Submission No 6

INQUIRY INTO 2022 REVIEW OF THE LIFETIME CARE AND SUPPORT SCHEME

Organisation: NSW Bar Association

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Standing Committee on Law and Justice 2022 Review of the Compulsory Third Party Insurance and Lifetime Care and Support Schemes

10 October 2022

SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the Courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. Currently, 423 of our members report practicing in the areas of common law and personal injury. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This submission is informed by the insight and expertise of the Association's Common Law Committee.

Contents

A. Executive Summary and Recommendations

1. The NSW Bar Association (**the Association**) thanks the NSW Legislative Council's Standing Committee on Law and Justice (**the SCLJ**) for the invitation to comment on the 2022 Review of the Compulsory Third Party Insurance and Lifetime Care and Support Schemes.

2. At the outset, the Association draws attention to the following figures published by Ernst & Young in August 2022, which relate to actual versus expected claims experience between December 2021 and June 2022 (**the relevant period**):[1]
    a. Statutory benefit claims reported during the relevant period were expected to be 1,174. The actual number of statutory benefit claims reported was 717. This is a difference of 457 claims or 39% less than expected.[2]
    b. Statutory benefit claim payments during the relevant period were expected to be $153.4 million. The actual amount paid out was $104.4 million. This is a difference of $49 million or 32% less than expected.[3]
    c. Claims reported for damage in cases where whole person impairment (**WPI**) was >10% during the relevant period were expected to be 638. The actual number of claims reported was 358. This is a difference of 280 claims or 44% less than expected.[4]
    d. Claims reported for damages in cases where WPI was ≤10% during the relevant period was expected to be 667. The actual number of claims reported was 203. This is a difference of 464 claims or 70% less than expected.[5]

3. The Association also notes that 60% of not at fault claims are assessed as involving minor injury.[6] The Compulsory Third Party Insurance Scheme (**CTP Scheme**) was designed on the basis that this figure would be 50%.

4. In the Association's opinion, each of these figures, and the figures at 2(d) in particular, indicate that the CTP Scheme is significantly underperforming. The figures in 2(c) and (d) also suggest that the current test for minor injury is excluding too many claims from the system.

5. The additional 10% of not at fault claims which are presently being assessed as involving minor injury is preventing an additional 10% of accident claimants, whom the CTP Scheme intended to have a right to receive damages, from pursuing their entitlement to damages and will thereby

[1] Ernst & Young, *2017 CTP Scheme: Quarterly Actual Monitoring – 30 June 2022 data*, 15 August 2022.
[2] Ibid p. 26.
[3] Ibid p. 27.
[4] Ibid p. 31.
[5] Ibid p. 31.
[6] Ibid pp. 17-19.

be causing significant injustice. The Association believes that this injustice is a direct result of an unfair minor injury test.

6. The Association advocates for the SCLJ to make the following recommendations in order to improve the CTP Scheme:
    a. Recommendation 1 – that the State Insurance Regulatory Authority (**SIRA**) review the definition of minor injury in relation to physical injuries including costing the impact of the following amendment to the definition:
        "A soft tissue neck and back injury assessed as causing a less than 5% whole person impairment is minor."
    b. Recommendation 2 – that the *Motor Accident Injuries Act 2017* (NSW) (**MAI Act**) and *Motor Accident Compensation Act 1999* (NSW) (**MACA**) be amended to reflect the workers compensation legislation by providing for resolution of disputes involving questions of causation to be determined as a legal issue after a hearing on the merits during conciliation/arbitration or mediation, with medical issues determined subsequently as medical assessment matters.
    c. Recommendation 3 – that legal costs for statutory claims under the MAI Act should be commensurate with costs paid in comparable disputes under the workers compensation scheme.
    d. Recommendation 4 – that the Personal Injury Commission (**the PIC**) be empowered to undertake merits review concerning disputes as to treatment and care under the Lifetime Care and Support Scheme and CTP Care.

7. The Association considers that the Government's objective of making premiums affordable has been met in the CTP Scheme, with the current CTP average premium in New South Wales being $483.

8. The Association submits that any further changes concerning premiums should restore the balance between benefits and insurer profit in line with the stated objectives of the 2017 reforms to the CTP Scheme.

