

Standing Committee on Law and Justice

**Eleventh Review of the
exercise of the functions of
the Motor Accidents
Authority and the Motor
Accidents Council**

Ordered to be printed 20 December 2011 according to
Standing Order 231

Executive summary

Introduction (Chapter 1)

This is the Committee's Eleventh Review of the exercise of the functions of the Motor Accidents Authority (MAA) and the Motor Accidents Council (MAC), as required under the *Motor Accidents Compensation Act 1999*. Whilst the Committee undertook its last review in 2010, with the commencement of the 55th Parliament following the general election in March 2011, the newly re-established Law and Justice Committee decided that it would commence the Eleventh Review of the MAA and MAC this year. With this approach, the Committee expects that it will be able to conduct two reviews and receive the government response to both of these reports within the four year parliamentary term. The Committee has therefore reviewed the way in which the MAA and the MAC have exercised their functions with reference to the MAA's *Annual Report 2009/10*.

The current Review was conducted concurrently with the Committee's Fourth Review of the Lifetime Care and Support Authority and the Lifetime Care and Support Advisory Council. That Review will be the subject of its own report, also to be published in December 2011.

The Eleventh Review of the MAA and the MAC examines a number of issues, with a focus including insurer profits and access to damages for pain and suffering. In addition, various aspects of the Motor Accidents Assessment Service, including the Medical Assessment Service and the Claims Assessment and Resolution Service are reviewed.

The Committee received 16 submissions from a variety of stakeholders. We also heard evidence from representatives of the MAA, the Law Society of NSW, the NSW Bar Association and the Insurance Council of Australia. In addition, evidence was obtained from the MAA and other participants through a process of written questions and answers. The Committee expresses its thanks to all those who participated in this year's Review, and in particular thanks the MAA for its cooperation.

Scheme performance and other issues (Chapter 2)

As in previous reviews, the Committee examined the performance of the MAA with reference to four key indicators: affordability, effectiveness, fairness and efficiency. The Committee was satisfied that the Scheme continues to function in an appropriate manner when assessed against the broad performance indicators of affordability and effectiveness. In particular, the Committee accepts that, as measured against average weekly wage, a CTP Green Slip is considerably more affordable now than compared to ten years ago. Nevertheless, in Chapters Three and Four of this report, the Committee canvasses issues that are at the core of assessing whether the Scheme is fair and efficient, both in terms of CTP price, injury compensation and treatment of those who are injured in a motor vehicle accident. The Committee examined the issue of health outcome measures, which has been a recurring issue in each of the Committee's reports since the *Sixth Review Report*. In this Review, the MAA updated the Committee on a number of inter-agency projects that it is involved with that relate to the measurement of health outcomes for injured people in the Scheme, and provided an example of a study conducted by the University of Sydney. The MAA Corporate Plan 2011-2015 has also identified a key result area of promoting better health and social outcomes for those injured in a motor accident. The Committee acknowledges the importance of improving health outcomes for people involved in the Scheme, and recommends that the MAA identify the development of health outcomes performance measures as a priority work area.

The Motorcycle Council of NSW expressed concern about the Medical Care and Injury Services (MCIS) levy and its impact on CTP insurance premiums for motorcyclists. In our *Tenth Review Report* the Committee noted that whilst the MCIS levy is expressed on Green Slips as a separate item, it is not clear what proportion of the levy is used for the LTCS Scheme and what proportion is used for hospital and ambulance services and the administration costs of the Motor Accidents Scheme.

In the current Review the MAA advised that in consultation with the Motor Accidents Council, it had introduced a trial on the Authority's Green Slip calculator for motorists to obtain a breakdown of the insurer premium, the MAA levy and the LTCS levy when comparing Green Slip prices. The MAA also advised that the CTP insurers estimated that the technical and administrative work that would be required to itemise the levy on Green Slips would cost between \$80,000 and \$400,000 per insurer, a cost that would be passed on to motorists. The MAA stated that the trial will be reviewed after one year in operation to consider the level of interest in going to the expense of applying this information on the Green Slip itself.

