

**Submission
No 10**

INQUIRY INTO 2022 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

Organisation: Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Chris Rath
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au

Dear Mr Rath

2022 Review of the Compulsory Third Party (CTP) Scheme

The Law Society welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice (**Standing Committee**) in relation to its 2022 review of the Compulsory Third Party (**CTP**) insurance scheme. The Law Society's Injury Compensation Committee has contributed to this submission.

The *Motor Accident Injuries Act 2017* (NSW), which commenced on 1 December 2017, established a new scheme of CTP insurance and system of benefits and support in relation to the death of or injury to persons as a consequence of motor accidents in NSW. The introduction of the 2017 Act represented a major departure from the previous CTP scheme in NSW which was 'almost entirely based on injured persons recovering lump-sum damages from persons at fault in a motor accident, as compensation for injury and resulting loss'.¹

The Statutory Review of the *Motor Accident Injuries Act 2017* was conducted by independent consultants Clayton Utz and Deloitte in 2021 and assessed the performance of the scheme over its first three years. The Statutory Review culminated in a report published in September 2021, which made 73 recommendations relating to scheme design, scheme implementation and KPIs.

The Law Society is of the view that the Government should commit to the implementation of all of the recommendations as soon as possible. In particular, we draw attention to the following recommendations that require urgent attention:

The provision of legal support to claimants in the scheme

The Statutory Review recognised that 'the framework for provision of legal support in the Scheme is complex and...overly restrictive'.² It was noted that while restricting access to

¹ Statutory Review of the Motor Accident Injuries Act, Discussion Paper by Clayton Utz and Deloitte, 5 July 2021, 3.

² Statutory Review of the Motor Accident Injuries Act (**Statutory Review**), Report by Clayton Utz and Deloitte, 22 September 2021, 121.

advice and representation, particularly at the claim management and internal review stages of decision making, is aimed at facilitating Objective (g) of the Act (i.e. to limit the costs of running the Scheme and keep CTP premiums affordable), it is problematic to structure a Scheme to rely on unpaid or pro bono services.³

The Law Society endorses the position set out in the Statutory Review that Scheme outcomes and the experience of injured persons in the Scheme will often benefit from access to the services of a legal adviser and advocate. This view was reinforced in Taylor Fry's report where it was found that access to a lawyer led to better outcomes vis-à-vis access to entitlements.⁴ Further, legal representation may enhance a claimant's experience of the operation of the Scheme, freeing up time for the claimant to focus on recovery.

Claimant lawyers do not receive a fee if a dispute does not proceed past the internal review point, even where they have done a significant amount of work which has resulted in an insurer overturning the original decision. We are concerned that, as a result, more disputes proceed to the Personal Injury Commission for review when, if appropriately resourced, claimant lawyers may be more successful in helping to resolve the matter during the initial stages of the process.

The CTP Assist scheme administered by SIRA is aimed at helping claimants understand the claims process and their entitlements. As recognised by the Statutory Review, however, 'it cannot replace the role of a lawyer who can both advocate for the injured person, and provide advice for the person's individual circumstances'.⁵

Insurer decision-making about treatment and care

An important discussion in the Statutory Review concerned the way in which the insurer is given authority to decide whether treatment and care is 'reasonable and necessary'. It was acknowledged that while the majority of insurers approve and pay for care on the recommendation of the injured person's treating practitioner, there may be negative consequences arising from this provision for some injured persons whose ability to access care may be limited or delayed, thereby exacerbating injury and increasing psychological distress.⁶

Recommendation 6 provides that the care and treatment recommended by the injured person's treating practitioner should be presumed to be 'reasonable and necessary' unless evidence is supplied to the contrary. The Law Society considers that such an amendment will provide greater assurance to the injured person that reasonable and necessary care and treatment will not be withheld. It makes sense that a treating professional is in the best position to decide what treatment and care is needed as opposed to a claims manager without the requisite professional training.

