



Our ref: 22/74

12 October 2022

Ms Bronwyn Martin
Director of Scheme Design, Policy and Performance
Motor Accidents Insurance Regulation
State Insurance Regulatory Authority
Level 14 & 15, 231 Elizabeth Street
SYDNEY NSW 2000

By email: [REDACTED]

Dear Ms Martin,

Statutory Review of the Personal Injury Commission Act 2020 (NSW)

1. The New South Wales Bar Association (**the Association**) thanks the State Insurance Regulatory Authority (**SIRA**) for the invitation to comment on the Statutory Review of the *Personal Injury Commission Act 2020 (the PIC Act)*.

Overarching concern with the Statutory Review process

2. In addition to the particular concerns with the PIC Act set out below, the Association has an overarching concern that SIRA has been charged with conducting a review of the Personal Injury Commission (**PIC**).
3. The Association considers this is inappropriate for the following reasons:
 - a. there is no evidence that SIRA has any relevant experience or expertise in operating or evaluating the performance of an independent quasi-judicial tribunal;
 - b. the Minister has discretion to determine who conducts the review under section 68 of the PIC Act. There is neither a compulsion, nor any implication, that the review should be conducted by SIRA; and
 - c. section 47 of the PIC Act empowers SIRA to intervene in proceedings in the PIC. In the Association's opinion, this power makes it particularly inappropriate for SIRA to be conducting the review. It has the potential to compromise the actual and perceived independence of the PIC and provides SIRA with an opportunity to criticise decisions

or practices of the PIC and air grievances outside its right of intervention in proceedings.

Particular concerns with the PIC Act

4. [REDACTED]

5. [REDACTED]

Independence from the regulator

- 6. The creation of a Motor Accidents Division in the PIC was intended to provide for a dispute resolution process which was independent of SIRA as the regulator.
- 7. As presently drafted, the PIC Act provides for the regulator to have the following involvement in the PIC:
 - a. under section 19(3)(c), SIRA is entitled to nominate a person to be on the Rule Committee;
 - b. under section 37(2), the Commission is to have regard to any relevant material prepared by SIRA in relation to training or “information”; and
 - c. under section 47, SIRA has a right to be heard in any proceedings before the PIC and may apply for an order for which any party may apply in those proceedings.
- 8. As a result, the regulator can be a party to proceedings in the PIC while simultaneously exercising a role with respect to training and supervision and, most importantly, being involved in the running of the PIC through the Rule Committee.
- 9. The regulator’s power to intervene in proceedings has existed for many years. No other member of the Rule Committee has such power.
- 10. The Association maintains its opposition to SIRA’s inclusion on the Rule Committee on the basis that it creates a perceived, if not actual, conflict of interest given SIRA can be a party to proceedings in the PIC. The inclusion of a SIRA representative on the Rule Committee undermines the independence of the PIC.

11. The Association notes that the appearance of a conflict can be just as damaging as an actual conflict in terms of undermining public confidence in the integrity of the system and the administration of justice.

Medical Assessments in Motor Accident Claims

12. Medical Assessments in motor accident matters remain the major dispute category in the Motor Accidents Division of the PIC, accounting for 58% of cases.¹
13. The Association has previously expressed its concerns in this area, most recently in the Association's submission dated 23 May 2022 in relation to the Clayton Utz Review of the *Motor Accident Injuries Act 2017* (NSW) (**MAI Act**).
14. 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.
15. Further, the workers compensation system provides a right of access to an independent tribunal for the purpose of determining the legal issue of causation. This affords an injured person and an insurer the opportunity to test the evidence at a hearing, as well as a right of review. Once that process has concluded the medical assessor will determine the extent or degree of whole person impairment, the need for treatment, or other medical issues.
16. By contrast, and as previously highlighted by the Association:²

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

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

¹ NSW Personal Injury Commission, *Annual Review 2020/2021*, p. 45.

