



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: InjuryComp:RHap1892171

11 May 2020

Ms Elizabeth Maister
Manager, Stakeholder Engagement
Motor Accidents Insurance Regulation
State Insurance Regulatory Authority

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

Dear Ms Maister,

Comments on the Motor Accidents Compensation Regulation 2020

Thank you for the opportunity to comment on the draft Motor Accidents Compensation Regulation 2020 (the draft Regulation) and associated Regulatory Impact Statement. The Law Society's Injury Compensation Committee has contributed to this submission.

As outlined in our letter to you of 5 March 2020 during the initial stage of the review process, the Law Society supports the remake of the expiring *Motor Accidents Compensation Regulation 2015* (the current Regulation) with amendment, to ensure the compulsory third-party (CTP) insurance scheme under the *Motor Accidents Compensation Act 1999 (MAC Act)* continues to operate effectively until all claims under that scheme are finalised.

We understand that the purpose of the automatic repeal mechanism under the *Subordinate Legislation Act 1989* is to ensure that all subordinate legislation on the NSW statute book is regularly reviewed and updated. In addition to determining whether the subordinate legislation is still required, the review exercise provides an opportunity for Government to consider whether the legislation is appropriately targeted and fit for purpose.

As raised in our previous letter to you on this matter, the Law Society considers that the current Regulation does not satisfactorily support access to justice under the scheme through meaningful legal representation in 2020 and beyond.

Restrictive regulated costs

The legal profession continues to hold strong concerns that the legal costs available under all SIRA-regulated schemes are below the true costs of providing legal services, in some cases significantly so. To highlight the discrepancies in the legal costs available to lawyers working under these schemes, compared with other regulated fees under NSW Government policy, we draw your attention to the Attorney General's rates for legal representation (payable to legal representatives engaged by and on behalf of the Government), under which a solicitor is entitled to payment of \$295 per hour, with a daily maximum of \$2,950 plus GST.

We note that over the last 10 years, the rates payable to lawyers acting for the NSW Government have increased from \$240 per hour to \$295 per hour (an increase of 23% since

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2010). In contrast, the base regulated fees under the *MAC Act* scheme have had minimal increases since inception in 1999. Since 2010, there has been one increase to the stage 4(a) costs, from \$670 to \$724. This amounts to an 8% increase in 10 years, despite increases to the Consumer Price Index (CPI) of 22.47% from March 2010 to March 2020.¹ The other regulated fees have had similarly minimal increases.

Since the last time the rates were reviewed and the regulations under the *MAC Act* were amended, there have been no increases to the legal costs available under the scheme, despite increases to the CPI of 9.17% from March 2015 to March 2020. This increase has not been reflected in the draft Regulation.

We note that the percentage increases allowed for regulated fees above the base amounts at Stage 4 (c)-(h) and at Stage 5 have not altered at all since 1999. In our view, the retention of these percentage rates over a period of 21 years is a key reason the regulated legal fees have increasingly lost touch with reasonable rates for legal representation.

We are aware that as the premium has already been taken for claims under the *MAC Act*, it may be difficult for a retrospective increase in fees without a similar ability to increase the premium. Notwithstanding these difficulties, the Law Society considers that to ensure meaningful representation under the scheme, and therefore, access to justice for all parties, options for reflecting the true value of services provided under each of the stages needs to be carefully and meaningfully considered.

To address the issues with costs being well below a reasonable level, the Law Society would welcome the opportunity to discuss options for increasing the fees in Tables A and B in Schedule 1 to the draft Regulation directly with you. We are not proposing, at this stage, for increases to the percentages used for calculation of legal fees above the base amounts in Stages 4 and 5, which we note would result in significant improvement in recovery of party/party legal costs.

No annual indexation of legal costs

To exacerbate issues associated with the already restrictive costs framework, we again note that the draft Regulation, like the current Regulation, makes no provision for the annual indexation of legal costs.

According to the figures from the 2019 Scheme Performance Report for the NSW Motor Accident Scheme under the *MAC Act*,² at 30 June 2019, there were still 14,617 open claims. While we acknowledge the number of claims is reducing, there are still numerous unresolved claims that may take years to finalise, particularly noting young children seriously injured on or before 30 November 2017 are unlikely to have their claims resolved for at least the next decade. There is currently no provision to ensure that regulated costs under the scheme keep up to date with the true costs of providing legal services – costs which we understand are unlikely to be reviewed again until the next review period in five years' time.

As raised in our letter to you dated 5 March 2020, we strongly urge that the Regulation be brought into line with the approach adopted under the 2017 CTP scheme, and provide for an annual indexation of the regulated costs at CPI. This would assist in appropriately

¹ Based on the Australian Bureau of Statistics' Consumer Price Index Inflation Calculator: <https://www.abs.gov.au/websitedbs/d3310114.nsf/home/consumer+price+index+inflation+calculator>.

² State Insurance Regulatory Authority, 'NSW Motor Accidents CTP scheme: *Motor Accidents Compensation Act 1999* Scheme performance report 2019', 2020 <https://www.sira.nsw.gov.au/data/assets/pdf_file/0008/815165/CTP-Scheme-1999-Scheme-Performance-Report-2019.pdf>.

acknowledging the regular increases in the costs of the provision of legal and administrative services over time.

Our recommendation for a provision enabling the annual indexation of the base amounts is in addition to our recommendation that you consider options for increasing the base amounts proposed above.

Contracting out of the costs schedule

The Law Society understands that the regulated costs regime under the *MAC Act* was designed to remove small and unmeritorious claims from that scheme. We note, however, that there are small claims that involve complex medical causation issues, gross embellishment of injuries, complex economic loss issues often involving self-employment, or false and misleading statements, that may still be suitable for assessment.

Legal representatives have a moral and ethical dilemma in properly preparing these claims for assessment within a regulated costs regime. The Law Society considers that it is very difficult for lawyers to assist in promoting the object of the *MAC Act* to deter fraud, and the efficient management of premiums levied, in claims involving such issues, where damages in such claims are assessed at \$50,000 or less.

We consider that, noting the regulation implies that small claims must, by necessity, have less time spent on them, proposed clause 8 will continue to make it very difficult for lawyers to assist in detecting and deterring fraud in small but complex matters. To ensure the Regulation is capable of meeting the objects of the *MAC Act*, we recommend subclause 8(5) be amended to enable a claims assessor to make a direction that departs from the Regulation in an exceptional case and for the avoidance of substantial injustice.

In addition, we recommend an additional provision be added to allow an insurer to pay costs to their legal representatives where insurer scrutiny of an unmeritorious claim has resulted in the claim being withdrawn.

Thank you again for the opportunity to comment on the draft Regulation. Please do not hesitate to contact Adi Prigan, Policy Lawyer, on (02) 9926 0285 or at adi.prigan@lawsociety.com.au should you wish to discuss.

Yours sincerely,



Richard Harvey
President