

# **Insurer claims handling and dispute resolution in compulsory third party (CTP) motor accident insurance**

**January 2017**

**State Insurance Regulatory Authority Board**

# Contents

Executive summary	3
Introduction	9
Background and context	10
Advisory and advocacy service	17
Dispute resolution	22
Appendix A – Summary of stakeholder submissions	26
Appendix B - Consultation questions	47

## Executive summary

This report summarises the consultations conducted by the board of the NSW State Insurance Regulatory Authority following the release of the NSW Government's discussion paper 'Claims handling and dispute resolution in compulsory third party (CTP) motor accidents insurance'. The State Insurance Regulatory Authority (SIRA) Board consulted with stakeholders on three specific areas:

1. The culture and process of claims management within the CTP scheme;
2. CTP advisory and advocacy services; and
3. Dispute resolution within the scheme.

The comments and recommendations from stakeholders on each area are summarised here.

### 1. Culture and claims management

Stakeholders were almost universally in agreement on the need to improve both the claims management culture and the process of claims management. Recommendations from stakeholders addressed the entire cultural ecosystem of claims management:

- Regulators, insurers and others must remain vigilant in identifying exaggerated or fraudulent claims.
- Regulators, insurers and all health and medical service providers should encourage injured people to focus on swift return to wellness, function and work, simplifying and reducing the time elapsed between injury and settlement of claims.
- The reigning paradigm of the CTP system should shift from a lengthy process with a focus on lump sum payments to the injured person's rapid recovery and return to wellness, work and life.
- The shift must involve all participants in claims management, advocacy and dispute resolution, and will require changes in organisation and organisational culture; outlook; skills; behaviour; and the structure, regulation and incentives that influence the system's effectiveness.
- Much greater clarity, simplicity and transparency are required: injured road users need clear, comprehensible and transparent information about what to do when injured in a road accident, making a claim, and the claims process, so that injured people can understand and better manage their trajectory.
- Insurance companies' claims management culture and processes need to speed up, encourage more effective treatment protocols, and focus on recovery.

- Similarly, the legal profession should assist the injured person to focus on the fullest and swiftest return to health, function and work.
- A single, independent specialist medical professional for assessment of the injured person is preferable to the frequent use of ‘duelling doctors’ leading to higher costs and delay in recovery.
- Allied health professionals should be encouraged (by contemporary protocols, certification, and use of digital enablement) to improve the efficacy of treatment of injured road users.
- SIRA should require all health professionals to apply scientifically validated methods to identify injured people who will not recover readily – and will need additional support - and make insurers responsible for applying such tools during initial triage.
- Treatment regimes should be more closely monitored, and the regulator and insurers should require the use of contemporary best practice guidelines, linking treatment fees with use of contemporary guidelines.
- Stakeholders expect that SIRA will apply its powers to define and drive cultural change within the scheme, and offered the Reference Panel wide-ranging practical measures SIRA could support to achieve reform of the scheme.
- The majority of stakeholders involved in processing and settling claims supported a simplified, defined benefits scheme for minor injuries, such as minor whiplash and psychological injuries, as proposed in the Government’s position paper. They did, however, point out the likelihood of disagreement and disputes at any significant eligibility juncture within the new scheme. Those representing the legal profession were strongly opposed to introduction of a defined benefits scheme, and predicted likely controversy would surround benefit eligibility criteria.

## **2. Advisory and advocacy services**

The Reference Panel heard a wide range of views and options about expanding the scope of advisory services within the CTP scheme. There was wide agreement that the aims of reform of advisory and advocacy services should be to enable speed, clarity and simplicity in the system through transparent, clear and comprehensible information about processes so that injured people can understand and better manage their trajectory through the system. The majority of stakeholders noted that the public at large has little understanding of the current CTP scheme, and any future scheme would benefit from a broader understanding. They cited the promotion activities supported by the Transport Accident Commission (TAC) in Victoria as a potential model. A support service would enable the potential benefits of providing immediate and easy access to the scheme for injured people.

Opinions differed widely about whether a 'claimant advocate' should perform some of the more basic services currently performed by legal practitioners. However stakeholders were in agreement about the imbalance or asymmetry of information between injured people and other actors in the system – insurers, health professionals, solicitors and barristers. Disability groups and others representing injured people argued in favour of an enhanced support service that would provide general information, guidance, and support to people injured in road accidents. Assistance is particularly needed, they noted, by socio-economically disadvantaged groups such as Aboriginal people, people from diverse cultural and linguistic backgrounds and people with disabilities.

Several stakeholders noted that the public at large, and in particular those involved in road accidents, were not sufficiently aware of how best to navigate the CTP scheme. More widely available information and support was seen as critical during the period of reform, and especially vital to the success of a new paradigm focussing on rapid recovery.

Specific recommendations included:

- Thoughtful consideration of the support service design, its objectives, intention, type, reach, scope, and scale.
- Expansion of SIRA's existing current Claims Advisory Service (CAS).
- Essential assistance should include advice on: claim lodgement and the claims process; completing forms and additional documents that may be required; the use of new tools and the interpretation of new guidelines (e.g., digital portals; comparison tables); communication between injured persons, insurers and treatment providers; understanding decisions made by insurers; considering options that may be available to them in response; and identifying ineffective treatment providers.
- Advice and assistance to professionals involved in the scheme, including health, legal, community service and government participants, to understand the implementation of changes introduced in the reform.
- A range of different options about specific services an expanded advisory service could feasibly and productively offer within the CTP scheme. Most salient were differing views about whether a 'claimant advocate' should perform some of the services currently offered by legal practitioners.
- Consensus that the support and advisory service should not replace specialist lawyers in complex cases.

Some stakeholders stated that the advisory service should act as the first step in dispute resolution, with the authority to make "small" decisions concerning treatment disputes, and, when necessary, providing access to details of 'accredited' lawyers.

Other stakeholders cautioned that the expansion of SIRA's services to a full advocacy service, including legal advice and opinions, could prove extremely costly as well as duplicative because it would require recruitment of a large number of seasoned legal specialists.

Views differed on the extent to which an enhanced advisory service could be seen to be independent, and how best to achieve actual and perceived independence.

Finally, there was general agreement that close monitoring and evaluation of an enhanced advisory service would be vital to determine whether the service was addressing the goals of the reform. Stakeholders recommended a staged introduction, with further enhancements following assessment of the service after several years.

### **3. Dispute resolution**

Stakeholders expressed divergent views about the reform of the dispute resolution process. Strongly differing views were expressed about the process and roles of the major parties involved in the dispute process: the legal profession, the medical and allied health professions, and CTP insurers.

However, all stakeholders expressed concern for injured people and their families, and a shift to enabling swift and full recovery, while ensuring individuals' rights within the system. There was widespread criticism of the 'multi door' approach adopted in the NSW Workers Compensation scheme, with most stakeholders urging a 'one door' approach, less complexity in process and an expedited timeframe for dispute resolution.

Specific recommendations included:

- The dispute resolution system should minimise uncertainty for all parties.
- The goal of reform of the dispute resolution process in CTP should be minimising points of disputes and reducing the timeframe of disputes that unnecessarily delay both resolution and return to wellness.
- A three-tiered model including greater role for insurers in more effectively managing claims and disputes in the first instance

Representatives of several of the major stakeholders disagreed with aspects of the alternative models proposed in the Government discussion paper, and proposed constructive modifications. They included:

- A single medical assessment conducted by a certified panel of medical specialists, applying a "first cab off the rank" model, to avoid the unnecessary and time and costs in the current process.
- A single door approach for Tier 2 disputes, thereby combining features of Options 2 and 4 in the discussion paper.

- A staged approach to the introduction of a revised dispute resolution system, establishing a 3-year period of gradual reform and analysis of the full range of reforms proposed in the discussion paper.
- Harmonisation of differing approaches to personal injury management and dispute resolution under different NSW Government schemes.

There was some consideration about the advantages and disadvantages of transferring relevant dispute functions to a cross-Government entity like NCAT (Civil and Administrative Tribunal). However, prevailing sentiment was that SIRA should oversee essential reforms in both claims management and dispute resolution first, and then weigh the pros and cons of transfer.

#### **4. Other issues, including implementation, communication and greater use of digital systems**

- Most stakeholders considered that SIRA now has adequate powers to regulate a revised CTP system.
- Referring to the implementation of Workers Compensation reform and injury system reforms in other jurisdictions, some stakeholders identified valuable lessons for CTP reform in NSW, including measures to avoid.
- Several stakeholder groups suggested a single portal approach, similar to that used in Western Australia.
- Stakeholders urged greater use of data collection, analysis and feedback to all system participants, as well as a means for SIRA to monitor, manage and adjust the system.
- There was broad support for use of modern communications and dissemination of information to the public as well as to injured workers. It was recommended as a means of instilling the paradigm shift to recovery from payouts.
- Regulatory and other incentives for good claims management were recommended as a means of encouraging and rewarding effective service provision, and as vital mechanisms for accelerating the shift to a recovery paradigm.
- Stakeholders also raised a number of matters beyond the scope of this consultation which are included in the attachments to this report.