² NSW Bar Association Submission, *State Insurance Regulatory Authority Consultation on the McDougall Review: COVID-19 and future opportunities for personal injury schemes*, 4 November 2021.

18. Members of the Association have also observed that medical disputes in the motor accident context are more prolonged and often unnecessarily expensive, placing a substantial burden on the medical assessment system under the MAI Act.
19. In the Association's view, applying the workers compensation dispute resolution model to similar disputes under the MAI Act would be fairer, more efficient and more readily facilitate dispute resolution.

Legal Costs in Motor Accident Claims in the PIC

20. As outlined below, the reality is that claimants face significant barriers accessing justice before the PIC without reasonable, adequate remuneration being provided to their legal representatives.
21. There is no equality of arms before the PIC. The MAI Act fails to deliver a fair system for motor accident victims, in part because claimants and potential claimants – who are not legally trained – may be left unrepresented in the face of legally well-resourced insurers.
22. Lawyers are paid \$1,600 for all work performed in relation to a Dispute Resolution Service dispute for statutory benefits. This fee was determined by actuarial assumptions as to the number of disputes which have proved to be wholly inaccurate, as to both the number of claims and the number of disputes.
23. In May 2021 Ernst & Young revised its premium assumptions. The total annual assumed legal expenses (being statutory benefit costs and scale costs in claims for damages) were estimated at \$274M per annum.
24. The Scheme has been running for almost 5 years and total legal costs are only \$95M for the past 12 months. It is acknowledged that this figure has increased significantly over the past three years, but it is still only a third of the assumed amount each year.
25. 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.

Additional matters

26. The Association holds additional concerns regarding several other aspects of the PIC Act.
27. First, section 31(2) provides:

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

Section 33(6) further provides:

The President may remove a decision-maker from office at any time.

28. These provisions may undermine the independence of medical assessors and merit reviewers.
29. Secondly, section 36(1) provides that decision-makers are, in the exercise of their functions, subject to the general control and direction of the President. The independence of those decision-makers from overruling or interference by the PIC (or a member), SIRA or any Public Service employee is preserved under section 36(3).
30. Despite section 36(3), the Association holds significant concerns that the independence of decision-makers may be undermined by the President's broad powers to remove and direct them. The perception of that power is at least as significant as its exercise. It may create a perception that the decision-making tribunal is independent for only so long as a President is of the view that its members are making decisions that meet his or her approval.
31. Thirdly, the Association holds similar concerns in relation to section 33(8), a very broad provision which enables the President to remove a decision-maker from office "at any time". That power encroaches on the independence of decision-makers as it could be used to remove those whose decisions are seen to fall outside particular norms.
32. Fourthly, the Association is concerned about a number of provisions under Division 5.4, PIC Act (Conduct of Proceedings).
33. Section 52(1) provides that:

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.

34. The Association considers that the PIC Act should be amended to provide for a right of a claimant to be heard in person. Such right is an important procedural fairness safeguard, particularly for those claimants who, for reasons of physical or mental (including cognitive) impairment, or for other reasons, may not be able to participate remotely.
35. Fifthly, section 52(2) provides that:

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.
36. The Association submits that a claimant and the legal representatives for the parties should be present for the whole of any proceedings. No party should meet with or appear before a member of the PIC in the absence of representatives for all other parties, other than in circumstances conforming to the usual *ex parte* exceptions recognised by Courts.
37. Finally, section 52(3) provides that:

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

38. We submit that this should be subject to the right of the parties to be heard, again in accordance with important procedural fairness principles. The interpretation of the adequacy of material is a significant threshold issue which should not be determined in the absence of submissions from the affected party. The opportunity to be heard on the threshold issue also enables the PIC to focus on the real issue(s) in dispute.

Conclusion

39. The Association thanks you in advance for considering this feedback. Should you wish to discuss or if the Association may be of further assistance, please do not hesitate to contact Policy Lawyer, Lucy-Ann Kelley at [REDACTED].

Yours sincerely,

[REDACTED]

Gabrielle Bashir SC

President

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