

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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7 November 2022

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 – Additional submission

The Law Society welcomes the opportunity to provide an additional submission to the Standing Committee on Law and Justice 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.

Regulated costs in the Motor Accidents Scheme

At the outset, the Law Society wishes to draw the Committee's attention to the way in which the current level of regulated costs is insufficient to meet the actual costs of providing advice in motor accident matters. The fact that there is typically no entitlement to paid legal costs until a dispute proceeds beyond the internal review stage means that lawyers are having to undertake significant unpaid work. We consider that the unsatisfactory way in which costs are provided for in the scheme has the potential to exacerbate barriers to justice as lawyers will be disincentivised from working in motor accidents cases and claimants will be expected to navigate a complex legal area and procedural system at the Personal Injury Commission (PIC) without professional advice and support.

Introduction of an ILARS-style scheme for CTP

As noted by the Independent Review Office (IRO) in its submission to the Statutory Review of the Motor Accident Injuries Act 2017 (**Statutory Review**), the independent legal assistance and review service (ILARS) is 'strongly supported by those who represent lawyers' as well as being highly valued by external stakeholders who see the service as 'accessible and expert' and 'as seeking outcomes which (are) fair to all stakeholders'.¹ The Law Society concurs with the view that the ILARS has greatly assisted injured workers in

¹ Independent Review Office (IRO), Submission to the Review, pp 7-8 as quoted in *Statutory Review of the Motor Accident Injuries Act 2017* (September 2022) 73.

accessing free, independent advice to have their claims investigated and professionally represented.

The Law Society remains supportive of the introduction of a modified ILARS-style scheme for statutory benefits in CTP. However, if any such scheme is to be introduced, there would need to be significant capacity-building (within the IRO or otherwise) to ensure that it is administered by those with expertise in motor accidents. Before lending full support to such a scheme, we would also seek further clarifications around its funding. Whereas ILARS may be fit-for-purpose for a workers compensation scheme, there are novel considerations around how ILARS-style funding arrangements will be structured in relation to a private insurance scheme.

We note that an outstanding question remains whether the introduction of an ILARS-style scheme would have a material cost on premiums.² The Law Society supports the view that an actuarial costing commissioned by SIRA may be helpful but recommends that any such costing take a holistic view of the impact of an ILARS-style scheme on the 'front-end' early resolution of disputes.

Legal advice in the Motor Accidents scheme

As set out in the *Statutory Review of the Motor Accident Injuries Act 2017* (**Clayton Utz/Deloitte Report**), there are multiple benefits arising from the provision of legal support to persons injured in motor vehicle accidents. These include the way in which a lawyer can offer professional advice on access to entitlements in a context where 'decisions are made by a person (the relevant insurer) whose interests are not necessarily the same as those of the claimant'.³ The complexities of the CTP scheme are difficult for a layperson to understand, and access to a lawyer can have numerous psycho-social benefits by 'reducing the burden on the claimant themselves in respect of understanding and advocating for their entitlements to statutory benefits'.⁴

The Law Society is supportive of CTP Assist, but as noted in the Clayton Utz/Deloitte Report, this service does not supplant the need for tailored, individualised advice in respect of statutory benefit entitlements.⁵ Access to legal advice should not create a more adversarial approach to claims management, but in fact may make it less so, given that claimants will be assisted in how to properly prepare their claim for the purposes of the relevant insurer as decision-maker.

Potential benefits of an ILARS-style scheme

In principle, we consider that it would be beneficial and in keeping with the objects of the *Motor Accident Injuries Act 2017* (NSW) if the entitlement for paid legal support arose at the front-end of the process (i.e. to assist with the making of a claim) as well as at other significant points in time (i.e. when the insurer makes a decision adverse to the claimant that gives rise to the right to seek internal review; after the matter has been through internal review; and at the point where the matter proceeds to a dispute in the PIC).

It is our members' experience that most claimant solicitors tend to avoid incurring disbursements in relation to obtaining pre-accident clinical records until the matter is eligible to be referred to the PIC for assessment, where legal fees and disbursements are recoverable. This is particularly relevant in matters regarding aggravation of pre-existing

² Taylor Fry, *Review of legal support for people injured in the NSW CTP Scheme* (3 September 2021), 7.

³ *Statutory Review of the Motor Accident Injuries Act 2017* (September 2022) 74.

⁴ Ibid.

⁵ Ibid.

conditions. If claimant solicitors were to have access to an ILARS-style scheme, this is likely to incentivise early and thorough investigation of claims with relevant documents being submitted to the insurer at the internal review stage. The certainty that costs for all services can be recovered facilitates earlier provision of advice to claimants on their prospects of success. In our view, unmeritorious referrals to the PIC will be less likely to occur and PIC Members will have greater capacity to assess other claims and provide a faster turnaround time for meritorious claims.

A further consideration is the way in which costs are dealt with in statutory benefit disputes. At the current time, the maximum costs for legal services provided in connection with a merit review are \$1800. When an insurer declines to pay the maximum costs, it is often the case that there is an application to the PIC for costs to be assessed. This is a protracted process that is placing pressure on the PIC and would be remediated by the introduction of an ILARS-style scheme where a solicitor is paid a guaranteed set fee (with appropriate uplifts for complexity).

Subject to some outstanding questions around its funding and administration, the Law Society offers its in-principle support for a ILARS-style scheme for CTP that allows for the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes through expert, legal assistance, and that means lawyers are paid fairly for their work.

Thank you for the opportunity to comment.

Yours sincerely,

Joanne van der Plaats
President