THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:JWamb130821

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State Insurance Regulatory Authority
Level 13 West
2-24 Rawson Place
Haymarket NSW 2000

By email:
consultation@sira.nsw.gov.au
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Dear Sir / Madam,

Post Implementation Review of the Authorised Health Practitioner Framework

The Law Society of NSW appreciates the opportunity to provide a submission to the State Insurance Regulatory Authority's ('**SIRA**') Post Implementation Review of the Authorised Health Practitioner ('**AHP**') Framework. The Law Society's Injury Compensation Committee has contributed to this submission.

The Law Society's primary submission is that the AHP framework is ineffective and should be reconsidered in its entirety. There is no evidence in the experience of Law Society members that the current AHP framework has reduced the number of reports produced by outlier medical practitioners who are heavily biased towards the claimant or the insurer. However, the AHP framework does impose unnecessary administrative burdens on medical practitioners to take positive steps to become, and remain, authorised by SIRA. The Law Society supports a system of regulation where registered medical practitioners are authorised for the purposes of the Act, but where SIRA possesses the power to issue directions to non-compliant medical practitioners.

If the AHP framework is retained, the Law Society reiterates its key concerns in relation to the appropriateness and effectiveness of the current framework in line with our attached recent submission to SIRA's Statutory Review of the *Motor Accidents Injuries Act 2017* ('**the Act**') and makes a number of suggestions for improvement. The Law Society is primarily concerned with the burdensome administrative requirements imposed on medical practitioners by the AHP framework, as well as the limited fees chargeable by medical practitioners under the current costs structure in the *Motor Accident Injuries Regulation 2017* ('**the Regulation**'). In our members' experience, this leads to a number of issues, including:

(a) A reduced number of medical practitioners working in the compulsory third-party insurance ('**CTP**') scheme;
(b) Undue delays in obtaining medico-legal assessments, particularly for niche or complex medical matters;
(c) Medical practitioners receiving remuneration incommensurate with the amount of work undertaken; and

(d) The quality of reports is impacted, increasing chances of error, which gives rise to greater disputation.

The Law Society also considers that there needs to be appropriate incentives to ensure greater uptake of joint medico-legal assessments to decrease disputes between insurers and claimants. We suggest that the protocol contained in the Motor Accident Guidelines under the *Motor Injuries Compensation Act 1999,* which encourages joint medico-legal assessments, and its enhancement with additional incentives, may be suitable for this purpose.

The Law Society's comments in response to the questions in the Discussion Paper are attached.

Should you have any questions in relation to this submission, please contact Ann-Marie Boumerhe, Acting Policy Lawyer, on (02) 9926 0187 or email Ann-Marie.Boumerhe@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

Encl.

1. Do you have any comments in relation to the scope or process of the review?

The Discussion Paper notes that costs will not be considered as part of this review. However, in our view, one of the key factors impacting the effectiveness of the framework is the prescribed maximum fee recoverable by a medical practitioner pursuant to section 28 of the *Motor Accident Injuries Regulation 2017.*

It is the experience of our members that the volume of work involved for medical practitioners to complete a report is not commensurate with the prescribed maximum fee recoverable under the Regulation. This is resulting in a reduction in the number of medical practitioners prepared to take on the work, or, the acceptance of the work by medical practitioners being conditional upon their receiving additional reading/complexity uplift fees. This is often the case in matters where the clinical notes and related materials for review are in excess of 300 pages.

The Law Society suggests that the scope of this review ought to consider whether the prescribed maximum fee recoverable is sufficient and whether an alternative fee scale should be contemplated in light of the complexity of a matter, similar to that provided by the *Workplace Injury Management and Workers Compensation Act 1998 (WIMWCA*).[1]

2. How can the AHP framework better deliver on its key objectives to improve the injured person's customer experience, and encourage the early and just resolution of disputes?

We note that the customer experience survey referred to in the Discussion Paper relates to early treatment interventions rather than the independent assessment of a dispute that already exists between the parties when an AHP is appointed.

It is the experience of our members that the number of AHPs available within the framework is reducing and we are concerned that this may be as a result of the burdensome nature of the application process, coupled with the insufficient regulated maximum fee recoverable for medical practitioners.

As a consequence of this, the framework is not meeting the objective of the early and just resolution of disputes, as the wait time for medico-legal examination is increasing, with little availability amongst AHPs, even for telehealth assessments, during the COVID-19 pandemic.

