THE LAW SOCIETY
OF NEW SOUTH WALES

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Our ref: InjuryComp:DHjl 1446435

15 March 2018

Ms Mary Maini
Executive Director
Motor Accidents Insurance Regulation
State Insurance Regulatory Authority
Level 6, McKell Building
2-24 Rawson Place
Sydney NSW 2000

By email: leanne.boyd@sira.nsw.gov.au

Dear Ms Maini,

Proposed changes to the Motor Accident Guidelines

Thank you for the opportunity to comment on the proposed change to clause 5.6 of Part 5 of the Motor Accident Guidelines ('the Guidelines') with regards to the diagnosis of minor injury. This is a joint response on behalf of the Law Society of NSW and the Australian Lawyers Alliance.

It is our view that as currently drafted, clause 5.6 is ambiguous and unhelpful. We submit that it would be of greater assistance to have a clear delineation between medical diagnosis and consideration of that medical diagnosis, having regard to the statutory provisions of the *Motor Accident Injuries Act 2017* ('the Act') and the Guidelines.

We note the following specific concerns with regards the proposed amendment:

1. Clinical Diagnosis by a non-treater

There appears to be an inconsistency in the proposed redraft of clause 5.6. The clause states that the diagnosis of injury must occur as the result of a clinical assessment, but then provides that a claims manager making a decision on "minor injury" under the Act and Guidelines should consider information from all health practitioners "providing treatment" to the claimant. We consider that the Guidelines should be re-drafted to ensure that claims managers exclude or do not consider information from health practitioners who are not providing treatment to the claimant.

2. A "Clinical Assessment"

There is also ambiguity as to whether a "clinical assessment" refers to an examination of the claimant. We submit that it is unclear under the proposal whether a claims manager can make a finding as to minor injury based upon a "diagnosis" following a file review conducted by a physiotherapist, psychologist, occupational therapist or other health professional who is employed on staff at the relevant CTP insurer.

We submit that any diagnosis of injury used in determining that a claimant has a "minor injury" should be based solely upon a clinical examination and the production of a report setting out the findings and the basis for the diagnosis.

3. Independence of medical (not health) practitioners

It is noted that the proposal as currently drafted does not provide that a diagnosis of injury upon which a claims manager relies is required to come from either a treating medical practitioner or an independent medical practitioner. We strongly endorse diagnosis of injury being provided by treating practitioners only, rather than hired medico-legal opinion providers. However, if someone other than a treating practitioner is involved in this process, this person should be both independent of the insurer and also a registered medical practitioner.

We submit that there is nothing in the Guidelines that would preclude an in-house physiotherapist, psychologist, occupational therapist or other health professional from providing a file opinion and diagnosis that could be subsequently relied upon by a claims manager (in preference to any information from treating health practitioners) in determining whether there is a minor injury. We submit that there is a fundamental and self-evident unfairness in a critical diagnosis being made by medical practitioners who are not appropriately independent.

4. Medical practitioners

The diagnosis leading to a decision of "minor injury" carries very significant consequences for claimants under the scheme. It disentitles claimants to any future statutory benefits and precludes them from pursuing a common law claim. Accordingly, we submit that such a critical decision be based upon independent clinical examination by a qualified medical practitioner.

The extra training and scrutiny required of medical practitioners (as distinct to health practitioners) provides further assurance that this pivotal decision is being treated with the significance it deserves. We submit that the use of opinions provided by in-house physiotherapists and psychologists on the permanent payroll of CTP insurers as the medical justification to make such significant decisions in relation to the rights of claimants is inappropriate and will not engender public confidence in the fairness and openness of the scheme.

Conclusions

The Law Society and the Australian Lawyers Alliance recommend that clause 5.6 of the Guidelines should make provision for independent clinical examination by a medical practitioner, and preferably the claimant's treating practitioner, to form the basis for any non-treating diagnosis used to classify a claimant as having a minor injury.

There is no objection to the classification of minor injury being based upon documented opinion provided by treating medical practitioners.

Representatives of the profession would be pleased to discuss these issues further with SIRA. Should you have any questions or require further information, please contact Michael Tidball, Chief Executive Officer of the Law Society of NSW on (02) 9926 0215.

Yours sincerely,

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President
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Andrew Stone SC
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