NSW GOVERNMENT

Response to the Legislative Council General Purpose Standing Committee No. 1 Inquiry Report into Personal Injury Compensation Legislation

Introduction

On 8 December 2005 the Legislative Council General Purpose Standing Committee No. 1 (the Committee) released its Report on Personal Injury Compensation Legislation (the Report). The Report contains a series of recommendations proposing changes to civil liability, workers compensation and motor accidents compensation legislation. The Committee's recommendations are intended to be implemented as a package.

The Government has now carefully considered the substance and cost implications of the Committee's recommendations.

Context of the Government's reforms

Between 1999 and 2003, important reforms to the laws of civil liability and compensation were introduced by the New South Wales Government and approved by the New South Wales Parliament.

The *Motor Accidents Compensation Act 1999* was introduced to reduce the number of matters going to litigation and to emphasise early treatment and rehabilitation of motor accident victims. The reforms decreased transaction costs including legal costs, medico-legal costs and investigation costs. Green Slips were made more affordable, and more of the premium dollar is now directed towards injured claimants.

The reforms to the workers compensation scheme in 2001 were designed to address the growing scheme deficit, while avoiding the need to increase premiums or reduce benefits. Prior to the 2001 reforms being implemented, a large proportion of the resources of the scheme were being consumed by legal fees. Legal payments had risen from $200 million per annum in 1996/97 to $350 million per annum in 2000/01. In some cases the lawyers' fees ended up being considerably higher than the final award to the injured worker.

Disputation rates were high. If the insurer disputed the claim, the worker usually had to attend court. In such cases there was a long wait for workers to receive any benefits, sometimes years. None of this was conducive to the worker's injury management, rehabilitation and early return to sustainable employment. The reforms addressed these problems.

The Government's civil liability reforms were necessary to deal with the insurance crisis, which was crippling small businesses, community groups, sporting organisations and local councils. The reforms were not only, however, a response to the problems regarding insurance, and about reducing premiums. The *Civil Liability Amendment (Personal Responsibility) Act,* passed by Parliament on 20 November 2002, implemented the second stage of the reforms

and went to the heart of the Government's concerns about a litigation culture. This legislation unashamedly sought to restore the principle of personal responsibility and to address certain areas of the law of negligence which were completely out of step with community expectations.

What have the reforms delivered?

The reforms have delivered numerous benefits to the community.

Motor vehicle accidents:

- Compulsory Third Party premiums[1] have been reduced from $441 in June 1999 to $317 in March 2006, representing a saving of $124.
- There is a greater emphasis on early treatment and rehabilitation of motor accident victims.
- The claims process has been streamlined. It is less adversarial and more claimant-friendly.
- Transaction costs have been reduced.
- There is increased scheme efficiency (ie more of the premium dollar is available to claimants for compensation).

Stabilisation of the scheme has also meant that the Government could deliver the no-fault Lifetime Care and Support scheme, a benefit for inevitable accidents and no-fault benefits for children.

Workers compensation:

- The scheme deficit has been significantly reduced. Recent figures from PricewaterhouseCoopers (PwC) show that the $3.2 billion deficit of December 2002 has been reduced to a $1.16 billion deficit as at December 2005, representing a $2.1 billion reduction.
- Premiums have remained affordable.
- Transaction costs have been reduced.
- There have been improvements in claims administration and return to work rates.
- There have been improvements in support to employers and workers.
- An almost 60 per cent reduction in disputes has occurred (from 8, 000 per quarter to 3, 400 per quarter).
- The compensation available under the statutory scheme has been improved.

Stabilisation of the scheme has also meant that at the same time as increasing benefits for workers suffering back injury, the Government has also been able to reduce premiums for employers by 5 per cent in December 2005 then a further 10 per cent from June 2006, leading to an improved business environment in New South Wales.

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[1] Average premium for a Sydney metropolitan passenger vehicle.

Civil liability and health care liability:

- Public liability premiums have started to decrease. The Australian Prudential Regulation Authority (APRA) report issued in August 2005 shows a reduction of over 10 per cent in the average written premium for public liability insurance in New South Wales (for the period between 2003 and 2004).
- Professional indemnity premiums have started to decrease.
- Availability of public liability and professional indemnity insurance coverage has increased, with specific coverage now available for not-for-profit organisations.
- Payouts for damages have been limited to fair and sustainable levels
- Claims for minor injuries causing no ongoing impairment appear to have decreased, however people suffering from these types of injuries are still entitled to recover financial and medical costs.

Consistency across the schemes

While the Committee recognised in its Report that important differences exist between various personal injury law schemes in New South Wales and acknowledged that there are sound reasons for the maintenance of separate legislative arrangements, it nonetheless recommended that standardisation occur across the various schemes in a number of respects.

The Committee's recommendations for standardisation are not supported by the Government. Standardisation cannot occur without some of the important features of each fundamentally distinct and unique personal injury compensation scheme being undermined or even lost.

Attempting to standardise the workers compensation scheme, which is primarily a no-fault compensation scheme with limited common law benefits, with a statutory fault-based motor accidents scheme or a common law based civil liability scheme, is undesirable.

The Government's reforms to the workers compensation scheme were introduced in an environment where the common law component of the system was threatening the overall viability of the no-fault scheme, which delivers benefits to all workers who are injured. The Government's reforms stabilised the scheme, protecting no-fault benefits for all injured workers, while delivering improved no-fault benefits including the introduction of a broader range of permanent impairment benefits, together with increases in the maximum amounts available for permanent impairment and a new benefit for domestic assistance.

The imposition of civil liability thresholds onto the statutory based, no-fault workers compensation scheme, for example, could only be achieved by increasing workers compensation premiums for employers or decreasing

compensation for the injured workers in the no-fault scheme. Alternatively, preservation of the fundamental principle underpinning the workers compensation scheme, being the provision of immediate assistance to workers without the necessity for them to first prove fault, could be relinquished.

