

INQUIRY INTO 2022 REVIEW OF THE LIFETIME CARE AND SUPPORT SCHEME

Organisation: Independent Review Office (IRO)

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The Hon Chris Rath MLC
Chair
NSW Legislative Council Standing Committee on Law and Justice

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

Dear Chair

IRO submission to 2022 Review of the Lifetime Care and Support scheme

The Office of the Independent Review Officer (IRO) is pleased to provide the enclosed submission to the NSW Legislative Council Standing Committee on Law and Justice *2022 Review of the Lifetime Care and Support scheme*. I appreciate the Committee agreeing to a brief extension of time for the submission to be provided.

I consent to the submission being published by the Committee.

Yours sincerely

Simon Cohen
Independent Review Officer

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About the Independent Review Office

The Office of the Independent Review Officer (IRO) is an independent statutory office and public service agency established under the *Personal Injury Act 2020* (PIC Act) and the *Government Sector Employment Act 2013*. The IRO commenced operation in its current form on 1 March 2021.

The statutory functions of the Independent Review Officer are set out in clause 6 of Schedule 5 to the PIC Act, and include, as relevant:

- (a) dealing with complaints made to the Independent Review Officer under Schedule 5
- (b) inquiring into and reporting to the Minister for Customer Service and Digital Government on any matters arising in connection with the operation of the PIC Act or the *enabling legislation* as the Independent Review Officer considers appropriate or as may be referred by the Minister
- (c) encouraging insurers and employers to establish complaint resolution processes for complaints arising under the enabling legislation.

The enabling legislation includes the *Motor Accidents Injuries Act 2017* (MAI Act), *Motor Accidents Compensation Act 1999* (MAC Act) and *Motor Accidents (Lifetime Care and Support) Act 2006* (MA(LCS) Act).

The IRO welcomes the opportunity to provide a submission to the Legislative Council Standing Committee on Law and Justice (Standing Committee) 2022 Review of the Lifetime Care and Support scheme.

Background

The legislative background

The Lifetime Care and Support Authority of New South Wales (LCSA) was established by the MA(LCS) Act to become responsible for payment for the assessed treatment and care needs of claimants who were accepted as participants in the scheme¹.

Participants include any claimant injured in a motor vehicle accident to which the MAC Act applied² and who met the criteria specified in the Lifetime Care and Support (LTCS) Guidelines³, or claimants who were eligible to 'buy in' to the scheme pursuant to sections 7A and 7B of the MA(LCS) Act. The program providing services to these claimants is referred to as the Lifetime Care and Support Scheme (LCSS).

The MAI Act commenced on 1 December 2017 and applies to accidents occurring on or after 1 December 2017. The MAI Act established a new compulsory third party (CTP) Green Slip scheme with the stated purpose of better supporting people injured on NSW roads.

Section 3.2 of the MAI Act relevantly provides that, in the case of the payment of statutory benefits for treatment and care provided more than 5 years after the motor accident concerned, the "relevant insurer" (which is responsible for payment of statutory benefits) is the LCSA.

The LCSA may also enter into an agreement with a relevant insurer to assume responsibility for the payment of statutory benefits for treatment and care provided during the period of five years after the motor accident concerned, if it is satisfied that the injured person is likely to be entitled to statutory benefits for treatment and care after the end of that five year period⁴. When the agreement takes effect, the LCSA becomes the relevant insurer.

¹ Section 11A MA(LCS) Act

² The MAC Act applies to accidents occurring prior to 1 December 2017

³ Sections 4 & 7 MA(LCS) Act

⁴ Section 3.45 of the MAI Act

The program providing services to claimants under the MAI Act, where the LCSA is the relevant insurer, is referred to as CTP Care.

The first injured persons whose accident occurred after 1 December 2017 (and hence are subject to the MAI Act) are due to transition to CTP Care in December 2022 (i.e., five years after the MAI Act commenced). CTP Care is also currently running a pilot program for those claimants who have transitioned earlier.

The role of the IRO in CTP complaints

Clause 8(1) of Schedule 5 to the PIC Act states:

A claimant may complain to the Independent Review Officer about any act or omission (including any decision or failure to decide) of an insurer that affects the entitlements, rights or obligations of the claimant under the enabling legislation.

Relevantly, this includes dealing with complaints about insurers made by claimants who have suffered injuries within the meaning of s.1.10(1) of the MAI Act and similar provisions of the MAC Act.

An 'insurer' for the purposes of IRO's complaint handling function means '*a licensed insurer under any of the enabling legislation*' – clause 1 of Schedule 5 to the PIC Act. The LCSA is not a licensed insurer.

Claimants can lodge a complaint about the conduct or decision of an insurer relating to the provision of benefits or services ranging from the payment of weekly compensation for loss of income to the payment of treatment expenses. Once in receipt of a complaint which the IRO assesses to be within its power to deal with, a Notice of Complaint is forwarded to the relevant insurer. The Notice of Complaint will outline the concerns of the injured person, the solution they are seeking, and seek a response from the insurer about the complaint. The objective is to reach a fair and reasonable solution to the complaint.

