THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC/RHap1986214

2 December 2020

[redacted]
Executive Director
Motor Accidents Insurance Regulation
State Insurance Regulatory Authority
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By email: Motoraccidents@sira.nsw.gov.au

Dear [redacted]

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

The Law Society of New South Wales welcomes the opportunity to provide a submission to the State Insurance Regulatory Authority's (SIRA) Review of Legal Support for Injured People in the NSW Compulsory Third Party (CTP) Scheme (the Review). The Law Society's Injury Compensation Committee has contributed to this submission.

We understand that the Review will be inquiring into:

1. whether current legislative, regulatory and service provision of legal support is promoting the objects of the *Motor Accident Injuries Act 2017* (the MAI Act), including:
    - encouraging the early resolution of motor accident claims, and
    - the quick, cost-effective and just resolution of disputes, and
2. the feasibility of expanding the Independent Legal Assistance and Review Service (ILARS) into the CTP scheme, as well as the role and alignment of SIRA's Legal Advisory Service (LAS) to the suite of supports injured people are able to access in the scheme.

This submission addresses the Review's key areas of focus, as outlined above.

1. The current legislative, regulatory and service provision of legal support

The Law Society has been engaging with the NSW Government, including SIRA, for a number of years over our concerns about the issues arising from a prohibitive costs framework in the CTP scheme. Generally, we are concerned that the current legislative and regulatory framework is failing to promote many of the MAI Act's objects, and does not encourage the early resolution of motor accident claims or the quick, cost-effective and just resolution of disputes. In our view, the counterintuitive nature of many of the regulated costs provisions serve to enhance disputation rates and discourage early and prompt resolution of disputes, thereby increasing overall costs to the scheme. The Law Society has identified various unintended consequences associated with the regulated costs provisions.

In addition to the submission we made to SIRA in December 2018 (enclosed), our comments on the issues with the scheme's regulated costs framework are outlined below.

Current costs model

Legal costs available to lawyers under the CTP scheme are governed by the MAI Act and the *Motor Accident Injuries Regulation 2017* (the Regulation).

The system is based primarily on payment of a fee to a solicitor for the resolution of a matter at various points in the dispute resolution process. The Law Society continues to hold strong concerns that the costs available to legal practitioners for services under the scheme are inadequate, and represent a significant underfunding of the work required of lawyers working in the system, particularly in the context of statutory benefit disputes.

We understand that some legal practitioners are, on occasion, having to personally bear costs incurred outside of those provided for under the Regulation, for example in relation to preliminary advice. There is also 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 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 Dispute Resolution Service (DRS).

We are particularly concerned that without resolution of the legal costs issues, the availability of competent legal practitioners to assist stakeholders under the scheme may diminish as the administrative and other costs associated with professional legal services continue to make the provision of those services untenable for many practitioners. This will inevitably have an adverse impact on the capacity of decision-makers to resolve disputes in a timely, just and cost-effective manner, and on the ability of injured people to access justice under the scheme.

Insurer representatives

We note that under clause 3 of Schedule 1 to the Regulation, where an insurer's solicitor can demonstrate to a Dispute Resolution Officer that a review is not merited, insurer representatives are entitled to recover payment of up to 8 monetary units. Where the dispute proceeds to a review panel assessment, both parties can recover 16 units.

In our view, the reduced fee for bringing the dispute to an end at an early stage fails to account for the fact that a reply involves a two-step process:

1. the respondent must address whether there is cause to suspect error; and then
2. if such cause exists, the merits of the application regarding the subject matter must be dealt with.

In practice, this is dealt with in a single reply, which means the same amount of work goes into a reply regardless of what stage the dispute is determined. This is a cost-effective way to manage the dispute, but it may involve a detailed set of submissions addressing the relevant authorities around the alleged legal error.

We query the rationale behind lowering the recoverable fee for the quick resolution of the dispute if an insurer representative has been wholly successful in preventing an unmerited claim proceeding to the DRS and ultimately, saving the scheme costs. We understand the cost of convening three assessors for a review panel would be greater than 8 units.

The Law Society is concerned these provisions, which result in legal representatives recovering lower fees for better outcomes, act as impediments to proper legal representation in the motor accidents scheme.