## Conclusions

Almost without exception stakeholders recommend improvements in the claims management and dispute resolution aspects of the NSW Government's Compulsory Third Party Scheme, and in the advice, guidance and support Government provides for injured road users making claims under the scheme. Stakeholders and their representatives who participated in consultations and provided written submissions on NSW's Compulsory Third Party insurance scheme did so in a compressed period of consultation, but in a process that was free and frank. Their views augmented the consultations and submissions received previously on the scheme as a whole, and enabled the SIRA Board to delve into some of the critical barriers and dispute points in the scheme, and some of the complexities involved in adjusting the scheme.

The SIRA Board also received a range of informed and constructive suggestions, focussed primarily on bringing the scheme in line with citizens' expectations, evolving trends in claims management and dispute resolution, and emergent medical evidence about injury and recovery. The board recommends to the Minister the findings of the consultation, and encourages changes to claims management culture and process; support and advocacy; and dispute resolution that make the NSW CTP scheme fairer, more transparent, more affordable and more sustainable, and underpin the scheme with a model focussed on rapid recovery and return to wellness.



## Introduction

This report summarises the series of consultations held in November 2016, facilitated by a reference panel comprising Dr Abby Bloom and Dr Graeme Innes AM, independent directors of SIRA (State Insurance Regulatory Authority), the regulator of the NSW Motor Accidents Compulsory Third Party (CTP) scheme. The consultations formed part of the process of reform of the CTP scheme in New South Wales. Previous consultations with stakeholders, facilitated by SIRA Board Deputy Chair Ms Nancy Milne OAM and former NSW Government Minister the Honourable John Della Bosca, focussed on the broad range of details and processes required to implement the NSW Government's reform model. Those meetings generated very useful feedback. Two of the issues that were of particular concern to stakeholders were the process of claims handling, and dispute resolution.

This report summarises the feedback to the Reference Panel and submissions received in response to specific questions included in the Government discussion paper 'Insurer claims handling and dispute resolution in compulsory third party (CTP) motor accident insurance'. The main topics addressed in the consultations were:

- the change in approach and claims management culture required by CTP insurers and service providers
- innovations in claims management and the claims process that would encourage rapid recovery
- a proposed Support and Advocacy service to assist injured people in the claims process
- the role of the regulator – SIRA – in claims management
- the use and adaptation of existing dispute resolution mechanisms to support a defined benefits scheme.

Both the issues of claims handling and dispute resolution were prominent themes in the Milne/Della Bosca consultations, and stakeholders provided detailed responses. Consequently this consultation focussed on more specific aspects of claims handling and dispute resolution, guided by a series of more specific questions. The consultation process was compressed and tightly focussed. The Reference Panel met or consulted with a range of stakeholders, including each of the insurers involved in the NSW Motor Accidents (CTP) scheme; several professional bodies representing solicitors and barristers; several professional bodies representing health practitioners; academic experts on injury and injury recovery; and groups representing motorists and people living with severe injuries and their carers.

A separate, simultaneous consultation addressed in detail the matter of insurer profit.

# Background and context

## Background

In June 2016, following extensive public consultation, the Minister for Innovation and Better Regulation announced the NSW Government's intention to reform the NSW Motor Accidents (CTP) Scheme. The proposed reform would introduce a hybrid scheme, entailing no-fault defined benefits for all injured road users, while retaining the right for the more seriously injured to claim common law damages.

## Achieving the objectives of CTP reform

The NSW Government's objectives for CTP reform are to:

- increase the proportion of benefits provided to the most seriously injured road users
- reduce the time it takes to resolve a claim
- reduce opportunities for claims fraud and exaggeration, and
- reduce the cost of CTP Green Slip premiums.

Two major themes emerged consistently during consultations. The first concerned changes needed in insurer claims handling culture. The second concerned the fair determination of a claimant's entitlement to benefits, and specifically the mechanisms and processes of dispute resolution. Stakeholders noted that the insurers operating in the CTP scheme operate with a profit motive, and emphasised the role of Government, through SIRA, in ensuring that insurers fairly determine and provide a claimant's entitlement to benefits.

To facilitate the consultation, and focus stakeholder feedback on these two issues, the NSW Government released a discussion paper on insurer claims handling and dispute resolution in CTP motor accident insurance. The Government has signalled its intention to undertake a statutory review of the new scheme after three years. The purpose of that review will be to assess the impact of reforms on insurer profit margins, timeliness of benefits and the customer experience.

## Role and function of the SIRA Board in the consultation process

The NSW Government commissioned the SIRA Board to conduct further consultation on how best to shift from the current process of claims handling and dispute resolution, with its focus on lump sum negotiation, to a scheme that provides benefits quickly and returns the injured person to maximum health, work, and quality of life.

The function of the SIRA Board Members on the Reference Panel was to:

- lead consultation with stakeholders to obtain their views on measures that would assist to deliver the cultural shift required by insurers and other service providers in a defined benefits scheme
- lead consultation on options provided in the Discussion Paper in relation to dispute resolution in a defined benefits scheme
- capture feedback on other ideas or views that would improve claims management and the resolution of disputes in the scheme
- provide a report to the Minister documenting feedback and the merit of any alternative options for delivering the documented approaches.

In facilitating the provision of advice and recommendations, the SIRA Board has been guided by the Government's stated objectives of scheme reform: the need to ensure fairness across the scheme and the application of a benefits scheme that promotes the recovery of injured road users, balanced against the need for certainty and affordability.

In addition to assuming a hybrid scheme, the scope of the consultation was limited to the details, processes and related issues as outlined in the 'Insurer claims handling and dispute resolution in Compulsory Third Party (CTP) Motor Accident Insurance discussion paper'.

### **The consultation process and focus**

The SIRA Board invited a wide range of service providers and stakeholders in the CTP scheme to meet with the Reference Panel and to provide written submissions. Groups that provided a submission and/or attended a meeting included the current CTP insurers, the three peak legal professional bodies in NSW, health professional bodies in NSW, a peak transport organisation, a peak carers organisation, health service providers, health research institutions and individuals.

A synopsis of feedback received in consultations and through written submissions is contained in the Appendix A to this report. The list of questions for the consultation is contained in Appendix B. Other useful feedback and observations on matters indirectly related to the consultations are documented in answers to Question 12 in Appendix A.

## Consultation findings

The results of the consultations and submissions are summarised in three sections:

1. Culture and claims management
2. Advisory and advocacy services
3. Dispute resolution

## Culture and claims management

Earlier consultations facilitated by Nancy Milne and John Della Bosca recommended that a fundamental change in paradigm, culture, and processes is essential to the success of a revised CTP scheme focussed on speed, immediacy, clear processes, evidence-based treatment, and the fair and just resolution of disputes.

One of the themes emerging from the earlier consultations was that success will be influenced by the increased efficacy of medical and allied health professional services involved in both assessing and treating injured road users. The need to monitor the skills, capabilities, qualifications and service patterns of all service providers operating within the CTP system will be equally important.

### Observations concerning insurers:

It was apparent from consultations and submissions that insurers are acutely aware of the gap between current capabilities and practices. Both people and processes will need to be reoriented, they maintained, in order to shift the focus of claims management to a recovery and wellness paradigm focussed on the individual. Insurers attributed the adversarial culture within the current scheme to generous lump sum benefits and the high incidence of exaggerated or fraudulent claims. Insurers blamed these drivers for a culture where antagonism and cynicism compete with customer centricity. From their perspective, the increasing tendency towards legal representation – especially for minor claims - had impeded claims management staff's access to injured road users, and prevented genuine efforts to facilitate early and effective treatment and return to work. Insurers advised that shifting the culture to a recovery paradigm will require them to invest in retraining existing staff, and recruiting staff with different skillsets more appropriate for the new paradigm.

Insurers predict that for them the process of shifting their culture and process of managing claims to a more customer centric model, whilst still identifying exaggerated or fraudulent claims, will throw up some challenges. They asked that SIRA apply incentives to encourage more customer centric claims management, with a stronger focus on the health and wellbeing of the injured person. Correspondingly, SIRA should use various

means to discourage poor claims management practices. Insurers also recognised that the management of claims without legal representation will require insurer behaviour that recognises the power/knowledge imbalance in the claims management process.

In both consultations and written submission the representatives of the legal profession criticised insurers' track record of claims management, and expressed scepticism about insurers' ability to meet lawyers' expectations of best practice in claims management.

### **Observations on shifting the public's understanding and expectations of the CTP scheme:**

A number of stakeholders described the significant challenge of changing the understanding and expectations of the public at large in relation to the CTP scheme. There was discussion concerning the limited public perspective about the objectives of the scheme: stakeholders referred to the dominance of plaintiffs' lawyers advertising in the form of billboards and radio messaging, citing the emphasis on lump sum payouts. By comparison, they stated, there was little or no publicity about 'recovery' or 'return to wellness', and cited Government-led campaigns in other jurisdictions that could be a model for NSW.

The success of the NSW "Nudge" (Behavioural Insights) Group is noted: the group or their methods might be applied in the reform of the NSW CTP Scheme to encourage behavioural change during the reform implementation process.