9. Future evaluations of the performance of the CTP Scheme should focus on delivering both the stated objectives and the legislative objectives relating to the payment of benefits under the Scheme, being:
    a. To provide the fairest compensation regime possible consistent with maintaining the present premium;
    b. To ensure the majority of premium is paid to the injured with an emphasis on the most seriously injured;

c. To ensure the restriction on claims for damages is confined to injuries which are genuinely minor in nature without restricting or removing the right to claim damages for those with moderate or serious injuries;
d. To equip the regulator with sufficient resources to monitor insurer behaviour so that claims for statutory benefits are not rejected unreasonably and unrepresented claimants are not discouraged from exercising their rights to claim compensation or damages due to insurer behaviour. We note that currently 77.9% of claimants do not have legal representation;[7]
e. To require CTP insurers, as receivers of public money that is compulsorily levied, to act in all cases in a way which promotes the quick, cost effective and just resolution of disputes; and
f. To equip the regulator with sufficient resources to perform its statutory function to undertake a genuine, open and widespread consultation for the purpose of conducting an ongoing review of the minor injury definition. This should include seeking feedback from non-legally represented claimants who have left the CTP Scheme.

10. The Association expands on these recommendations further below.

[7] State Insurance Regulatory Authority, *2017 CTP Scheme Open Data: Claims by Legal Representation (New CTP) – 12 months*, <https://www.sira.nsw.gov.au/CTP-open-data>.

B. Proposed Recommendations

Recommendation 1

That SIRA review the definition of minor injury in relation to physical injuries including costing the impact of the following amendment to the definition:

> ***"A soft tissue neck and back injury assessed as causing a less than 5% whole person impairment is minor."***

Issues with the current minor injury definition

11. In its 2020 Review of the CTP Scheme, the SCLJ proposed as part of Recommendation 1:

> *That the current statutory review of the Motor Accident Injuries Act 2017 closely consider the following issues for reforms to the scheme:*
>
> …
>
> *how the minor injury definition can be amended to ensure it does not exclude those with genuine minor injuries, including in relation to psychological claims...* [8]

12. In its Review, the SCLJ summarised the submissions of the NSW Bar Association (at Attachments 1 and 2) on this point as follows:

> *The NSW Bar Association outlined a number of examples in its submission of problems encountered in relation to the minor injury definition, including insurers not accepting the opinion of a treating doctor, and claims officers and rehabilitation providers attending medical consultations between doctors and a claimant, undermining doctor patient privilege. It also highlighted that 60 per cent of claims are closed after 26 weeks as 'minor injuries' whereas original predictions made by actuaries had this figure at 50 per cent. The NSW Bar Association, in particular, called for the whole person impairment test to be reduced from 10 per cent to 5 per cent.*[9] (footnotes omitted)

13. In its Response to the 2020 Review, the NSW Government expressly supported the SCLJ's recommendation and noted that Clayton Utz and Deloitte considered that recommendation as part of the Statutory Review of the MAI Act (**the Clayton Utz Review**).[10]

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[8] NSW Legislative Council's Standing Committee on Law and Justice, *Report No. 77: 2020 Review of the Compulsory Third Party Insurance Scheme,* July 2021, p. vii.

[9] NSW Legislative Council's Standing Committee on Law and Justice, *Report No. 77: 2020 Review of the Compulsory Third Party Insurance Scheme,* July 2021, p. 8, referring to NSW Bar Association, *Submission to the 2020 Review of the Compulsory Third Party Insurance Scheme*, 10 November 2020 and NSW Bar Association, *Supplementary Submission to the Standing Committee on Law and Justice's 2020 Review of the Compulsory Third Party Insurance Scheme*, 10 December 2020.

[10] NSW Government, *Government Response to the Report of the Legislative Council's Standing Committee on Law and Justice on the 2020 Review of the Compulsory Third Party Insurance Scheme.*

14. In the Clayton Utz Review, the independent reviewer made a number of recommendations in relation to the minor injury framework and recognised the importance of ensuring that the scope of the minor injury definition is appropriately balanced against the needs of injured persons who are affected by it.[11]

Subsequent correspondence between the Association and the SCLJ regarding Recommendation 1 of the 2020 Review of the CTP Scheme

15. On 30 August 2021, the Association wrote to then Committee Chair, the Hon. Wes Fang MLC, requesting clarification on Recommendation 1 of the 2020 Review of the CTP Scheme (see Attachment 3). Specifically, the Association submitted:

