29 September 2020

Mr Peter Rozen QC
Victorian Worker's Compensation System Independent Review Team
Department of Justice and Community Safety
121 Exhibition St
Melbourne, VIC 3000

By email: agentreview@justice.vic.gov.au

Dear Mr Rozen,

Submission in response to the *Victorian Workers' Compensation System: Independent Review into the Agent Model and the Management of Complex Claims Discussion Paper August 2020*

The Law Institute of Victoria (LIV) is pleased to have been given the opportunity to respond to the Discussion Paper dated August 2020: *Victorian Workers' Compensation System: Independent Review into the Agent Model and the Management of Complex Claims*.

As the peak body for the legal profession, representing approximately 19,000 lawyers and people working to provide legal services in Victoria, the LIV welcomes the opportunity to engage with this Review.

Furthermore, the LIV confirms the necessity for this Review to be undertaken, as anecdotal reports from LIV members suggest poor conduct/decision-making on the part of WorkSafe Agents as identified by the Ombudsman in her reports, and the negative impact of this on the health and long-term recovery prospects of their clients.

In considering:

1. That the 2016 Ombudsman's report failed to bring about any significant changes to Agent conduct, despite most of the recommendations being accepted;

2. The inability to remove from the Agent model the inherent contradiction of a beneficial legislative scheme being administered by commercial, profit making entities; and

3. The critical need for cultural change in the handling of complex claims;

the LIV supports a model which removes complex claims from the Agents' administration, to be managed directly by WorkSafe. The LIV considers this is the best model which is capable of achieving the "*wholesale changes to the system*" which the Ombudsman suggests is essential to addressing the issues identified in her reports.

The LIV's responses to specific questions raised in the Discussion Paper follow.

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Identifying and Assessing Complex Claims

What are the features of a claim for worker's compensation that make it complex, or at risk of being complex?

Having regard to the fact that the definition of a Complex Claim for the purpose of the Review is '*where the injured worker has received 130 weeks or more of weekly payments*', LIV members have reported that in their experience:

1. the threshold to receive weekly payments beyond 130 weeks is very high, such that many workers who continue to engage with the scheme in the longer term would not be captured by this approach; and

2. the mere fact that an injured worker returns to work or ceases to receive weekly payments does not necessarily equate to their claim being less complex.

In view of this, the LIV considers that defining a "complex claim", should take into account other considerations including the nature of the injury and the extent of any treatment.

It is the experience of LIV members that workers' who suffer from significant injuries such as pain syndromes, brain injuries and spinal conditions, or who require extensive surgical treatment, will routinely interact with the scheme over an extended period even if weekly payments cease.

It is therefore critical that there be an individualised approach to defining complexity, which takes into account various factors.

This could be achieved by introducing a "narrative" test to determine whether a claim is a complex claim, in addition to the 130-week delineator.

The review may also wish to consider including in the definition of a "complex claim", cases that satisfy the current definition of *"Serious Injury"*[1] set out in the WorkCover legislation.

How, and at what stage, should claims for worker's compensation be assessed as being complex, or at risk of becoming complex?

In recognising the importance of early intervention in injury management, and that some claims will become increasingly complex over time, the LIV suggests the identification of complex claims should occur in several stages.

This could occur upon claim lodgement and then again at some later time before 130 weeks**.**

Some claims, for example where there are severe physical injuries or traumatic psychological conditions, can reasonably be assessed as complex from the beginning. Certainly, the view of LIV members is that such claims will rapidly become complex, particularly if the quality of the claimant's interactions with the scheme is poor.

[1] See section 325 of the *Workplace Injury Rehabilitation and Compensation Act 2013(WIRC Act).* In determining whether an individual satisfies this definition, regard can be had more broadly to the long-term consequences of the injury on an injured worker's life. For more information, the Judicial College Manual on Serious Injury is a useful source of information: https://www.judicialcollege.vic.edu.au/eManuals/SIM/index.htm#54358.htm

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In determining when a claim should be classified as complex, the review should note that at present *the "employment obligation period"*[2] ceases after 52 weeks of incapacity. It therefore seems reasonable to wait until after this period expires to assess claim complexity as the employment of many workers who have not returned to full duties by this time is often terminated, with consequent deterioration in their condition(s).

The LIV encourages the Review to also consider whether this timeframe is adequate in the current environment or whether employers should perhaps be incentivised to retain injured staff for longer than the current 52 weeks.

