

SIRA

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# Statutory Review

Report on the outcome of the two-year Statutory  
Review of the Personal Injury Commission Act 2020

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# Contents

<b>Executive Summary</b>	<b>2</b>
<b>Summary of recommendations and suggestions</b>	<b>4</b>
<b>1. Recommendations</b>	<b>5</b>
<b>2. Suggestions</b>	<b>6</b>
<b>3. Introduction</b>	<b>7</b>
3.1. Establishment and role of the Commission	7
3.2. Objects of the PIC Act	7
3.3. Structure of the PIC Act	8
3.4. Commission personnel	9
3.5. Commission Rules	9
3.6. Rule Committee	9
<b>4. Conduct of the Review</b>	<b>10</b>
4.1. Consultation	10
4.2. Reviews of the Standing Committee on Law and Justice	10
<b>5. Do the policy objectives of the PIC Act remain valid and do the terms of the Act remain appropriate for securing those objectives?</b>	<b>12</b>
<b>6. Themes raised in submissions relating to the terms of the Act</b>	<b>13</b>
6.1. IRO background	13
6.2. Objects and functions of IRO	13
6.3. Whether the PIC Act is the appropriate legislation for the IRO provisions	14
6.4. Further issues for consideration	14

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6.5.	Medical privacy and publication of decisions	16
6.6.	Membership of the Rule Committee	17
6.8.	Conduct of proceedings	18
6.9.	Federal jurisdiction	19
<b>7.</b>	<b>Operational concerns raised in submissions</b>	<b>20</b>
7.1.	Delays in the Commission	20
7.2.	Data publication	22
7.3.	Stakeholder engagement and consultation	23
7.4.	Electronic Portal	23
7.5.	Procedural directions and formality	23
<b>8.</b>	<b>Tribunal user experience</b>	<b>24</b>
8.1.	Methodology	24
8.2.	Summary of findings	24
8.3.	User experience and continuous improvement	25
<b>9.</b>	<b>Future considerations</b>	<b>26</b>
9.1.	Scheme and dispute model complexity	26
9.2.	Delays	26
9.3.	Legal support for Motor Accidents matters	27
9.4.	Future horizon	27

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# Executive Summary

The *Personal Injury Commission Act 2020* (the PIC Act) establishes the independent Personal Injury Commission (the Commission) of New South Wales.

The PIC Act provides for the Commission to establish a central registry and to exercise dispute resolution functions in the workers compensation and motor accidents schemes as provided for under the PIC Act and the workers compensation and motor accidents legislation.

In addition to establishing the Commission, the PIC Act abolished the former Workers Compensation Commission (WCC), the SIRA Dispute Resolution Service (DRS), the Medical Assessment Service (MAS) and the Claims Assessment and Resolution Service (CARS).

Section 68 of the PIC Act requires the Minister to undertake two Reviews of the PIC Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.<sup>1</sup> The Reviews are to be undertaken as soon as possible after the period of two years (the Review) and then seven years from the date of assent, being 11 August 2020.<sup>2</sup>

This Review commenced on 12 August 2022 by the State Insurance Regulatory Authority (SIRA), the regulator of the workers compensation, motor accidents and home building schemes, on behalf of the Minister. Public consultation was undertaken between August and

October 2022, with eight submissions received from key stakeholders. This has been further supplemented through qualitative research to capture the voice of lived experience from users of the Commission in April 2023. We would particularly like to thank stakeholders who have contributed to this Review, and to those injured people who generously shared their time and experiences with us to help inform this Review.

To provide expert advice and guidance to this Review, SIRA established an Advisory Committee chaired by the Hon. Greg Keating and attended by Nancy Milne OAM, Professor Tania Sourdin and Elizabeth Welsh. We also extend our thanks to the Advisory Committee members for their contributions and expert guidance to this Review and final report.

This Review concludes that generally, the objects and terms of the PIC Act remain appropriate to achieve its policy objectives.

It is however important to observe that the PIC Act has been in operation for just over two years, and the Commission is continuing to develop and refine its policies, procedures, practices and systems. This period of time has also been impacted by unprecedented operational challenges caused by the COVID-19 pandemic. Having considered available information, submissions, and claimant insights to this Review, we have made two recommendations as well as three targeted suggestions for consideration by the Commission.

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1 *Personal Injury Commission Act 2020*, s68(1).

2 *Personal Injury Commission Act 2020*, s68(2).

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The first recommendation made by this Review relates to the appropriate Act for provisions in relation to the Independent Review Office (IRO) and the oversight of the Independent Legal Assistance and Review Service (ILARS). The objects of the PIC Act relate to the establishment, purpose and functions of the Commission. They do not currently extend to the IRO, whose functions primarily relate to dealing with complaints about licensed insurers under the workers compensation and motor accidents schemes, and the management and administration of ILARS in the workers compensation scheme. The IRO also has a function to inquire into and report to the Minister on any matters arising in connection with the operation of the PIC Act or enabling legislation.<sup>3</sup> Given the purpose and structure of the PIC Act, it is appropriate that consideration be given regarding the appropriate legislative instrument to provide for the appointment and functions of the IRO, aligned to appropriate and relevant statutory objectives, and removal of those provisions which relate to the IRO from the PIC Act.

The most prominent issue raised by stakeholders during consultation concerned delays, particularly in relation to medical assessment matters in the Motor Accidents Division of the Commission. Consideration of the issues raised, while important, do not appear to be related to the objects and terms of the PIC Act and are accordingly out of scope for this Review. Evidence suggests there are a range of operational and external factors

contributing to the current delays, the most notable of which is the disruption to in-person medical assessments caused by COVID-19. Stakeholders also raised issues regarding the dispute resolution model under the *Motor Accident Injuries Act 2017* (MAI Act), with support for increased harmonisation and efficiency between the two schemes. While this Review does not provide specific recommendations regarding operations of the Commission or the dispute resolution models under the enabling legislation, further review of these issues may be warranted, particularly if delays persist. Accordingly, the second recommendation is for SIRA to continue to closely monitor delays in the system. This will require examination of the key drivers of any ongoing disputes and delays, including whether aspects of the dispute resolution model can be improved, and progress made by the Commission with clearing the backlog of matters.

The Review also considered submissions by medical stakeholders in relation to publication of decisions and privacy concerns, issues in relation to publication of data and a range of other operational matters at the Commission. The Review includes a number of suggestions for consideration by the Commission in relation to issues that are outside the scope of the terms of reference.

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3 *Personal Injury Commission Act 2020*, sch 5 cl 6(b).

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# Summary of recommendations and suggestions

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# 1. Recommendations

This Review makes two recommendations as outlined below.

## Recommendation 1

It is recommended that the NSW Government:

- a. consult on a recommended approach to establishing a fit for purpose legislative framework to provide for the appointment, administration and specific functions of the IRO relevant to the workers compensation and motor accidents schemes. This will require consideration of the appropriate legislative instrument, for instance, in the enabling legislation rather than in the PIC Act.
- b. In addition to providing for the appointment, administration and functions of the IRO, the fit for purpose legislative framework should ensure:
  - i. tailored and appropriate statutory objectives,
  - ii. effective governance, performance and accountability on the management of the IRO and administration of ILARS in the workers compensation scheme,
  - iii. clarity of the IRO's functions, including removal of the IRO's function to inquire into and report to the Minister on matters regarding the operation of the PIC Act or enabling legislation, and
  - iv. clarity of the IRO's role in managing complaints for CTP Care<sup>4</sup> in the motor accidents scheme.
- c. Make any necessary legislative changes, including to the PIC Act and relevant legislation, to implement the government's preferred option.

## Recommendation 2

It is recommended that SIRA:

- a. closely monitor any ongoing issues of delays in the Commission in relation to the resolution of medical assessment matters in the motor accidents scheme. Should delays persist in the Motor Accidents Division of the Commission, it is recommended SIRA examine the key drivers of ongoing disputes and delays, including operations or aspects of the dispute resolution model in the motor accidents scheme in the enabling legislation.
- b. undertake a comparison of the timeframes and associated costs for resolution of statutory benefits claims under the motor accidents scheme and workers compensation claims under the workers compensation scheme to identify opportunities for harmonisation across the two schemes and inform advice to Government on proposed options to improve the efficiency and effectiveness of dispute resolution under both schemes.

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<sup>4</sup> CTP Care is administered by the Lifetime Care and Support Authority (LCSA) and refers to the functions exercised by the LCSA as the relevant insurer under the MAI Act.

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## 2. Suggestions

In addition to the Recommendations, this Review makes three targeted suggestions for consideration by the Commission to address identified issues which, while out of scope for this Review, may provide opportunities for enhanced operations and transparency, and improved engagement with stakeholders and injured people.

### **Suggestion 1**

The Commission may wish to conduct a review of procedures in relation to informing parties of the Commission's Decision Publication Policy, to encourage early applications for deidentification and/or redaction. The Commission should also review information published on the Personal Injury Commission website regarding applications for deidentification and/or redaction to ensure consistency with the terms of Rule 132 (4) of the Commission rules.

### **Suggestion 2**

The Commission may wish to consider developing a data publication policy in relation to the frequency of publication and type of data that is made available to the public. It is recommended that this include consultation with stakeholders and consideration of submissions to this Review.

### **Suggestion 3**

The Commission may wish to consider further opportunities for engagement and consultation with stakeholders, including medical stakeholders and insurers.



# 3. Introduction

## 3.1. Establishment and role of the Commission

On 1 May 2018, the Legislative Council Standing Committee on Law and Justice inquired into the workers and motor accidents compensation schemes under section 27 of the *State Insurance and Care Governance Act 2015* (SICG Act).

Following those enquiries, the Committee released the 2018 Review of the Workers Compensation Scheme Report. The Committee recommended that workers compensation and motor accident dispute resolution systems be consolidated into a single personal injury tribunal by expanding the jurisdiction of the WCC but retaining two streams of expertise.