### **Observations on treatment and return to work:**

All stakeholders acknowledged and supported the benefits of rapid treatment and return to work. Immediate and proactive treatment was widely supported.

Health experts identified three shortcomings in treatment for injuries sustained in road accidents: overtreatment, under treatment, and ineffectual treatment. They reserved most criticism for inappropriate assessment and consequently ineffectual treatment of soft tissue injuries. Citing research findings, they noted that extended treatment is not recommended for most soft tissue injuries, and can be linked with dependence and poorer health outcomes. They expressed concern over some investigative procedures, particularly imaging, and invasive treatments (including surgery), which under certain circumstances have been shown to lead to poor health outcomes.

Rehabilitation and research organisations confirmed most injured people with soft tissue injuries recover quickly. They urged SIRA to incorporate into assessment and treatment procedures the recent evidence supporting evidence-based triage. They strongly recommended that SIRA introduce practices that assist the one-third of road users who have been proven by research to recover best when they are identified in the assessment process, and receive appropriate psychological and physiological

assessment. By definitively identifying those who will recover with enhanced treatment, a significant proportion of injured road users with soft tissue injuries could recover and avoid chronic ill health. In addition, collecting and analysing data on patterns of rehabilitation and recovery were recommended in order to demonstrate what approaches produce the best health and functional outcomes for people with soft tissue injuries.

Health specialists also expressed concern that the fee-for-service payment models used in treatment of injured road users tend to support quantity of service provision over service quality (effectiveness). They observed that in their experience compensation schemes tend to promote quantity and frequency of treatment rather than efficacy. Some practitioners, they asserted, may overtreat simply because they are unaware of, or not committed to, best practice guidelines for soft tissue injuries. Some are influenced, they believe, to recommend treatment modalities, or extend treatment, in response to pressure from the injured person or their family.

Among the recommendations made by several stakeholders was the opportunity to eliminate the delay, cost and potential impaired recovery resulting from disagreement between doctors enlisted by the parties. Stakeholders urged SIRA to consider a completely independent, preferably full-time panel of medical specialists who would be the sole decision-makers about assessment and treatment. In this 'first cab off the rank' model, injured road users would be assessed by a single expert rather than by different doctors hired by the two parties under the current scheme.

Health and injury rehabilitation specialists flagged the challenging role for SIRA in fostering rapid recovery in CTP, as distinct from the Workers Compensation scheme. In contrast to Workers Compensation (which has formal links with employers and return to work), the CTP scheme does not have a formal link with employers. Highlighting delayed claim notification in CTP, they were of the view that the lack of a link with employers will make it harder for insurers to guide and manage treatment directed at rapid recovery and return to work. One stakeholder representative suggested that SIRA consider providing insurance protection for employers who provide paid work for injured road users who recovered to partial capacity.

Insurers expressed concern about maintaining a balance between best practice in injury management and recovery, vigilance against over-servicing, and establishing the challenge of instilling injured people with confidence in their treatment. Their experience shows that their relationship with a claimant may be damaged when treatments are declined. Injured road users may question the insurer's motivations, thereby impairing the insurer's ability to manage the individual's return to health and work. As a means of addressing this conundrum one insurer suggested regulated treatment allowances aligning to best practice guidelines be used uniformly by all insurers.

SIRA was also urged to strengthen its role in commissioning and disseminating research on best practice approaches to injury prevention, injury management and optimising recovery.

### **Observations on incentives for good claims management:**

Stakeholders recommended a wide spectrum of initiatives by SIRA that would introduce incentive alongside regulation. Suggestions included publication of insurer ratings based on key performance indicators, and the creation of specialist CTP claims categories in Personal Injury Education Foundation (PIEF) Awards. It was recommended that during the run-off period of the current scheme incentives should apply to the management of claims under both the current scheme and revised scheme.

Additional measures recommended as a means of improving claims outcomes included accreditation or qualification processes for service providers and new or revised codes of conduct.

### **Observations on term licences:**

Stakeholders did not support the introduction of term licences to replace the existing perpetual licences granted to CTP scheme insurers. They maintained that the long tail nature of CTP claims, and the higher capital investment needed, require insurers to be able to make reasonably firm predictions about their operations in the CTP market. Other regulatory tools such as sanctions and fines, particularly if linked to when insurer obligations are not met, were considered more suitable incentives/sanctions in a long tail scheme.

### **The CTP Reform Reference Panel comments and conclusions**

Consultations about claims management reinforced the complexity of the CTP ecosystem and the wide range of behaviours, processes, and dynamics that will need to change for the CTP system to achieve effective reform. While all stakeholders expressed commitment to prompt assessment, treatment and recovery, the Reference Panel observed mutual dissatisfaction among central stakeholders acting for injured parties. Consultations with stakeholders representing the injured person focussed their concerns and recommendations on speeding up the process and providing knowledgeable, best practice support for rapid recovery.

There was a strongly held view that the cultural shift will not occur unless it extends to insurers, health care providers, legal practitioners, the public at large, and to SIRA.

The consultations highlighted SIRA's opportunity to adopt more data driven claims management and regulation. SIRA was urged to use its role as regulator to educate road users and the public at large about scheme changes to ensure sound understanding of

the recovery paradigm, and set an expectation that injured people should receive timely support for return to health, social and economic participation.

Stakeholders cited common features of schemes, such as specialist legal and medical accreditation, and rigorous treatment guidelines. Interestingly the Reference Panel heard suggestions that 'training' should reach back to initial training of future claims managers, as well as in-service training of currently employed claims management staff. SIRA-supported treatment guidelines and, potentially, stipulated cost allowances, adopted by all insurers would go some way to ensuring uniform, effective and fair claims management and medical treatment, but effectiveness would depend on SIRA's ability to monitor, manage, incentivise and sanction.



## **Advisory and advocacy service**

Previous observations by SIRA Board Deputy Chair Ms Nancy Milne AOM and former NSW Government Minister the Honourable John Della Bosca expressed a view that it is vital for injured people to have immediate and easy access to support services such as a support and advocacy service in some form. The Reference Panel was provided with all previous submissions made to the Milne/Della Bosca panel that concerned advocacy.

The Reference Panel heard a wide range of views and options about the advantages, disadvantages and challenges of expanding the scope of advisory services within the CTP scheme. The Discussion Paper noted that the existing SIRA Claims Advisory Service is restricted to providing basic information. The proposal contained within the Discussion Paper described expansion of that service to assist claimants to navigate issues and options in their claims; assistance with administrative steps; form completion; advice on review processes and requirements; and assistance in contacting the insurer in limited cases.

In addition to an enhanced advisory service, the Discussion Paper sought views on whether a new advocacy service should play a direct role in advocating for the injured road user through internal review processes, and providing legal advice and appraisal services in cases of merit or medical review. There was wide agreement that any advisory and advocacy services should be aimed at enabling greater speed, clarity and simplicity in the system by providing transparent, clear and comprehensive information about processes so that injured people can understand and better manage their trajectory through the system.

### **The challenge of addressing the asymmetry (imbalance) of information**

Opinions differed widely about whether a 'claimant advocate' should perform some of the more basic services currently performed by legal practitioners. Many stakeholders supported assistance and/or advocacy services which extend beyond the service currently provided by SIRA's Claims Advisory Service, emphasising the need for a service that assists the injured person to lodge claims and provides general information. Many stakeholders support assistance and/or advocacy services beyond the service currently provided by SIRA's Claims Advisory Service.

Most stakeholders criticised the current undesirable imbalance or asymmetry of information between injured people and other actors in the system – insurers, health professionals, solicitors and barristers. In particular, disability groups and others representing injured people argued in favour of an enhanced support service that would provide information, guidance, and support to people injured in road accidents.

Assistance is particularly needed, they noted, by socio-economically disadvantaged groups such as Aboriginal people, people from diverse cultural and linguistic

backgrounds and people with disabilities. These stakeholders suggested that many people sought the services of solicitors simply because, with limited English as their second (or third) language, they believe that solicitors could explain their situation within the CTP scheme in language that they can understand. These representatives endorsed an enhanced advice service that provides multilingual, culturally appropriate and accessible information and basic advice that would speed up the process and provide more cost-effective information to injured road users and their families.

### **An enhanced advisory service – introducing a wider advocacy role**

Stakeholders presented strong views for and against incorporating advocacy in an expanded “Claims Advisory Service”. The major supporters focussed on how it would lower the overall as well as individual cost of disputes, and provide essential, independent and no cost services currently only available through legal practitioners.

Some stakeholders stated that the service should act as the first step in dispute resolution, with the authority to make “small” decisions concerning treatment disputes, and, when necessary, providing access to details of ‘accredited’ lawyers.

However there was consensus that an enhanced advisory and advocacy service should not replace specialist lawyers in complex cases.

### **Expediting decision-making about small claims for low level medical disputes**

Both in consultations and in written submissions the groups representing legal practitioners in NSW were adamant in stating their opposition to establishing any other ‘support and advocacy’ service other than “the quality support and advocacy service that already exists – the legal profession.” However, the legal profession did indicate support for “some form of ‘small claims’ decision-making process for low level medical disputes.”