Case Management of Complex Claims

Are current case management practices able to support and treat the individual needs of injured workers with complex claims?

The LIV's view is that the current model is not capable of consistently supporting and treating individuals with complex claims.

LIV members report that the current case management practices of Agents often result in injured people feeling like they are being treated as a number, rather than as an individual. LIV members report that many injured workers are constantly having to "prove" their injuries and fight for their benefits, which hinders their recovery. This was well illustrated in the cases featured in the recent 4 Corners episode.[3]

Far from providing prompt and proactive treatment and management of claims, quality interactions and sustainable return to work outcomes, LIV members acting for injured workers have reported concern that some Agents frequently:

- appear to delay making decisions;
- appear to actively seek to minimise benefits;
- rely heavily on surveillance material in an attempt to reduce benefits;
- appear to ignore the expert advice of treating health professionals;
- appear to "doctor shop" for medical opinions which support benefit reductions;
- make inconsistent decisions about treatment;
- lack flexibility and common sense in decision making;
- employ case managers who are indifferent and insensitive in their demeanour, and lack experience in communicating with injured people;
- lack continuity in case managers, who change regularly;
- fail to respond promptly, or at all, to communications from injured workers or their representatives;
- pressure injured workers to participate in return to work processes when they are incapable of doing so;
- fail to intervene when employers do not meet their obligations under the law; and
- fail to meaningfully engage in dispute resolution processes.

[2] Section 103 of the WIRC Act sets out that an employer must, to the extent that it is reasonable to do so, provide suitable modified employment to a worker who regains capacity within the employment obligation period.
[3] https://iview.abc.net.au/show/four-corners, Episode "Immoral and Unethical"

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The effect of this conduct is that there is a greater need for matters to be escalated within dispute resolution processes. This increases the burden on the scheme's finances and tends to further hinder an injured worker's recovery due to the delays and stresses inherent in these processes.

The LIV submits that the current Agent model does not sufficiently incentivise individualised care. Rather, Agents are rewarded for using generic milestones to reduce benefits.

Describe what needs to change in the case management practices of complex claims so that injured workers are better supported and treated.

The LIV considers that the following changes would go some way towards enhancing the experience of injured workers with Complex Claims:

i. Compassionate early engagement and the allocation of additional resources to the prompt management of claims would likely lead to improved health and return to work outcomes for injured workers and reduce the number of disputes.

   In this respect the Review may wish to seek information about the current WorkSafe pilot which allows for the provision of up to 13 weeks of medical treatment costs to first responders with psychological injuries prior to claim determination.

ii. Giving greater weight to the opinions of a worker's treating medical and allied health professionals when making decisions and minimising the use of Independent Medical Examinations (IME's) so that injured workers do not feel they are having to constantly "prove" their injury.

iii. Improving the quality of the staff engaged by Agents, so that staff making decisions are appropriately qualified and experienced to make those decisions.

   In this regard, it may be useful for this Review to compare the credentials of WorkSafe Agent staff with staff employed by the TAC or other public liability insurers, where it is understood that staff often have allied health experience and qualifications.

The LIV considers, however, that the breadth of problems identified with the Agent model cannot be addressed by merely tinkering with the current system.

Financial Incentives and Agent Decision Making

What role do the current financial incentives for agents have in the agent's management of complex claims? Do the current financial incentives for agents support prompt, effective and proactive outcomes for injured workers with complex claims?

Whilst there is a need for greater openness in detailing the financial arrangements between WorkSafe and the Agents, it appears that, in general, benefit reduction is central to incentives for Agents. If this is the case, the LIV submits that this is inconsistent with the underpinnings of the scheme, to benefit injured Workers. It means that Agents' decision making is likely to be affected by a desire to achieve financial reward, rather than being focussed on the well-being and interests of injured claimants.

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This compromised focus may well be a fundamental driver of the poor conduct and decision-making of some Agents.

Describe:

a. the ways in which the current financial incentives for agents could be changed to maximise outcomes for injured workers with complex claims.

b. any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents;

Describe any non-financial mechanisms by which agents could be encouraged to promote quality decision making.

The LIV submits that there should be a change in the basis for Agent incentives from benefit reduction to benefit delivery.

Agents should be evaluated through the achievement of *sustainable* recovery and return to work measures and the timely delivery of benefits.

