THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Carmel Donnelly
Chief Executive
State Insurance Regulatory Authority
2-24 Rawson Place
Haymarket NSW 2000

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

Dear Ms Donnelly,

Review of the minor injury definition in the *Motor Accident Injuries Act 2017*

Thank you for the opportunity to provide a submission to the review of the minor injury definition contained in the *Motor Accident Injuries Act 2017* (the Act). The Law Society's Injury Compensation Committee has contributed to this submission.

Background

Throughout the 15-month reform process leading up to the introduction of the 2017 Compulsory Third Party (CTP) insurance scheme, the Law Society, along with other legal professional bodies, engaged in comprehensive discussions with the NSW Government, providing in-depth policy advice and recommendations to help shape a new CTP insurance scheme. While recognising the issues with the former scheme under the *Motor Accident Compensation Act 1999,* and that there would inevitably be some 'losers' in the new scheme, our recommendations focused on ensuring the 'losers' were not, in fact, the vast number of injured people the scheme was specifically designed to protect and compensate. We advocated in favour of upholding fairness for injured motorists as the primary objective for a new CTP scheme.

When the Government's proposal for a minor injury test was first proposed in 2017, the legal profession raised strong concerns. We feared the overly restrictive definition, which fails to account for appropriate nuances or the real-life consequences of a person's injury, would have adverse outcomes for many moderately to seriously injured people in NSW.

In the two years since the minor injury definition's introduction, anecdotal evidence available to the Law Society, including from our members, doctors and claimants, suggests the minor injury definition has resulted in a significantly harsher treatment of claimants than under the previous scheme. We are seriously concerned this definition is operating to deprive many genuinely injured people of appropriate benefits and compensation, despite the legitimacy and accepted reality of their injuries.

Analysis of whether the definition is meeting its objectives

Data access issues

During the introduction and debate of the new CTP scheme legislation, the Government cited the objectives of the legislation to include a focus on the provision of benefits to the most seriously injured people, reducing fraud and exaggeration under the scheme, and providing savings to motorists in Green Slip premiums.

To determine whether the scheme is operating as intended and meeting the Government's stated objectives, the Law Society submits that access to the pre-scheme assumptions, and meaningful claims data, is vital. To date, the legal profession has received insufficient information to enable us to meaningfully interrogate the scheme's performance. In our view, an objective review of the impacts of the minor injury definition on injured people in NSW, and consideration of whether the scheme is meeting its objectives, is virtually impossible without the provision of meaningful data on the scheme's performance. We look forward to further discussions regarding access to this data.

Access to file reviews

In its 2018 submission to the Standing Committee on Law and Justice's (SCLJ) Review into the CTP scheme, SIRA advised it had commissioned 'two independent research institutions to conduct a file review' to 'examine the first 1,000 claims with a focus on claims that are deemed 'minor' injury claims'.[1] To date, SIRA has not published these reports.

Noting the significance of the file review reports to the current review, we query the utility of a public consultation on the minor injury definition at this time, and in the absence of public access to relevant information.

High number of minor injury assessments

Based on the limited information presently available to us, including the data contained in SIRA's *'2017 CTP scheme at a glance'* reports, we note the high number of minor injury determinations made under the scheme. From SIRA's most recent '*CTP scheme at a glance'* report, at 30 July 2019, the total number of claims where the injured person has been assessed as having sustained only a minor injury is approximately 58% (7,269 of the 12,444 claims assessed to date). In our view, the high proportion of claims assessed as a minor injury (as we understand it, significantly higher than expected), reflects the unreasonably low threshold for meeting that definition.

The Law Society also understands the claims numbers to date are well below the projected claims figures and we query whether this could be leading to excessive insurer profits. The Law Society hopes if there is to be an adjustment to the scheme as a result of a meaningful review of claims data compared to projected outcomes, it will be to increase access to benefits for injured people, rather than simply to reduce the price of Green Slips.

The minor injury definition

The definition of 'minor injury' goes to the very essence of the CTP scheme. It is central to the functioning of both the statutory and common law branches of the scheme. It is the

[1] State Insurance Regulatory Authority, *Submission to the Legislative Council Standing Committee on Law and Justice: second review of the Workers Compensation and Motor Accidents Schemes* (June 2018) p. 12 < https://www.parliament.nsw.gov.au/lcdocs/submissions/60908/0004%20SIRA.pdf>.

mechanism by which statutory benefits may be cut off six months after the accident, and the means by which a person's ability to claim common law damages is determined.

'Minor injury' is defined in section 1.6 of the Act, which empowers the *Motor Accident Injuries Regulation 2017* (the Regulation) to specify injuries that are, or are not, minor injuries.