Similarly, standardising the statutory fault-based motor accidents scheme with a common law based civil liability scheme cannot be achieved without increasing Green Slip premiums or otherwise jeopardising the unique features of the motor accidents scheme. As a compulsory insurance based scheme, the motor accidents scheme includes the nominal defendant, ensuring that those injured by an at fault, but uninsured, driver will not go uncompensated.

More recently, stabilisation of the motor accidents scheme has enabled the Government to introduce important new features including:

- the no-fault Lifetime Care and Support scheme which provides benefits for life to those who are catastrophically injured, regardless of fault;
- a no-fault benefit for children;
- provisions to ensure that those who are injured through an "inevitable accident" are compensated.

The cost impact of the changes on the community and business

The cost implications of the Committee's recommendations deserve careful consideration.

The Government has recently announced a decrease in the target workers compensation premium rate to 2.17 per cent (down from 2.57 per cent in 2001). If the recommendations contained in the Committee's Report were adopted, independent actuaries PricewaterhouseCoopers estimate that it would lead to the annual cost of premium as a percentage of wages increasing to at least 3.59 per cent to as high as 4.60 per cent.

This is not good for business in New South Wales. Indeed, if the reforms were to be unwound, it is likely that the reductions in workers compensation premiums which have been delivered to employers in New South Wales of 5 per cent in December 2005 and a further 10 per cent from June 2006 would be reversed.

Similarly, the Committee's Recommendation 7 to replace the 10 per cent whole person impairment threshold for non-economic loss awards under the *Motor Accidents Compensation Act 1999* with the *Civil Liability Act 2002* threshold is estimated by independent actuaries Taylor Fry as requiring an increase of up to $116 in the average gross Green Slip premium. Recommendation 17 to reduce the cap on non-economic loss damages to $300,000 will have little impact in ameliorating the significant cost implications of the other recommendations.

It is important to point out that the primary means through which the Government's reforms have been able to achieve savings is by reducing "transaction costs" in the schemes, in particular legal costs. While the Committee's recommendations might appear to lead to increased benefits, a large proportion of the costs to business and the community would be consumed in legal and other costs and would not assist injured persons.

The Government's position

As the Government sees it, the task is to strike an appropriate balance between the rights of injured people to compensation, and the ability of the rest of the community to pay for that compensation. In addition, an appropriate balance needs to be struck between personal responsibility for one's own conduct and social expectations for proper compensation and care.

The Government believes that reasonable balances have been achieved through the personal injury compensation laws currently in operation in New South Wales.

Implementing the Committee's recommendations would destablilise that balance, with the only obvious benefit being to those with minor injuries. Furthermore, it is noted that the fundamental concept underpinning the Committee's model, being the creation of a new personal injury compensation tribunal, is not supported by either the NSW Law Society or the NSW Bar Association.

The Committee does, however, raise a number of valid concerns in its Report that are shared by the Government. In particular, concerns relating to affordability of available insurance and the profitability of the insurance industry. The Government shares the Committee's sentiments that insurers should be made to account and disclose, although notes that this is already occurring on a national level.

In addition, the Government sees merit in keeping certain aspects of its reforms, such as the duty of care provisions, under review. It is, however, too early for this to occur given the limited number of cases which have been determined under the new provisions. Further, if any review is to be undertaken, the Government is of the view that consideration should be given as to whether it may be more appropriate for a review to be undertaken on a national level.

Recommendation 1
That the Government look at ways of providing additional assistance to not-for-profit and community groups in paying public liability insurance premiums, possibly through the use of a pooled, bulk purchase insurance scheme.

Response:
The Government welcomes the Committee's finding that the personal injury law reforms have started to deliver lower premiums and greater availability and affordability of insurance. The not-for-profit and community sectors of the market are now serviced by a number of insurance schemes, such as NCOSS Community Cover, CRISP Community Related Insurance and Superannuation Program, Community Care Underwriting (a joint initiative between IAG, QBE and Allianz), and Suncorp. This was not the case prior to the civil liability reforms.

It should be noted that the Government has taken significant steps to assist the community sector through the establishment of a pooled, bulk purchase insurance scheme for not-for-profit and community groups. The Government granted $237,270 to the Council of Social Services of New South Wales (NCOSS) in June 2002 to fund a two year project to establish a bulk buying insurance scheme for the not-for-profit and community sector. The objectives of the project were to:

- establish a bulk buying scheme;
- provide ongoing information to assist non-government organisations to identify their insurance needs; and
- provide risk-management training and assistance.

In May 2004 NCOSS requested additional funding from the Government to enable the NCOSS Community Cover scheme to become fully operational. The Government made further grants to NCOSS totalling $110,291 in June and July 2004.

Recommendation 2
That the Government provide advice to all Local Councils and Shire Associations in New South Wales, for distribution to local community and sporting groups within the wider community, on the effects of the Government's changes to the duty of care provisions of the *Civil Liability Act 2002* and the repeal of s.14 of the *Associations Incorporation Regulation 1999* in 2002.

Response:
The Government notes that this Recommendation arose from a submission made by a legal practitioner[2] who argued that incorporated community and sporting groups no longer need public liability insurance, in light of the duty of care provisions in the *Civil Liability Act 2002* and the removal of the legislative requirement that incorporated associations effect and maintain public liability insurance.

While the Government's reforms have significantly improved the liability position of volunteers and community groups, this does not necessarily mean that they no longer require insurance.

The Government is pleased to respond to all enquiries concerning the duty of care provisions in the *Civil Liability Act 2002*, and the effect of the *Associations Incorporation Amendment (Public Liability) Regulation 2002.* A number of publications have also been produced. It would be inappropriate, however, for the Government to issue advice regarding the need for incorporated community and sporting groups to obtain public liability insurance. Insurance cover is a matter for each organisation, and needs to be assessed on a case-by-case basis. Independent advice should be sought where required.