### **Stakeholders flag issues in an expanded advocacy service**

Stakeholders recommended consideration of a number of essential matters before implementation of an advocacy service. They included the intention, type, reach, scope, and scale of such a service. Stakeholders would like to see the objectives of the service clearly defined and preferably focussed on providing assistance to the injured person navigating the scheme. Other concerns were how and where the service would be established: through a SIRA delivered or managed service, or through a new independent service, but always with the objective of ensuring independence and minimisation of conflicts of interest.

Some stakeholders cautioned that the expansion of SIRA’s services to a full advocacy service, including legal advice and opinions, could prove extremely costly as well as duplicative because it would require recruitment of a large number of seasoned legal specialists.

A strong theme emerging from stakeholders was that any advocacy service provided for injured people should not replace the role of lawyers in litigated cases - that there is value in independent advice from legal representatives.

Stakeholder views diverged on the question of the level of legal advice that such a service would provide. Even strong supporters for establishing a support and advocacy service articulate the value of lawyers for those seriously injured or cases involving administrative challenges.

Views differed on the extent to which an enhanced advisory service could be seen to be independent, and how best to achieve actual and perceived independence, including structure and physical location of the service.

One consistent request by stakeholders was that regardless of the scope and reach of the support and advocacy service, the service ought to be informal and minimise bureaucracy.

### **SIRA's Role in promoting a rapid recovery paradigm**

Several stakeholders noted that the public at large, and in particular those involved in road accidents, were not sufficiently aware of how best to navigate the CTP scheme. More widely available information and support was seen as critical during the period of reform, and especially vital to the success of a new paradigm focussing on rapid recovery. They cited the promotion activities supported by TAC in Victoria as a potential model.

### **The CTP Reform Reference Panel comments and conclusions**

The Reference Panel found strong support overall for expanded information and advisory services that provide additional procedural assistance and support for injured people. Insurers and representatives of injured road users encouraged SIRA to support expanded outreach activities as well as providing essential information and guidance on the claims process. SIRA was also encouraged to establish updated, evidence-based standards and procedures and make use of codes and guidelines, as well as a central claims lodgement portal, to streamline and provide greater consistency in the process.

Specific recommendations on modes of assistance to enhance injured road users' understanding and ability to easily navigate the CTP system include:

- information and support in claim lodgement
- explanation of the claim processes
- new tools and guidelines, including digital portals and tools which may be developed for claims or dispute lodgement

- helping injured people understand decisions by insurers, and considering the options that may be available to them
- facilitating quick dispute resolution in cases of simple treatment disputes
- when necessary, providing details of accredited, specialist lawyers
- advice and assistance to professionals working within the scheme, including health, legal, community service and government sections in understanding the changes and any challenges presented by the reform
- introducing a consumer portal, collecting and disseminating injured persons' views on potential scheme improvements
- a mechanism for feedback on friction points within the revised scheme
- disseminating evidence-based information on injury, rehabilitation and recovery.

The Reference Panel recognises the advantages to injured road users and their families of better understanding of their entitlements under the CTP scheme and the process of making a claim. The Reference Panel supports the objectives of providing better independent information, orientation and guidance to claimants and their families; informing citizens of their rights and entitlements within the CTP scheme; and monitoring and providing transparency in the revised scheme.

The Reference Panel notes the challenges of ensuring independent information and advice, and recognises the role that specialist legal practitioners will continue to play in the CTP system. The Reference Panel heard convincing arguments for improvements in the advice that injured road users receive on: claim lodgement and the claims process; completing forms and additional documents that may be required; the advantages of new digital tools and data-based benchmarking (ex: digital portals; comparison tables; communication between injured persons, insurers and treatment providers; understanding decisions made by insurers; considering options that may be available to them in response; and identifying ineffective treatment providers.

There was general support for a service that embraces support and limited advocacy, effectively a 'Claims Support Service', or 'Injured Persons Assistance Service' as opposed to an 'Advocacy' service. The Reference Panel concluded that there is less support for, and legitimate concerns about, extension of advisory services to include the provision of legal opinion around causation, earning capacity, or damage. There was, however, consensus about the benefits that would accrue from expeditiously resolving minor injury claims in a scheme which minimises potential dispute points, and supports efficient dispute resolution, reducing reliance on legal interpretation and advice in simple claims.

The Reference Panel heard persuasive support for SIRA expanding its role in advice and assistance to professionals involved in the scheme, including health, legal, community

service and government stakeholders, especially during the implementation of the reform. The Reference Panel also heard compelling reasons to introduce reform in stages, with further enhancements or modifications adopted after careful assessment over a period of two to three years. With the benefit of experience the NSW Government can better assess whether the service adequately addresses the goals of the reform, and how it might be revised and improved.

## Dispute resolution

Stakeholders expressed divergent views about reform of the dispute resolution process, as illustrated by the strongly expressed views of each of the major parties involved in the dispute process: the legal profession, the medical and allied health professions, and CTP insurers.

### Consensus on basic principles, goals and objectives

However, all stakeholders expressed concern for injured people and their families, and supported a shift to swift and full recovery of injured road users, while ensuring individuals' rights are protected within the system. There was widespread criticism of the 'multi door' approach adopted in the NSW Workers Compensation scheme, with most stakeholders urging a 'one door' approach, less complexity in the processing of claims, and an expeditious dispute resolution.

Specific recommendations included:

- certainty about the pathway, and minimal uncertainty about outcomes and timing for the injured person
- ease of access and efficiency for all stakeholders – vital for containing costs
- fairness
- opportunity for informal resolution
- tribunal independence, both perceived and real

There was strong support from the majority of stakeholders for a three-tiered model including a greater role for insurers in more effectively managing claims and disputes in the first instance. Representatives of the legal profession did not support this option stating an opinion that merit review by SIRA, and insurer internal reviews did not satisfy the impartiality, independence and integrity requirements of a fair and transparent dispute resolution model.

All agreed that SIRA as the regulator, and stakeholders, must remain vigilant in identifying exaggerated or fraudulent claims. In addition:

- SIRA as the regulator should encourage injured people to focus on swift return to wellness, function and work, simplifying and reducing the time elapsed between injury and settlement of claims.
- The goal of reform of the dispute resolution process in CTP should be minimising points of disputes and reducing the timeframe of disputes that unnecessarily delay both resolution and return to wellness.

Representatives of several of the major stakeholders disagreed with some aspects of the alternative models proposed in the Government Discussion Paper, and instead proposed constructive modifications. They included:

- As described previously, a single medical assessment conducted by a certified panel of medical specialists, applying a “first cab off the rank” model, to avoid the unnecessary and time and costs in the current process.
- A single door approach for Tier 2 disputes, thereby combining features of Options 2 and 4 in the discussion paper.
- A staged approach to the introduction of a revised dispute resolution system, establishing a 2-3-year period of gradual reform and analysis of the full range of reforms proposed in the Discussion Paper.
- Harmonisation of different approaches to personal injury management and dispute resolution under different NSW Government schemes. Some stakeholders discussed the advantages and disadvantages of transferring dispute resolution functions in the CTP scheme to a cross-Government entity like NCAT (Civil and Administrative Tribunal). However, the overall conclusion was that SIRA should first ensure essential reforms in both claims management and dispute resolution, and only then weigh the pros and cons of folding dispute resolution under the CTP scheme into a cross-Government entity like NCAT.

One group suggested that an insurer’s internal review team should and could be independent, and that staff would have appropriate training, qualifications, knowledge, experience and interpersonal skills to resolve disputes effectively. SIRA would be well advised to have oversight of the operation of those functions. However, not all stakeholders agreed.

Concerns were raised about Tier 2 disputes that the proposed models would result in problems similar to those experienced in the NSW Workers Compensation Scheme, which, according to some stakeholders, is both confusing (in terms of correct access points), onerous (in terms of process), and inefficient (in terms of speed of processing).

Options 2 and 4 were preferred by most stakeholders, with health and disability providers favouring Option 3 on the basis that it provides an alternative to court in Tier 3. However, maintaining the right to court appeal was welcomed by stakeholders who supported Options 2 and 4, the differentiating factor being whether the tribunal in Tier 2 would be housed within SIRA or constituted as an independent tribunal.

### ***The CTP Reform Reference Panel comments and conclusions***

The Reference Panel supports the NSW Government’s goal of ensuring a fair and expeditious CTP dispute resolution system, operating within a model that puts a priority on the injured road user’s recovery to wellness. Such a system requires minimising

avoidable dispute points within the CTP scheme, and efficient and fair dispute resolution that minimises unnecessary complexity, costs, and reliance on legal interpretation.

Among the options proposed in the Discussion Paper, Option 2 has the benefit of a single entry point, and accessibility to suitably skilled and qualified experts. Its independence may be strengthened by the statutory appointment of its leader.

Option 4 provides a greater level of structural and administrative independence, which may contribute to greater public confidence. On the other hand, the independence of the body proposed in Option 4 may isolate it from vital aspects of the scheme as a whole, impeding its ability to act with the best interests of the scheme – and citizens as well as customers. Several stakeholders recommended the initial establishment of a tribunal under the umbrella of SIRA. The benefits, they explained, are in the capacity of SIRA to fine tune its mandate and operations, and only then set it apart as an independent body.