Common solutions following IRO inquiries and investigation include the insurer paying a benefit (such as making weekly payments or reimbursing treatment costs), taking action (such as rearranging a medical examination or changing a case manager), or providing further information to the claimant about a decision or action.

Where complaints cannot be solved or are not within the IRO's jurisdiction, the injured person will be provided with information about other forums to deal with their dispute (such as the Personal Injury Commission).

Issues

The power to deal with complaints about LCSA

IRO has handled most CTP complaints since the commencement of the PIC Act on 1 March 2021. However, until recently, this has not included handling complaints relating to participants in the CTP Care program, and still does not include complaints relating to participants in the LCSS.

The reason for this is that the LCSA, which administers CTP Care and the LCSS, has declined to accept complaints from the IRO, and to provide information in response to complaints, on the basis it is not a licensed insurer (as noted above) and the IRO may not have the power to deal with complaints about and require information from the LCSA.

The State Insurance and Regulatory Authority (SIRA) does have the power to receive and investigate complaints made about CTP Care pursuant to subsection 10.1(d) of the MAI Act.

Our view is that it is not clear whether the IRO has the power under Schedule 5 of the PIC Act to deal with complaints from injured persons about the LCSA. In particular, given the IRO role to deal with complaints by claimants under enabling legislation including the

MA(LCS) Act, and given it is the LCSA which exercises insurer functions under that Act, our view is that Parliament's intention the IRO deal with these complaints is clear.

As an interim measure, and to ensure there is no gap for injured persons under CTP Care, SIRA delegated to the IRO in June 2022 the function, pursuant to subsection 10.1(d) of the MAI Act, of investigating and responding to complaints about claims handling practices of the LCSA in respect of its functions under sections 3.2(3) and 3.45 of the MAI Act. The IRO has accepted this delegation.

While the delegation may not be strictly necessary, this is a pragmatic approach that provides injured persons and the LCSA certainty on the matters IRO can deal with. It also ensures a consistent complaint-handling process for persons injured in motor accidents, and that there is no unnecessary duplication and double handling of matters between SIRA and IRO. It has been reflected in Part 4 of the draft Motor Accident Guidelines: CTP Care⁵, which relevantly provide:

An injured person may complain to the Independent Review Officer (IRO) about any act or omission of an Insurer that affects their entitlements, rights or obligations under the Motor Accident Injuries Act 2017 (see clause 8, Part 4 of Schedule 5 to the Personal Injury Commission Act 2020).

Any complaints about the LCSA in respect of its functions related to the payment of treatment and care expenses under the Motor Accident Injuries Act 2017 may also be directed to the IRO.

The delegation does not, however, provide an ongoing solution to this issue, nor does it address the question of complaints concerning claimants in the LCSS.

The IRO's experience

The IRO has received only a small number of complaints concerning the LCSA since commencing the CTP function on 1 March 2021, with two (2) complaints in the 2021/2022 financial year. Reasons for this likely include LCSA's view that the IRO cannot deal with these matters; hence, information about our role is not provided to injured persons.

One complaint came from a participant in the LCSS. The injured person complained to the IRO that claims for certain equipment required for activities of daily living were being refused. The LCSA did not provide information about the complaint, stating the IRO did not have jurisdiction to deal with the complaint. However, the LCSA did make contact with the injured person, who later advised the IRO that following contact with us, his complaint had moved forward.

The second complaint came from a participant in CTP Care, and included concerns about delays in approving gardening assistance, home modifications and case management. The IRO, in response to the complaint, referred the injured person to the icare website for information on how to make the complaint.

We observe that these complaints raise issues common in other CTP complaints handled by the IRO – including concerns about delays in decision making and case management.

We also note that, with the transition of claims from other insurers to CTP Care from 1 December 2022, and clarity about the IRO's role to deal with complaints in these matters, it is likely that substantially more complaints about CTP Care will be received by the IRO in future periods.

Recommendations and conclusions

There is uncertainty about the IRO's role to deal with complaints about CTP Care or the LCSS. The intent of Schedule 5 of the PIC Act was to confer a general CTP complaints handling power upon the IRO, and there is no rationale for excluding complaints from

⁵ [Draft Motor Accident Guidelines: CTP Care - SIRA \(nsw.gov.au\)](https://www.nsw.gov.au/draft-motor-accident-guidelines-ctp-care-sira)

participants in CTP Care and the LCSS from that remit. Without an effective external complaint handling option, participants in these schemes are disadvantaged.

In view of current uncertainty, the IRO recommends there be amendments to the appropriate legislation to clarify that the IRO has the power to deal with complaints made by participants in the CTP Care program and the LCSS.