Minor Injury Framework

The 'minor injury' framework applies to persons whose only injuries resulting from the motor accident concerned are 'minor injuries' and has the following consequences:

- Access to statutory benefits for treatment is limited after 26 weeks by a more restrictive test than the 'reasonable and necessary' test that applies to all other injuries;
- Weekly payment of statutory benefits for loss of earnings or earning capacity are not available after 26 weeks after the motor accident concerned; and

³ Ibid., 70.

⁴ Taylor Fry, Review of legal support for people injured in the NSW CTP Scheme (**Taylor Fry Review**), 3 September 2021.

⁵ Statutory Review, 74.

⁶ Ibid., 17.

- There is no entitlement to an award of damages.

The Statutory Review rejected the submission of SIRA and other stakeholders that the minor injury framework assists people with a minor injury to focus on their recovery by gaining 'fast access to statutory benefits'.⁷ Instead, the framework, the purpose of which is to ensure the affordability of premiums and deter fraud and exaggeration of claims, 'simply reduces and removes the entitlement to benefits'.⁸

The Law Society considers that the 'minor injury' definition is too restrictive and often results in claimants being cut-off from statutory benefits prematurely. The definition can lead to arbitrary, counterintuitive and unfair outcomes for claimants for various reasons. We refer the Standing Committee to Recommendations 34 to 39 that relate to the 'minor injury' framework and note the following:

a) *Adjustment disorder*

The Statutory Review found (at Recommendation 34) that 'adjustment disorder' should not be included within the definition of 'minor injury' because the diagnosis is not an indication that the injured person's psychiatric injury will resolve by 26 weeks after the accident.

As noted by the Law Society in its submission to the Review, psychiatric injuries are time dependent and/or often have a delayed onset of symptoms. As a consequence, if a person has sustained a significant psychiatric injury, it may not be able to be properly diagnosed less than six months post-accident, when an insurer is required to make a liability determination. Categorising all adjustment disorders as minor is at odds with the experience of our members that many claimants who suffer from a chronic adjustment disorder continue to suffer from significantly disabling symptoms years after the accident.

As noted in the Statutory Review, '(t)he definition of 'minor injury' must only include conditions that are expected, with appropriate treatment and care, to resolve within 6 months after the motor accident concerned'.⁹ The current system, whereby an injured person may have to approach the insurer with an updated diagnosis after 26 weeks and ask to be allowed back in the Scheme, does not promote recovery.

b) *Minor injury and permanent impairment*

The Statutory Review also noted (at Recommendation 36) that injured persons with a degree of permanent impairment greater than 10% should be entitled to claim damages irrespective of the 'minor injury' classification of their injuries.

The Review notes the anomalous situation where a person has multiple 'minor injuries' (and no injuries that are not 'minor injuries') but permanent impairment of greater than 10%. We consider that it is in keeping with the objectives of the Scheme that all seriously injured people (including those that fall within the aforementioned category) are given the right to claim damages for non-economic loss.

c) *'Minor injury' statutory benefits time limit*

For the reasons set out in the Statutory Review, the Law Society also notes the importance of extending injured persons' entitlement to ongoing statutory benefits from 26 to 52 weeks, in circumstances where those persons have not returned to work at 26 weeks, require ongoing treatment and care, and have an established statutory benefits claim (Recommendation 37). While this may come at some cost to the Scheme, we consider this

⁷ Ibid., 84.

⁸ Ibid.

⁹ Ibid., 88.

proportionate, considering the evidence that only 2% of minor injury treatment and care claims remain open at 52 weeks after the motor accident.¹⁰

In this context, we refer the Standing Committee to the latest EY CTP Scheme Quarterly Actuarial Monitoring Report.¹¹ In the Report, it was noted that the numbers of not-at-fault non-minor injuries are lower than was expected at the outset of the scheme. Whereas the frequency of such claims was predicted to be 0.120% in December 2017, as of 15 January 2022 the frequency of these non-minor claims was roughly half of that at 0.061%.

d) Reversal of a minor injury decision

Recommendation 39 of the Statutory Review proposed that a change of the insurer's position in relation to classifying a person's injuries as minor injuries should be confirmed independently if the change occurs more than 18 months after the motor accident.

