INSURANCE COUNCIL OF AUSTRALIA

18 March 2016

Law Reform Commission of Western Australia
Level 12, Westralia Square
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Perth 6000

Email: provisionaldamages@justice.wa.gov.au

Dear Sir / Madam

Provisional Damages and Damages for Gratuitous Services – Project 106 Discussion Paper

The Insurance Council of Australia (ICA) appreciates the opportunity to provide comments to the Western Australian Law Reform Commission's (WALRC) Project 106 Discussion Paper.

The ICA is the representative body of the general insurance industry[1]. ICA members provide a range of general insurance products including public liability insurance, professional indemnity insurance and workers' compensation insurance.

In response to the proposed reform options and questions outlined in the discussion paper the ICA provides the following comments.

In relation to reform options regarding modifying the "once and for all" rule in WA, the ICA is firmly of the view that:

1. Provisional payments should only be available to claims relating to asbestos or other dust diseases with long latency periods;
2. Modification of the "once and for all" rule would create significant challenges and uncertainty for insurers in relation to their prudential reserving requirements and ability to efficiently manage and finalise long tail claims. This may impact the affordability of liability insurance for personal injury;
3. Outside of claims relating to asbestos and dust diseases there should be no modification to the 'once and for all rule'.

[1] Our members represent more than 90 percent of total premium income written by general insurers. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

In relation to reform proposals concerning damages for gratuitous services previously provided by an injured claimant (*Sullivan v Gordon* damages) the ICA submits:

1. There is no common law basis for a separate head of damage for an injured claimant's inability to provide gratuitous services to a third party;
2. The introduction of *Sullivan v Gordon* damages has the potential to significantly increase the quantum of some claims which may impact insurance affordability;
3. If *Sullivan v Gordon* damages are introduced, enabling legislation must be drafted narrowly to ensure eligibility is restricted to benefit those with the greatest care needs;
4. Any reform to damages for gratuitous service must take into account care services provided under statutory schemes.

Modifying the "once and for all" rule (provisional damages)

The ICA is of the view that, outside of asbestos and other dust disease claims, there should be no change to the "once and for all" rule in personal injury common law claims in WA.

The ICA acknowledges that the "once and for all" rule can lead to unjust outcomes for asbestos and dust disease suffers. This is due to the unusual latent nature of these diseases and the propensity for these sufferers to develop fatal and more serious secondary illnesses often many years after the initial diagnosis of their original injury. In these circumstances the case for allowing provisional payments for these claims may be justified.

However, the ICA does not believe any modification of the "once and for all" rule across all personal injury claims can be justified against the negative impact this will have, namely:

- The increased legal costs and court congestion as a consequence of the added complexity in claims (eg. claimant lawyers having to investigate and identify the potential for deterioration / secondary illnesses);
- The removal of finality and financial certainty to all parties to a litigation, including insurers;
- The impact on insurers' claims reserving and ability to manage and settle long tail claims;
- The increased underwriting risk that multiple claims may be made on an insured party;
- The consequential inflationary effect on insurance premiums and premium affordability.

The ICA is particularly concerned about the impact the removal of the "once and for all" rule across all personal injury claims would have on insurers' ability to manage long tail claims expeditiously and settle these claims with any financial certainty. This will create significant reserving and prudential management challenges for insurers.

For example, in the absence of the "once and for all" rule, on some claims an insurer, despite having settled the claim with a plaintiff, may need to continue setting aside additional funds as a reserve against the settled claim. This may be required for several years after settlement.

This additional reserving requirement and the increased underwriting risk of a plaintiff making multiple claims on an insured could ultimately lead to higher insurance premiums.

The need for empirical evidence to justify modification of the "once and for all" rule

Given the negative impacts modification of the "once and for all' rule may have, the ICA also submits there must be compelling empirical evidence provided on the practical need to extend provisional payments beyond asbestos or other dust disease related personal injuries.

In relation to this we wish to highlight that no State or Territory in Australia allows access to provisional payments in civil claims other than in relation to asbestos and dust disease related injuries. Therefore WA would be considerably out of step with other jurisdictions if provisional payments were available for all personal injury claims.

Damages for Gratuitous Services provided to others (*Sullivan v Gordon* damages)

The lack of common law foundation for *Sullivan v Gordon* damages

As outlined in the discussion paper, *Sullivan v Gordon* damages are anomalous with the common law principle that non-financial loss is recoverable only within the general damages (non-economic loss) component of a civil claim, and cannot be claimed under a separate head of damage.