One option raised by several stakeholders is a step beyond harmonisation of different NSW Government personal injury schemes, namely consolidating CTP and Workers Compensation personal injury tribunals into a joint personal injury tribunal. Consolidation would accelerate and drive harmonisation and the efficiencies gained could further reduce the cost of premiums. Then, as a further step, it was suggested, the consolidated tribunal could be transferred to an independent tribunal outside of SIRA.

It is likely that the context in which the scheme operates will change, and unintended consequences may appear. Regardless of the direction taken by Government, the Reference Panel recommends a staged approach, including intensive monitoring, review, feedback, consultation, and evaluation, together with reviewing the effectiveness of whatever tribunal the Government chooses to adopt when the scheme is more mature.

### **Other issues, including implementation, communication and greater use of digital systems**

Other observations of stakeholders include:

- Most stakeholders considered that SIRA now has adequate powers to regulate a revised CTP system.
- Referring to the implementation of Workers Compensation reform and injury system reforms in other jurisdictions, some stakeholders identified valuable lessons for CTP reform in NSW, including measures to avoid.
- Several stakeholder groups suggested a single portal approach, similar to that used in Western Australia.



- Stakeholders urged greater and proactive use of data collection, analysis and feedback to all scheme participants, as well as a means for SIRA to monitor, manage and adjust the system.
- There was broad support for use of modern communications and dissemination of information to the public as well as to injured workers as a means of instilling the paradigm shift from payouts to recovery.
- Regulatory and other incentives for good claims management were recommended as a means of encouraging and rewarding effective service provision, and as vital mechanisms for accelerating the shift to a recovery paradigm.
- Stakeholders also raised a number of matters beyond the scope of this consultation which are included in the attachments to this report.

A comprehensive analysis of other matters raised during consultation is summarised in Question 12 contained in Appendix A.

## Appendix A – Summary of stakeholder submissions

Responses to the questions posed in the Discussion Paper 'Insurer claims handling and dispute resolution in compulsory third party (CTP) motor accident insurance'.

### **1. What do you believe are the major issues, cultural or otherwise, for insurers, and other service providers, in moving to a defined benefits scheme?**

The majority of stakeholders believe that the main objective of a defined benefits scheme is to facilitate the recovery and return to wellness and work of injured road users. Effective claims handling, together with the minimisation and timely resolution of disputes were flagged by many as essential to improving the outcomes for injured road users.

Health experts advocated for early intervention that includes insurer and health provider screening for risk factors that may impede predicted recovery. One stakeholder submitted that if the primary focus by all parties is the health and wellbeing of the injured person, the culture of claims management will have to change.

Some stakeholders do not believe the current scheme is unduly “adversarial” and therefore the dispute resolution aspect of the current scheme may not warrant the changes proposed. Some expressed concern that a defined benefits scheme may result in a greater level of disputation resulting from a larger number of potential dispute points (e.g. reductions in weekly benefits over time, meeting a threshold for common law claims) and an inability to settle claims up front.

One issue of concern to various stakeholders is the imbalance of knowledge and power in favour of insurers when they deal with injured people who have little or no experience in CTP. It was suggested that an enhanced information and support service could redress this asymmetry of information. Currently the imbalance is often addressed by engaging legal representation.

Stakeholders believe a shift in paradigm (to recovery) and culture must be collective, and inclusive of insurers, health care providers, legal practitioners and SIRA.

SIRA should be active in educating road users about scheme changes, and the new paradigm. SIRA should also promote the expectation that injured persons should receive timely support that would foster rapid return to health, and social and economic participation.

Insurers recommended that SIRA should use its role as scheme regulator to adopt a more data-driven claims management and regulatory approach. Collecting and analysing data, and disseminating it where appropriate and useful, should augment focussed, commissioned research.

Insurers were acutely aware that their staff must increasingly adopt a customer centric approach. They recognised that claims management staff must display concern and empathy for the individual, and will have to more explicitly facilitate wellness. While the requisite skills exist to varying degrees in insurers' claims management departments, they are not uniformly available. The common law nature of the current scheme was said to have exposed claims staff to cultural norms involving legal representatives focussed chiefly on maximising financial results for their clients. Insurers observed that unfortunate by-products of these circumstances included:

- a. a lower level of insurer access to injured parties for the purposes of facilitating early and effective return to work and treatment
- b. cynicism on the part of some claims officers, particularly in relation to minor whiplash matters.

Insurers noted that finding a balance between customer service and maintaining vigilance against exaggerated or fraudulent claims, may be challenging. Recent amendments to the Claims Handling Guidelines which direct a 'principled' claims practice were considered a good example of how guidelines can accelerate the transition.

Insurers accept that claims management staff will need training in the management of defined benefit claims, and in being proactively engaged with customers, employers and treating healthcare professionals in the development of injury management plans. Challenges in developing plans in a scheme that does not include a mandate for employers supporting the injured person's return to work were raised.

### **Early treatment to avert or resolve chronic symptoms:**

A range of stakeholders advised the Reference Panel that proactive treatment for injury should be a very high priority. However, health experts advised that in some instances frequent treatment for soft tissue injuries can be associated with reduced motivation to comply with essential self-management aspects of a treatment program. Ensuring that treatment paths are consistent with established and current best practice guidelines was considered vital to contain treatment costs and facilitate early recovery.

Several stakeholders expressed concern about fee for service payment models in medical treatment under the scheme, asserting that they support quantity of service over quality. Others suggested that the scheme encourage the use of biopsychosocial rather than medical models of clinical practice. Pointing to approaches used in other countries, they recommend these methods to achieve more definitive assessments and faster and more complete recovery from injury.

Some stakeholders cited sometimes unfortunate effects of unnecessary and harmful investigations, particularly imaging studies and invasive treatments (including surgery), and recommended that SIRA discourage these treatments under the reformed CTP scheme.

Health and rehabilitation experts asserted that most injured people recover quickly from soft tissue injuries. Application of validated measures to identify those who may not will minimise over-treatment and facilitate early intervention for those who will find it more difficult to recover.

Supporting such initiatives with data collection and analysis will better enable all stakeholders in the scheme, and injured road users, to understand, accept and implement evidence-based effective recovery plans. One insurer also proposed SIRA strengthen its role in commissioning and disseminating research on best practice approaches to injury prevention, injury management and recovery optimisation. They recommended that SIRA collaborate with other personal injury compensation regulators where appropriate.

### **Injured party barriers for return to work:**

Several stakeholders expressed concern that injured parties in both the current and proposed CTP scheme may remain on compensation for an extended period in the absence of employer obligations or incentives to offer the claimant (their employee) a return to work plan.

It was recommended that SIRA focus intensively on early intervention and early referrals to rehabilitation/return to work. The provision of subsidies or incentive payments for pre-injury employers to retain injured employees at work was also suggested.

**Data:** A greater focus by SIRA on data collection and analysis was strongly supported as a means to identify and act early on emerging trends that may compromise scheme efficiency, service and cost. Stakeholders recommended longitudinal research across the 'claimant journey, and the use of data and research findings to support practices beneficial to both road safety and recovery from injury.

**Logistics:** Insurers and their representatives requested that SIRA consider the work insurers will be required to do to alter IT systems, processes, data and training in preparing for a defined benefits scheme. They also reminded SIRA that they will need to plan, fund, and implement training and recruitment accordingly – with commensurate costs incurred by all insurers.

### **SIRA's role**

Stakeholders encouraged SIRA to use its powers, oversight and funding to catalyse and assure scheme reform. A shift in perception and understanding within the community at

large about the purpose and benefits of CTP insurance will be required. Clear and strong communications by SIRA were suggested in order to manage customer expectations and assert a form of pressure on insurers to implement the changes and achieve the results intended by the reform.

An essential aspect of SIRA's role in expanding advisory services, stakeholders counselled, is to ensure that the public is alert to the purpose, function and independence of SIRA. The Victorian Transport Accident Commission's communications were cited as an excellent example to follow.

One stakeholder suggested SIRA take on a quality control role in monitoring the capability of insurers' claims staff. They also recommended that SIRA share best practice approaches across insurers in the scheme. Stakeholders further suggested that SIRA publish individual insurer performance data, thereby establishing benchmarks and encouraging higher performance.

## **2. What do you believe are the key considerations in establishing the support and advocacy service?**

Representatives of the legal profession and one other stakeholder representative did not support the establishment of a support and advocacy service. The legal profession noted that they currently provide these services, and do not support any change in the current model.

All other stakeholders generally endorsed an information and support and/or advocacy service whose main purpose would be to assist injured persons from the point of lodging their claim through the process of resolving their claim. They recommended that the service ensure that the person making the claim has adequate information, guidance, and support in navigating the claims process. Stakeholder opinions varied on this point. Comments focussed on:

- the objective of the support and advocacy service
- the extent of its functions
- the capabilities its staff would require to perform these functions effectively in the interest of people making claims
- whether the service should be internal or external to SIRA.

