

INQUIRY INTO 2022 REVIEW OF THE COMPULSORY THIRD PARTY INSURANCE SCHEME

Organisation: NSW Bar Association

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The Hon Chris Rath MLC
Chair of the Standing Committee on Law and Justice
2022 Review of the Compulsory Third Party Insurance Scheme
NSW Parliament House, 6 Macquarie Street
SYDNEY NSW 2000

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

Dear Chair,

2022 Review of the Compulsory Third Party Insurance Scheme – Further Submission

1. The New South Wales Bar Association (**the Association**) thanks the Standing Committee on Law and Justice for the opportunity to make a further submission to the 2022 Review of the Compulsory Third Party Insurance Scheme regarding whether the Independent Legal Assistance and Review Service (**ILARS scheme**) should be extended to claimants under the *Motor Accident Injuries Act 2017* (**MAI Act**).
2. The Association endorses the ILARS scheme as a beneficial and practical means of providing access to free, independent legal advice to injured persons in circumstances where there is a disagreement with insurers regarding entitlements. The ILARS scheme enhances access to justice for injured persons.
3. The Association supports in principle the extension of the ILARS scheme to claimants under the MAI Act. The Association is of the view that extension of the scheme would go a significant way towards:
 - a. Encouraging the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes, in accordance with the policy objectives of the MAI Act.
 - b. Redressing legal assistance deficiencies in the current CTP scheme;
 - c. Enabling claimants to make judgments about the merits of challenging insurer decisions or to provide assurance that the insurer decisions are sound, lawful and consistent with evidence obtained;

- d. Ensuring claimants can navigate the CTP scheme to gain access to benefits that will assist their recovery and to exercise their rights in circumstances where they disagree with decisions by an insurer.
- 4. The Association has previously highlighted the benefits of legal advice and representation for claimants in the motor accidents scheme. In its submissions to the Standing Committee on Law and Justice's 2020 and 2022 Reviews of the CTP Scheme (**enclosed**), the Association commented on the following matters relevant to the proposal currently under consideration:
 - a. The inequities and injustices arising from the resource imbalance of individual claimants and well equipped and experienced insurers;
 - b. The great difficulties that unrepresented claimants experience in navigating the CTP scheme, which is highly technical and notoriously complex;
 - c. The adverse impacts of insurer behaviour, including the unreasonable rejection of claims for statutory benefits and unrepresented claimants being discouraged from exercising and enforcing their rights to claim compensation or damages;
 - d. The fact that 77.9 per cent of claimants in the motor accidents scheme do not have legal representation;
 - e. A lack of awareness and understanding on claimants' part as to their legal rights and entitlements under the scheme and an inability of unrepresented claimants to advocate effectively on their own behalf;
 - f. Restrictions on access to paid legal advice as barriers to claimants pursue and secure fair outcomes and issues associated with claimants being actively encouraged to seek to resolve matters themselves rather than engaging legal support;
 - g. Actuarial assumptions underlying the scheme which have proven to be inflated and wholly inaccurate both as to the number of disputes and legal costs for claimants in the statutory benefits scheme.
- 5. The Association's support for the extension of the ILARS scheme is strengthened by an analysis of two recent reports commissioned by the State Insurance Regulatory Authority (**SIRA**):
 - a. Clayton Utz's *Statutory Review of the Motor Accidents Injuries Act 2017*, published 22 September 2021 (**the Clayton Utz report**); and
 - b. Taylor Fry's *Review of legal support for people injured in the NSW CTP Scheme*, published 3 September 2021 (**the Taylor Fry report**).
- 6. The Clayton Utz report focused on the design and terms of the MAI Act and its associated Regulations and Guidelines to ascertain whether the policy objectives of the CTP scheme were being met. The Taylor Fry report considered the appropriate model of legal support for claimants under the MAI Act, including consideration of introducing an ILARS-style scheme.

7. The Association's prior submissions and the findings of the abovementioned reports shared a number of common themes, including that:
- a. Unrepresented claimants experience great difficulties accessing the benefits of the MAI Act due to the highly technical and notoriously complex nature of the motor accidents legislative regime;
 - b. legal assistance and representation have a beneficial effect on a claimant's capacity to enforce their rights and access benefits; and
 - c. initial actuarial assumptions forecasting the number of claims and legal costs for claimants were inflated and wholly inaccurate.