We therefore recommend subparagraph 1(3)(b)(ii) of Schedule 1 to the Regulation be amended to remove the 8 unit restriction and enable legal representatives to recover costs in line with the recoverable amount for disputes that progress to the DRS for review.

Claimant and insurer representatives – costs for services

We note there is no provision for recovery of costs for initial advice or ad-hoc telephone advice. We consider 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. Early legal advice is not something which can be provided by CTP Assist, whose role is limited to providing non-legal guidance.

We also note 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 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.

We suggest 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.

Claimant representatives – timing for the provision of costs

Presently, CTP insurers approach the payment of legal costs associated with statutory benefits disputes differently. Some insurers will pay on receipt of the invoice once a claim is lodged with DRS, while other CTP insurers prefer to wait until the conclusion of the dispute to pay an invoice. Our members have advised that there are presently two CTP insurers who refuse to pay an invoice without an order from DRS and on almost every occasion, refuse to pay the nominal $1,660 plus GST fee which is currently prescribed by the Regulation.

Practitioners under the scheme are required to apply to DRS for a merit review of legal costs, put on submissions justifying why costs are justified and wait a further three or more months for the issue to be resolved. Practically, we consider this approach is a drain on the NSW CTP scheme and is enabling unnecessary disputes to proceed to DRS. We suggest the legislation be amended to clarify that the entitlement to the full regulated legal fee is triggered on the lodgement of a regulated statutory benefits matter with DRS (irrespective of the outcome of the dispute) and is payable by the insurer on the conclusion of that dispute, without an order from DRS being required.

<u>PAWE and other weekly payment disputes</u>

The Law Society understands that the initial reasoning behind not allowing legal fees for pre-accident weekly earnings (PAWE) and other weekly payment disputes, was the assumption that injured people would be able to work out the payments with the insurer's assistance or alternatively, directly with DRS.

In practice, however, PAWE has become one of the most complex issues in the CTP scheme, primarily where injured persons are self-employed. 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. We suggest the legislation be amended to provide for legal costs for these services.

Recovery of costs and expenses

We note that some insurers refuse to pay legal representatives for medical disputes without a cost order. This is because clause 2 of Schedule 1 to the Regulation provides that costs for medical disputes can only be allowed by a claims assessor or a court. Further to our submission to SIRA from December 2018, we note this is problematic because medical disputes are routinely referred by DRS directly to a medical assessor (not a claims assessor) and medical assessors have no power to award costs. As stated above, in our view, this is an unnecessary scheme friction point which should be addressed.

Issues with sections 8.3 and 8.10 of the MAI Act

The Law Society notes that in the recent decision of *AAI Ltd trading as GIO v Moon* [2020] NSWSC 714, Justice Wright of the Supreme Court found it difficult to reconcile sections 8.3(4) and 8.10 of the MAI Act. Ultimately, Justice Wright determined that regardless of the outcome of their dispute, a claimant is entitled to costs as there is nothing in the MAI Act to prevent an award of costs to an unsuccessful party.[1]

Justice Wright noted there are two main provisions relating to costs: section 8.3, which deals with costs between a party (claimant or insurer) and their lawyer in claims for statutory benefits and claims for common law damages; and section 8.10, which deals with the costs between two parties (claimant and insurer) in a statutory benefits claim only and prevents an insurer recovering costs from the claimant, but does allow a claimant to recover costs from the insurer.[2] His Honour found that under subsection 8.10(3) of the MAI Act, there are two means by which a claimant can be paid costs by an insurer; either because the Regulation provides for it, or because DRS permits it. His Honour found, therefore, that there are two corresponding categories of legal costs recoverable from an insurer:

a) all legal costs that do not exceed the maximum costs fixed in the Regulation; and
b) costs which exceed the maximum costs fixed by the Regulation if DRS permits this, in accordance with the circumstances set out in subsection 8.10(4).

