



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC/RHap2007280

21 December 2020

[REDACTED]
Executive Director
Motor Accidents Insurance Regulation
State Insurance Regulatory Authority
Level 6, 2-24 Rawson Place
Haymarket NSW 2000

By email: Motoraccidents@sira.nsw.gov.au

Dear [REDACTED]

SIRA Review of Legal Support for Injured People in the NSW CTP Scheme – supplementary submission

Thank you for the opportunity the Law Society was given to meet with representatives from SIRA and the consultants engaged to conduct the Review of Legal Support for Injured People in the NSW CTP Scheme (the Review) on 9 December 2020. We appreciated the opportunity to discuss our original submission in further detail and to respond to follow-up questions.

As requested, please find enclosed our original and supplementary submissions to the Standing Committee on Law and Justice as part of its 2020 Review of the CTP Scheme.

Additional information sought

During the meeting, the consultants sought additional information about the types of matters that legal practitioners should be able to recover legal costs for, primarily in the event that, ultimately, a legal assistance model is not made available in the CTP scheme.

As raised in our original submission, the Law Society is strongly in favour of extending the ILARS scheme to CTP statutory benefit disputes. We would have strong concerns if this matter is not given very serious consideration, particularly noting the Standing Committee on Law and Justice has previously recommended such an expansion.

In the event, however, that an ILARS-type scheme is not made available to CTP statutory benefit matters, we consider provision be made for recovery of costs by both claimant and respondent lawyers for advice or services provided at any stage of the review process. For example, and as outlined in our submission, we suggest the below matters should become the subject of up-front funding.

1. Initial advice or ad-hoc telephone advice

We suggest provision be made available for legal costs associated with initial or ad-hoc advice. There is currently no provision in the CTP scheme for the recovery of such costs. We consider

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an increased focus on initial advice would help with claimant expectations in relation to the 26-week cut-off period for statutory benefits, would reduce unnecessary disputation by unrepresented claimants and educate claimants on overall scheme design.

2. Advice in relation to internal reviews

We suggest that provision be made for advice in relation to internal reviews as, currently, claimant lawyers do not receive a fee if a dispute does not proceed past the internal review point, even where they have done a significant amount of work which has resulted in an insurer overturning the original decision.

We are concerned that, as a result, more disputes proceed to the Dispute Resolution Service (DRS) for review when, if appropriately resourced, claimant lawyers may be more successful in helping to resolve the matter during the initial stages of the process.

3. Investigations and disbursements during the investigatory stage

There is no fee to investigate a matter or to cover disbursements during the investigatory stage without a risk to a practitioner that they may not be paid (i.e. the system requires a CTP practitioner to take on a matter, proceed through the internal review stage, lodge a DRS application and then apply for costs and disbursements retrospectively). This is not a sustainable model for practice.

Further, in many cases, it results in claimants not being in a position to understand their rights. It also results in practitioners not being in the position to determine the veracity (or otherwise) of the claims. This in turn can deny access to justice to claimants or enable the pursuit of unmeritorious claims through the DRS.

We consider that costs should be allocated for the investigatory stage of a dispute.

4. PAWE and other weekly payment disputes

We note that pre-accident weekly earnings (PAWE) and other weekly payment disputes have become some of the most complex issues in the CTP scheme, primarily where injured persons are self-employed. This is evidenced by the fact that insurance companies regularly rely on forensic accountants to produce PAWE reports for the purposes of determining PAWE.

Currently, regulated legal costs are not recoverable for these types of disputes. In our view, legal representatives should be able to assist claimants with PAWE and weekly payment disputes, and should be entitled to legal fees and disbursements for those services.

5. Cap on costs for medical treatment disputes

We note there is currently a \$6,000 cap on costs, per claim, for medical treatment disputes. This includes other medical disputes such as minor injury or whole person impairment disputes for non-economic loss.

We note, however, that medical treatment expenses for those with minor injuries are available for life. This cap is likely to prove problematic in instances where an insurer consistently disputes expenses and we can foresee issues with claimants being required to pursue the dispute themselves against an insurer after the first three to four disputes. This cap also has the potential to drive adverse insurer behaviour by incentivising the raising of repeated medical disputes until legal access under the cap is exhausted.

We suggest, therefore, that the cap on medical treatment disputes be removed entirely.

6. Costs for appearances

It is currently unclear whether practitioners must apply for costs for appearances at assessment conferences or hearings under the 'exceptional circumstances' provisions under section 8.10(4) of the *Motor Accident Injuries Act 2017*.

We suggest that it should be clarified that the cost of appearing at an assessment conference is allowable on top on the flat fee of \$1,660, given that an assessor is only likely to hold an assessment conference in cases of sufficient gravity to justify it being held, such as with disputes on fault or contributory negligence. Similarly, we consider it should be clarified that the cost of preparation for an assessment conference is allowable as an extra cost on top of this flat fee.

This would reduce the need for a further, and inevitable, application to the DRS for recovery of such costs.

Interviews with CTP claimants

We understand the consultants have also sought the details of claimants who may have had issued with insurers and / or the complexity of the CTP scheme. We have passed this request on to members of the Injury Compensation Committee, who will provide these details to you directly.

Thank you again for an opportunity to meet and to contribute to this consultation. Should you have any questions in relation to this submission, please contact [REDACTED]

Yours sincerely,



Richard Harvey
President

Encl.