As observed by the High Court in *CSR v Eddy (2005), Sullivan v Gordon* damages are also distinct to, and not a subset, of *Griffiths v Kerkemeyer* damages[2]. The latter are designed to compensate the claimant for their need for gratuitous services (whether incurred or not) where the plaintiff can no longer provide these services to themselves. Conversely, *Sullivan v Gordon* damages compensate the claimant in situations where they are no longer able to provide gratuitous service to other people, and are therefore not available as a separate head of damages at common law.

Given the lack of common law foundation for *Sullivan v Gordon* damages, the ICA is of the view that it is appropriate that these damages remain only compensable as part of the general damages component of a common law claim.

The impact of *Sullivan v Gordon* damages on insurance premiums

While there is no common law basis for the provision of *Sullivan v Gordon* damages, we note there are policy arguments in support for allowing these damages to be claimed as a separate head of damages at common law.

However it is imperative that the policy arguments in support of *Sullivan v Gordon* damages be considered very carefully against the corresponding policy arguments against allowing these damages. In particular, the potentially significant increase in the quantum of some claims and the subsequent impact this could have on the cost of insurance premiums.

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[2] *CSR v Eddy* (2005) HCA 64, at 34.

Damages for future care are commonly the largest component of common law personal injury claims. Therefore, legislative provisions allowing for *Sullivan v Gordon* damages, may, in certain classes result in disproportionately large awards. This may be further exacerbated where a plaintiff had (or was expected to have) provided gratuitous care to multiple people, or where the plaintiff's injury has a disproportionate impact on their ability to provide gratuitous services to others (compared to the plaintiff's own need for gratuitous services).

There is also likely to be greater difficulty in quantifying the gratuitous care needs of others compared to quantifying the care needs of the plaintiff. These difficulties could lead to more lengthy and complex claims which will also increase court and legal costs.

It should also be noted that Australia's increasing life expectancy and ageing population has forecast an ongoing increase in people requiring the gratuitous care of others[3]. Therefore the availability of *Sullivan v Gordon* damages does have significant potential to increase the liability risk in the community.

These additional costs and liability risks will increase the underwriting risk for insurers and reinsurers who offer and underwrite liability cover for personal injury claims. Depending on the extent of this increased risk, this may ultimately result in more expensive public liability insurance premiums.

Legislation allowing *Sullivan v Gordon* damages must be narrowly defined.

Given the potential for *Sullivan v Gordon* damages to increase claims costs and premiums the ICA submits that it is imperative that, should WA decide to introduce *Sullivan v Gordon* damages, any enabling legislation and eligibility criteria to receive these damages must be clearly and narrowly defined to ensure that these damages are only awarded to benefit of those with the highest care needs.

Therefore the ICA submits that, should a decision be made to introduce *Sullivan v Gordon* damages in WA, these damage only be available:

1. For gratuitous domestic services (as described on page 30 of the discussion paper).
2. To relatives of the plaintiff (as defined on page 32 of the discussion paper);
3. Where it can be clearly established that the plaintiff had provided the gratuitous services before their injury;
4. Where there is a reasonable expectation that, after the plaintiff's injury, the gratuitous services have or would have been provided for a defined number of hours per week and a consecutive period of time;
5. Where there is a reasonable and genuine need for the services to be provided for those hours per week and consecutive period of time.

[3] National Centre for Social and Economic Modelling Working Paper 11/07, University of Canberra, June 2011, page 1.

Defining eligibility in this way would also help ensure a level of consistency with other State and Territory legislation.

Other Care services available under other statutory insurance schemes.

The ICA submits that any reform allowing for *Sullivan v Gordon* damages must also be undertaken with due consideration of the care services provided under other statutory insurance schemes.

The recently established National Disability Insurance Scheme (NDIS) will provide a range of care and support services to people with disabilities. The benefits of these care and support services may also flow to their families and domestic carers. The WA CTP insurance scheme also has provisions for injured motorists care needs.

Any legislative changes allowing for *Sullivan v Gordon* damages should take into account the existing care entitlements provided under statutory schemes with eligibility exclusions applied where fair and appropriate.

Contact us

We trust these comments are of assistance.

The ICA is happy to discuss our submission and the reforms raised in the discussion paper with you further.

If you have any questions, please contact Vicki Mullen, General Manager, Consumer Relations and Market Development Directorate via email vmullen@insurancecouncil.com.au, or phone (02) 9253 5120.

Yours sincerely

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