The Clayton Utz Report (22 September 2021)

8. In its report, Clayton Utz noted the following matters relevant to the proposal currently under consideration:¹
- a. The MAI Act and its associated Regulations are complex for persons without legal training or legal assistance to read, understand and navigate;
 - b. Unassisted and unrepresented claimants are "entirely in the hands of the relevant insurer and the claim manager to whom at any given time their case is assigned";
 - c. The insurer-led claims structure is inappropriate for some claims given that insurers are not advocates or legal advisors for injured persons whose claims they manage;
 - d. Claimants would benefit from an advocate given that claims decisions are made by insurers whose interests are not aligned with those of claimants; and
 - e. Restrictions on access to legal advice and representation, and restrictions on the fees that lawyers may charge for their work within the scheme, are "not ends in themselves" but are rather "intended to facilitate achievement of the Act's objectives...and to limit the costs of running the scheme to keep CTP premiums affordable".²
9. On the question of whether the ILARS scheme should be extended to claimants under the MAI Act, Clayton Utz recommended that careful consideration be given to this option, although it recognised that this may not address all of the current issues affecting the operation of the scheme.³
10. While Clayton Utz did not comment on the Taylor Fry report or its findings, it did make some observations and recommendations relevant to the appropriate model for access to legal support in the CTP scheme. These included:⁴

¹ Clayton Utz, *Statutory Review of the Motor Accidents Injuries Act 2017*, published 22 September 2021, paragraph 3.7.8.

² Ibid.

³ Ibid.

⁴ Ibid.

- a. That “the experience of a number of claimants in the scheme bears out the self-evident proposition that many injured persons will benefit from having access to the services of a professional adviser and advocate, in terms of accessing entitlements under a complex scheme of statutory benefits where decisions are made by a person (the relevant insurer) whose interests are not necessarily the same as those of the claimant”;
- b. That legally advised claimants are not only more likely to achieve a good outcome in terms of access to entitlements (as recognised in the Taylor Fry report), but may also be more likely to have an improved experience of the scheme generally due to a reduced burden on the claimant themselves in terms of understanding and advocating for their entitlements;
- c. The CTP Assist service cannot replace the role of a lawyer who can both advocate for the injured person and provide advice for the person’s individual circumstances; and
- d. Whether a person has the benefit of legal advice does not make the scheme more or less ‘adversarial’ and should not affect consideration as to whether injured persons should be able to access the advice and advocacy of a lawyer.

The Taylor Fry Report (3 September 2021)

11. The Taylor Fry report was more conservative about the potential benefits of the extension of the ILARS scheme and expressed a number of reservations about introducing the ILARS scheme in its current form. These included that:⁵

- a. It would represent a fundamental departure from the policy objective of the reforms introduced in 2017;
- b. Scheduled fees (for workers compensation) are not set by the Minister or reviewable by Parliament or subject to regulation from SIRA;
- c. It may act as a disincentive to private CTP insurers in providing the assistance that they should be providing to claimants, and it may result in a more adversarial approach to claims management; and
- d. It may have a material cost impact on premiums. Experience to date under the 2017 CTP scheme suggests that the allowance for legal costs currently in CTP premiums could accommodate some increases to legal costs without adversely impacting premiums. However, ILARS has the potential to increase costs such that premiums could be adversely impacted. An actuarial costing should be commissioned by SIRA if further consideration is to be given to this option.

12. The Association suggests, however, that these reservations be considered in the context of Taylor Fry’s analysis of insurer internal reviews, disputes and claimant outcomes for represented and unrepresented claimants. Those findings included that:⁶

⁵ Taylor Fry, *Review of legal support for people injured in the NSW CTP Scheme*, published 3 September 2021, pages 6-7.

⁶ Ibid, pages 4-5.