Justice Wright determined that DRS can permit the payment of legal costs over and above the regulated amounts if the claimant is under a legal disability or because there are exceptional circumstances in the claim. This is because solicitors acting for infants or persons without legal capacity might be required to undertake more work than for a claimant without such legal disability.[3] Other cases may be exceptional because of an 'unusual degree of factual or legal complexity … requiring the incurring of more substantial legal costs by a claimant'.[4] His Honour acknowledged that costs still had to be reasonable and necessary, but he clearly recognised that for some claims, costs over and above the regulated amounts can be recovered from the insurer.

The Law Society suggests that sections 8.3 and 8.10 of the MAI Act be amended to clarify what costs are payable, and how, in both a statutory benefits and a common law damages claim.

We further note that section 8.10 of the MAI Act only applies to claimants, and not insurers. To address the disparity between the costs available to claimant and insurer lawyers, the Law

[1] *AAI Ltd trading as GIO v Moon* [2020] NSWSC 714 at [82].
[2] Ibid, see [70], [72] and [74].
[3] Ibid, at [98].
[4] Ibid, at [99].

Society suggests that the MAI Act also be amended to clarify that, in line with the Supreme Court's decision, costs over and above the regulated amounts be recoverable by both claimants and insurer lawyers.

Access to justice under the scheme

As we have raised previously, the Law Society holds strong concerns that the current costs regime inhibits access to justice for parties under the CTP scheme. We note that, according to the most recent publicly available data provided by SIRA over the past 12 months, only 22.42% of claimants have had legal representation.[5] Under the current scheme, therefore, various claims continue to be dealt with in circumstances where claimants may not have access to appropriate and independent legal advice.

We note that '25.2% (1.88 million) of NSW residents speak a language other than English at home and between 6% and 40% (depending on the age range) of those who do so, cannot speak English very well, or cannot speak English at all'.[6] Some persons injured or relatives of those killed in car accidents have mental health issues, cognitive impairment issues and chronic pain issues. We are concerned that many of these people are vulnerable and are at risk of being denied access to benefits and compensation if they do not retain a lawyer to advocate for them against a powerful and knowledgeable insurer.

While the Law Society supports the development of a non-adversarial CTP insurance scheme, in practice, the current systems and structures do not support this objective. The complexity of the scheme and the power imbalances between parties necessitates the availability of legal assistance, both at the early and later stages of the dispute. Indeed, we consider that many of the fundamental problems with the current CTP scheme have occurred as a direct result of the decision to remove or significantly reduce the role of lawyers in the scheme without sufficient attempts to build processes to ensure that injured people are given easy access to the benefits they are entitled to, the information or support they need to understand and pursue their legal rights, or the treatment they need to recover.

We continue to hold the strong view that the availability of expert legal advice to help all stakeholders under the CTP insurance scheme is crucial to creating a fair compensation scheme within the current CTP insurance framework.

2. The feasibility of extending legal funding to the CTP scheme

The Law Society notes that on 1 March 2021, the Personal Injury Commission (PIC) will be established, with jurisdiction over CTP disputes. In our various submissions to the Government in relation to the establishment of the PIC, the Law Society has continued to advocate that the primary consideration in establishing a joint Commission must necessarily be whether such a Commission would result in better outcomes for parties involved in the process.

We note that the Standing Committee on Law and Justice's 2018 Review of the Workers Compensation Scheme report recommended (recommendation 3):

> *'That the NSW Government preserve the Workers Compensation Independent Review Office and Independent Legal Assistance and Review Service in the workers compensation scheme, and expand its services to claimants in CTP insurance scheme disputes.'*

[5] State Insurance Regulatory Authority, "CTP Open Data" portal, accessed 27 November 2020 < https://www.sira.nsw.gov.au/CTP-open-data>.
[6] Judicial Commission of NSW, "Equality before the Law Bench Book", accessed 18 November 2020, < https://www.judcom.nsw.gov.au/publications/benchbks/equality/section03.html>.

The Law Society considers that this approach to funding for legal representation is crucial to the development of the PIC. The Law Society continues to hold strong concerns that without appropriate consideration being given to developing a model for legal representation in the Motor Accidents Division of the PIC, accessibility issues will continue to manifest.

As we have advocated for previously, the Law Society supports the role of the ILARS, managed by an independent Workers Compensation Independent Review Office. We support the availability of an ILARS-type model to legal funding being extended to statutory benefits disputes in the 2017 CTP scheme.