Recommendation 3
That the Government legislate to require disclosure by insurers operating in the public liability market of basic market, premium, claims and liability data to the Parliament, through an amendment to the *Civil Liability Act 2002* to insert a part similar to Part 15.2 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002*.

Response:
The Government supports insurer accountability and transparency, and recognises that the community needs information in order to be confident that insurers are passing on the full benefit of tort law reforms. While it is possible for the State to require disclosure in relation to specific statutory schemes which are under its control, such as in relation

[2] Mr Timothy Abbott, Walsh and Blair Lawyers

to motor accidents, insurers otherwise operate in a national market. The Commonwealth has the primary power and responsibility to regulate the insurance industry and the price of insurance, and it makes sense to collect data on a national basis.

In this regard, the Government notes that insurers are already subject to a number of ongoing monitoring and disclosure requirements:

- The Australian Competition and Consumer Commission (ACCC) monitors costs and premiums in the public liability and professional indemnity sectors of the insurance market. It has released five Monitoring Reports (on a six monthly basis) to date. On 17 February 2005, the Commonwealth announced that it had requested the ACCC to continue to monitor costs and premiums in these classes of insurance on an annual basis for a further three years.

- The Australian Prudential Regulation Authority (APRA) now collects public liability and professional indemnity insurance data through its National Claims and Policies Database (NCPD). The NCPD was launched in January 2005 and the first set of reports produced on 11 August 2005. All Australian insurers are required to provide wide-ranging and detailed policy, premium and claims data for the purposes of the NCPD. APRA collects more detailed information than the information required under the ACT's *Civil Law (Wrongs) Act 2002*. APRA also produces reports with the data broken down by State/Territories. Insurers must report twice a year and APRA has developed reporting standards and data specifications.

Legislatively requiring insurers to provide data to the NSW Parliament would be an unnecessary duplication, particularly when the data is currently being collected by regulators with the expertise necessary to monitor it. The Recommendation is accordingly not supported.

Recommendation 4
That the Government:
- discontinue the use of the MAA Medical Assessment Guidelines based on the AMA Guides (4th edition) under the *Motor Accidents Compensation Act 1999.*
- discontinue the use of the WorkCover Guidelines, based on the AMA Guides (5th edition) under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998.*

Response:
The Recommendation to discontinue the use of the MAA Medical Assessment Guidelines based on the AMA Guides (4th edition) under the *Motor Accidents Compensation Act 1999* is not supported. The use of the MAA Medical

Assessment Guidelines is integral to the operation of the objectively based 10 per cent Whole Person Impairment (WPI) threshold for the recovery of non-economic loss damages under s.131 of the *Motor Accidents Compensation Act 1999.*

The Recommendation to discontinue the use of the WorkCover Guidelines, based on the AMA Guides (5th edition) under the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* is not supported.

Guidelines provide an evidence based methodology for assessing permanent impairment and are used by medical specialists trained in their use. Their use means that the assessment process is based on objective measures and has a high degree of reliability. Medical specialists from the relevant speciality area, trained in the use of the Guidelines, should make an assessment at the same level of impairment for the same injured person.

The Guidelines were developed by medical specialists in New South Wales who reviewed and adapted the American Medical Association Guides to introduce a consistent, reliable and clinically defensible means of assessing permanent impairment.

For both motor accidents and workers compensation matters, there are appeal mechanisms which enable the decision of the medical specialists to be reviewed. The reintroduction of disputation into the scheme through the use of a subjective, judicially determined threshold would significantly increase legal costs incurred in the schemes, requiring increased premiums without necessarily delivering greater benefits to injured people.

Recommendation 5
That the Government create a new personal injury compensation tribunal, based on the current processes of the Dust Disease Tribunal, for the determination of statutory and common law compensation claims made under the *Motor Accidents Compensation Act 1999*, the *Workers Compensation Act 1987* and the *Civil Liability Act 2002*. This tribunal should replace existing mechanisms for determining disputed claims.

Response:
The Recommendation is not supported.

In relation to motor accidents matters, the Government's reforms introduced by the *Motor Accidents Compensation Act 1999* established the Claims Assessment and Resolution Service (CARS) and the Medical Assessment Service (MAS) to

provide dispute resolution services for the motor accidents scheme as an alternative to litigation in disputed matters.

The Committee's proposal for a new tribunal to determine motor accidents (as well as workers compensation and civil liability) claims, is premised on a return to judicial determination of access to general damages (non-economic loss) and removes the current role of expert medical assessment in determining the level of impairment and thus eligibility for non-economic loss awards in the motor accidents scheme. The Government does not support the return to subjective judicial determination of this issue (see response to Recommendation 7 below).

The Government does not consider that the Committee's report advances any compelling case for replacing the existing motor accidents scheme dispute resolution services. The Committee's report notes that if there was a return to judicial determination of access to non-economic loss entitlement CARS could determine motor accidents compensation claims and that CARS is "essentially doing this already when an injury exceeds 10 per cent Whole Person Impairment". The Government would concur with that view.

With regard to the proposed medical assessment service, the report notes that the new service should be "similar to that provided by doctors appointed to MAS".

The Government considers that it has been able to attract the very best medical and legal practitioners to undertake medical and claims assessments and that MAS and CARS have amassed considerable expertise in the area of motor accidents injuries and claims.

In relation to workers compensation matters, the Workers Compensation Commission provides an effective and efficient venue for the resolution of such disputes. It has been in operation for just over four years and was a major change to dispute resolution for workers compensation matters in New South Wales.

Prior to the 2001 workers compensation reforms being implemented, a large proportion of the resources of the workers compensation scheme were being consumed by legal fees. Legal payments had risen from $200 million per annum in 1996/97 to $350 million per annum in 2000/01. In some cases the lawyers' fees ended up being considerably higher than the final award to the injured worker. The 2001 reforms have saved $1.793 billion, the vast majority (more than 80 per cent) as a result of reduced legal and related costs. In addition, claim management reforms have significantly improved outcomes for injured workers following the introduction of reforms such as provisional liability and the Claims Assistance Service, both of which have decreased disputes. This has been coupled with an increased focus on injury management. The introduction of the Workers Compensation Commission has allowed for speedier resolution of those disputes that do arise.