> *Having reviewed the Report, it seems that there is an inadvertent error in the second bullet point of Recommendation 1, which reads: "how the minor injury definition can be amended to ensure it does not exclude those with genuine minor injuries, including in relation to psychological claims".*
>
> *Given the nature of the discussion on those matters in the body of the Report (eg. at paragraphs [2.8] to [2.22]), it appears that the second reference in the above sentence should instead be to "**non-minor**" injuries.*
>
> *That is, if the intention of the recommendation is that the statutory review should consider how the 'minor injury' definition can be amended to avoid capturing those who do not have genuinely minor injuries (ie. those who have non-minor injuries), the Association respectfully submits that the second bullet point of Recommendation 1 should read:*
>
> > *That the current statutory review of the Motor Accident Injuries Act 2017 closely consider the following issues for reforms to the scheme:*
> > *…*
> > *how the minor injury definition can be amended to ensure that it does not ~~exclude~~ **include** those with genuine **non-**minor injuries, including in relation to psychological claims.*

[11] Clayton Utz, *Report: Statutory Review of the Motor Accident Injuries Act 2017*, 22 September 2021.

16. On 7 September 2021, the Association received a response from the Committee Chair advising that the issues raised by the Association could be pursued at the time of the next review (see Attachment 4).

The unfair consequences of too many minor injury determinations

17. As noted above, 60% of not at fault claims are presently being assessed as involving minor injury.

18. The original assumption was that there would be 6,000 claims for damages each year.[12] In July 2020, the figure was revised down to between 4,400 and 3,685. In June 2022, it was further reduced to between 2,800 and 3,600. This is close to half of the original assumption.

19. The impact of denying benefits to the most seriously injured under the current broad definition of minor injury is stark. The shift from a 50% to a 60% minor injury classification has the following effect:

    a. 1,000 minor injury claims at $6,750 each (Ernst & Young, June 2020 – average of $4,500 – $9000) = $6,750,000 ($6.75 million), as opposed to
    b. 1000 non-minor injury claims at $100,000 = $100,000,000 ($100 million).

20. This considerable difference has profound and unfair consequences for injured persons. Further, while the reality is that some of those non-minor injury claims would be above the 10% WPI threshold, on any account, it represents an extraordinary discrepancy in expected versus actual experience.

Current CTP Scheme performance on a comparison of actual versus expected claims numbers and payments

21. The Association refers again to the figures published by Ernst & Young in August 2022 which relate to actual versus expected claims experience in the CTP Scheme between December 2021 and June 2022 (as highlighted in paragraphs 2 – 3 above).

22. The Ernst & Young figures indicate that the CTP Scheme is significantly underperforming. In the Association's view, the figures clearly suggest that the current test for minor injury excludes too many claimants from the Scheme and is thereby likely to be causing significant injustice by preventing an additional 10% of accident claimants from pursuing their entitlement to damages.

[12] Ernst & Young, *Cost Regulation Costing*, 6 July 2017, p. 9.

23. This position is reinforced by the fact that claim payments for damages in the December 2021 – June 2022 period for injuries with <10% WPI were $28.7 million, or 58%, less than expected.[13]

Clayton Utz assumed that SIRA would undertake another review of the minor injury definition

24. The Clayton Utz Review identified that the objective outcomes of the minor injury test come at the expense of compensation for loss suffered by persons who are injured through the fault of another person, where the law would otherwise entitle such persons to compensation.[14]

25. In its review of the minor injury framework, the independent reviewer also recognised that the minor injury definition will do its work imperfectly and that some injured persons will lose support that they actually still need.[15]

26. Clayton Utz felt that they were not in a position to examine the definition of 'minor injury' from a technical point of view and it was assumed that SIRA would undertake another review of the minor injury definition.[16] The Review concluded:

> *We assume that SIRA will undertake another review of the minor injury definition. Submissions to this Review certainly indicate that stakeholders consider it to be necessary. When it undertakes the next review, we trust that SIRA will have the benefit of the discussion in this Review to assist its work to ascertain both: (i) whether it is achieving its aims, and (ii) whether it is appropriately balanced against the needs of injured persons who are affected by it.*[17]

27. In the Association's opinion, it is evident that Clayton Utz were sufficiently concerned by the identified discrepancies arising from the minor injury definition to highlight their assumption that, given those discrepancies, SIRA would review the definition.

28. The Association urges SIRA to act on this assumption and the significant concerns underlying it by reviewing the definition of minor injury as a matter of priority.

29. Recommendation 34 of the Clayton Utz Review was that the Minister consider the making of an amendment to the regulations to remove 'adjustment disorder' from the definition of

[13] Ibid p. 32.
[14] Clayton Utz, *Report: Statutory Review of the Motor Accident Injuries Act 2017*, 22 September 2021, p. 84.
[15] Ibid Section 3.9.4.
[16] Ibid p. 86.
[17] Ibid p. 87.

