998 Act* and refers to a workplace injury where the worker is likely to have an incapacity for work (whether total or partial, or a combination of both) for a continuous period of more than seven days.
Whole person impairment (WPI)	A whole person impairment assessment is an assessment of the degree of permanent impairment of any body part, system or function which is impaired as a result of an injury and expressed as a percentage.
Work injury damages	If a worker is injured in circumstances where the employer was negligent, the worker may have a right to claim work injury damages. 'Damages', in relation to work injuries, are compensatory in that they attempt to measure, in monetary terms, the harm caused to a worker by the negligence of their employer.

Worker with high needs	Defined in the 1987 Act as a worker whose injury has resulted in permanent impairment and the degree of impairment is assessed as more than 20 percent.
Worker with highest needs	Defined by the 1987 Act as a worker whose injury has resulted in permanent impairment and the degree of impairment is assessed at more than 30 percent.

Disclaimer

This publication may contain information that relates to the regulation of workers compensation insurance, motor accident compulsory third party (CTP) insurance and home building compensation in NSW. It may include details of some of your obligations under the various schemes that the State Insurance Regulatory Authority (SIRA) administers.

However to ensure you comply with your legal obligations you must refer to the appropriate legislation as currently in force. Up to date legislation can be found at the NSW Legislation website legislation.nsw.gov.au

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals, or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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