It is also considered that to make any radical changes to dispute resolution processes after such a relatively short period of time would be disruptive by creating high levels of confusion and anxiety for injured workers, employers and other stakeholders and thus would be counter-productive.

In relation to other personal injury compensation matters, the Government is satisfied that the District Court of New South Wales is operating as an effective dispute resolution forum.

The Government notes that neither the Law Society of New South Wales nor the New South Wales Bar Association support the establishment of a personal injury compensation tribunal.

Recommendation 6
That the Government develop a new medical service to provide independent medical assessment of claimants' injuries for the proposed new personal injury compensation tribunal.

Response:

The Government does not support the proposal to establish a new personal injury compensation tribunal.

Recommendation 7
That the Government amend the *Motor Accidents Compensation Act 1999* to replace the existing 10 per cent WPI threshold for the recovery of non-economic loss damages under s.131 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15 per cent of 'a most extreme case', coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33 per cent of 'a most extreme case'.

Response:
The Recommendation is not supported.

The threshold test used to assess claims for non-economic loss damages under the *Civil Liability Act 2002* is similar to the non-economic loss threshold which was in place under the *Motor Accidents Act 1988 (the 1988 Act)*. Under section 79 of the 1988 Act, non-economic loss awards could only be made where the loss of the injured person was at least 15 per cent of a most extreme case and

the injured person experienced a significant impairment to their ability to lead a normal life for a period of at least twelve months.

Prior to the Government's 1999 reforms to the motor accidents scheme, soft tissue injuries were receiving non-economic loss awards and whiplash injury represented almost 40 per cent of claims. The flow on cost of this was the major driver of the then increasing and unaffordable compulsory third party (CTP) premiums.

The 10 per cent whole person impairment threshold for non economic loss awards was introduced under the *Motor Accidents Compensation Act 1999* to support two key reform objectives:

- to restrict the level of non-economic loss compensation in cases of less serious injuries; and
- to ensure that the most seriously injured people receive maximum compensation.

To date CTP insurers have either made payments for non-economic loss on finalised claims, or have included a component for non-economic loss in their claims reserve, in approximately 10 per cent of full claims[3]. This is in line with actuarial estimates that the 1999 scheme changes to ensure that the most seriously injured people receive maximum compensation, should result in approximately 10 per cent of claimants receiving payments for non-economic loss.

The Government has commissioned independent actuarial advice from Taylor Fry Consulting Actuaries to assess the likely cost impact for the motor accidents scheme of adopting the Committee's recommendation.

Taylor Fry note that the only significant difference between the Committee's recommendation proposing the adoption of the threshold for claims for non-economic loss damages under the *Civil Liability Act 2002* and the non-economic loss provisions applicable for CTP claims under the 1988 Act (from September 1995 to October 1999), is that the *Civil Liability Act* does not include the 1988 Act restriction that the injured person's ability to lead a normal life has been, or in the near future is likely to be, significantly impaired for a continuous period of not less than 12 months by the accident injury. Taylor Fry note that the Committee is also proposing (at Recommendation 17) a reduction in the non economic loss maximum award (from $359,000) to $300,000. Taylor Fry indicate that all other things being equal, the absence in the *Civil Liability Act* threshold of the 1988 Act 'significant impairment' restriction would result in more total non-economic loss being awarded under the recommendation than for accident periods governed by

[3] Accident Notification Forms permit a payment to the claimant of up to $500. If the claim exceeds that amount, a full claim needs to be made.

the 1988 Act, however, the proposed reduction in the non-economic loss cap would have the opposite effect.

In assessing the potential cost impact of the recommendation, Taylor Fry have considered three scenarios which take into account changes in the propensity to claim (the number of full claims expressed as a percentage of the number of traffic casualties).

CTP premium impact - adoption of non-economic loss threshold under the *Civil Liability Act 2002*

	Propensity to claim	Increase in average CTP premium
Scenario 1	Assume current claim propensity (35-40 per cent)	$34
Scenario 2	Assume claim propensity of 50 per cent (A claim propensity of 50 per cent is mid-way between the current propensity to claim and claim propensity for the last 4 accident years under the 1988 Act)	$89
Scenario 3	Assume claim propensity of 60 per cent (this approximates to the propensity to claim for the last 4 accident years under the 1988 Act)	$116

Taylor Fry acknowledge that scenario 1 is unrealistic as it implies that in reverting to legislative provisions similar to those under the 1988 Act, which resulted in much greater total amounts of non economic loss being paid than under the current *Motor Accidents Compensation Act*, there would be no increase in the propensity to claim.

Taylor Fry consider that scenarios 2 and 3 represent easily conceivable outcomes that would imply an increase in scheme average gross premium of approximately $100. Based on the average premium (all vehicle classes) of $312 (as at 30 March 2006) this would result in the average premium increasing to $412.

Implementation of the Committee's recommendation would have a significant negative impact on CTP premium affordability for NSW motorists. Accordingly, the Government considers that the recommendation to replace the motor accidents scheme 10 per cent WPI threshold for the recovery of non-economic loss with the *Civil Liability Act* threshold is not a viable option.

Recommendation 8
That the Government amend the *Workers Compensation Act 1987* to replace the existing 10 per cent WPI threshold for the recovery of non-economic loss damages under s.67 of the Act with the same threshold as is used for claims for non-economic loss damages under the *Civil Liability Act 2002* – namely 15 per cent of 'a most extreme case', coupled with a sliding scale of damages until the severity of the non-economic loss reaches 33 per cent of 'a most extreme case'.

Response:

While at first glance it may seem preferable to have consistency of impairment levels across all types of personal injury claims, there are in fact significant differences in how the threshold is applied.