Stakeholders agreed that an advocacy service provided by SIRA should not replace the role of lawyers in litigated cases. Maintaining access to legal services for those seriously injured or in cases involving administrative law challenges was considered reasonable and necessary.

Opinions varied widely on the detail of the nature of an information, support and advocacy service. Recommendations for the service included:

- offering general advice on the claims process, and on completion of the forms required
- facilitating communication between the injured person, insurers and treatment providers
- providing basic legal advice
- acting as the first step in dispute resolution with the authority to make 'small' decisions concerning treatment disputes
- informing claimants of clinical practice guidelines
- identifying ineffective treatment providers.

Comments about the detail of an expanded information, support and advocacy service included:

- its scale: the number of participants expected to seek information, support and advocacy assistance from the service in the new scheme was predicted to increase significantly.
- whether a higher level of simple disputes may arise under the reformed scheme, especially disputes about access and earning capacity
- its reach: the location and breadth of services, as well as delivery methods and channels
- the cost of running an expanded service
- the scope of the service as an advocate or an adviser
- the intersection of the service with external legal professionals: if the service were to provide general legal advice, would that advice extend to recommending and briefing medico legal experts? Would mediation be a priority for this service? Would the service facilitate quick decisions on a set of prescribed minor dispute matters?
- in-house level of technical skill required, as well as multilingual, cultural and other capabilities that ensure access to its services?
- how best to ensure that the service meets and maintains ethical and professional standards.
- the structural, administrative and financial independence of the expanded service, including continuous improvement and feedback mechanisms.

One consistent request by stakeholders was that regardless of the scope and reach of the support and advocacy service, the service should be informal and have minimal bureaucracy.

It was suggested that the success of a support/advisory/advocacy service be measured on a range of quantifiable and other indicators, including time for resolution of comparable claims, resolution rates and customer experience.

### **3. Which support and advocacy service option do you think would deliver the best outcomes for claimants and why?**

*Two options for a new support and advocacy service were proposed in the discussion paper:*

- 1. Option 1, a SIRA delivered or managed service*
- 2. Option 2, a new independent service that is separate from SIRA and funded by an extension of the Medical Care and Injury Services levy on CTP Green Slips.*

Some stakeholders expressed the view that the current system of legal representation is the best option for claimants. They believe it is independent, professional, highly experienced, regulated, cost-effective and insured.

Some stakeholders believed that SIRA should not be responsible for providing advice to claimants on the pursuit of their claim unless SIRA is also prepared to retain qualified lawyers, who meet appropriate professional standards, have relevant specialist qualifications and experience, and are indemnified to provide advice on personal injury matters.

Stakeholder opinions varied about the two options. Some recommended hybrid versions. Many stakeholders recommended that the service should:

- maintain independence and minimise conflicts of interest
- be cost effective and not create layers of bureaucracy
- not duplicate services already provided by other service providers or professionals.

A further concern was how this function would be regulated to ensure that it meets ethical and professional standards and requirements.

### **4. What do you believe should be the powers of the Claimant Advocate?**

The role of the Claimant Advocate generated varying opinions. The legal profession was opposed to a Claimant Advocate service other than the services offered by external, independent, specialist legal professionals. Some stakeholders were open to a Claimant

Advocate performing some tasks currently undertaken by lawyers, such as claims lodgement and liaising with insurers regarding simple treatment disputes.

Stakeholders cited a range of powers and functions that could or should be delegated to the Claimant Advocate, including:

- the ability to obtain verbally information from all parties
- the power to quickly obtain documents necessary to expeditiously identify issues in dispute and effectively mediate outcomes for parties
- the capacity to guide people through the scheme
- the ability to provide specific legal advice and assistance such as legal case appraisal.
- the capacity to prepare documentation for a merit review or medical assessment
- the ability to overturn some insurer compensation assessments.

#### **5. What involvement should SIRA have in the lodging and management of claims? Should there be early intervention or outreach for newly injured people?**

There were diverse views on SIRA's role in the lodgement and management of claims.

The legal profession maintain that SIRA should have no role in providing advice to claimants; SIRA should not replace lawyers.

However, others strongly supported SIRA's involvement in the lodgement of claims if SIRA's involvement were to enable easier access to the scheme, and facilitate earlier intervention and treatment. Assistance in the claims process for people from culturally and linguistically diverse backgrounds, and people with disabilities, was considered important.

Information that helps claimants more easily navigate the scheme was considered a central SIRA function. Stakeholders supported SIRA instituting an online claims portal that provides a simple and easy mechanism for injured persons to lodge their claims, which could then be forwarded automatically to the appropriate insurer in real time.

Some concern was expressed about SIRA playing a role in managing claims on the basis that it could create confusion for claimants who might misapprehend who is their key contact for ongoing assistance. It was recommended by some that assistance managing claims should be the role of insurers

An alternate view was that if SIRA were to manage this aspect of claims, SIRA would be in a position to track the progress of claims, and intervene as necessary.



One stakeholder criticised outreach and early intervention as general strategies on the basis that they could potentially hinder recovery by raising issues that would not otherwise have been a concern to the claimant. However, they agreed that early intervention should be available to injured people identified as being at high risk of failing to recover without early intervention and treatment - an option in cases where a treating health practitioner identified these risks in the course of assessment.

Another stakeholder held the opposite view, that early intervention in injury and claims management is essential for injured people to return to their pre-injury lives and re-engage in their usual social, vocational and community activities. Psychosocial factors, other participants added, can influence injury severity, disability and the recovery path, and therefore must feature in early assessment and treatment.

## **6. What are your views on introducing term licences, rather than perpetual licences?**

In general, the insurance industry commented that term licences may introduce instability in the market, and would not be attractive to insurers seeking to enter the NSW CTP Scheme. They favoured perpetual licences in preference to term licences for the following reasons:

- the high capital investment needed for a commercially viable long tail insurance scheme requires long-term stability and certainty.
- term licenses would provide an administrative burden for both insurers and SIRA. Associated increased operational costs would be passed on in premium increases.

Insurers emphasised that maintaining stability in the scheme is paramount to protect the public's best interest, for both road users and injured persons. Whether perpetual licences are maintained or term licences are introduced, they recommended that SIRA should place emphasis on constructive incentives that encourage continuous service improvements, rather than punitive measures.

Other stakeholders felt term licences would facilitate closer scrutiny of insurers' performance during the licence review cycle and act as a deterrent to poor performance.

Some stakeholders argued that SIRA's existing powers might be used to greater effect if applied to suspend or cancel licences, and issue penalties to underperforming insurers.

It was noted that suspension of insurer licences could lead to judicial review. An alternate approach was suggested. that included a system of fines, so that claimants are reimbursed for any inconvenience caused by insurer behaviour contrary to CTP claims management, assessment and treatment guidelines.

## 7. What are your views on the dispute resolution model, particularly the type of disputes dealt with at each tier?

Many stakeholders elected to comment on opportunities available to limit disputes in the first instance, before elaborating on the question of how disputes should be resolved.

### **Medico-legal assessments:**

Many stakeholders urged the Reference Panel to identify opportunities to eliminate biased medico-legal reporting from the scheme wherever possible. They reported that injured people strongly dislike medico legal assessments, and that the assessments themselves lead to disputes and also lead to higher levels of disability. Some stakeholders were concerned about what they observe as the propensity to use medico legal experts with little or no current, practical clinical experience, and others who demonstrate consistent bias.

Several stakeholders encouraged the use of a single medical expert throughout the essential stages of the claim process. They referred the Reference Panel to the UK's MedCo portal, where a suitable medical expert can be chosen from an established panel. They proposed that SIRA's Medical Assessment Service play the role of the MedCo portal, with the caveat that SIRA must ensure adequate quality control.

**Treatment fees:** Fees for allied health services and investigations such as MRIs are a significant source of friction within the scheme. Several stakeholders proposed that SIRA use its regulatory power to set provider fees within the scheme.

**Binding assessments:** Some stakeholders proposed that Section 61 of the *Motor Accidents Compensation Act* be amended so that both the Certificate and the accompanying Statement of Reasons from a medical assessor be binding. Currently, a claims assessor and the parties to a claim cannot rely upon an Assessor's Statement of Reasons to resolve other disputes.

Several stakeholders suggested the amendment of Section 95(2) of the Act to make assessments by claims assessors binding on both parties. The practical consequence of this amendment, they believe, would be that insurers would no longer have the right to appeal any issue of liability and the injured person would be bound by the determination and assessment of damages.

**Contributory negligence:** Some stakeholders proposed amending Section 138 of the Act to prescribe fixed levels of contributory negligence for certain offences.

## **Tiers:**

The Reference Panel heard that ideally, new dispute resolution structures should be responsive to the type and urgency of the matter being referred, and should strike an appropriate balance between simplicity and robustness.

The legal profession did not support any of the dispute resolution models put forward in the paper. Citing their experience with the NSW workers compensation scheme, they stated that internal review by CTP insurers will remain inadequate under any of the proposed models for two reasons, . First, they assert that insurers should make a robust and correct decision in the first place. Second, they believe that many clients who take the initial step of seeking an internal insurer review will give up contesting the decision on their claim if they have been unsuccessful in the early stage.