The Law Society urges SIRA to ensure that claimants under the CTP scheme are given the same access to legal representation as injured workers are under the workers compensation scheme.

3. Comments on the statistics provided

We note the statistics SIRA provided to legal stakeholders on 9 November 2020 to assist with submissions to this Review. We have had the benefit of reviewing the comments made by the Australian Lawyers Alliance. We echo the concerns raised, particularly that without a further breakdown of the figures, these statistics provide little meaningful data for a true comparison between the legal costs paid to claimant and insurer representatives (noting disbursements, counsel fees and other unregulated costs such as accountant reports are likely included in the total figure at item 1, while the figure at item 3 likely does not include such costs as insurers obtain the majority of disbursements before outsourcing a file).

We further note, in relation to the figure at item 8, that costs over $1,660 do not necessarily indicate an exceptional costs order, noting:

- a costs penalty under section 6.23 of the MAI Act will give a 25% increase of the maximum (which is more than $1,660),
- disbursements may take the sum over $1,660, and
- awarding costs in two disputes assessed at the same time will increase the sum of the costs to over $1,660. For example, if there is a dispute under sections 3.11 and 3.28 of the Act, and if there is also a section 3.38 dispute (which occurs regularly), the sum of $3,320 plus GST will appear on the certificate.

We suggest that to provide meaningful insight into scheme performance and the true costs of managing the scheme, consideration be given to providing more robust and granular scheme figures.

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

Yours sincerely,

Richard Harvey
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

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6 December 2018

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Dear [redacted]

Costs regulations matters

The Law Society notes the recent introduction of the Motor Accident Injuries Amendment (Indexation) Regulation 2018 ('the Indexing Regulation') and the decision to index costs for legal services to inflation. We also note that the State Insurance Regulatory Authority ('SIRA') has promptly uploaded relevant costs amounts to the SIRA website, and we thank the Minister and SIRA for these recent developments.

As part of the Law Society's ongoing consultation with SIRA, we make the following targeted recommendations in relation to the current costs regime for CTP matters, further outlined below:

1. That in circumstances where an insurer makes an allegation that a claimant (or one of the claimant's witnesses) has made a statement knowing that it is false or misleading in a material particular in relation to the claim, both the insurer's costs and the claimant's costs not be restricted by the provisions of clause 8 of the Motor Accidents Compensation Regulation 2015 ('MAC Regulation') or clause 25 of the Motor Accident Injuries Regulation 2017 ('MAI Regulation').
2. That the MAC Regulation be amended to provide for an annual indexation of costs.
3. That costs be increased for infant settlement approval cases.
4. That costs for liability disputes in the MAI Regulation regime be amended to include an allowance for an advocate's fee at a hearing; for a view (hourly rate and travel); and for the taking of statements (hourly rate or per conference).
5. That the MAI Act and/or the MAI Regulation be amended to provide clear and unambiguous jurisdiction to appropriate decision makers to assess costs in relation to all statutory benefit disputes.
6. That section 8.10(4) of the MAI Act be clarified and the MAI Regulation be amended to provide jurisdiction to claims assessors so they can appropriately assess costs in statutory benefit claims.

1. Regulated costs in fraud cases

Issue

- Insurers may be successful in defending or minimising a claim when they prove that the claim is fraudulent or that the claimant (or one of the claimant's witnesses) has knowingly made false or misleading statements in connection with the claim.
- Claimants may be accused of making a fraudulent claim or making false or misleading statements in connection with a claim but may be successful in their claim and defeat the insurer's allegation.
- The costs regulations do not permit contracting out on the part of either party if the claimant is awarded less than $50,000 (under the *Motor Accidents Compensation Act 1999* – 'MAC Act') or $75,000 (under the *Motor Accident Injuries Act 2017* – 'MAI Act').