If this focus was adopted the LIV suggests it would:

1. Encourage the prompt approval of treatment.

2. Encourage an emphasis on the views of the injured worker's treating medical and allied health practitioners at first instance, rather than promoting a model where Agents arrange multiple IME's for "check box" decision-making, resulting in inefficiency and delay.

3. Reduce reliance on purely quantitative measures of scheme success (For example; how many people remain in receipt of payments at certain points in time).

4. Promote scheme viability through improved outcomes for claimants, and a corresponding reduction in "long tail" benefits.

However, the LIV submits that incentivising this approach and promoting genuine change in Agent behaviour will be difficult to achieve in a profit driven system. As such, a complete restructure of the current model is required.

<u>Oversight of Agents by WorkSafe</u>

Are WorkSafe's processes for overseeing agents' management of claims achieving prompt, effective and proactive outcomes for injured workers?

The LIV has limited understanding of existing WorkSafe oversight processes and, subject to commercial in confidence considerations, would like to better understand the existing contractual expectations WorkSafe has of the Agents.

Do the new mechanisms implemented by WorkSafe in response to the Ombudsman's 2019 report address any limitations in WorkSafe's oversight of agent decision making?

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Many of the recommendations made by the Ombudsman in her 2019 report are useful for quantifying and further identifying the systemic problems in the Agent Model, but not necessarily resolving them.

In this respect, the LIV invites the Review to consider the information provided by the Workers' Compensation Independent Review Service (WCIRS) in its monthly stakeholder reports, which at this relatively early stage seem to indicate that high rates of Agent decisions are being overturned.

The LIV is concerned that the mechanisms which have been implemented in response to the Ombudsman's recommendations do not address the foundational issues of:

- Scheme culture;
- Agent culture; and
- The economic drivers of decision making;

which the LIV considers to be the basis of the current difficulties.

How could any limitations in WorkSafe's oversight of agent decision making be overcome?

WorkSafe oversight of agent decision making could be improved by using qualitative assessment of decisions by Agents, randomly auditing Agent decisions, particularly before and after conciliation conferences, improving the current complaints process for injured workers and creating forums for regular feedback between WorkSafe and stakeholders.

Evaluation measures

To what extent do current measurements of outcomes for injured workers, including return to work rates and worker surveys, accurately measure whether the agent model achieves prompt, effective and proactive outcomes for injured workers?

Describe any additional or alternative methods of measuring outcomes for injured workers that should be considered?

The consultation paper prepared by the Review referenced the WorkSafe Victoria Annual Report 2019[4] which detailed metrics used to measure Agent performance.

Those metrics could include measurement of whether injured workers received medical and like expenses benefits, as recommended by treating health practitioners, in a timely way.

Return to work success measures seem to be at a very early stage and may not capture the long term and sustained return to work success rate.

The Ombudsman reports confirm the majority of WorkCover claims are non-complex. Surveys targeted to claimants with complex claims will improve the accuracy of measurement of Agent service delivery for that cohort of claimants.

The current agent model and alternative models

[4] https://content.api.worksafe.vic.gov.au/sites/default/files/2019-10/ISBN-WorkSafe-annual-report-2019.pdf; p.142

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In its recent focussed discussion group, the Review identified three options available to it in deciding how best to move forward.

Option 1:
No change to the current model.

Option 2:
Keep the Agent model, but have complex claims administered by a specialist unit within each agency.

Option 3:
Keep the Agent model, but have complex claims managed in-house by a unit within the WorkSafe.

The LIV submits that the third option is preferable.

Accepting the status quo will not rectify the issues identified by the Ombudsman.

Similarly, retaining the agent model fails to address the problems associated with engaging Agents whose decision making may be motivated by financial incentives, and the correlative risk that claims will be managed for the financial benefit of the Agency, and not for the primary benefit of the injured worker.

The third option removes any possibility of conflicted decision making by shifting poor decision making from being a contract management issue to being an internal performance management issue. It means that the scheme's focus can be on its own goals and objectives, not the corporate goals and objectives of the agencies it engages.

The LIV also submits that Option 3 provides the optimal foundation to achieving:

- Stakeholder engagement;
- Education – both for participants and employers;
- Scheme viability. Funds currently flowing to management fees or the profit margins of agencies could be reinvested in the scheme. Reduced complaints would take the stress off the currently overwhelmed complaints and conciliation process;
- Consistency of case outcomes;
- Better experiences and health outcomes for injured workers with complex claims;
- More streamlined management and oversight functions.