Minor physical injuries

The legislation defines minor physical injuries as soft tissue injuries. It covers an injury 'to tissue that connects, supports or surrounds other structures or organs of the body' but not an injury 'to nerves or a complete or partial rupture of the tendons, ligaments, menisci or cartilage'.

The Regulation specifies that injury to a spinal nerve root manifesting in neurological signs, but not radiculopathy, is a minor injury.

The *Motor Accident Guidelines* (the Guidelines) list the five signs of radiculopathy, of which two must be present for there to be a non-minor injury (loss of asymmetry of reflexes, positive sciatic nerve root tension signs, muscle atrophy, muscle weakness referable to an appropriate spinal nerve root distribution and reproducible sensory loss referable to an appropriate spinal nerve root distribution).

Minor psychological injuries

The Act defines a minor psychological or psychiatric injury as an injury that is not a recognised psychiatric illness. The Regulation includes an acute stress disorder or adjustment disorder, within the meaning of DSM-5[2], as a minor injury the purposes of the Act.

Issues with the minor injury definition

The focus of the minor injury definition is on the injury to the specific body part, not the disabilities or impact flowing from that injury. By attempting to focus on how an injury can be diagnosed objectively, without any contemplation of the real-life consequences of a person's injury, we consider this definition leads to arbitrary, counterintuitive and unfair outcomes for claimants.

The Law Society reiterates the position we have put forward previously that many of the injuries categorised as 'minor' or 'soft tissue' injuries within the meaning of section 1.6 of the Act are in no way minor with regard to the impact of the injuries on the day-to-day life and / or employment of a claimant.

We are particularly concerned the definition results in unfair outcomes for injured people with persistent physical and psychological symptoms who, despite having diminished work capacity after an accident, are nevertheless cut off from access to statutory benefits at 26 weeks and have no recourse to common law claims for damages, because under the legislation, their injuries are considered 'minor'.

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[2] *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition, published by the American Psychiatric Association 2013.

Spinal injuries

Under the Guidelines, the line between minor and more serious nerve root injuries is the presence of verifiable radiculopathy. Under the AMA4 Guides, verifiable radiculopathy is sufficient to meet an assessment rating of DRE III, which provides for a 10% whole personal impairment (WPI) evaluation in relation to the lumbosacral spine and 15% WPI evaluation in relation to the cervicothoracic spine and thoracolumbar spine.

We note the group of spinal injury victims who have long-term consequences are mostly those who have suffered some insult to intervertebral discs and have pain which radiates into a limb, but whose injury falls short of the 'verifiable radiculopathy' a DRE III assessment requires. We understand the minor injury test is also being applied to capture as minor injuries disc injuries that do not result in an external rupture of the outer ligamentous structure (for example, an annular tear). Law Society members have noted numerous instances where disc bulges in the cervical or lumbar spine (without an external rupture of the outer ligamentous structure) have been classified as a 'minor injury' despite these injuries preventing a claimant from returning to employment at, or at periods approaching, the 26-week mark.

Many injured people under the *Motor Accident Compensation Act 1999* have been assessed as having soft tissue injuries to the cervical, thoracic and lumbar spine, attracting a DRE II rating of 5% to all three levels of the spine and an overall assessment of 15% WPI. Despite such injuries involving ongoing pain, often radiating from the spine into a limb, stiffness and muscle spasms, and although entitled to non-economic loss, they cannot recover damages for that non-economic loss because they will be assessed as having a minor injury, which prevents them recovering any damages at all. Conversely, a person may sustain a chipped tooth in a motor vehicle accident which is highly likely to attract a 0% WPI, but which is considered a non-minor injury, despite that injury having no impairment on any part of their work or domestic life.

If the Government's intention is to protect people with genuine injuries who suffer economic loss, we submit the current application of the 'minor injury' test is not achieving this outcome. We restate our position that the DRE III classification is much too high for the purpose of excluding minor neck and back injuries from ongoing statutory benefits and the damages regime. We have previously brought to the Government's attention numerous cases that demonstrate serious injuries which have resulted in long-term economic and / or treatment needs where a person has been assessed as DRE II. We also note the lack of nuance in minor injury determinations and the arbitrary line drawn between minor and non-minor injuries, with no regard to the real-life consequences of an injury.

To ensure claimants with legitimate and incapacitating symptoms are afforded the protection and compensation they require, we strongly urge the Government to consider amending either the 'minor injury' definition in the Act or to clarify in the Regulation that:

1. injuries assessed as DRE II are excluded from the definition of 'minor injury', and

2. any person assessed with a combined whole person permanent impairment of greater than 10% is taken as having non-minor injuries.

Psychological injuries

Psychological injuries are rarely evident immediately after an accident. The true extent of the injury may not surface until after the insurer has made its minor injury decision or even after the first 26 weeks following the accident. For the surviving spouse, post-traumatic stress

disorder (PTSD) for example, may not present until the acute stage of grieving has passed, and a claimant with a minor physical injury causing unremitting pain may not develop a substance abuse disorder for a year after an accident.