In 2016, the costs provisions in the MAC Regulation were amended in the face of the investigations undertaken by NSW Police Force/SIRA Strike Force Raven and the number of fraudulent and exaggerated claims that were discovered. The MAC Regulation was amended by the insertion of clause 8, which served to restrict a solicitor from contracting out of the regulated fees if the claimant was awarded less than $50,000. The MAI Regulation contains a similar provision at clause 25, but applies in relation to claims worth less than $75,000. The costs provisions apply to solicitors acting for insurers as well as solicitors acting for claimants.

Whilst we note the aim of the amendment to the cost provisions was to discourage the making of unmeritorious claims, we submit that the amendment to the regulation has had unintended consequences. In circumstances when a fraudulent claim is uncovered (such as a staged accident), and the claimant is confronted with evidence to this extent, the claim will often be withdrawn by the claimant, resulting in an award of no dollars to the claimant. In such cases it is entirely appropriate that the claimant not recover costs, however we submit that this creates an unfairness for the lawyers acting for the insurer who are also not able to recover costs in circumstances where significant time, work and effort goes into uncovering an unmeritorious claim. In cases where claims are made in the order of many hundreds of thousands of dollars and the insurer is successful in proving that the claim is exaggerated, the claimant may ultimately be awarded an amount less than that proscribed in legislation (either $50,000 or $75,000). In such cases, we submit that lawyers acting for the claimant should maintain the ability to recover some costs (as allowed for by regulation), however we note that this again leaves the lawyers acting for the insurer at a disadvantage that is not of their own making. In that situation, the insurer's lawyers are restricted to charging the limited sum allowed under the regulation, which is often insufficient to remunerate them for the work and effort undertaken to expose an exaggerated claim.

Insurers are regularly required to expend significant sums in legal costs defending unmeritorious claims. Insurer costs are also governed by the restrictions contained in the regulations and are, in the Law Society's view, insufficient to enable a lawyer acting for an insurer to recover an appropriate and accurate amount of costs of defending an unmeritorious claim. Proving fraud or exaggeration often requires many hours of hard work analysing documents and statements, linking claims and claimants, insured owners and drivers, vehicles and accident locations to find patterns. Noting that one of the objects of both Acts is to deter fraud, it is the view of the Law Society that this is not promoted in circumstances where insurer lawyers who are successful in appropriately eliminating or seriously reducing the value of a claim are not properly compensated for the work done.

It is also the experience of our members that on some occasions insurers have made unmeritorious allegations of fraud or unsubstantiated allegations that a claimant has made false or misleading statements in an attempt to coerce a claimant into accepting an offer less than the value of the claim. We note that claimant solicitors are often also required to expend significant sums defending allegations made by insurers which may or may not be proved. Is It therefore the view of the Law Society that solicitors acting for claimants, where there is an allegation of fraud or the making of a false or misleading statement, should also be excused from the cost restrictions nominated in the regulation to enable them to properly defend the often serious allegations made.

Recommendation
That the MAC Regulation and the MAI Regulation be amended to enable insurers and claimants to contract out of the regulated fees in all matters (including those matters resolved for less than $50,000 or $75,000) in circumstances where the insurer makes or has made an allegation in writing that the claimant (or one of the claimant's witnesses) has knowingly made false or misleading statements in connection with a claim.

2. Indexation of costs for matters dealt with under the MAC Act

Issue
- The Indexing Regulation provides for the indexing of costs available in MAI Act matters, however no similar indexation provision has been made for the indexing of costs available in MAC Act matters.

The Law Society notes that the costs of operating a legal business in this practice area continue to increase regardless of whether the solicitor is undertaking MAI Act matters or MAC Act matters. Motor accident claims have historically had a 'long tail', and it is likely that there will be claims being assessed under the MAC Act for many years in the future.

The indexation of legal costs under the MAI Act acknowledges the simple fact of inflation and other relevant matters and ensures that costs can keep pace with the consumer price index. We are grateful that the Government has acted on this issue. However, we submit that it is only fair that costs under the MAC Act also be also indexed.

Recommendation
That the MAC Regulation be amended to provide for an annual indexation of costs in a similar way to the indexation of costs under the MAI Regulation.