Further, the regulated fee is inadequate for proper analysis and examination of claimants who have extensive medical histories or suffered complex injuries. In our members' experience, this leads to an increase in disputation, caused by errors made in the assessment of an injured person, or the simple fact that time and cost restrictions are resulting in issues not being considered by AHPs. The AHP framework is therefore unlikely to reduce the number of minor injury or WPI disputes in the CTP scheme.

[1] New South Wales, *Workplace Injury Management and Workers Compensation (Medical Examinations and Reports Fees) Order 2020 No. 2* under the *Workplace Injury Management and Workers Compensation Act 1998*, No 83, 17 April 2020, sch 3-4: Schedule 3 and Schedule 4 provides for the maximum fees chargeable by 'approved medical specialists' who can provide medical assessments on medical disputes as referred under subsection 321(1) of the WIMWCA.

3. How do we incentivise the take up of joint medico-legal assessments in the CTP scheme?

The Law Society considers that use of the protocol contained in the Motor Accident Guidelines under the *Motor Injuries Compensation Act 1999*,[2] which encourages joint medico-legal assessments, is a useful starting point to the process of incentivisation. However, this protocol does, in the Law Society's view, also require some enhancement.

The Law Society proposes that claimants should be given the option of opting in to the joint medico-legal process. If the claimant does choose to opt in, the insurer should be required to offer a joint medico-legal assessment and suggest three appropriate medical practitioners. If the claimant disagrees with the suggested medical practitioners, their legal representatives should be given the opportunity to offer three in reply.

If an agreement cannot be reached, then an independent arbiter at SIRA can choose anyone on the PIC list of medical assessors. This will foster a more genuine attempt by both parties to engage in the joint medico-legal process.

This protocol would also articulate a procedure for dispute resolution when there is disagreement on a joint letter of instruction, and a protocol for how supplementary reports can be requested. This too can be resolved by SIRA as an independent arbiter if required.

The Law Society submits that, as set out in 1 and 2 above, increasing the prescribed maximum fee recoverable and considering an alternative fee scale in light of the complexity of a matter or where an interpreter is required in the Regulation will also incentivise joint medico-legal assessment. The Law Society suggests that elevating the chargeable rate for a joint medico-legal report above the rate for a unilateral report may also further facilitate this.

The Law Society suggests that insurers should be subject to a KPI percentage as determined by SIRA, whereby they agree to undertake a number of joint medico-legal assessments for damages claims each year. If those targets are not met, it impacts the percentage of profit margin they can file for in their next premium filing. The failure to meet those KPIs should automatically trigger a portfolio review by SIRA to investigate whether there has been systemic non-compliance. This offers an incentivised process for insurers that should see an increase in uptake of joint medico-legal assessments.

4. What, if any, changes are required to either the eligibility requirements or terms of appointment?

The Law Society is concerned that requiring a qualified medical practitioner to take positive steps to secure approval for writing reports imposes unnecessary hurdles and inhibits greater uptake of joint medico-legal assessments in the CTP scheme. This requirement makes it especially difficult to obtain a medico-legal opinion in a more complex medical case within the capped costs rate of $1,660. The Law Society supports a system where it is not necessary for a specialist to "opt in" to the report writing system but where SIRA retains the power to discipline outliers in a procedurally fair way. This is consistent with Clause 26D of the proposed amendments to the *State Insurance and Care Governance Act 2015* contained in the Motor Accidents and Workers Compensation Legislation Amendment Bill 2021.

[2] State Insurance Regulatory Authority, *Motor accident guidelines: claims handling and medical (treatment, rehabilitation and care)* (Guidelines, 1 January 2017) cl 10.5: These guidelines were made pursuant to s 44 of *Motor Injuries Compensation Act 1999*, and Clauses 10.3-10.8 (specifically 10.5) set out a protocol for joint medico-legal assessments.

If the AHP framework is retained, we suggest that the process of renewal for AHP status be redefined such that once an AHP is admitted onto the list, medical practitioners should be required to adhere to the terms of appointment and eligibility criteria, including the requirement to produce a report within the regulated fee structure. Provided that the medical practitioners comply, they should not be required to renew their AHP status. In such a system, SIRA continues to retain control of removing an AHP if they are in breach of the eligibility criteria or terms of appointment.