'minor injury'. This recommendation has been embraced by the NSW Government. It is clear that further work must be done to define minor injury in the context of physical injury to provide the same fairness: that is, the definition of minor injury in relation to physical injury should only capture those injuries which genuinely resolve within 6 months after the motor accident.

30. The Association has expressed particular concerns about the categorisation of some soft tissue neck and back injuries as minor since the original design of the MAI Act in 2016.

31. With the benefit of several years' experience of the minor injury definition at work, the Association remains of the view that its proposed amendment to the definition would solve many of the current problems in this area, principally:

a. It may eliminate, and would discourage overuse by insurers of arguments relating to, the aggravation of pre-existing degenerative change;
b. It would re-establish the test of causation in the MAI Act in relation to WPI which is consistent with the common law position for the purpose of determining the nature and extent of an injury;
c. It would be a test based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition* (1995) (**AMA 4 Guides**), which are a central feature of the MAI Act and which are better understood and widely applied in comparison with the unique definition in the MAI Act; and
d. It would move the dispute to a position where an injured person will at least have the benefit of a medical assessor determining the nature of the injury, as opposed to being placed at an unfair disadvantage in dealing, often directly, with a well-resourced, experienced insurer at an early stage after an injury.

The importance of collecting and publishing data for assessing the performance and operation of the CTP Scheme

32. The Association considers greater transparency as to the CTP Scheme's operation is required to support the statutory objectives of the CTP Scheme.[18]

33. The 2017 CTP Scheme Open Data page on the SIRA website records gross amounts paid under the CTP Scheme to date. There is no doubt that premium and claims numbers are well within Scheme design objectives.

[18] In particular to ensure the collection and use of data to facilitate the effective management of the compulsory third-party insurance scheme as per section 3.1(2)(h) of the MAI Act.

34. The following information, which could be readily gleaned from data presently collected by SIRA, would provide an insight into how the Scheme is operating:

a. How many current claims for statutory benefits are open on each CTP insurers' books;
b. How many current open files include a concession or determination that an injured person has exceeded the 10% WPI threshold;
c. How many current and open claims for damages each insurer has; and
d. How many current claims involve ongoing weekly benefits in the statutory benefits scheme.

35. This is data which the Association believes SIRA would have and which it submits should be made publicly available so as to put the overall figures into context and permit an understanding of whether claim numbers are escalating or whether they have stabilised.

36. lt is not sufficient for broad cumulative figures to be provided without the detail essential for a proper understanding of the Scheme's operation. The public are entitled to know how the Scheme is working, particularly well after the three year "honeymoon period", a statutorily recognised point at which it was considered that a reliable assessment of the Scheme's performance would be possible. In our view, the fewer claims under the Scheme than the modelling predicted can no longer be explained on the basis of the honeymoon period: three years was considered to be the time at which Scheme performance would be sufficiently indicative to justify formal review.

37. SIRA and the CTP insurers may seek to draw a comparison with a slow uptake in claims following the introduction of the MACA in relation to damages claims. In the Association's view, this is not a proper analogy.

38. The MACA saw the introduction for the first time of the 10% WPI threshold which took some time for the legal profession to understand. This has not been a barrier to claims under the MAI Act which has adopted the same approach to thresholds for damages claims as the MACA.

39. If damages claims are significantly reduced, as they appear to be, there must be some other explanation. The obvious factors include:

a. A definition of 'minor injury' which captures more serious injuries, thereby removing the right to claim damages;
b. The effective exclusion of the legal profession from the process;
c. The imbalance of power in favour of insurers; and

d. The lack of knowledge on the part of self-represented claimants regarding their legal rights and the value of their claims.

Recommendation 2

That the MAI Act and the MACA be amended to reflect the workers compensation legislation by providing for resolution of disputes involving questions of causation to be determined as a legal issue after a hearing on the merits during conciliation/arbitration or mediation, with medical issues determined subsequently as medical assessment matters.

40. The Clayton Utz Review considered the current claim and dispute resolution framework in the MAI Act, and the following policy objective in Section 1.3(2):

> *Objective g) To encourage the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes.*

41. The Association regards the model for medical assessment under the workers compensation scheme as far preferable to the current processes under the MAI Act. Where there is a dispute about causation of an injury, the Workers Compensation Dispute Resolution Pathway works more efficiently and finalises claims in a more satisfactory way than similar disputes under the MAI Act.