Claims frequency and propensity to claim is also discussed as we have regularly done since our *Seventh Review Report*. Claims frequency has dropped from a figure of 41 (per 10,000 vehicles) in 2000/01 to a low of 23 in 2007/08. In the latest reporting year claim frequency had increased to 27. Similarly, the propensity to claim dropped from 51 per cent in 2000/01 to a low of 41 per cent in 2006/07, but has since risen to 47 per cent. During the current Review claim frequency or propensity to claim was not raised as an issue in the context of barriers to making a claim. However, it was raised in relation to the issue of insurer profits, and this is discussed in Chapter 3. Representatives of the Insurance Council of Australia explained to the Committee that the reduction in claims frequency was unprecedented, and whilst there had been a significant amount of analysis to determine why it had occurred, no one has been able to identify a reason. Furthermore, he noted that no one can predict what will happen to claim frequency in the future.

One of the important services provided by the MAA is the provision of information about the Scheme to stakeholders and the general public. It is important that people injured in a motor vehicle accident are aware of their rights and responsibilities. To do this the MAA operates a Claims Advisory Service, including translation services, and also extensively advertises its Green Slip calculator. The Committee acknowledges the efforts of the Motor Accidents Authority to publicise information about the CTP Scheme, including in several community languages. It is evident to the Committee that the Green Slip calculator is a valuable and useful tool for motor vehicle owners.

The Motorcycle Council of NSW raised concerns in relation to the adequacy of crash reporting data, and argued that the MAA required a better crash data facility to give them better base information so that they can do their job more effectively. The Council recommended that NSW adopt a similar scheme as to that which operates in Western Australia. The MAA noted that Western Australia is probably a world leader in this area, and that their streamlined system has led to many efficiencies, ranging from faster injury management to police spending less time filling out forms and more time on the 'front line'. The MAA informed the Committee that it had recently arranged for the West Australian Insurance Commission to give a presentation about its crash reporting scheme to stakeholders. The MAA subsequently commissioned a scoping study for a similar system to be implemented in NSW. The Committee welcomes the proactive approach taken by the MAA, and recommends that the MAA release the results of the scoping study, as well as the details of its recommendations in relation to implementing a similar model in NSW, in order to inform stakeholders and provide a mechanism for stakeholder comment.

The MAA derives its responsibility for injury prevention initiatives from section 206 of the *Motor Accidents Compensation Act 1999*. Under the Act, the MAA is required to provide funding for measures for preventing or minimising injuries from motor accidents, and safety education. The MAA advised the Committee that whilst the Centre for Road Safety has been the lead government agency for road safety in NSW since it was established in 2008, it remains committed to working closely with the Centre for Road Safety and will also continue to provide funding for road safety initiatives. The Committee notes the difficulty in determining from the Authority's Annual Report the actual amount spent on road safety and motor vehicle injury prevention programs, and recommends that the Annual Report should itemise 'Road safety grants and sponsorships' as a separate line item.

The Motor Accidents Council (MAC) is an advisory group appointed for a term of three years by the Minister for Finance. The role of the MAC is to facilitate input on the Motor Accidents Scheme from relevant stakeholders and to consider issues referred by the MAA with a view to providing advice and recommendations. The Committee heard from stakeholders that the MAC had been very active over the reporting period, and congratulates the Committee Chair Ms Aplin and Council members for their contribution to this important forum.

Insurer profits and other issues (Chapter 3)

Insurer profits

Insurers are required by the *Motor Accidents Compensation Act 1999* to report to the MAA the profit margin on which their premiums are based and the actuarial basis for calculating their profit margin. Insurers report to the MAA on two types of profits: prospective profit and realised profit. Prospective profit is that which the insurer expects to achieve at the time of filing a premium, given assumptions about the number of claims it expects to have to pay out, investment returns and premium income. Realised profit is what the insurer actually made in profit in a given year once all costs and income have been accounted for. A good understanding of realised profit may not be known for at least five years after the underwriting year.

