Supplementary Submission No 8a

INQUIRY INTO 2020 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

Organisation: New South Wales Bar Association

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NEW SOUTH WALES
BAR ASSOCIATION

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Mr Wes Fang
Chair, Standing Committee on Law and Justice
Review of the Compulsory Third Party Insurance Scheme
Legislative Council
Parliament of New South Wales

10 December 2020

By email

Dear Chair

Supplementary submission to the Standing Committee on Law and Justice's 2020 Review of the Compulsory Third Party Insurance Scheme

1. Thank you for inviting a supplementary submission concerning the operation of the *Motor Accident Injuries Act 2017* (NSW) (***MAI Act***) No Fault Statutory Scheme within the first 26 weeks of an accident.

2. The confinement of benefits to that period applies to those who are mostly at fault for an accident and those who have suffered a minor injury.

3. The finalisation of the entitlement to benefits in relation to determinations of minor injury is often made after the 26-week period has expired. To assist the Standing Committee, the Association has enclosed below examples of problems which have been encountered primarily by Claimants, who are mostly self-represented at the time, in relation to liability disputes and minor injury.

Liability Disputes

4. Examples of problems encountered in relation to liability disputes include:

    a. Delaying a decision on liability whilst investigations are undertaken;

    b. Making adverse decisions on liability on hearsay-based Police opinion which would be inadmissible in any Tribunal where the rules of procedural fairness apply;

    c. Relying on that type of Police opinion when the person responsible for the accident either has not or will not be interviewed for the purpose of the liability investigation;

    d. Relying on traffic reconstruction evidence to dispute liability for statutory benefits;

    e. Employing the approaches set out above in claims where there is a significant or even major injury requiring extensive ongoing medical treatment beyond 26 weeks;

    f. The most significant resources seem to be applied to claims in which a person has been seriously injured.

Minor Injury

5. The following are examples of problems encountered in relation to minor injury.

6. In many cases Insurers do not accept the opinion of a treating doctor, despite this having been promoted as a benefit of the Scheme in simplifying reducing disputes.

7. Claims officers and rehabilitation providers attend medical consultations between a general practitioner and a claimant. This appears to be creating problems with the doctor patient relationship, including undermining doctor patient privilege.

8. There have been instances of inappropriate behaviour by claims officers or rehabilitation providers in attending medical examinations. Examples of such behaviour include debating a person's capacity for work during the consultation with the doctor and informing a Claimant in that context that their claim was going to be closed because surveillance material had been obtained.

9. It is common for an Insurer to refuse to fund CT or MRI scans in relation to soft tissue injuries of the neck or back but to then obtain medico-legal reports from radiologists, orthopaedic surgeons or neurologists for the purpose of arguing that a person's injuries reveal pre-existing degenerative change unrelated to the subject accident when at law such an aggravation is causally related to the accident.

10. The Insurers proceed on guidelines which require a direct connection between a motor accident and an injury. This seems to be interpreted as requiring the nature and extent of the injury to be apparent at the time of the impact and reported immediately. This approach is very unfair when there are many valid reasons why such reporting may not be able to be made at that stage, and it does not reflect the relevant legal test.

11. Correspondence from Insurers is overly detailed. It often contains lengthy information which is irrelevant to the subject of the correspondence. There is no clear or consistent template for providing the necessary information for unrepresented Claimants in protecting their own interests in a dispute with an insurance company.

12. The Association is also concerned that claims officers are not informing the injured about their entitlement to care. In some cases, Claimants have been told that they can no longer make such a claim when an enquiry has been made about obtaining help with housework.

13. The process of an Insurer determining minor injury in effect determines many injured Claimants' legal rights once and for all. Claimants are being forced to engage directly with insurance companies in the earlier stages of their injury when they are at their most vulnerable. The Association is concerned that this is a significant factor in Claimants abandoning their claims.

14. For those Claimants who have successfully established that they are not most at fault in those claims where there is a liability dispute, those people are then confronted with all of the disputes that can arise in relation to benefits in the first 26 weeks.

15. The use of accounting and forensic reports to assist in determining the appropriate rate or entitlement to weekly payments causes unnecessary delay and significant stress to Claimants and also creates a completely one sided controversy.

16. A major failing in the Scheme in relation to minor injury is the fact that an Insurer's determination of minor injury is binding for the purpose of a claim for damages. In other

words, no claim for damages can be brought. What in effect is happening is that for those who have been found to have suffered minor injury, their rights are determined, usually shortly after the 26-week period has expired, before they have even had the opportunity of properly understanding what is going on. Their rights are being removed in circumstances where Insurers have an unfair advantage. This problem arises as a result of the operation of section 4.4 of the *MAI Act* which provides that no damages may be awarded to an injured person if the person's only injuries resulting from the motor accident were minor injuries.

17. The legislature saw fit to provide that statutory benefits determinations relating to fault, contributory negligence or any other such matter prescribed by the regulations is not binding in connection with a claim for damages (see section 3.44 of the *MAI Act*).

18. The amendment of the *MAI Act* to make a decision as to minor injury non-binding would remove the current incentive for Insurers to take whatever steps they can to succeed in obtaining a finding of minor injury at an early stage. That would go a long way towards levelling the playing field for injured Claimants and restore a degree of fairness to the system.

Conclusion

19. If the Association can further assist the Standing Committee, please contact our Director of Policy and Public Affairs, Elizabeth Pearson, at first instance via .

Yours sincerely

Michael McHugh SC
President