On 7 August 2019, the then Minister for Customer Service, the Hon. Victor Dominello, announced that the NSW Government supported, in principle, establishing a consolidated tribunal with separate workers compensation and motor accidents divisions. Following this announcement, the Department of Customer Service undertook targeted consultation with key stakeholders to inform development of options to establish a single Commission with greater alignment of dispute resolution processes across the two schemes.

Stakeholder submissions supported retaining specialist expertise in separate divisions due to the different nature of the schemes, as well as to ensure minimal disruption to appeal and review pathways.

During the progression of the Personal Injury Commission Bill 2020 in Parliament, Schedule 5 was added to set out the provisions relating to a new office, the Independent Review Office (IRO). The IRO replaced the former Workers Compensation Independent Review Office (WIRO) established under the *Workplace Injury Management and Workers Compensation Act 1989* (WIM Act).

The PIC Act was assented on 11 August 2020 (except for Schedule 5 and 6 which commenced on later dates) and established an independent Commission which commenced operations on 1 March 2021.

The Commission exercises functions in two divisions:

- The Workers Compensation Division, and the
- Motor Accidents Division.

The Commission is headed by the President who is a judge of a court of record.

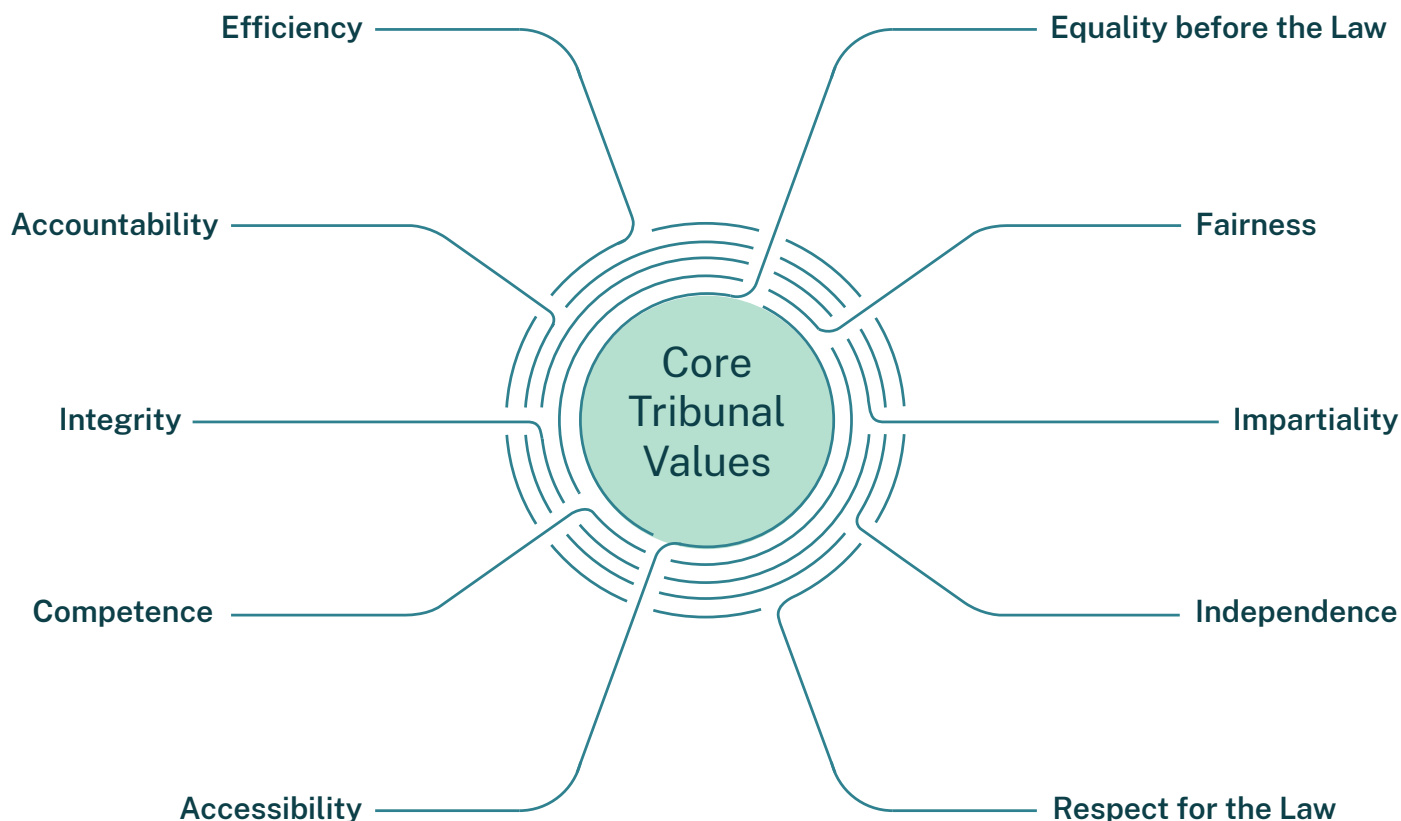
## 3.2. Objects of the PIC Act

Section 3 of the PIC Act sets out the following objects:

- a. to establish an independent Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and motor accidents legislation and provide a central registry for that purpose,
- b. to ensure the Commission —
  - i. is accessible, professional and responsive to the needs of all of its users, and
  - ii. is open and transparent about its processes, and
  - iii. encourages early dispute resolution,
- c. to enable the Commission to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible,
- d. to ensure that the decisions of the Commission are timely, fair, consistent and of a high quality,
- e. to promote public confidence in the decision-making of the Commission and in the conduct of its members,
- f. to ensure that the Commission —
  - i. publicises and disseminates information concerning its processes, and
  - ii. establishes effective liaison and communication with interested parties concerning its processes and the role of the Commission,
- g. to make appropriate use of the knowledge and experience of members and other decision-makers.

These objects are broadly aligned with the core tribunal values of the Council of Australasian Tribunals' (COAT) Australian and New Zealand Tribunal Excellence Framework (June 2017) (Tribunal Excellence Framework).

Figure 1: Core Tribunal Values<sup>5</sup>



The Tribunal Excellence Framework has also informed the structure and design, rules, procedures and operations of the Commission.<sup>6</sup>

The Review further notes that the Commission plans to undertake a formal COAT self-assessment in 2024 (its fourth year of operation) once the Commission has stabilised its operations and cleared the pandemic-related medical dispute backlog.<sup>7</sup>

### 3.3. Structure of the PIC Act

The PIC Act is structured in seven parts:

- Part 1 - Preliminary information, including the Objects of the Act
- Part 2 - Establishment of the Commission, including Membership of the Commission and functions of the President, Division Heads and Members
- Part 3 - Functions of the Commission generally and the constitution of the Commission,
- Part 4 - Medical assessors, merit reviewers and mediators, including information about their appointments and functions
- Part 5 - Practice and procedure
- Part 6 - Enforcement provisions, and
- Part 7 - Miscellaneous provisions, including information around annual reviews.

<sup>5</sup> Council of Australasian Tribunals, *Australia and New Zealand Tribunal Excellence Framework*, p 6.

<sup>6</sup> *Personal Injury Commission Response to SIRA's Data and Information Collection Request of 17 March 2023*, p 1.

<sup>7</sup> *Ibid*, p 4.

The five<sup>8</sup> schedules to the PIC Act are:

- Schedule 1 - Savings, transitional and other provisions, which namely relate to matters concerning the establishment of the Commission and the transition to the Commission from the WCC, the DRS and the WIRO,
- Schedule 2 - Provisions relating to members of the Commission,
- Schedule 3 - Workers Compensation Division, including special constitution requirements,
- Schedule 4 - Motor Accidents Division, including special constitution requirements, and
- Schedule 5 - Independent Review Officer (IRO), including information about the functions and appointment of the IRO, namely the management of complaints in both the workers compensation and motor accidents schemes and the management and administration of the Independent Legal Assistance and Review Service (ILARS) in the worker compensation scheme.

### 3.4. Commission personnel

Section 22(1) of the PIC Act provides that persons (including the Principal Registrar and other registrars) may be employed in the Public Service under the *Government Sector Employment Act 2013* (GSE Act) to enable the Commission to exercise its functions. Section 59 of the GSE Act provides that the persons so employed (or whose services the Commission makes use of) may be referred to as 'officers' or 'employees' or 'members of staff' of the Commission.

Members of the Commission are appointed by the Minister. The presidential members of the Commission are the President and Deputy Presidents. Non-presidential members are principal members, senior members, and general members. Members must meet specific qualifications to be appointed.<sup>9</sup>

The PIC Act provides for the appointment by the President of decision makers (merit reviewers and medical assessors) and mediators. These decision makers and mediators may be appointed only if they have the required qualifications as set out in sections 33 and 39 of the PIC Act.

### 3.5. Commission Rules

The PIC Act is supplemented by the Personal Injury Commission Rules 2021 (Commission rules). The object of the Commission rules is to give effect to the guiding principle for the PIC Act and the Commission rules in their application to proceedings in the Commission.<sup>10</sup>

Section 42 of the PIC Act provides that the guiding principle for the PIC Act and the Commission rules, in their application to proceedings in the Commission, is to facilitate the just, quick and cost-effective resolution of the real issues in the proceedings.

The Commission rules are the rules with respect to:

- the practice and procedure to be followed in proceedings before the Commission,
- the practice and procedure to be followed in proceedings before medical assessors, merit reviewers or mediators, and
- any matter that is, by this Act or enabling legislation, required or permitted to be prescribed by the Commission rules.<sup>11</sup>

### 3.6. Rule Committee

Section 19(2) of the PIC Act provides that the functions of the Rule Committee are:

- a. to make the Commission rules, and
- b. to ensure that the Commission rules it makes are as flexible and informal as possible.

In addition to the broad rule making power in section 20(1), section 20(2) of the PIC Act sets out a range of specific matters the Rule Committee may make rules for or with respect to, some of which include the way for referring claims or disputes for assessment or determination or for making appeals, the splitting and consolidation of proceedings and the provision of documents and information between the parties.

The Rule Committee conducts regular reviews of the Commission rules and makes appropriate amendments where necessary.