The Committee has looked at the issue of insurer profits in each of its eleven Reviews. During the course of the *Tenth Review*, the MAA advised the Committee that it had commissioned an independent competition review of the Scheme. Hence the Committee recommended that the competition review involve stakeholder consultation and that the results be made public as soon as possible.

In the current Review, a number of participants again expressed concern about the size of the profits realised by insurers. For example, the NSW Bar Association noted that over several years of the Scheme's operation, insurers had retained profits well in excess of the prospective forecasts, and concluded that there must be a fundamental flaw in the design of the Scheme. The Law Society of NSW and the Australian Lawyers Alliance were also critical that realised insurer profits have repeatedly and significantly exceeded prospective profit forecasts. In response the Insurance Council of Australia explained to the Committee that insurance companies had benefitted from a fall in claim frequency, resulting in higher profit levels than forecast. The Insurance Council noted that the premium determination process is thorough and reviewed multiple times, and any bias or mistakes in the premium determination process would be identified.

In relation to the argument that CTP insurer profits are excessive, the MAA advised that it had taken steps to strengthen its regulatory oversight. The Authority explained that it had been actively looking at the rigour of the regulatory tools available to it within its legislative powers. It had produced new Premium Determination Guidelines that require greater disclosure of projected profit and rates of

return by insurance companies. In addition, the MAA asserted that its new modelling tools should enable a more rigorous assessment of the assumptions used by insurers in setting target profit margins. The MAA also advised the Committee that whilst the results of the competition review have not yet been released, the Minister for Finance and Services, the Hon Greg Pearce MLC, has initiated an internal review of CTP pricing. The Minister has asked the MAA to consider: insurer profits and costs; transparency in legal costs to ensure that injured people get to a fair level of their entitlement in their hand; fair and affordable CTP green slip pricing; and the Motor Accident Authority's operating model to ensure the agency has optimal regulatory powers.

The Committee notes that section 28 of the *Motor Accidents Compensation Act 1999* requires the MAA to assess the insurers' CTP profit margin, and the actuarial basis for its calculation, and to present a report on that assessment annually to the Parliamentary Committee. Previously the MAA has responded that the profit report included in the MAA Annual Report satisfies this statutory requirement. However, the Committee is not satisfied that the MAA is adequately fulfilling its statutory obligation under Section 28 of the Act, and therefore recommends that the MAA present a report on its assessment of insurer profit margins and the actuarial basis for its calculation, including an explanation for any material deviation on forecasted profit, to the Committee on an annual basis.

The Committee acknowledges that since the Committee's Tenth Review, there has been a change in government. Hence the Committee accepts that the new Minister responsible for the MAA, the Hon Greg Pearce MLC, has responded to the issue of insurer profits and other issues by commissioning this new CTP pricing review. Whilst the Committee supports this course of action by the Minister, we are undertaking preliminary investigation into engaging an actuarial consultant to assist the Committee to further examine the issue of insurer profits and provide advice on certain aspects of the MAA Scheme. In order to better inform the Committee and stakeholders, the Committee recommends that the MAA should publish information about the CTP pricing review, such as its terms of reference and timeframe. The Committee considers that the new CTP pricing review should include consultation with the public and stakeholders, and to facilitate this, the MAA should publish a discussion paper on the issue to help direct stakeholders' feedback.

The Australian Prudential Regulatory Authority (APRA), an Australian Government body, has the lead role to play in the prudential supervision and solvency of insurance companies. The solvency of licensed CTP insurers is also a key issue for the MAA and indeed the whole community, and the Committee notes that the MAA is working closely with APRA in this regard.

Legal costs

Legal costs under the Motor Accidents Scheme are regulated by the Motor Accidents Compensation Regulation 2005 (the Cost Regulation). The Cost Regulation governs, amongst other things, the maximum costs recoverable by legal practitioners for services provided to a claimant or an insurer in any motor accidents matter. In practice, legal representatives set their own fees, which are paid by their clients. If the client's claim is successful, the insurer reimburses the claimant an amount according to the Cost Regulation, leaving the client liable for any difference between the fee charged and the recoverable cost.