There is also an inherent inconsistency with the minor injury threshold requirements and a medical practitioner's ability to diagnose a DSM-5 psychological condition. For example, if a claimant does not experience psychological symptoms immediately after the accident, the DSM-5 requires that a period of six months pass before a diagnosis of PTSD can be made. In such circumstances, the diagnosis would occur after the insurer has made its minor injury determination, depriving the claimant of their ongoing statutory entitlements.

We consider it manifestly unfair to deny a claimant benefits due to a delayed onset of symptoms. We therefore recommend that:

1. statutory benefits be required to continue beyond six months if a claimant is unable to be diagnosed for minor injury purposes, and

2. the insurer's minor injury determination be reviewable upon receipt of further evidence which demonstrates a non-minor injury exists.

Binding determinations

As outlined above, claimants under the scheme may currently be deprived of any common law rights at an early stage, often before their injuries have stabilised. We note, however, section 3.44 of the Act provides the Regulation can prescribe certain statutory benefits determinations that will not be binding in relation to claims for damages. We have previously recommended that a determination made by an insurer or the Dispute Resolution Service (DRS) as to causation of harm, or whether or not an injury is a minor injury, be prescribed by the Regulation as non-binding.

We reiterate it is often not possible to ascertain the degree of WPI, or fully investigate causation issues for the purpose of a common law claim within 26 weeks, which is the timeframe for a determination about a minor injury under the statutory benefits scheme. We submit claimants should not be deprived of their limited common law rights as a result of the requirement for insurers to make a decision within six months of the accident.

We note within that limited timeframe, claimants may also not have been in a position to receive legal advice, fully appreciated the significance of the determination, or understood the relevant dispute pathways.

We therefore again recommend the Regulation prescribe the following decisions as non-binding:

1. whether an injury is a minor injury, and

2. whether an injury is causally related to the subject accident.

As above, we also recommend there be a requirement for an insurer to reassess a minor injury determination at any time when presented with new information, even after an initial liability decision has been considered by the DRS.

Pre-existing, aggravated and consequential injuries

We note the minor injury test, and the Guidelines which support it, do not provide any indication of how pre-existing, aggravated injuries (which were asymptomatic or symptomatic before the accident) or consequential injuries should to be dealt with. To reduce the variableness and inconsistency of decisions being produced, we consider treating practitioners and DRS Assessors need clear guidance on how they should assess an injury, in accordance with legal principles.

The Law Society submits the Guidelines should be amended to clarify that unless the insurer obtains evidence to the contrary, such as clinical records or a medical report from a treating General Practitioner, if a non-minor injury exists, the pre-existing, aggravated or consequential injury should be accepted as caused by the accident. Adopting such an approach would ensure insurers properly investigate claims rather than making determinations based solely on the Certificate of Capacity or Certificate of Fitness.

Recovery and deterioration of injuries

In WPI assessments under the former CTP scheme, the injured person is assessed as they are on the day of the assessment, the focus being on impairments resulting from injuries. Under the minor injury test however, there is a focus on categorising the injury sustained on the day of the accident. Therefore, if a person fractures their left little toe when knocked off a motorbike and that fracture heals with no residual pain or restriction, the claimant will still be assessed as having a non-minor injury.

This should apply to any form of non-minor physical injury, including for example, any laceration to the skin (the skin being the largest organ of the body). In practice, however, we are concerned a lack of guidance on this point results in health practitioners imposing a more stringent interpretation of what constitutes a non-minor injury than required under the legislation. Our members have noted health practitioners have different interpretations as to whether they should be considering an injury in terms of whether the injury is having an ongoing impact which is minor or non-minor, or whether the injury to the specific body part itself satisfies the minor injury definition.

To enhance clarity and reduce variableness in decisions, we recommend the Guidelines be amended to clarify that such physical injuries must be assessed on the basis of the injury sustained on the day of the accident, regardless of whether or not that injury has since healed.

Language and awareness issues

We consider the choice of the subjective word ‘minor’ in the minor injury definition lends to confusion and variability in decisions. What may be a ‘minor’ injury to an insurer may be of great significance to an injured person. Other injured people may think they have an insignificant injury, when in fact they do not satisfy the minor injury definition, for example because they have a fractured little finger.

Members of the Law Society have also continued to raise concerns over the lack of awareness among health practitioners about the concept of minor injury, which is leading to highly variable outcomes and, often, clear access to justice issues for many injured persons. Our members have provided examples of doctors focusing on the main injury in terms of the most problematic injury to their patient and may overlook or fail to mention other injuries, for example a chipped tooth or fractured little toe, which would allow their patient to satisfy the definition of a non-minor injury.