The LIV considers that the third option is the model best suited to addressing the core issues identified in the Ombudsman's reports. It would remove the compromised motivation of the Agents and would enable the primary focus to be on the health and recovery of injured workers.

It would also align the Workcover scheme with parallel schemes such as the TAC scheme, increasing the possibility of industry-wide learnings.

Are there practices or procedures used by other compensation schemes, in Australia or overseas, that maximise outcomes for injured workers that the Review should examine

As noted above, there are parallel schemes in Victoria, which the LIV considers would be worthy of investigation by the Review:

1. *The Transport Accident Commission (TAC)*

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The TAC model manages claims in-house, including complex claims.

LIV members who work in both the TAC and WorkCover schemes report that there are major cultural differences between the two schemes. The TAC scheme does not adopt a 'one size fits all' approach to case management. Efforts are made to tailor management of claims to the specific needs of each individual claimant.

Evidence of the benefits of an internal claims handling system, coupled with a culture of individualised care is reflected in the fact that, historically, there has not been a culture of poor behaviour or compromised decision making within the TAC scheme. However, over the past year, there has been a significant increase in disputes related to TAC decisions which have most commonly arisen as a result of outsourcing claim file reviews to external parties. It is worth noting that a number of these reviews have been outsourced to insurers who are also currently WorkSafe Agents.

Stakeholders report that complex claims case managers within the TAC system are more likely to listen to the expert opinion of health professionals. They rely more on an evidence-based approach to decision making in relation to benefit provision, not an incentives-based approach. In our experience, there is a much greater level of trust between the scheme and stakeholders in TAC than in Workcover. They appear to better understand that stakeholders have a substantial interest in the long-term viability of the scheme as well.

The systems and processes of the TAC flow from the culture described above. They promote a collaborative approach with all stakeholders, including claimants, with the overarching objective that all parties work together to ensure appropriate supports and benefits are provided to the injured person, and avoiding unnecessary disputes.

The LIV recognises that the number of complex claims administered by WorkSafe is considerably higher than the TAC, but this should not preclude the TAC being looked to as an optimal model.

The TAC's current processes for handling complex cases appear to be efficient and effective.

2. *The National Disability Insurance Scheme (NDIS)*

The NDIS is worthy of consideration as an alternative model – but only from a theoretical perspective, not as a model of good practice.

NDIS scheme participants play a major role in determining the reasonable and necessary supports necessary for them to lead an ordinary life. This participant-centred approach is a powerful example of individualised care and empowerment.

It has been well publicised, however, that there have been significant issues in putting these ideals into practice.

The experience of LIV members acting for clients of the NDIS scheme reflects that:

- Many NDIS clients have experienced significant delays in receiving decisions about their eligibility;
- Many NDIS clients have experienced significant delays in receiving decisions about finalisation of their plans;

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- Many NDIS clients have experienced significant delays in receiving decisions through the NDIA's internal reviews system; and

- There are concerns about the expertise of some NDIS Planners, and their capacity to make informed decisions.

As a scheme, the NDIS continues to experience significant issues in claims management – especially in complex claims. Funding shortfalls may underpin many of these issues.

The LIV urges the Review to look at those elements of the NDIS scheme that provide the most benefit to scheme participants: mainly its focus on empowering participants to make decisions about the allocation of resources to address their health and well-being needs. However, the LIV does not recommend the NDIS as a model for claims handling.

Are there any other matters the Review should consider in meeting the Terms of Reference?

Whilst outside the remit of the current Review, the LIV believes that consideration should be given to whether the administration of all claims, not just complex claims, should be brought in-house at Worksafe.

Also, outside the remit of the current Review is the role of self-insurers. LIV members have reported that poor conduct and mishandling of claims frequently involves self-insurers whose behaviour often goes unchecked and appears removed from accountability structures within WorkSafe. In view of this, the LIV adds its voice to calls for a further review to examine the degree to which self-insurers adequately and appropriately administer the claims of injured workers.

Finally, the LIV calls on the Review to have regard to the detrimental effect of the current claims process on the mental health of injured workers. The pejorative experiences that many workers report about claims processes are frequently a direct consequence of Agent conduct. This often worsens the mental health of some injured workers.

The LIV thanks the Review for giving consideration to these submissions.

If you have any queries please contact Irene Chrisafis, Senior Lawyer and Privacy Officer, by telephone on 03 9607 9386 or by email at IChrisafis@liv.asn.au.

Yours sincerely,

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