Legal costs arose as a concern for participants during the current Review, as it has during the Committee's six previous reviews. Over the years participants such as the Law Society of NSW and the NSW Bar Association, have repeatedly expressed concerns that as a consequence of increasing legal fees, the Cost Regulation does not adequately provide for recoverable costs, which can leave claimants unfairly disadvantaged. In the *Tenth Review Report*, the issue of legal costs was extensively discussed and

the MAA advised that the Cost Regulation was due to be automatically repealed on 1 September 2010, but that this date had been extended to 1 September 2011. The MAA established a working party to review the regulation, and the MAA advised the Committee that the result was a very good package and expected to put it to the Government for the remaking of the regulation.

The continuing importance of resolving the issue of legal costs was evident to the Committee, as during the course of the current Review the MAA advised that the number of claimants engaging legal representation had increased by some 13 per cent since 2002, and now over half of all year one claims involved legal representation. In addition, the proportion of motor accident cases in the court system had also increased. The MAA advised the Committee that the cost regulation had been extended again for another 12 months to 1 September 2012. The legal groups contributing to the Review were very critical that the costs regulation had not been updated. Similarly, as for legal costs, costs for services provided by a doctor under the Motor Accidents Scheme are regulated by the Cost Regulation. The Australian Medical Association (AMA) NSW presented concerns to the Committee that are similar to that presented by the legal representatives, that is, the Cost Regulation has not kept up to date with contemporary fees.

The Committee is concerned that the Costs Regulation was not revised on 1 September this year, and recommends that the Minister expedite the remaking of the Regulation rather than waiting until its expiry on 1 September 2012. The Committee also considers that an increase in transparency and understanding of costs in the Scheme is desirable, and recommends that the Government introduce amendments to the *Motor Accidents Compensation Act 1999* to provide the MAA with the authority to collect and disclose data on the amount of compensation that claimants receive once legal costs have been deducted.

During the Review the Australian Physiotherapy Association expressed concern to the Committee that some CTP insurers have set their own physiotherapy fee schedule, which may be quite fixed and take no account of the time or expertise of the physiotherapist involved. In response the Committee recommends that the MAA review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms to incorporate physiotherapist type and expertise information so that an appropriate level of remuneration can be provided for.

The Committee also heard from Carers NSW, which noted that there is limited information for carers on the MAA and LTCSA's website. The Committee recommends that the MAA produce and publish on its website information specifically directed to assist carers.

Discount rate

The final issue discussed in Chapter Three is the discount rate. When a lump sum payment is awarded to seriously injured people to compensate for future economic loss resulting from that injury, the present value of the future economic loss is qualified by adopting a prescribed discount rate. The *Motor Accidents Compensation Act 1999* sets the discount rate for the Scheme at five per cent. The Australian Lawyers Alliance was concerned that the discount rate of five per cent may result in seriously injured people receiving inadequate compensation to meet their ongoing care needs. The MAA advised that a five per cent discount rate is used in other compensation schemes, and by other Australian States and Territories. The Committee notes that the introduction of the Lifetime Care and Support Scheme, which provides for the lifetime care needs of catastrophically injured persons, has reduced the overall impact of the discount rate on the Scheme. The discount rate was raised by only one stakeholder and the Committee will keep a watching brief on this issue.

Motor Accidents Assessment Service (Chapter 4)

The final Chapter examines issues raised by participants in relation to the Motor Accident Assessment Service (MAAS). The MAAS is comprised of two components: the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).

Inquiry stakeholders raised a number of issues relating to the MAS, which assesses medical disputes that arise between an injured person and an insurer regarding the treatment, stabilisation and degree of permanent impairment of injuries, as well as the level of impairment of a claimant's earning capacity.

In its *Eighth Review Report*, the Committee examined in detail the matter of delays in assessments and disputes under the MAS system. Some stakeholders noted that there was scope for improvement in the time taken to finalise assessments and disputes. The Committee's *Ninth Review Report* noted that the lifecycle of MAS assessments had reduced to 93 days as of May 2008.