For workers compensation the level of whole person impairment is established through the use of objective medical assessments. Where a worker suffers permanent impairment from a work related injury, the degree of that impairment is a medical matter requiring assessment by a medical specialist.

The use of the civil liability threshold and test would move away from the important aim of ensuring that there are objective assessments of impairment by medical specialists to ensure consistency of assessment.

The Government has recently announced a decrease in the target premium rate as a percentage of wages to 2.17 per cent, down from 2.57 per cent in 2001. PricewaterhouseCoopers has estimated that, if the Committee's recommendations were adopted, it would lead to the annual cost of premium as a percentage of wages increasing to at least 3.59 per cent and as high as 4.60 per cent. This increase would be derived from higher economic benefits (via the reduction in the discount rate); reintroduction of the ability to access medical benefits via a common law head of damage; and a lower and less well-defined threshold. A large proportion of this increased cost for NSW business would not be passed on to workers in the form of compensation as the move away from an objectively based threshold would increase disputes, and hence legal costs.

Recommendation 9
That the Government ensure that implementation of the recommendations in this report does not affect the current provisions of the *Workers Compensation Act 1987* dealing with the payment of non-economic loss damages to victims of hearing loss.

Response:
The Government is committed to ensuring that there are no changes to benefits for those workers who suffer a hearing loss.

Recommendation 10
That the Government amend s.14 of the *Civil Liability Act 2002* to reduce the current 5 per cent discount rate on damages for future economic loss paid as a lump sum to a 3 per cent discount rate.

Response:
The Recommendation is not supported.

It is noted that for civil liability claims generally, in no other jurisdiction is the discount rate for lump sum damages for future economic loss prescribed at less than 5 per cent[4]. Some jurisdictions in fact impose a higher discount rate (see for example Western Australia, where the discount rate is currently 6 per cent).

[4] Only in the Australian Capital Territory is no discount rate prescribed at all, meaning that the common law rate of 3 per cent applies.

Recommendation 11
That the Government amend the *Motor Accidents Compensation Act 1999*:

- to reduce the current 5 per cent discount rate on damages for future economic loss paid as a lump sum under s.127 of the Act to a 3 per cent discount rate
- to repeal s.124 of the Act preventing the award of damages for loss of earning capacity in respect of the first five days during which loss was suffered
- to change the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under s.125 of the Act to an amount that is three times the average weekly earnings at the date of the award, consistent with s.12 of the *Civil Liability Act 2002*.

Response:

(i) ***reduce the current 5 per cent discount rate on damages for future economic loss paid as a lump sum under s.127 of the Act to a 3 per cent discount rate***

The Recommendation is not supported.

It is noted that for motor vehicle accident claims, in no other jurisdiction is the discount rate for lump sum damages for future economic loss prescribed at less than 5 per cent.[5] Some jurisdictions in fact impose a higher discount rate (see for example Western Australia, where the discount rate is currently 6 per cent).

In addition, Parliament has passed the *Motor Accidents (Lifetime Care and Support) Act 2006* establishing the Lifetime Care and Support (LTCS) Authority to provide medical treatment, care and support services to all people who are catastrophically injured in motor vehicle accidents for life, regardless of who was at fault in the accident. In the motor accidents scheme, a catastrophically injured person making a fault based claim who becomes an LTCS participant will receive lifetime care and support instead of a lump sum damages award for their estimated future medical treatment and care needs.

In catastrophic injury claims, damages for future care and treatment are the major component of the award. With the establishment of the LTCS scheme, the effect of the discount rate on lump sum awards for the severely injured will be considerably less significant. In particular, the replacement of a lump sum for future care by the LTCS scheme alleviates concerns presented to the Committee that that the lump sum award will run out earlier than intended. The provision of lifetime care and support also addresses the Committee's concern that "the pool

[5] See n. 4 above.

of capital to fund damages should be targeted at the severally or catastrophically injured".

(ii) repeal s.124 of the Act preventing the award of damages for loss of earning capacity in respect of the first five days during which loss was suffered

The Recommendation is not supported.

Section 124 of the *Motor Accidents Compensation Act 1999* was introduced in tandem with the early payment of medical expenses, whereby an injured person is able to access up to $500 for medical and treatment expenses to enable early injury treatment to assist in their recovery. These integrated reforms were introduced to encourage those with minor injuries to utilise the accident notification process as an alternative to lodging a claim and so reduce the number of small claims in the scheme. These changes reflect the emphasis of the 1999 reforms in promoting early access to treatment and rehabilitation and also ensuring that compensation is directed primarily to those who have suffered permanent and severe injuries.

(iii) ***change the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under s.125 of the Act to an amount that is three times the average weekly earnings at the date of the award, consistent with s.12 of the Civil Liability Act 2002***

The Recommendation is not supported.

Currently the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under the *Motor Accidents Compensation Act 1999* is $3,296. This is significantly more than the gross weekly earnings cap of $2,592 (based on $864 average weekly earnings [November 2005]) currently available under s.12 of the *Civil Liability Act 2002.* The Government does not propose to reduce the maximum amount of economic loss damages that may be awarded for loss of net weekly earnings under s.125 of the *Motor Accidents Compensation Act 1999.*

Recommendation 12
That the Government amend the common law provisions of Part 5 of the *Workers Compensation Act 1987:*

- so that persons who recover economic loss damages in respect of an injury under s.151A of the Act may continue to be able to access future compensation for medical expenses under the workers' compensation system
- so that persons accessing future compensation for medical expenses may be able to negotiate the commutation of their ongoing medical expenses as a lump sum
- so that economic loss damages cannot be accessed under s.151H of the Act unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15 per cent of 'a most extreme case' (as assessed judicially in the proposed personal injury compensation tribunal)
- so that when calculating economic loss damages under s.151I of the Act, the proposed personal injury compensation tribunal is to disregard the amount (if any) by which the injured worker's net weekly earnings would have exceeded an amount that is three times the average weekly earnings at the date of the award
- to reduce the current 5 per cent discount rate on damages for future economic loss paid as a lump sum under s.151J of the Act to a 3 per cent discount rate
- to amend the provisions of s. 151IA of the Act to provide that damages for economic loss should not be paid to an injured worker beyond the official age for accessing the aged pension in Australia.