8 Schedule 6 which contained the consequential amendments to other legislation has been repealed.

9 *Personal Injury Commission Act 2020*, Div 2.2.

10 *Personal Injury Commission Rules 2021*, Rule 3.

11 *Personal Injury Commission Act 2020*, s20(1).

# 4. Conduct of the Review

Section 68 of the PIC Act requires the Minister to undertake two Reviews of the PIC Act to determine whether the policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The Reviews are to be undertaken as soon as possible after two years, and seven years, from the date of assent, that being 11 August 2020.

SIRA has undertaken the two-year Statutory Review of the PIC Act on behalf of the Minister, and published terms of reference for the Review on SIRA's website in August 2022.<sup>12</sup>

As part of the Review, SIRA established an Advisory Committee to provide expert advice and guidance to the Review, including findings, suggestions and recommendations outlined in this Review. Terms of reference for the Advisory Committee were established in early 2023, outlining the purpose, background to the Review, and roles and responsibilities of members. The Advisory Committee, chaired by the Hon. Greg Keating and attended by Nancy Milne OAM, Professor Tania Sourdin and Elizabeth Welsh, met on several occasions between March and May 2023. His Honour, Judge Gerard Phillips, President of the Commission, was invited to address the Advisory Committee meeting on 8 May 2023, discussion of which focused on progress in addressing delays in the Motor Accidents Division of the Commission.

The Review has considered whether the policy objectives of the PIC Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. As outlined in the terms of reference, this Review does not make recommendations relating to the design and operation of the motor accidents and workers compensation schemes, including the following legislation:

- *Workers Compensation Act 1987*,
- *Workplace Injury Management and Workers Compensation Act 1998*,
- *Motor Accidents Compensation Act 1999*,  
and
- *Motor Accident Injuries Act 2017*.

Issues falling outside the terms of reference are noted and suggestions for further review are made where appropriate.

Given the PIC Act's recent implementation and the exceptional circumstances under which the Commission has been operating during the COVID-19 pandemic, the Review considers that it would not be prudent to recommend significant changes to the legislation at this stage. The PIC Act is still in its infancy, and the new Commission is still developing and refining its policies, procedures, practices and systems. Therefore, the scope of recommendations and suggestions provided by this Review are relatively limited.

## 4.1. Consultation

Public consultation for the Review commenced on Friday 12 August 2022 and closed on 7 October 2022. Submissions were received from eight stakeholder groups including peak legal bodies, medical stakeholders and insurers. Copies of the submissions have been published on SIRA's website.<sup>13</sup> To supplement the submissions received from key stakeholders, qualitative research was undertaken to capture the voice of lived experience for users of the Commission across both schemes. In-depth interviews were conducted by an external provider, fiftyfive5, to capture the user experience and insights across key themes aligned to the statutory objectives of the PIC Act. Further detail on the qualitative research undertaken is considered in Part 8 of this Review.

## 4.2. Reviews of the Standing Committee on Law and Justice

During the course of this Review, we acknowledge that the Standing Committee on Law and Justice of the NSW Parliament (Standing Committee) reviewed both the motor accidents scheme and the Lifetime Care and Support (LTCS) scheme in 2022, with the reports tabled in Parliament on 24 February 2023. The Standing Committee made two recommendations of relevance to this Review, as outlined below.

<sup>12</sup> Available at: <https://www.sira.nsw.gov.au/consultations/personal-injury-commission-statutory-review/publications/terms-of-reference-for-the-statutory-review-of-the-personal-injury-commission-act-2020>

<sup>13</sup> Available at: <https://www.sira.nsw.gov.au/consultations/personal-injury-commission-statutory-review/consultation-submissions>

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## 2022 Review of the Lifetime Care and Support scheme - Recommendation 1

*That the Personal Injury Commission Act 2020 be amended to clarify the legislative power of the Independent Review Office to deal with disputes related to the Lifetime Care and Support Authority.<sup>14</sup>*

This issue is relevant to this Review's consideration of the most appropriate Act for the statutory provisions relating to the establishment and functions of the IRO.

It is noted that the IRO does not have a role in dealing with disputes in the motor accidents scheme under the PIC Act. However, it is appropriate to clarify the complaints handling role of the IRO under the motor accidents scheme, in particular with CTP Care. This has been included in Recommendation 1 of this Review.

## 2022 Review of the CTP insurance scheme - Recommendation 2

*That the State Insurance Regulatory Authority investigate, either through the Statutory Review of the Personal Injury Commission Act 2020 or separately, whether any aspects of the Act or their operation:*

- *may impede the timely resolution of disputes by the Commission*
- *undermine an individual's medical privacy during the publication of Medical Review Panel certificates.<sup>15</sup>*

While this Review has considered both of the matters raised in Recommendation 2 and the specific issues raised by stakeholders during public consultation, we consider that the terms of the PIC Act are not a contributing factor to the delays experienced by the Commission. Therefore, a comprehensive investigation into the cause of the delays is not within scope for this Review. The Review does note operational and scheme design factors that may be impacting on the timely resolution of disputes. Further investigation is appropriate, particularly if delays persist beyond clearance of the COVID-19 backlog of medical assessment matters.

Stakeholder feedback in relation to privacy issues and the publication of Commission decisions has been considered in the context of section 58 of the PIC Act. Suggestions for the Commission's consideration are made in relation to operational matters including ensuring injured people and stakeholders understand how and when to apply for deidentification and/or redaction, and the issues that will be considered by the Commission in determining such applications (see Suggestion 1 of this Review).

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14 Standing Committee on Law and Justice Report No 83, 2022 Review of the Lifetime Care and Support Scheme, p vii.

15 Standing Committee on Law and Justice Report No 82, 2022 Review of the Third Party insurance scheme, p ix.

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# 5. Do the policy objectives of the PIC Act remain valid and do the terms of the Act remain appropriate for securing those objectives?

The Review concludes that overall, the objects and terms of the PIC Act remain generally appropriate to achieve the policy objectives of the PIC Act for the Commission. This finding is consistent with the majority of stakeholder submissions to the Review.

The Law Society of NSW (Law Society) and the Australian Lawyers Alliance (ALA) specifically noted that the policy objects and terms of the PIC Act remain appropriate.

The submission of the Insurance Council of Australia acknowledges *...the important role of the PIC in facilitating just, quick and cost effective dispute resolution for injured people and consider that overall, the policy objectives of the PIC Act remain valid.*<sup>16</sup>

The key issue raised by stakeholders in relation to the terms and objects of the PIC Act focused on the IRO and ILARS provisions in Schedule 5 to the Act.

This Review will now turn to consideration of this and other key themes within the scope of the terms of reference.

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16 Insurance Council of Australia Submission, p 1.

# 6. Themes raised in submissions relating to the terms of the Act

## 6.1. IRO background

The WorkCover Independent Review Office, later, the Workers Compensation Independent Review Office (WIRO), the predecessor to the IRO, commenced operation on 1 October 2012 following amendments to the WIM Act. In 2018, the report to the Law and Justice Inquiry of the Workers Compensation Scheme recommended the NSW Government preserve the WIRO and ILARS in the workers compensation scheme.<sup>17</sup> The report also recommended the expansion of WIRO services to the motor accidents scheme.<sup>18</sup>

The PIC Act established an independent Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and the motor accident legislation, including to exercise dispute resolution functions in both schemes as provided for under the PIC Act and the workers compensation and motor accidents legislation.

## 6.2. Objects and functions of IRO

However, as noted in the IRO's submissions to this Review,

*When the PIC Bill was first introduced to Parliament, it did not include a Schedule to establish the IRO, and no reforms of the role of the then WIRO were envisaged. The Bill was amended by the Legislative Council to include what is now Schedule 5 to the PIC Act. However, no amendments were proposed to the objects of the PIC Act (at section 3), which are focused entirely on the Personal Injury Commission (Commission).<sup>19</sup>*

As noted in icare's submission,

*Even though the PIC Act established the IRO and ILARS through Schedule 5, the objects under s 3 of the PIC Act are specific to the Commission in its conduct and how it performs its functions, and do not make reference to IRO.<sup>20</sup>*

Clause 6, Schedule 5 to the PIC Act sets out the following functions of the IRO:

- a. to deal with complaints made to the Independent Review Officer under this Schedule,
- b. to inquire into and report to the Minister on any matters arising in connection with the operation of this PIC Act or the enabling legislation as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister,
- c. to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the enabling legislation,
- d. to manage and administer ILARS (including by issuing ILARS guidelines),
- e. any other functions as may be conferred on the Independent Review Officer by or under this PIC Act or any other Act (including the enabling legislation).

The IRO's role and functions differ to those of the Commission, and as noted above, the objects of the PIC Act are specific to the Commission and not directly relevant to the role and functions of the IRO. This Review considers this raises a significant question as to whether the PIC Act is the appropriate Act for the IRO provisions.

<sup>17</sup> Standing Committee on Law and Justice Report No 67, 2018 Review of the Workers Compensation Scheme, p viii.

<sup>18</sup> Ibid.

<sup>19</sup> Independent Review Office Submission, p 1.

<sup>20</sup> icare Submission, p 2.

## 6.3. Whether the PIC Act is the appropriate legislation for the IRO provisions

### 6.3.1. Options considered

In relation to the statutory framework for the IRO, the following options have been considered:

#### Maintain status quo

This option would not change the objects of the PIC Act or create objects for the IRO. It would maintain the existing framework, which includes the IRO's functions and statutory obligations as set out in Schedule 5 to the PIC Act.

This option is the least disruptive but does not address concerns in relation to the absence of statutory objects relevant to the IRO.

#### Amend the objects of the PIC Act to make them relevant to the IRO

The objects of the PIC Act were developed in the drafting of the PIC Bill before it was amended to include Schedule 5. The Commission and the IRO have distinct and different functions and any attempt to modify the existing objects of the Act to make them relevant to both may create less certainty. This option is not recommended, noting that stakeholders generally agree that the objects of the PIC Act<sup>21</sup> remain valid for the purposes of the PIC Act.