In the current Review the MAA was asked why the median lifecycle for finalising medical disputes had risen to 101 working days in 2009/10, from a record low of 78 days in 2007/08 (the record high was 177 days in 2002/03). The MAA advised that it continues to monitor the timeliness of finalisations of medical disputes, and that the increase in the number of days taken to finalise a medical assessment may be attributed to a number of factors. The Committee acknowledges that the MAA has advanced a number of factors or reasons why the median lifecycle of MAS disputes has increased. However, it is not clear to the Committee how these reasons correspond to the experience and evidence put forward by the Law Society. The Committee will therefore keep a watching brief on this issue, and will take a keen interest in the issue for its next review.

Access to damages for non-economic loss

A focus of Chapter Four is the issue of access to damages for non-economic loss, that is, for pain and suffering, for a person injured in a motor accident. Under the Motor Accident Compensation Scheme, a person injured in a motor vehicle accident is not entitled to claim for damages for non-economic loss unless the degree of their permanent impairment as a result of the injury caused by the motor accident is greater than ten per cent. This test is referred to as the ten per cent whole person impairment (WPI) threshold.

The ten per cent WPI threshold for non-economic loss was examined in the Committee's *Eighth, Ninth and Tenth Review Reports*. Some stakeholders have criticised the threshold as being unfair because it excludes a significant proportion of those injured in motor accidents from receiving compensation for non-economic loss. Some stakeholders were also concerned that the score for assessment of psychiatric injury could not be combined with the score for the assessment of physical impairment when determining the degree of WPI.

The Committee review the proposals for reform presented by stakeholders including lowering the WPI threshold, permitting the aggregation of physical and psychological injuries and replacing the ten per cent WPI threshold with alternatives, such as the threshold in section 16 of the *Civil Liability Act 2002*. In addition the Committee reviews a proposal for a single system of compensation in NSW.

The Committee is concerned that the current WPI approach does not strike the right balance between Scheme efficiency and affordability and compensation for pain and suffering to those who are injured in a motor accident. The Committee is concerned that the ten per cent whole person impairment threshold has been set too high, and hence recommends that the NSW Government review the

threshold for access to damages for non-economic loss under the Motor Accidents Scheme to achieve a better balance between Scheme efficiency and compensation. To assist this review, the Committee recommends that the MAA publish a discussion paper outlining the issues, including an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of: changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*; lowering the ten per cent whole person impairment threshold; and allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

Another area of concern was the ability of MAS Assessors to make assessment about causation, i.e. whether the treatment provided to an injured person relates to the injury caused by the motor vehicle accident. This issue was particularly concerning for several stakeholders because of the binding nature of a MAS Assessors' assessment. The Committee acknowledges the competing views put forward by the various stakeholder groups in relation to the issue of legal causation. The Committee also notes the comments of the MAA that the MAS is working effectively. The Committee considers that it did not receive enough evidence to draw a conclusion as to whether legal or medical professionals should be responsible for determining the test of legal causation. As such, the Committee recommends that this issue should be referred to the MAC for its careful analysis and review.

Chapter Four also considers issues impacting on the Claims Assessment and Resolution Service (CARS), which provides a service to resolve disputes about claims, including procedural disputes and eligibility for exemptions from assessments, as well as undertaking general assessments of claims for damages.

The Committee acknowledges that the MAA undertook a review of CARS in the second half of 2010. During the current review the Committee sought information on the outcomes of the CARS review. However, the MAA advised that the review recommendations were being considered as part of a wider review, and hence had not been publicly released. In relation to CARS two issues arose during the current Review: the late claims process and section 89A pre-settlement conferences.

Late claims

In regards to the late claims process, the Australian Lawyers Alliance and the Bar Association argued that the requirement for claimants to provide a full and satisfactory explanation for the delay in lodging a claim has become an overwhelmingly difficult and time-consuming exercise. The MAA advises that late claims was a key issue that the CARS review addressed, and that whilst a response to that review has not been released yet, it was something that the MAA has agreed it needs to look at. The Committee looks forward to assessing this response at its next review.