- a. Legally represented claimants are more likely than unrepresented claimants to seek an internal review to challenge an unfavourable decision and to challenge unfavourable internal review outcomes; and
 - b. Legally represented claimants have a higher overall rate of success in achieving an overturn of an initially unfavourable decision.
13. Importantly, Taylor Fry also recognised that there remains an unmet need for claimant support, which it believed reflected a lack of claimant awareness and understanding and/or a lack of willingness to proceed due to the perceived difficulty of the claims process.⁷ Taylor Fry identified a number of options for addressing this unmet legal need which it proposed as ‘alternatives’ to increasing the support provided by lawyers. Such options included “increasing support...through improved communications to claimants from the scheme regulator”.⁸ The Association notes that such ‘alternatives’ to legal assistance are unproven and unsubstantiated in terms of addressing unmet legal need■
14. The Taylor Fry report also noted that a substantial degree of claims were rejected by the insurer on first consideration due to an absence of necessary information, and that such rejections were “perhaps as a default”,⁹ only overturned when more comprehensive information was provided. After reviewing a substantial number of different areas of disputes, the Taylor Fry stated that the analysis suggested that claimants who engage legal representation prior to internal review appeared to have greater success in achieving the ultimate outcome of having minor injury decisions overturned and that claimants who were unrepresented at internal review have much greater success in achieving that outcome if they subsequently engage legal representation.¹⁰
15. In response to the issues posed by incomplete claim information at the time of internal review, Taylor Fry suggested that “SIRA may wish to review and refine some insurer decision milestones to reduce the extent to which adverse decisions are made to the detriment of claimants in the absence of important and relevant information.”¹¹
16. Instead of seeking SIRA “review and refine some insurer decision milestones”, funding the legal assistance of claimants at an early stage appears to ensure the proper preparation and subsequent presentation of relevant material that can be put before an insurer. The insurer can then make an informed decision and achieve a primary outcome of the MAI Act, being a just and cost-effective outcome for all parties.

⁷ Ibid, page 5.

⁸ Ibid.

⁹ Ibid, page 58.

¹⁰ Ibid, page 32.

¹¹ Ibid.

17. In response to the Taylor Fry report's concerns that the involvement of lawyers may give rise to "more contested claims"¹², we observe that the initial actuarial calculations as to the quantum and cost of claims have proven to be erroneous. The Taylor Fry report stated:¹³

"The projected ultimate number of disputes for a mature scheme was estimated to be approximately 42,000 (including panel reviews). The scheme actuary has subsequently provided an estimate of ultimate dispute numbers for the first accident year of the scheme (AY 2018) and this is significantly lower, at approximately 8,600 (approximately 80% lower than the mature scheme accident year estimate). The actual number of disputes to date from this accident year is approximately 3,500 (to 31 December 2020).

The scheme actuary has provided an explanation for the difference between the estimate of dispute numbers in a mature scheme, and that which is estimated for the first accident year. It is reproduced in Figure 5.2, which shows that the sources of difference between the mature scheme estimate and current AY 2018 estimate are primarily:

- *Fewer claims than expected (particularly, at-fault claims)*
- *Lower than expected levels of legal representation (legal representation rates of 25% to 35%, compared to the levels of 50% to 60% assumed)*
- *Fewer than expected disputes, after already allowing for fewer claims and less legal representation.*

The scheme actuary observes a correlation between legal representation and the level of disputation, ascribing part of the observed lower level of disputation to the lower observed level of legal representation. It is reasonable to conclude that the lower-than-expected level of observed legal spend is also related to the lower-than-expected levels of disputation and lawyer involvement."

18. The Association referred to similar reduced claims and benefits in its submission to the Standing Committee on Law and Justice 2022 Review of the Compulsory Third Party Insurance and Lifetime Care and Support Schemes on 10 October 2022:

"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):

- 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.*
- 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.*
- 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.*

¹² Ibid, page 69.

¹³ Ibid, pages 22-23

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.”

19. On these very low levels of claims, there is scope for a higher number of claims and allied legal representation to be covered by expected costs. Provision of adequately funded legal representation would not materially affect the scheme, even accounting for a reasonable increase.
20. There is merit in investigating the actuarial basis for an ILARS system to ensure premium impacts are not substantial, as recommended by Taylor Fry.¹⁴ The recommendation that the costs payable be higher than those in the Workers Compensation scheme could be determined after an actuarial assessment. The Workers Compensation Scheme funding model provides an appropriate model for considering the calculated costs, particularly given the Personal Injury Commission’s existing framework for commensurate management of claims.

Conclusion

21. The Association thanks you in advance for considering this submission. Should you wish to discuss or if the Association may be of further assistance, please do not hesitate to contact Lucy-Ann Kelley, Policy Lawyer _____

Yours sincerely,

Gabrielle Bashir SC

President

Enc: NSW Bar Association’s submission to the Standing Committee on Law and Justice’s 2022 Review of the CTP Scheme (includes NSW Bar Association’s submission to the 2020 Review of the CTP Scheme)

¹⁴ Ibid, page 69.