#### Develop new objects for the Act that are relevant to the IRO

If the statutory provisions relating to the IRO are retained in Schedule 5, an insert of one or more objects to the Act that reference the IRO and its functions could be accommodated by amending Schedule 5 to the Act. Having two sets of objects in the Act may cause confusion and not adequately align to overall scheme objectives outlined in the enabling legislation. This option is not recommended.

#### A different legislative instrument

Alternatively, consideration could be given to whether the PIC Act is the most appropriate legislative instrument for the IRO statutory provisions. With the exception of Schedule 5 to the PIC Act, all of the substantive provisions of the Act and the other four schedules to the Act relate to the Commission. There is no functional link between the IRO and the Commission that necessitates combining them in one Act.

If an alternative Act was identified as more suitable, consideration could be given to whether IRO specific objects may be included as part of any Government amendment to omit the IRO provisions from the PIC Act and include them instead in a more suitable Act. This appears to be the most appropriate option and has been included in Recommendation 1 of this Review.

### 6.3.2. Recommended option

Given the objects of the PIC Act, and the independence of the Commission established under the PIC Act, it is recommended that further consultation be undertaken to identify a more suitable legislative instrument for the IRO provisions and that Schedule 5 be removed from the PIC Act. This process should also include developing tailored statutory objects relevant to the IRO, and consideration of the further issues noted in 6.4 below.

This recommendation responds to issues raised by stakeholders as part of the Review and is also consistent with the policy objectives of the PIC Act, particularly the establishment of an independent Personal Injury Commission.

## 6.4. Further issues for consideration

### 6.4.1. Objects of IRO

In submissions to this Review, the IRO and icare both identify the need for clearer legislative guidance around the objects and functions of the IRO.

This Review supports the development of tailored and appropriate statutory objectives for the IRO, consistent with the objects of the alternative legislative home that is identified for the IRO provisions.

### 6.4.2. Independent Legal Assistance and Review Service (ILARS)

Under clause 6(d), Schedule 5 to the PIC Act, the IRO has the function to manage and administer ILARS, including issuing ILARS Guidelines:

*The purpose of ILARS is to provide funding for legal and associated costs for workers under the Workers Compensation Acts seeking advice regarding decisions of insurers for those Act and to provide assistance in finding solutions for disputes between workers and insurers.*<sup>22</sup>

The IRO may issue ILARS guidelines which provide guidance on:

- a. the approval of lawyers to be granted funding under ILARS (including their qualifications and experience for approval), and
- b. the allocation and amount of funding for legal and associated costs under ILARS.

<sup>21</sup> *Personal Injury Commission Act 2020*, s3.

<sup>22</sup> *Personal Injury Commission Act 2020*, sch 5 cl 9(2).



These guidelines must be published on the NSW legislation website. ILARS guidelines only apply to workers compensation matters and are not currently aligned with the legal costs provisions in the Workers Compensation Regulation 2016.

The Standing Committee on Law and Justice of the NSW Parliament (the Standing Committee), in accordance with clause 12, Schedule 5 to the PIC Act, was required to consider whether ILARS should be extended to claimants under the MAI Act. While the Standing Committee did not make a recommendation regarding this matter, it noted general stakeholder consensus that ILARS should not be extended to the motor accidents scheme in its current form. The Standing Committee noted further that a more detailed examination was required and supported SIRA's end-to-end review of legal supports in the motor accidents scheme and plans for consultation in 2023.

As noted by icare in submissions to this Review,

*the PIC Act does not define standards for how the IRO is to manage ILARS. As a result, there is currently no oversight of the management and administration, or the independence of ILARS.<sup>23</sup>*

In its current form, the PIC Act requires the IRO to prepare and forward to the Minister an annual report, including information on the operation of ILARS.<sup>24</sup> However, the PIC Act does not establish legislative objectives or requirements for review or ongoing monitoring of the cost-effectiveness of ILARS, or a need to align to or comply with regulated costs.

A lack of regulatory oversight may limit openness, transparency and accountability for ILARS. Without such oversight, it may be difficult to evaluate the effectiveness and efficiency of the program and ensure that it is providing the best possible outcomes for workers, while ensuring the ongoing affordability and viability of the scheme.

Concerns raised during consultation highlighted the costs of ILARS are growing significantly, despite the disputation rate remaining static. A new legislative framework for IRO should include provisions to ensure effective governance, performance and accountability for the management of the IRO and administration of ILARS.

Legislative objectives for the IRO will support any future reviews of ILARS and provide clear standards to assess its operation. This has been included in Recommendation 1 of this Review.

### 6.4.3. Complaints about the Lifetime Care and Support Authority (LCSA)

The Standing Committee's Review of the LTCS scheme recommended the PIC Act be amended to clarify the legislative power of the IRO to deal with disputes<sup>25</sup> related to the Lifetime Care and Support Authority (LCSA).<sup>26</sup>

The LCSA exercises its primary functions under the *Motor Accident (Lifetime Care and Support) Act 2006* and also functions under the MAI Act (CTP Care).

### 6.4.4. CTP Care

Under provisions of Schedule 5 to the PIC Act, the IRO has a complaint function in the motor accidents scheme in relation to complaints by claimants about insurers under the MAI Act, and its predecessor, the *Motor Accidents Compensation Act 1999*. Clause 1 of Schedule 5 defines 'insurer' to mean 'a licensed insurer under any of the enabling legislation'.

CTP Care is the term used to describe the statutory functions of the LCSA under the MAI Act<sup>27</sup> as the 'relevant insurer' for the purposes of the payment of statutory benefits for treatment and care after five years after the motor accident concerned (or in the period before five years by agreement with the relevant CTP insurer). Section 3.45(1) of the MAI Act expressly states that the description of the LCSA as the relevant insurer for the purposes of the MAI Act does not make that Authority an insurer when exercising functions under the MAI Act. In submissions to this Review, the IRO noted that there is uncertainty about whether the IRO's functions extend to dealing with complaints about the LCSA under CTP Care.<sup>28</sup>

In 2022, SIRA delegated functions under section 10.1(1)(d) of the MAI Act to investigate and respond to complaints about claims handling practices of the LCSA in respect of the exercise of its functions under sections 3.2(3) and 3.45 of the MAI Act to the IRO. SIRA also published new Motor Accident Guidelines: CTP Care (version 1.0) to reflect this delegation. The purpose was to simplify the process for injured people transitioning from a licenced insurer to CTP Care and to clarify who they can contact if they have a complaint.

This Review recommends that clarification and extension of the IRO complaints function to include complaints from claimants about the LCSA in exercising functions under the MAI Act should be included in any consultation and subsequent legislative changes.

<sup>23</sup> icare Submission, p 2.

<sup>24</sup> *Personal Injury Commission Act 2020*, sch 5, cl 13.

<sup>25</sup> The Review notes that IRO's function is to manage complaints and it is the function of the Commission to manage disputes. Given the Standing Committee is referring specifically to the IRO in this recommendation, we consider the Standing Committee to be referring to complaints and not to dispute resolution.

<sup>26</sup> *Standing Committee on Law and Justice Report No 83, 2022 Review of the Lifetime Care and Support scheme*, p 19.

<sup>27</sup> *Motor Accident Injuries Act 2017*, ss 3.2(3) and 3.45.

<sup>28</sup> *Independent Review Office Submission*, p 2.

## 6.4.5. Lifetime Care and Support Scheme (LTCS scheme)

The LCSA is the Authority responsible for the administration of the LTCS scheme under the *Motor Accident (Lifetime Care and Support) Act 2006*. The IRO does not have any functions relevant to the operation of the *Motor Accident (Lifetime Care and Support) Act 2006*. Any consideration of a new role for the IRO in relation to a complaint function relevant to the LCSA under the *Motor Accident (Lifetime Care and Support) Act 2006* are matters relevant to that Authority and the Minister for Work Health and Safety.

## 6.4.6. IRO inquiry and report to the Minister

The primary statutory object of the PIC Act is the establishment of an independent Personal Injury Commission. The IRO's function to inquire into and report to the Minister on any matter arising in connection with the operation of the PIC Act<sup>29</sup>, would appear inconsistent with the object of an independent Commission. Any proposed amendment relevant to the IRO provisions should consider whether this function of the IRO should also be amended to ensure the integrity and independence of the Commission is maintained.

### Recommendation 1

It is recommended that the NSW Government:

- a. Consult on a recommended approach to establishing a fit for purpose legislative framework to provide for the appointment, administration and specific functions of the IRO relevant to the workers compensation and motor accidents schemes. This will require consideration of the appropriate legislative instrument, for instance, in the enabling legislation rather than in the PIC Act.
- b. In addition to providing for the appointment, administration and functions of the IRO, the fit for purpose legislative framework should ensure:
  - i. tailored and appropriate statutory objectives,
  - ii. effective governance, performance and accountability on the management of the IRO and administration of ILARS in the workers compensation scheme,
  - iii. clarity of the IRO's functions, including removal of the IRO's function to inquire into and report to the Minister on matters regarding the operation of the PIC Act or enabling legislation, and

iv. clarity of the IRO's role in managing complaints for CTP Care<sup>30</sup> in the motor accidents scheme.

- c. Make any necessary legislative changes, including to the PIC Act and relevant legislation, to implement the government's preferred option.

## 6.5. Medical privacy and publication of decisions

Stakeholder submissions raised issues regarding an injured person's personal and health information in the context of the publication of Commission decisions, particularly Medical Review Panel certificates under motor accidents legislation.<sup>31</sup>

As noted above, the 2022 Review of the Compulsory Third Party insurance scheme by the Standing Committee on Law and Justice noted these concerns and recommended that an investigation be conducted into whether the terms or operation of the PIC Act '... undermine an individual's medical privacy during the publication of Medical Review Panel certificates.'<sup>32</sup>

Section 58 of the PIC Act provides that the Commission must publish certain decisions in accordance with the Commission rules. Publication of decisions is intended to guide and assist tribunal users and promote public confidence in Commission decision-making.

