

**INQUIRY INTO 2018 REVIEW OF THE COMPULSORY
THIRD PARTY INSURANCE SCHEME**

Organisation: NSW Bar Association

Date Received: 22 June 2018

NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO NEW SOUTH WALES LEGISLATIVE COUNCIL LAW AND JUSTICE COMMITTEE REVIEW OF THE COMPULSORY THIRD PARTY (CTP) INSURANCE SCHEME

1. The New South Wales Bar Association greatly appreciates the opportunity to provide submissions to the 2018 Law and Justice Committee Review of the Compulsory Third Party (CTP) Insurance Scheme.
2. The terms of reference naturally focus on the operation of the *Motor Accident Injuries Act 2017* (“MAI Act”). When the MAI Act was passed, it was accompanied by a blank Regulation. There was intensive consultation concerning the content of the Regulation and Guidelines to the legislation prior to the commencement of the operation of the Act on 1 December 2017.
3. Unfortunately the Regulations in some respects undermined those aspects of the legislation which were designed to afford fairness.
4. Since the commencement of the operation of the Act there have been far fewer claims than anticipated, involvement of the legal profession has been actively discouraged by insurers and the public have not been properly informed as to their legal rights by the State Insurance Regulatory Authority.
5. In his Second Reading Speech on 9 March 2017 the Minister, the Hon Victor Dominello MP, indicated that under the new motor accidents scheme 55% of benefits will be paid in year one. As things presently stand only a fraction of that amount will have been paid out and it is possible that the Scheme will deliver far less in the way of compensation benefits to the injured than was assumed by the Scheme Actuary.
6. The New South Wales Bar Association has greatly appreciated the cooperation which has been forthcoming from SIRA in relation to sharing data as to the operation of the new Scheme.
7. In the first 6 months of the new scheme’s operation 4,135 claims have been lodged. Payments made in the first 6 months of operation of the Scheme totalled \$16,660,826. In the same period insurer premiums totalling \$930 million have been collected. ¹ The amount paid out compared to the amount collected is the equivalent of 1.72%.
8. Whilst there is no doubt that the Scheme is in an early stage, those indications suggest that the assumptions underlying the calculation of the average premium must be closely scrutinised throughout the development of the Scheme. At present the Government has committed to a review of the Scheme after two years however by that stage it will be too late to remedy injustices which will have been inflicted on accident victims who are presently being informed that they have no common law rights.

¹ Based on the insurer premium exclusive of GST of \$355 as assumed by the Scheme Actuary and based on 5.2 million registered vehicles as stated in the Second Reading Speech.

9. The actuarial assumptions made for the purpose of the calculating the average premium of \$528 are set out at Schedule 1E to the Motor Accident Guidelines. The New South Wales Bar Association is endeavouring to understand how the Scheme is functioning by comparison to those assumptions. In order for anyone to understand whether the new CTP scheme can afford a real “fairness test” it will be necessary to have reliable data as to what is in fact happening in relation to the following:

- a. Claims frequency in at fault and not at fault minor injury claims, claims for damages with a whole person impairment less than 10% and in claims for damages concerning a whole person impairment greater than 10%.
- b. The average claim size of each of those categories of claims.

10. There are other assumptions which would also be relevant. A copy of pages 24 to 31 of the Motor Accident Guidelines are attached and marked Annexure “A”.

Minor Injury

11. It is submitted that the Standing Committee on Law and Justice should examine the issue of whether the restriction of common law rights to motor accident victims with soft tissue injuries to their neck and back is fair or appropriate, taking into account the following matters:

- a. Whether those suffering “soft tissue” injuries to the neck and back have suffered genuine injuries which should be compensated;
- b. Whether the current test for soft tissue neck and back “minor injury” is too stringent;
- c. Whether the Scheme can afford a more generous test for “soft tissue” neck and back minor injury.

12. The present indications are that the Scheme can afford to lower the threshold test for a minor injury. The New South Wales Bar Association has consistently argued that the threshold for a non minor soft tissue injury to the neck and back should be greater than or equal to 5% whole person impairment under the AMA 4.

The Role of the Legal Profession

13. The New South Wales Bar Association is extremely disappointed that the legal profession has not been afforded a proper place in the operation of this new Scheme. By contrast, in Victoria, the Transport Accident Commission (“TAC”) has introduced a protocol which recognises the role played by a legal advisor in their system. One of their guiding principles is that an individual should not be deprived of his or her legal rights due to ignorance of those rights. In Victoria a lawyer can charge between \$5,000 to \$7,000 for work which is capped at \$1,600 in New South Wales.

14. The comparison between the information on the TAC website concerning common law rights and the SIRA website on the same topic is stark. The involvement of

the Law Institute of Victoria and the Australian Lawyers Alliance is acknowledged on the TAC website. There is a common law protocol which emphasises the need to ensure that claimant's legal rights and obligations are being observed and are not abandoned for the lack of opportunity to enforce them.

15. The role played by a claimant's lawyers in the process is recognised by the TAC. A copy of the relevant extracts from the web pages and the Transport Accident Act Common Law Protocol are annexed and marked "B".

16. It is submitted that the Standing Committee should recommend that the role of lawyers in the Motor Accident Scheme be respected as an integral part of providing the necessary assistance to claimants seeking statutory benefits and common law damages under the *Motor Accident Injuries Act 2017* and that a protocol similar to that which exists in Victoria should be developed.

17. Legal advisors are paid a reasonable fee for assisting in disputes under the Statutory Benefits Scheme. In New South Wales under this new Scheme insurers actively discourage access to legal advice and it must follow from that that injured claimants are being deprived of their entitlement to compensation and/or damages due to the failure on the part of the insurers and the Regulator to ensure that they are properly advised.

18. There is evidence to suggest that insurers may be engaging in conduct that has the tendency to discourage individuals to exercise their right to obtain legal advice. An example letter is attached and marked Annexure "C".

19. An injured person who goes to the SIRA website to seek guidance in bringing a claim does not receive adequate guidance regarding their right to obtain legal advice. Some extracts of the SIRA website are annexed hereto and marked "D"

Dispute Resolution Service and CTP Assist

20. At the date of these submissions the Dispute Resolution Service and CTP Assist have had relatively little work to do. The Association does not have direct experience of dealing with either of those entities. It is likely to be individual unrepresented claimants who have the relevant experience. Any review of the quality of those services can only be undertaken by interviewing individual claimants to ascertain whether or not they were properly advised and/or assisted through the process. Any review of insurance claim files or SIRA files will fail to identify shortcomings in those services, and will render the results of any survey vulnerable to confirmation bias.

22 June 2018