Further, as the Certificate of Fitness / Certificate of Capacity requests a 'diagnosis of motor accident related injury(ies)', we have noted issues with practitioners summarising the major condition affecting their patient, rather than listing the individual injuries sustained in the accident. Quite often, this results in a Certificate of Fitness / Certificate of Capacity being completed with a 'whiplash' or 'soft-tissue' diagnosis as this may be the issue a patient complains about the most, despite the existence of other injuries such as a small fracture. It has been our members' experience that insurers rarely conduct further enquiries and often simply accept the general health practitioner's diagnosis at face value, pigeon-holing the claimant incorrectly into the 'minor injury' category. Insurers tend to rely on this diagnosis to refuse diagnostic investigations and treatment beyond a certain period.

We recommend consideration be given to a new requirement for insurers to obtain ambulance and hospital records, along with the claimant's treating practitioner's records, before a minor injury decision is made.

We also recommend SIRA focus on engaging with the health practitioner industry with the aim of enhancing general understanding of the minor injury threshold, including through development of guidance and training packages for health practitioners. We note SIRA is reviewing the claim form and recommend consideration be given to amending the format of the certificate of fitness to ensure health practitioners are encouraged to record all injuries sustained in the accident, not just the most troublesome injuries.

Clarity issues

Despite two years of operation, the Law Society considers the minor injury test and how it will apply to an individual case is unclear and highly variable. The case studies on the SIRA website do little to enhance clarity or certainty. So much of the information has been de-identified that there is virtually no detail to assist claimants, practitioners, insurers or doctors understand what is or is not a minor injury.

We recommend SIRA provide additional guidance on what is intended to, and what should be captured by, this definition.

We also recommend SIRA consider establishing a working group, comprising SIRA representatives, DRS assessors, insurer representatives, legal representatives and medical assessors, to:

- monitor minor injury decisions made by insurers and the DRS,
- make recommendations in relation to the inclusion or exclusion of particular injuries in the regulation, and
- in the continued absence of publication of these decisions, identify decisions of interest and draft de-identified case notes for online publication.

Proposed way forward

We believe the minor injury definition the Government has developed has resulted in genuinely incapacitated people being denied proper compensation because their disability does not meet the demanding test imposed by the legislation. We submit the current definition is not operating as intended and we urge the Government to reconsider it.

Proposed new minor injury test

The recommendations we have made throughout this submission assume the maintenance of the existing 'minor injury' definition, notwithstanding the various issues associated with it.

In our view, however, a better approach would be for the Government to reconsider and reformulate the minor injury definition.

We therefore reiterate the position we put forward in 2016 that instead of the current 'minor injury' definition, a 'narrative test' should be developed, which includes objective evidence of physical or psychological injury, but that does not rely solely on a number (for example, a WPI percentage). Instead, such a test should also consider the consequences of the injury on a person. We recommend such a test be drafted with reference to the French test of Physical and Psychological injuries (Atteinte a l'integrete Physique et Psychique – AIPP), and contain elements along the lines of:

- A permanent reduction in physical, psychosensory or intellectual potential that is the result of an anatomo-physiological injury:
  - that can be detected medically and can therefore be assessed on the basis of appropriate clinical testing, supplemented by a study of additional tests furnished (eg MRI, x-ray, CT scan, etc), and
  - that is compounded by pain phenomena and psychological impacts or ordinarily associated with the sequelae described, as well as consequences in everyday life that are customarily and objectively associated with such injury.

We would be happy to discuss this proposal with you in further detail.

Options for addressing issues with fraud, exaggeration etc

If the Government's aim, as originally stated, is to reduce the number of minor soft tissue neck and back injuries from ongoing benefits and the damages regime, and to reduce the potential for exaggeration and fabrication, we note the many new deterrents within the Act which already act to discourage falsification of injury, exaggeration of injury and small claims. These include the nature of the statutory benefits scheme which makes no provision for lump sum payments, the obligations and duties of a claimant to participate actively in treatment and rehabilitation programs, the preclusion period for making a common law damages claim, the preclusion period before settlement of a common law claim, the abolition of damages for gratuitous care, lifetime medical expenses for those with more than a minor injury and, finally, the legal costs caps.

Conclusion

The Law Society does not consider the 'minor injury' test, as currently drafted, is a proportionate or necessary response to meet the scheme's stated objectives. We recommend careful consideration be given to ensuring a more appropriate definition is developed, with regard to the real-life consequences of a person's injury. We would welcome an opportunity to engage further with the Government to help address these issues.

Thank you again for an opportunity to comment on this important review. Should you have any questions in relation to this submission, please contact Adi Prigan, Policy Lawyer, on (02) 9926 0285 or email Adi.Prigan@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President