It should also be noted that there are Commission rules in place that seek to address concerns in relation to medical privacy. Rule 132 (1) of the Commission rules states:

*The Commission or the President may, of their own motion or on the application of a relevant person, direct either or both of the following –*

- a. *that all or part of a publishable decision be de-identified before it is published,*
- b. *that part of a publishable decision be redacted before it is published.*

Furthermore, under Rule 132(4):

*In determining an application for a direction, the Commission or the President is to have regard to the following matters –*

- a. *the objects of the PIC Act and enabling legislation and, in particular, the object that the Commission be open and transparent about its processes,*
- b. *the prevention of prejudice to the proper administration of justice,*

29 *Personal Injury Commission Act 2020*, cl 6(b) sch 5.

30 CTP Care is administered by the Lifetime Care and Support Authority (LCSA) and refers to the functions exercised by the LCSA as the relevant insurer under the MAI Act.

31 See for example, *Royal Australian and New Zealand College of Psychiatrists NSW Branch Submission*.

32 *Standing Committee on Law and Justice Report No 82, 2022 Review of the Third Party insurance scheme*, p ix.

- c. *the safety, health and wellbeing of a person affected or named by the publishable decision,*
- d. *the views of any other party to the proceedings,*
- e. *whether it is necessary in the public interest for the direction to be given and whether the public interest in giving the direction significantly outweighs the public interest in open justice.*<sup>33</sup>

Publication of decisions is an important function of an independent Commission and is consistent with the objects of the Act. Publication of decisions helps to ensure decisions are consistent and of a high quality. It also informs, educates, and assists Commission users, and promotes public confidence in Commission members and decision makers.

This Review does not support amendment of these provisions. The legislative provisions and Commission rules noted above seek to strike a balance between the interests of injured people and the appropriate protection of privacy and the public interest in open justice.

### 6.5.1. Understanding of the Commission Rules in relation to de-identification or redaction of publishable decisions

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) raised concerns that there are ‘significant barriers’ to lodging an application (for example, time limits).<sup>34</sup>

Rule 132(2) of the Commission rules states that ‘an application for a direction may be made during, or after the completion of, the proceedings in which the publishable decision is issued.’ Decisions of the Commission are also not published for seven days to allow a party time to apply for de-identification or redaction after a decision is made.

The Decision Publication Policy, available on the Commission website, states:

*The Commission operates under a presumption in favour of publication of decisions. In exceptional circumstances decisions may be de-identified or redacted before publication. Decisions are not published for seven days to allow a party time to apply for de-identification or redaction.*<sup>35</sup>

It has been observed that the term ‘exceptional circumstances’ does not appear in the Commission rules or the PIC Act in relation to applications for de-identification or redaction of published decisions.

The Review considers there may be opportunities for the Commission to clarify communication with stakeholders and tribunal users about the Commission rules in relation to deidentification and/or redaction.

#### Suggestion 1

The Commission may wish to conduct a review of procedures in relation to informing parties of the Commission’s Decision Publication Policy, to encourage early applications for deidentification and/or redaction. The Commission should also review information published on the Personal Injury Commission website regarding applications for deidentification and/or redaction to ensure consistency with the terms of Rule 132 (4) of the Commission rules.

## 6.6. Membership of the Rule Committee

Section 19(3) of the PIC Act sets out the statutory requirements for the composition of the Rule Committee. The Rule Committee is comprised of 11 representatives from a broad range of groups to ensure there is diversity of views in the development of the Commission rules.

The Rule Committee’s functions are limited by statute to rules about practice and procedure to be followed in proceedings.

The New South Wales Bar Association (Bar Association) submitted that SIRA’s presence on the Commission’s Rule Committee could be perceived to be a conflict of interest, as SIRA can participate in proceedings before the Commission under section 47 of the PIC Act.<sup>36</sup>

SIRA is a member of the Rule Committee due to its legislative and regulatory role as scheme stewards for both workers compensation and motor accidents schemes in NSW. Participation in the Rule Committee enables SIRA to have input into the processes and procedures to reflect the intent of the dispute pathways for these schemes.

Section 47 of the PIC Act specifically provides for intervention by SIRA in any proceedings before the Commission. SIRA has had a legislative power to become involved in workers compensation disputes for many years. Additionally, SIRA has recently published a Litigation Intervention Policy<sup>37</sup> that outlines SIRA’s approach to becoming involved in proceedings before a Court or Tribunal when it is not an existing party to the litigated matter.

33 Personal Injury Commission Rules, Rule 132(4).

34 Royal Australian and New Zealand College of Psychiatrists NSW Branch Submission, p 4.

35 Available at: <https://pi.nsw.gov.au/decisions>

36 New South Wales Bar Association Submission, pp 2-3.

37 Available at: <https://www.sira.nsw.gov.au/resources-library/law-and-policy-or-corporate/publications/litigation-intervention-policy>.

## 6.6.1. Consultation on the Commission Rules

icare submitted that greater transparency could be achieved by introducing new powers for the Commission to consult stakeholders prior to making rules or the President issuing procedural directions, noting that changes can have an impact on insurer operations and legal costs.<sup>38</sup>

As noted above, the Rule Committee is constituted by a broad and diverse membership to ensure the views of the relevant stakeholders contribute to the development of the Commission rules.

This Review also notes that the Commission has multiple standing reference groups with representatives of its key stakeholders. The Commission meets with these groups regularly to provide updates on changes to the Commission rules, policies and procedures, and to consult on key issues and seek feedback. This includes representatives from the insurance industry.<sup>39</sup>

This Review does not consider it necessary to recommend the legislation be amended to impose obligations for further consultation. However, given the feedback received, the Commission may wish to explore further opportunities for consultation and engagement with insurers regarding changes to process and procedure in the future. This has been considered in Suggestion 3 (see below).

## 6.7. Powers of the President of the Commission

### 6.7.1. Power to give directions

Section 31(2) of the PIC Act provides that:

*The President may give directions as to the members who are to constitute the Commission for the purposes of any particular proceedings.*

*Note – The President may delegate the function of constituting the Commission for particular proceedings to a Division Head of a Commission Division or another member. See section 18.*

This provision is necessary for the operations of the Commission and the allocation of matters to members. It is consistent with the other statutory functions of the President and similar powers can be found in section 27(2) of the Civil and Administrative Tribunal Act 2013.

### 6.7.2. Power to dismiss decision-makers

Section 33(8) of the PIC Act provides the President with the power to remove a medical assessor or merit reviewer (a ‘decision-maker’) from office at any time.

The Bar Association has expressed concern that this is a very broad provision that may encroach on the independence of decision-makers, as it could be used to remove those whose decisions are seen to fall outside particular norms.<sup>40</sup>

It is considered that the power contained in section 33(8) is a necessary power. The President has the statutory function to appoint decision-makers under section 33 and should, as a matter of course, also have the power to remove a decision-maker.

## 6.8. Conduct of proceedings

### 6.8.1. Conferences

The Bar Association submitted that section 52(1) of the PIC Act should be amended to ensure claimants have a right to be heard in person.<sup>41</sup> Section 52(1) of the PIC Act provides:

*Proceedings need not be conducted by formal hearing and may be conducted by way of a conference between the parties, including a conference at which the parties (or some of them) participate by telephone, closed-circuit television or other means.*

This procedural flexibility of the Commission is similar to that of the former WCC, DRS, MAS and CARS. The use of conferences as a more flexible alternative to formal hearings facilitates an efficient and cost-effective method of resolving disputes and is consistent with the objects of the PIC Act. This has proved particularly beneficial for the Commission to continue operating during the COVID-19 pandemic.

### 6.8.2. Private conferences with parties and relevant experts

The Bar Association submitted that no party should meet or appear before a Commission member in the absence of representatives for all other parties, except under the usual ‘ex parte’ exceptions recognised by Courts.<sup>42</sup> Section 52(2) of the PIC Act provides:

*Subject to any procedural directions, the Commission may hold a conference with all relevant parties in attendance and with relevant experts in attendance, or a separate conference in private with any of them.*

38 icare Submission, pp 1 and 3.

39 Commission Response to SIRA’s Data and Information Collection Request of 17 March 2023, pp 13-14.

40 New South Wales Bar Association Submission, pp 4-5.

41 Ibid, p 5.

42 Ibid.

Members of the Commission and decision-makers must act in accordance with administrative law principles of procedural fairness including the hearing rule and the rule against bias. These principles are relevant to the conduct of proceedings and communications with the parties to proceedings. In the absence of any issues raised in practice, no legislative amendment is recommended at this stage.

### 6.8.3. Determination of matters without a formal hearing or conference

Section 52(3) of the PIC Act provides that:

*If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act and enabling legislation without holding any conference or formal hearing.*

The Bar Association submitted that the interpretation of the adequacy of material is a significant threshold issue and should not be determined in the absence of submissions from the affected party.<sup>43</sup>

The legislation governing the former WCC, DRS, CARS and MAS included similar provisions to s 52(3) of the PIC Act such as the now repealed provisions outlined below:

- section 354(6) of the WIM Act – ‘If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing’.
- section 7.46(6) of the MAI Act - ‘If the claims assessor is satisfied that sufficient information has been supplied to him or her in connection with a claim, the assessor may exercise functions under this Act without holding any formal hearing’.
- section 104(6) of the MAC Act – ‘If the claims assessor is satisfied that sufficient information has been supplied to him or her in connection with a claim, the assessor may exercise functions under this Act without holding any formal hearing’.

The Review also notes Procedural Direction PIC2 – Determination of matters ‘on the papers’, which sets out the practice and procedure of the Commission in determining matters on the basis of the documents provided, in the absence of any conference or formal hearing. This includes factors such as whether the parties have addressed all the relevant issues in their submissions, whether further submissions are required, the degree of complexity of the legal and/or factual issues in dispute, and whether parties have requested a determination ‘on the papers’.

This review does not recommend any amendment to section 52(3) at this time.