Response:

The Recommendation is not supported.

In 2001 the Government introduced reforms to enhance the performance of the system and ensure that injured workers are provided with the treatment and support they need to return to work.

Concerned about the financial state and long-term viability of the New South Wales workers compensation scheme, the Government appointed Justice Terry Sheahan to conduct an inquiry into common law issues relating to workers compensation (the Sheahan Inquiry). Among other things, the inquiry considered proposals for a threshold for common law claims, noting both the need to make proper restitution to workers who can prove negligence and the need to care for all workers regardless of fault.

The Sheahan Inquiry concluded among other things that:

- it is unarguable that the objective of obtaining from the NSW compensation scheme the maximum possible award of common law damages conflicts with the statutory objectives of the scheme. Swift and effective treatment, rehabilitation, and early return to work at maximum earning capacity do not sit comfortably with a tax-free lump sum based upon an extended period of provable past economic loss, estimated likely future losses and costs, and the intangible consequences of injury, such as pain and suffering and loss of "amenity of life";
- the increasing focus on gaining a maximum lump sum, especially one offering the prospect of recovering large common law damages for economic loss, is seen to encourage "illness behaviour" rather than "wellness behaviour", and transforms the expected focus on support, recovery and an early return to safe productive work into an adversarial relationship which is costly, in terms of money, time and scheme objectives, and eats into the funds available for the assistance of all injured workers[6]; and
- less than 2 per cent of injured workers accessed common law but common law payments made up almost 30 per cent of payments, with a large proportion being expended on legal and other related costs.

The Government maintained a common law component to the scheme. The damages that may be awarded are:

- damages for past economic loss due to loss of earnings, and
- damages for future economic loss due to the deprivation or impairment of earning capacity.

The changes to lump sum entitlements arising from the 2001 reforms are consistent with the Scheme's primary objective: to rehabilitate injured workers and enable them to return to suitable, safe and durable employment as quickly as possible.

The 2001 reforms to the benefits structure included:

- Significantly increasing maximum amounts of statutory compensation – specifically increasing the maximum lump sum payment for permanent impairment and pain and suffering under sections 66 and 67 from $171,000 to $250,000.
- Providing that damages for economic loss will be calculated to age 65 for both men and women, by modifying the common law presumption that the normal retirement age is 60 years for women and 65 years for men.

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[6] *Commission of Inquiry into Workers' Compensation Common Law Matters* at p18

- Providing for a broader class of injury, including psychological injuries, to receive no-fault permanent impairment benefits under the statutory no-fault scheme. The former Table of Disabilities which was used to identify impairment did not compensate all permanent injuries, leaving those who were not compensated to pursue fault-based common law action. The assessment of permanent impairment is now made by reference to whole person impairment as provided for in the WorkCover Guides issued for that purpose, which cover all permanent injuries.
- Extending compensation to include permanent impairment from psychological/psychiatric injury subject to a threshold of 15 per cent permanent impairment.
- Providing that compensation for non-economic loss is only available through the statutory scheme.

Recommendation 13
That the Government amend the *Civil Liability Act 2002*, the *Motor Accidents Compensation Act 1999* and the *Workers Compensation Act 1987* to provide for the recovery of *Sullivan v Gordon* type damages, possibly based on the provisions of s.100 of the *Civil Law (Wrongs) Act 2002* (ACT).

Response:
The Government supports in part the Committee's recommendation to reinstate *Sullivan v Gordon* damages. The Government is of the view that such damages should be available in the cases of greatest need.

On 10 May 2006 the Government introduced a Bill into Parliament, the *Civil Liability Amendment Bill 2006,* providing a right for seriously injured people to recover damages for the loss of capacity to provide domestic services to their dependants, so-called *Sullivan v Gordon* damages, in cases of the greatest need.

The Bill permits these damages to be awarded in general civil liability claims, motor accident claims and dust diseases claims. *Sullivan v Gordon* had no relevance to workers compensation. Section 60AA of the *Workers Compensation Act 1987* provides for no-fault compensation for domestic assistance to an injured worker, including gratuitous assistance, but with certain restrictions. Weekly benefits payable to an injured worker are also calculated under s.37 with reference to the worker's dependants. In addition, substantial death benefits are payable to dependants wholly dependent on the worker for support: s.25. In relation to common law work injury damage claims (other than those related to dust diseases), s.151G of the 1987 Act restricts damages to economic loss for past and future loss of earnings, but does not apply to claims under the *Compensation to Relatives Act 1892.*

Recommendation 14
That the Government amend the nervous shock provisions under s.30 of the *Civil Liability Act 2002* so that rescuers who arrive at the scene of an accident after its occurrence are entitled to recover damages where they suffer serious psychological injuries, and are not penalised for the contributory negligence of the victim to whom they provide assistance.

Response:

(i) amend the nervous shock provisions so that rescuers who arrive at the scene of the accident be entitled to recover damages where they suffer serious psychological injuries

The Recommendation is not supported.

Nervous shock is a category of personal injury loss the parameters of which are constantly being tested. On policy grounds, there need to be some limitations set regarding the recovery of damages for nervous shock. The Ipp Report[7] outlined why the law makes it harder to recover for negligently occasioned psychiatric injury than physical injury. Reasons include (i) the difficulty of proving the existence and extent of mental harm; (ii) the difficulty of foreseeing the number of people who may suffer mental harm as opposed to physical harm; and (iii) given the limited resources, the priority of compensating people for physical harm over compensating people for pure mental harm.