Other stakeholders endorsed the alternate three-tiered model for providing a more-straightforward and timely option, without the need for escalation to legal/court based decisions.

### **Tier 1**

The requirement for insurer reviews was supported by a majority of stakeholders. Some emphasised that insurers should be more thorough in their investigation before issuing a decision, obviating the need for a second review.

Another stakeholder was of the opinion that in some cases it is reasonable to have an additional party review the decision given.

the considerable complexity often involved in decisions concerning causation and pre-existing injuries. A second review, also facilitated by the insurer, was considered advantageous to earlier resolution of a claim. Insurers strongly asserted the benefits to injured people and the scheme when the insurer can work directly with the injured person to resolve the claim. Insurers proposed an independent internal review team with appropriate experience, knowledge and authority to provide the insurer with an opportunity to detect and remedy any systemic issues.

In response to that proposal one stakeholder suggested SIRA consider whether internal reviewers should be internally appointed by the insurer (i.e., rehabilitation staff) or externally appointed.

### **Tier 2**

Stakeholders generally endorse a single body to determine Tier 2 disputes. They recommended it because it would simplify the process, reduce the strain of the process on claimants, and reduce the elapsed time for resolving disputes.

Several submissions addressed specific dispute types heard at Tier 2. The disputes they recommended for resolution at Tier 2 include:

- defined benefits disputes
- common law quantum and contributory negligence,
- simple Section 151Z recovery disputes.

Insurers proposed that in the case of Tier 2 disputes:

- decisions be binding on both parties
- all documents and evidence be disclosed for transparency, with limited exceptions including fraud being alleged
- all decisions are published.

Some stakeholders did not agree with the concept that the onus for establishing that a decision was correct should rest with the insurer. They recommended instead the civil onus where the injured person is required to prove their claim.

A triage system was considered essential for effectively managing Tier 2 disputes. Triage should consider factors including complexity, suspicion of fraud or monetary value.

One stakeholder urged that Tier 1 treatment disputes, in particular, whiplash treatment disputes, be managed within six weeks after injury. Elapsed time in resolving these disputes should be translated into KPIs, they recommended, and the KPIs should be reported publicly to encourage performance in the revised scheme.

There was general agreement that legal representation was appropriate for complex disputes and would add value. Many stakeholders recommended that the Claimant Advocate should provide additional support for Tier 1 and Tier 2 dispute resolution.

### **Tier 3**

Certain stakeholders recommended retention of the right to appeal to Court in complex and atypical cases, such as common law claims where liability has been denied, claims involving suspected fraud, and common law claims involving children.

One insurer proposed Tier 3 should only be available where an assessor (or panel of assessors) has made an error, and a party seeks administrative review of the determination. The ability to engage a lawyer at Tier 3 was considered wise to reduce any perception of injustice. However, one stakeholder supported instead an independent

tribunal at Tier 3 on the basis that a tribunal may be less adversarial and more likely to facilitate better health outcomes.

One stakeholder requested SIRA closely monitor the unnecessary pursuit of administrative appeals by CTP insurers. This practice was said to create a trickle-down effect across the scheme, leading to greater bureaucracy and more complex and time-consuming decision-making by dispute assessors.

Stakeholders noted that an appeals process and mechanism already exists within the Medical Assessment Service (MAS) and recommended that it remain unmodified.

**8. What are your views on aspects of dispute resolution being provided by an independent tribunal and which types of disputes or appeals, if any, would be best dealt with by that tribunal?**

Support was expressed for an independent tribunal with the ability to resolve disputes about defined benefits, common law quantum and contributory negligence. It was recommended that the body have the ability to approve agreements reached between insurers and claimants about the commutation of benefits. Another stakeholder did not support establishing an independent tribunal, judging it unnecessary and likely to add cost and complexity to the scheme.

All stakeholders agreed that establishing the independence of the dispute resolution process is critical to increasing confidence in the impartiality of decision making in the scheme. Independence should extend to structure, finances, and internal administration. Independence would be enhanced by nominating a Statutory Officer in Charge, and separating entirely the budget of the body from the budget of SIRA's motor accidents insurance regulation branch.

According to stakeholders, with appropriate safeguards for trust and confidence in the tribunal's independence, the tribunal's core business should be dispute resolution, and its focus solely on responding to the specific needs of those who have suffered injury, and, as part of the claims process, have become involved in disputes of different types. Some stakeholders recommended that all serious disputes should be subject to determination by an independent tribunal. Others recommended an independent tribunal consider only appeals where there was reason to suspect that relevant guidelines and regulations had not been followed in the first instance.

**9. Given each dispute resolution option has advantages and disadvantages, what do you see as the best option in a hybrid scheme and why?**

The legal profession was strongly opposed to removal of any right that injured road users have to engage or seek advice from the legal profession.

Options 2 and 4 were favoured by most other stakeholders. Health and disability specialists preferred Option 3 because they argued that it relies on established services whilst providing an alternative to Court.

Stakeholders were most supportive of Options 2 and 4 because they each have a single access point. Under Option 2 disputes are resolved by a single independent service within SIRA. Under Option 4, injured people are directed to an independent tribunal. Allowable appeals from both options are referred to Court (with the exception of Medical Assessment Service appeals, which would be reviewed by a panel of 3 MAS assessors).

Stakeholders identified the following advantages and disadvantages of Options 2 and 4:

### **Option 2:**

- Single entry point, therefore more accessible for injured people.
- Allows for more flexibility in escalating disputes internally.
- Allows for relatively informal processes and procedures.
- Allows SIRA better control of the service provided, ensuring it is outcome-focused for the injured person.
- Allows SIRA the added benefit of quickly identifying and addressing adverse dispute and scheme trends.
- Provides the option of allowing NSW Workers Compensation claimants access to the service in future years.
- Tribunal's independence can be enhanced by statutory protections ensuring the independence of decision makers, thereby strengthening public confidence in its independence.

Some stakeholders did note that a tribunal positioned within SIRA, without administrative and structural independence, would not be perceived as truly independent.

Stakeholders supporting option 2 judged that the control it would give SIRA over the dispute function would outweigh any disadvantages, especially if its introduction is accompanied by enhanced communication campaigns.

Timeliness of dispute resolution was emphasised by many stakeholders. Some expressed a view that independent assessors should remain external to SIRA and that in-house assessors would be perceived to be less independent.

There was also support in submissions and consultations for the appointment of qualified and trained assessors to SIRA to speed the resolution of disputes. Internal SIRA assessors would also reduce concerns about conflict of interest in cases of assessors

also working in private legal practices. It was proposed that additional expertise could be engaged as required in matters requiring higher specialist expertise.

#### **Option 4:**

- single entry point
- independent tribunal
- well known and trusted in the community
- processes and procedures could be more formal.

Some participants urged SIRA to monitor reform carefully for unintended consequences, especially if dispute resolution is moved to an external tribunal at an early stage. Others recommended that the tribunal remain within SIRA initially, with the objective of moving it to an external body once its role and functions had been well-established. A nominal 3-year period was suggested.

#### **Overall Principles:**

The following items were identified as critical factors in the success of any model in a revised scheme:

- certainty of pathway for injured person
- ease of access
- opportunity for informal resolution
- timeliness to facilitate recovery
- accessibility (linguistic, cultural, for people with disabilities), fairness and efficiency.

Additional factors proposed, but not as central:

- a mechanism for effectively dealing with fraudulent and exaggerated claims
- certainty of knowing where to go if there is a dispute
- effective case management and assistance to injured people
- clarity and simplicity in understanding the jurisdiction for particular disputes.

#### **10. Do you believe any further powers would be required for internal claims assessors than currently exist for the Principal Claims Assessor or other SIRA staff assessors?**

A stakeholder suggested that internal assessors could be given powers to:

- compel the attendance of parties at assessment conferences

- make findings which may result in a claim being dismissed and/or order legal costs against the offending party
- exercise a discretionary power enabling them to refer claimants found to have engaged in "fundamental dishonesty" to the police or relevant peak body.

A stakeholder suggested that if commutation of benefits is allowed in the scheme, the assessors should have the power to authorise commutation of benefits by consent of the parties.

### **11. Are there opportunities for positive incentives for good claims management outcomes, along with the proposed actions already being taken by SIRA to address current claims management behaviours in the scheme?**

Stakeholder views varied on this point.

A number of stakeholders questioned whether the range of existing statutory powers available to SIRA is being fully utilised, implying that SIRA could be more effective in improving claims management behaviours

Others held the view that the revised scheme design should avoid or eliminate adversarial claims management behaviours. It should provide strong incentives for insurers to continuously improve how they resolve claims – with emphasis on the recovery of injured people. Stakeholders confirmed their support for the aim of the proposed scheme design, and their expectation that it will create a culture that focusses on assisting the injured person, which in itself improve claims outcomes. They advised that SIRA should ensure that incentives for effective claims management are extended to the management of existing claims.