Section 89A pre-settlement conferences

Section 89A of the *Motor Accidents Compensation Act 1999* was introduced in 2008, and provides for a compulsory settlement conference between the parties before proceedings to CARS. However, the Bar Association submitted to the Committee that complying with Section 89A of the Act has caused considerable expense for the parties, and that the insurers are taking technical points in almost every case. The Association argued that the result is that the requirements of the Act are difficult to comply with at reasonable cost. The Committee acknowledges that the MAA looked at the issue of s.89A conferences as part of the CARS review, and notes the preparedness of the MAA to look into the impact of section 89A settlement conferences and the concerns of the Bar Association. The Committee therefore recommends that the MAA meet with the Bar Association and other stakeholders as soon as practicable with a view to resolving the issue.

Summary of recommendations

- Recommendation 1** **11**
That the Motor Accidents Authority identifies the development of health outcomes performance measures as a priority work area.
- Recommendation 2** **22**
That the Motor Accidents Authority publish the results of the scoping study that it commissioned into New South Wales adopting a similar crash reporting scheme as that in operation in West Australia. The Motor Accidents Authority should also publish the recommendations it made to government as a result of the scoping study in order to inform stakeholders, and provide a mechanism for stakeholder comment.
- Recommendation 3** **24**
That the Motor Accidents Authority include in its Annual Reports a separate line item[s] for reporting 'Road safety grants and sponsorships'.
- Recommendation 4** **41**
That the Motor Accidents Authority present a report on its assessment of insurer profit margins and the actuarial basis for its calculation to the Committee, including an explanation for any material deviation on forecasted profit, on an annual basis in order to fulfil its statutory obligation under section 28 of the *Motor Accidents Compensation Act 1999*.
- Recommendation 5** **42**
That the Motor Accidents Authority promptly publish information about the CTP pricing review, including its terms of reference and timeframe. In addition, the Motor Accidents Authority should publish a discussion paper on the issues covered in the review, consult widely including with stakeholders and the public, and publish its findings.
- Recommendation 6** **48**
That the Minister expedite the remaking of the Motor Accidents Compensation Regulation 2005, rather than waiting until its expiry on 1 September 2012.
- Recommendation 7** **48**
That the New South Wales Government pursue amendments to the *Motor Accidents Compensation Act 1999* to provide the Motor Accidents Authority with the authority to collect and disclose data on the amount of compensation a claimant receives once legal costs have been deducted.
- Recommendation 8** **51**
That the Motor Accidents Authority, in consultation with appropriate stakeholders, review the Physiotherapy Notice of Commencement and Physiotherapy Review Forms.
- Recommendation 9** **53**
That the Motor Accidents Authority produce and publish on its website information specifically directed to assist carers.

Recommendation 10

69

That the New South Wales Government review the threshold for access to damages for non-economic loss under the Motor Accidents Scheme in order to achieve a better balance between Scheme efficiency and compensation.

That the Motor Accidents Authority publish a discussion paper outlining the issues relating to access to non-economic loss damages. This discussion paper should include an actuarial analysis of the ramifications to the Scheme, claimants, CTP pricing and insurers of:

- changing the threshold to access non-economic damages to that of s.16 of the *Civil Liability Act*
- lowering the ten per cent whole person impairment threshold; and
- allowing both physical and psychological injuries to be aggregated to determine the whole person impairment threshold.

The Authority should make this review a priority, and publish the discussion paper, invite comment and pursue any subsequent legislative amendment during 2012.

Recommendation 11

72

That the Motor Accidents Council form a sub-committee to review, analyse and recommend a course of action to the Motor Accidents Authority on the issue of legal causation.

Recommendation 12

77

That the Motor Accidents Authority meet with the New South Wales Bar Association and other stakeholders as soon as practicable with a view to finding a solution to the issue of pre-settlement conferences under section 89A of the *Motor Accidents Compensation Act 1999*.