Section 30(2) of the *Civil Liability Act 2002* provides that a person is not entitled to damages they suffer because another person was killed or injured unless they were a witness to the scene or are a close family member of the victim. This legislative formulation, far from restricting the common law, in fact virtually mirrors it.

It is appropriate to require the plaintiff (not being a close family member of the victim) to be present at the scene and witness the accident. Furthermore, the Government is satisfied that most rescuers (such as ambulance officers, doctors and nurses) are adequately catered for and would be compensated by way of other schemes such as workers compensation.

(ii) amend the nervous shock provisions so that rescuers not be penalised for the contributory negligence of the victim to whom they provide assistance

The Recommendation is supported.

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[7] *Review of the Law of Negligence Final Report,* Canberra, September 2002

The Ipp Report recommended that damages for pure mental harm be reduced in the same proportion as any contributory negligence on the part of the killed or injured person. The Report stated that 'although this provision might seem hard to justify from the point of view of the person claiming damages for pure mental harm, from the defendant's point of view it might be thought only fair.'

New South Wales followed the recommendation of the Ipp Report. The Government notes, however, that other States and Territories have not adopted such a provision.

The Government is accordingly prepared to consider introducing legislative amendments to the nervous shock provisions of the *Civil Liability Act 2002* so that rescuers who were at the scene when the victim was killed, injured or put in peril (excluding close family members) do not have their damages reduced for the contributory negligence of the victim to whom they provide assistance.

Recommendation 15
That the Government amend the *Motor Accidents Compensation Act 1999* to change the definition of motor vehicles so that transport accidents (where no CTP insured vehicle is involved) are assessed under the *Civil Liability Act 2002.*

Response:
The *Motor Accidents Compensation Amendment Act 2006*, recently passed by Parliament, amends the *Motor Accidents Compensation Act 1999* to limit the application of the Act to motor accidents in which a compulsory third party insurer (or the Nominal Defendant) is on risk and certain work injury claims involving motor vehicles.

The application of the *Motor Accidents Compensation Act 1999* to railway, ferry and other transport accidents is governed, however, by section 21 of the *Transport Administration Act 1988.* The Government does not propose to make any amendments in this area at the current time.

Recommendation 16
That the NSW Government legislate if necessary to overturn the 1968 decision of the High Court in *Planet Fisheries Pty Ltd v La Rosa* in order to facilitate the development by the proposed new personal injury compensation tribunal of guidelines for the assessment of non-economic loss damages in personal injury cases in New South Wales.

Response:
The proposal to establish a new personal injury compensation tribunal is not supported.

Furthermore, s. 17A of the *Civil Liability Act* already provides that in determining damages for non-economic loss, a court may refer to earlier decisions of that or other courts for the purpose of establishing the appropriate award in the proceedings. Section 135 of the *Motor Accidents Compensation* Act also permits this.

Recommendation 17
That the Government reduce the caps on non-economic loss damages available under s.16 of the *Civil Liability Act 2002* and s.131 of the *Motor Accidents Compensation Act 1999* to $300,000.

Response:
The Committee's recommendation that the cap on non-economic loss damages under s.17 of the *Civil Liability Act 2002* and s.131 of the *Motor Accidents Compensation Act 1999* be reduced to $300,000 will impact primarily upon awards to the most severely injured. The Government does not support the recommendation to reduce damages in this way.

Recommendation 18
That the Government amend the *Workers Compensation Act 1987*:
- to increase the cap on non-economic loss damages available under s.67 of the Act to $300,000
- to repeal s.66 of the *Workers Compensation Act 1987*.

Response:

The Recommendation is not supported.

Permanent impairment is directly related to reduced capacity to work as a result of a work-related injury (the fundamental purpose of workers compensation).

The use of objective medical assessment to determine the level of a worker's permanent impairment and compensation entitlement ensures that there is consistency of approach within the scheme. It has also reduced transaction costs in the scheme, which enabled the Government to increase the maximum amount which can be awarded under s.66.

The Government recently announced changes to lump sum compensation. For all injuries sustained on or after 1 January 2006 there will be an increase in the benefit payable to workers who sustain spinal injuries that result in permanent impairment by an additional 5 per cent.

Recommendation 19
That the Government examine and publish a report on the merits or otherwise of introducing universal, no-fault compensation under the NSW Motor Accidents Scheme.

Response:
Parliament has recently passed the *Motor Accidents Compensation Amendment Act 2006* which introduces a new special children's benefit which provides a no-fault entitlement for treatment, rehabilitation and care costs for NSW resident children up to the age of 16 injured in motor vehicle accidents. The Amendment Act also extends motor accidents scheme coverage to provide full compensation entitlements for injury or death caused by a motor vehicle accident where no one is considered to have been at fault, that is, a 'blameless' or 'inevitable' accident.

Parliament has also passed the *Motor Accidents (Lifetime Care and Support) Act 2006* which establishes a new scheme to provide lifetime care and support for people who suffer catastrophic injuries from motor vehicle accidents in NSW. The Lifetime Care and Support (LTCS) scheme will cover people with catastrophic injuries entitled to make a negligence or fault-based claim under the *Motor Accidents Compensation Act 1999*, and will also include those people with catastrophic injuries who were at fault in an accident or people who sustain catastrophic injuries in a motor vehicle accident where no one was at fault.

The Government has announced that the special children's benefit and the LTCS scheme for children will commence from 1 October 2006, with the LTCS scheme for other catastrophically injured motor accident victims to commence 12 months later.

The introduction of these significant no–fault benefits for people injured in motor vehicle accidents in NSW will ensure that those most seriously injured in road accidents and children, who are the most vulnerable road users in our community, will be guaranteed access to all necessary medical treatment,

rehabilitation and home care, regardless of who was at fault in causing the accident.

The Government considers that any further extension of no-fault cover in the motor accidents scheme should more appropriately be considered once there has been sufficient experience with the operation of the new benefits to enable their evaluation.