The Law Society agrees with the rationale set out in the Statutory Review that the reversal of an insurer's position at a later stage, while necessary in certain circumstances, may adversely affect the injured person's treatment and financial support at a time when they might think that the issue has settled. An independent assessment is therefore warranted in the interests of fairness.

Claims relating to the death of a loved one

The Law Society acknowledges the grief and trauma experienced by the families of those lost in a motor vehicle accident. With a view to minimising the distress on families, we support an amendment in line with Recommendation 46 to provide that a psychological or psychiatric injury resulting from the death or catastrophic injury of a family member is not a 'minor injury' for the purposes of the Act.

Medical Opinion

The Statutory Review found that users of medical opinion evidence (lawyers and insurers) were 'universal in their view that the AHP framework does not achieve its objectives, and only serves to introduce additional administrative burdens on participants in the Scheme'.¹² We refer the Standing Committee to Recommendation 29, noting our agreement with the view that while joint medico-legal assessments may not always be appropriate in relation to a claim for damages, they can be beneficial in supporting the claimant's experience with the scheme and assisting the just, quick and cheap resolution of motor accident disputes.

Time for making of claims for statutory benefits

The Statutory Review recommended amending the Act to make weekly payments of statutory benefits payable in respect of the period before the claim is made even if the claim is made more than 28 days after the date of the motor accident, if the claimant provides a full and satisfactory explanation for the delay. In the experience of our members, s 6.13(2) has operated as an inflexible rule in the past, and we therefore support the implementation of this recommendation.

20 Month Cooling Off Period

Recommendation 17 relates to the current requirement for an injured person with a degree of permanent impairment of 10% or less to wait 20 months before lodgement of a claim for damages. As recognised by stakeholders in the Statutory Review, the '20 month waiting period does not seem to have any solid, rational foundation' and creates problems for

¹⁰ Ibid., 91.

¹¹ 2017 CTP Scheme Quarterly Actuarial Monitoring 30 June 2022 data, 15 August 2022 available at https://www.sira.nsw.gov.au/data/assets/pdf_file/0008/1100150/2017-CTP-Scheme-quarterly-Actuarial-Monitoring-June-2022.pdf

¹² Statutory Review., 70.

insurers and the efficiencies of the dispute resolution system'.¹³ The Law Society strongly agrees that the cooling off period should be removed.

Similarly, section 6.23(1) of the Act should be amended to remove the 2-year prohibition on settling claims for damages

The 5% discount rate on future economic loss

Section 4.9 of the Act sets out that an award of damages in respect of future economic loss is to be qualified by adopting the prescribed discount rate, which is the rate set by the Regulations, or 5% if no rate applies. The Statutory Review recommended that the Government 'consider the making of a regulation which properly qualifies the present value of future economic loss', noting that 'an arbitrary discount applied to all awards of future economic loss is not an appropriate mechanism...to achieve Objective (b)'.¹⁴ The Law Society supports this recommendation, noting its particular importance for young persons who are catastrophically injured and have other needs above and beyond the treatment and care that can be provided under the Lifetime Care and Support Scheme.

Other recommendations on Scheme implementation

We refer the Standing Committee to the further recommendations made in the Statutory Review on implementation of the Scheme, particular priority areas identified including the need for an examination of the types of matters suitable for internal review and steps to address fraud in the system.

Thank you for the opportunity to comment. Questions at first instance can be directed to Sophie Bathurst, Policy Lawyer,

Yours sincerely,

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Chief Executive Officer

¹³ Ibid., 34.

¹⁴ Ibid., 36.