## 6.9. Federal jurisdiction

icare submitted that the Review should explore options to enhance the powers of the Commission to consider matters involving federal jurisdiction.<sup>44</sup>

The provisions in Division 3.2 of the PIC Act provide for the application for leave and if leave is granted, for the determination of compensation claims under the motor accident and workers compensation legislation (substituted proceedings) by the District Court.

Division 3.2 also provides flexibility to the District Court to use the particular expertise of the ‘usual decision-maker’ provisions designed to assist the Court in facilitating the efficient resolution of substituted proceedings.

This approach aligns as broadly with the established arrangements for matters involving federal jurisdiction in Part 3A of the *Civil and Administrative Tribunal Act 2013*.

The Review considers it is important for certainty and public confidence that this consistency in approach across relevant NSW legislation is maintained.

<sup>43</sup> New South Wales Bar Association Submission, p 6.

<sup>44</sup> icare Submission, p 4.

# 7. Operational concerns raised in submissions

Several stakeholder submissions raised operational issues that are not directly related to the terms of the PIC Act. Whilst these may be important considerations for the effective operation of the Commission, they fall outside the scope of the terms of reference of this Review. As such, the Review does not thoroughly examine these matters, rather, offers a condensed discussion of these issues and any relevant recommendations and suggestions for consideration by the Commission.

## 7.1. Delays in the Commission

Delay in resolving disputes is clearly a prominent issue for stakeholders, particularly in relation to medical assessment matters in the Motor Accidents Division.

Stakeholders generally do not attribute the delays to the terms of the PIC Act. The majority of contributing factors cited by stakeholders relate to issues outside the scope of the terms of reference for this Review, including:

- external factors such as the impact of COVID-19, strikes, floods and non-attendances,<sup>45</sup>
- operational issues such as staffing and technology (particularly the electronic portal in Motor Accidents),<sup>46</sup>
- dispute models and scheme design under enabling legislation,<sup>47</sup>
- formality of processes and procedures.<sup>48</sup>

As identified in Part 4.2 of this Review, the Standing Committee's 2022 review of the CTP Scheme recommended SIRA investigate, either through this Review or separately, whether any aspects of the PIC Act or its operation may impede the timely resolution of disputes by the Commission. The Government response supported this recommendation, acknowledging that this issue was being considered as part of the Statutory Review of the PIC Act, and that operational and scheme design aspects that are outside the terms of reference and scope of the Statutory Review will be considered separately. It was further noted that this would require ongoing monitoring of the work being undertaken by the Commission to reduce the backlog of disputes.

### 7.1.1. Medical assessment delays

The Commission has experienced unprecedented disruption of its operations due to the COVID-19 pandemic, particularly in relation to disputes requiring in-person attendance. For approximately seven months during the 2021/2022 public health crisis, all in-person medical examinations had to be suspended. This took place over two separate periods due to the outbreak of the Delta variant in 2021, and in 2022 due to the Omicron variant. Even when in-person examinations resumed, they were conducted under strict conditions. This contributed to higher rates of non-attendance. For example, in the first six months of 2022 there were 1800 appointments that did not take place out of 3600 appointments booked by the Commission.<sup>49</sup> The ongoing impact of COVID-19 can be seen in the backlog of delayed medical assessment matters in the Motor Accidents Division.

### 7.1.2. How has the Commission addressed the delays?

The Commission has put in place measures to address the challenges of operating in a post-COVID-19 environment, including:

- new medical suites at 1 Oxford Street, operating under strict conditions and gradually increasing capacity,<sup>50</sup>
- online examinations with the Commission's Psychiatrists. This has proven successful and continues to be utilised by the Commission,<sup>51</sup>
- fitting out the Commission's premises with audio-visual technology in hearing rooms and Members' chambers to allow matters to be heard via Microsoft Teams, and<sup>52</sup>
- a trial of SMS appointment reminders in March 2023 to help reduce non-attendances.<sup>53</sup>

These measures, along with reduced non-attendances due to COVID-19 related issues, have allowed the Commission to make significant progress in reducing the backlog of delayed medical assessment matters in the Motor Accidents Division.

<sup>45</sup> *icare Submission*, p 5.

<sup>46</sup> See for example, *Australian Lawyers Alliance Submission*.

<sup>47</sup> *New South Wales Bar Association Submission*, p 1.

<sup>48</sup> *Law Society of New South Wales Submission*, pp 2-3.

<sup>49</sup> *Judge Gerard Phillips Re: NSW Legislative Council Standing Committee on Law and Justice 2022 Review of the CTP Scheme*, p 4.

<sup>50</sup> *Commission Response to SIRA's Data and Information Collection Request of 17 March 2023*, p 9.

<sup>51</sup> *Ibid*, p 10.

<sup>52</sup> *Ibid*, p 8.

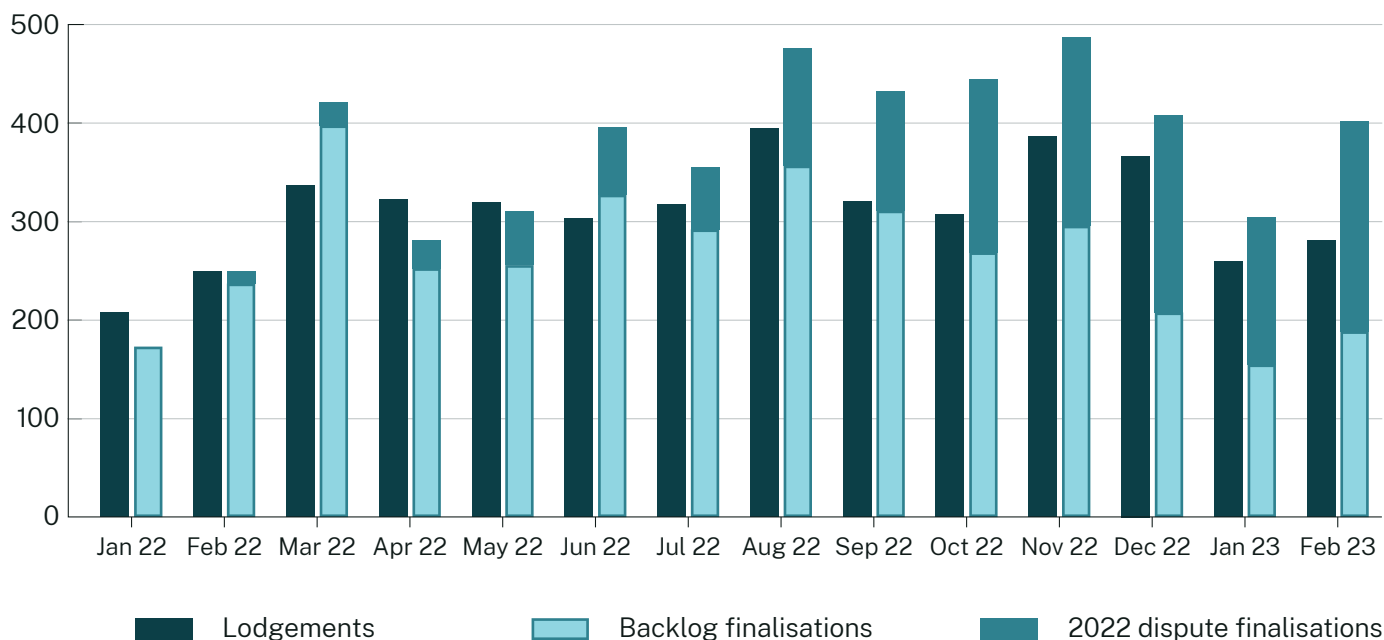
<sup>53</sup> *Ibid*, p 6.

### 7.1.3. Current progress

The following information has been sourced from Edition No.45 of the Personal Injury Commission News, issued 24 March 2023.<sup>54</sup>

Finalisations of medical disputes have increased over the year of 2022 and remain consistently high, with an average of 420 finalisations per month. Average clearance rates are at 127 per cent, meaning more matters are being completed than are being lodged.

#### Motor accidents medical disputes - registrations vs finalisations

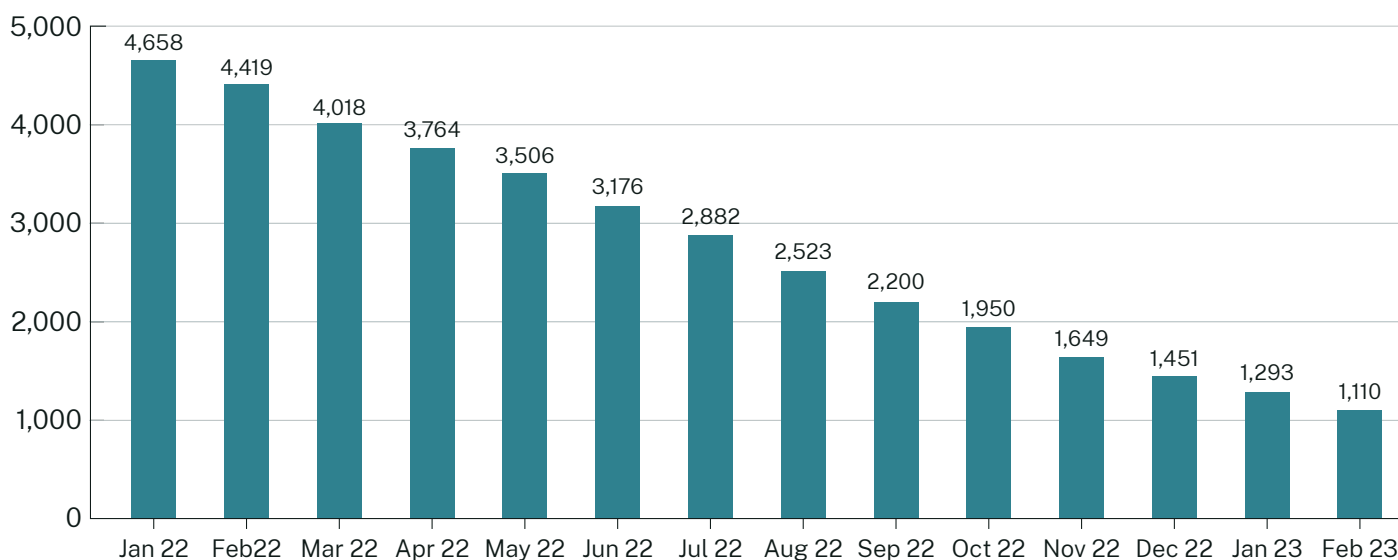


Data was extracted on 17 March 2023 for February 2023 EOM and is subject to change each month.