Recommendation 20
That the Government examine and publish a report on the merits or otherwise of universal, no fault access to economic loss damages under the provisions of Part 5 of the *Workers Compensation Act 1987.*

Response:

In New South Wales, workers compensation is generally available to injured workers on a no-fault basis. It provides for immediate assistance, including weekly benefits, medical treatment, rehabilitation assistance and lump sums for permanent impairment to workers without requiring them to prove that someone else was to blame for their injury.

In addition, if an injured worker has suffered a permanent injury that is assessed at 15 per cent or more whole person impairment they may lodge a claim for common law damages. To be successful an injured worker would need to prove negligence on the part of their employer.

The Sheahan Inquiry which was held in 2001 considered a wide range of matters around common law claims, including thresholds and process. As a result some changes were introduced. The Government does not consider that there is a need for a further report at this stage into common law claims.

Recommendation 21
That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* to apply only to awards of damages of up to $50,000, rather than the current $100,000.

The Legal Profession Act 1987 was repealed by Schedule 1 to the *Legal Profession Act 2004* with effect from 1 October 2005. The equivalent section is section 338 of the *Legal Profession Act 2004*. Section 338 provides that maximum legal costs are fixed for claims for personal injury damages up to $100,000, at 20 per cent of the amount recovered, or $10,000 whichever is the greater.

The cap on legal fees was introduced by the Government in 2002 to promote efficiency on the part of the legal profession, to help contain claims costs, and to prevent the erosion by legal fees of damages payable under a judgment. The Government does not support diluting this important reform by applying the cap only to claims under $50,000.

In 2005 the Government uplifted the cap on legal costs in relation to claims under $100,000 in the District Court where additional costs are incurred in arbitration and appellate proceedings. The new s.338A of the *Legal Profession Act 2004* allows a respondent to a matter reheard after arbitration, or a respondent to an appeal, to claim an additional amount of costs of up to 15 per cent of the amount recovered, or $7,500, whichever is the greater.

It will take some time before the impact of this amendment is known. The amendment should be allowed to take effect before further costs cap amendments are considered.

Recommendation 22
That the Government amend the cap on the recovery of legal costs by a successful claimant from a defendant under s.198D of the *Legal Profession Act 1987* so that it also applies in circumstances where the Court of Appeal reduces damages below $50,000 and awards costs of the appeal to the successful appellant (previously the defendant) on an uncapped basis.

Response:
As noted in the response to Recommendation 21 above, the Government does not support the proposal to apply the cap on legal costs only to claims under $50,000. As such the Government has considered Recommendation 22 on the basis of a $100,000 cap.

The decision of *Newcastle City Council v Travis McShane* (No 3) [2005] NSWCA 437, which was handed down after the Committee's Report was released (9 December 2005), clarifies that the cap on legal costs also applies to the costs of an appeal. A legislative amendment to apply the cap on legal costs to the costs of an appeal therefore appears unnecessary.

For claims of up to $100,000, where an unsuccessful plaintiff is ordered to pay the defendant's legal costs, the maximum costs are fixed at 20 per cent of the amount sought to be recovered by the plaintiff: s.338(1)b) *Legal Profession Act 2004.*

The Committee's Report refers to the claim of Mr McCann as the basis for this recommendation. Mr McCann was injured and awarded $224,843 by a District

Court Arbiter. The defendant appealed and the District Court awarded $238,542. The defendant then appealed to the Court of Appeal which reduced the award to $95,478. Mr McCann was ordered to pay the defendant's costs of the appeal. The Committee's Report states that Mr McCann's award was entirely consumed by the legal costs he had to pay to the defendant's solicitors, and he had to pay an additional $5,121 from his own pocket.

Mr McCann sought damages considerably in excess of $100,000, and so the cap on costs would not have applied for his benefit when the defendant was successful upon appeal.

Claimants and their legal advisers should take into account the availability of the cap on defendant's costs the claimant may be liable to pay by ensuring the claimant seeks only a realistic amount of damages.

Recommendation 23
That the Government commission a review by the New South Wales Law Reform Commission of the duty of care and establishment of liability provisions of the *Civil Liability Act 2002*, particularly as they affect children and young people.

Response:
The Recommendation is not supported.

While the Government sees merit in keeping certain aspects of its reforms under review, such as the duty of care provisions, it is too early for this to occur given the limited number of cases which have been determined under the new provisions. Further, it is noted that the reforms were undertaken on a national level throughout Australia's State and Territory jurisdictions. If any review is to be undertaken, the Government is of the view that consideration should be given as to whether it may be more appropriate for a review to be undertaken on a national level.

Recommendation 24
That the Government commission a review by the New South Wales Law Reform Commission of the medical negligence claims provisions of the *Civil Liability Act 2002*, including:

- Whether the modified Bolam rule is operating successfully
- The restriction on damages where injury is caused by the mentally ill
- The restriction on damages for the cost of raising an unintended child
- The restriction on damages for non-essential medical procedures
- The definition of medical professionals.

Response:
The Recommendation is not supported.

See response to Recommendation 23 above.

Recommendation 25
That the Government move immediately to mandate electronic fund transfer of compensation payments to injured workers by the insurance companies, with payments to be made on the exact date that they are due.

Response:
As noted in the course of the Parliamentary Inquiry, WorkCover requires that all Agents, under the new scheme arrangements, provide electronic funds transfer.

Recommendation 26
That the Government examine whether there would be merit in adopting legislation in New South Wales similar to Schedule 3 of the Australian Capital Territory's *Civil Law (Wrongs) Act 2002* dealing with liability for injury or death of participants in equine activities.

Response:
The Recreational Activities provisions in the *Civil Liability Act 2002* (Part 1A, Division 5 – see particularly ss. 5L, 5M and 5N) specify that the provider of a recreational service is not liable for personal injury or death suffered by a voluntary participant in a dangerous recreational activity as a result of the materialisation of an obvious risk. There is no duty of care if there is a risk warning or if a waiver has been signed. It is unnecessary to specifically legislate in respect of equine activities.