42. Further, the workers compensation system provides a right of access to an independent tribunal for the purpose of determining the legal issue of causation. This affords an injured person and an insurer the opportunity to test the evidence at a hearing, as well as a right of review. Once that process has concluded, the medical assessor will determine the extent or degree of WPI, the need for treatment, or other medical issues.

43. By contrast, and as previously highlighted by the Association:

> *Under the MAI Act, there is no early identification of the issues which may require determination as the claim proceeds. Issues of injury, aggravation of pre-existing change or causation are rolled up into the definition of 'minor injury' (s 1.6 MAI Act) or into the question of whether there is a whole person impairment greater than 10% (s 4.11 MAI Act). It is then a matter for a medical assessor to determine all issues which arise, with the result that a party, particularly those without legal representation, have had a 'hearing' without ever understanding the issues to be determined. That is obviously unsatisfactory and gives rise to*

undue complication involving administrative law review or further medical assessment, assuming that the injured person is capable of pursuing either of those remedies.[19]

44. To summarise, causation of injury is decided as a legal issue under the workers compensation system, whereas it is resolved as a quasi-medical issue, with complex legal tests applied by medical practitioners, under the motor accident scheme. Under the latter scheme, legal issues are generally incompletely understood and imperfectly applied by those performing medical assessments.

45. Members of the Association have also observed that medical disputes in the motor accident context are more prolonged and often unnecessarily expensive, placing a substantial burden on the medical assessment system as a whole under the MAI Act.

46. Proof of the disparity between the systems lies in the vastly greater number of successful administrative law challenges to medical assessment disputes brought in the Supreme Court in motor accident cases than in workers compensation cases.

47. In the Association's view, applying the Workers Compensation Dispute Resolution Pathway to similar disputes under the MAI Act would be fairer and more efficient.

Recommendation 3

Legal costs for statutory claims under the MAI Act should be commensurate with costs paid in comparable disputes under the workers compensation scheme

Access to legal advice and representation

48. The public should be able to have confidence that state agencies administering motor accidents injury compensation and the Scheme as a whole are accessible and transparent, and will afford the injured a fair opportunity to uphold their lawful rights.

49. The Association considers that the current CTP Scheme is failing to care for or adequately support the injured, leaving them to fend for themselves against insurance companies and Scheme agents who have access to lawyers with specialist expertise. The legislation is extraordinarily complex, involving cross references to other pieces of legislation, regulations, claims and medical guidelines.

[19] NSW Bar Association, *Submission: State Insurance Regulatory Authority Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury schemes*, 4 November 2021.

50. The Association believes that the CTP Scheme has become increasingly technical, unnecessarily bureaucratic and difficult to navigate without legal assistance. The public are not adequately informed of their rights, including the right to seek legal advice. The Association is concerned that the Scheme is presented, including on SIRA's website, as one not requiring a lawyer, notwithstanding that, on any view, it is a complex legislative regime. Victims are actively encouraged to seek to resolve the matter themselves, resulting in increased stress and emotional strain, which frequently results in an unfair outcome. The Association recommends that SIRA's public messaging be altered to direct and encourage claimants to seek legal advice.

Prescribed legal costs

51. Without reasonable, adequate remuneration being provided to legal representatives, the MAI Act cannot deliver a fair system for motor accident victims. There is currently no equality of arms before the PIC, in part because claimants and potential claimants – who are not legally trained – are left unrepresented in the face of legally well-resourced insurers.

52. Lawyers are paid $1,600 for all work performed in relation to a Dispute Resolution Service dispute for statutory benefits. The $50,000 and $75,000 no contracting out provisions are also operating too harshly in many cases. SIRA modelling in July 2017 suggested that there would be $130 million in non-contracted out legal costs in the statutory scheme per annum, and $258 million in common law costs per annum. It is possible for a lawyer to provide a service, which, after disbursements, can mean that most professional fees are written off. These limitations are unsustainable from the Association's perspective.

53. The paucity of legal costs in the CTP Scheme results in the vast majority of claimants being unrepresented, impacting adversely on the Scheme's overall performance. Most decisions, some of them determinative of wider rights such as the entitlement to damages, are made in the absence of a claimant having legal advice. In most cases, no lawyer protecting the claimant's interests will ever see these decisions. Claimants then leave the Scheme, assuming they have been paid all of their entitlements and dealt with fairly. If claimants have been dealt with fairly, it must follow from data as to the proportion of claimants' legal costs under the Scheme (see below at paragraph 56) that the Scheme is not performing as intended. If they have not been dealt with fairly, the justification for the Scheme (a new era of insurer behaviour) is absent and the Scheme is not performing as intended.