The Commission has reduced the total number of matters on hand for medical assessment matters in the Motor Accidents Division to below 4000 for the first time since March 2021.

As of 24 March 2023, the backlog of delayed medical assessment matters has dropped to below 1000. This is a total reduction of over 3600 matters since January 2022. The table below shows the downward trend each month of backlog matters.

#### Motor accident medical backlog (pre-1 Jan 2022) disputes on hand



If these trends remain relatively consistent, the Commission projects the backlog of delayed medical assessment matters in the Motor Accidents Division will be cleared by Quarter 3 of 2023. It is recommended that this progress continue to be monitored, and that if delays continue, SIRA should examine the key drivers of delays with disputes, including a consideration of the efficiency of the CTP dispute resolution model and opportunities for improvement.

## Recommendation 2

It is recommended that SIRA:

- a. closely monitor any ongoing issues of delays in the Commission in relation to the resolution of medical assessment matters in the motor accidents scheme. Should delays persist in the Motor Accidents Division of the Commission, it is recommended SIRA examine the key drivers of ongoing disputes and delays, including operations or aspects of the dispute resolution model in the motor accidents scheme in the enabling legislation.
- b. undertake a comparison of the timeframes and associated costs for resolution of statutory benefits claims under the motor accidents scheme and workers compensation claims under the workers compensation scheme to identify opportunities for harmonisation across the two schemes and inform advice to Government on proposed options to improve the efficiency and effectiveness of dispute resolution under both schemes.

## 7.2. Data publication

There is clear appetite from stakeholders for additional and more frequent data publication by the Commission to ensure openness and transparency, particularly in relation to delays.

The ALA provided specific examples of data they consider the Commission should publish, including:

- the length of the current queues for medical assessments, and<sup>54</sup>
- further information on the Commission's processes and results, such as the number of current cases before the Commission, and timing between the date an application is filed and the date a decision is made, by dispute type.<sup>56</sup>

The Insurance Council of Australia supports more frequent publication of data, such as quarterly reporting on finalisations against lodgements by lodgement type.

icare submitted that the Commission should publish data that allows a holistic, end-to-end view of disputes in both motor accidents and workers compensation. icare suggests this should include enhanced reporting on dispute outcomes, key upcoming hearing dates and dispute status.<sup>57</sup>

Section 66 of the PIC Act provides that the President must provide to both the Minister and SIRA an Annual Review of the operations of the Commission. The review is to be tabled in Parliament and is to include the following information:

- a. the number and type of proceedings instituted in each Commission Division during the year,
- b. the sources of those proceedings,
- c. the number and type of proceedings that were made during the year but not dealt with,
- d. the extent to which the operations of the Commission are funded by each operational fund,
- e. any other information that the President considers appropriate to be included or the Minister directs to be included.<sup>58</sup>

On 24 June 2022, the Commission published a list of Key Performance Indicators (KPI's)<sup>59</sup>, developed through consultation with the Law Society of NSW, the NSW Bar Association, CTP Insurers Reference Group, SIRA, IRO and icare.<sup>60</sup> Results of these KPI's will be reported in the Commission's Annual Review in 2023, which will provide more detailed information in relation to the lifecycle of disputes and the timeliness of the Commission's decision making on an annual basis.

Given the Commission is currently working on a new digital platform for both Divisions that will streamline data reporting, it may be timely for the Commission to consult further with stakeholders to ensure concerns around frequency and detail of data publication are addressed.

## Suggestion 2

The Commission may wish to consider developing a data publication policy in relation to the frequency of publication and type of data that is made available to the public. It is recommended that this include consultation with stakeholders and consideration of submissions to this Review.

54 Available at: <https://pi.nsw.gov.au/resources/personal-injury-commission-news/2023-personal-injury-commission-news/edition-no.45>

55 Australian Lawyers Alliance Submission, p 2.

56 Insurance Council of Australia Submission, p 1.

57 icare Submission, pp 3-4.

58 Personal Injury Commission Act 2020, s66(4).

59 Available at: <https://pi.nsw.gov.au/resources/key-performance-indicators>

60 Commission Response to SIRA's Data and Information Collection Request of 17 March 2023, p 29.



## 7.3. Stakeholder engagement and consultation

### 7.3.1. Medical stakeholders

The RANZCP state that they do not believe that there was sufficient consultation with the medical profession regarding the PIC Act and that better consultation may have resulted in greater protections for individuals.<sup>61</sup> The RANZCP also note that they are aware of ‘a number of senior medical assessors’ who have left the Commission because of their concerns regarding medical privacy, and submit that ‘this is contributing to an already significant workforce issue...’<sup>62</sup>

The ALA reported anecdotally that a significant number of doctors are not willing to work for the Commission.<sup>63</sup>

The Review considers that these issues may be indicative of a need for further engagement and consultation with the medical community. This has been included in Suggestion 3 (below).

### 7.3.2. Insurers

icare submitted that the terms of the PIC Act should include a power for the Commission to consult with relevant stakeholders prior to issuing proposed rules and directions. icare notes that procedural directions (such as the introduction of pagination) may have an impact on insurer operations and legal costs<sup>64</sup>

This is an operational issue for the Commission, noting that the Commission does not require legislated powers to consult with stakeholders in relation to Commission rules and procedural directions.

It may be appropriate for the Commission to review its processes for engagement and consultation with insurers in relation to proposed changes to the Commission rules and procedural directions.

#### Suggestion 3

The Commission may wish to consider further opportunities for engagement and consultation with stakeholders, including medical stakeholders and insurers.

## 7.4. Electronic Portal

The ALA submitted that user experience of the motor accident portal has been negative, and that their members have consistently complained of the portal not functioning, not being accessible, and causing significant delays.<sup>65</sup>

The Commission has reported that a new Single Digital Platform will launch for motor accidents users from 19 June 2023, and that Workers Compensation Division users will transition to the platform in early 2024.<sup>66</sup>

The Commission also notes that user feedback and engagement has been central to the design of the new system:

*Detailed user personas were developed to inform the design of the new platform and tribunal users have participated in showcase events and user acceptance testing so that their feedback could be incorporated into the development of the platform.*<sup>67</sup>

## 7.5. Procedural directions and formality

The Law Society of NSW’s primary concerns relate to the formalisation of the Commission’s processes and the impact this may have on the efficiency and the cost effectiveness of the Commission:

*In the view of some of our members, various recent procedural directions tend to produce unnecessary formalisation of proceedings, for example rigorous enforcement of rules around the indexing and paginating of documents that are already uploaded correctly on the Portal. We consider that any directions should always be made bearing in mind the objects of the Act to resolve the real issues justly, quickly, cost effectively and with as little formality as possible.*<sup>68</sup>

The Review notes that the power of the President to make procedural directions is generally aligned with the approach of the *Civil and Administrative Tribunal Act 2013*.<sup>69</sup>

The form and content of procedural directions is a matter for the Commission and is not directly relevant to the terms of reference for this Review.

61 Royal Australian and New Zealand College of Psychiatrists NSW Branch Submission, p 3.

62 Ibid, p 4.

63 Australian Lawyers Alliance Submission, p 4.

64 icare Submission, p 3.

65 Australian Lawyers Alliance Submission, pp 2-3.

66 Personal Injury Commission News, Edition 47, published 15 May 2023.

67 Commission Response to SIRA’s Data and Information Collection Request of 17 March 2023, p 4. Law Society of

68 New South Wales Submission, p 1.

69 See for example *Civil and Administrative Tribunal Act 2013*, s 26.

# 8. Tribunal user experience

To help inform the findings of this Review, qualitative research was commissioned by SIRA to undertake in-depth interviews with injured people who have been through the dispute process at the Commission. The findings provide valuable insights on a user's experience to inform the findings of this Review and capture the voice of lived experience.

This survey is not intended to be representative of all injured people who have been through the dispute process at the Commission. It should also be noted that perceptions of the Commission can be influenced by dispute outcomes, the nature and extent of the injury suffered, as well as the life circumstances of injured people.

## 8.1. Methodology

Thirteen in-depth interviews were conducted with injured people across both the motor accidents and workers compensation schemes, and across a range of dispute types.

Interviewees had varying levels of interaction with the Commission, ranging from lots of direct contact to hardly any at all, especially if contact was initiated and conducted through a legal representative.

## 8.2. Summary of findings

Overall, the interviewees valued the Commission and its role in the workers compensation and motor accident compensation schemes.<sup>70</sup>

In terms of experience, there was a mix of positive and negative perceptions. On balance, most people interviewed felt some part of their experience could have been improved, even among interviewees who had favourable dispute outcomes.<sup>71</sup>

### 8.2.1. Opportunities for greater engagement with tribunal users

Most injured people will have had limited or no prior experience with the dispute process and the Commission.<sup>72</sup>

The complexity of the dispute process and use of legal jargon can also make it difficult for people to know what to expect, particularly for people from non-English speaking backgrounds:

“My first language is Spanish. You don't know the meaning of some words or terms. And how are you going to take a decision without knowing the meaning of the emails or phone calls. The language is definitely a barrier...I think they must have more accommodation for different languages<sup>73</sup>

“Everything I found was just jargon to me. It just didn't make much sense, obviously, I'd have to use my solicitor to interpret stuff and relay that information to me. But just to me that that was probably the number one barrier.”<sup>74</sup>

Overall, the responses of interviewees show a clear desire for better engagement and information about what to expect through the dispute process at the Commission.

<sup>70</sup> fiftyfive5, *Personal Injury Commission Customer Experience Interviews*, p 24.