3. Costs in infant approvals

Issue
- Under clause 8A of the MAC Regulation, if an infant claimant's case is settled for under $25,000, a solicitor can charge up to $5,000 for legal costs. If the claim resolves for between $25,000 and $50,000, a solicitor is entitled charge up to $10,000 for legal costs. Clause 26 of the MAI Regulation contains similar provisions but adds a third category for claims worth between $50,000 and $75,000.

It is our view that it is currently unclear whether a solicitor is also able to charge for disbursements including the court filing fee (which is required to be paid in all infant cases), and medical evidence in support of the claim and approval. We submit that if the total amounts include disbursements, these are grossly inadequate and unfair.

All settled infant claims should be referred to the court for approval to ensure certainty. As infants have no capacity to enter into a contract such as a settlement deed, an unapproved settlement could see the insurer met with a further claim a significant period of time in the future.

We note that infant approval matters require the payment of a court filing fee as well as briefing of counsel, as the court requires confirmation from counsel that a settlement amount is recommended. As such, it is our view that legal costs permitted for even a small claim could be taken up almost entirely by disbursements.

We note that none of the amounts proscribed for costs listed in clause 8A of the MAC Regulation and clause 26 of the MAI Regulation are indexed. It is our view that this operates particularly unfairly in children's matters, as children's claims often cannot be settled for a number of years after an accident has occurred due to the full extent and impact of the accident not being initially clear.

Anecdotal information from Law Society members indicates that practices that led to the amendment of the MAC Regulation with regard to infants have been addressed and appear to be in decline. The Law Society submits that it would be appropriate for the amounts to be relaxed and for the explicit exclusion of disbursements from the regulated lump sum for professional costs.

Recommendation

That amounts able to be charged by a legal practitioner in accordance with clause 8A of the MAC Regulation and clause 26 of the MAI Regulation be:

1. Indexed annually;
2. Increased; and
3. Amended to exclude (from the capped figure) disbursements such as medical report fees, court filing fees and counsel's fees.

4. Costs of liability disputes in the MAI Act regime

Issue

- Insurers are able to deny all liability for a claim for statutory benefits on the basis that the accident is not a motor accident, or for other statutory reasons.
- Insurers are able to deny liability to pay statutory benefits beyond the first 26 weeks on the basis that the claimant was wholly or mostly at fault.
- Claimants are not entitled to legal costs for making an application for internal review of the insurer's decision.
- Although claimants are entitled to legal costs for subsequently taking a dispute to the DRS and having that dispute heard and determined by a claims assessor, legal costs for such miscellaneous claims assessment matters are capped at $1,600 (indexed to $1,630) and no additional costs are allowed.

When an insurer denies liability for a claim, the claimant has a right to challenge that decision. As has been shown in relation to matters under the MAC Act regime (and which also appears anecdotally to also be the case under the MAI Act), these challenges have on some occasions been successful.

We submit that 'claims killer' disputes should be resourced properly so that injured persons can access justice and the benefits to which they are entitled. The Law Society notes anecdotal information from claims assessors that suggest they are presiding over complex disputes relating to liability that would ordinarily be heard in a multi-day trial in the District Court – disputes which often include expert accident reconstruction reports and statements from multiple witnesses.

To ensure the correct decision is made about an insurer's liability, the claims assessor may need to hold a hearing and take oral evidence from the claimant or other witnesses. In these disputes the insurer may also seek to produce witnesses such as the insured driver, undertake a view of the scene of the accident or conduct other investigations.

The amount that an insurer or claimant's solicitor can recover for pursuing a dispute regarding liability under the MAI Act regime is limited to $1,600 (recently indexed to $1,630). We note that professional costs for attendance at an assessment conference hearing or conducting a conference with a witness are claimable under the MAC Regulation on a full assessment or an interlocutory-type matter such as a late claim dispute.

Recommendation
That the MAI Regulation be amended to provide for the following in addition to the capped costs:

- An amount for a face-to-face assessment conference hearing of $1,250 (the same amount as under the MAC Regulation, but to be indexed); and
- an amount for the cost of a conference with a party to the assessment or a witness (the same amount as under the MAC Regulation, but to be indexed).