5. How should SIRA measure the overall effectiveness of the AHP framework?

While this would not provide a full evaluation of the framework, the Law Society suggests that useful information would be garnered from the implementation of mandatory reporting, where insurers reported to SIRA the specific AHPs that they engage throughout the year. This would provide SIRA with specific insight into the behaviours of insurers. Detailed reporting should also include whether the AHP was engaged on a joint medico-legal basis or for an insurer's sole assessment. This could facilitate greater uptake of joint medico-legal assessments. This should also promote greater confidence on the part of claimant law firms to engage in the joint medico-legal process if they believe insurers are being held accountable by SIRA as to their selection of joint medico-legal assessors.

6. Do you have any comment with regard to the ease, efficiency and transparency of the application and review process outlined in Part 8 of the guidelines?

The Law Society's members do not have direct experience of the application and review process for AHPs. However, anecdotally, our members have been told by medical practitioners that it is burdensome and little assistance is provided by SIRA during the application and review process. The Law Society considers that it is necessary for SIRA to implement measures to streamline the process and to give troubleshooting assistance to medical practitioners seeking to apply to become an AHP.

Clause 8.15 of Version 7 of the Motor Accident Guidelines gives a medical practitioner applicant 14 days to review a decision of SIRA not to grant AHP status. The Law Society is of the view that 14 days is an insufficient timeframe, noting that the medical practitioner may well seek legal advice on the reasons provided by SIRA. We suggest that this timeframe be extended to 28 days.

7. How can the quality of applications be improved?

This is a matter for other stakeholders.

8. Can SIRA's published list be improved to ensure it is simple for injured people, insurers, and legal professionals to use?

SIRA's published list of AHPs is currently available on SIRA's website in two versions, including a list sorted by specialty, and a list sorted in alphabetical order by surname. In our view, this does not facilitate ease of access for injured people, insurers, and legal professionals. Although there is a function on SIRA's website to search for allied health practitioners in the Workers Compensation scheme, where search results can be filtered by the practitioner's location *and* specialty, the same does not exist for AHPs in the CTP scheme. Difficulties are typically encountered when attempting to ascertain whether a practitioner's status is active or inactive at any relevant point in time.

It is the Law Society's view that SIRA should consider ways to improve customer experience such as the creation of a single digital database where AHPs can be sorted alphabetically by name (surname or first name), specialty, location, gender, or any combination of these

characteristics. This will ensure that an appropriate AHP can be easily and efficiently found by injured people, insurers and legal professionals.

9. How can SIRA ensure that AHPs have the appropriate training and experience, and consistently delivering high quality reports?

The Law Society has no direct experience of whether the existing training and education requirements are sufficient. However, we reiterate the need to minimise administrative burdens imposed by the AHP framework. Training requirements must not be overly burdensome but should offer medical practitioners an optional further qualification that they can add to their existing qualifications.

In terms of delivering high quality reports, the Law Society notes that AHP reports are either obtained by insurers or served upon insurers. Therefore, SIRA should consider setting benchmarks for standards of AHP reports, in conjunction with the Australian Medical Association ('**AMA**'). These benchmarks need to be clearly communicated and readily accessible publicly.

The Law Society suggests that SIRA should audit CTP claims at random and, as part of that process, review the medico-legal reports on file to ensure the benchmark requirements are met. An AMA medico-legal expert should be involved in that review process, as opposed to the review being undertaken by a person without relevant training.

A feedback mechanism should also be implemented post audit, providing constructive comments to AHPs, after which a follow up audit could be conducted. Failure by the AHP to amend their practices would then result in SIRA considering whether their continued appointment on the AHP list remains appropriate.

10. Do you have any other comments in relation to the AHP framework that you would like considered as part of this review?

In the case of a medical dispute that deals solely with the degree of whole person impairment, the Law Society considers a viable option is for the dispute to be referred directly to a medical assessor appointed by the PIC. This is likely to be a useful option for parties, rather than obtaining two sets of medico-legal reports. In order to achieve the objects of the CTP scheme,[3] and the objects of the Medical Assessment Guidelines Version 5,[4] there should be additional requirements on the prima facie material needed to justify referral to the PIC medical assessor. These requirements will limit the number of disputes able to be referred directly to the medical assessor and mitigate the risk of backlog and the increase in systemic costs. This proposal is consistent with achieving the objects in subsections 1.3(2)(a) and 1.3(2)(g) of the Act.

[3] *Motor Accidents Injuries Act 2017* (NSW) s 1.3(2).
[4] State Insurance Regulatory Authority, *Medical Assessment Guidelines Version 5* (Guidelines, 12 February 2021) cl 1.13 <https://www.sira.nsw.gov.au/__data/assets/pdf_file/0020/222473/medical-assessment-guidelines.pdf>.