Incorrect assumptions underlying current prescribed legal costs

54. Current legal costs were determined by actuarial assumptions made in 2017 by Ernst & Young. As discussed above, these actuarial assumptions have proven to be wholly inaccurate, both as to the number of claims, the number of disputes and the number of disputes which would involve lawyers in the statutory benefits scheme.

55. In May 2021, Ernst & Young revised its premium assumptions.[20] The total assumed legal expenses (being statutory benefit costs and scale costs in claims for damages) were estimated at $274 million per annum.

56. The Scheme has been running for almost five years and total legal costs are only $95M for the past 12 months. Almost two thirds of this figure comprises insurance company costs. Claimants' legal costs are only $32.7 million of the total of $95 million. It is acknowledged that this figure has increased significantly over the past three years, but it is still only a third of the assumed amount each year and most of it is being paid to insurer's representatives.

57. There is clearly scope for increasing scale fees for legal services to a realistic level, which would benefit the operation of the Scheme by providing injured persons with recourse to proper legal advice. This is in contrast to the current situation where the scale costs in the statutory Scheme are unrealistically low, to the point that it is not viable to provide legal services in many cases.

58. The Association strongly recommends that the present disparity of legal representation of parties to disputes be rectified by a significant increase in prescribed fees for legal services, particularly in relation to statutory benefits. Any such increase should be at least commensurate with fees available under the workers compensation scheme.

Recommendation 4

The PIC be empowered to undertake merits review concerning disputes as to treatment and care under the Lifetime Care and Support Scheme and CTP Care

59. At present, the only avenue for review from a decision of an Assessor or Review Panel under the Lifetime Care and Support Scheme is by way of administrative law review proceedings in the Supreme Court of NSW. A review of the relevant cases discloses that this avenue is not being utilised.

[20] Ernst & Young, *Review of Dispute Projections for 2017 CTP Scheme,* State Insurance Regulatory Authority, May 2021.

60. The Association believes that this is because there is no right to legal representation in such a claim under the MAI Act and there is no provision for legal costs. While legal representation and legal costs are both available under the review of an administrative decision in the Supreme Court of NSW if a party is successful, the Association considers it to be highly unlikely that an unrepresented person would pursue that path or understand that is available.

61. The PIC is the appropriate forum for those disputes to be ventilated where a hearing can take place on the merits with some provision for legal costs.

62. At present in relation to CTP care, claims in which there is an ongoing entitlement to treatment will be entering that part of the Scheme later this year. Some may already have made the transition. At present there is no visibility as to:

    a. What is being paid under the MAI Act for care (as opposed to treatment); and
    b. How many people are receiving the benefit of care (and how many are not).

63. This is an area in which a thorough review is required and action needed to provide an accessible pathway of review of insurers' decisions. Again, the PIC is the appropriate forum for disputes arising out of that aspect of the Scheme to be resolved.

C. The NSW Bar

64. The Association is a voluntary professional association comprised of more than 2,400 barristers with their principal place of practice in NSW.[21] Currently, 423 of our members reportedly practice in the areas of common law and personal injury.[22] The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[23]

65. Barristers are independent specialist advocates,[24] both in and outside of the courtroom.[25] Barristers owe their paramount duty to the administration of justice.[26]

66. The Association can speak with experience to issues affecting the performance and operation of the state's Compulsory Third Party Insurance Scheme. This submission reflects the expertise, experience and concerns of the Association's members including through the following initiatives.

67. The Association would be pleased to assist the Standing Committee on Law and Justice with any questions it may have, through oral or further written submissions. Please contact Lucy-Ann Kelley, Policy Lawyer, at , if you would like any further information or to discuss this submission.

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21 NSW Bar Association, *Statistics*, as at 6 October 2022 <https://www.nswbar.asn.au/the-bar-association/statistics>.

22 Ibid.

23 NSW Bar Association, *New South Wales Bar Association Strategic Plan 2021-25* <https://nswbar.asn.au/uploads/pdf-documents/SP2021.pdf>.

24 *Barristers' Rules* r 4(c).

25 See *Barristers' Rules* r 11(c)(d).

26 *Barristers' Rules*, rr 4(a), 23.