<sup>71</sup> Ibid, p 29.

<sup>72</sup> Ibid, p 8.

<sup>73</sup> Ibid, p 16.

<sup>74</sup> Ibid.

There was positive feedback about the assistance of Commission staff, however there were also opportunities for improvement noted, including:<sup>75</sup>

- injured people not being informed of who would be attending sessions,
- injured people not knowing who to contact or what to do if a remote session goes down,
- lack of explanation for delays,
- injured people not knowing what to expect in the session and how best to prepare, and
- there wasn't always a single point of contact at the Commission for people, which required time for people to get up to speed.

Ensuring injured people are informed and know what to expect through a claim and dispute process is a collective responsibility for scheme participants, including insurers, legal representatives, the Commission and SIRA as regulator.

While this Review has not made any specific recommendations or suggestions for the Commission to consider, there may be opportunity for all parties to consider ways to better engage and inform users about what to expect throughout the dispute resolution process.

## 8.2.2. Delays

There were multiple negative comments about the length of the process and the impact this can have on people emotionally, although in some instances the impact of COVID-19 was noted as the reason for the delay.

“‘Already been dragging on for 3 years’, ‘it was just long, it was slow’, ‘It was a very long process, it was going on for ages’, ‘I just want this to finish’<sup>76</sup>

‘First contacted July 2021, then scheduled medical assessment May 2022, then moved to Nov 2022 when wasn't able to make the May one...it took far too long’<sup>77</sup>

In instances of delay, it is particularly important to ensure injured people are kept informed, including about the potential timeframes for resolution.

## 8.2.3. Empathy

A motor vehicle accident or work injury can be a difficult and emotional event in a person's life. It is also something that may not be caused by the actions of the injured person, such as where a person is not at fault for causing a motor vehicle accident. At the same time, there can be other events in their life they are still trying to manage such as looking after children, keeping up with mortgage repayments and cost of living pressures. With this context in mind, having empathy with injured people through the process is very important.<sup>78</sup>

Some interviewees noted the difficulty in having to retell their story to a stranger, and how the dispute process can be emotionally taxing.

“‘I'm dealing with a mental condition at the same time, and finding the whole process to be an extension of that traumatic incident’<sup>79</sup>

‘I'm genuinely injured, I should be looked after in this process, that was not the case at all.’<sup>80</sup>

## 8.3. User experience and continuous improvement

The Commission intends to commence surveying its users once it has a more stable operating environment. This Review is supportive of the Commission exploring further ways to capture user experience trends to inform continuous improvement initiatives in the future, particularly in relation to engaging with and informing users about what to expect throughout the dispute resolution process, including timeframes and next steps.

75 fiftyfive5, *Personal Injury Commission Customer Experience Interviews*, p 16.

76 Ibid, p 17.

77 Ibid.

78 Ibid, pp 9 and 23.

79 Ibid.

80 Ibid.

# 9. Future considerations

As already canvassed throughout this report, broader issues regarding the enabling legislation and scheme design were also raised by stakeholders as part of this Review. For completeness, this section touches on these issues briefly in relation to possible future reviews and considers how the use of emerging technology could enhance service delivery at the Commission.

## 9.1. Scheme and dispute model complexity

The ability of the Commission to meet its policy objectives is significantly influenced by the complexity of the overall claims process and scheme design provided for in the enabling legislation.

The issue of complexity may be illustrated by the low rate of self-represented claimants at the Commission. At present, self-representation in the Commission accounts for only 0.1 per cent in the Workers Compensation Division and 3 per cent in the Motor Accidents Division.<sup>81</sup> The need for support in understanding the dispute process is also clearly evident in the qualitative research of Commission user experience outlined in Part 8 above.

## 9.2. Delays

Stakeholders also submitted that differences in scheme design may be impacting the efficiency of the Commission in determining medical assessment matters in the Motor Accidents Division.

### 9.2.1. Dispute models and the question of causation of injury

The intersection between scheme design and dispute models and the operations of the Commission can be clearly seen when examining how disputes about causation of injury are determined under motor accidents and workers compensation legislation.

The Bar Association notes that medical assessment matters remain the major dispute category in the Motor Accidents Division of the Commission, accounting for 58 per cent of all disputes.<sup>82</sup> These assessments are often required to be conducted in person, and as such have been heavily impacted by the COVID-19 pandemic.

His Honour, Judge Gerard Phillips, President of the Commission has also noted the disparity in the number of medical assessments in the Motor Accidents and Workers Compensation Divisions:

*Since the end of July 2022, the Commission has been scheduling on average over 700 medical appointments per month in the Motor Accidents Division alone. In November, as at the date of this correspondence, 791 medical appointments have been scheduled. In the Workers Compensation Division, in excess of 200 medical appointments per month have been scheduled during the same period.*<sup>83</sup>

The Bar Association submit that this disparity in the number of medical assessments in each Division may be related to differences in the dispute models under the enabling legislation for each scheme:

*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.*<sup>84</sup>

The published Commission Medical Review Panel decision of *Sarwary v Allianz Australia Insurance Limited*<sup>85</sup> illustrates how this issue can contribute to inefficiency in the dispute process for motor accidents matters and incur significant costs to resolve a relatively minor dispute.

The dispute concerned a \$400 Transcutaneous Electrical Nerve Stimulation (TENS) machine on the basis that the claimed treatment was not reasonable and necessary and not causally related to the subject motor accident.

Although the amount claimed was very small, the dispute pathway in the motor accidents scheme necessitated a medical assessment. Under the workers compensation dispute model, a similar medical dispute is able to be determined by a member of the Commission at first instance without the need for medical assessment.

The matter then proceeded to a Medical Review Panel comprised of two specialist medical practitioners and a member of the Commission, who were required to

81 *Personal Injury Commission Annual Review 2021-2022*, p 44.

82 *New South Wales Bar Association Submission*, pp 3-4.

83 *Judge Gerard Phillips Re: NSW Legislative Council Standing Committee on Law and Justice 2022 Review of the CTP Scheme*, p 5.

84 *New South Wales Bar Association Submission*, p 3.

85 [2023] NSWPICMP 125.

consider approximately 900 pages of documentation submitted by the parties. This is despite the fact that the findings of a Review Panel are not determinative of causation in any other dispute between the parties.

His Honour, Judge Gerard Phillips, President of the Commission, has stated that ‘The Workers Compensation dispute model is more efficient and cost effective than the Motor Accidents model at this time.’<sup>86</sup>

Oposing views are provided by the medical stakeholders. Professor Ian Cameron states in his submission that ‘...medical determination is important to the fair and accurate determination of causation due to the complexity of the issues considered’ and there is ‘no cogent reason’ to change the test of causation for Motor Accidents disputes.<sup>87</sup>

As noted in Recommendation 2, if delays persist for medical assessment matters in the Motor Accidents Division of the Commission, then it would be appropriate for SIRA to further examine the key drivers of ongoing disputes, including operations or aspects of the dispute resolution model in the motor accidents scheme.

Any examination should include a comparison of the timeframes for resolution of statutory benefits claims under both schemes as well as potential cost impacts. This will help inform future advice to Government on the efficiency and effectiveness of the current dispute resolution models under the enabling legislation and identify opportunities for harmonisation across the two schemes.

### 9.2.2. Personal Injury Commission Amendment Bill 2022

The Review acknowledges that the Government introduced a suite of proposed legislative amendments to the PIC Act and to motor accident legislation in the Personal Injury Commission Amendment Bill 2022. The proposed changes were aimed at improving flexibility and efficiency in the operation of the Motor Accidents Division of the Commission and creating more consistent procedures across the two divisions. The proposed changes included:

- allowing non-party summonses to be issued in the Motor Accidents Division of the Commission,
- allowing evidence to be given on oath or affirmation in the Motor Accidents Division,
- requiring that a Commission member attempt to bring the disputing parties to conciliation before assessment of a damages claim, and
- introducing mediation as an alternative dispute resolution mechanism within the Motor Accidents Division.

The Bill was introduced but lapsed when Parliament was prorogued. It is a matter for the Government, but a further review of these proposed amendments may be relevant in any ongoing review of persistent delays.

## 9.3. Legal support for Motor Accidents matters

The Bar Association submitted that claimants face significant barriers accessing justice before the Commission due to the level of legal costs available under the MAI Act:

*The Association strongly recommends that the present disparity of legal representation of parties to disputes should be rectified by significantly increasing the prescribed fees for legal services, particularly in relation to statutory benefits.*<sup>88</sup>

This issue falls outside the scope of this Review. Further work is being progressed by SIRA separately in response to enhanced claimant supports and the regulation of legal costs within the motor accidents scheme.

## 9.4. Future horizon

The future of dispute resolution within the Commission appears promising, as the Commission becomes more established and continues to develop.

With new technologies emerging, there is potential to simplify dispute resolution processes and to improve efficiency and effectiveness into the future. For instance, advancements in Online Dispute Resolution (ODR) are reshaping access to justice by providing additional cost-effective and timely dispute resolution options and supporting earlier resolution of disputes.<sup>89</sup> The Commission is already embracing aspects of this through increased usage of virtual conferences and planned enhancements to the electronic portal.

Technological developments and the rise of artificial intelligence may provide further opportunities to streamline administratively burdensome tasks such as document management. There is also potential for the use of apps to assist people to receive tailored procedural advice and support in navigating the dispute process. Making the process easier to navigate may also allow for increased rates of self-represented parties.

86 Commission Response to SIRA's Data and Information Collection Request of 17 March 2023, p 3.

87 Professor Ian Cameron Submission, p 2.

88 New South Wales Bar Association Submission, p 4.

89 See Tania Sourdin, *Briefing Paper - Technology & Justice Intersections*, available at: [https://www.newcastle.edu.au/\\_data/assets/pdf\\_file/0006/789927/Tania-Sourdin-Technology-and-Justice-Intersections.pdf](https://www.newcastle.edu.au/_data/assets/pdf_file/0006/789927/Tania-Sourdin-Technology-and-Justice-Intersections.pdf)

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