Specific proposals to encourage improved insurer performance included:

- publication of key performance indicators and/or star rankings which include customer feedback as an indicator.
- making available each insurer's claims management performance to policy holders when they are purchasing their CTP policy, so that policy holders can make an informed decision when buying their CTP Green Slip
- making available research on good claims management practices, e.g. claims management models, measuring/incentivising good health outcomes and treatment pathways for injured people with psychosocial risk factors
- creation of a specialist CTP Claims Manager category in the Personal Injury Education Foundation (PIEF) Awards with encouragement for insurers to nominate exemplary staff.

Additional suggestions for improving claims outcomes include:



- implementation of an accreditation or qualification process for service providers or legal practitioners.
- health practitioners playing a larger role in good claims management by setting appropriate patient expectations about recovery, and by providing and monitoring treatments that are evidence based
- introduction of codes of conduct for service providers or legal practitioners.

Stakeholders suggested SIRA introduce additional measures to improve claims management outcomes across the scheme, including:

- sharing good case management case studies with stakeholders
- encouraging – or requiring - education for claims managers, for example, through the provision of forums or webinars to disseminate the latest evidence-based research and practice.
- providing flexible, easily accessible education for General Practitioners
- supporting early detection of people requiring more focussed treatment in order to recover from their injuries.

Stakeholders maintained that a major incentive for good claims management is that insurer costs are likely to reduce as a result of better recovery and fewer resources devoted to disputes.

## **12. Any other items of relevance or importance requiring comment?**

A number of issues raised were outside of the terms of reference of this report: ..

### **Weekly benefits**

Concerns were expressed about a five-year period of relatively high benefits for loss of earnings would impose a high financial risk, and recommended strongly that SIRA thoroughly examine the full implication of what they viewed as a generous provision.

### **Retain the current scheme and introduce legal cost reforms**

One stakeholder observed that the scheme was not broken and reform of legal costs would produce greater improvement in the scheme than wholesale benefit reform.

### **Scheme design**

One stakeholder restated their opposition to a defined benefits scheme with limited common law and the proposed dispute resolution model. It criticised the proposed dispute model as unsound and unfair. It also firmly opposed any scheme design based on the NSW workers compensation system.

One stakeholder included as an attachment to their submission the Workers Compensation Independent Review Officer's opening statement to the Standing Committee on Law and Justice dated November 2016. The statement mentioned the practice of insurers of sending injured people to medical specialists who are known to have a conservative point of view. The submission also mentioned the problem of the person's doctor referring them to a doctor not familiar with current medical practice and theory in the relevant field of injury management.

One organisation asserted that disputes arise for a number of reasons, but ultimately CTP insurers are profit driven and the profits they produce through the scheme are ultimately a reflection of their skill and success in saying "no" to injured road users. The organisation claims that insurers rely upon medico-legal practitioners with little or no current and relevant clinical practice, and that the insurers have ready access to a large pool of medico-legal opinion writers prepared to provide pro-insurer opinions. Rather than removing any scope to argue with or challenge the biased opinions of the insurer-paid experts, they maintain, the Government has given decisive weight to their opinions, to the detriment of claimants.

One stakeholder independently identified a gap in the proposed reforms: they do not address insurer practices of repeatedly asserting contributory negligence where none has occurred. They noted that in their assessment the proposed reforms favour insurers at the expense of injured people and lawyers.

A stakeholder advised that all systems need a period of adequate stress testing and analysis to insure that the changes do not "break the system".

## **Fraud**

A member of the public suggested harsher penalties for a claimant, and their solicitor and medical practitioner, if they are involved in proven fraudulent claims.

One stakeholder recommended that SIRA have the powers to investigate and take action against fraud, citing the Queensland scheme as a model.

## **First party versus third party**

One stakeholder strongly advocated for first party insurance arrangements where the insurer manages the claims of their customer (or anyone injured in their vehicle) rather than the party that they injure (third party). It argued that insurers would compete on the basis of the service they offer in their personal injury claims policies, and would be directly responsible for their client rehabilitation.

## **SIRA service standards – meetings with insurers’ internal review teams**

A stakeholder recommended that SIRA should provide guidelines and service standards, and hold meetings with insurers’ internal review teams, to achieve a level of consistency and quality assurance across insurers. It may also give claimants greater confidence that their complaints are being considered in accordance with SIRA’s standards and training.

## **UK’s MedCo portal**

A couple of stakeholders recommended the accreditation of all medico-legal providers by SIRA where a medical practitioner is required to resolve a dispute, the injured person and insurers should be encouraged to use a single medical expert through the essential parts of the claim process. The adoption of a process similar to the United Kingdom’s MedCo portal, where an independent panel randomly allocates a doctor to prepare a medical report, has also been proposed. They maintained the Medco approach will lead to reduced costs for both parties.

## **SIRA overseeing internal dispute resolution process of insurers**

A stakeholder recommended that SIRA play an overarching role in managing the efficiency, effectiveness, timeliness and sustainability of the dispute resolution process.

SIRA’s role would involve:

- the ability to oversee the internal dispute resolution process within each insurer on a ‘whole of insurer’ basis
- establishing and reviewing KPIs and performance expectations for various aspects of the dispute model
- regulatory authority to make changes to keep the key metrics for the scheme in line with expectations.

## **Transparency and disclosure of documents**

One stakeholder recommended the implementation of an automatic disclosure regime to promote transparency and to facilitate a collaborative approach to claims resolution between parties. If open disclosure provisions were to be enacted in NSW, the legislation must make clear whether it is the intent of the Government to abrogate legal professional privilege, and if so, to what extent.

## **Publication of assessor awards**

One stakeholder recommended that the decisions and awards of SIRA Dispute Resolution Service assessors be published to guide better, more consistent decision-making by assessors and facilitate more predictability within the scheme.

Additionally, this practice would serve as a deterrent for unmeritorious claim practices and would reduce friction points between insurers and claimants by influencing their respective approaches to settlement. This, in turn, would improve the timeliness of claim resolution and over time, reduce the disputes which require assessment.

### **Lifetime benefits**

One stakeholder claimed that the provision of lifetime benefits to claimants creates a number of complexities, both operationally and financially.

## **Compensation for children and young people**

One stakeholder is concerned that injured people will not be adequately compensated for lost and future income and on-going treatment beyond the first five years. This is claimed to have implications for all drivers, pedestrians and passengers, but specifically for young people because:

- young drivers are over-represented in road crashes compared to other age groups, especially young males
- road crashes are one of the leading causes of injury, disability and death among young people
- the lost income and cost of care of young people will be significantly higher than for someone injured at 40 or 65. They are also less likely to have well-funded income protection insurance.

In addition the stakeholder recommended:

- that the proposed scheme is evaluated after a reasonable period to assess if health outcomes have improved for injured persons compared to the current system
- that increasing life expectancy trends and the effects of ageing on long term disability are taken into consideration to allow ongoing necessary treatment when estimating future treatment costs.

## **Commutation of benefits**

A stakeholder expressed its preference for a negotiated settlement (commutation) with the claimant, stating that an independent tribunal should also have the ability to approve agreements reached between insurers and claimants regarding the commutation of benefits.

## **Revise SIRA's Permanent Impairment Guidelines**

An organisation recommended revisions to the SIRA Permanent Impairment Guidelines following scheme reform, stating that some aspects of the Guidelines encourage surgery (because it is defined as creating greater impairment) and also encourage pain and disability.

It also requested that, after the implementation of changes to the current system, there should be a formal evaluation of changes that have occurred with reference to the health of injured people.

## Relying on the TAC model

Some stakeholders suggested consideration of the Transport Accident Commission (TAC) model in Victoria when designing the NSW CTP scheme. However, one stakeholder has cautioned against basing the design of the NSW scheme on TAC's model. Reasons for this caution included:

- multi-faceted system that has evolved over many decades
- differing quality of the roads in Victoria verses NSW
- higher number of speed cameras in Victoria and therefore different driving behaviours.

## Appendix B - Consultation questions

Stakeholders were asked to consider the following questions:

1. What do you believe are the major issues, cultural or otherwise, for insurers, and other service providers, in moving to a defined benefits scheme?
2. What do you believe are the key considerations in establishing the support and advocacy service?
3. Which support and advocacy service option do you think would deliver the best outcomes for claimants and why?
4. What do you believe should be the powers of the Claimant Advocate?
5. What involvement should SIRA have in the lodging and management of claims? Should there be early intervention or outreach for newly injured people?
6. What are your views on introducing term licences, rather than perpetual licences?
7. What are your views on the dispute resolution model, particularly the type of disputes dealt with at each tier?
8. What are your views on aspects of dispute resolution being provided by an independent tribunal and which types of disputes or appeals, if any, would be best dealt with by that tribunal?
9. Given each dispute resolution option has advantages and disadvantages, what do you see as the best option in a hybrid scheme and why?
10. Do you believe any further powers would be required for internal claims assessors than currently exist for the Principal Claims Assessor or other SIRA staff assessors?
11. Are there opportunities to pursue positive incentives for good claims management outcomes, along with the proposed actions already being taken by SIRA to address current claims management behaviours in the scheme?
12. Any other item of relevance or importance requiring comment.