5. Costs assessments for MAI Act statutory benefits disputes

Issue

- Clause 2(1) of Schedule 1 of the MAI Regulation provides that the maximum legal costs for a medical dispute is 16 monetary units "as allowed by the claims assessor or court". It is our view that this is to be interpreted as meaning that legal costs are not payable for a medical dispute unless the dispute is referred to a claims assessor for a costs assessment to be made. We submit that this could create inefficiencies through having matters passed between decision makers with one deciding the substantive matter and the other making the decision in relation to costs.
- Clause 1(aa) of Schedule 2 to the MAI Act gives jurisdiction to merit reviewers to determine under section 8.10 of the MAI Act whether "the costs and expenses incurred by the claimant are reasonable and necessary". We submit that acts to limit the power to assess costs to merit reviewers only and may lead to inefficiency if, for example, a claims assessor is not empowered to determine costs when assessing a miscellaneous claims assessment matter.
- We submit that section 8.10 of the MAI Act is unclear in its operation

Under the MAC Act, a claims assessor or the court determines costs at the conclusion of the claim. When making this decision, the claims assessor or the court includes the costs of medical disputes referred to the Medical Assessment Service ('MAS'). Costs associated with disputes that arise in connection with the claim before the claim itself is determined are assessed by claims assessors when the dispute is determined.

Under the MAI Act, individual medical disputes, merit review matters and claims disputes may occur at many stages during the life of the statutory benefits claim and there is no concluding point to a statutory benefits claim for someone who is not at fault and has a non-minor injury, other than the general effluxion of time.

It has been the experience of our members that not all injured persons will have both a statutory benefits claim and a common law claim. As such, it is unfair for some injured persons to be made to wait for costs assessments to be completed months or

years after the disputes are determined. We therefore submit that it is important that proper provision be made for the timely assessment of legal costs associated with all types of statutory benefit disputes.

We also submit that there is tension between clause 1(aa) of Schedule 2 to the MAI Act (which appears to give only merit reviewers power to determine disputes about costs) and section 6.21 of the MAI Act (which gives a claims assessor power to impose a costs penalty) and clause 2(1) of Schedule 1 to the MAI Regulation (which gives a claims assessor power to assess the costs associated with a medical dispute). To avoid disputation, we submit that the Act and/or Regulation be amended accordingly. The Law Society submits that costs assessments should be undertaken by persons with the appropriate expertise at the conclusion of the individual dispute regardless of the method of conclusion (whether through settlement, determination, etc.). We submit that it would be preferable for the person assessing the substantive dispute to also assess the costs associated with that dispute. Further, we submit that the guidelines be amended to provide an appropriate mechanism for the resolution of costs disputes.

We also submit that section 8.10(4) of the MAI Act requires clarification. Section 8.10(1) provides that a claimant can recover 'reasonable and necessary' costs associated with a statutory benefits claim. Section 8.10(2) provides for the regulation of costs, and section 8.10(3) appears to limit reasonable and necessary costs.

The costs regulation only permits a claim for costs associated with disputes that arise, and is limited only to disputes referred to DRS. We submit that if section 8.10(4) was designed to permit the departure from the regulated costs in the case of infants or in exceptional circumstances, this is not currently clear. It is the submission of the Law Society that claims assessors (who are currently all personal injury lawyers), and not merit reviewers, would have the necessary and more appropriate expertise to 'permit' payment and assess costs in those circumstances.

Recommendation

That the MAI Act and/or MAI Regulation be amended to provide clear and unambiguous jurisdiction to appropriate decision makers to assess costs of all statutory benefit disputes. We further submit that the Act and/or Regulation should be amended to clarify when the liability to pay costs arises (i.e. upon lodgement of the application) and when costs should be assessed (i.e. at the conclusion of the dispute, regardless of the outcome of the dispute – be it by settlement, determination or dismissal of the application).

Section 8.10(4) of the MAI Act should also be clarified and the MAI Regulation be amended to provide jurisdiction to claims assessors to assess costs in the course of conducting a statutory benefits claim, and depart from the regulated amounts in the case of persons lacking in legal capacity or in other exceptional circumstances.

Should you have any further queries in relation to this issue, please contact the Committee's Principal Policy Lawyer, [redacted]

Yours sincerely,

Doug Humphreys OAM
President